STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** 1525 Sherman Street, 4th Floor, Denver, Colorado 80203	
TOM HARVEY THOMPSON, III, Complainant, vs. **TAMMY HOLLAND,** Respondent.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **OS 2015-0024**

AGENCY DECISION GRANTING MOTION FOR SUMMARY JUDGMENT

This matter is before the undersigned Administrative Law Judge ("ALJ") on a Motion for Summary Judgment ("Motion") filed and served by counsel for Respondent ("Respondent"). The Motion was supported by the Affidavits of Tammy Holland ("Exhibit No. 1") and Samuel B. Gedge ("Exhibit No. 2"), and the respective attachments thereto. Complainant Tom H. Thompson, III ("Complainant") filed a brief in opposition to the Motion ("Response").

The Complaint

Complainant alleged that Respondent violated Colorado law by failing to register as a political committee and violated federal law by causing a political advertisement to be published without including a "paid by" disclosure as part of the ad. Respondent filed and served an Answer to the Complaint denying the allegations.

Motion for Summary Judgment

Respondent seeks summary judgment on the Complaint as follows:

1. That Respondent's was not required by Colorado law to register as a political committee because the subject advertisements did not specifically advocate for or against any candidate;

2. That Respondent's actions were only relevant to a local election and thus not subject to federal campaign laws.

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Applicable Law

Summary judgment is proper when the pleadings, affidavits, depositions, or admissions show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c). The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. *Continental Airlines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987); *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000). The movant may satisfy this burden by showing there is no record evidence supporting the nonmoving party's case. Once the movant has met the initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. *Civil Service Commission v. Pinder*, 812 P.2d 645 (Colo. 1991); *Schultz v. Wells, supra*.

Summary judgment is a remedy that should be granted only upon a clear showing that there is no genuine issue as to any material fact. *In the Matter of the Application for Water Rights* of *the United States of America*, 854 P.2d 791 (Colo. 1993); *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). In determining whether summary judgment is proper, all doubts as to whether an issue of fact exists must be resolved against the moving party. *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981).

In ruling upon a motion for summary judgment the nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts. *Peterson v. Halsted, supra; Van Alstyne v. Housing Authority of City of Pueblo,* 985 P.2d 97 (Colo. App. 1999).

Article XXVIII of the Colorado Constitution defines a political committee as a group of two or more persons that accepts or makes an expenditure in excess of $200 to support or oppose the election of one or more candidates. Id at § 2(12)(a). An expenditure is defined in this context to mean money spent for the purpose of expressly advocating the election or defeat of a candidate. Id at § 2(8)(a).

Undisputed Material Facts

The subject advertisements are attached to the affidavit of Respondent Tammy Holland. Respondent is a resident of the community of Strasburg, Colorado, and is a parent of a student who previously attended school in the local Byers School District. Complainant was a member of the Byers School District board in September, 2015, when the advertisements were published. Respondent opposed policy choices of the school board to include a curriculum identified as "common core" for education of students in the

school district. Complainant was standing for re-election in September, 2015, along with other members of the district board. Respondent paid for two advertisements in a local newspaper, the *I-70 Scout*, in which she urged voters to hold incumbent candidates "accountable" who had voted to "implement policies that do not benefit" students. She further advocated that voters carefully consider the qualifications and policy positions of the candidates. The first ad noted that voters had the "opportunity to vote in new members" while the second ad stated that "it is time for the Byers community to vote in new members who have fresh perspectives on policies that serve the best interests of our children." The incumbent and non-incumbent candidates were named, but neither of the two ads specifically urged a vote for or against any named candidate for the upcoming school board election. The cost of the advertisements exceeded $200 and was funded by contribution from at least one person aside from Respondent.

Analysis

The Colorado Supreme Court has construed the definition of "expenditure" in Section 2(8)(a) of Const. Art. XXVIII to cover "only those communications that explicitly advocate for the election or defeat of a candidate in an upcoming election." *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 51. The Court emphasized that the definition was intended to be narrowly interpreted to include the so-called "magic words" of express advocacy—such as "vote for," "elect," "support," or "defeat"—or substantially similar synonyms before a communication became subject to the regulations imposed on campaign speech by the Article. *Id* at 1255-56.

Here, review of the subject advertisements reveals no words of express advocacy. While the position of Respondent might be understood to be critical of board policies adopted prior to the election, the language of the advertisements did not explicitly urge voters to elect or defeat any named candidate or group of candidates. The statements in the advertisements regarding "new" members are not necessarily anti-incumbent. The school board would be reconstituted following the election and in that sense would be new. Nor is there any statement to suggest that an incumbent candidate could not bring a fresh perspective as a result of the campaign process. Given the requirement of applying a narrow interpretation of express advocacy so as to not unreasonably burden the exercise of speech, the ALJ finds and concludes as a matter of law that the language of the advertisement is not so explicit as to bring Respondent's communication within the bounds of an "expenditure" subject to Article XXVIII.

With regard to the second allegation of Complainant that Respondent was bound to identify herself as the source of the communication pursuant to 11 Code of Federal Regulations § 110.11(b)(3), Respondent's Motion argued that federal election law is inapplicable to campaigns in local elections. Specifically, Respondent noted that the term "candidate" is defined in 52 United States Code § 30101(2) to mean a person who is standing for federal office. In the Response, Complainant identifies no authority to the contrary. Under Colorado law, only a communication that meets the definition of an independent expenditure must include the disclosure of the person who made the

expenditure. Section 1-45-107.5(5)(a), Colorado Revised Statutes. By virtue of the fact that the subject communications do not contain express advocacy, and therefore do not meet the definition of "independent expenditures," there is no legal requirement to disclose who paid for the communications. Accordingly, the ALJ finds and concludes that there is no genuine issue of material fact that prevents summary judgment from being granted as to the second allegation of the Complaint.

AGENCY DECISION

As a matter of law, Complainant failed to establish any of the violations alleged in the Complaint. The Motion for Summary Judgment filed and served by Respondent is granted.

This decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colorado Constitution Article XXVIII, Section 9(2)(a).

DONE AND SIGNED this 7th day of April, 2016.

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KEITH J. KIRCHUBEL
Administrative Law Judge