

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, Denver, CO 80203	
Elections Division of the Secretary of State Petitioner	▲ COURT USE ONLY ▲
vs.	CASE NUMBER: OS 2021-0011
Greg Brophy Respondent	
NOTICE OF ORDER ISSUANCE	

The attached decision per art. v, secs. 44 and 48 was issued March 01, 2022 in the above referenced case.

Dated: March 23, 2022

/s/ Jessica Soto

Jessica Soto
Court Clerk

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, Denver, Colorado 80203	
Elections Division of the Secretary of State, Complainant vs. Gregory Brophy and Frank McNulty, Respondents	CASE NUMBER: OS 2021-0011
DECISION	

This case is a complaint pursuant to Colo. Const. art. V, secs. 44.2(4)(b)(III), 48(4)(b)(III), and Rule 4, 8 CCR 1505-8. Hearing was held and recorded remotely March 1, 2022 before Administrative Law Judge (“ALJ”) Matthew E. Norwood. Peter Baumann, Assistant Attorney General, appeared for the Complainant (“Division”). Suzanne Taheri, Esq., appeared for the Respondents.

Summary

The Division asserts that the Respondents received compensation for advocating to redistricting committees created by secs. 44.2(4)(b)(III) and 48(4)(b)(III), but did not report as required by those subsections. The ALJ finds and concludes that the Division has failed to prove such advocacy. No sanction is imposed.

Findings of Fact

Based on the evidence submitted at the hearing, the ALJ makes the following findings of fact:

Amendments Y and Z

1. On November 6, 2018, Colorado voters passed amendments Y and Z to the state Constitution. Amendment Y created a redistricting commission to redraw boundaries for elections for members of the United States House of Representatives, based on the results of the 2020 census. Amendment Z created such a commission for the drawing of boundaries for state Senate and state House of Representatives districts.

2. Amendment Y amended Colo. Const. art. V, sec. 44. Amendment Z repealed and re-enacted sec. 48. The new portion of sec. 44 pertinent to this case is sec. 44.2(4)(b)(III):

Persons who contract for or receive compensation for advocating to the commission, to one or more commissioners,

or to the nonpartisan staff for the adoption or rejection of any map, amendment to a map, mapping approach, or manner of compliance with any of the mapping criteria specified in section 44.3 of this article V are lobbyists who must disclose to the secretary of state any compensation contracted for, compensation received, and the person or entity contracting or paying for their lobbying services. ... The secretary of state shall adopt rules to facilitate the complete and prompt reporting required by this subsection (4)(b)(III) as well as a complaint process to address any lobbyist's failure to report a full and accurate disclosure, which complaint must be heard by an administrative law judge, whose decision may be appealed to the court of appeals.

3. There is substantially similar language at sec. 48(4)(b)(III), applicable to that section.

4. There is no dispute that the Respondents have not made the kind of disclosure described in the two subsections. Respondents do dispute that they were compensated for or engaged in the kind of advocacy described.

Procedural background

5. Mr. Baumann submitted to the Office of Administrative Courts ("OAC") an October 12, 2021 "notice of referral" addressed to Matthew Azer, the Director of the OAC. The notice said that Stanley Matsunaka, through counsel, had filed an August 24, 2021 complaint with the Secretary of State alleging that the Respondents and an Alan Philp had failed to comply with constitutional requirements related to redistricting lobbying. Also per the notice, on September 27, 2021, Mr. Matsunaka had filed an amended complaint, which was attached to the notice as exhibit 1. This exhibit 1 is not the exhibit 1 admitted at hearing. The attachment has not been offered as evidence.

6. Per the notice, and as shown in the attachment, Mr. Matsunaka's complaint had three claims. The October 12, 2021 letter stated that the Division had investigated the complaint, and was referring the matter to the OAC for a hearing by an ALJ. The letter was not in the form of a charging document. It stated as to Mr. McNulty that:

Following its investigation, the Division believes there are sufficient grounds to warrant a hearing as to whether McNulty has committed the violations alleged in Claims 1 and 2 of the complaint. Specifically, the Division's investigation **suggests**: [that Mr. McNulty engaged in the compensated advocacy requiring disclosure per secs. 44.2(4)(b)(III) and 48(4)(b)(III)]. [Bolding added.]

...

The Division believes this is a factual dispute that should be determined by an ALJ.

...

7. The notice went on to state that the Division did not believe there were sufficient grounds for the ALJ to find a violation as alleged by Mr. Matsunaka in his third claim.

8. The notice made similar statements as to Mr. Brophy in reference to Mr. Matsunaka's claims 1 and 2, and again used the word "suggests." Finally, the notice stated that the Division did not believe there were sufficient grounds to find a violation on the part of Mr. Philp. The notice concluded with the statement:

The Division will pursue Claims 1 and 2 of the complaint against McNulty and Brophy, but will not pursue Claim 2 against Philp, or Claim 3. Ultimately, the Division believes that the ALJ must enter a decision as to each claim alleged in [Mr. Matsunaka's] complaint.

9. On December 27, 2021, Ms. Taheri submitted an unopposed motion to dismiss Mr. Philp. The ALJ granted that motion January 6, 2022.

10. Hearing was held February 14, 2022 with the two parties present. The ALJ raised the fact that there had been no proper charging document. Specifically, there was no allegation that the Respondents had done anything wrong. That the evidence "suggests" a violation, is not a "claim showing that the pleader is entitled to relief," as described in C.R.C.P. 8(a). C.R.C.P. 11 requires an attorney to attest that the claim "is well grounded in fact." The Colorado Rules of Civil Procedure, the rules of procedure in the district courts, apply "to the extent practicable" to administrative hearings. Section 24-4-105(4), C.R.S. At the hearing there was no one who was going to present evidence for the ALJ to enter a decision on the parts of Mr. Matsunaka's complaint that the Division could affirmatively state was unsupported, but which, per the notice, the ALJ was to decide.

11. The Division agreed to file a charging document by February 28, 2022. The Respondents wanted the hearing to be held the next day, March 1, 2022. That request was granted. The Division did file an "Amended Notice of Referral and Complaint" ("Complaint") February 28, 2022.

12. At hearing, the only witnesses called by the Division to substantiate the allegations in the Complaint were the Respondents themselves. And although the allegations in the Complaint chiefly concern statements by the Respondents at public meetings, meetings that were presumably recorded, no recordings or transcripts of the Respondents' statements at those meetings were submitted as evidence.

Claim against Frank McNulty

The May 19, 2021 meeting

13. Frank McNulty is a former speaker for the Colorado State House of Representatives. On March 5, 2020, Colorado Neighborhood Coalition ("CNC") entered into a consulting agreement with Square State Strategy Group ("Square State") whereby Square State was paid \$4,000 per month. Exhibit 2. CNC is a non-profit corporation. Square State is Mr. McNulty's consulting company. It does legislative lobbying. By the terms of exhibit 2, Square State agreed to act as the registered agent for CNC. Mr. McNulty also testified that *he* was the registered agent and strategic counsel for CNC.

Mr. McNulty joined CNC in January 2020. One of the purposes of CNC was to help people engage in the redistricting process.

14. In 2021, CNC employed Mr. Philp as a lobbyist before the redistricting commissions. CNC submitted proposed maps to the commissions.

15. Mr. McNulty, or an entity controlled by or employing Mr. McNulty, has contracted with, or received compensation from CNC.

16. Paragraph 25 of the Complaint alleges that on May 19, 2021, Mr. McNulty and Mr. Philp met with Jason Kelly, a congressional (sec. 44) commissioner. That meeting took place and was also attended by a Ms. Gigi Dennis, a former state senator. The allegation of paragraph 25 is that Mr. McNulty and Mr. Philp “discussed” the redistricting process with Mr. Kelly. But there is no allegation that Mr. McNulty advocated for “the adoption or rejection of any map, amendment to a map, mapping approach, or manner of compliance with any of the mapping criteria,” at the meeting.

17. Mr. McNulty testified that the current redistricting was not discussed at the meeting. He testified that he discussed the redistricting process done in 2011 and amendments Y and Z. A proposed congressional map had not yet been issued at the time of the meeting.

August 18, 2021

18. On this date, Mr. McNulty testified before a joint hearing of both commissions (secs. 44 and 48). He also answered questions, which he understood was not testimony. The meeting occurred in Highlands Ranch, which Mr. McNulty had formerly represented in the General Assembly. At the outset of that testimony Mr. McNulty testified that he wears many “hats,” including that of consulting. He made a statement that he was testifying in a private capacity.

19. At the meeting, Mr. McNulty fielded questions from the commissioners. In Mr. McNulty gave an opinion at the meeting as to where a boundary should be drawn for a state house district in Highlands Ranch. He had been asked where he would draw the boundary. Mr. McNulty also recommended that the congressional districts be drawn in a way that made them competitive.

20. On September 18, 2021, after the meeting, CNC submitted a proposed redistricting map to the legislative (sec. 48) commission. The map is not in evidence. There is insufficient evidence whether CNC’s map was consistent with or inconsistent with Mr. McNulty’s testimony or his answers to questions at the August 18, 2021 meeting. According to Mr. McNulty, it was Mr. Philp’s responsibility to submit a redistricting map for CNC.

21. There is insufficient evidence that Mr. McNulty took any action that would require him to register per secs. 44.2(4)(b)(III) or 48(4)(b)(III), or that he violated any rule of the Secretary of State.

Claim against Gregory Brophy

22. Mr. Brophy is a former state senator. He is a farmer and has a consulting company that does lobbying at the state capitol.

23. Mr. Brophy received compensation from CNC in 2020 and 2021. Mr. Brophy has not had a formal contract with CNC.

May 28, 2021

24. On this date, Mr. Brophy attended a meeting of the Congressional Commissions Public Hearing Schedule Committee. This is a subcommittee of the congressional (sec. 44) committee. At that meeting, he answered questions regarding the “communities of interest” language in sec. 44(1)(d). He described his experiences working on redistricting in 2011. No proposed redistricting map had been released to the public at the time of Mr. Brophy’s statements to the subcommittee.

25. Exhibit 3 is an invitation from Commissioner Julie Shephard (the spelling is as shown on her text messages, exhibit 3) to Mr. Brophy to “dial in” for the meeting. She said that she would like to hear from him about “past perspectives about the hearing process and lessons learned (format, locations, messaging etc).”

26. Paragraph 30 of the Complaint alleges that Mr. Brophy also met with groups in Colorado to encourage them to contact the two commissions and told the groups “to use specific words that would resonate with the commissions in light of the requirements found in Amendments Y and Z.” Mr. Brophy did so, but this, by itself, does not constitute the kind of activity that would require registration as a lobbyist per secs. 44.2(4)(b)(III) and 48(4)(b)(III).

27. There is insufficient evidence that Mr. Brophy took any action that would require him to register per secs. 44.2(4)(b)(III) or 48(4)(b)(III), or that he violated any rule of the Secretary of State.

Conclusions of Law

Based upon the foregoing findings of fact, the ALJ enters the following conclusions of law:

1. The Division is the “proponent of the order” in this case and therefore has the burden of proof. Section 24-4-105(7), C.R.S. The Division has failed to prove the allegations in the Complaint that Mr. McNulty or Mr. Brophy engaged in any conduct requiring them to register with the Secretary of State as a lobbyist per secs. 44.2(4)(b)(III) or 48(4)(b)(III).

2. The Complaint also alleges that the Secretary of State is entitled to relief against the two men per Rules 4 and 5 at 8 CCR 1505-8. Rule 5.6.1 of those rules provides:

If, after its investigation, the division has reasonable grounds to believe that a violation of section 24-6-301 et seq. C.R.S., has occurred, the division may initiate a hearing with the Secretary of State or their designee under section 24-4-105, C.R.S.

3. The Complaint in this case has no allegation as to a violation of any provision of part 3 of article 6 of title 24 of the C.R.S. No violations of any Secretary of State rule have been proven.

C.R.C.P. 11

4. Respondents' counsel submitted a February 28, 2022 motion to dismiss. The ALJ did not dismiss the case at hearing, but permitted the parties to present evidence. Included in the motion to dismiss was a request for attorney fees and expenses per C.R.C.P. 11, on the basis that the Complaint was "groundless and frivolous."

5. As stated, the Colorado Rules of Civil Procedure, and C.R.C.P. 11, apply "to the extent practicable" to administrative hearings. Section 24-4-105(4), C.R.S. Whether to impose sanction per C.R.C.P. 11, turns on pre-filing and pre-pleading behavior, not post-signing behavior such as failure to dismiss a claim after an attorney learns that it is groundless. *SRS, Inc. v. Southward*, 272 P.3d 1179, 1181-82 (Colo. App. 2012). Bad faith is not a prerequisite for C.R.C.P. 11 sanctions. *Stepanek v. Delta Cty.*, 940 P.2d 364, 370 (Colo. 1997). The ALJ, as he is not a court of record, does not have the authority to assess attorney fees per Section 13-17-102, C.R.S. The phrase "substantially frivolous [or] substantially groundless" appears in Section 13-17-102(4), C.R.S. Except for the reference to this language, Respondents have not requested attorney fees per this authority.

6. *In re Trupp*, 92 P.3d 923, 929 (Colo. 2004), cited by the Respondents, sets out a three-part test for Rule 11 analysis: whether the attorney who signed the pleadings: "(1) read them; (2) undertook reasonable inquiry into them; and (3) possessed a proper purpose in filing them." The signature of Mr. Baumann appears on the Complaint, and there is no indication that he did not read it prior to his signature. In response to the ALJ's questions at the hearing, he was aware of the contents of the allegations.

7. Factor (2) appears to have also been met. For the most part, the facts alleged in the Complaint were established. Mr. McNulty in fact met with Commissioner Kelly on May 19, 2021, and he testified before a joint hearing of the commissions August 18, 2021. At that meeting, he discussed specific boundaries. He or his firm was compensated by CNC.

8. Mr. Brophy indeed met with the subcommittee of the congressional committee on May 28, 2021, as alleged. He discussed the concept of "communities of interest." He met with groups in Colorado and encouraged them to use specific words that would "resonate" with the Commission, all as alleged in paragraph 30 of the Complaint. He also received compensation from CNC.

9. There is no indication that the Complaint was filed for any improper purpose, factor (3). Rule 11 gives harassment, unnecessary delay, or needless increase in the cost of litigation, as examples of such an improper purpose.

10. The deficiency in proof in this case relates to the connection between the facts alleged and whether they establish that CNC paid the Respondents to advocate for any particular mapping approach. The evidence supplied did not establish such a connection. But this is a different issue from that of whether Mr. Baumann failed to meet his obligations when he signed the Complaint.

11. Finally, Respondents argue that the Division's position in this case is inconsistent with statements made by former Secretary of State Wayne Williams' Business and Licensing Division on May 16, 2018. Those statements are linked from the February 28, 2022 motion to dismiss, but were not offered as evidence. In any case, they were made prior to the December 19, 2018 effective dates of secs. 44.2(4)(b)(III) or 48(4)(b)(III). To the extent the prior statements are at all controlling, they cannot carry any weight contrary to subsequent constitutional language.

12. No attorney fees per C.R.C.P. 11 are ordered.

DONE AND SIGNED

March 14, 2022



MATTHEW E. NORWOOD
Administrative Law Judge

Evidence admitted:

Exhibits 1-3.

Certificate of Service

I certify that I have served a true and correct copy of the above **Decision** was served by email at Denver, Colorado to:

Peter Baumann, Campaign Finance Fellow
Department of Law
peter.baumann@coag.gov

Suzanne Taheri
staheri@mavenlawgroup.com

Dated: March 23, 2022

/s/ Jessica Soto

Office of Administrative Courts