

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2004B093**

MOTION TO QUASH SUBPOENA WITH RECITATION OF LEGAL AUTHORITY

KENNETH SCHULTER,
Complainant,

vs.

**DEPARTMENT OF PERSONNEL AND ADMINISTRATION, DIVISION OF
CENTRAL SERVICES,**
Respondent.

Eric Scott Myers ("Myers"), by his undersigned attorneys, hereby moves to quash the subpoena issued to him and states as follows:

1. Myers is employed by the Colorado General Assembly as a staff analyst for the Joint Budget Committee of the Colorado General Assembly.
2. The Joint Budget Committee is created pursuant to section 2-3-201, C.R.S., and one of its duties, pursuant to section 2-3-203, C.R.S., is to hold hearings on and make recommendations to the appropriations committees of each house on the budget requests of each state agency.
3. On May 17, 2004, Myers received a subpoena to testify in this action. A copy of the subpoena and an accompanying letter, indicating that he may testify at 1:00 on Wednesday, afternoon are attached to this Motion.
4. It is believed that Myers may be called to testify concerning what was or was not said during the November 2003 hearing of the Joint Budget Committee concerning the 2004-05 budget request of the Department of Personnel in regard to the Document Solutions Group of the Division of Central Services.
5. Myers, as an employee of the General Assembly, is entitled to legislative immunity and cannot be required to testify on a matter within the sphere of legitimate legislative activities.
6. The best evidence of what was said during the hearing would be the transcript or

the audio tape of the hearing.

ARGUMENT

I. Legislative Immunity

Section 16 of article V of the Colorado Constitution provides:

The members of the general assembly shall, in all cases except treason and felony, be privileged from arrest during their attendance at the sessions of their respective houses, or any committees thereof, and in going to and returning from the same; *and for any speech or debate in either house, or any committees thereof, they shall not be questioned in any other place.* [Emphasis added]

Colorado courts have interpreted this clause consistently with the nearly identical clause found in the federal Constitution.

"Given the substantial identity of language between the federal and state provisions, we are convinced that the purpose and policies underlying each are the same. And, those purposes and policies require that the state provision, like the federal provision, be interpreted to provide *an absolute immunity for all actions involved in the performance of any legislative functions.*" [emphasis added] Lucchesi v. State, 807 Colo. App. 1185, 1189 (Colo. App.1990).

Thus, the protection of the speech and debate clause is not simply limited to speeches or debates on the floor or in committees, but extends to all "legitimate legislative functions". Romer v. Colorado General Assembly, 810 P.2d 215, 225 (Colo. 1991). The clause protects legislators "against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." United States v. Brewster, 408 U.S. 501, 525, 92 S. Ct. 2531, 2544, 33 L.Ed. 2d 507 (1972).

The United States Supreme Court has recognized that legislative immunity extends to legislative aides for acts which if performed by the member would have been privileged. *See, Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed. 2d 583 (1972). The discussions at the Joint Budget Committee hearing related to the budget for the Department

of Personnel which would ultimately become the basis for a portion of the fiscal year 2004-05 general appropriations bill. As such, they related to what would go into legislation, clearly a legitimate legislative function. As no member of the Joint Budget Committee could be compelled to testify concerning the discussions at the hearing, no member of the staff of the Joint Budget Committee can be compelled to testify either.

II. Best Evidence

As stated by the Colorado Court of Appeals in *People v. Banks*, 655 P.2d 1384 (Colo. App. 1982):

The best evidence rule requires that the best evidence available be presented in lieu of less satisfactory evidence. *McCormick on Evidence* § 230 (E. Cleary 2d ed. 1972); see *Bloxsom v. San Luis Valley Crop Care, Inc.*, 198 Colo. 113, 596 P.2d 1189 (1979). Implicit to this rule is that better evidence exists.

655 P.2d at 1387.

The best evidence of what was or was not said at the hearing before the Joint Budget Committee would be the actual tape recording or a transcript prepared from the tape recording of the hearing. One witness's recollection of what was said is certainly not as reliable as the tape or transcript. Even if the Court finds that Myers is not entitled to legislative immunity, as better evidence exists, Myers should not be required to testify.

Wherefore, Eric Scott Myers prays for an order quashing the subpoena served upon him.

Office of Legislative Legal Services
Jeremiah B. Barry (10400)

By: _____
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CERTIFICATE OF SERVICE

I certify that on this __ day of May, 2004, the foregoing MOTION TO QUASH SUBPOENA WITH RECITATION OF LEGAL AUTHORITY was served on all parties by facsimile and by depositing correct copies of the same in the United States mail, first class postage prepaid, addressed to the following:

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