DISTRICT COURT **CITY AND COUNTY OF DENVER, COLORADO**	 ▲ COURT USE ONLY ▲
Plaintiff: **AMERICAN CIVIL LIBERTIES UNION OF COLORADO, INC.** Defendant: **JEFFREY WELLS**, in his official capacity as Executive Director of the Colorado Department of Personnel and Administration	Case Number: **04 CV 4161** **Courtroom 6**

O R D E R

THIS MATTER comes before the court on cross motions for summary judgment with a stipulated set of facts. Plaintiff has brought this action challenging the validity of DPA regulations governing the standards for issuing, denying, canceling and revoking permits for demonstrations and special events in the public areas adjacent to the State Capitol. The plaintiff specifically attacks various parts of the regulation. The specific sections of the regulations attacked are:

> 9.0 Cancellations
>
> The permit holder must notify the Executive Director 24 hours in advance of any cancellation of any event. The Executive director may cancel a scheduled event if the level of security is heightened, as declared by the President, the Governor, the U.S. Department of Homeland Security, or Colorado Office of Preparedness Security and Fire Safety.
>
> 1.8 "Solicitation" means any request or demand for monetary contributions or the sale of expressive materials, such as bumper stickers or buttons.
>
> 3.2 Events and solicitation authorized by a permit holder may be conducted on the State Capitol Grounds only within a 100-foot external radius of the site defined by a permit. No other

solicitation is allowed on the State Capitol Grounds except on the perimeter sidewalks.

5.0 Other State Buildings and Grounds

Solicitation and commercial enterprise within state buildings and on grounds other than the State Capitol Grounds and Lincoln Park are not allowed except on the perimeter sidewalks when in conjunction with Department of Human Services business enterprise activities pursuant to §§26-8.5-101, *et seq.*, C.R.S., or in the usable space of an agency occupying a building as an approved tenant when the head of the agency approves the activity in writing and takes full responsibility for the activity.

7.0 Permit Denials

A permit may be denied in writing by the Executive Director upon the following grounds:

7.4 It reasonably appears that the proposed event is likely to incite or produce imminent lawless action. No permit shall be denied based upon the content of the views to be expressed at the event.

8.0 Permit Revocation

8.1 A permit issued for an event at the State Capitol Complex Buildings and Grounds is revocable if the permit holder or participants violate these regulations or the laws of the United States or State of Colorado in the course of the event.

8.2 During the conduct of an event, the ranking law enforcement official in charge may revoke a permit if it reasonably appears that continuation of the event is likely to incite or product imminent lawless action. Law enforcement officials may direct counter-demonstrators to alternative locations in order to preserve the permit holder's privileges and to protect public health, safety and welfare.

6.0 Permit Applications

6.2 Applications to conduct an event at the State Capitol Complex Buildings and Grounds may be obtained from the Department of Personnel & Administration, Division of Central Services located at 225 East Sixteenth Avenue, Suite 800, Denver, Colorado, 80203. Applications will not be accepted more than 180

> days nor less than 30 days before a proposed event is scheduled to occur. Applications must be legible and complete, and on the approved form. The Executive Director may grant a waiver if it appears that, under the circumstances, it would be possible to adequately protect public safety, health, and welfare.

(The court has listed the regulations in this order because it is the order chosen by plaintiff in its opening brief.)

APPLICABLE LAW

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Article II, sec. 10 of the Colorado Constitution provides:

> **Freedom of speech and press**. No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court shall determine the law and the fact.

Plaintiff argues that the pertinent sections of the regulations are violative of the above state and federal constitutional provisions. Needless to say, Colorado and federal courts have been interpreting these constitutional provisions ever since the first statute or regulation touching upon freedom of speech was passed. These case interpretations have given, necessarily, complexity to these otherwise simple and straightforward statements of rights.

In his opinion in *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) Justice Marshall examined two ordinances of the City of Rockford, Illinois. The court's conclusion was that the "anti-picketing" ordinance was unconstitutional but that the "antinoise" ordinance was constitutional. The case involved picketing at Rockford West High School.

The *Grayned* opinion is important and has been cited by both plaintiff and defendant in this case. Perhaps the most important part of the opinion, and perhaps the most frequently cited, is the following:

> Condemned to the use of words, we can never expect mathematical certainty from our language.

(*Grayned v. City of Rockford*, 408 U.S. 104, 110.)

Legislators and regulators have no tool other than language. Justice Marshall and other justices in other cases have worked to provide interpretive tools for the analysis of statutes and regulations which address free speech issues. Free speech is not absolute. Justice Marshall himself wrote:

> Subject to such reasonable regulation, however, peaceful demonstrations in public places are protected by the First Amendment. Of course, where demonstrations turn violent, they lose their protected quality as expression under the First Amendment.

(*Grayned v. Rockford, supra,* at 116.)

Chief Justice Rehnquist wrote: "But it is also well settled that the government need not permit all forms of speech on property that it owns and controls." *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 678.

Because it is universally acknowledged that freedom of speech may be regulated the words of regulation must be crafted with care.

CONTENT ANALYSIS

The court believes the first analysis must be whether the regulation is content-based. Content-based regulation is subject to the most intensive scrutiny.

In *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) Justice Kennedy discussed regulations limiting freedom of speech in terms of their content as follows:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. *Community for Creative Non-Violence, supra*, 468 U.S., at 295, 104 S.Ct., at 3070. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. *See Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925, 929-

> 930, 89 L.Ed.2d 29 (1986). Government regulation of expressive activity is content-neutral so long as it is "*justified* without reference to the content of the regulated speech." (*Community for Creative Non-Violence, supra*, 468 U.S. at 293, 104 S.Ct. at 3069 (emphasis added); . . . .

(*Ward v. Rock Against Racism*, 491 U.S. 781, 791.)

The Colorado Supreme court has addressed content-neutrality in *Denver Publishing Company v. City of Aurora*, 896 P.2d 306 (Colo. 1995). In that case the parties agreed that the subject ordinance was content-neutral. Given that stipulation Chief Justice Rovira then described the examination which need be made. He stated:

> At the outset the parties have agreed that the Ordinance is content-neutral, and thus, while it falls under the auspices of heightened public for a review, the proper inquiry is whether the Ordinance is a valid time, place or manner regulation.

(*Denver Publishing Company v. City of Aurora*, 896 P.2d 306, 311.)

Justice Rovira went on to state standards which must be met in order to sustain a content-neutral regulation on freedom of speech. He said:

> As explained above, a content-neutral restriction will withstand constitutional review if it is narrowly tailored to serve a significant governmental interest. *E.g. id*.; *Perry*, 460 U.S. at 45, 103 S.Ct. at 954-55 (1983); *Williams v. Denver*, 622 P.2d 542 (Colo. 1981). Further, courts must consider the restriction in context to determine whether alternative methods of communication remain available.

(*Denver Publishing Company v. City of Aurora*, 896 P.2d 306, 312.)

Guided by the above pronouncements the court turns first to the regulations addressed by plaintiff's claims to determine whether they are based upon the content of speech or "content-neutral". The court concludes that they are content-neutral.

First, regulation 7.4 states specifically "no permit shall be denied based upon the content of the views to be expressed at the event."

Second, a review of the entire set of regulations discloses no content-based restriction. The regulations taken as a whole apply equally to all demonstrations and special events at the State Capitol Complex Buildings and Grounds.

Third, facts have been stipulated to and there is no particular permit has been denied based upon anticipated content of the demonstration or special event.

SIGNIFICANT GOVERNMENT INTEREST ANALYSIS

The court's conclusion that these are content-neutral regulations does not end the inquiry, however. The next step is for the court to determine whether the regulation "advance[s] a significant governmental interest." (*Denver Publishing Company v. City of Aurora*, 896 P.2d 306, 313 quoting from *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37 at 45.)

The *Denver Publishing* case discussed the analysis of content-neutral restrictions in the following language:

> Even a content-neutral restriction must be narrowly tailored. *E.g., Madsen v. Women's Health Center*, 512 U.S. 753 ---- 114 S.Ct. 2516, 2524, 129 L.Ed.2d 593 (1994). Narrow tailoring does not, however, mean that the regulation must be the least restrictive alternative. The Supreme Court explained this distinction in *Ward v. Rock Against Racism*, 491 U.S. 781, 798, 109 S.Ct. 2746, 2757-58, 105 L.Ed.2d 661 (1989):
>
> > Lest any confusion on the point remain, we reaffirm today that a regulation of time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interest but that it need not be the least restrictive or least intrusive means of doing so.
>
> In *Ward*, the court found that the appellate court had erred by "sifting through all of the available or imagined alternatives" to achieve the City's interest in regulating the sound volume emanating from a municipal band shell. *Id*. at 797, 109 S.Ct. at 2757. The Court explained the least restrictive analysis has never been part of the time, place and manner analysis. *Id*. at 798 n. 6 109 S.Ct. at 2757-58 n. 6 ("[T]he same degree of tailoring is not required of these [content-neutral] regulations, and least-restrictive-alternative analysis is fully out of place."). Rather, the legislation must "promote a substantial governmental interest that would be achieved less effectively absent the regulation." *Id*. at 799, 109 S.Ct. at 2758 (quoting *United States v. Albertini*, 472 U.S. at 689, 105 S.Ct. at 2906-07 (1985)).

(*Denver Publishing Company v. City of Aurora, supra*, at 314.)

Does the regulated scheme highlighted by the subsections at issue here "promote a substantial governmental interest that would be achieved less effectively absent the regulation"? The regulations themselves state their purpose:

> The purpose of these rules is to establish standards for acceptance, processing, review and disposition of permanent applications for demonstrations and special events at the State Capitol Complex Buildings and Grounds. Statutory authority exists in §§24-30-102(2)(a), 24-82-101 and 24-82-105, C.R.S.

The court concludes that as a whole these regulations do promote the substantial governmental interest in maintaining order in demonstrations or protests at the State Capitol. They also promote the state's interest in regulating a lawless action or in regulating incitement to lawless action. Finally, the regulations are largely based from United States Supreme Court opinions in the area of regulation of speech. The court therefore finds that with one exception as a whole the regulations do indeed promote substantial governmental interest that would be achieved less effectively absent the regulations.

REGULATION SPECIFIC ANALYSIS

CANCELLATIONS

The ACLU challenges Regulation 9.0 on the basis that it is an unacceptable prior restraint on speech because it impermissibly delegates broad discretion to the DPA. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992). Under *Denver Publishing Co.* and *Ward*, a regulation may not burden substantially more speech than is necessary to further governmental interests; however, the regulation need not be the least restrictive means of accomplishing the government's interest in protecting public safety and security. *Denver Publishing Co.*, 896 P.2d at 314; *Ward*, 491 U.S. at 798. The language of the cancellation regulation is permissive, not mandatory, and therefore narrows the scope of the regulation because it does not require cancellation every time there is a heightened level of security. It states that the "Executive Director *may* cancel a scheduled event if the level of security is heightened." While the regulation may not be the least restrictive means for the DPA to accomplish its goal of protecting public safety and security, it does not place an undue burden on speech.

SOLICITATION

The court declines to accept the ACLU's characterization of the solicitation regulations as content-based and, as stated above, concludes that they are content-neutral. The regulations address the manner and place of speech rather than the content. They "make [] no distinction with respect to the type of solicitation proscribed," *Denver Publishing co.*, 896 P.2d at 313, or with respect to how collected monies are disbursed. *See Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *see also Riley v. Nat'l Federation of the Blind*, 487 U.S. 781, 787 (1988). Further, the restrictions are narrowly tailored to advance governmental interest in minimizing disruption to the access to the capitol grounds and buildings and reducing potential conflict between permitted demonstrators and counter demonstrators. Solicitation is not banned on state capitol grounds; rather, it is limited to the perimeter sidewalks or to the 100-foot external radius for those authorized by permit holders. Additionally, solicitation is permissible at other state buildings and grounds with the approval of the head of the particular agency, or under certain conditions on the perimeter sidewalks. While the latter restriction is not necessarily the least restrictive means of achieving the state's interest, neither is it broader than necessary. *See Denver Publishing, supra*. Finally, the regulations do not abridge other channels of communication. Solicitors have access to any number of other forums and manners for solicitation.

PERMIT DENIAL AND REVOCATION

The ACLU argues that the permit denial and revocation regulations are impermissible prior restraints on speech because they are not sufficiently narrow, objective and definitive, and that the permitting authorities have too much discretion. Regulations 7.4 and 8.2 allow for permit denial or revocation, respectively, if it reasonably appears that the event is "likely to incite or produce imminent lawless action." This language mirrors that of the U.S. Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Regulation 8.1 allows for revocation of a permit if state or federal laws or regulations are violated. The governmental interest in denying or revoking permits focuses on the protection of public safety and the preservation of State property. While permits are an acceptable form for regulating "competing uses of public forums," the permitting scheme cannot grant "overly broad discretion to a government official." *Forsyth*, 505 U.S. at 130 (1992). Citing its prior case law, the Court in *Forsyth* states:

> [A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definitive standards to guide the licensing authority. The reasoning is simple: If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgement of our precious First Amendment freedoms is too great to be permitted.

Id. at 131, *internal citations omitted*.

While the state's public safety concerns are certainly legitimate, the restrictions in Regulation 7.4 are not sufficient to withstand the requirements set forth in *Forsyth*. As written, the regulation allows denial of a permit based on a permit application filed possibly weeks or months in advance. Even though the regulation is specifically targeted at action that is *likely* to produce *imminent* lawlessness, the permitting official must make this determination based on information contained in an application and well in advance of the actual event. Without further guidelines or standards, the regulation delegates an impermissible level of discretion to the permitting official; therefore, 7.4 is an unconstitutional prior restraint on speech.

Regulation 8.2 does not suffer from the same infirmities as 7.4. Again, the language of the regulation is nearly identical to that in *Brandenburg* and specifically regulates activities that are *likely* to produce *imminent* lawless action, which when considered together with the temporal limitations and training and expertise of the decision-maker, renders 8.2 sufficiently narrow, objective and definite. The decision to revoke as directed by Regulation 8.2 is an on-site determination made during the event by law enforcement officials. The regulation does not grant undue discretion to the decision-making authority because it grants no more authority to law enforcement than that which law enforcement normally exercises. Because of the immediacy of the determination and by whom it is made, Regulation 8.2 is sufficiently narrowly tailored to advance the State's legitimate interests.

Similarly, Regulation 8.1 does not grant undue discretion and is not overly broad. Regulation 8.1 allows for the revocation of a permit if state or federal laws or regulation are violated. The State clearly has an interest in ensuring that "these regulations or the laws of the United States or the State of Colorado" are not violated thereby maintaining the safety and security of the permitted event. It would be unreasonable for the State to articulate each and every violation of regulation and/or law that would trigger revocation of a permit. The ACLU compares this regulation to the city ordinance at issue in *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272 (Colo. 1995). In that case the Colorado Supreme Court invalidated an ordinance making it "unlawful to operate a sexually oriented business without a license. . . ." *City of Colorado Springs* at 279. The present regulation is distinguishable and thus sufficiently narrow first, because it is not a prior restraint on speech; second, because it does not mandate revocation, but rather makes a permit *revocable*; and third, because alternative means of communication are available whereas in *Colorado Springs* the ordinance denied "access to the market place of ideas." *Id, internal punctuation and citations omitted*.

PERMIT APPLICATIONS

Finally, the ACLU challenges Regulation 6.2 regarding permit applications on the basis that it is not narrowly tailored and that the advance notice requirement burdens free speech. On the contrary, the court concludes that the regulation is quite narrowly tailored and does not overly burden free speech. The regulation requires that applications be submitted at least 30 days in advance but not more than 180 days in advance. A deadline for applications is not an unnecessarily burdensome requirement. Furthermore, a waiver may be granted allowing permit applications to be submitted after the 30 day deadline therefore alleviating any burden that may exist as a result of the deadline.

For the reasons stated herein regulation 7.4 is declared unconstitutional or lacking adequate guidelines to be used in denying permit applications. All other sections are found to be constitutional.

Done this 23rd day of June, 2006.

BY THE COURT:

H. Jeffrey Bayless
District Judge

cc: