

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

**CASE NO. OS 2003024**

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**ORDER GRANTING REQUEST FOR ATTORNEY FEES**

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**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.**

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**Background**

This case concerns 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 history of this case was set forth in the Agency Decision Dismissing Complaint dated January 9, 2004. The history is again set out here for the convenience of the reader.

The Complainant, Allen M. "Mac" Williams, originally filed his complaint with the Attorney General. 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. The Attorney General forwarded Complainant's complaint to the Division of Administrative Hearings ("Division") on October 2, 2003. In a paper filed October 22, 2003, the Complainant 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 was 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. 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." The request asked for the hearing to be vacated so that the matters brought up in the motion could be adjudicated first. The Respondents had until December 24, 2003 to respond. Respondents did not provide a response.

On December 26, 2003, Richard Walker, the paralegal for the Administrative Law Judge ("ALJ"), notified the parties by telephone and e-mail that the ALJ would not be able to rule on the motion until the January 5, 2004 hearing itself. By notifying the parties in this way, the ALJ put Complainant on notice that he could not rely on the submission of his Request to Issue Notice of Default to excuse an appearance.

At the hearing, Richard C. Kaufman, Esq., counsel for the Respondents, appeared but the Complainant did not. At the hearing, the ALJ denied Complainant's Request to Issue Notice of Default. As the motion was denied, the Complainant was required to present his case. He did not do so because of his unexplained absence and the ALJ dismissed his complaint with prejudice. As stated in the Agency Decision Dismissing Complaint, the Complainant, as the proponent of the order, had the burden of proof. Section 24-4-105(7), C.R.S.

At the hearing, counsel for Respondents asked to submit a request for attorney fees and costs. The January 9 Agency Decision Dismissing Complaint gave the Respondents 20 days in which to file a request for attorney fees and costs. The Agency Decision further provided an additional 20 days for a response.

On January 29, 2004, the Respondents filed their request for attorney fees and costs. Attached to the request was an itemization of these amounts. No fee agreement was included.

On February 12, 2004 by fax and on February 17, 2004 by hard copy, Complainant filed his "Response to Motion for Fees and Costs or in the Alternative Request of a Hearing on the Merits of Awarding Attorney's Fees Pursuant to C.R.C.P. 121, Practice Standard 1-22(2)(c)." That paper also had the title: "Motion for Reconsideration of Agency Decision to Not Dismiss for Lack of Subject Matter Jurisdiction" and "Motion for Reconsideration of Agency Decision to not Amend Caption." In that Response, Complainant requested a hearing per Practice Standard 1-22(2)(c). Such a hearing is discretionary on the part of the ALJ. That request was granted and a hearing was held February 24, 2004. Mr. Kaufman and Mr. Williams appeared by telephone and the matter was recorded on tape no. 7387. The hearing consisted of argument; no new evidence was offered by either party.

## Discussion

The Motion for Fees and Costs relies on Section 24-4-105(4), C.R.S. and Rules 11 and 121, of the Colorado Rules of Civil Procedure. In his Response, the Complainant makes a number of objections to the Motion for Fees and Costs as well as requesting other relief. This Discussion will follow the format of that Response. Following this Discussion the ALJ will make Findings of Fact per C.R.C.P. 121 at Section 1-22.

### *Timely Filing*

Complainant states that the Motion for Fees and Costs was not timely filed because it was improperly served on the Complainant. Complainant objects to the fact that the Respondents sent copies of filings to him at an address in Palisade, Colorado: an address different than the post office box used in the original Complaint. The Division had sent all of its correspondence in this case to the post office box.

In the first place, the Motion for Fees and Costs was timely filed with the Division on January 29, 2004. Secondly, it is clear from his Response, that Respondent *received* the Motion for Fees and Costs. Respondent makes no argument that mail does not reach him or that he was otherwise prejudiced by Respondents' use of the Palisade address. It appears from a review of the file that the Respondents have consistently used the Palisade address since their answer in this case in October of 2003. Although Respondent has participated in this case, he has never made any objection to the use of the Palisade address by Respondents up to this point.

### *Absence of a Fee Agreement*

Complainant next relies on C.R.C.P. 121, Section 1-22(2)(b) regarding motions for attorney fees and the sentence therein:

The motion shall be accompanied by any supporting documentation, including materials evidencing the attorney's time spent, the fee agreement between the attorney and client, and the reasonableness of the fees.

Complainant argues that the Motion did not include the fee agreement between the attorney and client nor any information as to the reasonableness of the fee.

Section 1-22(2)(b) provides that "any" supporting documentation shall be provided. No specific documentation is required and there is no requirement to submit a fee agreement or evidence of the reasonableness of the fees. The Respondents' Motion does set out with specificity the fees charged. With simple division it can be determined that "RCK," Mr. Richard C. Kaufman, charged \$250 per hour and that an associate "WHC" or William H. Caile charged \$150 per hour. As found below, Respondent does not challenge the reasonableness of these fees.

### *Should the Hearing Have Been Stayed?*

Complainant next argues that his filing of the Request to Issue Notice of Default should have stayed the proceedings per the authority of C.R.C.P. 12(b)(1) and *Furlong*

*v. Gardner*, 956 P.2d 545 (Colo. 1998). Firstly, C.R.C.P. 12(b)(1) does not provide for such an automatic stay. Secondly, Complainant does not explain how *Furlong v. Gardner* applies to this case and the ALJ does not perceive any applicability. That case held that the a minute order which reserved ruling on the defendant's motion for summary judgment was an appealable final order per 42 U.S.C. Section 1983. None of Complainant's authority supports the extraordinary notion that a party may unilaterally stay a previously scheduled hearing date.

Complainant goes on to object to the fact the Respondents did not respond to Request to Issue Notice of Default. But Respondents were not required to respond.

#### *Notification to Complainant*

Complainant next argues that the telephone message sent to him to inform him that the ALJ would not be able to rule on the Request to Issue Notice of Default was left at a telephone number where he was not living at that particular time. Per the Complainant, he played the message back when he returned to the home on February 6, 2004. He objects that the Division did not also call his cell phone and leave a message there in addition to calling his telephone number. The number used by the Division was the number that appeared on multiple papers filed by Complainant. A review of the file shows no cell number for Complainant. Complainant never told the Division that he would not be timely picking up telephone messages or that the Division should also call his cell number. In addition to leaving the message on his answering machine, the Division also e-mailed Complainant with the message that the ALJ would not rule on the Request to Issue Notice of Default until the hearing date. Respondent makes no comment as to whether he received the e-mail.

Of course, the issue of whether the Division properly notified Complainant is beside the point. The Division was under no obligation to call Complainant at all. Complainant was noticed of and aware of the January 5 hearing date. The call to the parties was only an additional courtesy to dispel any misapprehension on the part of the Complainant that filing his Request to Issue Notice of Default allowed him not to appear. Any such misapprehension, though, is not reasonable and Complainant had no basis to believe that he could chose not to appear at hearing.

#### *The ALJ is Authorized to Assess Attorney Fees*

Contrary to the assertion of Complainant, Colo. Const. art. XXVIII authorizes the ALJ to assess attorney fees. Article XXVIII, section 9(2)(b) governs complaints against the Secretary of State. It provides that such complaints are to follow the same procedures set forth in paragraph section 9(2)(a). Paragraph 9(2)(a) provides that the hearing is to be heard by an ALJ who is to issue a final decision subject to review by the Court of Appeals per Section 24-4-106(11), C.R.S. Section 24-4-105(2)(a) provides that in any proceeding "in which an opportunity for agency adjudicatory hearing is required under the state constitution or by this or any other statute, the parties are entitled to a hearing and decision in conformity with this section." Section 24-4-105(4), C.R.S., then, permits the ALJ to "award attorney fees for abuses of discovery procedures or as otherwise provided under the Colorado rules of civil procedure; and take any other

action authorized by agency rule consistent with this article or in accordance, to the extent practicable, with the procedure in the district courts.” Emphasis added.

C.R.C.P. 11 provides that by signing a pleading, an attorney or a party not represented by an attorney, certifies that to the best of his knowledge “it is well grounded in fact and is warranted by existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A violation of C.R.C.P. 11 may be based on the signing of a motion. *Jensen v. Matthews-Price*, 845 P.2d 542 (Colo. App. 1992). C.R.C.P. 121 at Section 1-22 sets out the procedure in District Court for the imposition of attorney fees.

Complainant argues that the ability to award attorney fees applies only to abuses of discovery. Yet this ignores the “or as otherwise provided under the Colorado rules of civil procedure” language. C.R.C.P. 11 provides for the assessment of attorney fees for any pleading filed in violation of C.R.C.P. 11’s proscription against ungrounded, unwarranted and harassing pleadings and motions.

Complainant also relies on the Order Denying Motion for Award of Attorneys’ Fees and Denying Award of Costs issued August 7, 2003 by ALJ Judith F. Schulman in *In the Matter of the Complaint Filed by Mac Williams Regarding Alleged Violations of the Fair Campaign Practice Act by Colorado Association of Realtors; Colorado Association of Realtors, PSF, IPAC, CORPAC, RPAC and IMC.*, OS 2003001. In that case, the ALJ denied the request for attorney fees as the Respondents relied upon Section 13-17-102, C.R.S. Section 13-17-102 is limited to “civil actions” in “courts of record.” Proceedings before the ALJ are neither. Section 13-1-111, C.R.S.

#### *Public Policy*

Complainant cites a portion of the Order Denying Respondents’ Motion for Attorney Fees and Costs by Deputy Chief Administrative Law Judge Marshall A. Snider in *In the Matter of the Complaint Filed by Mac Williams Regarding Alleged Violations of the Fair Campaign Practices Act by Ron Teck and Friends of Ron Teck*, OS 2003-022, issued January 13, 2004.<sup>1</sup> There ALJ Snider noted that most complaints regarding the campaign finance laws are left to private citizens and that “[a]n award of attorney fees and costs against a person who files a complaint under these laws could deter the strong enforcement of the campaign finance requirements.” *Teck*, slip op. at 1. But nothing in this language or the public policy of strong enforcement of campaign finance laws requires the ALJ or parties to tolerate harassment.

One could imagine a sympathetic case of a non-attorney private citizen filing a complaint with the Secretary of State, not being aware that this would convert that citizen into a complainant in a lawsuit before an ALJ. For such a person ignorant of the process this could truly chill the private enforcement of the campaign finance laws. That hypothetical is not this case though. The Complainant is well aware of the consequences of filing a complaint under Article XXVIII. In addition to this case, the

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<sup>1</sup> The request for attorney fees in this case also did not rely on C.R.C.P. 11.

*Teck* case and the *Grand Junction Area Realtors* case cited above, Complainant has filed two other complaints alleging violations of the campaign finance laws: Case no. OS 2002023 against Mesa County Citizens for Representative Government and OS 2002031 also against Ron Teck and Friends of Ron Teck.

#### *Other Issues*

Other issues raised by the Complainant are not germane. Any rule making by the Secretary of State after the hearing date of January 5, 2004 would have no bearing on this case. As discussed in the Agency Decision Dismissing Complaint and as discussed below, Complainant makes no argument why any such rules would apply retroactively. Discussions of settlement are also not germane and are not to be brought before the ALJ.

To the extent Complainant's Response to Motion for Fees and Costs also seeks reconsideration of his earlier request to dismiss this matter on the basis of the lack of subject matter jurisdiction, the ALJ declines to reconsider. Contrary to the assertion of the Complainant, Article XXVIII, Section 9(2)(b) does not require the Attorney General to prosecute complaints against the Secretary of State. Rather, the complaints are to be referred to an ALJ, as was done in this case. The ALJ also declines to reconsider his decision not to amend the caption. Both of these last issues were also discussed in the Agency Decision Dismissing Complaint and are discussed further below.

#### **Findings of Fact**

The ALJ therefore makes Findings of Fact as required by C.R.C.P. 121, Section 1-22(2)(c):

1. The ALJ does not find that the original Complaint in this matter was filed in violation of C.R.C.P. 11. However, the ALJ does find as fact that Complainant's Request to Issue Notice of Default; Request to Consider Question of Subject Matter Jurisdiction at This Time filed December 11, 2003 was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law in violation of C.R.C.P. 11. The reasons for this finding of fact are set out in the Agency Decision Dismissing Appeal and will be set out here as well:

a. Complainant argued in the Request to Issue Notice of Default that because the Attorney General did not investigate, "this hearing is in default." Request to Issue Notice of Default, p. 2. Inaction on the part of the Attorney General is not a reason to halt the proceeding. The ALJ has no authority to require the Attorney General to conduct an investigation. Additionally, 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 and which Complainant acceded to. 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.

b. If Complainant truly believed that failure of the Attorney General to investigate and prosecute deprived the ALJ of jurisdiction, this does not explain why Complainant continued to pursue the case after the Attorney General declined to participate. Complainant continued to pursue this case as an individual knowing Respondents would be required to expend money in defense.

c. Related to this, the Complainant argued in the Request to Issue Notice of Default that the caption in this case should read “before the Attorney General,” and not “before the Secretary of State.” Any agency decision in a complaint against the Secretary of State, though, would most correctly be an agency decision of the Secretary of State. In any case, such a distinction is without substance.

d. Further the Complainant’s Request to Issue Notice of Default sought to vacate the hearing on the basis that 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.” Request to Issue Notice of Default, 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, might relate to some of the issues in this case *in the future*. But 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).

2. Because the Request to Issue the Notice of Default was so groundless and because Complainant failed to appear at the hearing to defend it or to present evidence, the ALJ finds that Complainant filed the Request to Issue Notice of Default for the purpose of harassment. In support of this finding are these facts:

a. Complainant had received notice of and was aware of the January 5, 2004 hearing date in this matter.

b. To the extent Complainant believed his filing of the Request to Issue Notice of Default permitted him to not attend the hearing, such belief was not reasonable.

c. Complainant knew or should have known that his Request to Issue the Notice of Default was groundless and in violation of C.R.C.P. 11.

d. The Division made efforts to contact both parties to inform them that the Request to Issue Notice of Default would be considered at the January 5, 2004 hearing. Whether or not Complainant received the telephone message informing him of

this, there is no evidence that he did not receive the e-mail containing the same information. Complainant knew or should have known that he needed to attend the hearing to defend his motion and pursue his complaint if it was not granted.

e. Complainant knew or should have known that Respondents would spend money in the preparation of hearing and in attending the hearing when he knew he would not appear.

f. There is no evidence Respondent made an effort to communicate with Respondents to inform them he would not attend.

3. Complainant received the Motion for Fees and Costs filed by Respondents.

4. Documents supporting the Motion for Fees and Costs have been supplied showing the fees charged. Complainant has not challenged the reasonableness of the fees and has presented no evidence that the fees charged were other than reasonable.

5. Based on the fact the Request to Issue Notice of Default was filed without being well grounded and warranted as required by C.R.C.P. 11 and based on the fact that it was filed for the purposes of harassment as proscribed by C.R.C.P. 11, the ALJ orders that all attorney fees incurred by the Respondents during the period January 2, 2004 to January 5, 2004, excluding the time on January 5, 2004 after the hearing, be assessed against the Complainant. This totals \$2,000. It is unclear from the submissions of Respondents whether any costs are associated with this period of time and the ALJ declines to order costs.

6. Although at the hearing on February 24, 2004 there was discussion of Complainant's complaint in case no. OS 2003001 referenced above, the ALJ has not considered Respondent's conduct in that case in these Findings of Fact or in the assessment of attorney fees.

### **Order**

The Complainant shall pay \$2,000 to Respondents: an amount representing the attorney fees of Respondents for the time period identified above.

### **DONE AND SIGNED**

March \_\_\_\_, 2004

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MATTHEW E. NORWOOD  
Administrative Law Judge

## CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the above **ORDER GRANTING REQUEST FOR ATTORNEY FEES** 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.

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Secretary to Administrative Law Judge