

BEFORE THE SECRETARY OF STATE

STATE OF COLORADO

CASE NO. OS 2002-024

AGENCY DECISION

IN THE MATTER OF THE COMPLAINT FILED BY HAL SHROYER REGARDING ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT ON THE PART OF HELEN HILL, ADAMS COUNTY TREASURER and CLYDE SPERO, CANDIDATE FOR ADAMS COUNTY TREASURER

On October 23, 2002, Complainant Hal Shroyer filed a complaint with the Colorado Secretary of State against Helen Hill, Adams County Treasurer, and Clyde Spero, candidate for Adams County Treasurer (Respondents), alleging violations of the Fair Campaign Practices Act, Sections 1-45-101-1-45-118, C.R.S. (2002) ("the Act"). The Secretary of State transmitted the complaint to the Colorado Division of Administrative Hearings for the purpose of conducting a hearing pursuant to Section 1-45-111(2)(a), C.R.S. (2002) of the Act.

Hearing was held in this matter on January 28, 2003. Complainant appeared and represented himself. Respondents also appeared in person. Helen Hill was represented by Thomas E. Downey, Jr., Esq. and Clyde Spero was represented by Patrick J. Canty, Esq. The Administrative Law Judge (ALJ) issues this Agency Decision pursuant to Section 1-45-111(2)(a), C.R.S. (2002) and Section 24-4-105(14)(a), C.R.S. (2002).

PRELIMINARY MATTERS

A telephonic motions hearing was held in this matter on January 27, 2003 to consider two matters: a motion filed on behalf of Robert S. Grant, District Attorney for the Seventeenth Judicial District (Grant), to quash a subpoena for Grant to testify at the hearing on the merits; and a motion filed on behalf of Respondents to strike as untimely a pleading entitled "Late Discovery of Hal Shroyer" or in the alternative a motion in limine concerning that pleading. Participating in the motions hearing were complainant, Thomas E. Downey, Jr. on behalf of Respondent Hill, Patrick J. Canty on behalf of Respondent Spero, and Sean May and Bruce Levin, Deputy District Attorneys, on behalf of Grant.

The ALJ granted the motion to quash based on the fact that Complainant's offer of proof as to Grant's anticipated testimony indicated that the proposed subject of Grant's testimony would be irrelevant to any issue in this case.

The ALJ also granted the motion to strike “Late Discovery By Hal Shroyer.” This document, which was served on Respondents one week in advance of hearing, in fact was not late discovery but instead purported to amend Complainant’s prehearing statement by endorsing additional witnesses and exhibits not listed in Complainant’s previously filed prehearing statement. The motion was granted because the filing was untimely, in violation of Colorado Division of Administrative Hearings Rule 13.

ISSUE PRESENTED

The issue to be determined in this proceeding is whether Helen Hill and Clyde Spero violated Sections 1-45-117, 1-45-103 and 1-45-107, C.R.S. (2002) of the Act by sending to Adams County residents a letter endorsing Clyde Spero’s candidacy for Adams County Treasurer that contained the Adams County logo and Adams County website address.

FINDINGS OF FACT

Based on all the evidence presented at hearing, the ALJ finds as fact:

1. Helen Hill was the elected Adams County Treasurer for 24 years prior to her retirement on December 31, 2002. Her official office address as County Treasurer was 450 South 4th Avenue, Brighton, Colorado 80601. Hill’s home address is 3225 E. 124th Avenue, Thornton, Colorado 80241.
2. Clyde Spero was the Democratic candidate for treasurer of Adams County in the November 2002 general election.
3. The website address for Adams County government is www.co.adams.co.us.
4. In the fall of 2002, Hill volunteered her services in connection with Spero’s campaign for Adams County Treasurer. As part of those volunteer services, Hill wrote a letter on Spero’s behalf endorsing his candidacy (“the Spero endorsement letter”). The letter, addressed to “Dear Voter and Friend,” was signed by “Helen Hill, Adams County Treasurer.” The upper right hand corner of the letter listed the sender as “Helen Hill, Adams County Treasurer, www.co.adams.co.us, 3225 East 124th Avenue, Thornton, CO 80241.
5. Hill’s endorsement letter thanked voters for taking the time to register and vote, indicated Spero had won her endorsement for county treasurer, and urged support of his candidacy based upon his education, experience, commitment and skills. The letter referenced Spero’s website address and enclosed one of his campaign brochures. Adjacent to Hill’s signature at the bottom of the letter was a facsimile of the Adams County seal or logo.

6. Hill drafted the endorsement letter in longhand and provided it to the treasurer of Spero's campaign, Judith Kahle. At the time Hill provided the letter to Kahle, it contained no return address, county website address or county seal/logo. In her private time, Kahle typed and formatted the letter, adding the return address and county website. In addition, Kahle obtained the county's seal/logo by downloading it and copying it from the website of Ron Stowell, a Republican candidate for county commissioner. She then added a facsimile of the seal/logo obtained from Stowall website to the bottom of the letter. Kahle then returned the letter to Hill for her signature.

7. Hill drafted the endorsement letter at home on her own time, without the use of any Adams County resources or supplies, and not in her capacity of Adams County Treasurer.

8. Based on her prior experience and knowledge of how the county seal/logo was being used, at the time she signed the final version of the endorsement letter it was Hill's understanding that it was acceptable to use the county seal/logo on the letter. During her 24 years as Adams County Treasurer Hill was unaware of any policy prohibiting the use of the seal/logo for non-county business. In addition, Hill was aware other individuals had used and were using the county seal/logo for such purposes.

9. Ron Stowell was a Republican candidate for Adams County Commissioner in the November 2002 general election. In the fall of 2002, the Committee to Elect Ron Stowell maintained a website in support of Stowell's candidacy. That website contained links to various other websites, including a link to the official Adams County Colorado website homepage that was illustrated with a facsimile of the Adams County seal/logo. Both Hill and Kahle were aware of the Stowell website use of the Adams County seal/logo at the time Hill signed the Spero endorsement letter.

10. David Alan Shaklee was a Republican candidate for Adams County Coroner in the November 2002 general election. In the fall of 2002, the Committee to Elect David Alan Shaklee for Adams County Coroner maintained a website in support of Shaklee's candidacy. That website contained links to various other websites, including one entitled "Adams County government links" that was illustrated with a facsimile of the Adams County seal/logo. Both Kahle and Hill were aware of the Shaklee website use of the Adams County seal/logo at the time Hill signed the Spero endorsement letter.

11. In the fall of 2002 the Adams County Amateur Radio Emergency Service (ACARES), a private organization of amateur radio operators, maintained a website describing the activities of the organization. Included on the homepage of the website was a facsimile of the Adams County seal/logo, along with the facsimiles of the Colorado state flag and the logo of the Amateur Radio Emergency Service. Both Kahle and Hill were aware of the ACARES website use of the Adams County seal/logo at the time Hill signed the Spero endorsement letter.

12. In the fall of 2002, the Adams County Republican Party maintained a website containing a facsimile of the Adams County seal/logo. Both Kahle and Hill were aware of the Adams County Republican Party website use of the Adams County seal/logo at the time Hill signed the Spero endorsement letter.

13. It was Hill's intent to make the endorsement letter look professional. It was not her intent to make the letter look like official county business. The county seal/logo was used as a symbol of the county in general terms, in the same way that the American flag is used as a symbol for the country.

14. Hill donated to the Spero campaign blank paper personally belonging to her for use in the endorsement letter mailing.

15. Hill donated to the Spero campaign envelopes personally belonging to her for use in the endorsement letter mailing. The donation consisted of several different types of envelopes left over from Hill's prior election campaigns for Adams County Treasurer. They each contained a return address including Hill's name, home address and the words "Adams County Treasurer." In addition, the return address on one set of envelopes also included the word "Democrat."

16. The letterhead and envelopes used in the Spero endorsement letter mailing were not the property of Adams County or any other public entity, were not paid for with public funds, and did not resemble in format the official stationery of Adams County or the Adams County Treasurer.

17. The Spero campaign paid all postage for the endorsement letter mailing. Hill did not make any contribution toward postage and no public funds were expended for postage in connection with this mailing. The mailing process itself was handled by the Spero campaign with no involvement from and expenditure of public funds by Adams County.

18. In its November 1, 2002 Report of Contributions and Expenditures filed with the Colorado Secretary of State, the Committee to Elect Clyde Spero Adams County Treasurer reported Hill's donation of paper and envelopes to the campaign as a contribution in kind with a fair market value of \$186. The evidence does not reflect such report was inaccurate or inappropriate in any way.

19. Hill received no money in connection with her advocacy of Spero's campaign. She did not obtain the county seal/logo for use on the letter based on her position as County Treasurer.

20. The seal/logo of Adams County, a facsimile of which appeared on the Spero endorsement letter and on the Shaklee, Stowell, ACARES and Adams County Republican Party websites, is a registered trademark of the Adams County Government. The application for registration of trademark or servicemark concerning this seal/logo was filed

with the Colorado Secretary of State by the Adams County Government in July 2000. The application indicates the trademark is used in "County business." A previously-designed seal/logo was registered with the Colorado Secretary of State by the Adams County Government at the same time.

21. There was no evidence that Adams County ever charges the public for use of facsimiles of the Adams County seal/log or for the Adams County website address. The inclusion of the Adams County website address and the use of a facsimile of the County's seal/logo on the Spero endorsement letter did not cost Adams County any money, did not constitute an expenditure of public funds, and did not constitute a contribution of a thing of value to the Spero campaign.

22. The evidence did not reflect what role, if any, Respondent Spero had with respect to the creation and mailing of the endorsement letter.

23. The evidence failed to show that Adams County prohibited the use of its seal/logo for other than official county business and further failed to show that Adams County has ever sought to control or limit use of its seal/log.

24. The evidence failed to show that Adams County prohibits or limits in any way references to its website address.

25. No public funds were expended to produce or mail the Spero endorsement letter.

DISCUSSION

1. Shroyer asserts Respondents Hill and Spero have violated Section 1-45-117, C.R.S. (2002) of the Act by improperly contributing public funds to an election campaign. He also appears to assert violations of Section 1-45-107, relating to independent expenditures and Section 1-45-103, C.R.S. (2002), specifically the definition of "contribution" found at 1-45-103(4), C.R.S (2002). As the Complainant in this matter, Shroyer bears the burden of proof. Section 1-45-111(2)(a), C.R.S. (2002). He has failed to meet this burden.

2. The Act prohibits political subdivisions of the state, such as the Adams County Treasurer's Office, from making "any contribution in campaigns involving the nomination, retention, or election of any person to any public office." Section 1-45-117(1)(a)(I), C.R.S. (2002). A contribution under the Act includes "anything of value given, given directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall or election," Section 1-45-103(4)(a)(IV), but does not include "services provided without compensation by individuals volunteering their time on behalf of a candidate, candidate committee, political committee, issue committee, or political party." Section 1-45-103(4)(b).

3. The evidence did not establish any contribution of public funds was made in this matter. On the contrary, the record established that Respondent Hill provided voluntary services by drafting a letter in support of Respondent Spero's election. The letter was drafted on Hill's personal time at her home without the use of any Adams County resources or supplies. Hill volunteered her time on behalf of the Spero campaign to produce this letter and received no compensation for drafting it or for endorsing Spero. Thus, Hill's actions in drafting and signing the letter and endorsing the Spero candidacy did not even constitute a contribution under the Act. Section 1-45-103(4)(b), C.R.S. (2002).

Furthermore, there was no evidence that any public funds were expended in connection with the drafting, production or mailing of the Hill's endorsement letter. As noted, Hill drafted the letter at home on her personal time without using any Adams County resources or supplies in so doing. She gave the draft to Judith Kahle, the campaign's treasurer, who typed and formatted the document, obtained a facsimile of the Adams County logo/seal from the website of a Republican candidate for Adams County Commissioner, and copied the facsimile logo onto the endorsement letter. Hill then signed the letter. The letter was produced using paper belonging personally to and donated by Hill. It was mailed in envelopes donated by Hill that had been left over from Hill's own prior election campaigns. Postage was provided by the Spero campaign.

While Hill's donations of paper and envelopes were contributions in kind under the Act, Section 1-45-103(4.5)(a) (the fair market value of a gift or loan of any item or real or personal property other than money made to a candidate committee), there is no evidence these items belonged to the Adams County Treasurer's Office or any other public entity. In addition, there is no evidence that any of the other aspects of this mailing (typing, postage, envelope-stuffing) involved resources of the Adams County Treasurer's Office or any other public entity. Thus, no contribution to Spero's campaign was made by or on behalf of any public entity in connection with the endorsement letter and no violation of Section 1-45-117(1)(a) has been established.

4. Complainant asserts a contribution of public funds occurred in connection with the endorsement letter because the Adams County website and a facsimile of the Adams County seal/log appeared in the letter. These assertions are without merit.

Complainant is unable to articulate any basis for his claim that inclusion of the Adams County website address in the endorsement letter somehow constituted a contribution of public funds to Spero campaign. The ALJ is similarly unable to discern any basis for that claim. The county's website address constitutes identifying information for the county, similar to a street address or telephone number. It is not information that the county commonly sells or reserves for special purposes; rather, it is public information clearly intended by the county for widespread public dissemination. Furthermore, Hill did not have to use her position as Adams County Treasurer to obtain the website address. Consequently, use of the website was not a thing of value given to the Spero campaign, Section 1-45-103(4)(a)(IV), and inclusion of the county's website address did not involve

the contribution of any public funds to the Spero campaign in violation of Section 1-45-117(1)(a).

5. Similarly, use of a facsimile of the Adams County seal/logo on the endorsement letter did not constitute a contribution of public funds to the Spero campaign. As was the case with the county's website address, no public moneys were spent or contributed to obtain or provide the seal/logo for the endorsement letter. The logo is widely available to and used by the public, as indicated by its presence on the websites of candidates Shaklee and Stowell, the Adams County Republican Party, and ACARES, a private amateur radio operators group. In fact, the facsimile of the logo used by the Spero campaign in the endorsement letter was obtained by campaign treasurer Judith Kahle from just such a public source: the website of Republican candidate for county commissioner, Ron Stowell. Hill did not use her position as Adams County Treasurer to obtain the seal/log for the endorsement letter. In fact, Hill was not involved in obtaining a copy of the logo for this purpose at all. Additionally, no public resources of any type were utilized to locate, download or copy the logo. Consequently, the process of obtaining a facsimile of the seal/logo did not constitute a contribution of public funds to the Spero campaign in violation of Section 1-45-117(1)(a).

The actual inclusion of a copy of the seal/logo on the endorsement letter (separate and apart from the manner in which it was obtained) also did not constitute a contribution of public funds in violation of the Act. No public moneys were expended in connection with the use of the logo and no contribution from any public source was made. Thus, inclusion of a copy of the county seal/logo on the endorsement letter did not violate Section 1-45-117(1)(a).

6. Complainant asserts that use of the seal/logo constitutes a contribution of public funds because the seal/logo has been trademarked by the county and is intended only for county business. The ALJ disagrees.¹

No evidence was presented that the county has ever sought to enforce its trademark or prohibit the use of the county logo/seal under circumstances such as the one at issue here. Thus, the evidence did not establish the county places any value on the public's use of facsimiles of the county's logo. Consequently, no evidence in the record establishes that use of a facsimile of the county's logo constitutes "anything of value," as would be required to render use of the logo a contribution under the Act. Section 1-45-103(4)(a)(IV). Additionally, because Judith Kahle (an individual who is not a respondent in this matter) obtained the likeness of the logo from public sources without the use of public resources or public funds, there is no evidence that a contribution was made by a public entity in connection with the process of obtaining the logo facsimile.

¹ Whether or not use of a facsimile of the county's seal/logo on the endorsement letter constituted an infringement of the county's trademark is, of course, not directly an issue in this Fair Campaign Practices Act proceeding and the ALJ does not understand Complainant to be arguing to the contrary.

Thus, no violation of Section 1-45-117(1)(a) was established in connection with the Spero campaign obtaining or using a facsimile of the county's seal/logo.

7. Complainant's apparent underlying concern with the Spero endorsement letter is what he considers to be an *appearance* that public funds were contributed to endorse the candidacy of Spero, even if no public funds were actually contributed or expended. The Act, however, does not address this issue. What the Act prohibits are actual contributions of public funds to election campaigns. Section 1-45-117(1)(a)(I), C.R.S. No such expenditures or contributions were made in this case. Furthermore, the Act explicitly permits elected officials to express their personal opinions on "any issue." Section 1-45-117(1)(b)(II), C.R.S. Hill expressed her opinion in the endorsement letter consistent with this provision.

Contrary to Complainant's assertions, there is nothing in the Act that prevents Hill from identifying herself as the incumbent Adams County Treasurer in the context of expressing such an opinion (as Hill did in the endorsement letter), as long as public funds are not expended in process. Thus, no violation of the Act occurred merely because Hill identified herself in the endorsement letter as the incumbent Adams County Treasurer. Similarly, even if it had been established that the use of the County seal/logo and website on the letter tended to make the letter appear "official,"² such appearance would not constitute a violation of the Act. In order to violate Section 1-45-117(1)(a), there must be an improper contribution of public funds; mere official appearance does not suffice. Consequently, no violation of the Act can be established based merely on the fact that Hill was identified in the endorsement letter as Adams County Treasurer. Nor can a violation of the Act be established based merely on the alleged "official" appearance of the endorsement letter, even if such appearance might tend to suggest public funds were expended in connection with its production and mailing.

8. Complainant appears to argue that a violation of Section 1-45-103, and specifically Section 1-45-103(4), occurred in this case. Section 1-45-103 consists solely of definitions applicable to the Act and Section 1-45-103(4) refers specifically to the definition of a contribution. Because it is not possible to violate a definition, no violation of Section 1-45-103(4) has been established in this case.

9. Complainant also argues that the endorsement letter violated Section 1-45-107 of the Act. This argument is without merit. Sections 1-45-107(1) and (2) relate to independent expenditures. An independent expenditure is defined in pertinent part in Section 1-45-103(7) of the Act as a "payment of money by any person for the purpose of advocating the election. . .of any candidate, which expenditure is not controlled by, or coordinated with, any candidate or any agent of the candidate." There is no evidence that any expenditures were made by Hill in connection with the endorsement letter. In addition, there is no evidence that any expenditures were made by anyone in connection with the endorsement letter that were not coordinated with Spero's agent, campaign treasurer

² The ALJ has made no such finding in this matter.

Judith Kahle. Thus, no independent expenditure has been established in connection with the endorsement letter and thus no violation of Section 1-45-107(1) or (2) has been proved. Furthermore, neither of these sections is enforceable. *Citizens for Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174 (10th Cir. 2000).

Section 1-45-107(3) provides: “[e]xpenditures by a person on behalf of a candidate for public office that are coordinated with or controlled by the candidate or the candidate’s agent shall be considered a contribution to the candidate and subject the candidate and the contributor to any applicable penalties contained in this article.” In this case, the Spero campaign properly reported Hill’s contribution of paper and envelopes as a contribution in kind. Complainant has failed to assert that Hill’s voluntary, private contribution imposed any other reporting requirements or subjected either Hill or the Spero campaign to any “applicable penalties,” nor is the ALJ aware of any. Thus, no violation of Section 1-45-107 has been established.

10. Complainant presented no evidence that Respondent Spero (as opposed to his campaign treasurer) had any direct involvement in the endorsement letter. Therefore, for this additional reason, no basis exists in the record to determine Spero personally violated any provisions of the Act.

In sum, the ALJ concludes Complainant has failed to meet his burden of establishing any violation of Section 1-45-117(1)(a)(I), Section 1-45-103(4), or Section 1-45-107, C.R.S. (2002) of the Act occurred in this matter.

CONCLUSIONS OF LAW

1. The Secretary of State and the Administrative Law Judge have jurisdiction over this complaint.

2. Complainant has failed to meet his burden of establishing any violation of Section 1-45-117(1)(a)(I), Section 1-45-103(4), or Section 1-45-107, C.R.S. (2002) of the Act occurred in this matter.

AGENCY DECISION

Because Complainant has failed to establish, as alleged in the Complaint, that either Respondent Hill or Respondent Spero violated any provisions of the Act in connection with the Spero endorsement letter, this matter is dismissed.

DONE AND SIGNED
September ____, 2003

JUDITH F. SCHULMAN
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above **AGENCY DECISION** was served by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado addressed to: Hal Shroyer, P.O. Box 232, Westminster, CO 80036; Thomas Downey, Downey & Knickrehm, 733 East 8th Avenue, Denver, CO 80203; Patrick Canty, 1525 Josephine St., Denver, CO 80206; and was served via inter-office mail on William A. Hobbs, Deputy Secretary of State, Department of State, 1560 Broadway, Suite 200, Denver, CO 80202, on this ___ day of April, 2003.

Secretary to Administrative Law Judge

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