

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. 0S 2002-023

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY MAC WILLIAMS REGARDING
ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT ON THE PART
OF MESA COUNTY CITIZENS FOR REPRESENTATIVE GOVERNMENT, Respondent**

This matter is before the Administrative Law Judge on the complaint of Mac Williams ("Williams") against Mesa County Citizens for Representative Government ("MCCRG"). The complaint was filed with the Colorado Secretary of State on October 21, 2002 and alleges that MCCRG has violated certain provisions of the Fair Campaign Practices Act, Section 1-45-101 *et seq.*, C.R.S. (2002). The Secretary of State transmitted the complaint to the Colorado Division of Administrative Hearings for the purpose of conducting a hearing pursuant to Section 1-45-111(2)(a), C.R.S. (2002).

The hearing in this matter was held in Denver, Colorado, on January 27, 2003, before Administrative Law Judge Marshall A. Snider. Williams was present at the hearing and appeared without legal counsel. MCCRG was represented by Keith Boughton, Esq. The Administrative Law Judge issues this Agency Decision pursuant to Section 1-45-111(2)(a), C.R.S. (2002) and Section 24-4-105 (14)(a), C.R.S. (2002).

STATEMENT OF THE ISSUE

On October 11, 2002 MCCRG filed a report of contributions and expenditures with the Mesa County, Colorado, Clerk and Recorder. The report disclosed a contribution of \$5,000 from "Colo. Realtors Grand Jct" and a contribution of \$3,000 from "Colo. Realtors State". On October 29, 2002 MCCRG filed an amended report disclosing a contribution of \$5,000 from "Colo. Realtors IPAC Grand Jct" and a contribution of \$3,000 from "Colo. Realtors IPAC State". The complaint alleges that "Colo. Realtors" refers to the Colorado Association of Realtors ("CAR"), an organization located in Englewood, Colorado.

Williams' complaint alleges that MCCRG is an issue committee formed to influence a "No" vote on a ballot issue before the voters in the November, 2002 election in Mesa County. The complaint asserts that MCCRG failed to comply with the reporting and disclosure requirements of the Fair Campaign Practices Act ("FCPA"). Specifically, the complaint asserts that the report filed by MCCRG on October 11 did not accurately disclose the true identity or location of the contributors of the "Colo. Realtors" funds.

MCCRG asserts that it adequately disclosed the source of the contributions. MCCRG also claims that it did not willfully violate the FCPA. MCCRG alleges that Williams'

complaint is substantially frivolous, groundless and vexatious and that MCCRG should therefore be awarded its attorney fees in defending against this complaint.

FINDINGS OF FACT

1. In the November 5, 2002 general election the Mesa County, Colorado, Board of County Commissioners presented a ballot issue to the voters of Mesa County entitled "the Home Rule Charter Commission TABOR ballot question" ("the home rule ballot issue"). The question presented by the home rule ballot issue was whether Mesa County should create and fund a home rule charter commission.

2. Mac Williams is a member of an organization known as "Voters for Local Home Rule to Streamline Government". This organization was a proponent of the home rule ballot issue.

3. MCCRG is an issue committee formed for the purpose of opposing the home rule ballot issue. MCCRG's address is in Grand Junction, Colorado, which is located in Mesa County. Christopher J. Thomas ("Thomas") is the registered agent listed on the Issue Committee Registration Form filed with the Mesa County Clerk and Recorder.

4. The Grand Junction Area Realtor Association ("GJARA") is a local association of realtors in Mesa County. GJARA is associated with the statewide Colorado Association of Realtors. GJARA was opposed to the home rule ballot issue.

5. GJARA collects yearly dues from its member realtors. These dues are allocated to GJARA dues, Colorado Association of Realtors dues, National Association of Realtors dues, a "Public Awareness Assessment", and a \$25.00 voluntary donation to a "Political Survival Fund" ("PSF").

6. PSF funds are used to support or oppose candidates or issues at the national, state and local levels. PSF is an affiliate committee with the Colorado Association of Realtors Political Action Committee and the Colorado Association of Realtor Issues Political Action Committee ("CAR-IPAC").

7. One-half of PSF contributions are devoted to issue, as opposed to candidate, elections. Of that amount, 30% is allocated to CAR-IPAC. Seventy percent of the funds allocated to CAR-IPAC are accounted for as money available to the local realtor associations that contributed the funds. When a local realtor association wishes to spend money on a local issue election, the local association must request that CAR-IPAC issue a check for that purpose, because the PSF funds contributed by the local association members are held by CAR-IPAC. CAR-IPAC makes the requested contribution in the local election if the local realtor association's members have contributed the amount requested to the PSF, and if the money is used in a manner consistent with CAR-IPAC goals. Although the check for such a contribution is from a CAR-IPAC account, members of the local realtor association contributed the funds represented by that check.

8. GJARA decided to contribute money to MCCRG. GJARA's association executive, Pat Teck, contacted CAR-IPAC to determine how much money was available in the local realtor account attributable to GJARA. GJARA had \$5,755.20 in available local funds contributed through the PSF.

9. GJARA requested that \$5,000 of the locally contributed funds attributable to GJARA be paid to MCCRG to oppose the home rule ballot issue, and also requested that the state-wide CAR-IPAC contribute \$3,000 of state IPAC funds. The CAR-IPAC trustees approved GJARA's request at a meeting on September 6, 2002. A Colorado Association of Realtors "Check Request Form" was completed and approved, authorizing issuance of a check in the amount of \$8,000 to Mesa County Citizens for Representative Government; charged to "Grand Junction IPAC - \$5,000/State IPAC - \$3,000."

10. CAR-IPAC issued a check payable to MCCRG for \$8,000 on September 17, 2002. Thomas received and deposited the check on September 18, 2002.

11. On October 11, 2002 Thomas filed a Report of Contributions and Expenditures with the Mesa County Clerk and Recorder. This report covered the period September 9, 2002 through October 10, 2002. This was the first time Thomas had completed and submitted such a form.

12. Thomas reported the \$8,000 contribution from CAR-IPAC on the October 11 report. Thomas adopted the information on the CAR-IPAC check and check stub in filing his report. The name and address of the account holder described on the check was "Colorado Realtors I-PAC, 309 Inverness Way South, Englewood, CO 80112". The check stub read: "IPAC – Grand Junction \$5,000; IPAC – State \$3,000."

13. In the October 11 report Thomas identified the sources of these contributions as follows: (1) "COLO. REALTORS GRAND JCT, (no street address), GJ, CO 81501" (\$5,000); and (2) "COLO. REALTORS STATE, 309 INVERNESS W., ENGLEWOOD, CO 80112" (\$3,000).

14. Williams' complaint against MCCRG was dated October 17, 2002. The Colorado Secretary of State received the complaint on October 21, 2002. The Secretary of State transmitted the complaint to the Colorado Division of Administrative Hearings and to MCCRG on October 22, 2002.

15. On October 29, 2002 Thomas filed an Amended Report of Contributions and Expenditures with the Mesa County Clerk and Recorder, in response to Williams' complaint. In the amended filing, Thomas identified the sources of the contributions at issue as: (1) "COLO. REALTORS IPAC GRAND JCT, 309 INVERNESS W., ENGLEWOOD, CO 80112" (\$5,000); and (2) "COLO. REALTORS IPAC STATE, 309 INVERNESS W., ENGLEWOOD, CO 80112" (\$3,000).

16. No entity exists known as "Colorado Realtors Grand Junction" or "Colorado Realtors IPAC Grand Junction".

17. Thomas acted in good faith in filing the October 11 and October 29 reports. He did not intend to willfully or intentionally avoid a reporting obligation under the FCPA or to obscure the sources of the \$8,000 contribution to MCCRG.

NATURE OF THE COMPLAINT

Williams' complaint asserts that MCCRG's October 11, 2002 report of contributions did not disclose the true identity of the contributor of the \$8,000 check. The complaint also alleges that the Colorado Association of Realtors is prohibited by law from making contributions to local issue committees. Because the Colorado Association of Realtors is not a party to this case, the Administrative Law Judge will not address that latter portion of the complaint.¹ In a subsequent e-mail to the Colorado Secretary of State supplementing his complaint, Williams states that the identity and location of "Colo. Realtors" is confusing.

The complaint was filed prior to the filing by MCCRG of an amended report of contributions on October 29, 2002. At hearing the parties presented evidence and argument regarding the October 29 report without objection. The issue of whether the October 29 report complied with the FCPA was therefore tried by consent and the complaint is therefore amended to include that issue. See C.R.C.P. 15 (b); *Rominiecki v. McIntyre Livestock Corp.*, 633 P.2d 1064 (Colo. 1981).

DISCUSSION

1. The Fair Campaign Practices Act requires an issue committee such as MCCRG to report all contributions received, including the name and address of each person who has contributed \$20 or more. Section 1-45-108(1)(a), C.R.S. (2002). The first question that must be addressed is to identify the appropriate level of statutory compliance that is required by the FCPA. MCCRG argues that a substantial compliance test is the appropriate analysis, rather than a requirement of strict compliance with the FCPA.

The Colorado Supreme Court has held that a substantial compliance test is the appropriate means of analysis for determining compliance with statutory procedures regulating the right to vote, or the exercise of the right of initiative or referendum. Strict compliance is not required. Thus, the court has ruled that substantial compliance with the statute regulating the content of write-in ballots cast for a candidate is sufficient to validate the ballots, so as to not unreasonably burden the right to vote. *Meyer v. Lamm*, 846 P.2d 862, 874-77 (Colo. 1993). Similarly, because the rights of initiative and referendum are fundamental rights under the Colorado Constitution, the sufficiency of an initiative petition should be determined on the basis of substantial compliance. *Fabec v. Beck*, 922 P.2d 330, 341 (Colo. 1996); *Loonan v. Woodley*, 882 P.2d 1380, 1383-84 (Colo. 1994). A liberal

1. After filing his complaint Williams sought to add the Colorado Association of Realtors IPAC as a party. The Administrative Law Judge denied that request in an order dated December 26, 2002.

construction to these laws is mandated so that the fundamental right to vote may be facilitated, not hampered by technical provisions that are unnecessary to fairly guard against fraud and mistake. *Loonan v. Woodley*, *supra* at 1384, citing *Montero v. Meyer*, 795 P.2d 242, 245 (Colo. 1990); see also *Fabec v. Beck*, *supra* at 341.

The obligation to complete a disclosure form in compliance with the reporting requirements of the FCPA does not rise to the same level as the fundamental rights of citizens to vote or initiate new laws. The FCPA's disclosure requirements are designed to benefit voters by providing information, not to protect any rights of the entity making the disclosure. Therefore, cases such as *Meyer v. Lamm*, *supra*, and *Loonan v. Woodley*, *supra*, do not mandate a substantial compliance analysis in the present case.

2. Nevertheless, the Administrative Law Judge concludes that independent of the above case law a substantial compliance test provides the appropriate form of analysis in this case. The legislative declaration of the FCPA focuses primarily on the problems of corruption, special interests and money in elections for candidates, not on ballot issues or issue committees. Thus, disclosure of contributions in an issue election is not considered by the FCPA to be as critical as similar disclosures in a candidate election. *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000).

In the context of complying with laws regulating elections and initiatives, substantial compliance is measured by the following considerations: (1) the extent of the non-compliance; (2) whether the purpose of the law is substantially achieved despite the non-compliance; and (3) whether a good faith effort has been made to comply with the law (as opposed to an intent to mislead the electorate). *Bickel v. City of Boulder*, 885 P.2d 215, 227 (Colo. 1994); *Loonan v. Woodley*, *supra* at 1384. Application of a similar test in the present case is sufficient to achieve the purpose of the FCPA to provide disclosure of the identity of contributors to an issue committee.² A strict compliance test, on the other hand, would subject issue committees to potential penalties when such penalties are not necessitated by the purposes of the statute. The Administrative Law Judge therefore concludes that a substantial compliance analysis, rather than a strict compliance test, is the appropriate analysis to be applied in the present case.

3. The original report of the \$5,000 contribution filed by MCCRG on October 11, 2002, did not comply with Section 108(1)(a) of the FCPA, even under a substantial compliance test. The October 11 report referred to an entity that did not exist ("Colo. Realtors Grand Jct"), omitted the address of the contributor of \$5,000 and did not reflect that the contributor was a political action committee. It would be very difficult for any person reading this report to identify the source of this contribution.

However, the October 11 report did comply with Section 108(1)(a) of the FCPA with regard to the \$3,000 contribution. The reference to "Colo. Realtors" along with the address

2. A rule of substantial compliance with a statute will apply when such a rule serves the purposes of the statute. See *Charnes v. Norwest Leasing, Inc.*, 787 P.2d 145 (Colo. 1990).

of that organization is sufficient disclosure of the name and address of the statewide association of realtors that was the source of the contribution. Even if this disclosure were considered to be out of strict compliance with Section 108(1)(a), the disclosure is sufficient under a substantial compliance test: the extent of any non-compliance was not substantial; the purpose of the FCPA (disclosure of the identity of the contributor) was substantially achieved by this disclosure; and Thomas made a good faith effort to comply with the law and did not intend to mislead the electorate (Findings of Fact, Paragraph 17).

4. The deficiencies in the October 11 report were corrected on October 29. The October 29 amended report substantially complied with Section 108(1)(a) of the FCPA. First, the extent of any non-compliance in the amended report was not substantial. The amended report provided an address for the Grand Junction contributor and disclosed that the contributor was a political action committee. Although it may have been more accurate to indicate that the contributors were members of GJARA in Grand Junction, the report reflects that the contribution came from realtors in Grand Junction and provided an address at which the contributor could be contacted or identified.

Second, the purpose of the FCPA was substantially achieved by this disclosure. A person reading this report would know that a political action committee of realtors in Grand Junction, Colorado had made a \$5,000 contribution, and the address at which the contributor could be contacted or identified was disclosed in the event a reader of the report wished to pursue further information.

Williams argues that the MCCRG report is deceptive because it implies that the contribution comes from Grand Junction (Mesa County) interests, when it really came from a Denver area entity. However, in this respect the October 29 report is accurate. In fact, the funds contributed to MCCRG did come from contributions made by the members of GJARA in Mesa County. Findings of Fact, Paragraphs 5 - 8. In addition, the Denver area address is accurate; although Mesa County realtors contributed these funds, the administration of the funds took place at the CAR address in Englewood, Colorado.

Finally, Thomas made a good faith effort to comply with the law and did not intend to mislead the electorate. The Administrative Law Judge therefore concludes that the October 29, 2002 MCCRG amended Report of Contributions and Expenditures substantially complied with the FCPA.

5. MCCRG requests that an award of attorney fees be assessed against Williams because the complaint is unfounded, and is substantially frivolous, groundless or vexatious. MCCRG relies on Rule 11 of the Colorado Rules of Civil Procedure and Section 13-17-102, C.R.S. (2002) as the basis for an attorney fee award.

This complaint was not unfounded. In fact, the Administrative Law Judge has concluded that the report on file at the time Williams presented his complaint failed to substantially comply with the disclosure requirement of the FCPA as it relates to the \$5,000 contribution.

MCCRG argues that this is the third FCPA complaint filed by Williams as a result of the November, 2002 election, and that Williams therefore is guilty of harassment and the filing of vexatious complaints.³ There is simply no evidence to support this allegation by MCCRG. MCCRG has not established that any of the other complaints have been determined adversely to Williams, or that the other complaints were substantially frivolous or groundless. The General Assembly has determined that complaints by private parties are the mechanism for enforcement of the FCPA. Section 1-45-111(2)(a), C.R.S. (2002). If some arbitrary limit on the number of complaints were to result in an award of attorney fees against a complainant, citizens would be discouraged from exercising their right to bring such an enforcement action. Therefore, the mere fact that Williams has filed three complaints, in the absence of any evidence that these complaints were substantially groundless or unfounded, does not warrant the imposition of attorney fees against Williams.

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction over the subject matter of this complaint. Section 1-45-111(2)(a), C.R.S. (2002).
2. The October 11, 2002 Report of Contributions and Expenditures filed by MCCRG did not provide the name and address of the person making the \$5,000 contribution and was not in compliance with Section 1-45-108(1)(a), C.R.S. (2002). In all other respects the October 11 report complied with the FCPA.
3. The October 29, 2002 amended Report of Contributions and Expenditures complied with Section 1-45-108(1)(a), C.R.S. (2002).
4. MCCRG is not entitled to an award of attorney fees against Williams.

AGENCY DECISION

MCCRG failed to comply with the reporting requirements of the FCPA with regard to the \$5,000 contribution described in its October 11, 2002, report. In all other respects MCCRG's filings with the Mesa County Clerk and Recorder complied with Section 108(1)(a) of the FCPA.

Once a violation of the FCPA has been established, the Administrative Law Judge must include in the Agency Decision the appropriate order, sanction or relief *authorized by the FCPA*. Section 1-45-111 (2)(a), C.R.S. (2002). However, the FCPA does not authorize any sanctions that can be imposed by an administrative law judge for MCCRG's conduct in

3. Two of the complaints related to the home rule ballot issue. The third complaint involved a different matter.

this case.

Section 113 of the FCPA identifies sanctions for various violations of the statute. None of these sanctions are appropriate in this case. Section 113(1) provides that a willful or intentional violation of Section 108 is a class two misdemeanor. However, an administrative law judge has no authority to determine criminal violations.

Section 113(2) establishes a civil penalty for violations of the FCPA relating to contribution limits. Contribution limits are governed by Section 105.3 of the statute. The present case does not involve an allegation of violations of the contribution limits of Section 105.3.

Section 113(4) permits the imposition of a penalty of fifty dollars for each day's failure to file information required by Section 108 of the FCPA. This penalty is to be imposed by "the appropriate officer". The "appropriate officer" means the individual with whom an issue committee must file reports under Section 109(1) of the statute. Section 1-45-103(1), C.R.S. (2002). In the present case, Section 109(1) identifies the "appropriate officer" as the county clerk and recorder of the county of residence of the person making the filing. MCCRG's address is in Mesa County and the appropriate officer in this case is therefore the Mesa County Clerk and Recorder.

Under Section 113(4) of the FCPA, if either of MCCRG's reports were not timely the Mesa County Clerk and Recorder, as the "appropriate officer", could fine MCCRG for failing to timely file information. In that event, MCCRG could appeal to the Secretary of State, who would refer the appeal to an administrative law judge. Section 1-45-113(4)(b)(I), C.R.S. (2002). The present case did not arise under that procedure; the Administrative Law Judge is not hearing an appeal from the assessment of a penalty by the Mesa County Clerk and Recorder. Further, the Administrative Law Judge is not the "appropriate officer" as defined in Section 103(1) of the FCPA. Therefore, the FCPA does not authorize the Administrative Law Judge to impose a penalty for late reporting.

Williams requests as a remedy that MCCRG be required to return the contribution to the Colorado Association of Realtors. The FCPA does not provide for that remedy. In fact, as discussed above, the FCPA authorizes no sanction that can be imposed by an administrative law judge for the failure of compliance found in this case. No serious sanction is warranted in any event because MCCRG acted in good faith and corrected its violation promptly after the omission in the report was called to its attention, and before the November 5, 2002 election.

It is therefore the Agency Decision that MCCRG failed to comply with Section 108(1)(a) of the FCPA in its October 11, 2002 report of a \$5,000 contribution, but did not otherwise violate the FCPA. No sanction is authorized by the FCPA for this violation.

Dated: March _____, 2003

MARSHALL A. SNIDER
Administrative Law Judge

CERTIFICATE OF MAILING

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Mac Williams
P.O. Box 546
Clifton, CO 81520

Keith Boughton, Esq.
562 White Ave.
Grand Junction, CO 81501

William Hobbs
Deputy Secretary of State
1560 Broadway
Suite 200
Denver, CO 80202

on this ____ day of March, 2003.

Secretary to Administrative Law Judge

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