

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. 0S 2003-003

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY VICKI JOHNSON REGARDING
ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT BY SHERIDAN
2002 RECALL COMMITTEE, MARY CARTER and CHANELE BEACHAM ,
Respondents**

This matter is before the Administrative Law Judge on the complaint of Vicki Johnson ("Johnson") against Sheridan 2002 Recall Committee ("the Recall Committee"), Mary Carter ("Carter") and Chanele Beacham ("Beacham"). The complaint was filed with the Colorado Secretary of State on February 13, 2003 and alleges that Respondents have violated certain provisions of the Fair Campaign Practices Act, Section 1-45-101 *et seq.*, C.R.S. (2002). 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).

The hearing in this matter was held in Denver, Colorado, on May 7, 2003, before Administrative Law Judge Marshall A. Snider. Johnson was present at the hearing and appeared without legal counsel. Carter and Beacham were represented by Larry W. Berkowitz, Esq. The Recall Committee was not represented by counsel. Jack Eitzel, a representative of the Recall Committee, appeared at the hearing. Eitzel is not an attorney and therefore was precluded from providing legal representation to the Recall Committee during the hearing. Eitzel was permitted to present his own testimony on behalf of the Recall Committee.

The Administrative Law Judge issues this Agency Decision pursuant to Section 1-45-111(1)(e) and (2)(a), C.R.S. (2002) and Section 24-4-105 (14)(a), C.R.S. (2002).

STATEMENT OF THE ISSUES

A non-profit organization known as Sheridan United provided T-shirts, water bottles and flyers to citizens of the city of Sheridan, Colorado, around the time of a municipal election in October, 2002. Johnson alleges that these items constituted a contribution to the election campaigns of Carter and Beacham and also to the recall effort of the Recall Committee. Johnson further claims that Respondents failed to report these contributions as required by the Fair Campaign Practices Act ("the Act"). Johnson also alleges that the recall committee failed to report the service of an attorney in its report of contributions and expenditures.

Respondents deny that they received any contributions from Sheridan United. For the most part Respondents assert that they were not involved with Sheridan United and its activities, and that even if they had knowledge of or were involved with these activities, Sheridan United's conduct did not relate to the election campaigns of Carter and Beacham or to the recall effort of the Recall Committee. The Recall Committee claims that the attorney was a volunteer and that therefore the services of the attorney did not qualify as a contribution that was required to be reported under the Act.

PRELIMINARY MATTER

At the close of Johnson's evidence the Administrative Law Judge granted a motion to dismiss the complaint against Beacham and Carter because the evidence presented did not, as a matter of law, establish that Sheridan United had made a contribution to Beacham or Carter that required reporting under the Act. The basis of that dismissal will be discussed below as part of the Discussion and Conclusions of Law sections of this Agency Decision.

FINDINGS OF FACT

Based upon the evidence presented at the hearing the Administrative Law Judge finds as fact:

1. Carter and Beacham were candidates for the offices of mayor and city councilperson, respectively, in the October 1, 2002 election in the City of Sheridan, Colorado.

2. The Recall Committee was formed and registered under the Act with the purpose of supporting the recall of the mayor of the City of Sheridan and certain city council members at the October 1, 2002 election.

3. Sheridan United is a nonprofit corporation that was registered with the Colorado Secretary of State in August, 2002. Sheridan United was formed by Jason Patton ("Patton"), who referred to himself as the organization's chair. Patton is an acquaintance of both Carter and Beacham, but is not closely associated with either of them. Patton is the son of friends of Carter's and he knows Carter through involvement in Sheridan civic affairs. Patton's brother went to school with Beacham's son. Patton is a friend of Jack Eitzel, who was an organizer of the Recall Committee.

4. Patton spoke out publicly in favor of the recall and attended some meetings of the Recall Committee. Carter was not a member of the Recall Committee, but attended its meetings and did volunteer work for the Recall Committee. Beacham also attended meetings of the Recall Committee.

5. The City of Sheridan conducted Sheridan Pride Day, also known as Sheridan

Clean Up Day, on September 21, 2002. As part of that event residents of Sheridan were given the opportunity to dump trash without paying the usual fees.

6. Sheridan United purchased T-shirts and water bottles, and prepared a flyer, all of which were distributed at the September 21 event. The only writing on the T-shirts read "SHERIDAN UNITED". Attached to the water bottles was a label that contained the Sheridan High School 2002 football schedule and, on the right side of the label, the words "SHERIDAN UNITED".

7. The flyer had the same logo as the T-shirt and the water bottles, containing the words "SHERIDAN UNITED", and also contained the following text:

Sheridan United encourages
you to participate in . . .
❖ Sheridan Clean Up Day - SAT. SEPT. 21st
❖ Sheridan Celebrates! - SAT. SEPT. 28th
❖ Sheridan Recall Election - TUE. OCT. 1st

Sheridan United Mission Statement: Sheridan United will serve as a not for profit effort to unify the residents of the city of Sheridan. Charting a new course for change while charting the economic and social opportunities for the future of the city of Sheridan. First and foremost protecting the children and their future.

8. Except as described in Findings of Fact, Paragraphs 6 and 7, there was no other writing on the T-shirts, water bottles or flyers. No mention was made in these materials of Carter, Beacham or any other candidate for election or person whose recall was being sought in the October 1 election. This material did not urge a vote for or against any candidate or subject of the recall.

9. Johnson did not present any persuasive evidence that the materials distributed by Sheridan United were understood by the electorate to relate to the election, defeat or recall of any person.¹

10. Carter first became aware of the existence of Sheridan United at the September 21 Sheridan Pride Day event. She was aware of the flyer, T-shirts and water bottles but did not know who was involved in Sheridan United. Carter did not at this time attempt to determine who was involved in Sheridan United. Carter did not consider that any of the Sheridan United material advocated the recall of the mayor or Carter's election to that post.

11. Beacham first became aware of the existence of Sheridan United on

1. Johnson presented evidence that two people, including a city council member, associated the T-shirts with the Recall Committee. That evidence falls short of establishing that the T-shirts promoted or were designed to influence the election, defeat or recall of any person.

September 20, 2002. Beacham was aware of the Sheridan United flyer at the September 21 Sheridan Pride Day event. Beacham also helped distribute the T-shirts and water bottles on September 21; these items were sitting on a table at the spot where Sheridan residents checked in for the trash drop-off. At this time Beacham did not know who was involved in Sheridan United and she did not attempt to determine who was involved in Sheridan United. Beacham did not know at this time who paid for the Sheridan United materials. Beacham did not consider that the water bottles or T-shirts or any other Sheridan United activity related to her election campaign or advocated her election.

12. Eitzel was an organizer of the Recall Committee. He first learned of the Sheridan United activities at the September 21 Sheridan Pride Day, when he checked in to drop off trash and was given a T-shirt and water bottle. He had never heard of Sheridan United prior to that day. Eitzel made no attempt at that time to determine who was involved with Sheridan United and he does not know who funded its activities.

13. Sheridan United had a float in the parade at the September 28, 2002 Sheridan Celebrates event. The float consisted of a historically styled trolley car. Several placards with the words "SHERIDAN UNITED" were attached to the trolley. Other than placards identifying the name of the company that operated the trolley car there were no other signs on this float. The election was not mentioned on the float. No signs on the trolley in any way mentioned Carter, Beacham or any other candidate for election or person whose recall was being sought. The trolley did not contain any signs that urged a vote for or against any candidate or subject of the October 1 recall.

14. At the September 28, 2002 Sheridan Celebrates event Sheridan United distributed the same T-shirts and water bottles as those that were made available at the September 21 event.

15. Carter was present at the September 28 parade. She did not at that time make any attempt to determine who was involved in Sheridan United or who had paid for the float or other Sheridan United materials. Beacham was not involved with the Sheridan United float on September 28.

16. Carter and Beacham were unaware of Sheridan United's activities prior to September 20. Carter and Beacham did not control Sheridan United in its purchase and distribution of the T-shirts, water bottle and flyer. Carter and Beacham did not coordinate with Sheridan United in the purchase and distribution of these items. In addition, there

was no evidence that these activities of Sheridan United were coordinated with or controlled by any agent of Carter or Beacham.

17. Patton prepared a letter dated September 21, 2002, over his signature, encouraging Sheridan residents to vote in the recall election. Although no specific candidates were mentioned, the letter implied that some elected officials should not be retained in office.² Patton never mailed or distributed this letter to anyone.

18. Sheridan United also prepared a 2002 Denver Broncos football schedule on a refrigerator magnet. Other than the football schedule, the only other writing on this item read: "SHERIDAN UNITED: PROTECTING OUR CHILDREN'S FUTURE". No mention was made on this schedule of Carter, Beacham or any other candidate for election or person whose recall was being sought in the October 1 election. This item did not urge a vote for or against any candidate or any subject of the recall. No evidence was presented that these Bronco schedules were distributed at any time to any person.

19. Sheridan United did not make any direct contributions to the Carter or Beacham campaigns or to the Recall Committee.

20. Neither Carter, Beacham nor the Recall Committee reported any contributions from Sheridan United in their reports of contributions and expenditures filed pursuant to the Act.

21. The Recall Committee did not have an attorney prior to the October 1, 2002 election. After the election Johnson requested a recount, which was conducted by the Sheridan city clerk on October 8. Eitzel was out of town on the day of the recount. Attorney Charles Bonniwell volunteered to attend the recount on behalf of the Recall Committee. The evidence did not establish whether Bonniwell attended the recount as an interested citizen associated with the Recall Committee, regardless of his status as an attorney, or whether he was present as counsel for the Recall Committee. The Recall Committee did not report any contribution or contribution in kind from Bonniwell in its reports filed pursuant to the Act.

DISCUSSION

1. Johnson's complaint alleges five violations of the Act. Johnson did not present any evidence to support three of these allegations: (1) that the T-shirts were purchased with Recall Committee funds and that Respondents failed to report any contributions or expenditures related to that purchase; (2) that the trolley car went to voters' homes and offered to take them to vote on October 1, 2002, and none of the Respondents reported any contributions or expenditures related to that activity; and (3) that the Recall Committee failed to report contributions related to a mailing. The burden of proof is on

2. The letter stated that the city needed elected officials who would listen and understand and that elected officials should understand the consequences of their actions.

Johnson, as the person filing the complaint. Section 1-45-111(2)(a), C.R.S. (2002). Because Johnson did not present any evidence in support of the charges described in this paragraph, those allegations are dismissed.

2. The Fair Campaign Practices Act requires candidates and committees such as the Recall Committee to report all contributions received, including the name and address of each person who has contributed \$20 or more. Section 1-45-108(1)(a), C.R.S. (2002). The remaining allegations of Johnson's complaint are that Respondents failed to report contributions or contributions in kind from Sheridan United and that the Recall Committee failed to report a contribution from attorney Charles Bonniwell. Johnson carries the burden of proof on these charges. Section 1-45-111(2)(a), C.R.S. (2002).

Sheridan United

3. A "contribution" includes "[A]nything of value 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), C.R.S. (2002) (emphasis supplied). A "contribution in kind" means the fair market value of a gift or loan of any item of real or personal property made to or for a candidate committee or issue committee *for the purpose of influencing* the nomination, retention, election or defeat of a candidate. Section 1-45-103(4.5)(a), C.R.S. (2002) (emphasis supplied).

4. **The T-shirts and water bottles.** The T-shirts and water bottles distributed by Sheridan United contained no language promoting or attempting to influence any candidate's election, defeat or recall. Therefore, under Sections 1-45-103(4)(a)(IV) and 1-45-103(4.5)(a) of the Act, Sheridan United's distribution of these items is not a contribution or contribution in kind.

Johnson argues that Patton had personal connections to Beacham and Carter, that he favored the recall of Johnson and others and attended meetings of the Recall Committee. In addition, Johnson points out that Beacham and Carter attended Recall Committee meetings and, in Carter's case, volunteered for the recall effort. Johnson therefore asserts that the inference must be drawn that Patton (and thus Sheridan United's) purpose in distributing the T-shirts and water bottles was to promote the election of Beacham and Carter and the recall of the existing office-holders.

Even if Sheridan United's purpose was to promote the election of Beacham and Carter and the recall of the existing office-holders, Respondents cannot reasonably be held to know that the T-shirts and water bottles were distributed for that purpose. The items on their face did not relate to the election and no persuasive evidence was presented that these materials were understood by the electorate to relate to the election, defeat or recall of any person. Further, the relationships between Patton and Respondents are too tenuous to support an inference that Respondents were aware of Sheridan United's intent. The Respondents did not know who was behind Sheridan United and the items distributed, on their face, did not promote any interest of the Respondents.

Johnson also argues that Respondents had a duty to investigate the identity of Sheridan United in order to report possible contributions. Nothing in the Act imposes such a duty of investigation.

Colorado courts have narrowly construed the Act. See *League of Women Voters v. Davidson*, 23 P.3d 1266, 1276 (Colo. App. 2001), citing *Common Sense Alliance v. Davidson*, 995 P.2d 748 (Colo. 2000). One justification for this narrow construction is that a violation of the reporting requirements of the Act carries criminal penalties. See Section 1-45-113 (1), C.R.S. (2002). To accept Johnson's argument would be to give a very broad reading to the Act and place onerous duties of investigation and reporting on candidates and committees whenever an independent entity made an expenditure that on its face did not relate to an election, simply because that entity supported one side in the election. Such a broad reading of the Act is not reasonable, and is inconsistent with the narrow and cautious approach to campaign finance reporting evidenced in *League of Women Voters v. Davidson*, *supra*.³

5. **The flyer.** The flyer distributed by Sheridan United on September 21 contained language relating to the election. In addition to encouraging participation in the election, the flyer arguably inferred that officials should be recalled (because the flyer referred to "charting a new course for change"). Even this language does not support a requirement that Respondents report the cost of this flyer as an indirect contribution or contribution in kind. The language regarding "a new course" or "change" was contained in the mission statement of the organization and was not placed next to the reference to the election. Further, the flyer does not on its face promote or seek to influence the election, defeat or recall of any candidate. Nothing in the flyer reasonably would put Respondents on notice that the purpose of this flyer was to promote anyone's candidacy or influence the election.

Respondents cannot reasonably be required to know the subjective intent of Patton or Sheridan United in distributing the flyer. It would be unreasonable to require Respondents to report or make inquiry about these materials as a potential contribution, and be subject to criminal prosecution and other penalties for the failure to do so⁴, based upon the subjective intent of another person. In addition, such a conclusion would involve a very broad reading of the Act, inconsistent with the holding in *League of Women Voters v. Davidson*, *supra*.

6. There is another very important reason why the expenditures by Sheridan United for T-shirts, water bottles and flyers are not a contribution to Carter or Beacham. An independent expenditure is defined in Section 1-45-103(7), C.R.S. (2002) as the payment of money by any person for the purpose of advocating the election or defeat of a candidate,

3. In construing a statute it is presumed that a just and reasonable result is intended. Section 2-4-201 (c), C.R.S. (2002).

4. See 1-45-113(1), (4), C.R.S. (2002).

as long as the expenditure is not controlled by or coordinated with a candidate or an agent of a candidate. Even if, as Johnson argues, the purpose of the Sheridan United expenditures was to advocate the election of Carter and Beacham, those candidates did not control or coordinate these expenditures and there was no evidence that any of their agents did so (Findings of Fact, Paragraph 16). Therefore, under Johnson's theory of the case these expenditures by Sheridan United would be independent expenditures.

Independent expenditures are not considered contributions to a candidate unless they are controlled by or coordinated with the candidate or candidate's agent. Section 1-45-107(3), C.R.S. (2002). Because Carter, Beacham or their agents did not control or coordinate the Sheridan United expenditures, these independent expenditures are not considered contributions to Carter or Beacham. *Id.*

7. For the above reasons Sheridan United's payment for and distribution of the T-shirts, water bottles and flyers did not constitute a contribution or contribution in kind to Carter or Beacham under Section 1-45-103(4)(a)(IV) and (4.5)(a), C.R.S. (2002). Similarly, these items were not a contribution in kind to the Recall Committee, as defined in Section 1-45-103(4.5)(a), C.R.S. (2002). Therefore, Respondents were not required to report these items as contributions under Section 1-45-108(1), C.R.S. (2002).⁵

Johnson argues that Sheridan United should not be allowed to actively pursue the recall of officials and election of candidates without being required to disclose the names of its contributors. However, the evidence did not establish that Sheridan United pursued the recall of officials and election of candidates. To the contrary, the evidence showed only that Sheridan United distributed materials that either on their face made no mention of the October 1 election, or referred to the election only in a neutral manner. More fundamentally, Sheridan United is not a Respondent in this case and the complaint did not allege any violation of the Act by Sheridan United.

Bonniwell's Participation in the Recount

8. Charles Bonniwell volunteered to attend the recount on behalf of the Recall Committee. His services are not a contribution under Section 1-45-103(4)(a)(IV) of the Act because that section covers only contributions to candidates, and the Recall Committee is

5. The Patton letter dated September 21, 2002 was never distributed (Findings of Fact, Paragraph 17), and therefore could not be a contribution or contribution in kind. Because this letter remained with Patton and no one else received it, this letter is not something of value given to the candidates (Section 1-45-103(4)(a)(IV), C.R.S. (2002)) or a gift of an item of personal property (Section 1-45-103(4.5)(a), C.R.S. (2002)). Respondents cannot be required to report something that they did not know about and, as far as the election was concerned, did not exist.

not a candidate.⁶ Similarly, Bonniwell's activities are not a contribution in kind under Section 1-45-103(4.5)(a) of the Act because that section refers only to contributions of real or personal property, not personal services.

In any event, regardless of whether Bonniwell attended the recount as an interested citizen or as counsel for the Recall Committee, his participation did not constitute a contribution because a contribution does not include services provided without compensation by individuals volunteering their time on behalf of a candidate, candidate committee or political committee. Section 1-45-103(4)(b), C.R.S. (2002). Therefore, Bonniwell's services were not a contribution and the Recall Committee was not required to report these services as a contribution.

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction over the subject matter of this complaint. Section 1-45-111(2)(a), C.R.S. (2002).

2. The T-shirts, water bottles and flyers distributed by Sheridan United did not constitute a contribution to Carter or Beacham under Section 1-45-103(4)(a)(IV), C.R.S. (2002), or a contribution in kind to Carter or Beacham under Section 1-45-103(4.5)(a), C.R.S. (2002).

3. The T-shirts, water bottles and flyers distributed by Sheridan United were not a contribution in kind to the Recall Committee, as defined in Section 1-45-103(4.5)(a), C.R.S. (2002).

4. Respondents were not required to report the T-shirts, water bottles and flyers distributed by Sheridan United as contributions under Section 1-45-108(1), C.R.S. (2002).

5. The Recall Committee was not required to report Bonniwell's services as a contribution. Section 1-45-103(4)(b), C.R.S. (2002).

AGENCY DECISION

It is therefore the Agency Decision of the Administrative Law Judge that Johnson has failed to prove that Respondents have violated Section 108(1)(a) of the Act. Johnson's complaint is dismissed.

6. The complaint in this case makes no charges against Carter or Beacham with regard to Bonniwell's activities.

Dated: May _____, 2003

MARSHALL A. SNIDER
Deputy Chief Administrative Law Judge

CERTIFICATE OF MAILING

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

Sheridan 2002 Recall Committee
c/o Jack A. Eitzel
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Vicki Johnson
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William Hobbs
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on this ____ day of May, 2003.

Secretary to Administrative Law Judge

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