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OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

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<tr><td>ORIGINAL PROCEEDING PURSUANT TO
§ 1-40-107(2), C.R.S. (2007)
Appeal from the Ballot Title Setting Board</td></tr>
<tr><td>IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2007-2008, #76 ("Just Cause for Employee Discharge or Suspension")

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.</td></tr>
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Atty. Reg. #: 14621</td><td>Case Number: 08 SA 120</td></tr>
<tr><td colspan="2">RESPONDENTS' OPENING BRIEF</td></tr>
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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" is a political catch phrase that taints voter understanding of this measure.

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 employment actions against employees. This proposal was denominated as Initiatives 2007-08 #76.

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 March 19, 2008.

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1 Blake misstates the names of the Proponents in the caption to this matter. Instead of the actual proponents of #76, he lists the names of the proponents of Initiative 2007-08 #73 and #75 which he is also challenging.

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 April 2, 2008. The Board denied the motion, and this appeal followed.

STATEMENT OF FACTS PRESENTED

Initiative 2007-08 #76 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 a judicial remedy after discharge or suspension, sets timelines and procedures for such litigation, 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 cause for employee discharge or suspension, and, in connection therewith, requiring an employer to establish and document just cause for the discharge or suspension of a full-time employee; defining "just cause" to mean specified types of employee misconduct and substandard job performance, the filing of bankruptcy by the employer, or documented economic circumstances that directly and adversely affect the employer; exempting from the just cause requirement business entities that employ fewer than twenty employees, nonprofit organizations that employ fewer than one thousand employees, governmental entities, and employees who are covered by a collective bargaining agreement that requires just cause for discharge or suspension; allowing an employee who believes he or she was discharged or suspended without just cause to file a civil action in state district court; allowing a court that finds an employee's discharge or suspension to be in violation of this amendment to award

reinstatement in the employee's former job, back wages, damages, or any combination thereof; and allowing the court to award attorneys fees to the prevailing party.

SUMMARY OF ARGUMENT

The Title Board correctly found that #76 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. 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 #76 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. In re Initiative 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). In re Initiative 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 #76's legal effects does not amount to a second subject.

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) employers' right to contract; and (c) applies the measure to full-time employees (persons who have worked more than six months for an employer) but not persons subject to a bona fide collective bargaining agreement. See Motion for Rehearing at 5-7.

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.'" In re Initiative for 1997-1998 No. 64, 960 P.2d 1192, 1197 (Colo. 1998) (emphasis added), quoting In re Initiative 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.*" In re Initiative for 1997-1998 No. 74, 962 P.2d 927, 929 (Colo. 1998) (emphasis added).

The essence of Blake's arguments about terminating the at-will relationship is that such relationship can never be changed. According to Blake, it is too much a part of our social fabric to allow a just cause standard to be adopted. Such a change would allegedly violate too many provisions already in the Constitution. While novel, this is not part of a single subject analysis ever used by the Court. The at-will relationship is not enshrined constitutionally, and this measure subjects

only certain employers to the just cause standard, exempting businesses that employ fewer than twenty employees, non-profits that employ fewer than one thousand employees, all government employees, and employees subject to bona fide collective bargaining agreements.

Blake also contends that #76 "eliminates a person's fundamental right to contract." Motion for Rehearing at 6. Blake's analysis would necessitate taking the same position as to prohibitions on terminating employees because of age, sex, religion, or race. This measure simply requires that employers have a substantial job-related reason for discharge or suspension of an employee. That goal is a far cry from impairing the right to contract.

Blake's most interesting arguments before the Title Board were that voters would be surprised that a "full-time" employee was defined to mean someone who works for at least six months and is not subject to a bona fide collective bargaining agreement. Aside from making the assertion, Blake offered no insight as to why voters would be shocked at these elements of the definition. Unfortunately, Proponents can offer no insight about it either.

The Board's single subject analysis reflects this limitation, and #76 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 misleading for failure to inform voters that "just cause" is not already a part of Colorado law. Motion for Rehearing at 2.[2]

The Board's 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. 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). Such an exercise would run counter to the governing statute and judicial precedent.

In any event, Blake argues elsewhere in his Motion that the at-will doctrine is engrained in the public consciousness. "The doctrine of employment at will has deep roots in American law dating back at least to the nineteenth century." Motion for Rehearing at 5-6. If Blake is to be believed, no one thinks just cause is the

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[2] He also argued that the title should disclose that the measure applies only to full-time employees who are not subject to a collective bargaining agreement. The Board modified the title in light of these concerns.

existing legal standard for employee discharge or suspension, and the ballot title is not worded to give them any other impression.

B. "Just cause" is not a catch phrase.

Blake claims that the ballot title impermissibly contains a catch phrase, "just cause."

This is not 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). "Just cause" is no 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).

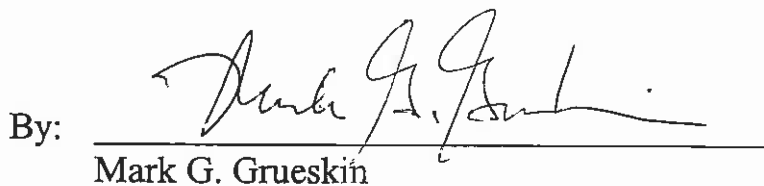
The mere assertion by Blake that this phrase is politically loaded does not satisfy the burden for this claim to be sustained. Blake was required to adduce some evidence that this phrase is something other than merely descriptive of the proposal. #256, 12 P.3d at 257. Having failed to do so, this claim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

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. There is no such risk here, and the Board's decision should be upheld.

Respectfully submitted this 29th day of April, 2008.

ISAACSON ROSENBAUM P.C.

By: 

Mark G. Grueskin

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that on the 29th 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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