DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: April 8, 2013 3:10 PM FILING ID: C6A07BF2
Plaintiff: SCOTT E. GESSLER, individually and in his capacity as the Secretary of State of the State of Colorado v. Defendants: DAN GROSSMAN, SALLY H. HOPPER, BILL PINKHAM, MATT SMITH and ROSEMARY MARSHALL in their official capacities as members of the Independent Ethics Commission and the INDEPENDENT ETHICS COMMISSION, an inferior tribunal of the State of Colorado	• COURT USE ONLY • -
Attorneys for Plaintiff*: David A. Lane, #16422 KILLMER, LANE & NEWMAN, LLP The Odd Fellows Hall 1543 Champa Street, Suite 400 Denver, Colorado 80202 Telephone: (303) 571-1000; Fax: (303) 571-1001 dlane@kln-law.com Robert J. Bruce, #17742 LAWLIS & BRUCE, LLC 1875 Lawrence Street, Suite 750 Denver, Colorado 80202 Telephone: (303) 573-5498; Fax: (303) 573-5537 robertbruce@lawlisbruce.com Michael R. Davis, #39788 LAW OFFICE OF MICHAEL R. DAVIS, LLC (MRDLaw) 3301 West Clyde Place Denver, Colorado 80211 Telephone: (303) 325-7843; Fax: (303) 723-8679 mrd@mrdavislaw.com *Acting as Special Attorneys General	Case No.: 2013CV030421 Div:

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Scott E. Gessler, in his individual capacity and in his official capacity, as Colorado Secretary of State (the "Secretary" or "Secretary Gessler"), by and through his undersigned attorneys, respectfully submits the following as his Response to Defendants' Motion to Dismiss. In opposition thereto, Plaintiff states as follows:

I. INTRODUCTION

Secretary Gessler initiated this action on January 20, 2013 challenging the exercise of jurisdiction by the Colorado Independent Ethics Commission (the "IEC") acting through its appointed members in Case No. 12-07. In that proceeding, the IEC determined to proceed with a complaint filed by Citizens for Responsibility and Ethics in Washington d/b/a Colorado Ethics Watch. See Complaint, para. 6. The Complaint alleges that certain reimbursements paid by the office of the Secretary of State to the Secretary violated criminal statutes.

In response to IEC Case No. 12-07, the Secretary responded to the allegations and sought to have the Complaint dismissed for lack of jurisdiction. See Complaint, para. 9. The Secretary contends that the IEC has usurped jurisdiction beyond its limited authority. On January 7, 2013, the IEC denied the Secretary's Motion to Dismiss. See Complaint, para. 9. This action ensued. Its original two claims sought relief for the IEC exceeding its jurisdiction. The Court denied preliminary relief after a hearing.

The Secretary subsequently amended the Complaint by asserting additional claims for declaratory judgment for due process violations attenuated by further and additional highly irregular proceedings in IEC Case No. 12-07. The Defendants' Motion to Dismiss seeks dismissal of the Secretary's claims challenging the jurisdiction as maintained by the IEC to date,

the Defendants have not responded to the claims relating to the IEC's due process violations. Contrary to Defendants' argument, the claims as originally pled are proper, and its Motion to Dismiss must be denied.

II. ARGUMENT

1. Standard of Review

Motions to Dismiss are disfavored. Fluid Technology, Inc. v. CVJ Axles, Inc., 964 P.2d 614, 616 (Colo. App. 1993). In evaluating a Motion to Dismiss, the Court must take the allegations contained in the Complaint as true. Public Service Company of Colorado v. Van Wyk, 27 P.3d 377, 386 (Colo. 2001).

In the context of reviewing actions of an inferior tribunal such as the IEC, the allegations of the complaint are taken as true and the complaint is sufficient so long as it expresses any theory of a law upon which relief may be granted. Barnes v. City of Westminster, 723 P.2d 164, 165 (Colo. App. 1986); Regenitter v. Fowler, 132 Colo. 479, 290 P.2d 223, 225 (Colo. 1955).

2. The Secretary's Complaint Sets Forth Facts Which When Taken as True Justify Legal Relief.

The Secretary's first two claims for relief are in the nature of a Writ of Prohibition.

> Prohibition is a preventative proceeding. Leonard v. Bartels, 4 Colo. 95; People ex rel Dougan v. District Court, 6 Colo. 34, prerogative in character, i.e., not grantable ex debito justitiae. Leonard v. Bartels, supra; McInerny v. Denver, 17 Colo. 302, 29 P. 516. It lies to prevent an inferior tribunal, whether it have judicial or quasi-judicial powers, from usurping a jurisdiction with which it is no legally vested….

Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781, 783 (Colo. 1958). The right to relief in the nature of prohibition is set forth in C.R.C.P. 106(a) and C.R.S. §24-4-106(2).

Here, the Secretary has alleged that the IEC is an inferior tribunal. See Complaint, para. 5. The Secretary then alleges that the IEC is proceeding with a Complaint against the Secretary. See Complaint, para. 6. The Secretary sought to have the IEC's proceedings dismissed for lack of jurisdiction, but the IEC denied the motion. See Complaint, para. 9. The Complaint then provided that continued proceedings by the IEC are in excess of jurisdiction in violation of the specific terms of C.R.C.P. 106 and C.R.S. §24-4-106(2). See Complaint, para. 13. The Secretary also alleges that there is no plain, speedy or adequate remedy at law. See Complaint, para. 19. As a result, he seeks a declaratory order in the nature of prohibition against the IEC, Complaint, para. 14, and injunctive relief, Complaint, paras. 16-22, Wherefore Clause A and B.

Based on the foregoing, the Complaint and specifically first two claims for relief asserted by Secretary Gessler's properly set forth facts and a cognizable legal theory sufficient to support those claims for which the law provides a basis for relief. See C.R.C.P. 106(a)(4)(b) and C.R.S. §24-4-106(8) (both allowing for relief from inferior tribunals acting without jurisdiction). Therefore and because the Complaint is properly pled, the Motion to Dismiss must be denied.

3. The Secretary Need Not Wait to Raise His Jurisdictional Challenge Until The IEC Completes Its Ultra Vires Process.

A party to a proceeding may raise a tribunal's lack of jurisdiction at any time. Olsen v. Hillside Community Church, 126 P.2d 847, 878 (Colo. App. 2005) citing In re Water Rights of Columbine Assn., 993 P.2d 483, 488 (Colo. 2000) and In re Marriage of Mallon, 956 P2d 642, 645 (Colo. App 1984). Courts do not require parties seeking relief in the nature of prohibition to subject themselves to actions taken without jurisdiction. See, e.g., Byrd v. Stavley, 113 P.3d 1273, 1276 (Colo. App. 2005).

Defendants' argument that Plaintiff must exhaust administrative remedies would be true of a substantive change of the final result or a claim based on abuse of discretion. However, the first two claims in this case challenge the exercise of jurisdiction by the IEC and do not seek to restrain future error by the IEC, thus, given the allegations of the Complaint, the argument that the case is premature fails. Exhaustion of remedies is required unless an exception to such requirement exists. City and County of Denver v. United Airlines, Inc., 8 P.3d 1206, 1208 (Colo. 2000). Changes to actions in excess of jurisdiction constitute such an exception.

For example, the Colorado Supreme Court upheld a challenge to the City of Denver's exercise of jurisdiction seeking to have hearings, possibly requiring private parties to pay for a construction project in Denver & Rio Grande Western Railroad Company v. City and County of Denver, 673 P.2d 354 (Colo. 1983). In that case, the Court determined that hearings to be held were in excess of the City's jurisdiction and as such upheld an order enjoining those hearings. Id. at 362. In so doing, the Court rejected the argument that relief challenging jurisdiction was premature and that the Plaintiff had not exhausted its administrative remedies. Id. at 357. In so doing, the Court noted that a jurisdictional challenge under C.R.C.P. 106 seeking an order that the lower tribunal was exceeding its jurisdictional authority and a resulting injunction was proper before the tribunal issued its final order.

Just as in Denver & Rio Grande, supra., the Secretary seeks an order that the IEC's exercise of jurisdiction in its Case No. 12-07 is beyond its authority and a resulting injunction. See Complaint, paras. 13, 22 and Wherefore Clause. Therefore, the requested relief is properly before this Court, and the Motion to Dismiss must be denied.

Further, in Horton v. Suthers, 43 P.3d 611 (Colo. 2002), the Colorado Supreme Court rejected a similar exhaustion of remedies argument made on behalf of Department of Corrections

in the context of a habeas corpus petition. There, the Department of Corrections argued that a prisoner must exhaust administrative remedies provided to prisoners before seeking judicial relief. The Court rejected the Department of Correction's Argument as it confused jurisdiction with exhaustion of remedies. Id. at 617.

Here, the IEC also confuses jurisdiction with exhaustion of remedies with a jurisdictional challenge clearly contemplated as allowable pursuant to C.R.C.P.106(a)(4) and C.R.S.§24-4-106(2). After all, "the exhaustion doctrine has no application where the administrative agency does not have the authority to pass on every question raised by the party who has resorted to judicial relief." Graniger v. Crowley, 660 P.2d 1279 (Colo. 1983).

4. The IEC's Argument Defies Common Sense and Improperly Expands Limited Jurisdiction Conferred on It by the Colorado Constitution.

The IEC argues that only "final orders" can be challenged. In essence, the IEC argues that it can expand its jurisdiction without restraint and that it cannot be stopped until and unless its process has impuned a governmental representative and diverted the attention of governmental officials.

Fortunately, for the purpose of challenging actions in excess of jurisdiction, both C.R.C.P. 106(a)(4) and C.R.S. §24-4-106(8) specifically contemplate proceedings to allow parties to challenge jurisdiction without having to endure extra-jurisdictional proceedings before seeking the aid of the courts. Specifically, C.R.C.P. 106(a)(4) allows for relief when

> "any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction, and there is no plan, speedy and adequate remedy at law…(v) The proceedings before or decision of the body or officer may be stayed pursuant to Rule 65 of the Colorado Rules of Civil Procedure." [Emphasis Added].

Additionally, C.R.S. §24-4-106(8) provides, in pertinent part, as follows:

> Upon a showing of irreparable injury, and court of competent jurisdiction may enjoin at any time the conduct of any agency in which the proceeding itself or the action purported to be taken therein is clearly beyond the constitutional or statutory jurisdiction or authority of the agency….[Emphasis Added].

Relief pursuant to rule and statute both specifically and by their unambiguous terms contemplated jurisdictional challenges before a litigant is forced to endure extra-judicial orders from lower tribunals. The IEC's arguments in support of its Motion to Dismiss fly in the face of these legal authorities. While the IEC could ignore the law when it denied the Secretary's Motion to Dismiss for lack of jurisdiction, this Court cannot ignore either C.R.C.P. 106(a)(4) or C.R.S. §24-4-106(8) when it applies the standard for resolving a Motion to Dimiss. Since the Secretary's Complaint alleges facts consistent with both C.R.C.P. 106(a)(4) and C.R.S. §24-4-106(8), the Motion to Dismiss is unfounded.

5. The Denial of the Motion for Preliminary Injunction Cannot Serve as a Basis for Dismissal.

The Court denied the Secretary's request for preliminary injunctive relief. That decision does not end the matter and does not even serve as law of the case as this matter proceeds to a resolution on the merits at trial. Findings at preliminary injunction hearings are not conclusive at later stages of the proceeding. Mt. Emmons Mining Co. v. Town of Crested Butte, 690 P.2d 231, 239-40 (Colo. 1984).

Decisions at preliminary injunction hearings are made without formal proceedings followed at trials. Id. at 240. As such, the IEC's argument that a victory at the preliminary injunction hearing justifies dismissal without the benefit of a trial is not only irregular but demonstrative of the lack of regard for due process routinely exhibited by the IEC.

III. CONCLUSION

This case challenges the IEC's exercise of jurisdiction beyond its legitimate boundaries. Such a challenge is proper once the IEC rejected the Secretary's Motion to Dismiss. Neither the doctrine of exhaustion of remedies nor the Court's decision at the preliminary injunction hearing preclude this Court from resolving the two claims which the IEC seeks to dismiss on the merits. After all, the Complaint is properly pled and legitimately challenges the jurisdiction upon which the IEC has based its proceeding. Therefore, the Motion to Dismiss should be denied.

WHEREFORE, Plaintiff, Scott E. Gessler, respectfully requests that this Court deny Defendants' Motion to Dismiss.

DATED this 8th day of April, 2013.

/s/ Robert J. Bruce

David A. Lane, #16422
KILLMER, LANE & NEWMAN, LLP
The Odd Fellows Hall
1543 Champa Street, Suite 400
Denver, Colorado 80202
Telephone: (303) 571-1000
Fax: (303) 571-1001
dlane@kln-law.com

and

Robert J. Bruce, #17742
LAWLIS & BRUCE, LLC
1875 Lawrence Street, Suite 750
Denver, Colorado 80202
Telephone: (303) 573-5498
Fax: (303) 573-5537
robertbruce@lawlisbruce.com

and

Michael R. Davis, #39788
LAW OFFICE OF MICHAEL R. DAVIS, LLC
3301 West Clyde Place
Denver, Colorado 80211
Telephone: (303) 325-7843
Fax: (303) 723-8679
mrd@mrdavislaw.com

Attorneys for Plaintiff – Acting as duly appointed Special Assistant Attorneys General

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2013, a true and correct copy of the *Plaintiff's Response to Defendants' Motion to Dismiss* was filed and served via ICCES on:

Lisa Brenner Freimann, First Assistant Attorney General
Office of the Attorney General, State of Colorado
1300 Broadway, 8th Floor
Denver, Colorado 80203
Telephone: (720) 508-6385
Fax: (720) 508-6037
lisa.freimann@state.co.us

/s/ Shannon Neary
_____
Shannon Neary