

January 10, 2019

A Victory for Home Rule Independence: Court Limits Jurisdiction Over Home Rule Municipalities

On Jan. 3, 2019, a litigation team consisting of **Rich Benenson**, **Doug Friednash** and **Joshua Weiss** from **Brownstein Hyatt Farber Schreck** succeeded in an appeal challenging the jurisdiction of Colorado's Independent Ethics Commission (IEC) over home rule cities and home rule counties in Colorado, an issue of first impression for Colorado's courts. The court, in *Dunafon v. Jones et al.*, ruled that the IEC lacks jurisdiction over the City of Glendale and its mayor because the City of Glendale, a home rule city, has adopted its own code of ethics. This litigation is a substantial victory of the independence of Colorado's home rule cities and counties.

In 2006, Colorado voters enacted Amendment 41, a constitutional citizen initiative that created the IEC, a statewide agency tasked with hearing and adjudicating ethics complaints involving public officials in Colorado. However, because Colorado is a home rule state, Amendment 41 contains a carve-out provision intended to protect the independence of home rule cities and counties in regulating ethical matters involving their own officials and employees. The constitutional carve-out provides that the IEC lacks jurisdiction over any home rule city or county that has "adopted charters, ordinances, or resolutions that address the matters" contained in Amendment 41, now codified in the Colorado Constitution as Article XXIX.

The IEC has increasingly asserted its own jurisdiction over public officials from home rule municipalities. Indeed, it does not appear that the IEC has ever declined to assert jurisdiction over home rule officials on the basis of Article XXIX's carve-out provision.

In 2016 and 2017, the IEC received two complaints filed against Mayor Mike Dunafon of Glendale, Colorado. One of the complaints had previously been investigated and dismissed by the City of Glendale; the second complaint was never filed with the City of Glendale. The City of Glendale is a home rule city with its own set of ethics rules. On this basis, Mayor Dunafon challenged the IEC's jurisdiction, arguing that Article XXIX's carve-out provision applied because the City of Glendale is a home rule city that has enacted its own ethics rules. The IEC considered the issue of its jurisdiction over Mayor Dunafon for two-and-a-half years. On July 11, 2018, the IEC determined that it had jurisdiction over Mayor Dunafon to investigate complaints already deemed frivolous by the City of Glendale.

By an Order dated Jan. 3, 2019, the Denver District Court permanently enjoined the IEC from taking any further action and vacated the prior findings of the IEC regarding Mayor Dunafon for lack of jurisdiction.

The court reached its conclusion based on the plain language of Article XXIX of the Colorado Constitution and the intent of the drafters of Amendment 41. First, the court held that the plain text of Article XXIX, Section 7 of the Colorado Constitution provides that the IEC lacks jurisdiction over any home rule municipality that has enacted its own rules "regulating ethics in government." (Op. at 9.) Second, the court confirmed its interpretation of the constitution's plain language by reviewing the drafting history of Amendment 41, which eventually became Article XXIX. Specifically, the court reviewed recordings of the Title Setting Board that considered Amendment 41 and agreed with Mayor Dunafon that the drafters specifically acknowledged that home rule municipalities could adopt rules more or less strict than those contained in the constitutional amendment, and that under the carve-out provision, those home rule municipalities would not be subject to the IEC's jurisdiction.

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Under the court's reasoning, consistent with principles of home rule in Colorado, home rule municipalities retain the flexibility to regulate ethics in government consistent with the unique needs and desires of each home rule municipality. Going forward, to further protect against the jurisdiction of the IEC, home rule cities and counties should ensure that they have enacted rules and regulations concerning the ethical conduct of public officials and employees. Because this case presented an issue not previously considered by Colorado courts, uncertainty remains going forward regarding how broadly the court's rationale here will apply to other home rule cities and counties faced with similar issues. Brownstein's attorneys are available to assist home rule municipalities as they navigate this area.

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