

DISTRICT COURT, WATER DIVISION NO. 1, COLORADO
 Court Address: 901 9th Avenue, Greeley, CO 80631-1113
 Mailing Address: P.O. Box 2038, Greeley, CO 80632-2038

Plaintiff/Appellant: Christy Alexander

v.

Defendant/Appellee: Tori McMechan, in her official capacity as Town Clerk for the Town of Nunn

And,

Intervenor: Carol Holwerda, as chairperson of the circulators of the challenged recall petition.

▲ COURT USE ONLY ▲

Case No.: 09CV981

ORDER AFFIRMING THE FINDINGS AND ORDER OF THE HEARING OFFICER

This is a Judicial Review of an Administrative Decision pursuant to C.R.C.P. Rule 106(a)(4). The Plaintiff/Appellant, Christy Alexander, (the “Plaintiff”) is the mayor pro tem/trustee for the Town of Nunn. The Defendant is the clerk for the Town of Nunn, Colorado, who was acting as the hearing officer during a protest hearing relating to a recall petition submitted against Plaintiff. The Intervenor is the chairperson of a group of persons who circulated a petition seeking the recall of the Plaintiff as mayor pro tem/trustee.

The Plaintiff filed this case on September 29, 2009, and she has requested that the court review the finding of the Defendant that the recall petition pertaining to Plaintiff was legally sufficient. *See* C.R.S. 31-4-503(3)(d).

On October 23, 2009, the Intervenor filed a motion for a temporary injunction. The Defendant filed a motion to reconsider the court’s order allowing the Intervenor to intervene in this action on October 29, 2009. A hearing was held before this court on November 2, 2009.

The Plaintiff appeared *pro se* for the hearing before this court. The Defendant appeared with counsel, Ms. Scantland. The Intervenor appeared with her attorneys, Mr. Bell and Mr. Gould.

A verbal motion was presented to the court by the Intervenor on November 2, 2009, requesting the court to rule on the ability of the Plaintiff to represent the interests of two other elected officials for the Town of Nunn- Mayor Jeff Pigue and Trustee Jack Smith- who were not listed as petitioners in this action and who did not sign the complaint. Mayor Pigue and Trustee Smith were not present in court for the hearing on November 2, 2009. The Plaintiff informed the court that she is not a licensed attorney. The court issued a verbal ruling and held that the Plaintiff could not represent the interests of Mayor Pigue and Trustee Smith during the review

hearing and they were not parties to this case. The scope of the hearing was limited to the Defendant's finding of sufficiency of the petition to recall the Plaintiff.

This court has received and reviewed, as Exhibit 1, a DVD containing a recording of the protest hearing held on September 15, 2009. The Defendant testified at the hearing before this court. The court has also received Defendant's Exhibits A through W, inclusive.

The court has considered the evidence received, the contents of the file, and the arguments of the Plaintiff and the attorneys for the Defendant and Intervenor. For purposes of this order, the court will refer to the hearing held before the Defendant on September 15, 2009 as the "protest hearing" and the hearing held before this court on November 2, 2009 as the "review hearing".

I. Factual Background

The Plaintiff is the mayor pro tem/trustee for the Town of Nunn. A committee comprised of residents of Nunn, chaired by the Intervenor, circulated a petition to recall the Plaintiff. The recall petition was submitted to the Defendant, who is employed as the town clerk of Nunn. The Plaintiff timely filed a written protest with the Defendant pursuant to C.R.S. 31-4-503(3)(b), in which she contested the sufficiency of the recall petition. The grounds asserted by the Plaintiff in her written protest, submitted to this court as Defendant's Exhibit Q, included the following:

1. That the petition was signed by persons who were not registered electors;
2. Persons signing the petition were misinformed as to the charges against the Plaintiff and the circulators of the petition failed to have the persons signing the petition read the contents of the petition;
3. That the petition was not circulated properly because the petitions were circulated by persons other than the circulator who signed the attestation page affixed to the recall petitions;
4. There were persons who signed the recall petition who did not reside in Nunn.

A protest hearing was held on September 15, 2009, and the Defendant served as the hearing officer at the protest hearing. *See* C.R.S. 31-4-503(3)(b). The Plaintiff represented herself during the protest hearing. The Intervenor appeared at the protest hearing and was represented by Mr. McIntyre.

The Plaintiff called Amy Shera (sp?) as a witness at the protest hearing. Ms. Shera testified that she was present at a town board meeting on August 6, 2009, and she observed a recall petition being passed between persons attending the meeting. She indicated that the circulators were also present at the meeting, but that the recall petition was simply handed to the first person in a row of seats and that person would sign the petition and then pass it to the next person in the row. The Plaintiff also testified at the protest hearing. The Plaintiff presented the hearing officer with a letter written by Gail Jurek, who requested that her name be removed from the petition. *See* Defendant's Exhibit N. Ms. Jurek did not testify at the protest hearing. The Plaintiff also presented a letter from Tina Hawkinson. *See* Defendant's Exhibit P. In this letter,

Ms. Hawkinson, who did not sign the recall petition, alleged that the petition circulator provided inaccurate information to her. Ms. Hawkinson did not testify at the protest hearing. The Plaintiff also tendered to the hearing officer a list of the names on the recall petition that she was challenging (Defendant's Exhibit M) and a list of those persons who signed the petition at the August 6, 2009 board meeting (Defendant's Exhibit O).

The Intervenor presented testimony from several witnesses at the protest hearing. Three people who circulated the recall petition testified at the protest hearing that they did not provide inaccurate information to the persons signing the petition. There were eleven witnesses who testified that they signed the recall petition, and this court has confirmed that the names of these eleven witnesses appear on the Plaintiff's recall petition. It should be noted that the recall petition was presented in five parts, which were tendered to this court at the review hearing as Defendant's Exhibits R, S, T, U and V. There was testimony at the protest hearing from a person named James E. Taylor, who indicated that he signed a petition to recall the Plaintiff; however, this court could not locate his name, signature, or street address on any of the exhibits submitted to this court. The Intervenor also presented the testimony of Howard Williams, who was present at the August 6, 2009 town board meeting, and he stated that people signed the recall petition outside of the meeting and that the petition was not passed down each row of people seated inside of the meeting room.

The Intervenor also presented letters from Tina Gourne (Defendant's Exhibit A); Elizabeth French (Defendant's Exhibit B); Dianne Schooler (Defendant's Exhibit C); Susan Hunt (Defendant's Exhibit D); A person with the last name of Frederikson (Defendant's Exhibit E); Patrick Johnson (Defendant's Exhibit F); Nyssa Johnson (Defendant's Exhibit G); Deborah Estreich (Defendant's Exhibit H); Phyllis Nase (Defendant's Exhibit I); Wilbur Schooler (Defendant's Exhibit J); Patti Norris (Defendant's Exhibit K); Judy Criswell (Defendant's Exhibit L). Each of these letters represented that the author signed the recall petitions voluntarily and that there were no misrepresentations made by the circulator. The authors of these letters, other than Ms. Nase, did not testify at the protest hearing.

The Defendant took the matter under advisement after the hearing and issued a written decision on September 21, 2009. The Defendant found that the petition to recall the Plaintiff was sufficient. *See* Defendant's Exhibit W. The Plaintiff thereafter filed a request for judicial review with this court.

The parties agree that the recall petition must have been signed by registered electors totaling at least 25% of the entire vote cast for the Plaintiff's office during the last regular vote. This equates to 27 valid signatures on the recall petition, and there has been no dispute by the parties as to that number. The total number of signatures on Defendant's Exhibits R, S, T, U and V is 96.

The Defendant testified at the review hearing that she did not consider all of the entries on the petition to recall the Plaintiff to be valid. The Defendant also testified at the review hearing that she compared the names on the petition to recall the Plaintiff with the voter registration list provided by the Weld County Clerk and Recorder, and that the names and signatures she determined were valid exceeded the minimum number necessary under the statute.

The Defendant did not indicate how many names she determined were valid and invalid. The parties did not tender a copy of the Weld County voter registration list to this court.

II. Standard of Review

Decisions of an administrative hearing officer exercising judicial or quasi judicial functions may be appealed to the District Court under C.R.C.P. 106(a)(4). Pursuant to Rule 106(a)(4)(I), “[r]eview shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer”. Thus, Rule 106(a)(4) requires district courts to set aside final orders of an administrative hearing officer if the officer exceeds its jurisdiction or abuses its discretion. *See City and County of Denver v. Eggert*, 647 P.2d 216 (Colo. 1982). However, the decision of a hearing officer “will not be reversed as an abuse of discretion unless, given the totality of the factual circumstances at the time of the decision, the hearing officer’s decision exceeded the bounds of reason”. *Rosenberg v. Board of Education*, 710 P.2d 1095, 1098-99 (Colo. 1985). An abuse of discretion occurs where the decision is “manifestly arbitrary, unreasonable, or unfair.” *See J.S. v. Chambers*, --- P.3d ---, 2009 WL 2960856 (Colo. App. 2009) (citing *E-470 Pub. Highway Auth. v. Revenig*, 140 P.3d 227, 230 (Colo. App. 2006)). “A reviewing court asks not whether we would have reached a different result, but rather whether the decision fell within a range of reasonable options.” *Id.* An agency abuses its discretion if the decision under review is not reasonably supported by competent evidence. *Freedom Colo. Info., Inc. v. El Paso County Sheriff’s Dep’t*, 196 P.3d 892, 899-900 (Colo. 2008).

“The standard of review under Rule 106(a)(4) of final administrative action is whether, on the basis of the whole record, the ultimate findings of the agency are supported by any competent evidence.” *Cooper v Civil Service Commission*, 604 P.2d 1186, 1189 (1979). In reviewing an administrative decision, this court cannot disturb factual findings supported by the record. *See Harvey v. Jefferson County School Dist.*, 710 P.2d 1103, 1109 (Colo. 1985). “[T]he credibility of witnesses, the sufficiency, probative effect and weight of the evidence, and the inferences and conclusions to be drawn therefrom are all within the province” of the hearing officer. *People in the Interest of A.G.G.*, 899 P.2d 319 (Colo. App. 1995). *See also Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). Accordingly, this Court may not investigate the merits or inquire if the hearing officer made a mistake in finding the facts or erred in its conclusions based on those facts, unless those conclusions exceeded the bounds of reason. *See State Board of Medical Examiners v. Spears*, 247 P.2d 563, 566 (Colo. 1927), *appeal dismissed*, 275 U.S. 508, 72 L.Ed. 398, 48 S.Ct. 158 (1927). However, “the reviewing court may determine whether there was any competent evidence to support the agency’s findings of fact,” *Denver Center for Performing Arts v. Briggs*, 696 P.2d 299 (Colo. 1985), as well as whether an erroneous legal standard was applied. *See Electric Power Research Institute v. City and County of Denver*, 737 P.2d 822, 835-36 (Colo. 1987). Moreover, when the issue on appeal involves a question of law, this court is not bound by the conclusions of

the agency. See *Rosenberg*, 710 P.2d at 1099. See also *Radke v. Union Pac. Railroad Co.*, 334 P.3d 1077 (Colo. 1959); *Tripp v. Cotter Corp.*, 79 P.2d 124 (Colo. App. 1985).

Finally, an administrative agency's decision is presumed to be correct such that the burden of showing reversible error is on the Plaintiff. See *Anderson v. Colo. State Dept. of Personnel*, 756 P.2d 969 (Colo. 1988).

III. Analysis

The Plaintiff has challenged the finding of sufficiency of the recall petition issued by the Defendant, claiming that the petition contained signatures obtained through deception; that many of the signatures did not contain the full legal name of the person signing the petition; and that the petition contained the names of persons who were not registered electors.

The Plaintiff presented a letter at the protest hearing from one person who claimed that a petition circulator provided false or inaccurate information when presenting the petition to that person. The Intervenor presented letters from several persons who signed the petition which indicated that there was no attempt by the circulators to convey fraudulent information. The hearing officer also heard testimony from three of the petition circulators and they testified that no deceptive information was presented by the circulators to the persons signing the recall petitions.

This court finds that there was evidence presented during the protest hearing to support a finding by the Defendant that the persons signing the recall petition against the Plaintiff were not provided false or deceptive information by the petition circulators.

The Plaintiff has also challenged whether the signatures and names on the recall petition comply with legal requirements. C.R.S. 31-4-503(2)(b) provides:

Any recall petition shall be signed only by registered electors using their own signatures, after which each elector shall print or, if such elector is unable to do so, shall cause to be printed such elector's legal name, the residence address of such person, including the street and number, if any; and the date of signing the same.

Specifically, the Plaintiff argues that many of the names appearing on the petition do not contain a middle name and others contain only a middle initial. The Plaintiff has not provided this court with any evidence that those persons who did not list a middle name actually have a middle name. Likewise, the Plaintiff has not established that the person using only a middle initial did not provide his or her legal name. As indicated previously in this order, none of the parties tendered to this court the Weld County voter registration list. It was the Plaintiff's burden to provide this information to the court as an exhibit if she wanted it to be considered by the court. The Defendant testified that she compared the names on the petition to the names on the voter

registration list and she determined that there were enough valid signatures to establish that the petition was legally sufficient.

During the protest hearing, the Intervenor cited to the Rule 17 of the Elections Rules for the Colorado Secretary of State, found at 8 CCR 1505-1, when arguing that the names and signatures on the petition were valid.¹ The hearing officer did not indicate in her written order whether or not she considered the Colorado Secretary of State Elections Rules when making her determination, and this court cannot consider the applicability of this Rule to this case because the Plaintiff has not submitted any information to the court that any particular name contained on the petition is not the legal name of the person signing the petition.

IV. Conclusion and Order

The Plaintiff has not met her burden to show that the Defendant exceeded her jurisdiction or that she abused her discretion when she determined that the petition to recall the Plaintiff was sufficient. The court affirms the findings and order of the Defendant hearing officer.

C.R.S. 31-4-503(4), requires the municipal clerk to submit said petition, with a certificate of its sufficiency, to the governing body of such municipality at the first meeting of such body following the expiration of the period of time when a protest may be filed, or the first meeting

¹ 17.3 Checking individual signatures.

17.3.1 Each individual entry shall be checked against the master voter registration files to assure that the elector was an eligible elector in the political subdivision at the time the petition was signed.

17.3.2 Each reason for rejection of an entry shall be recorded by separate code and a master record of the rejected entries shall be maintained. A master record shall also be maintained of each entry that is accepted.

17.3.3 If the information on the current voter registration file does not match the information on the entry, the elector's voter registration history shall be checked to determine if the information on the entry matches the voter registration file at the time the entry was signed.

17.3.4 Name of eligible elector. To be accepted, the name on the entry must be in a form similar to that found on the voter registration record. Signatures that are common variants of the name found on the voter record shall be counted. If the signer of the petition is not found on the voter registration file, or if applicable, the county assessors' list, the entry shall be rejected.

17.3.5 Middle initial and additional terms.

a. If the middle initial or middle name is not part of either the signature line or the voter record but is included on the other document, if the first and last name are the same on both documents, the entry shall be accepted.

b. If the middle initial or middle name on the signature line is different than the middle initial or middle name on the voter record, the entry shall be rejected.

c. If an indicator such as Jr., Sr., or II is present or omitted from the petition or the voter record, the entry shall be accepted. If two persons with the same name reside at the same address as found on the master voter list, the entry shall be rejected, unless the identity of the signer can be conclusively determined.

following a determination by the hearing officer that a petition is sufficient, whichever occurs later.

Regarding the recall petition for the Plaintiff, the hearing officer made the determination of sufficiency on September 21, 2009, which then required her to submit the recall petition to the governing body at their next scheduled meeting, which the parties agree occurred on October 1, 2009. The court agrees with the Intervenor that the Defendant was required by statute to submit all six recall petitions to the governing body at the October 1, 2009 meeting, regardless of the fact that the Plaintiff had filed a request for judicial review of the Defendant's decision. It is uncontroverted that Defendant only submitted to the town board the recall petitions for three trustees, but did not submit the recall petitions of Mayor Pigue, Trustee Smith, and Mayor pro tem Alexander. The town trustees then voted whether a date should be set for the electors to vote on the three recall petitions that were submitted by the Defendant and there was a tie vote, so a date for recall election was not scheduled. Counsel for the Town of Nunn concedes that the town board had no authority to decline to set a date for the recall election for those three trustees whose recall petitions were formally submitted on October 1, 2009.

The governing body for the Town of Nunn is required by statute to fix a date for the recall election not less than 30 days nor more than 90 days from the date of submission of the petition to the governing body, unless a regular election is to be held within 180 days after the date the petition was submitted, in which case the recall petition will be part of the regular election. C.R.S. 31-4-503(4). The court assumes that the Defendant will formally submit the petitions to recall the Plaintiff, Mayor Pigue, and Trustee Smith to the town board during the November 5, 2009 board meeting.

The Town of Nunn has a regularly scheduled election in April of each year, and the next regularly scheduled election was more than 180 days from October 1, 2009, but is less than 180 days from the November 5, 2009 board meeting.

The quandary is that there are two different statutory time periods now involved- the 30 to 90 day period from October 1, 2009, in which the recall election must be held for the three trustees whose names were submitted at the October 1, 2009 board meeting; and the date of the recall election for Plaintiff, Mayor Pigue, and Trustee Smith, whose recall petitions will be submitted to the governing body within 180 days of the April 2010 election, which by statute requires these petitions to be placed on the ballot on the date of the regular election in April 2010.

It appears to the court that the Defendant's decision to submit only three of the six recall petitions at the October 1, 2009 town board meeting was not done with malice or the intent to prevent the electors of Nunn from exercising their right to vote. Nonetheless, the Defendant was required under the law to submit all six recall petitions to the town board on October 1, 2009. It is equally clear that the board members were quite aware of the existence of the recall petitions for the Plaintiff, Mayor Pigue, and Trustee Smith on the date of the board meeting on October 1,

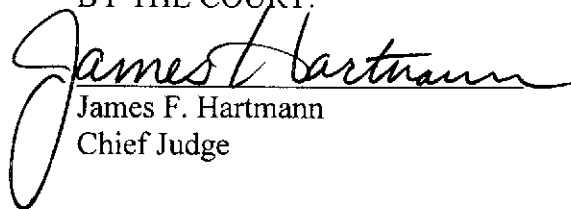
2009, even though the recall petitions may not have been formally tendered by the Defendant at that meeting.

It would defy common sense for the Town of Nunn to schedule one recall election within 90 days of October 1, 2009 for the three trustees whose recall petitions were formerly tendered at the October 1, 2009 meeting, and then schedule another recall election for the three others in April 2010. The residents of Nunn should not be made to bear the financial burden of funding two recall elections as a result of the Defendant's failure to submit all six petitions on October 1, 2009, as was required by statute. Equally important is the right of the electors of Nunn to consider and cast ballots for all six recall petitions in an expeditious manner.

IT IS THEREFORE ORDERED that the recall elections for all six recall petitions are to be scheduled within 90 days of October 1, 2009.

Dated: November 4, 2009

BY THE COURT:


James F. Hartmann
Chief Judge