

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

CASE NO. OS 20060015

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY KIM SAYERS REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY JEANNE
LABUDA.**

Background

The Complaint

On July 6, 2006 the Complainant, Kim Sayers, filed her Complaint in this matter with the Secretary of State. On July 11, 2006 the Secretary of State sent the Complainant a letter telling her, among other things, that she needed to provide the Defendant's mailing address. The Complainant modified her Complaint to provide that information and resubmitted it to the Secretary of State on July 13, 2006. The following day it was referred to the Office of Administrative Courts ("OAC") per Colo. Const. art. XXVIII, Section 9(2)(a). Hearing was held July 26, 2006 at the OAC. Michael Brewer, Esq. appeared on behalf of the Complainant and Edward T. Ramey, Esq. appeared on behalf of the Defendant, Jeanne Labuda.

The Complaint alleged that the Defendant, a candidate for State Representative for District 1, made five zero interest loans to her own campaign, totaling \$30,000. According to the Complainant, this conduct is prohibited by Colo. Const. art. XXVIII, Section 3(8). That subsection ("subsection (8)") provides:

Notwithstanding any other section of this article to the contrary, a candidate's candidate committee may receive a loan from a financial institution organized under state or federal law if the loan bears the usual and customary interest rate, is made on a basis that assures repayment, is evidenced by a written instrument, and is subject to a due date or amortization schedule. The contribution limits described in this section shall not apply to a loan as described in this subsection (8).

The Motion to Dismiss

On July 21, 2006 the Defendant filed a Motion to Dismiss. That Motion argued first that the discretionary language "may" in subsection (8) makes the subsection non-proscriptive. Second, the motion argued that prohibitions on a candidate's ability to lend money to themselves are unconstitutional, citing *Hlavac v. Davidson*, 64 P.3d 881

(Colo. App. 2002). That case at 884-5 relied on the holding *Buckley v. Valeo*, 424 U.S. 1 (1976) that such limitations would violate the First Amendment of the United States Constitution.

The July 24, 2006 Response Letter

On this date the Complainant responded to the Motion to Dismiss by sending a letter to the Secretary of State, with copies to the Defendant's counsel and the OAC. The Secretary of State also forwarded a copy of her copy of the letter to the OAC the following day. By the letter, the Complainant sought to amend her earlier Complaint. First, the Complainant indicated that her Complaint was against the Committee to Elect Jeanne Labuda, as well as the Defendant herself. Secondly, she sought to add to the Complaint another loan by the Defendant to herself of \$5,000. Finally, the Complainant argued in response that, if the loans are permitted under *Hlavac v. Davidson*, they nevertheless should have been reported as "contributions."

Hearing

At hearing on July 26, 2006, Mr. Brewer entered his appearance; previously the Complainant had been representing herself. Mr. Ramey also entered his appearance; another attorney, Mark Grueskin, Esq., had filed the Motion to Dismiss. The ALJ took up the matters raised in the Motion to Dismiss and the July 24, 2006 letter.

The Complainant, through counsel, orally made a more detailed Complaint, which contained two parts. Part one is that subsection (8) requires candidates to use a financial institution such as a bank and pay the financial institution interest to loan themselves money. Part two is that because the Defendant failed to use a financial institution for the loan, the interest that she avoided paying should have been reported as a contribution.

The Defendant did not object to the reframing of the Complaint as articulated by Complainant's counsel or to the adding of the sixth zero interest loan. The Administrative Law Judge ("ALJ") permitted this amendment.

The parties then agreed to the submission of a number of documents as evidence. No testimony was taken.

Findings of Fact

Based upon the evidence submitted at hearing, the ALJ makes the following Findings of Fact:

The Loans

1. The Defendant Jeanne Labuda is a candidate for State Representative for District 1.
2. For the reporting period October 1, 2005 through December 31, 2005, the Defendant reported, in addition to other contributions and expenses, a loan to herself in

the amount of \$5,000. She further reported that the interest rate for the loan was zero percent.

3. For the reporting period January 1, 2006 through March 31, 2006, the Defendant reported, in addition to other contributions and expenses, two loans to herself at an interest rate of zero percent. One loan was for \$10,000 and the other was for \$5,000.

4. For the reporting period April 1, 2006 to April 25, 2006, the Defendant reported, in addition to other contributions and expenses, a loan to herself of \$5,000 at an interest rate of zero percent.

5. For the reporting period April 26, 2006 to May 26, 2006, the Defendant reported, in addition to other contributions and expenses, a loan to herself of \$5,000 at an interest rate of zero percent.

6. For the reporting period June 29, 2006 to July 12, 2006, the Defendant reported, in addition to other contributions and expenses, a loan to herself of \$5,000 at an interest rate of zero percent.

Actions by the Secretary of State in Other Cases

7. The Complainant presented evidence of form letters issued by the Secretary of State in other campaigns.

8. For the reporting period January 1, 2006 to March 31 2006, the Committee to Elect Bob Gardner reported a loan by Robert S. Gardner of \$3,301.81 at an interest rate of zero percent.

9. Lori Lennartz, on behalf of the Secretary of State, sent a form letter dated May 4, 2006 to the Committee to Elect Bob Gardner. The form letter stated that one or more of the following deficiencies had been identified for a report of contributions and expenditures for the period January 1, 2006 through March 31, 2006. Following this statement were a number of check off boxes. The box "other" was checked. Typed in after the "other" were the words: "Loan from candidate please read Art.xxvIII(amendment) xxvII Sec 3(4)(8)." An additional box was added and checked. Next to this box were the words "Loan by a financial institution."

10. The Colorado Constitution contains no Article XXVIII, Section 3(4)(8). Subsection (8) does appear at Colo. Const. art. XXVIII, Section 3.

11. For the reporting period January 1, 2006 to March 31 2006, the Committee Scott Renfroe for Senate reported two loans by Scott Renfroe of \$7,000 and \$5,000, each with an interest rate of zero percent.

12. Ms. Lennartz sent a form letter dated May 4, 2006 to Mr. Renfroe with the same boxes checked and notations made as in the form letter sent to Mr. Gardner.

13. For the reporting period June 29, 2006 to July 12, 2006, "Harkins for Governor" reported a loan from Clyde Harkins of \$1,000 with an interest rate of zero percent.

14. Ms. Lennartz sent the same form letter dated July 24, 2006 to Harkins for Governor. This time Ms. Lennartz checked the box "other" and added the notation: "PLEASE Note: that you MUST form a committee in order to take contributions. At this time you are a candidate, not a committee. Also you may not give yourself a loan. I have included the report dates that are past due. You became a candidate on 5-26-06, and should have started filing then. The Contribution must be returned within 30 days."

15. For the reporting period January 1, 2006 to March 31, 2006 the Committee to Elect Wynne Palmero CU Regent reported a loan from Wynne Palmero of \$800 with an interest rate of zero percent.

16. Ms. Lennartz sent the same form letter dated May 2, 2006 to July 24, 2006 to the Committee to Elect Wynne Palmero CU Regent. This time Ms. Lennartz checked the box "other" and added the notation: "Please refer to Art xxv111 Sec. 3(4)(8) The \$800.00 loan should be a contribution."

17. There is no evidence the Defendant received one of the form letters, as have the above candidates.

18. No inference can be reliably drawn from the form letters to the above candidates as to the opinion of the office of the Secretary of State of the propriety under subsection (8) of loans by candidates to themselves at zero percent interest. The form letters are very brief and do not clearly articulate what is objected to. The form letters also appear to relate to issues other than loans. Finally, although the Defendant has loaned her own campaign \$35,000 at an interest rate of zero percent and has reported these loans to the Secretary of State, there is no evidence the Secretary of State objected to this practice in her case.

Conclusions of Law

Based on the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

1. Hearings before an ALJ pursuant to Colo. Const. art. XXVIII, Section 9(2)(a) are to be conducted in accordance with the provisions of Section 24-4-105, C.R.S. Colo. Const. art. XXVIII, Section 9(1)(f). Section 24-4-105(7) provides that the proponent of an order shall have the burden of proof. In this case the Complainant is the proponent of the order in that she seeks to establish a violation of Colo. Const. art. XXVIII, Section 3(8).

2. The Complainant argues that the form letters of Ms. Lennartz on behalf of the Secretary of State demonstrate an opinion of the Secretary of State that candidates must go through a financial institution to loan themselves money. The ALJ has found that this evidence does not support such an inference. The form letters are brief and unclear as to the opinion of the Secretary of State. Also, there is no evidence that the Defendant herself received any such letter, despite the fact that the Defendant openly reported loaning herself money at a zero percent interest rate six separate times.

3. It makes sense that if the Secretary of State meant to require all loans to go through financial institutions that she would say so by way of a rule. Nevertheless, the Complainant has cited no such rule in support of her contention and the ALJ has been unable to discover one.

4. The general rules of statutory construction apply when interpreting citizen-initiated measures such as Colo. Const. art. XXVIII. *Bickel v. City of Boulder*, 885 P.2d 215, 228, n. 10 (Colo. 1994). In interpreting a statute, an ALJ should give words their plain and ordinary meaning. Section 2-4-101, C.R.S.; *Hall v. Walter*, 969 P.2d 224 (Colo. 1998). If the meaning is clear and unambiguous, an ALJ need not resort to other aids of statutory construction to ascertain the intent of the voters. If the language is ambiguous, an ALJ may consider extrinsic sources to assist in ascertaining its meaning. *Colorado Department of Revenue v. Woodmen of the World*, 919 P.2d 806 (Colo. 1996).

5. The language of subsection (8) is unambiguous. It does not support Complainant's argument that candidates must use financial institutions and pay interest to loan themselves money. Subsection (8) is in the nature of a safe harbor and contains no prohibition of any kind. It does not address loans made other than through financial institutions. It simply provides that *bona fide* loans through financial institutions are exempt from contribution limits. What makes a loan *bona fide* are the criteria listed in subsection (8): the loan must require the payment of interest, must require repayment, must be evidenced by a written instrument and must be subject to a due date or amortization schedule.

6. *Hlavac v. Davidson, supra*, provides that contribution limits may not be imposed on expenditures by a candidate for his or her own campaign. The rules of the Secretary of State also reflect this principle at Rule 4.6 a., 8 CCR 1505-6. The Defendant argues that requiring candidates to go through financial institutions to loan themselves money would also violate this principle of *Hlavac*. According to this argument, candidates are permitted to *give* themselves money; certainly then, candidates should be allowed to *loan* themselves money. Loans, according to this argument, are equally protected by the First Amendment, yet, as they require repayment, are less inimical to the public policy of the campaign finance laws. That public policy seeks to restrict large campaign contributions. See, for example, the purpose of Colo. Const. art. XXVIII, set out in Section 1. Continuing this argument, a requirement to pay interest to a financial institution would restrict the First Amendment right of a candidate to loan himself or herself money.

7. It is true that Complainant's position, if adopted, raises a First Amendment issue. The ALJ need not resolve this issue as he has concluded that the plain language of subsection (8) does not require loans to be made through financial institutions.

8. The gravamen of the Complainant's argument is that candidates must go through financial institutions to loan themselves money. Her second argument is that even if this is not the case, the amount of money Defendant did not have to pay at a

commercial rate of interest should have been reported as a contribution, in addition to being reported as a loan.

9. A zero interest loan “contributes” to a campaign the time value of money. Should such loans then be reported as contributions? If so, how should they be valued? According to her July 24, 2006 letter, the Complainant argues that the interest rate should be 10% to 20%, if not higher, as she believes the loans were unsecured. Should such a market rate be applied? Or should we take a subjective approach, looking at what rate the lender wishes to charge?

10. There is no applicable authority to answer these questions. Again, the Secretary of State has made no rule in this area. Under the facts of this case, though, an answer is not required. Here the Defendant disclosed all the important information: she reported the amount of the loans, that they were from her and that she charged herself a zero percent interest rate. To the extent these loans provided a financial benefit to the Defendant because they were at a zero percent interest rate, that benefit may be calculated using whatever interest rate a person chooses to apply. In light of all this disclosure, there was no violation in failing to report any float as a contribution as well. This information is not necessary for the purpose of determining contribution limits in this case, as these limits do not apply to money a candidate contributes to his or her own campaign. *See, Hlavac v. Davidson, supra.*

AGENCY DECISION

It is therefore the Agency Decision that the Defendant Jeanne Labuda did not violate Colo. Const. art. XXVIII, Section 3(8) in loaning herself \$35,000 at no interest.

This Agency Decision is final it will be subject to review by the Court of Appeals, pursuant to Section 24-4-106(11), C.R.S.

DONE AND SIGNED

August 8, 2006

MATTHEW E. NORWOOD
Administrative Law Judge

CERTIFICATE OF SERVICE

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

Michael Brewer, Esq.
7465 E. Maple Ave.
Denver, CO 80230

Edward T. Ramey, Esq.
633 17th Street, Suite 2200
Denver, CO 80202

and to

William A. Hobbs
Deputy Secretary of State
Department of State
1560 Broadway, Suite 200
Denver, CO 80203

on this ____ day of _____, 2006.

Office of Administrative Courts