

**BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO**

Case No. OS 2002-10

**ORDER GRANTING RESPONDENTS' MOTION TO DISMISS AND AGENCY
DECISION**

**IN THE MATTER OF THE COMPLAINT FILED BY TIM W. PLEASANT REGARDING
ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT ON THE PART
OF THE CONSERVATIVE FUND, NORMA ANDERSON AND KELLY WEIST**

This matter is before the Administrative Law Judge on the complaint of Tim W. Pleasant against The Conservative Fund, Norma Anderson and Kelly Weist ("Respondents"). The complaint alleges that Respondents have violated certain provisions of the Fair Campaign Practices Act, Section 1-45-101 *et seq.*, C.R.S. (2002) ("the Act").

Respondents have filed a motion to dismiss the complaint for failure to state a claim, pursuant to CRCP 12(b)(5). Complainant filed a response to the motion to dismiss on October 18, 2002. The Administrative Law Judge grants the motion to dismiss and issues this Agency Decision.

STATEMENT OF FACTS

The complaint alleges the following facts and violations of the Act:

1. In July, 2002 Complainant and Ed Jones were candidates in a primary election for the Republican Party's nomination for Colorado's State Senate District 11.
2. In July, 2002 Respondent The Conservative Fund mailed to voters literature consisting of an application for an absentee ballot and instructions for mailing the absentee ballot.
3. This literature also contained the following statements:
 - A. "Your vote in this primary election counts!"
 - B. "Vote early -- Locations are enclosed"
 - C. "Vote absentee -- Your application is attached"
 - D. "A clear choice is to vote early or absentee"

E. "Ed Jones has done an excellent job for El Paso County" (this statement is made three times in the literature).

4. The cost of printing and mailing this literature exceeded \$1,000.00.

5. The Ed Jones campaign disavowed knowledge of this mailing.

6. Respondent The Conservative Fund filed a Federal Election Commission Statement of Organization form with the Colorado Secretary of State. This form identified Respondent Norma Anderson as The Conservative Fund's treasurer and Respondent Kelly Weist as assistant treasurer.

7. Respondent The Conservative Fund has made no other filings with the Colorado Secretary of State.

8. The complaint alleges that Respondents have violated the Act in several respects, including the following: failure to give the required notice of an independent expenditure in excess of one thousand dollars; failure to make the disclosure required in the political message produced by an independent expenditure; failure to register as a candidate committee or political committee; and failure to report contributions and expenditures.

DISCUSSION

A. STANDARDS FOR CONSIDERATION OF A MOTION TO DISMISS

The Colorado Rules of Civil Procedure apply to this case. Rule 15, Rules of Procedure for the Colorado Division of Administrative Hearings. Accordingly, Respondents' motion to dismiss will be decided under principles applicable to motions to dismiss filed pursuant to CRCP 12(b)(5).

A motion to dismiss for failure to state a claim must be decided solely upon the basis of the allegations stated in the complaint. *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095 (Colo. 1995). The Administrative Law Judge must accept as true the material allegations of the complaint. *Rosenthal v. Dean Witter Reynolds, Inc., supra*; *Douglas County National Bank v. Pfeiff*, 809 P.2d 1100 (Colo. App. 1991). The allegations of the complaint are to be construed strictly against the moving party. *Abts v. Board of Education of School District RE-1*, 622 P.2d 518 (Colo. 1980).

Motions to dismiss for failure to state a claim are viewed with disfavor. *Rosenthal v. Dean Witter Reynolds, Inc., supra*; *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286 (Colo. 1992). The motion should be granted only when it appears beyond doubt that the complainant can prove no set of facts that would entitle him to relief. *Rosenthal v. Dean Witter Reynolds, Inc., supra*; *Kratzer v. Colorado Intergovernmental Risk Share Agency*, 18 P.3d 766 (Colo. App. 2000).

B. THE REQUIREMENTS OF THE FAIR CAMPAIGN PRACTICES ACT

The Act regulates certain aspects of the activities of political committees and candidate committees. The Act also imposes certain requirements related to the making of independent expenditures. As relevant to this case, the Act defines a political committee as two or more persons who have associated themselves for the purpose of making contributions to candidate committees, or for the purpose of making independent expenditures. Section 1-45-103(10)(a), C.R.S. (2002). A candidate committee is a person or persons with the common purpose of receiving contributions or making expenditures under the authority of a candidate. Section 1-45-103(2), C.R.S. (2002). An independent expenditure is the payment of money by any person for the purpose of advocating the election or defeat of a candidate, if the expenditure is not controlled by or coordinated with a candidate or a candidate's agent. Section 1-45-103(7), C.R.S. (2002).

The Act imposes certain filing and reporting requirements on political committees, candidate committees and independent expenditures. Candidate and political committees are required to register with the Secretary of State. Section 1-45-108(3), 109(1), C.R.S. (2002). These committees must also file periodic reports of contributions and expenditures with the Secretary of State. Section 1-45-108(1), (2), C.R.S. (2002). In addition, certain notice and disclosure requirements are imposed upon persons making independent expenditures in excess of one thousand dollars. Section 1-45-107, C.R.S. (2002).

C. THE REQUIREMENTS OF THE ACT DO NOT APPLY TO THE ACTIVITIES OF THE CONSERVATIVE FUND THAT ARE THE SUBJECT OF THIS COMPLAINT

In their Motion to Dismiss Respondents argue that The Conservative Fund is not subject to the filing and reporting requirements of the Act because the activities alleged in the complaint are not covered by the Act. The Administrative Law Judge agrees that the complaint does not allege conduct that is regulated by the Act.

1. Federal Case Law Governing Regulation of Campaign Financing

The United States Supreme Court has determined that the government can validly regulate campaign financing only for expenditures that expressly advocate the election or defeat of a clearly identified candidate. *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley v. Valeo* the Supreme Court concluded that the regulations contained in the Federal Election Campaign Act of 1971 would violate First Amendment rights of free speech and association unless those regulations were narrowly construed to apply only to such express advocacy. 424 U.S. at 43, 64, 66. See also *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986); *Federal Election Commission v. Christian Action Network*, 894 F. Supp. 946, 951 (W.D.Va. 1995).

The Court in *Buckley* described examples of express advocacy as including language such as "vote for", "elect", "support", "cast your ballot for", "Smith for Congress", "vote against", "defeat" and "reject". 424 U.S. at 44, n. 52. This language established a "bright line" test for determining when a political communication would constitute express advocacy. *Maine Right to Life Committee v. Federal Election Commission*, 914 F. Supp. 8 (D. Maine 1996), *aff'd* 98 F.3d 1 (1st Cir. 1996). Such a bright line is necessary because of the difficulty inherent in distinguishing a discussion of political issues (which is protected by the First Amendment) from exhortations to vote for against a candidate. See *Federal Election Commission v. Massachusetts Citizens for Life*, *supra*; *Federal Election Commission v. Christian Action Network*, *supra*.

Therefore, "express advocacy" means explicit words that in express terms advocate the election or defeat of a clearly identified candidate. *Maine Right to Life Committee v. Federal Election Commission*, *supra*. The courts recognize that a communication may implicitly advocate the election or defeat of a candidate. However, the Supreme Court in *Buckley* adopted a bright line test in order to err on the side of permitting communications that affect the election process while avoiding any restriction on discussion of public issues. *Id.* at 12. A construction of a campaign finance law that would allow the regulation of communications that implicitly encourage the election or defeat of a candidate would nullify the Supreme Court's decision in *Buckley*. *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980); see *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000).

2. State Administrative Decisions

Administrative law judges have applied *Buckley v. Valeo* in cases under the Act and have consistently held that the Act does not allow regulation of expenditures for materials that do not expressly advocate the election or defeat of a clearly identified candidate. *In the Matter of the Complaint Filed by Martha Hill Kreutz*, Case No. OS 2000-3 (Administrative Law Judge Marshall A. Snider, December 8, 2000); *In the Matter of the Complaint Filed by the League of Women Voters*, Case No. OS 98-41 (Administrative Law Judge Margot W. Jones, March 9, 1999), *aff'd*, *League of Women Voters v. Davidson*, 23 P.3d 1266 (Colo. App. 2001); *In the Matter of the Complaint Filed by Pete Hautzinger*, Case No. OS 98-43 (Administrative Law Judge Nancy Hopf, December 8, 1998) (holding that issue advocacy groups may take positions favorable or unfavorable to candidates and that this conduct can not be regulated unless the communication plainly advocates the defeat or success of a clearly identified candidate); *In the Matter of the Complaint Filed by Terry Phillips and William Thiebaut*, Case No. OS 98-17 (Administrative Law Judge Judith F. Schulman, September 8, 1998).

3. State Case Law Governing Regulation of Campaign Financing

In *League of Women Voters v. Davidson*, *supra* the Colorado Court of Appeals addressed the question of what campaign activities may constitutionally be regulated

under the requirements of the Act. The Court of Appeals rejected the analysis of *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), by which a determination of what is express advocacy under *Buckley* could be made by examining the context of the speech in question. The Court of Appeals also rejected a strict interpretation of *Buckley* pursuant to which express advocacy would consist only of the "magic words" described in footnote 52 of *Buckley*. Instead, the court adopted an analysis that permits regulation of only those expenditures that are used for communications that expressly advocate the election or defeat of a clearly identified candidate, by use of the words set out in footnote 52 of *Buckley* or "other substantially similar or synonymous words". 23 P.3d at 1277.

4. Analysis of The Conservative Fund's Communication

Application of Case Law:

Applying the cases cited above, The Conservative Fund's activities in making expenditures to publish and distribute the material at issue in this case cannot be regulated under the Act. Nowhere in these materials does The Conservative Fund use explicit words that are identical to, substantially similar to or synonymous with the words described in *Buckley* (such as "vote for", "elect", or "support") to expressly advocate Jones' election. In addition, although the July, 2002 mailing urged recipients to vote, it did not exhort or direct them to vote for or against one candidate or the other.

The literature in this case is similar to that held not to be subject to regulation in *League of Women Voters v. Davidson*, *supra*. In that case, as here, some of the literature urged people to vote, but did not expressly ask voters to vote for an identified candidate. In addition, as in this case the literature in *League of Women Voters v. Davidson* favorably presented candidates without explicitly urging a vote for the candidate.

Complainant's Arguments:

Complainant argues that "taken as a whole" Respondents' activities amount to express advocacy and that the context of the communication should be considered. However, the Colorado Court of Appeals in *League of Women Voters v. Davidson* rejected a context-based standard for regulation of speech.

Complainant also asserts that the facts in this case are distinguishable from the facts in *League of Women Voters v. Davidson* because the mailing in the present case focused only on one candidate, rather than discussing the positions of a list of candidates. However, the decision in *League of Women Voters v. Davidson* was based solely on whether the communications in that case expressly or explicitly asked voters to vote for identified candidates. That inquiry does not depend on the number of candidates identified in the communication. Complainant's attempt to distinguish *League of Women Voters v. Davidson* in this fashion is simply an additional method of

arguing that the Administrative Law Judge should look at the context of the communication and base a ruling on the fact that the communication implies that voters should vote for Ed Jones. As noted above in Part C of this Discussion, however, the inquiry under *League of Women Voters v. Davidson* and numerous federal decisions is limited to whether the language in question expressly or explicitly asks voters to vote for identified candidates. The First Amendment prohibits regulation of expenditures for communications that implicitly encourage the election or defeat of a candidate and the Colorado Court of Appeals has rejected a context-based standard for regulation of speech.

Finally, Complainant argues that the expenditures in this case can be regulated because they constitute "issue advocacy". Whether the mailing in this case consists of issue advocacy is not determinative of Respondents' motion. It is true that the decision in *Buckley v. Valeo* was designed to protect issue advocacy, rather than express advocacy, from regulation. See *Citizens for Responsible Government v. Davidson*, 236 F. 3d 1174, 1187 (10th Cir. 2000). However, in doing so, the Court in *Buckley* held that only communications containing express words of advocacy of election or defeat of a clearly identified candidate could be regulated, because of the inherent difficulty of distinguishing discussion of political issues from exhortations to vote for or against a candidate (see Part C, 1 of this Discussion).

As a result, the inquiry under *League of Women Voters v. Davidson* and federal case law is limited to whether the language at issue expressly exhorts voters to vote for or against identified candidates. The statement that "Ed Jones has done an excellent job for El Paso County" does not explicitly or expressly advocate the election or defeat of a clearly identified candidate. Therefore, a determination that The Conservative Fund was required to give the notice and disclosures required in connection with an independent expenditure, or to meet the filing and reporting requirements for a political committee or a candidate committee, would violate its First Amendment rights of free speech and association. The Conservative Fund's activities complained of in this case are not subject to regulation under the Act.

D. THE MOTION TO DISMISS SHOULD BE GRANTED

Because The Conservative Fund's activities described in the complaint are not subject to regulation under the Act, the complainant can prove no set of facts that would entitle him to relief. Therefore, Respondents' Motion to Dismiss should be granted. *Rosenthal v. Dean Witter Reynolds, Inc., supra*; *Kratzer v. Colorado Intergovernmental Risk Share Agency, supra*.

AGENCY DECISION

Respondents' Motion to Dismiss is granted. The Complainant's complaint is dismissed.

DATED: October 25, 2002.

MARSHALL A. SNIDER
Administrative Law Judge

CERTIFICATE OF MAILING

I hereby certify that I have served a true and correct copy of the above **ORDER GRANTING RESPONDENTS' MOTION TO DISMISS AND AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Richard A. Westfall, Esq.
1430 Wynkoop Street
Suite 300
Denver, CO 80202

Tim W. Pleasant, Esq.
3107 W. Colorado Ave.
PMB #209
Colorado Springs, CO 80904

William Hobbs
Deputy Secretary of State
1560 Broadway
Suite 200
Denver, CO 80202

on this ____ day of October, 2002.

Secretary to Administrative Law Judge

os2002-10.faa/d

