

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

CASE NO. OS 2002-032

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY CHARLES H. BUCKNAM
REGARDING ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT BY
JOHN EVANS AND THE CANDIDATE COMMITTEE CITIZENS FOR JOHN EVANS**

This matter arises from a complaint filed with the Colorado Secretary of State on December 23, 2002, by Complainant Charles H. Bucknam. The complaint alleges violations of the Fair Campaign Practices Act, Sections 1-45-101 to 118, C.R.S. (2002) ("the Act"). 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), of the Act. Respondents then filed a Motion to Dismiss With Prejudice, and Complainant filed a Response to Motion to Dismiss with Prejudice and Amended Complaint, which was treated as a motion to amend.

A hearing was held on these motions on March 13, 2003, before Administrative Law Judge Nancy Connick. Complainant Charles H. Bucknam appeared and was represented by Jerri L. Hill, Esq. Respondents were represented by Richard A. Westfall, Hale Hackstaff Tymkovich, LLP. The record was held open to permit Complainant to file a copy of the Agency Decision in a prior proceeding initiated by him. On March 14, 2003, Complainant filed copies of the Agency Decisions in OS 98-22 and OS 98-46,¹ which the Administrative Law Judge has reviewed. The facts necessary to resolve the current complaint are not in dispute, and the motions filed by the parties resolve all legal issues. The Administrative Law Judge therefore enters this Agency Decision.

ISSUES PRESENTED

Three issues are presented in this matter:

1. The first issue is whether John Evans and the candidate committee Citizens for John Evans failed timely to report to the Secretary of State three contributions received in October, 2002, of at least \$1,000 from American Family Insurance, Colorado Realtors PAC, and Colorado Medical Society PAC. Section 1-45-108(2.5), C.R.S.,

2. The second issue is what sanctions, if any, are provided by the Act for a violation of Section 1-45-108(2.5), C.R.S., as described above.

¹ *In the Matter of the Complaint Filed by Charles H. Bucknam Regarding Alleged Violations of the Fair Campaign Practices Act by Steve Curtis, Chairman, Colorado Republican State Central Committee and In the Matter of the Complaint Filed by Charles H. Bucknam Regarding Alleged Violations of the Fair Campaign Practices Act by Joe C. Nunez and the Committee to Elect Joe C. Nunez.*

3. The third issue is whether Respondents violated Section 1-45-113(2), C.R.S., by allegedly paying a fine imposed for a late filing from the campaign funds of Citizens for John Evans rather than from the personal funds of John Evans.

4. The fourth issue is whether Complainant may add new alleged violations to his complaint by means of a motion to amend or whether he must file a new complaint with the Secretary of State.

FINDINGS OF FACT

1. John Evans was a candidate for the Colorado Senate in the November, 2002 election.

2. Citizens for John Evans, a candidate committee ("Committee"), received a \$1,000 contribution from American Family Insurance on October 7, 2002, within 30 days preceding the general election. Although the Committee reported this contribution on its regular reporting form filed with the Secretary of State on October 15, 2002, it did not file a Notice of Major Contributor form with the Secretary of State until January 2, 2003, almost three months after it was due.

3. The Committee received a \$1,500 contribution from Colorado Realtors PAC on October 10, 2002, within 30 days preceding the general election. Although the Committee reported this contribution on its regular reporting form filed with the Secretary of State on October 29, 2002, it did not file a Notice of Major Contributor form with the Secretary of State until January 2, 2003, almost three months after it was due.

4. The Committee received a \$1,000 contribution from the Colorado Medical Society PAC on October 28, 2002, within 30 days preceding the general election. Although the Committee reported this contribution on its regular reporting form filed with the Secretary of State on December 5, 2002, it did not file a Notice of Major Contributor form with the Secretary of State until January 2, 2003, over two months after it was due.

DISCUSSION AND CONCLUSIONS OF LAW

1. Jurisdiction. The Secretary of State has jurisdiction over complaints filed pursuant to the Fair Campaign Practices Act, Section 1-45-111(2)(a), C.R.S.

2. Reporting Violation. Citizens for John Evans² violated the Fair Campaign Practices Act, Section 1-45-108(2.5), C.R.S., by failing to file with the Secretary of State reports of the \$1,000 contributions it received on October 7 and 28, 2002, and the \$1,500 contribution it received on October 10, 2002, until January 2, 2003, well over the 24-hour period required for such report when the contribution is received within thirty days preceding the general election. The Act does not impose any requirement that the failure

2 The obligation to make this report lies with the candidate committee.

to report within 24 hours as required by Section 1-45-108(2.5) be intentional in order to constitute a violation.

3. No Monetary Penalty Provided. Complainant seeks a penalty pursuant to Section 1-45-113(4)(a), C.R.S., of \$50 per day for each day that the reports required by Section 1-45-108(2.5), C.R.S., were late. Neither this subsection nor any provision within Section 1-45-113, however, authorizes the Administrative Law Judge to impose a monetary penalty. Section 1-45-111(2)(a), C.R.S., provides that once a violation of the Act is established, the Administrative Law Judge's decision shall include "any appropriate order, sanction, or relief authorized by this article." The issue of sanctions is addressed in Section 1-45-113(1), (2), and (4), C.R.S., but none of these subsections authorizes the Administrative Law Judge to impose a sanction for Respondent's violation of Section 1-45-108.

a. Section 1-45-113(1) imposes a criminal penalty for a willful and intentional violation of Section 1-45-108, but the Administrative Law Judge has no authority to impose a criminal penalty.

b. Section 1-45-113(2) imposes a civil penalty for violations of provisions "relating to contribution limits," but Section 1-45-108 does not relate to contribution limits.³

c. Section 1-45-113 (4)(a) permits an "appropriate officer" to impose a monetary penalty up to \$1,000 when information required to be filed pursuant to Section 1-45-108 is late. An analysis of subsection (4), however, establishes that an administrative law judge is not an "appropriate officer" authorized to impose such a penalty. The procedure established allows a person against whom a penalty has been imposed to appeal that penalty and, if the Secretary of State does not reduce it or set it aside, to obtain a hearing before an administrative law judge. In such a hearing, the administrative law judge has authority to "set aside or reduce the penalty." Section 1-45-113(4)(a),(b) and (c), C.R.S. Under this procedure, the administrative law judge cannot be both the officer who initially imposes the penalty and whose action is subject to appeal and also the reviewer of his own action. In addition, the administrative law judge's authority in any such appeal is restricted. The administrative law judge may only set aside or reduce the penalty upon good cause shown. Section 1-45-113(4), C.R.S., therefore provides no authority for the Administrative Law Judge to impose a penalty for the Committee's violation of Section 1-45-108(2.5), C.R.S.

4. No Referral to District Attorney Provided. Complainant requests that the Administrative Law Judge refer this matter to the District Attorney for initiation of criminal charges and has submitted the Agency Decisions in OS 98-22 and OS 98-46 in support of her authority to do so. At the time these decisions were issued, Section 1-45-111(2)(a) of the Act authorized an administrative law judge to notify the attorney general and appropriate district attorney of violations found. This language, however, was deleted in the

³ Section 1-45-105.3, C.R.S., specifically imposes contribution limits.

2000 legislative session. The replacement language, as noted above, now provides that upon finding violations of the Act, an administrative law judge's decision shall include "any appropriate order, sanction or relief *authorized by this article.*" (emphasis added). Nothing in the Act authorizes referral to the District Attorney.

5. Dismissal of Alleged Violation of Section 1-45-113(2). Respondents have moved to dismiss the remaining allegation of the complaint which charges that they violated Section 1-45-113(2) by allegedly paying a \$800 penalty for late filing of a report from Committee funds instead of John Evans' personal funds. Respondents asserts that the Administrative Law Judge lacks authority to consider this complaint.

The Administrative Law Judge's authority to conduct hearings derives from Section 1-45-111(2)(a), C.R.S., which allows persons to file complaints with the Secretary of State when they believe certain sections of the Act have been violated. The enumerated sections do not include Section 1-45-113, and therefore the Administrative Law Judge has no authority to hold a hearing to consider an asserted violation of this provision. At hearing, Complainant also contended that the conduct alleged violates Section 1-45-110, which requires candidates to certify their familiarity with provisions of the Act, but this section is also not among those listed in Section 1-45-111(2)(a) which may be the subject of complaints. At hearing Complainant also cited as the basis of his complaint Section 1-45-106(1)(a)(II), C.R.S., regarding unexpended campaign contributions, a provision which may be the subject of a complaint. This provision was clearly not cited either as part of the original complaint or the purported amended complaint and cannot be asserted for the first time in response to a motion to dismiss.⁴ That portion of the complaint based on Section 1-45-113(2), C.R.S., is therefore dismissed.

5. Motion to Amend. Complainant has filed a pleading designated an Amended Complainant in which he asserts new violations of the Act and its rules regarding Committee registration forms and various reports. The Administrative Law Judge treats Complainant's Amended Complaint as a motion to amend. Respondents object to any motion to amend at this point in the proceedings.

The Act specifies the procedure by which persons asserting violations of certain of its provisions must assert those violations. Section 1-45-111(2)(a), C.R.S., requires the filing of a written complaint with the Secretary of State within 180 days after the date of the alleged violation. The Secretary of State then refers the complaint to an administrative law judge. Given this statutory procedure, the Administrative Law Judge lacks authority to bypass the procedure established by statute and accept a new complaint by means of granting the motion to amend. The motion to amend is therefore denied. Complainant must follow the procedure outlined in Section 1-45-111(2)(a), C.R.S., in relation to new complaints.

⁴ In addition, this provision on unexpended campaign contributions does not appear to apply to the use of campaign contributions during the course of a campaign.

INITIAL DECISION

It is the Agency Decision that the Citizens for John Evans violated the Fair Campaign Practices Act, Section 1-45-108(2.5), C.R.S., by failing to file reports with the Secretary of State within 24 hours of receipt of three contributions of \$1,000, \$1,500, and \$1,000 received respectively from American Family Insurance, Colorado Realtors PAC, and Colorado Medical Society PAC in October, 2002. The hearing scheduled for April 15, 2003, is vacated.

DONE AND SIGNED

March 17, 2003

NANCY CONNICK
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above **AGENCY DECISION** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado, to:

Jerri L. Hill, Esq.
12460 N. Third Street
Parker, CO 80134

Richard Westfall, Esq.
Hale Hackstaff Tymkovich, LLP
1430 Wynkoop, Suite 3000
Denver, CO 80202

and was served by interoffice mail to: William Hobbs, Department of State, 1560 Broadway, Suite 200, Denver, CO 80202, on September ____, 2003.

Secretary to Administrative Law Judge

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