SUMMARY
October 22, 2020

2020COA149

No. 19CA1344, Dunafon v. Krupa — Colorado Constitution — Ethics in Government — Independent Ethics Commission; Public Records — Colorado Open Records Act; Colorado Sunshine Act — Open Meetings Law

In this proceeding, a division of the Colorado Court of Appeals considers whether the district court had subject matter jurisdiction to review the Independent Ethics Commission's (IEC) denial of the appellant's record request under the Colorado Open Records Act (CORA), the IEC's Access to Records Rule, and the Colorado Open Meetings Law (COML). The division concludes that the district court lacked subject matter jurisdiction under these provisions because (1) the IEC is not an "agency" or "institution" subject to CORA; (2) the IEC's denial was not a "final action" under section 24-18.5-101(9), C.R.S. 2019; and (3) the IEC is not a "state public body" subject to COML.

The division also concludes that appellant's request to amend his complaint to bring a claim under C.R.C.P. 106(a)(4) was untimely.

COLORADO COURT OF APPEALS **2020COA149**

Court of Appeals No. 19CA1344
City and County of Denver District Court No. 18CV34699
Honorable Morris B. Hoffman, Judge

Michael Dunafon, individually and in his official capacity as Mayor of the City of Glendale, Colorado,

Plaintiff-Appellant,

v.

Elizabeth Espinosa Krupa, in her official capacity, William Leone, in his official capacity, Debra Johnson, in her official capacity, Yeulin Willett, in his official capacity, and Selina Baschiera, in her official capacity; and the Independent Ethics Commission, State of Colorado,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division II
Opinion by JUDGE FOX
Gomez and Taubman*, JJ., concur

Announced October 22, 2020

Brownstein Hyatt Farber Schreck, LLP, Douglas J. Friednash, Richard B. Benenson, Joshua A. Weiss, Denver, Colorado, for Plaintiff-Appellant

Philip J. Weiser, Attorney General, Christopher Beall, Deputy Attorney General, Gina Simonson, First Assistant Attorney General, Gina Cannan, Assistant Attorney General, Denver, Colorado, for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2019.

¶ 1 This case involves defendant's, the Independent Ethics Commission's (IEC),[1] denial of plaintiff's, Michael Dunafon's, request to access records of certain IEC meetings pursuant to the Colorado Open Records Act (CORA), the IEC's Access to Records Rule (the Records Rule), and the Colorado Open Meetings Law (COML). Dunafon, the mayor of Glendale, Colorado, appeals the district court's judgment dismissing his complaint for lack of subject matter jurisdiction. Because we conclude that the district court did not have subject matter jurisdiction to review the IEC's decision under CORA, the Records Rule, or COML, we affirm. Moreover, as we explain below, the district court had no legal obligation to allow Dunafon to amend his complaint.

I. Background

¶ 2 Article XXIX of the Colorado Constitution established the IEC to hear and investigate complaints, issue findings, assess penalties, and issue advisory opinions on ethics issues involving government officials. Colo. Const. art. XXIX, § 5. The IEC is "not an executive

[1] Dunafon also sued the individuals, in their official capacities, who make up the Independent Ethics Commission: Elizabeth Espinosa Krupa, William Leone, Debra Johnson, Yeulin Willett, and Selina Baschiera.

agency; it is instead an independent, constitutionally created commission that is 'separate and distinct from both the executive and legislative branches.'" *Colo. Ethics Watch v. Indep. Ethics Comm'n*, 2016 CO 21, ¶ 11 (quoting *Developmental Pathways v. Ritter*, 178 P.3d 524, 532 (Colo. 2008)); *see also* § 24-18.5-101(2)(a), C.R.S. 2019 (placing the IEC within the judicial branch). When the IEC receives a complaint, it first determines whether the complaint is frivolous. The IEC must then investigate, hold a public hearing, and issue findings for all nonfrivolous complaints; however, the IEC must keep confidential any complaint it deems frivolous. *Colo. Ethics Watch*, ¶ 2; *see also* Colo. Const. art. XXIX, § 5(3)(b).

¶ 3 The IEC received two complaints, one in 2016 and another in 2017, against Dunafon. The IEC held nonpublic executive sessions to consider the frivolity of the complaints and ultimately deemed them nonfrivolous.

¶ 4 While it considered whether the complaints were frivolous, the IEC also addressed its jurisdiction to investigate Dunafon. The Colorado Constitution exempts home rule municipalities "that have adopted charters, ordinances, or resolutions that address the matters covered by [Article XXIX]" from the requirements of Article

XXIX, *see* Colo. Const. art. XXIX, § 7, and Glendale is a home rule municipality with an ethics code, *see* Glendale Mun. Code, Title 2, Ch. 2.14. The IEC ultimately determined that it had jurisdiction to investigate Dunafon because Glendale's ethics code did not create a decision-making body sufficiently independent to adjudicate the complaints against Dunafon.

¶ 5 After the IEC decided that the complaints against Dunafon were nonfrivolous, Dunafon requested records of the executive sessions in which the IEC discussed the complaints, arguing that the materials were no longer confidential once the IEC deemed the complaints nonfrivolous. The IEC denied this request and a subsequent request from Dunafon's new counsel. Dunafon then sued to obtain the executive session records under CORA and COML.

¶ 6 The IEC moved to dismiss Dunafon's complaint. The district court granted the motion to dismiss in part, concluding that it did not have subject matter jurisdiction to review Dunafon's CORA claims but that Dunafon had met his burden under COML to allow in camera review of the records of certain executive sessions. After the IEC sought clarification, the district court dismissed Dunafon's

entire complaint with prejudice, having realized that Dunafon never requested the records the court earlier declared reviewable under COML. This appeal followed.

II. Subject Matter Jurisdiction, Preservation, and Standard of Review

¶ 7 "Subject matter jurisdiction concerns the court's authority to decide a particular matter." *In re Support of E.K.*, 2013 COA 99, ¶ 8. "The court's authority must be properly invoked before it can act, and a judgment rendered without subject matter jurisdiction is void." *Id.* (citing *Adams Cty. Dep't of Soc. Servs. Child Support Enf't Unit v. Huynh*, 883 P.2d 573, 574 (Colo. App. 1994)).

¶ 8 The parties agree that Dunafon preserved his arguments regarding CORA and the Records Rule. Here the dismissal for lack of subject matter jurisdiction warrants de novo review of the court's legal conclusions, including its statutory interpretation. *Bilderback v. McNabb*, 2020 COA 133, ¶ 10 (citing *Grant Bros. Ranch, LLC v. Antero Res. Piceance Corp.*, 2016 COA 178, ¶ 15).

A. Request Pursuant to CORA and the Records Rule

¶ 9 Dunafon argues that the district court had subject matter jurisdiction under CORA and the Records Rule to review his

request. Specifically, he argues that the IEC's denial of his records request was a final action and that the Records Rule does not limit the district court's jurisdiction to review his records request. We reject this argument.

1. Legal Framework

¶ 10 CORA establishes that "all public records shall be open for inspection by any person" unless otherwise provided by law. § 24-72-203(1)(a), C.R.S. 2019. CORA defines "public records" as "all writings made, maintained, or kept by the state, any agency, institution, a nonprofit corporation . . . or political subdivision of the state." § 24-72-202(6), C.R.S. 2019. Section 24-72-204(5)(a), C.R.S. 2019, addresses denials of record requests and reads in relevant part as follows:

> [A]ny person denied the right to inspect any record covered by this part 2 or who alleges a violation of section 24-72-203(3.5) may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why the custodian should not permit the inspection of such record . . . .

¶ 11 Recognizing that it is not a state agency, the IEC adopted the Records Rule to "favor[] public disclosure and transparency of its

records." *See* Records Rule, https://perma.cc/7JYU-URWL. The Records Rule expressly adopts CORA with three exceptions and additions not at issue in this case. *Id.*

¶ 12 Article XXIX created and empowered the IEC, Colo. Const. art. XXIX, § 5, and its implementing legislation provides that "[a]ny final action of the [IEC] concerning a complaint shall be subject to judicial review by the district court for the city and county of Denver." § 24-18.5-101(9). The Colorado Supreme Court has ruled that section 24-18.5-101(9) "is necessarily limited"; only encompasses "enforcement actions"; and does not provide for judicial review of other types of IEC decisions, such as a decision to dismiss an ethics complaint as frivolous. *Colo. Ethics Watch*, ¶¶ 13, 22.

¶ 13 "[W]hen the statutory language is clear and unambiguous, we need not look beyond its plain terms and must apply the statute as written." *Hall v. Am. Standard Ins. Co. of Wis.*, 2012 COA 201, ¶ 19 (citing *Kyle W. Larson Enters., Inc. v. Allstate Ins. Co.*, 2012 COA 160M, ¶ 10). "We must interpret [a] statute 'to give consistent, harmonious, and sensible effect to all its parts.'" *In re Marriage of Alvis*, 2019 COA 97, ¶ 9 (quoting *In re Marriage of Ikeler*, 161 P.3d

663, 667 (Colo. 2007)). "A statutory interpretation leading to an illogical or absurd result will not be followed," *Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004), and courts "avoid constructions that are at odds with the legislative scheme," *Bryant v. Cmty. Choice Credit Union*, 160 P.3d 266, 274 (Colo. App. 2007).

2. Analysis

¶ 14 Section 24-72-203(6) lists the entities subject to CORA. As the district court correctly noted, the IEC is not the state or a political subdivision of the state; therefore, it must be an "agency" or "institution" to be subject to CORA. The IEC is not an agency. *Colo. Ethics Watch*, ¶ 11. Dunafon does not argue, and has not argued, that the IEC is an institution under CORA. Accordingly, the district court did not analyze this issue, and we also provide no further analysis. *See Gf Gaming Corp. v. Taylor*, 205 P.3d 523, 528 (Colo. App. 2009) ("Issues not presented to or raised at the trial court will not be considered on appeal."). Accordingly, we conclude the IEC is not subject to CORA, and thus the district court lacked subject matter jurisdiction to review Dunafon's records request under CORA. *See* § 24-72-203(6); *Colo. Ethics Watch*, ¶ 11.

¶ 15 Alternatively, Dunafon argues that even if CORA does not apply to the IEC, the district court nonetheless had subject matter jurisdiction to review his records request under section 24-18.5-101(9) and the Records Rule. Specifically, Dunafon argues that the Records Rule incorporates much of CORA, including section 24-72-204(5)(a), which grants the district court jurisdiction to review denials of record requests. Further, Dunafon contends that a records request denial is a "final action" subject to judicial review under section 24-18.5-101(9).

¶ 16 With three exceptions, the Records Rule expressly adopts the provisions of CORA, including section 24-72-204(5)(a). However, while district courts in Colorado have "general jurisdiction," the General Assembly may limit a district court's jurisdiction so long as it does so explicitly. *Marks v. Gessler*, 2013 COA 115, ¶ 71. Section 24-18.5-101(9) establishes the district court's subject matter jurisdiction over IEC matters, and the statute's plain language limits that jurisdiction to review of "final action[s] of the [IEC] concerning a complaint."

¶ 17 Dunafon asserts that, by exercising its rulemaking powers, the IEC gave the district court subject matter jurisdiction to review

denials of record requests. But the IEC lacked the power to do so. *See Associated Gov't's of Nw. Colo. v. Colo. Pub. Utils. Comm'n*, 2012 CO 28, ¶ 8 ("Where a statute provides a right of review of an administrative decision, the statute is the exclusive means to secure review."); *Mile High United Way, Inc. v. Bd. of Assessment Appeals*, 801 P.2d 3, 5 (Colo. App. 1990) (holding that, if the General Assembly provides a statutory right of review, such review must be sought in strict compliance with the mandatory provisions of the statute, and, absent such compliance, a district court is without jurisdiction).

¶ 18 Even if we assume — without deciding — that the IEC can confer jurisdiction on the district court through its own rulemaking, any adopted rule must be consistent with section 24-18.5-101(9). *See Marshall v. Civil Serv. Comm'n*, 2016 COA 156, ¶ 12 ("[W]hen an agency exercises rulemaking authority, '[a] rule may not modify or contravene an existing statute, and any rule that is inconsistent with or contrary to a statute is void.'" (quoting *Colo. Consumer Health Initiative v. Colo. Bd. of Health*, 240 P.3d 525, 528 (Colo. App. 2010))). Thus, to the extent the Records Rule may be read to grant the district court jurisdiction to review the IEC's *nonfinal*

actions, it is invalid. Accordingly, to determine if the district court had jurisdiction to review the IEC's denial of Dunafon's records request, we must consider if the denial was a "final action" under section 24-18.5-101(9).

¶ 19 In *Colorado Ethics Watch*, the Colorado Supreme Court declared that final actions under section 24-18.5-101(9) "can only encompass enforcement actions." *Colo. Ethics Watch*, ¶ 13. Like the IEC action at issue there, the IEC's denial of Dunafon's records request did not involve enforcing any penalties and is not a final decision concerning the complaints against him. *See id.* Indeed, the IEC may decide not to enforce a penalty against Dunafon, but should it do so, he can seek judicial review of that decision, and the IEC's denial of his records request, at that point. *Id.*

¶ 20 Accordingly, we hold that the district court did not have subject matter jurisdiction to review Dunafon's request for records pursuant to the Records Rule. *See* § 24-18.5-101(9); *Colo. Ethics Watch*, ¶ 13.

B. Records Requested Under COML

¶ 21 Dunafon next argues that the district court had subject matter jurisdiction under COML to review his request. We likewise reject this argument.

¶ 22 COML states as follows: "all meetings of two or more members of *any state public body* at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times." § 24-6-402(2)(a), C.R.S. 2019 (emphasis added). As relevant here, a state public body is "any board, committee, commission, or other advisory, policy-making, rule-making, decision-making, or formally constituted body of any state agency [or] state authority." § 24-6-402(1)(d)(I).

¶ 23 *Doe 1 v. Colorado Department of Public Health & Environment*, decided after the district court's dismissal, instructs that the "phrase 'of any state agency' modifies each of the types of bodies that precedes it." 2019 CO 92, ¶ 17 (quoting § 24-6-402(1)(d)(I)). Therefore, COML only covers "state public bod[ies]" *within state agencies*, including "any board of any state agency, any committee of any state agency, any commission of any state agency, and any

other advisory, policy-making, rule-making, decision-making, or formally constituted body of any state agency." *Id.* It follows that "a state agency as a whole cannot constitute a state public body within the meaning of section 24-6-402(1)(d)(I) of [C]OML." *Id.* at ¶ 24. As mentioned, the IEC, as an independent and constitutionally created commission, is separate and distinct from the executive and legislative branches. *Colo. Ethics Watch*, ¶ 11; *see also* § 24-18.5-101(2)(a). While the Supreme Court has ruled that the IEC is not an "agency" under CORA, *Colo. Ethics Watch*, ¶ 11, it has not directly addressed whether the IEC is a "state agency" under COML.

¶ 24 COML does not define "state agency," but it is clear that the judicial branch, where IEC resides, is not a "state agency." § 24-18.5-101(2)(a). Black's Law Dictionary defines a "state agency" as "[a]n executive or regulatory body of a state." Black's Law Dictionary 78 (11th ed. 2019). The judicial branch is fundamentally not an executive body and logically not a regulatory body. Since COML does not define "state agency," we look to the broader administrative scheme for clues as to the legislature's intended meaning. *See Alvis*, ¶ 9 (interpreting statutes to give consistent, harmonious, and sensible effects to all parts). In

outlining the scope of the Administrative Procedure Act (APA), the legislature stated that the APA "applies to every agency of the state having statewide territorial jurisdiction *except those in the legislative or judicial branches*." § 24-4-107, C.R.S. 2019 (emphasis added). The legislature's language implies that agencies are housed *within* a branch of government and that a branch itself is not an "agency." This analysis applies equally to COML.

¶ 25 Because the judicial branch is not a "state agency," *id.*, and "a state agency as a whole cannot constitute a state public body" under section 24-6-402(1)(d)(I), *Doe 1*, ¶ 24, the IEC falls outside COML's scope. Lacking subject matter jurisdiction over Dunafon's COML claims, the district court appropriately dismissed his complaint.

III. Leave to Amend to Add a C.R.C.P. 106 Claim

¶ 26 Finally, Dunafon argues that the district court should have granted him leave to amend his complaint to add a Rule 106 claim because the IEC's access-to-records decision fails to provide a

"plain, speedy and adequate remedy otherwise provided by law."[2] C.R.C.P. 106(a)(4). We are not persuaded.

A. Review Standard and Applicable Law

¶ 27 The decision whether to grant or deny leave to amend is a matter within the discretion of the trial court, but that discretion is not without limits. *Vinton v. Virzi*, 2012 CO 10, ¶ 10. Whether an amendment would prove to be futile is a relevant consideration, *Benton v. Adams*, 56 P.3d 81, 85-86 (Colo. 2002); *Bristol Co. v. Osman*, 190 P.3d 752, 759 (Colo. App. 2007), and a proposed amendment would clearly be futile if it is incapable of withstanding a motion to dismiss. *Benton*, 56 P.3d at 86-87 (citing 4 James W. Moore et al., *Moore's Federal Practice* ¶ 15.15[3] (3d ed. 1999)); *see also Vinton*, ¶ 13 (noting that a trial court necessarily abuses its discretion by granting leave to amend without determining if the amendment advances a legal theory that can withstand a motion to dismiss).

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[2] Even *if* Dunafon preserved this issue by requesting leave to amend before the district court in his response to the IEC's motion to dismiss, because Dunafon did not file a motion for leave to amend with the proposed amendment we cannot fault the district court for not addressing a request made in a single sentence and within a footnote to Dunafon's response to the IEC's motion.

¶ 28 Judicial review under Rule 106 — which is "extraordinary in nature," *People v. Adams Cty. Court*, 793 P.2d 655, 656 (Colo. App. 1990) — is appropriate when a "governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law." C.R.C.P. 106(a)(4). Further, "a claim seeking review under Rule 106(a)(4) that is filed more than twenty-eight days after the governmental body or officer's final decision must be dismissed." *Auxier v. McDonald*, 2015 COA 50, ¶ 12.

B. Analysis

¶ 29 The IEC correctly points out that Dunafon did not file an amended complaint accompanied by a motion for leave to amend his complaint to add a claim under Rule 106(a)(4). Instead, Dunafon's response to the IEC's motion to dismiss included a single sentence within a footnote asking for leave to amend as an alternative form of relief. Even ignoring these deficiencies, Dunafon's December 20, 2018, complaint (and his February 14, 2019, request to amend) was filed more than twenty-eight days after the IEC rejected his first records request on May 15, 2018,

and his renewed request on November 6, 2018. The district court thus lacked jurisdiction to review Dunafon's Rule 106(a)(4) claim.[3] *See Auxier*, ¶ 12.

¶ 30 Accordingly, Dunafon's requested amendment would not have survived a motion to dismiss, and therefore the district court did not abuse its discretion by failing to rule on it. *See Vinton*, ¶ 13.

IV. Conclusion

¶ 31 Because the district court did not have subject matter jurisdiction to review the IEC's decision under CORA, the Records Rule, or COML, we affirm its judgment of dismissal. Moreover, the district court had no legal obligation to allow Dunafon to amend his complaint and did not abuse its discretion by not doing so.

JUDGE GOMEZ and JUDGE TAUBMAN concur.

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[3] We need not and do not decide whether C.R.C.P. 106 even applies here. Moreover, because Dunafon's equitable estoppel argument was raised for the first time on appeal, we decline to address it. *See Gf Gaming Corp. v. Taylor*, 205 P.3d 523, 528 (Colo. App. 2009). We also note that Dunafon previously litigated the issue of whether C.R.C.P. 106 provides an avenue to review an IEC action, and a division of this court concluded that it does not. *Dunafon v. Jones*, (Colo. App. No. 19CA0321, March 26, 2020) (not published pursuant to C.A.R. 35(e)).