

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

CASE NO. OS 2005-0005

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY HAROLD L. WEISBERG
REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY
FRED NEAL, CAROL BUHR, and EARL SCOPEL**

This matter arises from a complaint filed with the Colorado Secretary of State on March 31, 2005, by Complainant Harold Weisberg. The Secretary of State referred the complaint to the Division of Administrative Hearings on March 31, 2005, as required by Colo. Const., Art. XXVIII, Sec. 9(2)(a). The complaint alleges that the Respondents violated certain provisions of the Fair Campaign Practices Act, Section 1-45-101 to 118, C.R.S. (2004) (FCPA). Hearing was held on April 13, 2005, before Administrative Law Judge Nancy Connick. All parties were present and appeared *pro se*.

ISSUES PRESENTED

Complainant contends that the Respondents, as the Evans Recall Committee, failed to register their issue committee before making or accepting contributions or within ten day of receiving their first contribution. Sections 1-45-108(3) and (6), C.R.S. Complainant further charges that Respondents failed to report three contributions or expenditures:

1. Expenditures for the printing costs of flyers announcing a meeting at Centennial School on November 16, 2004.
2. The contribution of the rental value of Centennial School for the November 16, 2004 meeting.
3. The contribution of legal advice from a lawyer.¹

¹ Complainant originally claimed that Respondents either expended funds to hire a lawyer or accepted a non-monetary contribution of legal advice. At hearing, Complainant refined his complaint to charge only that Respondents accepted a contribution of legal advice provided without charge.

FINDINGS OF FACT

1. Respondents are the three members of the Evans Recall Committee, an issue committee. The declared purpose of the Evans Recall Committee is to recall the mayor of Evans, who is Complainant, and Evans city council members.

2. Respondents concede that the Evans Recall Committee came into existence on January 4, 2005. This is the date when the Evans City Clerk certified the format for the recall petitions to recall Mayor Harold Weisberg, the Complainant. At issue in this proceeding is whether the Evans Recall Committee came into existence at an earlier time.

3. On March 1, 2005, Respondent Fred Neal, as the registered agent, filed a Committee Registration Form registering the Evans Recall Committee. On the same date, March 1, 2005, Respondent Neal filed a Report of Contributions and Expenditures for the reporting period of January 4 through March 1, 2005. Neal did not report any of the alleged contributions or expenditures at issue in this matter, *i.e.*, the expenditures for printing the flyer; contribution of the rental space for the November 16, 2004 meeting; or the contribution of any legal advice received. The Respondents have not at any time reported these contributions or expenditures.

4. The City of Evans is a home rule city. Evans has not by ordinance addressed any of the matters covered by Colo. Const., Art. XXVIII or the FCPA.

5. Flyers. The City of Evans supplies water to a subdivision on its western boundary known as Arrowhead. Sometime after the beginning of August, 2004, some Arrowhead residents formed a group called Citizens for Concerned Water. This group formed due to concerns about their water rates and how Evans was using the funds generated by these rates. The group had no connection to the Respondents. Its organizers did not know Respondents.

6. The flyers at issue in this hearing came about when Citizens for Concerned Water decided to try to ascertain what concerns the residents of Evans might have regarding water. Citizens for Concerned Water paid for flyers entitled "Evans Water Users" that were distributed to Evans water users announcing a town meeting ("Evans Water Users flyers"). The meeting was to be held on November 16, 2004, at Centennial School in Evans.

7. The Evans Water Users flyers ask if water bills are too high, point to alleged water rate increases, assert that the city council might be using extra revenue from the increased water rates to cover shortfalls in other departments, and ask if water users are willing to continue to fund this asserted mismanagement. They further ask if water users are satisfied with how the city council has handled various issues and invite participation at a town meeting to discuss these issues. They cannot fairly be characterized as a plea for a recall.

8. Neither the Respondents nor the Evans Recall Committee paid the printing costs of the Evans Water Users flyers.

9. Rental Value of Centennial School for November 16, 2004 Meeting. At some point in September, 2004, Larry Howell, one of the organizers of Citizens for Concerned Water, became acquainted with Neal.

10. In October, 2004, Neal applied for a permit from the Weld County School District to use Centennial School for the meeting advertised by the Evans Water Users flyers. The school district has a policy of renting school buildings to various groups. It also provides school facilities to certain groups at no charge. Based on the information provided on the application and otherwise, the school district provided the use of Centennial School for the November 16 meeting at no charge.

11. The record does not establish what the normal rental charge for Centennial School for the November 16 meeting would have been had it not been provided without charge.

12. On the application, Neal listed the name of the sponsoring organization as Concerned Citizens/Water Rates. In the space provided to describe the organization as non-profit or commercial, Neal indicated that it was non-profit. By indicating it was nonprofit, Neal intended to signify that the meeting would be open to the public without charge. Neal further answered "yes" to the question of whether he thought the building should be provided at no charge and stated that increased water rates in Evans directly impact school budgets.

13. The November 16 meeting began with a presentation by Ken Blehm, an Arrowhead resident, about water issues. There was also some discussion about other issues, including an ethanol plant. Neal was in charge of part of the meeting, including a discussion of the possibility of recalling the mayor and city council members. Those who supported a recall, including Neal, viewed the meeting as an opportunity to gauge public sentiment in favor or a recall. Someone described the recall process. Some persons in attendance voiced their disagreement with a recall. Blehm did not support a recall, although the record does not establish whether he voiced this opinion at the meeting. The persons in attendance were urged to go to city council meetings and contact their council members.

14. The November 16 meeting was not called for the purpose of forming a recall committee. There were no recall petitions available at the meeting. There was no mention of a recall committee or any recall committee members. Although Neal supported a recall, he had not decided at the time of the meeting whether to proceed with a recall.

15. There is no evidence that Buhr or Scopel was involved in the November 16, 2004 meeting.

16. At the time of the November 16, 2004 meeting, Neal, Buhr and Scopel had not yet formed the Evans Recall Committee.

17. The record does not clearly establish what group, if any, reserved Centennial School for the November 16, 2004 meeting. In any case, Neal did not reserve Centennial School on behalf of the Evans Recall Committee.

18. Legal Advice. In September, 2004, Citizens for Concerned Water retained an attorney, who provided it legal advice.

19. At some time before January 4, 2005, Howell told Neal that Citizens for Concerned Water had retained an attorney in connection with its effort to obtain city financial records. Howell did not, however, tell any of the Respondents the substance of the advice provided by that attorney.

20. Neal referred to the retention of this attorney on the statement he drafted for the petition to recall the mayor of Evans. This statement appears on the face of the recall petition and includes the following language: "The mayor and city council have refused to investigate charges of money mismanagement by two former employees choosing to increase the budget instead. Access to public records and financial reports have been denied, even after retaining a lawyer."

21. The record does not establish that the legal advice obtained by Citizens for Concerned Water was shared with Respondents.

22. Neither Respondents nor the Evans Recall Committee retained an attorney.

DISCUSSION

Complainant relies on various requirements of the FCPA relating to issue committees. He generally asserts that Respondents failed timely to register the Evans Recall Committee. Section 1-45-108(3), C.R.S. [issue committees must register before accepting or making any contributions] and Section 1-45-108(6), C.R.S. [issue committees whose purpose is the recall of an elected official must register within ten business days of receiving first contribution]. Complainant further charges that Respondents failed to report the three contributions or expenditures at issue: the cost of printing the Evans Water Users flyers, the rental value of the use of Centennial School, and the value of legal advice received. Section 1-45-108(1)(a)(I), C.R.S.

The FCPA requirements cited by Complainants apply to issue committees. The first question before the Administrative Law Judge is therefore whether during the time period at issue (September, 2004, to January 4, 2005)², Respondents met this

² September, 2004, is when Citizens for Concerned Water obtained the legal advice that Complainant contends it conveyed to Respondents at some point before Neal referred to that legal advice on the recall

definition. The Administrative Law Judge finds that Respondents were not an issue committee at this time.

The FCPA adopts the definition of an issue committee found in Colo. Const., Art. XXVIII, Sec. 2(10):

- (10)(a) "Issue committee" means any person, other than a natural person, or any group of two or more persons, including natural persons:
- (I) That has a major purpose of supporting or opposing any ballot issue or ballot question; or
 - (II) That has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.

First, there is no evidence that two or more of the Respondents formed any group before January 4, 2005, the date they concede they formed the Evans Recall Committee. Respondents are all natural persons who must act in concert to form an issue committee. Complainant relies on the November 16 meeting as evidence of the formation of the Evans Recall Committee. The only Respondent who had any involvement in the November 16 meeting, however, was Neal. There is no evidence that either Buhr or Scopel was involved in the meeting. An individual natural person acting on his own, e.g., Neal, cannot meet the definition of an issue committee. Colo. Const., Art. XXVIII, Sec. 2(10).

Second, the way in which the November 16 meeting was advertised and conducted belies any inference that the major purpose of that meeting was supporting a ballot issue or question, as required for a group to be an issue committee. The purpose of the meeting was not to form a recall committee. The Evans Water Users flyer itself focuses on dissatisfaction with water rates. While it asks if water users are satisfied with how the city council has handled various issues, it cannot fairly be characterized as a plea for a recall. The sponsoring organization listed on the application for use of Centennial School is Concerned Citizens/Water Rates, not the Evans Recall Committee. The meeting itself initially focused on water rates, beginning with a presentation by an Arrowhead resident who never became a member of the Evans Recall Committee and personally opposed a recall. The meeting later explored the possibility of a recall, but no decision on recall was made. There were no recall petitions, and no committee members were identified. The major purpose of the meeting therefore was not supporting a ballot issue or question.

petition, approved on January 4, 2005. The other expenditures or contributions (*i.e.*, the flyers and the use of Centennial School) relate to the November 16, 2004 meeting and fall in this time period.

In addition, Respondents do not meet the second prong of the issue committee definition.³ There is no evidence that during the relevant time period, Respondents accepted or made contributions or expenditures in excess of \$200 to support or oppose any ballot issue or ballot question. The FCPA adopts the definitions of “contribution” and “expenditure” used in the Colo. Const., Art. XXVIII, Sec. 2(5) and 2(8).⁴ The record addresses only the three alleged contributions or expenditures at issue in this proceeding: the Evans Water Users flyers, the use of Centennial School, and the receipt of legal advice.

In relation to the flyers, Complainant alleges that Respondents, as the Evans Recall Committee, made expenditures to pay for the cost of printing the Evans Water Users flyers. The record establishes instead that Citizens for Concerned Water paid for these flyers. Respondents therefore made no expenditure whatsoever in relation to the Evans Water Users flyers.

In relation to the use of Centennial School, Complainant alleges that Respondents accepted a contribution valued at the normal rental fee for Centennial School. The record does not establish the value of this contribution or that it was accepted by Respondents as the Evans Recall Committee. The record therefore establishes no contribution accepted by Respondents in relation to the rental value of Centennial School.

In relation to the alleged receipt of legal advice, the record simply does not support this allegation. Citizens for Concerned Water did not in fact provide to Respondents or to the Evans Recall Committee the substance of the advice it received from its attorney. The mere fact that Citizens for Concerned Water alerted Neal that it had hired an attorney does not constitute any type of gift or contribution. There was therefore no contribution to Respondents in relation to legal advice. In all, Respondents

³ Secretary of State Rule 1.6(b), 8 CCR 1505-6, defining issue committee states that a “person or group of persons is an issue committee only if it meets both of the conditions in Article XXVIII, Section 2(10)(a)(I) and Section 2(10)(a)(II).”

⁴ As relevant here, a contribution pursuant to Article XXVIII, Sec. 2(5)(a) is as follows:

“Contribution” means:

- (I) The payment, loan, pledge, gift, or advance of money, or guarantee of a loan, made to any . . . issue committee . . .;
- (II) Any payment made to a third part for the benefit of any . . . issue committee . . .;
- (III) The fair market value of any gift or loan of property made to any . . . issue committee . . .;
- (IV) Anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate’s nominating, retention, recall, or election.

An expenditure pursuant to Article XXVIII, Sec. 2(8)(a) is in relevant part as follows:

“Expenditure” means any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question.

did not accept or make contributions or expenditures in excess of \$200 to support or oppose any ballot issue or ballot question.

Since Respondents do not meet either prong of the definitional test of an issue committee during the time period at issue (from September, 2004, until January 4, 2005), they were not an issue committee at this time. Respondents are therefore not subject to the FCPA requirements applicable to issue committees relied on by Complainant in his complaint. Sections 1-45-108(3) and (6), C.R.S. and Section 1-45-108(1)(a)(I), C.R.S.

Had the Administrative Law Judge found that Respondents were in fact an issue committee during the period in question, she would have to reconcile seemingly conflicting constitutional and statutory provisions. The definition of an issue committee, as supported by Rule 1.6.b, provides that an issue committee is only formed once it accepts or makes \$200 worth or expenditures or contributions. Colo. Const., Art. XXVIII, Sec. 2(10). On the other hand, the FCPA requires an issue committee to register *before* accepting or making any contributions. Section 1-45-108(3), C.R.S. In addition, the FCPA itself contains differing requirements for the registration of all issue committees (*i.e.*, before accepting or making any contributions) and issue committees for recalls (*i.e.*, within ten days of receiving its first contribution). Sections 1-45-108(3) and (6), C.R.S. Since Respondents here do not meet the definition of an issue committee, however, the Administrative Law Judge need not address these issues.

CONCLUSIONS OF LAW

1. Although Evans is a home rule city, it has not adopted an ordinance addressing any of the matters covered by Colo. Const., Art. XXVIII or the FCPA. It is therefore subject to the provisions of Article XXVIII and the FCPA. Section 1-45-116, C.R.S., and Rule 7.1, 8 CCR 1505-6.

2. Pursuant to Colo. Const., Art. XXVIII, Sec. 9(2)(a), the Administrative Law Judge has jurisdiction to conduct a hearing in this matter.

3. This issues in a hearing conducted by an Administrative Law Judge under Article XXVIII of the Colorado Constitution are limited to whether any person has violated Sections 3 through 7 or 9(1)(e) of Article XXVIII or Sections 1-45-108, 114, 115, or 117, C.R.S. Colo. Const., Art. XXVIII, Sec. 9(2)(a).

4. Colo. Const., Art. XXVIII, Sec. 9(1)(f) provides that the hearing is conducted in accordance with the Colorado Administrative Procedures Act. Under the Administrative Procedures Act, the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. In this instance, Complainant is the proponent of an order seeking relief against Respondents for violations of the FCPA. Accordingly, Complainant has the burden of proof.

5. During the time period relevant to this complaint, Respondents did not form an issue committee. No violations of the requirements for an issue committee to register or to report contributions or expenditures have therefore been established. Sections 1-45-108(3), (6), and (1)(a)(I), C.R.S. Further, Respondents, as the Evans Recall Committee, did not make expenditures or accept expenditures in relation to the Evans Water Users flyers, the use of Centennial School for a November 16, 2004 meeting, or the receipt of legal advice. Colo. Const., Art. 2(5) and (8).

AGENCY DECISION

It is the Agency Decision that the complaint in this matter is dismissed in its entirety.

DONE AND SIGNED

April 26, 2005

NANCY CONNICK
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above **AGENCY DECISION** was served by facsimile to:

Harold Weisberg
507 32nd Street
Evans, CO 80620-1603

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Carol Buhr
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William Hobbs
Deputy Secretary of State
1560 Broadway
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on this ____ day of June, 2005.

Assistant to Administrative Law Judge

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