

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

CASE NO. OS 2003024

AGENCY DECISION DISMISSING COMPLAINT

**IN THE MATTER OF THE COMPLAINT FILED BY ALLEN M. "MAC" WILLIAMS
REGARDING ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT
BY DONETTA DAVIDSON AND THE COMMITTEE TO ELECT DONETTA
DAVIDSON,**

Respondents.

Procedural Background

This case is a complaint alleging violations of the Colo. Const. art XXVIII and the Fair Campaign Practices Act at Sections 1-45-101 *et seq.*, C.R.S. The Attorney General forwarded Complainant's complaint to the Division of Administrative Hearings on October 2, 2003. In a paper filed October 22, 2003, the Complainant, Allen M. "Mac" Williams, clarified that his complaint was against Respondent Donetta Davidson personally as a candidate for the office of Secretary of State and against the Respondent Candidate Committee "Committee to Elect Donetta Davidson." Per the Complainant, the complaint is not against Donetta Davidson in her official capacity as Secretary of State.

The same October 22, 2003 paper also made clear that Complainant's complaint was confined to paragraph 1 of the complaint that alleged:

Ms. Davidson, as a candidate for secretary of state, has violated the provisions of Article 28 and CRS 1-45 Part 1 by not reporting unexpended campaign contributions for the election cycle ended 12/5/2002 as contributions from a political party in the current election cycle, which began 12/6/02, while she maintained an active candidate committee and appears to be a candidate for secretary of state for this current election cycle;

This case was scheduled for hearing January 5, 2004, however, the Complainant did not appear. Richard C. Kaufman, Esq. appeared on behalf of the Respondents. As of the date of this Agency Decision Dismissing Complaint, the Complainant has not explained his failure to appear.

The January 5, 2004 hearing date was set at a setting conference November 20, 2003, the date originally scheduled for hearing. The Complainant did not appear at the

setting conference, but acknowledged his understanding of the hearing date in papers filed afterwards.

On December 11, 2003 by fax and again December 15, 2003 by hard copy, the Complainant filed a Request to Issue Notice of Default; Request to Consider Question of Subject Matter Jurisdiction at This Time. On December 26, 2003, Richard Walker, the paralegal for the Administrative Law Judge (“ALJ”), contacted the parties and notified them that the ALJ would not be able to rule on the motion until the January 5, 2004 hearing itself.

At the hearing, the ALJ denied Complainant’s motion for the reasons set forth below. As the Complainant had not appeared, the ALJ dismissed his complaint.

The Request to Issue Notice of Default

Per Colo. Const. art XXVIII, sec. 9(2)(b), complaints against the Secretary of State are to be investigated by the Attorney General “using the same procedures” as complaints against any other person under sec. 9(2)(a). Sec. 9(2)(a), though, has no procedures for investigation other than a referral to an ALJ.

In this case, Complainant asked the Attorney General to investigate. Per a letter from Maurice G. Knaizer, Deputy Attorney General, dated October 1, 2003 and attached to Complainant’s motion, the Attorney General, after some preliminary review of the case, declined to investigate the matter further and referred the matter to the Division of Administrative Hearings. Complainant argues that because the Attorney General did not investigate, “this hearing is in default.” Motion, p. 2.

The ALJ concludes that inaction on the part of the Attorney General is not a reason to halt this proceeding, nor does it excuse the Complainant for failing to appear. Even if the ALJ had authority to do so, it would be pointless to require the Attorney General to conduct an investigation he deems meritless. Moreover, any investigation would ultimately have to be referred to an ALJ for hearing: the very process that was followed here.

Related to this, the Complainant argues that the caption in this case should read “before the Attorney General,” and not “before the Secretary of State.” Such a distinction would be without substance, though. As any agency decision in a complaint against the Secretary of State would most correctly be an agency decision of the Secretary of State and not the Department of Law, the ALJ declines to change the caption. Section 9(2)(a).

Further the Complainant’s motion seeks to vacate the hearing, as the Secretary of State held a rule making hearing December 2, 2003 where, according to Complainant, she “entertained a rule or rules that could affect a judgment in the instant matter.” Complainant stated: “the secretary could simply write a rule alleviating her of any responsibility of violations found by this tribunal.” Motion, p. 3. Complainant attached a copy of the rules proposed on October 22, 2003. He made no argument as to how the proposed rules would affect his case. He did cite (among others) proposed

rule 4.11 that, if adopted, could affect the issues in this case. In particular, he did not explain how any new rule would operate other than prospectively. Any new rule would not apply to the past conduct complained of. A statute is presumed to be prospective in its operation. Section 2-4-202, C.R.S. The same rules of construction that apply to statutes also apply to agency rules. *Regular Route Common Carrier Conference v. Public Utilities Commission*, 761 P.2d 737 (Colo. 1988); *Williams v. Colorado Dept. of Corrections*, 926 P.2d 110 (Colo. App. 1996).

Complainant also requested to vacate the hearing so that he could issue discovery to be answered prior to a hearing. Again, the Division of Administrative Hearings received the complaint in this matter October 2, 2003. Complainant had adequate time to issue discovery and his failure to do so sufficiently in advance of hearing is not a valid reason to continue the hearing now.

Dismissal

The Complainant, as the proponent of the order, has the burden of proof in this matter. Section 24-4-105(7), C.R.S. As the Complainant failed to attend the hearing and present any evidence, this Complaint is dismissed *with prejudice*.

AGENCY DECISION

It is the Agency Decision that the Respondents have not violated the Fair Campaign Practices Act or Article XXVIII of the Colorado Constitution in any respect alleged in the complaint in this matter. The complaint is dismissed with prejudice.

At hearing, Respondents requested attorney fees and costs. Respondents are granted 20 days from the date of this Agency Decision Dismissing Complaint to file any request for attorney fees and costs and supporting documents or argument. If such a request is filed, Complainant may file a response to the request within 20 days. In that event, the final order of the Administrative Law Judge pursuant to Colo. Const. art. XXVIII, sec. 9(2)(a) and Section 24-4-106(11)(b), C.R.S. will be deemed to have been entered on the date the Administrative Law Judge rules on the request for attorney fees and costs. If no request for attorney fees or costs is filed within 20 days, the final order of the Administrative Law Judge pursuant to Colo. Const. art. XXVIII, sec. 9(2)(a) and Section 24-4-106(11)(b), C.R.S. will be deemed to have been entered 20 days from the

date this Agency Decision is signed.

DONE AND SIGNED

January _____, 2004

MATTHEW E. NORWOOD
Administrative Law Judge

CERTIFICATE OF SERVICE

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

Richard C. Kaufman
1775 Sherman Street, Suite 2100
Denver, Colorado 80203

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

and to

William A. Hobbs
Deputy Secretary of State
Department of State
1560 Broadway, Suite 200
Denver, CO 80203

on this ____ day of _____, 2004.

Secretary to Administrative Law Judge