

BEFORE THE SECRETARY OF STATE

STATE OF COLORADO

CASE NO. OS 2004-003

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY CHARLES K. MAYFIELD
REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY THE
SILVERCREEK WATER AND SANITATION DISTRICT**

On April 8, 2004, Complainant Charles K. Mayfield filed a complaint with the Colorado Secretary of State against SilverCreek Water and Sanitation District (SilverCreek), alleging violations of the Fair Campaign Practices Act, Sections 1-45-101- 1-45-118, C.R.S. (2003) ("the Act"). The Secretary of State transmitted the complaint to the Colorado Division of Administrative Hearings on April 8, 2004, for the purpose of conducting a hearing pursuant to Article XXVIII, Section 9(2)(a) of the Colorado Constitution.

Hearing was held in this matter April 26, 2004. Complainant appeared personally and was represented Linda G. Alexander of Collins Cockrel & Cole. SilverCreek was represented by Thomas M Rogers III of Rothgerber Johnson & Lyons LLP. The Administrative Law Judge (ALJ) issues this Agency Decision pursuant to Article XXVIII, Section 9(2)(a) and Section 24-4-105(14)(a), C.R.S. (2003).

ISSUE PRESENTED

An election at which each of the five seats on SilverCreek's Board of Directors is being contested is scheduled for May 4, 2004. The issue to be determined in this proceeding is whether SilverCreek violated Article XXVIII of the Colorado Constitution and Section 1-45-117 of the Act by producing and mailing to SilverCreek customers at public expense approximately five weeks before the election a document entitled "Are You Interested in 'The Rest of the Story'? (SilverCreek District Responds to Attacks!)."

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. SilverCreek is a special district that provides water and sanitation services to district residents and is a political subdivision of the State of Colorado.

2. Charles K. Mayfield is a resident and property owner within the SilverCreek district

3. SilverCreek has a five-member board of directors who are elected by district residents on a biennial basis. Each of the current members of the board of directors is a candidate for re-election in a contested election scheduled for May 4, 2004. The ballot for the upcoming election lists 10 candidates, five of whom are current board members and five of whom are vocal opposition candidates.

4. The opposition candidates have organized under the umbrella of an election committee called the "Citizens for a Responsible Future" and, as a group, have raised a number of issues regarding the policies and actions of SilverCreek. The opposition candidates have introduced a platform that includes: a commitment to resolve current litigation and objections initiated by SilverCreek against SolVista Corporation and the Town of Granby relating to annexation and exclusion issues, support of that annexation effort and exclusion, and support for a lower mil levy.

5. Citizens for a Responsible Future has prepared and disseminated advocacy letters to residents of SilverCreek advocating the election of their slate of candidates and criticizing the actions of the existing SilverCreek board of directors, in part based on the issues described above.

6. In the period leading up to the election, the local newspaper has run stories concerning the election, including explanations of the contested issues and the positions of the opposition candidates.

7. On March 31, April 1 and April 2, 2004, SilverCreek, through its manager Gary Cooper, mailed to all SilverCreek District residents a letter entitled "Are You Interested in 'The Rest of the Story'? (SilverCreek District Responds to Attacks!) ("The Rest of the Story letter"). The letter addresses in a point by point fashion the issues that have been raised by the opposing candidates as criticisms of current board policies, including criticisms of the position taken by the current SilverCreek board members regarding the ongoing annexation/exclusion litigation, criticisms of the expenses associated with that litigation, and criticisms of the mil levy amount. On each point, the letter concludes that SilverCreek actions and positions are reasonable and justified. The Rest of the Story letter does not mention or reference the upcoming election in any way, does not indicate that any board members are up for election, does not identify the current board members by name, does not indicate that the current board members have any election opponents, and does not mention any election opponents by name. It also does not urge recipients of the letter to vote or to take any action at all.

8. The Rest of the Story letter was produced at public expense using SilverCreek letterhead and envelopes and was mailed to the approximately 600 residents of the SilverCreek, using \$.37 in postage for each letter. Thus, postage costs to the SilverCreek district for the mailing were approximately \$220.

9. Although Complainant asserts that the Rest of the Story mailing was originally targeted only to potential supporters of the current SilverCreek board of the directors, the evidence failed to show that was the case. Complainant Mayfield testified that he telephoned SilverCreek's manager, Gary Cooper, on April 2, 2004, to complain that he had not received the letter and to ask who had gotten it. Mr. Cooper's telephone response was that only certain residents had received the letter. He stated he would check to see who had received the letter and would get back to Mr. Mayfield. Several hours later Mr. Cooper sent an e-mail to Mr. Mayfield stating that the mailings of the letter "went out in Wednesday's, Thursday's and today's mail. If you don't get a copy by Monday please call me." There is no indication or reasonable inference from that e-mail or from Mr. Mayfield's testimony that SilverCreek intended, prior to Mr. Mayfield's inquiry, to send the letter only to certain targeted residents.

10. In the three and one-half years Mr. Mayfield has lived in the SilverCreek District he has never previously received a letter from SilverCreek explaining any actions of the board of directors or updating residents on SilverCreek decisions.

DISCUSSION

I.

MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Prior to hearing, SilverCreek filed a Motion to Dismiss or for Summary Judgment, asserting Complainant's complaint fails to state a claim upon which relief can be granted. The ALJ took the motion under advisement and resolves as part of this Agency Decision.

II.

1. The Act, in combination with Article XXVIII of the Colorado Constitution, which was approved by the people of Colorado in 2002, together comprise Colorado's campaign finance law. These provisions prohibit political subdivisions of the state, such as SilverCreek, 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. (2003). In addition, the Act prohibits political subdivisions from making "any contributions to urge electors to vote in favor or against" specified "state-wide ballot issues," specified "local ballot issues," and certain referred and recall measures. Section 1-45-117(1)(a)(I)(A)-(C), C.R.S. (2003).

2. Complainant maintains that by mailing the Rest of the Story letter at public expense to its customers approximately five weeks prior to the May 4, 2004 contested board of directors election, SilverCreek made a contribution of public funds in support of a candidate campaign in violation of Section 1-45-117, C.R.S. In defense, SilverCreek asserts the letter does not amount to express advocacy and therefore cannot constitutionally be regulated consistent with the First Amendment to the U.S. Constitution.

SilverCreek also argues that the letter does not fall within definition of “contribution” under the Act or Article XXVIII. The ALJ agrees the letter does not fall within the definition of “contribution” found in the Act and Article XXVIII of the Colorado Constitution and thus concludes mailing the letter at public expense to SilverCreek customers did not violate the provisions of Section 1-45-117 of the Act. Because the ALJ has determined the letter does not constitute an illegal contribution as a matter of statutory construction, the ALJ declines to reach the constitutional issues raised by SilverCreek.

3. As pertinent here, the definition of “contribution” applicable to Section 1-45-117 is found in Article XXVIII. Section 2(5)(a)(IV) of Article XXVIII defines a contribution as “[a]nything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate’s nomination, retention, recall, or election.”

SilverCreek asserts, first, that the Rest of the Story letter was not a thing of value. The ALJ disagrees. Although SilverCreek argues the letter had no value to the incumbent candidates because it did not refer to any of its directors by name, the ALJ disagrees that value as referenced in the definition of “contribution” must be measured in terms of value to a candidate. The letter was produced on SilverCreek letterhead, placed in SilverCreek envelopes, mailed with \$.37 postage and attempted to convey information to SilverCreek’s customers. It therefore was “a thing of value.”

4. Complainant argues the letter also fits the remainder of the definition of contribution. The ALJ is unpersuaded. In order to constitute a contribution under the Act and Article XXVIII a thing of value must be “*given, directly or indirectly, to a candidate.*” In this case, the Rest of the Story letter does not mention the incumbent members of SilverCreek’s board of directors by name, does not mention or even allude to the upcoming election, and does not name any election opponents or even allude to the existence of any such opponents. On the contrary, the letter addresses criticism of the actions of the SilverCreek board of directors as a whole, not in their individual roles and not as candidates. Under these circumstances, the letter does not amount to something of value given directly or indirectly to a candidate.

Similarly, the letter does not constitute a contribution under the Act and Article XXVIII because it is not a thing of value given, directly or indirectly, to a candidate “*for the purpose of promoting the candidate’s . . . election.*” Again, the letter makes no reference to the election or to any candidates, either directly or indirectly. Nor does it urge customers to vote for or against any candidate or to vote at all. It also does not identify the issues discussed in the letter as being election issues. Instead, the letter, by its terms, discusses criticisms of actions of the board as a whole and attempts to explain the board’s position on each of these issues. Under these circumstances, the Rest of the Story letter constitutes a communication by the board to its members and constituents regarding the governmental functions, duties and responsibilities of the board. Such communication is within the scope of appropriate official board functions and is not prohibited by the Act.

Consequently, the Rest of the Story letter, although produced at public expense, does not constitute an unauthorized contribution under the Act or Article XXVIII.

5. Complainant asserts that in light of the heated political climate in the SilverCreek District and the timing of the mailing, the Rest of the Story letter constitutes a blatant attempt by the SilverCreek District to sway the May 4, 2004 election by sending to District residents, at public expense, an advocacy piece in support of the policies of the current board. Complainant maintains that against this background the letter constitutes an unlawful contribution under the Act. The ALJ is unconvinced. Contrary to Complainant's arguments, the ALJ has determined that the Rest of the Story letter does not constitute an improper contribution under the Act and Article XXVIII. The ALJ further concludes that neither the political climate in the District nor the timing of the letter alters this result.

One of the underlying purposes of the Act and Article XXVIII is to assure that government does not provide an unfair advantage to one side over the other in the electoral process by utilizing public funds to propagandize in support of a particular candidate or issue. *Mountain States Legal Foundation v. Denver School District*, 459 F. Supp. 357 (D.Colo. 1978). Further, the specific purpose of Section 1-45-117 is to prohibit governmental entities from spending public funds to influence the outcome of campaigns for political office and ballot issues. *Colorado Common Cause v. Coffman*, 01CA1709, 32 Colo. Lawyer, May 2003 at 178 (March 27, 2003) (opinion modified and as modified, Petition for Rehearing denied May 29, 2003).

Consequently, as argued by Complainant, in order to comply with the prohibitions contained in Section 117 of the Act, governmental entities such as SilverCreek may not make contributions to candidate elections. However, contrary to the arguments of Complainant, neither the Act nor Article XXVIII prohibits the type of communication at issue in this case.

The Act and Article XXVIII do not prohibit all publicly-funded communications by a governmental entity merely because a candidate election related to that entity is pending, even if the political climate surrounding that election is heated, the communication is close to the election date, and the entity has not sent any such communications to its constituents in the years prior to the communication. In order to determine whether a communication constitutes an improper contribution, the content of the communication must be examined. In this case, the Rest of the Story letter makes no reference to an election, to candidates, to voting, or to electoral issues identified as such. Instead, it discusses attacks on the SilverCreek District as whole, rather than as individual board members, and responds to those attacks by explaining why the District has taken the positions and actions it has taken. The mere fact that election opponents of board members have discussed in their campaigns the issues referenced in the letter and have criticized board members for their actions and positions on these issues does not render this communication a prohibited contribution under Section 1-45-117 of the Act.

The ALJ agrees with SilverCreek that the Act does not render a communication from a governmental entity a contribution solely because it discusses issues that are the subject of a candidate campaign. Such a construction of the Act and Article XXVIII would inappropriately limit the ability of governmental entities to communicate with their constituencies. The determination of whether a publicly-funded communication constitutes an improper contribution requires an examination of the content of the communication. In this case, an examination of the Rest of the Story letter leads to the conclusion, for the reasons discussed above, that it does not constitute a thing of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's election and thus does not constitute an improper contribution under Section 1-45-117 and Article XXVIII of the Colorado Constitution.

6. In sum, the ALJ concludes Complainant has failed to meet his burden of establishing a violation of Section 1-45-117, C.R.S. (2003) of the Act, as alleged in the complaint, or a violation of Article XXVIII of the Colorado Constitution.¹

III.

Asserting the complaint is “clearly baseless and so clearly interposed merely for political gain,” SilverCreek seeks attorneys’ fees in this matter pursuant to “Colorado’s procedural rules and statute.” SilverCreek has failed to establish the complaint is clearly baseless or interposed merely for political gain and has failed to indicate any specific provision that authorizes the ALJ to grant of attorneys’ fees in this matter. Under these circumstances, the ALJ declines to award attorneys’ fees.

¹ Certain limitations and exceptions to the contribution and expenditure prohibitions of Section 1-45-117(1)(a)(I) appear in Section 1-45-117(1)(a)(II) and (1)(b) of the Act. The parties did not assert that these provisions are applicable in the present case and appeared to concede that those exceptions and limitations apply only to issue elections and not to the candidate elections. The ALJ agrees these exceptions and limitations apply only to issue elections and therefore does not address them in this decision.

CONCLUSIONS OF LAW

1. The ALJ has jurisdiction over the complaint in this matter. Article XXVIII, Section (9)(2)(a).
2. SilverCreek did not violate Article XXVIII of the Colorado Constitution or Section 1-45-117 of the Act by producing and mailing to SilverCreek customers at public expense a document entitled "Are You Interested in 'The Rest of the Story'? (SilverCreek District Responds to Attacks!)."

AGENCY DECISION

Because Complainant has failed to establish that SilverCreek violated Article XXVIII of the Colorado Constitution or Section 1-45-117 of the Act by producing and mailing to SilverCreek customers at public expense a document entitled "Are You Interested in 'The Rest of the Story'? (SilverCreek District Responds to Attacks!)," the Complaint in this matter is dismissed.

DONE AND SIGNED

May ____, 2004

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: Linda Alexander, Collins, Cockrel & Cole, 390 Union Blvd., Suite 400, Denver, CO 80228-1556; Thomas M. Rogers III, Rothgerber, Johnson & Lyons, 1200 17th Street, Suite 3000, Denver, Colorado 80202; and on William A. Hobbs, Deputy Secretary of State, Department of State, 1560 Broadway, Suite 200, Denver, CO 80202, on this ___ day of April, 2004.

Secretary to Administrative Law Judge

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