AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO

CATHRYN L. HAZOURI EXECUTIVE DIRECTOR. MARK SILVERSTEIN, LEGAL DIRECTOR

March 1, 2004

Bill Taylor
Associate Director
Department of Personnel & Administration
Division of Central Services
1001 E. 62nd Avenue
Denver, Colorado 80216

Re: proposed regulations for permits for State Capitol Grounds

Dear Mr. Taylor:

I write to provide comments about changes that the Department of Personnel and Administration (DPA) has proposed making to the State Capitol Buildings Group Grounds Permit Regulations. These proposed changes are being considered at a public hearing on March 1, 2004, at 8:30 a.m. Please include these comments in the administrative record.

One of the most frequently-used locations in Denver for expressing political views of all kinds is the steps of the State Capitol Building. Every year, the DPA issues hundreds of permits authorizing use of the steps of the Capitol or other portions of the Capitol grounds for rallies, demonstrations, or other expressive activity. These locations are public fora, where government bears the burden of justifying regulations that infringe the right of expression. With regard to many of the proposed regulations, the American Civil Liberties Union Foundation of Colorado (ACLU) believes that the DPA will have a difficult time meeting that burden of justification.

The ACLU has been involved in a dispute with the DPA about one of the current regulations, which states "solicitation" is prohibited on the State Capitol grounds. Because solicitation is a form of expression that is protected by the First Amendment, this blanket ban on constitutionally-protected expression violates the Constitution. After several years of trying to raise this issue with Colorado authorities, through letters and telephone calls, the ACLU filed a lawsuit last September to challenge the regulation in federal court.

The Executive Director of DPA at the time, to his credit, quickly acknowledged that the regulation violates the Constitution. On September 26, 2003, he issued a temporary emergency rule that rescinded the ban on "solicitation." He stated that he intended to adopt a corresponding permanent regulation.

Emergency rules can last for only 90 days. At the end of December, the DPA adopted a new emergency rule that restored the ban on "solicitation," but with an exception for solicitation that occurred in connection with permitted events. That emergency rule expires later this month.

The DPA has now proposed the text for the permanent rule to replace the blanket ban on solicitation. Unfortunately, the proposed text fails to resolve the constitutional flaws that prompted the current legal dispute. Moreover, in the course of considering revisions to the regulation that is challenged in the ACLU's lawsuit, the DPA apparently decided that it should revamp all the regulations that apply to the State Capitol Buildings Group Grounds. In the course of doing so, the DPA now proposes a number of regulations that are unnecessary, unwise, and also, in many cases, unconstitutional.

Solicitation

The current permanent regulation reads as follows:

> 1.436. Solicitation and/or commercial enterprise are not allowed on the State Capitol Buildings Group Grounds.

The regulation, as temporarily amended effective September 26, 2003, read as follows:

> 1.436. Commercial enterprise is not allowed on the State Capitol Buildings Group Grounds.

The emergency regulation adopted in September was in force only for three months. The second emergency rule, adopted in December and effective until March 26, 2004, reads as follows:

> 1.436. Solicitations or commercial enterprise is not allowed on the State Capitol Buildings Group Grounds, except as part of a permitted demonstration or special event.

Because the first emergency regulation is no longer in force, and because the second will expire in a few weeks, I will focus on the text that the DPA proposes for the permanent regulation.

The proposed permanent rule(s) regarding solicitation

Paragraph 1.10 of the proposed rules provides a definition of "solicitation," stating that the term "means any request or demand for monetary contributions or the sale of expressive materials, such as bumper stickers or buttons."

Paragraph 4.1 states that "[s]olicitation and commercial enterprise generally are not allowed in the buildings or on building grounds."

The area where the ban on solicitation applies is described in paragraph 1.12, which defines "State Capitol Buildings Group Grounds." That encompasses all state-owned buildings and the adjacent grounds in the area bounded by Sixteenth Avenue, Eleventh Avenue, Broadway, and Grant Street.

Solicitation is allowed in Lincoln Park (Paragraph 3.1). In addition, Paragraph 2.2 provides a small exception to the ban on solicitation on the Capitol Grounds. It states as follows:

> 2.2 Permitted demonstrations and special events are allowed solicitation related to the demonstration or special event on grassy areas only within a one hundred (100) feet external radius of the site defined by their permit. No other solicitation is allowed on the Capitol Grounds, including on the steps of the Capitol or the driveway around the Capitol.

The general ban on solicitation forbids all requests for money within a large geographical area. It is so broad that it forbids file clerks in numerous state offices from asking a co-worker for change for the coffee machine. Indeed, it forbids workers in the Colorado Department of Revenue from mailing out state tax forms, which solicit voluntary contributions for the Colorado Domestic Abuse Fund, the Special Olympics Colorado Fund, and eight additional funds.

The exception for demonstrations in Paragraph 2.2 is flawed for several reasons. First, it forbids solicitation in the more desirable locations within the customary area where demonstrations and rallies are held: the steps of the Capitol and the concrete walkways. It permits solicitation only on certain grassy areas, which can be totally inaccessible for days or weeks after a heavy snowfall. Second, it forbids solicitation that is not "related to" the demonstration. By allowing solicitation that is "related to" the demonstration but forbidding solicitation that is not related, the regulation represents content discrimination that is forbidden by the First Amendment. In addition, the term "related to" is overly vague, a defect that is especially problematic because violation of the regulation is a criminal offense. Prohibitions that implicate First Amendment rights and that also carry criminal penalties are subjected to the strictest legal test for vagueness. Third, the regulation allows only the permit holder to engage in solicitation. Participants or spectators are forbidden to speak, even to persons standing next to them, if that speech involves any request for money, no matter how unobtrusive. This regulation forbids spectators at a demonstration from asking one of their companions for a quarter to feed the parking meter.

Even if the DPA were able to convince a court that its proposed regulation were entitled to the most lenient legal standard that is possible, the regulation could be sustained only if

it were content-neutral and narrowly tailored to advance a significant government interest.

It is difficult to imagine what significant government interest the DPA believes it is advancing by proposing such a broad ban on such an innocuous and constitutionally-protected activity. Regardless of what harms the DPA believes its regulation aims to prevent, surely they can be adequately addressed with a targeted regulation that directly addresses the anticipated harm. It can surely do so without regulating solicitation at all during, and in the vicinity of, validly permitted rallies or demonstrations.

New authority to deny permits when "level of security" is heightened

Paragraph 6.6 of the proposed rules provides that a permit can be denied when "[t]he event is scheduled and the level of security is heightened as declared by the Governor or the Office of Homeland Security." This provision grants almost complete discretion to deny almost any permit for any expressive activity at any time.

The Department of Homeland Security has implemented a color-coded advisory system to denote when the threat of terrorism warrants a heightened level of security.[1] According to that advisory system, we have been in either yellow or orange ever since the color-coding scheme was devised in September of 2002. Yellow indicates "elevated condition," and orange indicates an even higher level of alert. Thus, under the proposed new rule, the DPA would have had discretion to deny any permit for any demonstration in the last 18 months. Moreover, the proposed regulation provides absolutely no guidance to the decisionmaker about when a state of "heightened security" requires denying a permit and when it does not. By granting a government official absolute and unguided discretion to allow or forbid speech, the proposed regulation violates the First Amendment.

New authority to cancel permits

Paragraph 8.1 contains a new provision that permits the DPA to revoke permits. It reads as follows:

> A permit issued for a demonstration of special event on the State Capitol Buildings Group Grounds is revocable if the permittee, participants, or spectators violate these regulations or the laws of the U.S. or the State of Colorado. Any such revocation, prior to the conduct of the demonstration or special event shall be in writing, and shall be approved by the Executive Director.

This provision provides that a permit can be canceled if the permittee, participants, or spectators violate any laws. It doesn't specify that the violations of law must occur on the State Capitol grounds, nor does it specify that the

[1] Paragraph 6.6 also refers to the Governor declaring that "the level of security" is heightened. I have not been able to find any statutory authority that sets out criteria for the Governor to make such a declaration.

violations must have some connection to the permit or the permitted event. This regulation provides that permit holders who get speeding tickets would thereby forfeit their First Amendment right to sponsor a rally at the seat of state government. Indeed, it provides that permittees lose their First Amendment rights if any of the participants or spectators violate the speeding laws. It is unclear how the State of Colorado intends to determine, in advance of the rally, the identities of participants or spectators at events that have not yet taken place. Yet the last sentence of the regulation clearly contemplates that permits might be canceled before the event because spectators or participants violate some law, someplace, at some time. This proposed regulation is not only unconstitutional; it is absurd.

Even if the regulation is narrowed so that it applies only to conduct that occurs during the rally, it is still overly broad. It authorizes silencing the persons who have obtained permits because of the actions of participants or spectators over whom they have no control. Moreover, it authorizes canceling the permit for any violation of law or any violation of a regulation, no matter how minor. In combination with the prohibition on solicitation, this regulation authorizes canceling the permit for a rally if a State Patrol officer overhears someone ask a friend for a quarter to feed a nearby parking meter.

New and unnecessary limits on expression

The proposed regulations unnecessarily limit the locations for permitted events. In the past, rallies have taken place on the East steps of the Capitol as well as the West Steps. The proposed regulations limit rallies to the West steps only. In addition, the regulations state that only one permitted event can take place at any one time. Instead of attempting to limit expression, the regulations should encourage it. There is no reason why simultaneous rallies could not occur at different locations within the territory covered by the regulations.

CURRENT REGULATIONS PROPOSED FOR RE-ENACTMENT

In addition to proposing new regulations, the DPA has also proposed re-adopting additional regulations that are currently in force. In the remainder of this letter, I will provide comments on some of those proposed regulations. .

Paragraph 5.2: 30-day advance notice

The proposed regulations specify that applications for permits must be submitted at least 30 days in advance of the date for a demonstration. There will be many occasions, however, when applicants will be unable to submit applications that far in advance. This is especially true when individuals or organizations want to express their views about breaking news events. Courts have recognized that strict enforcement of such an advance-notice requirement would violate the First Amendment. See NAACP v. City of Richmond, 743 F.2d 1346 (9th Cir. 1984) (holding that 20-day advance notice requirement for holding a parade violates the First Amendment). Requiring that permits be submitted thirty days in advance places more of a burden on expression that is necessary. Surely a request for a

parade permit prompts more administrative tasks than a request to reserve the steps of the State Capitol, yet numerous jurisdictions throughout the country are able to accommodate requests for parade permits that are submitted much closer to the date of the planned event. The requirement of advance notice should be shortened to reflect the period of time that is actually necessary for the DPA to carry out the administrative tasks that are necessary for processing the application.

Paragraph 5.3: waiver of the 30-day advance notice requirement

An inflexible requirement of advance notice that prevents persons from expressing their views on breaking news events would violate the First Amendment. The proposed regulation appropriately provides for a waiver of the advance-notice requirement. But the provision is drafted in a manner that 1) undoubtedly chills and discourages expression; and 2) violates the First Amendment by according unbridled discretion to the decisionmaker.

The exception is available only when the applicant "can demonstrate the impossibility" of complying with the 30-day advance notice requirement. This wording is likely to deter or discourage permit applicants in cases where a late application would be entirely appropriate. The text should be modified so that the regulation permits a late application in cases where a timely filing would be impractical. In addition, the regulation should provide an example of a situation in which a late application would be appropriate, such as when the demonstration is being held to address late-breaking news and waiting 30 days would dilute or alter the nature of the desired expression.

Paragraph 5.3 reads as though the executive director has complete discretion to grant or deny an application submitted less than thirty days in advance. Such discretion violates the First Amendment rule that permit schemes cannot permit the decisionmaker to wield unbridled discretion to permit or prohibit expression. The regulation should be redrafted to make it clear that when a late application is considered, it will be granted or denied on the same basis as other permits and only for one of the grounds specified in the section on permit denials.

Paragraph 6.3: clear and present danger

The proposed regulations provide that the Director of DPA can deny a permit when:

> It reasonably appears that the proposed demonstration or special event will present a clear and present danger to the public safety, good order, or health through a substantial and imminent threat of violence or destruction of property.

Paragraph 6.3. This provision is flawed in two respects. First, it permits the DPA unilaterally to deny a permit, and thus institute a prior restraint, without providing the permit applicants with any prior notice or opportunity to be heard. That procedural flaw violates the First Amendment principles articulated in Caroll v. Princess Anne, 393 U.S. 175, 180 (1968) (holding invalid an ex parte order forbidding holding of a political rally).

At a minimum, the regulation should require that the DPA inform the permit applicant of the Director's concerns and provide an opportunity for those concerns to be addressed.

Second, the proposed regulation grants the DPA too wide an authority to deny a permit. If a "clear and present danger" is sufficient to deny the right of expression, it is sufficient only when the government demonstrates that there is a clear and present danger, not when it "reasonably appears" there may be such a danger. The proposed rule allows a permit to be denied simply because the DPA has some grounds to suspect that the legal standard may be met. That is not sufficient. The text should be modified so that the regulation authorizes denying a permit only when it is clear that the event presents a clear and present danger. See National Socialist White People's Party v. Ringers 473 F.2d 1010 (4th Cir. 1972) (en banc) (reversing denial of a permit to use a school auditorium and ordering lower court to issue an injunction "requiring the Board to give the Party access to the auditorium unless a clear and present danger to good order or the preservation of property is shown").

Paragraph 8.2: permit revocation

Paragraph 8.2 provides as follows:

> 8.2 During the conduct of a demonstration or special event, the ranking police supervisory official in charge may revoke a permit if continuation of the event presents a clear and present danger to the public safety, good order, or health, or for any violation of applicable law or regulation.

The underlined portion appears to authorize the Colorado State Patrol to revoke a permit and shut down a demonstration if any spectator or participant at the event is violating any applicable law or regulation. This authority is overbroad for two reasons. First, it unjustifiably permits the government to revoke an organization's right of expression because of the conduct of persons unconnected with the organization and over whom the organization has no control. Second, even if the underlined portion applies solely to the violations for which the permittee is responsible, it nevertheless authorizes a severe and unjustified sanction – a prior restraint on the exercise of First Amendment rights – for minor violations of law or regulation. It apparently authorizes the State Patrol to shut down a rally if someone at the microphone solicits funds in violation of the solicitation regulation.

Additional provision

The DPA ought to add a sentence to the section of the regulations regarding permit applications. It should state that the DPA may not deny a permit based upon political, social, or religious grounds, nor may a permit be denied because of the viewpoints to be expressed.

I thank you for considering these comments.

Sincerely,

Mark Silverstein
Legal Director, ACLU of Colorado