

<p align="center">STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, Colorado 80203</p>	
<p>GIL BARELA, Complainant,</p> <p>v.</p> <p>LIBERTY COMMON SCHOOL, Respondent.</p>	<p align="center">▲ COURT USE ONLY ▲</p>
	<p>CASE NUMBER:</p> <p>OS 20150015</p>
<p align="center">DECISION</p>	

This matter is a complaint pursuant to the Fair Campaign Practices Act, Section 1-45-101, C.R.S., *et seq.* and Colo. Const. art. XXVIII, sec. 9. A hearing was held September 30, 2015 in Courtroom 2 of the Office of Administrative Courts. Administrative Law Judge ("ALJ") Matthew E. Norwood presided. Madeline Meacham, Esq., appeared on behalf of the Complainant and Barry K. Arrington, Esq., appeared on behalf of the Respondent.

Summary

The Respondent ("Liberty Common") is a charter school in the Poudre School District. The principal of the school posted on the school's Facebook page a link to a newspaper article about a candidate for the school board of the Thompson School District. The candidate had a student in the school. Others "liked" the link, and the principal also "shared" it to his own Facebook page. There he made comments favorable to the mother's candidacy. Other favorable comments were also "shared" from the school's Facebook page. The favorable comments were accessible by a "shares" click from the Facebook page.

The ALJ finds and concludes that the school's action was the giving of a thing of value to the candidate, namely favorable publicity. It was given indirectly to her for the purpose of promoting her election. The ALJ orders that the link be taken down, if this has not already been done. He imposes no other sanction.

Findings of Fact

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Liberty Common is a charter school as defined in Section 22-30.5-103(2), C.R.S. It is a public school operating within the Poudre School District. Once a certain threshold number of Poudre School District students are enrolled in Liberty Common, students from outside the school district are permitted to enroll through a lottery system.

2. Exhibit 1, pages 1 and 2 contain a posting on the Liberty Common Facebook page. The posting was made by Bob Schaffer, the principal of Liberty Common for grades seven through twelve. The posting was a link to an article in the Reporter-Herald, a Loveland, Colorado newspaper, reporting the candidacy of Tomi Grundvig for the Thompson School District school board.

3. Mr. Shaffer is also a former U.S. Congressman and is a leader in education.

4. When articles in a newspaper are linked on a Facebook page, a portion of the article appears. See page 1 of exhibit 1. Persons with Facebook access could then click on a link to the entire article. The portion in this case had a picture of Ms. Grundvig and the beginning of an article. The beginning said:

Grundvig to challenge Howard for Thompson school board

A substitute teacher and nurse, Tomi Grundvig, has announced that she will run against Pam Howard for a seat on the Thompson School District Board of ...

5. Someone at Liberty Common High School, most likely Mr. Schaffer, wrote in relation to the link the following:

Liberty Common High School parent Mrs. Tomi Grundvig announced she's running for a seat on the Thompson School District Board of Education. Loveland Reporter-Herald story about the position here:

6. Someone at Liberty Common then "liked" the posting of the link. Exhibit 1, p. 2. Other persons also "liked" it.

7. It is undisputed that pages 1 and 2 of exhibit 1 show entries on Liberty Common's Facebook page. The Complainant testified that pages 3 and 4 of exhibit 1 also appear on Liberty Common's Facebook page and that he himself viewed them there. He testified that the comments on pages 3 and 4 have since been taken down. Whether the original link to the article is still present is not clear.

8. Pages 3 and 4 of exhibit 1 contain "people who shared this." Mr. Shaffer disputed that pages 3 and 4 were on Liberty Common's Facebook page. He did agree

that he had "shared" on his own personal Facebook page the link to the article that he had posted on the school's Facebook page. His share and his added comments appear on page 4 of exhibit 1.

9. Page 2 of exhibit 1, undisputed as Liberty Common's Facebook page, shows four "shares" of the Facebook posting linking to the article. The "shares" are printed in blue showing that they can be linked to. The amount of "shares" likely increased over time.

10. The ALJ finds that the "people who shared this" on pages 3 and 4 of exhibit 1 were viewable from the "shares" link on page 2 of exhibit 1, the Liberty Common Facebook page. The Complainant's testimony that he saw the shared comments on Liberty Common's Facebook page likely required this intermediate step of clicking on the "shares."

11. The amount of time Mr. Shaffer spent away from his other duties as principal to post the link, to write about it and to post his comment on the share to his own Facebook page, was *de minimus*. No public money was otherwise spent to make these postings.

12. The shared comments were favorable to Ms. Grundvig. Mr. Shaffer's original posting of the link to the newspaper story about Ms. Grundvig is timed at 12:01 p.m., August 7, 2015. His sharing of his posting of the link on his own Facebook page is timed 1:05 p.m. that same day. He writes:

Another excellent education leader Tomi Grundvig is stepping up to offer sensible stewardship on the Thompson School District Board of Ed. Would be a fantastic addition to the Colorado Education landscape.

13. At 1:09 p.m. on the same day, someone at the "Colorado Education" Facebook site shared the Liberty Common posting and wrote:

Well-prepared mom/educator offers hope for solid leadership in the Thompson valley school district. Candidate supports Colorado Charter Schools. Colorado League of Charter Schools. Already opposed by the extreme left-wing Colorado Education Association teachers union because of her plans to put students first. ...

14. At 1:15 p.m. on the same day, someone at the Colorado Charter Schools Facebook site shared "Colorado Education's" Facebook post and wrote:

Experienced Colorado Education reformer/mom/educator announced bid for the Thompson valley school district Board of Education. Tomi Grundvig pledges to push for higher achievement and not pander to the extremist teachers' union. ... Candidate supports Colorado Charter Schools.

15. The ALJ specifically finds as fact that the posting of the link to the story, the "likes" and the "shares" on Facebook constituted favorable publicity: a thing of value given indirectly to candidate Grundvig. The thing of value was given by Liberty Common by its principal. The evidence does not establish a precise monetary amount for this thing of value.

16. The ALJ further finds that the thing of value was given for the purpose of promoting Ms. Grundvig's election. This is supported by Mr. Shaffer's favorable "share" concerning Ms. Grundvig and the fact that he posted the link in the first place.

17. Posting the link to the Reporter-Herald article had the effect of giving public exposure of candidate Grundvig's name and the fact that she was running. The exposure was generally to like-minded persons who supported charter schools. Most of these persons lived in the Poudre School District and would presumably be unable to vote in the Thompson school board election. Still, the posting had the effect of drumming up support for the candidate; the reach of Facebook is very wide.

18. The "liking" of the link to the article by others and by Liberty Common itself engendered a feeling of common cause with charter schools and with Ms. Grundvig, a Liberty Common parent.

19. This feeling was more vigorously expressed in the "shares" accessible from Liberty Common's Facebook page via a click. There the school community could view the statements of Liberty Common's principal in support of the candidate. Also visible were the other statements quoted above in support of her.

20. Only exhibit 1 was admitted as evidence at the hearing. After the hearing, counsel for the Respondent faxed to the Office of Administrative Courts a "Supplement to the Record." This supplement asks the ALJ to look at Liberty Common High School's Facebook page, the entire school's Facebook page and Mr. Shaffer's personal Facebook page. This evidence was not offered at the hearing and has not been considered.

Conclusions of Law

Based upon the foregoing findings of fact, the ALJ enters the following conclusions of law:

1. The complaint alleges that the Respondent's conduct constituted an illegal contribution as proscribed by Section 1-45-117(1)(a), C.R.S.

2. Section 1-45-117(1)(a)(I), C.R.S. provides in pertinent part:

No ... political subdivision of the state shall make any contribution in campaigns involving the ... election of any person to any public office

3. Section 1-45-103(6)(a), C.R.S. provides that: “Contribution’ shall have the same meaning as set forth in section 2(5) of article XXVIII of the state constitution.”

4. Const. art. XXVIII, sec. 2(5) provides in pertinent part:

(a) “Contribution” means:

...

(IV) Anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate’s ... election.

5. The definitions of “contribution” in art. XXVIII, sec. 2(5)(a)(I)-(III) are inapplicable to the facts of this case.

6. Liberty Common agrees that Poudre School District, to which it belongs, is a political subdivision of the state. This is the holding in *Keim v. Douglas County School District*, No. 14 CA 0268 (Colo. App. May 7, 2015) and *Bagby v. School District No. 1*, 186 Colo. 428, 528 P.2d 1299 (1974). But Liberty Common disputes that it is such a subdivision itself.

7. This is incorrect. The level of supervision and control of a charter school by a school district makes a charter school a subdivision of the state as well. A charter school is a public school of the school district that approves its charter application and enters into a contract with it. Section 22-30.5-104(2)(b), C.R.S. Enrollment in a charter school must be open to any child who resides within the school district. Section 22-30.5-104(3), C.R.S. A charter school must annually complete an audit that complies with the requirements of the Department of Education. Section 22-30.5-104(4)(a), C.R.S. For purposes of tax-exempt financing, a charter school, as a public school, is a “governmental entity.” Section 22-30.5-104(4.5)(a), C.R.S.

8. Furthermore, a charter school may operate free from specified school district policies and state rules set out by an automatic waiver of the State Board of Education. Section 22-30.5-104(6)(a), C.R.S. But it must comply with state laws for a performance evaluation system, the annual school calendar and the employment of licensed personnel. Sections 22-30.5-104(6)(b)(I), (II) and (III), C.R.S. Also, a school district, on behalf of the charter school, may apply for non-automatic waivers from certain statutes or rules. However, no such waivers shall be provided for state laws requiring school accountability committees, assessments, school performance reports and other laws. Sections 22-30.5-104(6)(c)(I)-(V), C.R.S.

9. The question then becomes whether Liberty Common gave something of value, directly or indirectly, for the purpose of promoting Ms. Grundvig’s election.

10. Liberty Common relies on *Keim, supra*, to support its position that there was no contribution. In that case the Douglas County School District began implementing a “reform” agenda. The School District commissioned and paid \$15,000 for the “Hess Report,” a white paper in favor of the reform agenda authored by a Dr.

Hess and a Mr. Eden. The report also touted the benefits of having a unified school board to advance the reform agenda. *Keim*, slip op. at 8. In September 2013, prior to the November 2013 school board election, the School District included an internet link to the Hess Report in its weekly e-newsletter. *Keim*, slip op. at 7. Referring to the Hess Report, the e-newsletter stated:

Hess and Eden point out that districts undergoing significant school reform transform from poor to passable, Douglas County's distinctive aim to going [sic] from good to great. The paper focuses on Douglas County reforms including choice and pay for performance.

Keim, slip op. at 7

11. The Court of Appeals in *Keim* determined that the school district's actions were not a "contribution," as defined in art. XXVIII, sec. 2(5)(a)(IV), in that they were not "[a]nything of value given, directly or indirectly, to a candidate." *Keim* held at slip op. 17 that:

[I]ndirectly giving something of value to a candidate must, at a minimum, involve providing something of value to someone other than the candidate ... but with the intention that the candidate will eventually receive or make use of that thing of value.

...

Although the Hess Report was distributed by way of an e-mail link to 85,000 Douglas County residents, such a mass distribution was insufficient to establish that the District put the Hess Report into the possession of, or otherwise provided it to, any candidate or someone acting on behalf of a candidate. Nor have we seen any evidence to support a conclusion that the District made the distribution with the intention that a particular candidate would eventually receive or make use of the Hess Report.

12. *Colorado Education Association v. Rutt*, 184 P.3d 65 (Colo. 2008) also discussed the "anything of value" language in sec. 2(5)(a)(IV). That case was also initially heard before an ALJ per the process at art. XXVIII, sec. 9. In that case the Colorado Education Association, a union, supported Bob Bacon for a state senate seat. The union and its local affiliate the Poudre Education Association held two "walks" in which they distributed campaign literature for Mr. Bacon. The complainants ("Rutt") alleged that this was an unlawful contribution by the union prohibited by art. XXVIII, sec. 3(4)(a). Rutt alleged that the "services of the [union] staff members in organizing the walks were 'anything of value' given indirectly to Bacon" and that the unions "effectively operated as Bacon's volunteer coordinator." *Rutt* at 80. Rutt introduced testimony that valued the contribution at \$35,000 to \$38,000.

13. The Court determined that there was no violation because of First Amendment considerations supported by the “membership communication exception” at sec. 2(8)(b)(III). *Rutt*, 184 P.3d 65, 69-70.

14. Significantly, the Court disagreed with the conclusion of the ALJ that because the activity was for the benefit of the union members, nothing was given to the Bacon campaign. Per the *Rutt* Court at 81:

[A]s we view the record, while it may be accurate to say that the challenged union activities were directly provided to union members with the purpose of promoting union interests, it seems similarly accurate to say that the unions' collective activities provided a benefit to the Bacon campaign when thousands of his campaign flyers were distributed to voters throughout the senate district. Thus, Rutt's argument that Bacon's campaign benefited and indirectly received value from the unions' activities and literature distribution rings true.

We have facts that may lead to two reasonable but contradictory conclusions: that the challenged union conduct is either permissible or prohibited under the article's two related definitions of a regulated contribution. To resolve this factual dilemma, we turn to the Supreme Court's mandate that requires us to give the benefit of the doubt to the union's right to core political speech rather than to Rutt's argument that involves censorship and regulation. Hence, applying the Court's mandate, we conclude that neither the unions' payments of staff salaries to organize the walks to distribute Bacon literature, payments for supplies and materials for the walks, nor the unions' course of conduct taken as a whole constitute prohibited contributions under either section 2(5)(a)(II) or section 2(5)(a)(IV). The challenged union activities do not violate section 3(4)(a) of article XXVIII.

15. As noted in the dissent in *Keim*, slip op. 35, the “tie goes to the speaker” rule in *Rutt* did not apply in *Keim* in that there were no similar membership communication First Amendment considerations. Nor are there any such considerations in Liberty Common's case.

16. The ALJ concludes that *Rutt*, not *Keim*, is the more applicable authority for the present case. *Keim* focused on the fact that no particular candidate was identified as receiving or making use of the thing of value. *Keim*, slip op. 17. And while *Keim* does discuss “possessing” the thing of value, the Court in *Rutt* was not concerned with whether Mr. Bacon “possessed” the assistance of the unions. Positive publicity cannot really be “possessed,” but it is certainly a thing of value in a campaign. The present

Exhibits admitted:

For the Complainant: exhibit 1.

For the Respondent: none.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this **DECISION** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Madeline Meacham, Esq.
1790 30th Street
Boulder, CO 80301

Barry K. Arrington, Esq.
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and to

Suzanne Staiert
Deputy Secretary of State
Department of State
1700 Broadway, Suite 270
Denver, CO 80290

on this 14 day of October, 2015


Office of Administrative Courts

case is distinguishable from *Keim* in that a particular candidate is benefited. The “likes” are likes for Ms. Grundvig, and the comments in the “shares” are complimentary of her.

17. The ALJ concludes that Liberty Common has made a contribution in a campaign of a person to a public office and has violated Section 1-45-117(1)(a)(I), C.R.S. Note that the prohibition on the expenditure of “moneys from any source” comes in the second portion of Section 1-45-117(1)(a)(I), C.R.S., and is not applicable to the prohibition on “contributions” in the first portion.

18. Any such violation shall be subject to the provisions of sections 9(2) and 10(1) of art. XXVIII, injunctive relief or a restraining order to enjoin the continuance of the violation. Section 1-45-117(1)(a)(I), C.R.S. Section 9(2)(a) authorizes the ALJ to render a decision including “any appropriate order, sanction, or relief authorized by this article.” Section 10(1) authorizes the imposition of a fine of at least double and up to five times the amount contributed.

19. Because the precise value of the amount contributed is not disclosed by the evidence, the proper amount of any fine would be difficult to determine. Moreover, the ALJ concludes that the violation is minor. No government money of any significant amount was spent to make the contribution.

20. The Complainant proposes having the Respondent make a “posting” (presumably on Facebook) that Liberty Common does not support any particular candidate, that it list all the candidates that are running and that it link to any articles about them. The ALJ rejects this proposed sanction. Posting such statements and links on the school’s Facebook page will bring about more “liking,” “sharing” and commenting and will further embroil the school in election politics. The less said on the school’s Facebook page about candidates and elections, the better. According to the evidence, the school has taken down the “shares” about Ms. Grundvig. To the extent that the school has not already done so, it shall remove the link to the Reporter-Herald story. No other sanction is imposed.

Decision

It is therefore the Decision of the ALJ that the Facebook “linking,” “liking” and “sharing” on the school’s Facebook page was an illegal contribution in a campaign involving the election of a person to public office as proscribed by Section 1-45-117(1)(a)(I), C.R.S.

DONE AND SIGNED

October 14, 2015


MATTHEW E. NORWOOD
Administrative Law Judge