

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 633 17 <sup>th</sup> Street, Suite 1300 Denver, Colorado 80202	▲ COURT USE ONLY ▲  <b>CASE NUMBER:</b>  <b>OS 2011-0010</b>
<b>IN THE MATTER OF THE COMPLAINT FILED BY THE CITY OF COLORADO SPRINGS and COLORADO ETHICS WATCH REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY THE REFORM TEAM AND DOUGLAS BRUCE</b>	
<b>ORDER OF DISMISSAL</b>	

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon referral by the Secretary of State of a complaint filed by the Mayor of the City of Colorado Springs (the City), alleging possible violations of election campaign reporting requirements by The Reform Team and its registered agent, Douglas Bruce. The complaint is based upon a letter filed with the City by Colorado Ethics Watch (CEW) that asked the City Council to direct the City Attorney to investigate the alleged violations. Because Colorado Springs is a home rule city with a municipal code that defines a process for local investigation and action upon such complaints, the ALJ lacks jurisdiction to conduct a hearing and the complaint must be dismissed. The complaint is returned to the City for investigation and action according to its municipal code.

### Background

According to a March 10, 2011 letter filed with the City by CEW, Douglas Bruce, a candidate for Colorado Springs City Council, filed a Statement of Organization on February 10, 2011 creating The Reform Team as a political committee. The Reform Team's stated purpose is to "elect fiscal conservatives to city council and oppose any person or proposal that interferes with that." Contribution disclosures filed by Mr. Bruce on behalf of The Reform Team show that Mr. Bruce and four other candidates for City Council, Ed Bircham, Richard Bruce, Helen Collins, and Gretchen Kasameyer, have all made substantial monetary contributions to The Reform Team.

CEW's letter asks that the City Attorney investigate whether Mr. Bruce and the other candidates for City Council who have contributed to The Reform Team have violated the law by failing to register as individual candidate committees and failing to report their individual contributions and expenditures. Although CEW specifically sought an investigation by the City Attorney, the City Mayor forwarded CEW's letter to the

Secretary of State on March 14, 2011, asking the Secretary to "investigate this complaint." The Mayor noted that although CEW had originally asked for a local investigation by the City Attorney, "we determined that a better venue would be your office." The Secretary of State then forwarded the matter to the Office of Administrative Courts for assignment of an ALJ. In his forwarding letter, the Secretary states, "We have confirmed via telephone call with the City Clerk that the City of Colorado Springs intends to be the complainant in this case."

Article XXVIII of the Colorado Constitution (Article XXVIII), and the Fair Campaign Practices Act (FCPA), §§ 1-45-101 to 118, C.R.S., are state laws that regulate campaign financing practices for all state-wide elections and most local elections, including some municipal elections. Both Article XXVIII and the FCPA provide for a process by which any person who believes there has been a violation of the state campaign financing laws can file a complaint with the Secretary of State, who then is required to refer the complaint to an ALJ for hearing.

The issue before the ALJ is whether Article XXVIII and the FCPA, and particularly the hearing process prescribed by those laws, are available to complainants who allege violations of the election laws of "home rule" cities. Per Article XX of the Colorado Constitution, home rule cities, like Colorado Springs, have jurisdiction over municipal elections and the charters and ordinances of those cities supersede conflicting state law.

For the reasons explained below, the ALJ concludes that the requirements specified by the Colorado Springs Municipal Code for campaign finance reporting, and the procedures specified for addressing violations of those laws, are inconsistent with and therefore supersede the requirements and procedures specified in Article XXVIII and the FCPA. That being the case, the ALJ is without jurisdiction to hear such complaints or impose sanctions for potential violations.

## **Discussion**

### *The Requirement of Subject Matter Jurisdiction*

Subject matter jurisdiction is an agency or administrative tribunal's power to deal with a particular case. *Geriatrics, Inc. v. Colo. State Dept. of Social Services*, 650 P.2d 1288, 1290 (Colo. App. 1982); *see also In re J.C.T.*, 176 P.3d 726, 729 (Colo. 2007) (subject matter jurisdiction is "a court's power to resolve a dispute in which it renders judgment.") If an agency or tribunal lacks subject matter jurisdiction, it is powerless to act.

Although Respondents have not yet objected to the ALJ's jurisdiction to hear this complaint, the ALJ may still not proceed in the absence of subject matter jurisdiction. Consent of the parties, express or implied, cannot create subject matter jurisdiction that is otherwise lacking. *Triebelhorn v. Turzanski*, 149 Colo. 558, 370 P.2d 757, 759 (1962). Administrative tribunals are creatures of statute, and the jurisdiction, powers, duties, and authority of such tribunals are limited to what is provided by law. *Compton v. Industrial Claim Appeals Office*, 13 P.3d 844, 845 (Colo. App. 2000); *Flavell v. Dept. of Welfare*, 144 Colo. 203, 355 P.2d 941, 943 (1960). Lack of subject matter jurisdiction may be raised *sua sponte* by a judge at any time. *Fullerton v. County Court*, 124 P.3d

866, 867 (Colo. App. 2005). If it appears that jurisdiction is lacking, the action must be dismissed. C.R.C.P. 12(h)(3); *Triebelhorn v. Turzanski*, *supra*.

### *The ALJ Lacks Subject Matter Jurisdiction*

At first blush, the plain language of Article XXVIII and the FCPA appears to apply to municipal elections. For example, § 2(2) of Article XXVIII defines a “candidate” to include a person seeking election to “local public office” at any “municipal election.” FCPA § 1-45-103(2) adopts this definition. Moreover, FCPA § 1-45-108(2)(a)(II) refers to the disclosures that a candidate must file with “the municipal clerk.” Because § 9(2) of Article XXVIII and § 1-45-111.5 of the FCPA give the ALJ the authority to hear complaints of alleged campaign finance violations, it is easy to think that the ALJ would have jurisdiction to hear complaints involving municipal elections.

Neither Article XXVIII nor the FCPA, however, override Article XX of the Colorado Constitution, which establishes the legislative authority of “home rule” cities. Section 6.d of Article XX specifically grants home rule cities the power to “legislate upon, provide, regulate, conduct and control . . . [a]ll matters pertaining to *municipal elections* in such city or town.” Emphasis added. Furthermore, § 6 states that:

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, *except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.*

Emphasis added.

Thus, although both a home rule city and the state may legislate as to matters of purely local concern, such as municipal elections, local ordinances supersede conflicting state laws. *R.E.N. v. City of Colorado Springs*, 823 P.2d 1359, 1362 (Colo. 1992). Per Article XX, home rule cities have plenary power over municipal elections that cannot be divested by the legislature. *Gosliner v. Denver Election Comm’n*, 191 Colo. 328, 330, 552 P.2d 1010, 1011 (Colo. 1976).

To the extent that Article XXVIII and Article XX may appear to conflict with regard to control over municipal elections, the conflict is resolved by § 8 of Article XX which states that, “Anything in the constitution of this state in conflict or inconsistent with the provisions of this amendment is hereby declared to be inapplicable to the matters and things by this amendment covered and provided for.” Although Article XXVIII also has a conflict provision (§ 11), that provision addresses only conflicting “statutes of this state,” and does not attempt to convey priority over conflicting constitutional provisions. Thus, the home rule provisions of Article XX remain the supreme law despite the subsequent adoption of Article XXVIII.

This assessment is confirmed by rules adopted by the Secretary of State, which dictate that,

The requirements of Article XXVIII of the State Constitution and of Article 45 of Title 1, Colorado Revised Statutes [the FCPA], *shall not* apply to home rule counties or home rule municipalities that have adopted charters, ordinances, or resolutions that address any of the matters

covered by Article XXVIII or Title 1, Article 45.

8 CCR 1505-6, Rule 7.1 (emphasis added).

The Secretary's interpretation is consistent with the language of Article XX and is therefore entitled to deference. *Smith v. Farmer's Ins. Exchange*, 9 P.3d 335, 340 (Colo. 2000).

Thus, home rule cities that seek to regulate the conduct of their municipal elections are exempt from conflicting state laws, including the FCPA and Article XXVIII.

There is no dispute that Colorado Springs is a home rule city. Moreover, the City has adopted a charter and ordinances that address campaign disclosures during municipal elections. Section 11-50 of the City Charter provides that "The City Council shall provide by ordinance for the disclosure of election campaign expenditures and election campaign contributions."<sup>1</sup> Pursuant to that authority, the City Council devoted Chapter 5 of the Municipal Code (the City Code) to "Elections," and devoted Article 2, Part 2 of that chapter specifically to "Fair Campaign Practices Act Reports; Filing."<sup>2</sup> Because the City has adopted a charter and a code that regulate campaign practices, conflicting state law is superseded. Section § 1.1.111 of the City Code reiterates that "all laws and statutes of the State of Colorado which limit, restrict, inhibit, direct or impose conditions and restrictions upon the grant of plenary power in local and municipal matters, under article XX of the Constitution of the state of Colorado . . . shall be and are hereby superseded and declared to be not applicable . . ."

Although the City Code supersedes conflicting state law, § 5.2.201 of the City Code readopts the provisions of the Fair Campaign Practices Act as amended, but reiterates that "[I]n the case of any inconsistency, this chapter, "Elections", of the City Code shall prevail." Thus, although the City Code borrows some of the requirements of the FCPA, it does so only to the extent they do not conflict with the City Code.

If the ALJ were to exercise jurisdiction over the alleged campaign reporting violations, it would conflict with the City Code. Most significant to the issue of jurisdiction is § 5.1.111 of the City Code, which provides a process for investigating and prosecuting suspected violations of the City's election laws. That section states that,

Any person may file an affidavit stating the name of any person who has violated any of the provisions of [Chapter 5] . . . stating the facts which constitute the alleged offense with the City Attorney. Upon the filing of an affidavit, the City Attorney shall investigate, and if reasonable grounds are found, the City Attorney shall prosecute the violation in the Municipal Court in the same manner as other ordinance violations.

Section 5.1.111 makes no reference to referral of an alleged violation to the Secretary of State or to an ALJ for administrative hearing. If fact, exercise of jurisdiction by the ALJ conflicts with this section of the City Code because it usurps the authority exclusively vested by the City Code in the City Attorney and the Municipal Court.

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<sup>1</sup> Found at [www.sterlingcodifiers.com/codebook](http://www.sterlingcodifiers.com/codebook), the City Charter of Colorado Springs.

<sup>2</sup> Found at [www.sterlingcodifiers.com/codebook](http://www.sterlingcodifiers.com/codebook), the City Code.

Moreover, § 5.2.204 of the City Code provides for sanctions that are substantially different from those found in Article XXVIII or in the FCPA. Whereas Article XXVIII, § 9 and FCPA § 1-45-111.5 provide for administrative monetary sanctions and injunctive relief, the City Code provides for criminal prosecution and punitive sanctions.<sup>3</sup> “Any person who knowingly violates any provision of section 5.2.202 . . . shall be guilty of a violation of the ordinances of the City, punishable as a misdemeanor, and shall upon conviction be punished by a fine not exceeding five hundred dollars (\$500) for each offense.” Section 5.2.204.A. Furthermore, § 5.2.204.A provides that any candidate violating § 5.2.202, shall,

forfeit the right to assume the nomination or to take the oath for the office to which the candidate may have been elected, unless the candidate has already taken the oath, in which case the office shall be vacated.

Article XXVIII and the FCPA contain no provisions for criminal penalties or forfeiture of candidacy. Thus, the City Code provides for significant sanctions that the ALJ has no authority to impose.

The ALJ’s jurisdiction to hear cases involving campaign practice violations arises exclusively from state law, specifically Article XXVIII, § 9(2) and FCPA § 1-45-111.5. Because those laws are superseded by the City Code, which makes no provision for referral to an ALJ for administrative hearing, the ALJ is without jurisdiction to conduct such a hearing.

#### *Summary*


Colorado Springs is a home rule city with a municipal code that regulates campaign registration and disclosure practices, and provides a process for local investigation and prosecution of suspected violations. It therefore supersedes the provisions of state law that provide for a different hearing process and different sanctions. Because the superseded state law is the sole source of the ALJ’s authority, the ALJ lacks jurisdiction to conduct a hearing or impose sanctions in this case.

#### **Order of Dismissal**

The complaint filed with the Secretary of State is dismissed and the matter is returned to the City for investigation and prosecution by the City Attorney as provided by § 5.1.111 of the Colorado Springs Municipal Code. This is a final agency decision subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S.

**Done and Signed**

March 18, 2011



ROBERT N. SPENCER  
Administrative Law Judge

<sup>3</sup> Section § 5.2.204.B also allows the Municipal Court to impose “sanctions provided by the [FCPA]”, but the footnote to this section cites a provision of the FCPA that was repealed in 2002.

**CERTIFICATE OF SERVICE**

I certify that I have served a true and correct copy of the above **ORDER OF DISMISSAL** by depositing same in the U.S. Mail, postage prepaid, at Denver, Colorado addressed to:

Luis Toro, Esq.  
Colorado Ethics Watch  
1630 Welton Street, #415  
Denver, CO 80202

Lionel Rivera, Mayor  
The City of Colorado Springs  
P.O. Box 1575, Mail Code 1549  
Colorado Springs, CO 80901-1575

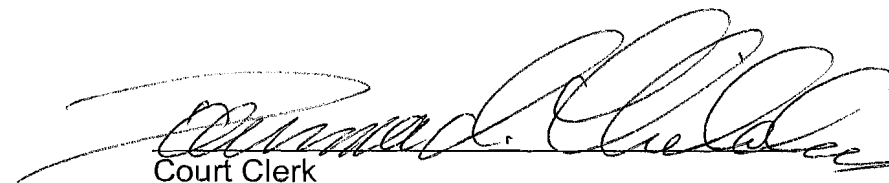
The Reform Team  
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Douglas Bruce  
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Colorado Springs, CO 80936

and

William Hobbs  
Secretary of State's Office  
1700 Broadway, Suite 270  
Denver, CO 80290

this 18<sup>th</sup> day of March 2011.

  
Court Clerk