CERTIFICATION OF WORD COUNT: 2,909

SUPREME COURT, STATE OF COLORADO 2 E 14th Avenue, Suite 400 Denver, CO 80203	
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2007) Appeal from the Ballot Title Setting Board	
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2007-2008, #62 ("Cause for Employee Suspension and Discharge") **Petitioner:** JOSEPH B. BLAKE, Objector, v. **Respondents:** JOANNE KING and LARRY ELLINGSON, Proponents, And **Title Board:** WILLIAM A. HOBBS, DANIEL L. CARTIN, and DANIEL DOMENICO.	**▲COURT USE ONLY▲**
Attorney for Respondents: Mark G. Grueskin Isaacson Rosenbaum P.C. 633 17th Street, Suite 2200 Denver, Colorado 80202 Phone Number: (303) 292-5656 FAX Number: (303) 292-3152 E-mail: mgrueskin@ir-law.com Atty. Reg. #: 14621	Case Number: 08 SA 90
RESPONDENTS' OPENING BRIEF	

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STATEMENT OF ISSUES PRESENTED

1. Whether the Title Board correctly found that an initiative that creates a just cause standard for discharge or suspension of employees comprises a single subject.
2. Whether the Title Board set a title that adequately conveyed the essential concepts of the just cause standard and associated remedies.
3. Whether the Title Board's use of the phrase "just cause" or the term "mediation" are political catch phrases that taint voter understanding of this measure.
4. Whether the single subject statement used in the title is adequate as an introductory phrase to describe the measure.
5. Whether the Title Board correctly accepted jurisdiction over this matter, given changes made by Proponents in direct response to issues raised by legislative staff at the statutorily mandated "review and comment" hearing.

STATEMENT OF THE CASE

Robin Wright and Cynthia Knox (hereafter "Proponents")[1] proposed an initiative to establish a just cause requirement before employers could take certain

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[1] Blake misstates the names of the Proponents in the caption to this matter. Instead of the actual proponents of #62, he lists the names of the proponents of Initiative 2007-08 #57 which he is also challenging.

employment actions against employees. This proposal was denominated as Initiatives 2007-08 #62.

This measure was considered by the Offices of Legislative Council and Legislative Legal Services and submitted to the Secretary of State for title setting. The Title Board established titles for each measure on February 20, 2008.

The Denver Metro Chamber of Commerce and Joe Blake (hereafter "Blake") objected to the title set by the Title Board, and a rehearing was held on March 5, 2008. The Board denied the motion, and this appeal followed.

STATEMENT OF FACTS PRESENTED

Initiative 2007-08 #62 establishes a just cause standard for the discharge or suspension of employees. It defines "just cause", requires that employers given written notice of the cause used to justify any discharge or suspension, allows employees to seek mediation within 30 days after discharge or suspension, sets timelines and procedures for such mediation, and authorizes the General Assembly to enact legislation to further the purposes of the amendment.

The Title Board set the following title for this measure:

> An amendment to the Colorado constitution concerning just cause for action against an employee by an employer, and, in connection therewith, prohibiting the discharge or suspension of an employee by an employer unless the employer has first established just cause; defining "just cause" to mean specified types of employee misconduct and substandard job performance, the filing of bankruptcy by the

employer, or the simultaneous discharge or suspension of ten percent or more of the employer's workforce in Colorado; requiring an employer to provide to an employee written documentation of the basis for his discharge or suspension; allowing an employee who believes he was discharged or suspended without just cause to apply for mediation to seek an award of back wages and reinstatement; allowing the mediator to assess costs for his services to the losing party and award attorneys fees to the prevailing party; and authorizing the general assembly to enact legislation to facilitate the purposes of this amendment.

SUMMARY OF ARGUMENT

Blake held a legal prism up to Initiative #62, attempting to separate certain of its elements to make them appear distinct. But the Board correctly found that #62 contains a single subject and included in its title only the central features of the proposal. It did not use catch phrases or inaccurately summarize the single subject or any other aspect of the measure. And it was correct to retain jurisdiction, given that revisions in the text were made in direct response to the issues raised by legislative staff in the review and comment hearing. The Board's decision making was deliberate, and this Court, in its limited review of the title, should affirm that decision.

LEGAL ARGUMENT

I. Legal standards for review.

In reviewing an action of the Board, this Court liberally construes the requirements for initiatives in order to facilitate the constitutional right of

initiative. In re Amend TABOR 32, 908 P.2d 125, 129 (Colo. 1995). All legitimate presumptions must be resolved in favor of the Board. In re Proposed Initiative on Education Tax Refund, 823 P.2d 1353, 1355 (Colo. 1991). An initiative title will only be invalidated in a clear case. Id.

As such, the scope of this Court's review of Title Board actions is limited. The Court will not address the merits, nor interpret the language, nor seek to predict the application of a proposed initiative. Neither will it reverse the actions of the Title Board if improvements could be made to an otherwise legally sufficient title. In re School Pilot Program, 874 P.2d 1066, 1070 (Colo. 1994). Finally, the Board is not required to describe every nuance and feature of the proposed measure. In re Proposed Initiative Concerning "State Personnel System", 691 P.2d 1121, 1124 (Colo. 1984).

The goal of the title setting process is "to ensure that persons reviewing the initiative petition and voters are fairly advised of the import of the proposed amendment." In re Proposed Initiative on "Trespass – Streams with Flowing Water," 910 P.2d 21, 23 (Colo. 1996). Only where the titles and submission clause are clearly vague, misleading, or confusing will a decision of the Title Board be overturned. In re Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the City of Antonito, 873 P.2d 733, 739-40 (Colo. 1994).

II. Initiative #57 contains a single subject.

A. Standard of review.

Article V, sec. 1(5.5) of the Colorado Constitution requires that "[n]o measure shall be proposed by petition containing more than one subject." The Court has clearly set forth the tests for evaluating an initiative's compliance with the single subject requirement. In order to violate this requirement, a proposed ballot measure must: (1) relate to more than one subject; and (2) have at least two distinct and separate purposes which are not dependent upon or connected with each other. Matter of Title, Ballot Title and Submission Clause, and Summary for "Public Rights in Waters II," 898 P.2d 1076, 1078-79 (Colo. 1995).

In applying this test, the Court will assess whether the initiative tends to effectuate "one general objective or purpose" (in which case it presents only one subject) or whether it "addresses subjects that have no necessary or proper connection to one another" (in which case it will be disallowed as containing more than one subject). Matter of Title, Ballot Title and Submission Clause, Summary Clause for 1999-2000 #25, 974 P.2d 458, 463 (Colo. 1999). However, provisions that assist in accomplishing a measure's essential purpose are well within its single subject. As such, the Court analyzes whether implementation provisions tend "to effect or to carry out" the "one general object or purpose of the initiative." In re

"Public Rights in Water II", 898 P.2d 1076, 1079 (Colo. 1995). Where details are "directly tied" to a proposal's "central focus," the Court will not find that a separate subject exists. In re Initiative for 1999-2000 #200A, 992 P.2d 27, 30 (Colo. 2000).

Further, a ballot measure encompasses a single subject, even if it includes "provisions that are not wholly integral to the basic idea of a proposed initiative." Amend TABOR 32, supra, 908 P.2d at 129. Thus, the fact that one or more of these provisions might stand alone as another initiative or that the measure itself is comprehensive or multi-faceted does not automatically make any aspect of the proposal a separate and distinct subject.

B. Conjecture about #62's legal effects does not amount to a second subject.

Blake argues that #62 "amends or repeals unrelated provisions of the constitution" and creates "unprecedented restrictions on substantive and procedural rights." See Petition for Review at 2-3. Before the Title Board, Blake argued that the provisions to be affected and rights to be curtailed include: (a) the at-will employment relationship; (b) the state's civil service system; (c) employers' right to contract; (d) right of access to the courts; and (e) due process. See Motion for Rehearing at 3-5.

All of Blake's arguments assume that the measure will ultimately be interpreted in a way that fits his legal conclusions. There is no reason to presume that at all. Constitutional amendments are typically interpreted in a manner that is consistent with existing provisions, and only where there is a direct conflict will the later adopted provisions be interpreted to limit earlier adopted ones. Submission of Interrogatories on SB 93-74, 852 P.2d 1, 6 (Colo. 1993).

Even this step is premature during the title setting process and cannot be the basis for the Board to refrain from acting. "In determining whether a proposed initiative comports with the single subject requirement, '[w]e do not address the merits of a proposed initiative, *nor do we interpret its language or predict its application if adopted by the electorate.*'" Matter of Title, Ballot Title and Submission Clause, and Summary for 1997-1998 No. 64, 960 P.2d 1192, 1197 (Colo. 1998) (emphasis added), quoting Matter of Title, Ballot Title and Submission Clause, and Summary for an Amendment Adding Section 2 to Article VII (Petitions), 907 P.2d 586, 590 (Colo. 1995). Potential effects are not equated with the purposes of an initiative. Yet, that is the conclusion Blake asks this Court to draw.

There is a limit on the degree to which the Court will entertain creativity in the nature of single subject objections by an initiative's opponents. "Multiple ideas

might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction until an initiative measure has been broken into pieces. *Such analysis, however, is neither required by the single-subject requirement nor compatible with the right to propose initiatives guaranteed by Colorado's constitution.*" Matter of Title, Ballot Title and Submission Clause, Summary Clause for 1997-1998 No. 74, 962 P.2d 927, 929 (Colo. 1998) (emphasis added). The Board's single subject analysis reflects this limitation, and #62 was correctly found to contain just one subject.

III. The title is clear and accurate.

A. The Title Board did not err by refusing to catalog potential effects of the measure in the title.

Blake argued before the Board that the title was incomplete for failure to refer to: (a) purpose and effects of superseding and impliedly repealing at-will employment relationship; (b) replacement of at-will relationship with a new legal standard for terminating and suspending employees; (c) replacement of civil service system with just cause requirement; (d) all employment relationships will be affected by initiative; (e) possible employer liability for damages, notwithstanding having a legitimate reason for suspension or termination of employment; (f) elimination of fundamental right of access to courts; (g) elimination of right of employees to enter into written collective bargaining

agreement or contract of employment; (h) post-discharge or post-suspension process as "arbitration" instead of mediation; and (i) finality of mediator's decision. See Motion for Rehearing at 7-8.

Arguments (a) through (g) above are all putative effects of the measure. The Board is neither authorized nor expected to undertake a speculative analysis of a proposed measure. Its stated task is to "unambiguously state the principle of the provision sought to be added, amended, or repealed." 1-40-106(3)(b), C.R.S. The Board is not supposed to wonder what the measure could do or how it might affect other provisions of the Constitution. In fact, this Court has clearly and repeatedly signaled to the Board that its job description does not include analyzing how a ballot measure interacts with existing law. In re Initiative 1999-2000 #255, 4 P.3d 485, 498-99 (Colo. 2000); In re Proposed Election Reform Amendment, 852 P.2d 28, 34 (Colo. 1993); In re Proposed Constitutional Amendment Concerning Limited Gaming in the Town of Burlington, 826 P.2d 1023, 1027-28 (Colo. 1992). There is no reason for the Board to engage in such guesswork as to #62. Such an exercise would run counter to the governing statute and judicial precedent.

As to Blake's argument about the mediation provisions, it is first clear that mediation is not the functional equivalent of arbitration. It is simply a precursor to the traditional judicial remedy that has often been the site for employment related

controversies and is not precluded by the terms of the initiative text. The mediator's decision is final but only in the context that neither employer nor employee can revisit that decision and prolong the expedited process provided in the amendment.

Further, finality in the mediation process is hardly a "central provision" of the measure. After all, the title is intended to be a "relatively brief and plain statement by the Board setting forth the central features of the initiative for the voters" rather than "an item-by item paraphrase of the proposed constitutional amendment or statutory provision." In re 1997-98 No. 62, 961 P.2d 1077, 1082 (Colo. 1998). A title need only provide voters with an overview of the central features of an initiative, In re Amendment to Article XVI, Section 6, Colorado Constitution, Entitled "W.A.T.E.R.", 875 P.2d 861, 864-65 (Colo. 1994), and it need not set forth each and every nuance and subtlety of a measure. In re Proposed Initiative Designated Governmental Business, 875 P.2d 871, 878 (Colo. 1994). Given these standards, the Board did not err in setting this title.

B. Neither "just cause" nor "mediation" are catch phrases.

Blake claims that the ballot title impermissibly contains two catch phrases, "just cause" and "mediation."

Neither is a political slogan of which this Court has been wary. "'Catch phrases' are words that work to a proposal's favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." In re Initiative 1999-2000 # 258(A), 4 P.3d 1094, 1100 (Colo. 2000). "Just cause" and "mediation" simply describe elements of the initiative, similar to "the management of growth," which the Court found to be "a neutral phrase, with none of the hallmarks that have characterized catch phrases in the past." In re Proposed Initiative 1999-2000 #256, 12 P.3d 246, 257 (Colo. 2000). Neither "just cause" nor "mediation" is any more prejudicial in terms of voter perception than "protect the environment and human health" which did not rise to the level of a catch phrase. In re Proposed Initiative 1997-98 #112, 962 P.2d 255, 256 (Colo. 1998).

The mere assertion by Blake that these phrases are politically loaded does not satisfy the burden for this claim to be sustained. Blake was required to adduce some evidence that this phrase is something other than merely descriptive of the proposal. #256, 12 P.3d at 257. Having failed to do so, this claim cannot be the basis for a successful appeal to this Court.

IV. The Board adequately summarized the single subject of the measure.

Blake contends that the summary of the single subject – "cause of employee suspension and termination" – is overly general and does not unambiguously state the principle of the measure to be considered by voters. See Petition for Review at 3.

Blake is in error. The phrase he identifies as the single subject summary is, in fact, just the unofficial caption for the measure. It was not even fashioned by the Board. That caption has no effect on the sufficiency of the Board's title because it is not included in the official titles and summary. In re Proposed Initiative 1999-2000 #215, 3 P.3d 11, 15 (Colo. 2000). Blake does not object to the real single subject summary employed by the Board – "just cause action against an employee by an employer." Thus, this claim is without merit.

V. The Board did not need to refer the matter back to the legislative staff for another review and comment hearing.

Blake contends that the proponents' inclusion of two elements of the definition of "just cause" – the employer's bankruptcy simultaneous discharge or suspension of 10% or more of the employer's Colorado workforce – were beyond the scope of the review and comment hearing held on Initiative #62.

Question 5 in the review and comment memo drafted by the legislative staff addressed stated:

5. There appears to be no allowance for layoffs due to a lack of work or even the bankruptcy of the employer. Is this the proponents' intent? If so:

a. Where should the employee stand vis-à-vis other creditors of the employer?

b. If the employer is a corporation and has no available assets, would the employee be able to hold the individualized officers of the corporate employer personally liable? Do the proponents wish to clarify whether this would be the case and, if so, what procedure should be followed to accomplish it?

(See Appendix 1, attached hereto.) The proponents responded with one change to this part of the measure to reflect the staff's concern about "a lack of work" by establishing the 10% across-the-board layoff element of "just cause" and another change to reflect "the bankruptcy of the employer." Thus, no resubmission to the legislative offices was necessary, In re Proposed Initiative 1997-98 #10, 943 P.3d 897, 901 (Colo. 1997), and the Board correctly so held.

CONCLUSION

The Title set by the Board was adequate in all respects. This review by the Court is not undertaken to substitute judicial judgment for that of the Board's. The entire purpose of this process is to keep voters from being surprised or confused by the Board's handiwork. Blake's analysis notwithstanding there is no such risk here, and the Board's decision should be upheld.

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 2008, a true and correct copy of the foregoing **RESPONDENTS' OPENING BRIEF** was hand delivered to the following:

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MEMORANDUM

January 24, 2008

TO: Robin Wright, Cynthia Knox, and Sara Kuntzler

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #62, concerning just cause employee suspension and discharge

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment appear to be:

1. To prohibit an employer from discharging or suspending an employee unless the employer has first established just cause for the discharge or suspension;

2. To define "just cause" to mean:

a. Incompetence;
b. Substandard performance of assigned job duties;
c. Neglect of assigned job duties;
d. Repeated violations of the employer's written policies and procedures relating to job performance;
e. Gross insubordination that affects job performance;
f. Willful misconduct that affects job performance; or
g. Conviction of a crime involving moral turpitude.

3. To specify that any employee who is notified that he will be or has been discharged or suspended shall receive the employer's written documentation of the just cause used to justify such discharge or suspension;

4. To allow an employee who believes he was discharged or suspended without just cause to, within thirty days after notification of the discharge or suspension, apply for mediation of a claim for wrongful discharge or suspension;

5. To state that a hearing shall be held before a private mediator within one hundred twenty days after an employee files for mediation;

6. To permit the employee and the employer to present evidence and make legal argument at the hearing;

7. To allow a mediator who finds that an employee was discharged or suspended without just cause to award the employee all back wages or reinstatement in his former job or both;

8. To require the mediator to assess the costs for his or her services to the losing party;

9. To allow the mediator to award attorney fees to the prevailing party as to any claim made by the employee;

10. To allow the general assembly to enact legislation to facilitate the purposes of the proposed amendment;

11. To make the proposed amendment effective upon proclamation of the governor regarding the votes cast on the amendment.

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical questions:

1. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by initiative:

"Be it Enacted by the People of the State of Colorado:"

Would the proponents consider adding such an enacting clause at the beginning of the proposed measure?

2. In Colorado, when a proposed measure adds new language to the Colorado Revised Statutes or the Colorado constitution, certain drafting conventions are used.

a. To provide notice to the public of the proposed changes to the law and to identify where a new provision is to be placed, an initiative, similar to a bill or referendum, generally refers to the specific statutory or constitutional article, part, or section that is to be amended or added. Proposed measures to add new language use an "amending clause" indicating the specific section of the law where new language will be added. The amending clause would be placed following the enacting clause referred to in the above question 1. Would the proponents consider adding an amending clause to the proposed measure, indicating where the new language is to placed? (See paragraph b. below for examples of amending clauses.)

b. Each section of the statutes and the constitution begins with a section heading that includes the section number and a short description of the section contents. If the proponents decide to specify a constitutional or statutory section that is to be created, as discussed in the above paragraph a., would the proponents consider adding a section heading? For example:

SECTION 1. Part 1 of article 2 of title 8, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

8-2-124. Just cause for discharge or suspension - mediation. (1) NO EMPLOYEE MAY BE DISCHARGED OR SUSPENDED UNLESS THE EMPLOYER . . .

OR

SECTION 1. The constitution of the state of Colorado is amended BY THE ADDITION OF A NEW ARTICLE to read:

Section 1. Just cause for discharge or suspension - mediation. (1) NO EMPLOYEE MAY BE DISCHARGED OR SUSPENDED UNLESS THE EMPLOYER . . .

c. Also, if it is the proponents' intent to add a new article or part to the constitution or the statutes, an initiative, similar to a bill or referendum, generally contains an article

or part heading that refers to the subject matter of the new article or part. The heading would be placed following the amending clause referred to in paragraph a. above. If the proponents intend to add a new part or article to the statutes or the constitution, would the proponents consider adding an article or part heading to the proposed measure? (A heading is not necessary if the proponents intend to add just a section.) For example:

ARTICLE XXX

Just Cause for Employee Discharge or Suspension

(or)

PART 5

JUST CAUSE FOR EMPLOYEE DISCHARGE OR SUSPENSION

3. To be consistent with standard drafting practices, would the proponents consider:

   a. Changing the paragraph letters in subsection (2) and (4) of the proposed measure to be lower case, not small capped? For example, "(A)" should be "(a)", "(B)" should be "(b)", etc.
   b. In subsection (2), capitalizing the first letter of the first word following each of the paragraph letters (a) to (g)? For example, "INCOMPETENCE" should be "INCOMPETENCE".
   c. In paragraph (g) of subsection (2), changing the comma following the word "TURPITUDE" to a period?
   d. Making the language of the proposed measure gender-neutral? For example, in subsection (3) and paragraph (a) of subsection (4), add "OR SHE" after the word "HE" and in paragraph (b) of subsection (4), add "OR HER" after the word "HIS".

4. In paragraph (a) of subsection (4) (in line 24), there seems to be a word missing. Would the proponents consider adding the word "THE" after the word "AT"?

5. In paragraph (d) of subsection (4), would the proponents consider changing "ATTORNEYS FEES" to "ATTORNEY FEES" for the correct term?

Substantive questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?

2. Subsection (3) states that the employee shall receive written documentation of the just cause for discharge or suspension. Do the proponents want to state directly that the employer shall

provide the written documentation to the employee?

3. Subsection (4) (a) refers to application for mediation. Do the proponents wish to specify how the mediator is selected?

4. Do the proponents wish to include a process to appeal the mediator's decision or is the mediator's decision a final action?

5. There appears to be no allowance for layoffs due to a lack of work or even the bankruptcy of the employer. Is this the proponents' intent? If so:

   a. Where should the employee stand vis-à-vis other creditors of the employer?

   b. If the employer is a corporation and has no available assets, would the employee be able to hold individualized officers of the corporate employer personally liable? Do the proponents wish to clarify whether this would be the case and, if so, what procedure should be followed to accomplish it?