

**BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO**

CASE NO. OS 2003-001

**AGENCY DECISION GRANTING MOTION FOR SUMMARY JUDGMENT AND MOTION
TO DISMISS FOR FAILURE TO SUBMIT PRE-HEARING STATEMENT**

**IN THE MATTER OF THE COMPLAINT FILED BY MAC WILLIAMS REGARDING
ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT BY COLORADO
ASSOCIATION OF REALTORS; COLORADO ASSOCIATION OF REALTORS, PSF,
IPAC, CORPAC, RPAC and IMC**

This matter is before the Administrative Law Judge (ALJ) on a Motion for Summary Judgment and a (renewed) Motion for Summary Judgment or in the Alternative Motion to Dismiss for Failure to Submit Pre-Hearing Statement filed by Colorado Associations of Realtors (CAR), Realtors Issues Political Action Committee (IPAC) and Colorado Association of Realtors Political Action Committee (CORPAC) (collectively referred to as "Respondents"). The Complainant, Mac Williams (Williams), has filed no response to the motions. For the reasons stated below, the ALJ grants Respondents' motions. Because the granting of these motions resolves all issues between the parties in the current proceeding, this order constitutes a final Agency Decision.

Procedural Background

This is a proceeding brought by Williams under the Fair Campaign Practices Act, Sections 1-45-101 through 1-45-117, C.R.S. (2002) (FCPA).¹ Williams initially filed his Complaint with the Secretary of State on January 22, 2003, asserting violations of the FCPA by the Grand Junction Area Realtors Association (GJARA), CAR, the Colorado Association of Realtors, Issues Political Action Committee and "other 'campaign committees' operated by Colorado Association of Realtors."²

On January 24, 2003, the Colorado Secretary of State (SOS) referred Williams' Complaint to the Colorado Division of Administrative Hearings (DOAH) for hearing pursuant to Section 1-45-111(2). On January 28, 2003, DOAH issued a Notice to Set for February 14, 2003, which notice, along with a copy of Williams' Complaint, was sent to Williams and the respondents that had been identified at that time, GJARA and CAR.

¹ This case involves the version of the FCPA that was in effect in the fall of 2002. References in this decision to the FCPA relate to provisions of the Act as it existed at that time.

² On May 15, 2003, GJARA's Motion to Sever and Conduct Hearing in Grand Junction was granted. As a result, GJARA is no longer a party in this proceeding.

On February 10, 2003, Williams amended his Complaint adding as respondents CORPAC, Issues Mobilization Political Action Committee (IMPAC) and Realtor Political Action Committee (RPAC).³

On February 13, 2003, the ALJ vacated the February 14, 2003 setting date after determining that the additional parties named by Williams in his Amended Complaint had not received notice of the setting conference. The order additionally determined that Williams had failed to provide names and addresses for each of the newly-named respondents and ordered him to do so. On February 18, 2003 Williams filed a Supplement to the Amended Complaint which assertedly provided names and addresses of the various respondents. Additionally, the Supplement named another respondent, Political Survival Fund (PSF), and appeared to redesignate the Issues Mobilization Political Action Committee (IMPAC) as the Issues Mobilization Committee (IMC) (this entity is referred to hereinafter as "IMC").

On February 27, 2003, CAR, IPAC and CORPAC answered the Amended Complaint. In their answer, Respondents denied Williams' allegations and asserted that certain respondents named in Williams' Amended Complaint and Supplement are not subject to suit because they have no separate legal identities.

On March 4, 2003, a Second Notice to Set was issued by DOAH scheduling the setting conference for March 14, 2003. On March 18, 2003, a Notice of Hearing was issued, setting a hearing for June 23-24, 2003.

On May 19, 2003 Respondents served and on May 20, 2003, Respondents filed a Motion for Summary Judgment. The motion was supported by an affidavit of Janice Molitor, Chief Financial Officer of CAR and loaned employee for IPAC and CORPAC, to which was attached Detailed Summary Reports of Contributions and Expenditures filed with the Secretary of State by IPAC on September 27, 2002 and January 31, 2003. The motion was additionally supported by further documentation, including pleadings in the present case, FCPA Advisory Opinions of the Secretary of State issued on September 23, 2002 and July 20, 2000, and an Agency Decision issued by ALJ Marshall A. Snider in Case No. OS 2002-023 on March 27, 2003. On June 10, 2003, Respondents filed a (renewed) Motion for Entry of Summary Judgment or in the Alternative to Dismiss for Failure to Submit Pre-Hearing Statement. Williams has failed to respond to either of these motions and has provided no indication that he intends to contest the motion in any manner.

Discussion

I. Effect of Failure to Respond to Motion for Summary Judgment. As noted, Respondents' original Motion for Summary Judgment was accompanied by an affidavit of Janice Molitor, Chief Financial Officer of CAR and loaned employee for IPAC and CORPAC. The Molitor affidavit provides a factual predicate for Respondents' assertions that Williams has failed to state a claim and Respondents are entitled to

³ On June 18, 2003, RPAC's Motion to dismiss was granted. As a result, RPAC is no longer a party in this proceeding.

judgment as a matter of law. Williams' failure to respond to Respondents' motion leaves unrefuted each of Respondents' factual assertions. The ALJ finds as fact each of the matters set forth in Respondents' affidavit and incorporates that affidavit herein.

II. Motion for Summary Judgment.

A. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. C.R.P.C. 56(c); *Civil Service Commission v. Pinder*, 812 P.2d 645, 649 (Colo. 1991). When a motion for summary judgment is made, an adverse party may not rest upon the mere allegations or denials of the opposing party's pleadings, but must set forth specific facts showing that there is a genuine issue for trial. C.R.C.P. 56(e). *Evans v. Colorado Permanente Medical Group*, 902 P.2d (Colo. App. 1995). Once the moving party affirmatively shows specific facts probative of its right to judgment, the nonmoving party must set forth facts showing there is a genuine issue for trial. *Meyer v. Schwartz*, 638 P.2d (Colo. App. 1981). If no counter-showing is made, the trial court has no alternative but to conclude that no facts remain to be determined. *Meyer v. Schwartz*, *id.*

In this case, Respondents served their Motion for Summary Judgment on May 19 and filed it on May 20, 2003. In that motion, Respondents set forth specific facts probative of their right to relief supported by an affidavit. Upon Respondents' showing of those facts, Williams was required to present facts showing there was a genuine issue for trial. *Meyer v. Schwartz*, *id.*; *Evans v. Colorado Permanente Medical Group*, *id.* If Williams could not meet his burden to show a true factual controversy, the ALJ has no choice but to determine the facts asserted by Respondents are uncontroverted and no genuine issue of material fact exists.

Pursuant to DOAH Rule 10, Williams had 10 days within which to file a response to the Motion for Summary Judgment. Williams failed to file any response within that period of time and, to date, has failed to respond to the motion or to seek an order permitting an extension of time within which to respond. He has also failed to file any response to Respondents' (renewed) Motion for Entry of Summary Judgment or in the Alternative to Dismiss for Failure to Submit Pre-Hearing Statement filed on June 10, 2003.⁴ Under these circumstances, the ALJ determines the facts as set forth by Respondents are uncontroverted. Furthermore, for the reasons stated below, the ALJ concludes that based on the uncontroverted facts Respondents are entitled to judgment as a matter of law.

B. Claims. Although Williams' claims are largely conclusory and lack specificity, he appears to assert the following alleged violations of the FCPA:

1. IPAC, CAR, CORPAC and IMC violated the disclosure requirements of Section 1-45-108(1)(a), C.R.S. (Complaint, paragraph 5; Amended Complaint, paragraph 4);

⁴ In fact, Williams has filed nothing in this proceeding since March 5, 2003 and has not affirmatively indicated any intention of pursuing this matter.

2. IPAC, CAR and PSF violated the registration requirements of Section 1-45-108(3), C.R.S. (Complaint, paragraph 3; Amended Complaint, paragraph 1);
3. CAR failed to maintain separate accounts in violation of Section 1-45-105.3(8), C.R.S. (Amended Complaint, paragraph 3); and
4. Each of the Respondents encouraged others to violate FCPA (Complaint, paragraph 4; Amended Complaint, paragraphs 5, 6);

C. Claims Against PSF and IMC. Respondents assert that because neither PSF nor IMC is a separate legal entity distinct from CAR, legal actions cannot be brought against them, thereby warranting dismissal of PSF and IMC from this proceeding. The ALJ agrees.

The uncontroverted evidence in this matter (specifically, the Molitor affidavit) establishes that PSF and IMC are not separate legal entities independent of CAR. Instead, PSF is simply the name of a bank account administered by CAR to which dues-related contributions are deposited. Similarly, IMC is merely a standing operating committee of CAR that focuses on and receives contributions for non-ballot issues. In Colorado, legal actions may only be brought against legal entities. *Barker v. Larimer County District Court*, 609 P.2d 628 (Colo. 1980). Because neither PSF nor IMC is a legal entity, Williams may not bring claims against them. Accordingly, Respondents are entitled to summary judgment of dismissal of all claims against PSF and IMC.

D. Claims Against CAR and CORPAC. Respondents assert that all claims against CAR and CORPAC should be dismissed because those Respondents are not issue committees under FCPA and are thus not subject to the reported requirements Williams has alleged they violated. The ALJ agrees.

FCPA imposes contribution limits and disclosure requirements on candidate committees, political committees and political parties, as those terms are defined under the FCPA. Although issue committees are not subject to contribution limits under FCPA, they are subject to reporting requirements. Issue committees are required to report their contributions received, including the name and address of each person who contributed twenty dollars or more, expenditures made, and obligations entered into by the committee. Section 1-45-108(1). Such committees must also deposit all contributions received in separate bank accounts, Section 1-45-105.3, and must register with the appropriate officer before accepting or making any contributions, Section 1-45-108(3).

Although the Complaint as amended and supplemented does not disclose the underlying factual background of this dispute, Respondents' motion indicates Williams' claims arise out of filings (or the absence thereof) leading up to a contested home rule ballot issue in Mesa County, Colorado. In the absence of any conflicting information concerning the parties' dispute, the ALJ finds the Respondents' description of the dispute to be uncontroverted. Thus, although the Complaint does not make this clear on its face, the

ALJ determines that Williams' claims against Respondents assert violations by Respondents in their alleged capacity as issue committees.

The amended and supplemented complaint includes allegations that CAR failed to comply with disclosure, registration and separate account requirements of FCPA. The uncontroverted evidence establishes that CAR does not meet the definition of either an issue committee or a political committee under FCPA. CAR is a non-profit corporation organized as a trade association under the Internal Revenue Code. CAR was not formed for the purpose of accepting or making contributions and does not accept contributions or make expenditures in support of or opposition to any candidate for state or local office or any ballot issue. Thus, CAR is not subject to regulation under the FCPA and is not required to be registered with the Secretary of State as either an issue committee or a political committee. Section 1-45-103(8)(a) and 1-45-103(10). Thus, Respondents are entitled to summary judgment of dismissal of all claims against CAR.

The amended and supplemented complaint includes allegations that CORPAC failed to comply with disclosure and separate account requirements of FCPA. The uncontested evidence concerning CORPAC establishes that it was formed for the purpose of accepting contributions and making expenditures to support candidates for state and local office in Colorado. Accordingly, CORPAC is a political committee as that term is defined under the act, Section 1-45-103(10), and has been registered with the Secretary of State since the early 1980's.

Because CORPAC is a political committee, it is necessarily excluded from also being an issue committee. Section 1-45-103(10)(a); see *Common Sense Alliance v. Davidson*, 995 P.2d 748 (Colo. 2000). Furthermore, the uncontested evidence established CORPAC raises money only for candidates, not issues. CORPAC does not accept contributions or make expenditures in support of or in opposition to ballot issues and did not make any expenditures in connection with the home rule ballot issue in Mesa County, Colorado. Therefore, CORPAC's activities do not meet the definition of an issue committee. Section 1-45-103(8)(a).

As noted above, Williams' complaint relates to the Mesa County home rule ballot issue and thus relates to the enforcement provision of the FCPA as it relates to disclosure requirements governing issue committees. Because the evidence established CORPAC is not an issue committee, it is not subject to FCPA's requirements regarding issue committee registration, disclosure and maintenance of separate accounts. All claims against CORPAC are therefore properly dismissed since they relate solely to FCPA requirements for issue committees.

E. Claims Against IPAC. Williams asserts that IPAC falsely registered as an issue committee while acting as a political committee (Complaint, paragraph 3), failed to identify its individual contributors in reports to the Secretary of State (Amended Complaint, paragraph 4); and filed an incorrect expense summary for the period September 12, 2002 through September 25, 2002 (Complaint, paragraph 5). Respondents assert that all claims against IPAC should be dismissed because it correctly registered with the Secretary of

State; is not required to disclose the source of non-earmarked funds; and because the September 12-25, 2002 report, although inadvertently incorrect in one respect, was in substantial compliance with the requirements of the FCPA and did not reflect intentional misconduct. The ALJ agrees.

1. Registration as an Issue Committee. Respondents assert that contrary to Williams' allegations, IPAC was not required to register as a political committee and instead is properly registered as an issue committee. The ALJ agrees with Respondents that IPAC's registration as an issue committee is proper.

The uncontroverted evidence establishes that IPAC has been registered with the Secretary of State since the early 1980's. It was formed for the purpose of obtaining and expending contributions to support or oppose ballot issues in general, county, district, special district, and municipal elections. Funds contributed to IPAC may be expended for ballot issues only. Consequently, IPAC fits within the definition of an issue committee, Section 1-45-103(8)(a)(II), and is necessarily excluded from being a political committee under FCPA. Section 1-45-103(8)(b); *Common Sense Alliance v. Davidson, id.* Accordingly, IPAC's registration as an issue committee is proper and Respondents are entitled to summary judgment on this claim.

2. Failure to Disclose Non-Earmarked Funds. Williams asserts, and Respondents concede, that IPAC failed to specifically identify its contributors in filings with the Secretary of State. Respondents assert, however, that it is not required under FCPA to make such disclosures. The ALJ agrees with Respondents that IPAC is not required under FCPA to disclose the specific identity of its contributors.

The uncontested evidence establishes that IPAC receives funds from individuals and entities involved in the real estate industry all over Colorado. IPAC does not solicit or receive funds for a particular ballot issues or questions. Instead, the funds that IPAC receives are deposited into IPAC's account. When a ballot issue or question arises, IPAC's Board of Trustees, in its sole discretion, decides whether funds will be expended from that account in connection with the ballot issue or question. Based on this information, it is apparent that IPAC is a multi-purpose issue committee as described in Section 1-45-103(8)(a)(II). See July 20, 2000 Advisory Opinion of Secretary of State Donetta Davidson addressed to Edward T. Ramey, Esq. Such multi-purpose issue committees are not required to identify the source of their contributions to the extent (as is the case with IPAC) such contributions are not sought and collected for specific ballot issues. Section 1-45-103(8)(b); July 20, 2000 Advisory Opinion of Secretary of State. Because the FCPA does not require IPAC, a multi-purpose issue committee, to identify the original source of its general, non-earmarked funds in disclosure statements, summary judgment in favor of Respondents on this claim is proper.

3. IPAC's Unintentional Error in its Disclosure Report for the Period September 12 through 25, 2002. Williams asserts, and Respondents concede, that IPAC filed an incorrect expense summary in the weeks leading up to the fall 2002 general election for the period of September 12-25. Respondents assert, however, that the error was inadvertent, was

corrected as soon as it became known, does not reflect intentional misconduct and did not alter the fact that the report was in substantial compliance with FCPA's disclosure and reporting requirements. The ALJ agrees with Respondents that IPAC's disclosure was in substantial compliance with the requirements of FCPA and thus did not constitute a violation of the FCPA.

With respect to this issue, the uncontested evidence established the following: On September 27, 2002, IPAC filed with the Secretary of State a Detailed Summary Report of Contributions and Expenditures for the period September 12-25, 2003. In that report, IPAC made an addition error. IPAC correctly listed its monetary expenditures, but added them up to a total of \$10,000 when they actually totaled \$19,500. IPAC did not intentionally file the report with that error; it was purely a miscalculation. Shortly after Williams filed his complaint, the calculation error was brought to the attention of IPAC's staff. The staff filed an amended Detailed Summary Report of Contributions and Expenditures with the Secretary of State on January 31, 2003. In the amended filing IPAC correctly added the monetary expenditures and reported the total expenditures to be \$19,500. In both the September 27, 2003 and January 31, 2003 filings, IPAC made a good faith effort to comply with the requirements of FCPA. IPAC correctly disclosed and listed all contributions received and expenditures made during the reporting period and did not intend to mislead the electorate.

IPAC's September 27, 2002 filing was neither intentionally inaccurate or significantly misleading. IPAC made an honest calculation error which was immediately corrected once the error was brought to IPAC's attention. Furthermore, the initial report correctly disclosed the sources of the contributions received and the expenditures made, as well as the itemized amounts of individual expenditures. In addition, the amended report also properly totaled the expenditures. The filings thus substantially complied with the disclosure and reporting requirements of the FCPA: the reports each listed the balance of funds at the beginning of the reporting period, the total contributions received and each of the expenditures made. In addition, the amended report contain the properly totaled expenditures. See Section 1-45-108(2)(b). Because IPAC acted in good faith and substantially complied with FCPA's disclosure requirements for issue committees, no violation of those requirements has been established and summary judgment with respect to this claim is appropriate. See Case No. OS 2002-023, Agency Decision dated March 27, 2003 (employing substantial compliance test rather than strict compliance test in determining whether issue committee has satisfied disclosure requirements under the FCPA).

4. Claims of Aiding and Abetting Violations of the FCPA. Williams asserts each of the Respondents assisted or encouraged one another or others to violate the FCPA. Respondents assert these claims should be dismissed because aiding and abetting a violation of the FCPA is not itself a violation of the Act. The ALJ agrees.

Section 1-45-111(2)(a), the enforcement provision of the FCPA, provides that any person who believes a violation of Sections 1-45-105.3, 1-45-105.5, 1-45-106, 1-45-108, 1-45-114, 1-45-115 or 1-45-117 has occurred may file a written complaint with the secretary

of state and obtain a hearing before an ALJ. The enforcement provision does not provide that aiding and abetting a violation of the FCPA is itself a violation of the FCPA and none of the provisions substantive provisions referenced in the enforcement section prohibit aiding or abetting violations of the FCPA. Thus, Williams may not file a claim based on such allegations and such allegations do not state a cognizable claim under the FCPA. Summary judgment with respect to this claim is therefore appropriate.

III. Motion to Dismiss for Failure to File Pre-Hearing Statement.

Respondents alternatively request that Williams' Complaint be dismissed as a sanction for his failure to file a pre-hearing statement as required by DOAH Rule 13, which requires that pre-hearing statements be filed and served not later than 20 days prior to hearing. The ALJ agrees that Williams' failure to file a pre-hearing statement under the specific facts of this case establishes an independent basis for disposing of this proceeding.

Based on DOAH Rule 13, the parties were required to exchange and file pre-hearing statements no later than June 3, 2003. Although Respondents timely complied with the rule, Williams did not timely file a pre-hearing statements or identify and exchange his exhibits and also failed to request an extension of time within which to file his pre-hearing statement.

Compliance with Rule 13 is mandatory and the ALJ is empowered to impose appropriate sanctions for non-compliance. DOAH Rule 13(E). In this case, a number of factors support a determination that the appropriate sanction for this non-compliance is dismissal of this proceeding: Williams has failed to provide a valid excuse for this non-compliance with Rule 13 and he has not recently participated in this proceeding (see footnote 4) or expressed any interest in pursuing this matter. Furthermore, particularly in view of the lack of clarity of the Amended and Supplemented Complaint, requiring Respondents to defend this proceeding without access to the information required to be provided in a pre-hearing statement would substantially disadvantage and prejudice Respondents.

Thus, Williams' failure to file a pre-hearing statement constitutes grounds for dismissing this proceeding. Respondents Motion to Dismiss this proceeding as a sanction for Williams' failure to file a pre-hearing statement is therefore granted as a separate and alternative ground for disposing of this proceeding.

ORDER

Respondents' Motion for Summary Judgment is granted with respect to each named Respondent and all claims contained in Complaint, Amended Complaint and Supplement to the Complaint. In addition and independent of the Order Granting Summary Judgment, Respondents Motion to Dismiss as a sanction for failure to file a pre-hearing statement is also granted. Because the granting of these motions resolves all issues between the parties in the current proceeding, this order constitutes a final Agency Decision.

DONE AND SIGNED

this ____ day of September, 2003.

JUDITH F. SCHULMAN
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the **AGENCY DECISION GRANTING MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS FOR FAILURE TO SUBMIT PRE-HEARING STATEMENT** was served by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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

Richard K. Clark, Esq.
Rothgerber Johnson & Lyons LLP
One Tabor Center
1200 Seventeenth Street, #3000
Denver, CO 80202

and was served via inter-office mail on William A. Hobbs, Deputy Secretary of State, Department of State, 1560 Broadway, Suite 200, Denver, CO 80202,

on this ____ day of September, 2003.

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