

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 BANNOCK STREET DENVER, CO 80202	EFILED Document CO Denver County District Court 2nd JD Filing Date: Feb 27 2009 2:36PM MST Filing ID: 23987317 Review Clerk: Rebecca Archuleta ▲ COURT USE ONLY ▲
Plaintiff: MICHAEL COFFMAN, v. Defendants: INDEPENDENT ETHICS COMMISSION.	CASE NO. 09 CV 1650 COURTROOM: 19
ORDER	

This matter originated through plaintiff Michael Coffman’s (“Coffman’s”) complaint filed on February 11, 2009 against defendant Independent Ethics Commission (“Commission”). It comes before the Court on plaintiff Coffman’s February 12, 2009 Emergency Motion for Stay of Proceedings of the Independent Ethics Commission, as well as a Supplement to that Motion filed on February 13. Defendant Commission, after acceptance of service of Coffman’s complaint on February 13, filed its Response to the Emergency Motion on February 18. Coffman replied on February 20.¹

Also before the Court is the February 17 Motion to Intervene of Colorado Ethics Watch (“Ethics Watch”), which is the complainant in the administrative proceeding involving Coffman which is currently pending before the Commission and which is the subject of Coffman’s Emergency Motion. Ethics Watch’s C.R.C.P. 121, § 1-15 compliance certificate indicates that the Commission does not oppose the intervention motion, and Coffman takes no position concerning intervention.

Having fully reviewed the motion papers and supporting materials, the applicable law, and being fully advised in the premises, the Court finds, concludes and orders as follows:

1. Plaintiff brings his complaint and emergency motion before the Court pursuant to Colo. Const. Art XXIX, § 5; C.R.S. § 24-18.5-101(9); C.R.S. §§24-4-106(4) through (9) and 24-4-105(11); and C.R.C.P. 106(4). The Court concludes it has jurisdiction to consider the Emergency Motion to the extent discussed below and that Coffman’s proper avenue for judicial review of actions of the Commission lies under the State Administrative Procedure Act, C.R.S. § 24-4-101 et seq., the Commission constituting an agency of the state within the definition of C.R.S. § 24-4-102(3).

¹ Coffman also resubmitted his Emergency Motion on February 20 to correct for a page missing in the original filing.

2. Defendant Commission was created as a result of the November 2006 enactment by the Colorado electorate of Amendment 41, “Ethics in Government.” The Amendment was certified by the Governor on December 31, 2006 and is now codified in the Colorado Constitution as Article XXIX. The Colorado Supreme Court has determined that the Amendment is self-executing, requiring no further action by the Colorado Legislature to be effective. Developmental Pathways v. Ritter, 178 P.3d 524, 533 (Colo. 2008). While the Legislature did pass subsequent legislation to facilitate the Amendment’s provisions as permitted by the Amendment itself, see Article XXIX, Section 9 and C.R.S. § 24-18.5-101, “it is the Commission, not the legislature, which must ultimately administer and enforce Amendment 41.” Id.

3. Subsequent to appointment of five Commission members pursuant to Section 5(1) of Article XXIX, on September 1, 2008 the Commission adopted Rules of Procedure, also pursuant to Section 5(1). According to the motion papers, the matter involving plaintiff Coffman represents the first matter which the Commission is attempting to bring to hearing in exercise of its constitutional mandate. That mandate, also found in Section 5(1), is as follows:

The purpose of the independent ethics commission shall be to hear complaints, issue findings, and assess penalties, and also to issue advisory opinions, on ethics issues arising under this article and under any other standards of conduct and reporting requirements as provided by law.

4. Article XXIX, Section 5(3)(a) provides:

Any person may file a written complaint with the independent ethics commission asking whether a public officer, member of the general assembly, local government official, or governmental employee has failed to comply with this article or any other standards of conduct or reporting requirements as provided by law within the preceding twelve months.

5. On February 13, 2008, prior to the date when all the Commission members had been appointed or its Rules of Procedure adopted, complainant Ethics Watch filed a written complaint concerning plaintiff Coffman, based on alleged conduct of Coffman while in his position as Colorado Secretary of State, a “public officer” as defined by Section 2(6) of the Amendment. Receipt of the complaint was acknowledged by the February 29, 2008 letter of an Assistant Attorney General in the Office of the Attorney General, who identified himself as counsel for the Colorado Independent Ethics Commission. The letter stated the complaint would be addressed “once the ...Commission begins taking action on requests for advisory opinions, requests for letter rulings and complaints.”

6. Subsequent to promulgation of its Rules of Procedure, the Commission began consideration of Ethics Watch’s complaint against Coffman. On October 8, 2008 the Commission first set the matter for hearing, which hearing date has since been rescheduled for March 6, 2009. The Commission considered a number of issues raised by pre-hearing motions, in particular a Motion to Dismiss filed by Coffman on December 17, 2008,

wherein Coffman sought dismissal of the complaint on several grounds, including the assertion that the Commission was acting in excess of its jurisdiction in proceeding to consider the complaint. The Commission issued its Order Regarding Motion to Dismiss on February 5, 2009, rejecting Coffman's grounds for dismissal. In particular, the Commission concluded (1) that it "has jurisdiction to hear testimony and accept evidence on the conduct of Coffman which is alleged in the Complaint to have occurred within twelve months of the filing of the Complaint which was done on February 13, 2008." (para. 4); (2) that the allegations in the Complaint are not frivolous (para. 5); and that under Article XXIX it has jurisdiction to hear complaints that allege conduct other than simply for private gain or personal financial gain, based on language in the Article empowering it to "hear complaints, issue findings, and assess penalties...on ethics issues arising under this article and under any other standards of conduct and reporting requirements as provided by law." (para. 6).

7. By his Emergency Motion, Coffman now seeks relief from this Court in the form of a stay of the Commission's hearing scheduled for March 6, 2009, primarily on grounds that the Commission is without jurisdiction to consider Ethic Watch's complaint against him.

8. Having fully considered Coffman's motion, the Court concludes that it is in most respects jurisdictionally premature. By seeking a stay of the Commission's proceedings prior to the time it completes the hearing and takes final agency action, Coffman is requesting interlocutory relief in the form of judicial intervention by this Court. However, the law is clear that, except for one circumstance discussed in paragraph 10 below, a district court lacks jurisdiction to intervene in or review the actions of an agency as defined by the statute until the agency's action is final. C.R.S. § 24-4-106 (2-4); T & S Leasing, Inc. v. District Court, 728 P.2d 729, 731 (Colo. 1986). Interlocutory review of agency action is generally rejected, not only because it results in piecemeal review and is inefficient, but because it results in judicial encroachment on the functions of other branches of government. Colorado Health Facilities Review Council v. District Court, 689 P. 2d 617, 622 (Colo. 1984); Envirotest Systems, Corp. v. Colo. Dept. of Revenue, 109 P.3d 142, 144 (Colo. 2005). That encroachment concern is equally relevant in the present case, where interlocutory judicial intervention is sought in the functions of what has been described as a "super- agency" constitutionally created by the electorate and set apart from both the executive and legislative branches. Developmental Pathways v. Ritter, 178 P.3d at 535.

9. Coffman's contention that the Court has jurisdiction to depart from this body of law and intervene in these proceedings under C.R.S. § 24-4-106(7) is unfounded, as that section of the statute clearly contemplates final agency action before the Court can act under it. Similarly, the Court rejects Coffman's implicit argument that the Commission's determination of the scope of its own jurisdiction through its Order Regarding Motion to Dismiss constitutes a "declaratory order" subject to immediate review under C.R.S. § 24-4-105(11). Firstly, while declaratory orders which terminate controversies constitute agency action ultimately subject to judicial review, there is no indication in the statute that such orders are subject to immediate review, absent final agency action. Secondly, unless otherwise provided by statute or rule, an order by which an agency or court affirms its subject matter jurisdiction to proceed is interlocutory in nature, not final. See, e.g., Walton v. State, 968 P.2d 636, 641 (Colo. 1998) (even where statute allows interlocutory appeal of

denial of state's motion to dismiss on governmental immunity grounds, state can litigate to "final" decision before seeking appellate review). See also Colorado Health Facilities Review Council, 689 P.2d at 622; Leonhart v. District Court, 329 P.2d 781, 783 (Colo. 1958).

10. The sole basis on which Coffman may legitimately seek interlocutory relief from this Court prior to final agency action lies under C.R.S. § 24-4-106(8). Envirotest Systems, 109 P.3d at 144; Colorado Health Facilities Review Council, 689 P. 2d at 622. That statutory provision permits interlocutory intervention in ongoing agency action only if (1) the agency proceeding or the action proposed to be taken in that proceeding is clearly beyond the constitutional or statutory jurisdiction or authority of the agency, and (2) there is a showing of irreparable injury. Coffman so alleges in his Emergency Motion for Stay.

11. Given the self-executing nature of Article XXIX, the Court must look to the Article itself to determine the constitutional scope of the Commission's jurisdiction or authority. The Court has reviewed the language of that Article in light of the jurisdictional determinations made by the Commission in its Order Regarding Motion to Dismiss. Having fully considered the jurisdictional arguments of Coffman advanced to the Court, the Court finds no support for the contention that the Commission is clearly acting beyond its constitutional authority in proceeding to hearing on the matter before it within the jurisdictional limits defined in its Order. The Commission is admittedly acting to implement a new constitutional enactment with little court authority to guide it, the sole interpretive decision being the Developmental Pathways v. Ritter decision cited above. Having reviewed that authority and the plain language of Article XXIX, the Court concludes that Coffman has failed to establish grounds for this Court to accord interlocutory judicial relief.

12. In particular, Coffman argues that the language of Developmental Pathways v. Ritter, 173 P.3d at 535, footnote 8, requires that this Court determine that the Commission cannot consider conduct occurring prior to its adoption of Rules of Procedure as of September 1, 2008, or alternatively cannot consider conduct occurring prior to September 1, 2007, being one year from the date of adoption of those Rules of Procedure. In view of the context in which that footnote language is utilized, the Court does not consider it authority for Coffman's jurisdictional proposition. Given the Supreme Court's determination that Article XXIX is self-executing, the plain language of the Article supports the jurisdictional determination of the Commission. Under that language, conduct occurring after the December 31, 2006 certification of the Amendment becomes actionable and properly considered by the Commission, so long as a viable complaint has addressed the alleged conduct within the twelve-month limitations period provided by Section 5(3)(a) of the Amendment. In the Court's view, the circumstance that the Commission was not immediately constituted, nor were procedural rules instantly adopted (without which no "threat of enforcement" was present to support an "as applied" challenge to the Amendment in Developmental Pathways) does not lead to the conclusion that "persons" were precluded from asserting complaints under Section 5(3)(a) once the Amendment became the law of the State upon certification, or that public officials remained immune from ultimate scrutinization of conduct covered by the Amendment occurring after the Amendment became the law of the State. Given that Ethic Watch's complaint was filed on February 13,

2008, the Commission has correctly drawn its temporal jurisdictional limits in this case to alleged conduct occurring within twelve months prior to that filing.

13. Similarly, the Court agrees with the Commission's determination that the plain language of the Amendment allows it to consider post-certification conduct timely complained-of, not only which allegedly violates the gift ban provisions of Section 3 of the Amendment, but also which implicates "any other standards of conduct and reporting requirements as provided by law." Article XXIX, Section 5(1); Section 5(3)(a).

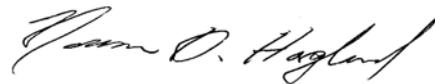
14. Coffman also alleges the prospect of irreparable injury if the Commission is allowed to proceed to hearing on Ethics Watch's complaint on March 6. As to the various procedural and non-jurisdictional substantive concerns Coffman raises, he clearly has a remedy at law in the form of post-hearing judicial review. Envirotest Systems, 109 P.3d at 13-14. The more personal and reputational concerns which Coffman raises may seem more glaring because this matter represents the first public hearing to be conducted by the Commission, but in any event will likely be present in all future hearings in which the conduct of a public official is addressed. But because Coffman fails to meet the first requirement of C.R.S. § 24-4-106(8) to justify interlocutory judicial relief, demonstration that the Commission is clearly acting beyond its constitutional or statutory jurisdiction or authority, the Court does not resolve here Coffman's additional assertions of irreparable injury.

15. The Court has before it the February 17 motion of complainant Ethics Watch to intervene in these proceedings. Based on Ethics Watch's C.R.C.P. 121, § 1-15 certification, the Court will allow plaintiff Coffman until March 9, 2009 to file his position, if any, on the motion, in default of which the Court will deem the motion confessed. See C.R.C.P. 121, § 1-15.3.

WHEREFORE, for the reasons above stated, plaintiff Coffman's Emergency Motion for Stay of Proceedings of the Independent Ethics Commission is hereby DENIED.

DATED AND SIGNED this 27th day of February, 2009.

BY THE COURT:



Norman D. Haglund
District Court Judge