

SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2007)
Appeal from the Ballot Title Board

IN THE MATTER OF THE TITLE, BALLOT
TITLE AND SUBMISSION CLAUSE FOR 2007-
2008, #96 ("COST-OF-LIVING WAGE
INCREASE")
JOSEPH B. BLAKE, OBJECTOR,

Petitioner,

v.

ERNEST L. DURAN, JR., AND BRADLEY
JOHNSON, PROPONENTS; AND WILLIAM A.
HOBBS, DANIEL L. CARTIN, AND DANIEL
DOMENICO, TITLE BOARD,

Respondents.

JOHN W. SUTHERS, Attorney General
MAURICE G. KNAIZER, Deputy Attorney
General*
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FILED IN THE
SUPREME COURT

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OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

▲ COURT USE ONLY ▲

Case No.: 08SA179

OPENING BRIEF OF TITLE BOARD

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William A. Hobbs, Daniel L. Cartin and Daniel Domenico, in their capacities as members of the Title Board (hereinafter “Board”), hereby submit their Opening Brief.

STATEMENT OF THE ISSUES

The Board adopts the statement of issues set forth in the Objector’s Petition for Review.

STATEMENT OF THE CASE

On April 25, 2008 the proponents filed Proposed Initiative #96 (#96) with the Secretary of State. The Board held a hearing to set the titles on May 7, 2008. The Board concluded that #96 had a single subject and set a title.

On May 14, 2008, Joseph Blake, the Objector, filed a motion for rehearing. He alleged that #96 contained multiple subjects; that the cost of living provision was fatally flawed; and that the titles were misleading, incomplete, confusing and inaccurate.

On May 21, 2008, the board denied the motion for rehearing. The Objector filed this appeal.

STATEMENT OF THE FACTS

#96, if enacted, would add section 124 to title 8, article 2 of the Colorado Revised Statutes. This measure would require all employers to provide their employees an annual wage or salary increase to account for an increase in the cost of living, as calculated by the Consumer Price Index referred to in Colo. Const. art. XVIII, § 15. The measure exempts wage or salary increases if the employer provides an annual wage or salary increase equal to or greater than the increase required by #96. An employer may not reduce the wages or salaries due to a decrease in the Consumer Price Index. An employee who does not receive a wage increase required by #96 may file a civil action to recover amounts owed to the employee.

SUMMARY OF THE ARGUMENT

#96 contains only one subject: annual cost of living wage or salary increases to employees. All of the provisions directly relate to this subject.

ARGUMENT

I. **#96 contains one subject: annual cost of living increases in employees' wages and salaries.**

The Objector contends that the Board should not have set titles because #96 contains more than one subject, thereby violating Colo. Const. art. V, § 1(5.5), which states:

No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in the title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

A proposed initiative violates the single subject rule if it “relate[s] to more than one subject and ... [has] at least two distinct and separate purposes which are not dependent upon or connected with each other.” *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2005-2006 #55*, 138 P.3d 273, 277 (Colo. 2002)(Colo. 2006) (#55) A proposed initiative that “tends to effect or to carry out one general objective or purpose presents only one subject.” *In re Ballot Title 1999-2000 #25*, 974 P.2d 458, 463 (Colo. 1999). The single subject rule both

prevents joinder of multiple subjects to secure the support of various factions and prevents voter fraud and surprise. #55, 138 P.3d at 277 *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-02* #43, 46 P.3d 438, 442 (Colo. 2002)(#43).

The Court will not address the merits of a proposed measure, interpret it or construe its future legal effects. #43, 46 P.3d at 443. . *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000* #258(A), 4 P.3d 1094, 1097-98 (Colo. 2000). The Court may engage in a limited inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. *In re Title, Ballot Title and Submission Clause for 2001-2002* #21 and #22, 44 P.3d, 213, 216 (Colo. 2002). The single subject rule must be liberally construed to avoid unduly restricting the right of initiative. *In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 No. 74*, 962 P.2d 927, 929 (Colo. 1998). Sections of a measure that include “implementation or enforcement details directly tied to the single subject will not, in and of themselves, constitute a single subject.” *Title, Ballot Title and Submission Clause, and Summary for 2005-2006* #73, 135 P.3d 736, 739 (Colo. 2006).

#96 has only one subject: annual cost of living increases in employees' wages or salaries. Each section relates to this subject. Employers must provide an annual cost of living increase to their employees' annual wages or salaries. The cost of living increase will be measured by the index used by the Department of Labor and Employment. #96 does not require an increase if the employer provides increases equal to or greater than those required by the amendment. The measure states that an employer may not reduce wages or salaries due to a decrease in the Consumer Price Index. The measure defines the terms "employer" and "employee" and describes enforcement mechanisms.

Objector contends that the measure has three separate subjects in addition to providing an annual wage or salary increase to account for a cost of living. First, he contends that the measure prohibits employers from reducing wages or salaries if because of a decrease in the Consumer Price Index. Contrary to Objector's analysis, this provision relates directly to annual wage or salary increases. A key function of the measure is ensuring that wages keep up with costs. Increases in wages are tied to the Consumer Price Index. It is possible that the Consumer Price Increase will fall. The requirement that wages cannot be reduced if the Consumer

Price Index falls is consistent with the measure's goal. Thus, it relates directly to the underlying purpose of the measure.

Objector next asserts that the measure eliminates "the fundamental right to contract." The court rejected this argument in *In re Title Ballot Title and Submission Clause for 2007-2008 #62* 2008 WL 2081571 (Colo.) (May 16, 2008) (#62). In response to this argument, the Court stated:

In short, Petitioner thinly parses the language of the measure in an attempt to create separate and distinct subjects. In order to do this, Petitioner speculates about the effects of the measure, postulating that if the measure is interpreted in a way that fits his conclusions, then the measure will have multiple effects. This approach is erroneous.

Id. at *6. Mere speculation about the legal effects of a measure is an insufficient ground upon which to assess the single subject. *Id.*

Objector also contends that the measure creates new civil penalties. The inclusion of penalties and enforcement procedures does not create a different subject. "[N]either the addition of civil penalties nor the enforcement of those penalties through private rights of action constitute separate subjects." *Blake v. King*, 2008 WL 2167847 (Colo.) (May 23, 2008) *3.

All of the sections cited by Objector do nothing more than define, implement and enforce the measure. The measure does nothing more than identify who must provide health care coverage, who can receive health care coverage, and the means by which health care coverage will be provided. “All of the measure’s sections, whether definition, implementation, or enforcement, relate to [the] single subject.” *Id. See also, Advisory Opinion to the Attorney General Re Florida Minimum Wage*, 880 So.2d 636 (Fla. 2004).

Finally, Objector contends that the Board should not have set the titles because the cost-of-living provision cannot be implemented. #96 requires the Department of Labor and Employment to use the same Consumer Price Index as it uses in making adjustments for inflation to the minimum wage rate pursuant to Colo. Const. art. XVIII, § 15. Section 15 refers to “the Consumer Price Index used for Colorado”. According to Objector, there is no such Consumer Price Index. Therefore, he asserts that the Board cannot set a title. The Court must reject this argument.

First, the Board cannot speculate about the constitutionality or feasibility of a measure when setting titles. #62, *supra*. Moreover, if the Board has the authority to assess the constitutionality or impact of a measure, the Board still would be

required to set a title. The Board must set a title if it understands the measure, and the measure has a single subject.

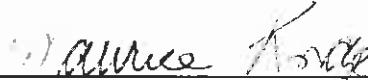
Second, Objector did not offer any legal authority for his proposition. Contrary to his assertion, the “Consumer Price Index” as used in article XVIII, § 15, can be identified. The Department of Labor and Employment has implemented Colo. Const. art. XVIII, § 15 by its promulgation of the Colorado Minimum Wage Order Number 24, 7 CCR 1103-1. It calculates the increase by using the Consumer Price Index for All Urban Consumers (CPI-U), All Items, for the Denver-Boulder-Greeley combined metropolitan statistical area as published by the United States Bureau of Labor Statistics. <http://www.coworkforce.com/lab>. Therefore, the contention that calculations cannot be made under the “Consumer Price Index” is without merit.

CONCLUSION

For the above-state reasons, the Court must affirm the Board’s action,

JOHN W. SUTHERS

Attorney General



MAURICE G. KNAIZER, 05264*

Deputy Attorney General

Public Officials

State Services Section

Attorneys for Title Board

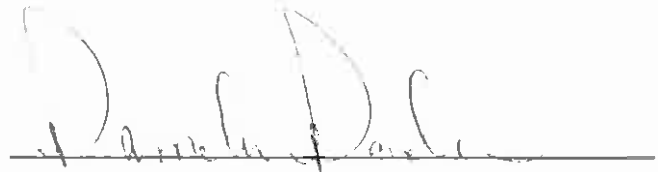
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **OPENING BRIEF OF TITLE BOARD** upon all parties herein by depositing copies of same overnight by DHL at Denver, Colorado, this 3rd day of June 2008 addressed as follows:

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A handwritten signature in black ink, appearing to read "Douglas J. Friednash", is written over a horizontal line.

*Proposed Initiative
#96
Final Text*

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

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

8-2-124. Cost-of-living wage or salary increase. (1) ALL EMPLOYERS SHALL PROVIDE TO THEIR EMPLOYEES AN ANNUAL WAGE OR SALARY INCREASE TO ACCOUNT FOR AN INCREASE IN THE COST OF LIVING, AS MEASURED BY THE CONSUMER PRICE INDEX ("CPI") USED FOR COLORADO. THE CPI SHALL BE THE SAME INDEX USED BY THE DEPARTMENT OF LABOR AND EMPLOYMENT IN MAKING ADJUSTMENTS FOR INFLATION TO THE STATE MINIMUM WAGE RATE PURSUANT TO ARTICLE XVIII, SECTION 15, OF THE CONSTITUTION OF THE STATE OF COLORADO. THE WAGE OR SALARY INCREASE MAY BE BASED UPON A CALENDAR YEAR, ANNIVERSARY YEAR, FISCAL YEAR, OR OTHER BASIS, SO LONG AS IT IS PROVIDED AT AN ANNUAL INTERVAL.

(2) THIS SECTION DOES NOT REQUIRE AN ADDITIONAL WAGE OR SALARY INCREASE IF THE EMPLOYER, PURSUANT TO ITS POLICY OR PRACTICE, AGREEMENTS WITH EMPLOYEES OR LABOR ORGANIZATIONS, OR ANY OTHER REASON OR OTHER LAW, INCLUDING ARTICLE XVIII, SECTION 15, OF THE CONSTITUTION OF THE STATE OF COLORADO, PROVIDES ANNUAL WAGE OR SALARY INCREASES EQUAL TO OR GREATER THAN THE INCREASE REQUIRED BY THIS SECTION.

(3) IN NO EVENT SHALL AN EMPLOYER REDUCE THE WAGES OR SALARIES OF AN EMPLOYEE OR EMPLOYEES BECAUSE OF A DECREASE IN THE CPI.

(4) "EMPLOYER" AND "EMPLOYEE" SHALL HAVE THE MEANINGS SET FORTH IN SECTION 8-4-101, EXCEPT THAT THE REQUIREMENTS OF THIS SECTION SHALL APPLY ONLY TO EMPLOYERS THAT REGULARLY EMPLOY TEN OR MORE EMPLOYEES IN THE STATE OF COLORADO.

(5) ANY PERSON MAY REGISTER A COMPLAINT WITH THE DIVISION OF LABOR IN THE DEPARTMENT OF LABOR AND EMPLOYMENT THAT AN EMPLOYEE OR EMPLOYEES HAVE NOT RECEIVED THE ANNUAL WAGE OR SALARY INCREASE REQUIRED BY THIS SECTION. THE DIRECTOR OF THE DIVISION SHALL INVESTIGATE THE COMPLAINT AND TAKE ALL PROCEEDINGS NECESSARY TO ENFORCE THE PAYMENT OF SUCH INCREASE.

(6) AN EMPLOYEE WHO DOES NOT RECEIVE THE ANNUAL WAGE OR SALARY INCREASE REQUIRED BY THIS SECTION IS ENTITLED TO RECOVER IN A CIVIL ACTION THE UNPAID BALANCE OF SUCH INCREASE, TOGETHER WITH THE COSTS OF SUIT AND REASONABLE ATTORNEY FEES IF THE EMPLOYEE PREVAILS, NOTWITHSTANDING ANY AGREEMENT TO WORK FOR A LESSER WAGE OR SALARY.

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ELECTIONS
SECRETARY OF STATE

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KW*

Ballot Title Setting Board

Proposed Initiative 2007-2008 #96¹

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado Revised Statutes concerning annual cost of living increases in employees' wages or salaries, and, in connection therewith, requiring employers to provide annual wage or salary increases to their employees to adjust for increases in the cost of living; restricting such requirement to employers who regularly employ ten or more persons; requiring that such increases shall be measured by the same consumer price index used for Colorado by the state department of labor and employment to make changes to the state minimum wage; specifying that the cost-of-living increase shall not apply for employees who receive annual wage or salary increases equal to or greater than the cost-of-living increases mandated by the measure; prohibiting employers from reducing wages or salaries due to a decrease in cost of living; enabling aggrieved employees to file complaints related to the cost-of-living increase with the state department of labor and employment and authorizing the director of that department to conduct investigations of such complaints and, if warranted, take action to enforce the payment of the cost-of-living increase; and enabling employees who did not receive the required cost-of-living increase to recover the amount of the adjustment owed, along with reasonable attorney fees, in a civil action.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado Revised Statutes concerning annual cost of living increases in employees' wages or salaries, and, in connection therewith, requiring employers to provide annual wage or salary increases to their employees to adjust for increases in the cost of living; restricting such requirement to employers who regularly employ ten or more persons; requiring that such increases shall be measured by the same consumer price index used for Colorado by the state department of labor and employment to make changes to the state minimum wage; specifying that the cost-of-living increase shall not apply for employees who receive annual wage or salary increases equal to or greater than the cost-of-living increases mandated by the measure; prohibiting employers from reducing wages or salaries due to a decrease in cost of living; enabling aggrieved employees to file complaints related to the cost-of-living increase with the state department of labor and employment and authorizing the director of that department to conduct investigations of such complaints and, if warranted, take action to enforce the payment of the cost-of-living increase; and enabling employees who did not receive the required cost-of-living increase to recover the amount of the adjustment owed, along with reasonable attorney fees, in a civil action?

¹ Unofficially captioned "Cost-of-Living Wage Increase" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

Hearing May 7, 2008:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 11:57 a.m.

Hearing May 21, 2008:

Motion for Rehearing denied.

Hearing adjourned 12:12 p.m.