

Denver District Court Denver County, Colorado 1437 Bannock Street Denver, Colorado 80202	<b>▲ COURT USE ONLY ▲</b>
<b>PLAINTIFF(S): COLORADO ETHICS WATCH</b>	Case No.: 09CV4989 Ctrm:5
v.	
<b>DEFENDANT(S): COLORADO INDEPENDENT ETHICS COMMISSION</b>	
<b>ORDER RE: MOTION TO DISMISS</b>	

**THIS MATTER** comes before me upon consideration Defendant Colorado Independent Ethics Commission’s (“Commission”) Motion to Dismiss. I have reviewed the Motion, the Response, the Reply, and the entire case file. I make the following findings of fact, conclusions of law, and enter the following **ORDER**:

**Background:**

Plaintiff filed its Complaint May 18, 2009 and attached numerous exhibits, including Advisory Opinion 09-04 (“Opinion”), which is the subject of Plaintiff’s Complaint. Plaintiff claims that its’ interests are substantially harmed by the issuance of the Opinion, and seeks to have the Opinion declared unlawful and set aside pursuant to C.R.S. §24-4-106 and/or C.R.C.P. 57. *See Complaint, First Claim for Relief, ¶¶19-21.*

The Commission’s Motion to Dismiss seeks to have the First Claim for Relief dismissed for the following reasons: 1) There is no right to judicial review of an advisory opinion; 2) The Complaint was untimely; 3) Plaintiff is not adversely affected or aggrieved by the Opinion; 4)Plaintiff’s claim is not justiciable.

**Standard of Review:**

A motion to dismiss for failure to state a claim is viewed with disfavor, and should be granted only if it appears that the plaintiff would not be entitled to any relief under the facts pleaded. *National Sur. Corp. v. Citizens State Bank*, 612 P.2d 70 (Colo. 1980). In ruling on a motion to dismiss for failure to state a claim, the trial court must accept the facts of the complaint as true and determine whether, under any theory of law, plaintiff is entitled to relief. If relief

could be granted under such circumstances, the complaint is sufficient. *W.O. Brisben Co., Inc. v. Krystkowiak*, 66 P.3d 133 (Colo. App. 2002).

Even though the court is required to accept the facts of the complaint as true, it is not required to accept as true legal conclusions couched as factual allegations. *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1959 (2007). A complaint may be dismissed “if the substantive law does not support the claims alleged.” *Denver Parents Ass’n v. Denver Bd. of Educ.*, 10 P.3d 662, 664 (Colo. App. 2000). If a complaint is challenged for failure to state a claim, and “matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in C.R.C.P. 56.” *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286 (Colo. 1992) (citing *Alexander v. Morrison-Knudsen Co., Inc.*, 166 Colo. 118, 444 P.2d 397 (Colo. 1968)).

Summary judgment is a drastic remedy and is not warranted except upon a clear showing that there is no genuine issue as to any material fact. *Hatfield v. Barnes*, 115 Colo. 30, 168 P.2d 552 (1946); *Greenwood Trust Co. v. Conley*, 938 P.2d 1141 (Colo. 1997). A motion for summary judgment is warranted when there are no genuine issues of facts and the issues become one of law for the court to resolve. *Enger v. Walker Field, Colo. Pub. Airport Auth.*, 181 Colo. 253, 508 P.2d 1245 (Colo. 1973). The moving party is entitled to summary judgment as a matter of law when there are pleadings, affidavits, depositions, admissions on file showing 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. *O.C. Kinney, Inc. v. Paul Hardeman, Inc.*, 151 Colo. 571, 379 P.2d 628 (1963). For purposes of summary judgment, allegations in the pleadings are deemed to be true. *Carter v. Thompkins*, 293 P.2d 265 (Colo. 1956).

The Opinion, which is the subject of the Complaint, was only attached to the Complaint. See *Exhibit 3*. I found it necessary to review the Opinion in light of the Motion to Dismiss. Since I did not exclude the Opinion in formulating this Order I treat the Motion to Dismiss as a motion for summary judgment. *Dunlap, supra*, 829 P.2d 1286 (Colo. 1992).

### **Findings of Fact and Conclusions of Law:**

The Commission’s Motion seeks to have the First Claim for Relief dismissed for the following reasons: 1) There is no right to judicial review of an advisory opinion; 2) The Complaint was untimely; 3) Plaintiff is not adversely affected or aggrieved by the Opinion; 4) Plaintiff’s claim is not justiciable.

#### ***1. The Opinion is not a final agency action subject to judicial review***

The Opinion was issued after a request was made by a General Assembly member (“member”). The member requested an advisory opinion, “asking whether a member of the General Assembly and her spouse may accept the travel-related expenses of accommodations, meals, ground transportation, and museum visits from The Multicultural Mosaic Foundation, while participating in an intercultural trip to Turkey. The Pacifica Institute in California may also help sponsor this trip.” See *Exhibit 3, p.1*. The Commission determined the travel-related

expenses, under the facts presented by the specific requester, would not be violation of Colorado Constitution Art. XXIX, and would constitute a gift to the State of Colorado. *Id.*

Plaintiff claims the Opinion is a “constitutionally mandated function of the [Commission] that is meant to declare the [Commission’s] official interpretation of an ethical standard of conduct.” *See Response to Motion to Dismiss, p. 5.* Plaintiff maintains that when the Commission issues an advisory opinion the Commission is taking an official action with legal consequence. *Id.* Plaintiff contends that Colorado Constitution Art. XXIX allows for persons to have the right to submit advisory opinion requests, receive formal advice from the Commission through the advisory opinion, and rely on such opinions to guide their conduct. Plaintiff asserts that in order to challenge the Commission’s interpretations of ethics rules Plaintiff is “required to wait for the covered person to rely on the advisory opinion, file a complaint against that person, then challenge the [Commission’s] ultimate resolution of the complaint in district court.” *Id.* at 6. Finally, the Plaintiff asserts that the advisory opinion “is a final agency action...” *Id.* at 7.

Administrative proceedings are accorded a presumption of validity and regularity, and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency. The burden is on the party challenging an administrative agency's action to overcome the presumption that the agency's acts were proper. *See Van Sickle v. Boyes, 797 P.2d 1267 (Colo. 1990); Wildwood Child & Adult Care Program, Inc. v. Colorado Dep’t. of Public Health & Env’t., 985 P.2d 654 (Colo. App. 1999).*

The Opinion was requested by a specific member of the General Assembly. The Opinion includes a “Summary,” “Discussion,” and “Conclusion,” all of which specifically discuss the specific requester and her spouse. The Commission determined only that the requester and her spouse could “accept the travel-related expenses Turkey *under the facts presented here.*” *See Exhibit 3, p.9 (emphasis added).* The Opinion was issued after a careful review of Section 3 of Art. XXIX, and in light of the *facts specific to the requester.* The order did not bear any marks of a final agency decision; it was neither the issuance of a general regulation nor the determination of particular rights in adjudication. *Colorado Health Facilities Review Council v. District Court, 689 P.2d 617, 621 (Colo. 1984).* As stated in the Commission’s own rules, an advisory opinion is only an *opinion.* *See Commission Rule 3.A.1.*

Final agency actions are subject to judicial review pursuant to either C.R.S. §24-18.5-101(9) or C.R.S. § 24-4-106. Because the Opinion is not a final agency action subject to judicial review I do not have subject matter jurisdiction over this matter. Furthermore, I do not find that the Plaintiff has overcome its burden of proving that the Commission’s acts were improper.

- 2. *Because the Opinion is not subject to judicial review, the remaining bases for dismissing the First Claim for Relief are moot.***

Done 10th day of November, 2009..

BY THE COURT:

A handwritten signature in black ink, appearing to read "Robert L. McGahey, Jr.", written in a cursive style.

---

Robert L. McGahey, Jr.  
District Judge

Cc: Counsel (by e-filing)