

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

CASE NO. OS 2004-0010

AGENCY DECISION

IN THE MATTER OF THE COMPLAINT FILED BY CHARLES BUCKNAM REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY EVA WILSON, JIM ENGH, ANN TOMSIC, KATHY HOLSCHER, TOM JACKSON, DIANNE DEMERS, ROGER ALLOTT, LEE JOHNSON, DANIEL DAILEY,¹ JOHN HOWER, DON KLEMME, KARL KNAPP, PATRICIA MOSCHNER, PAMELA GORDON, CHARLES FREE, LORA FREE, MEGHAN FREE, TOM WIENS and THE COMMITTEE EVA WILSON FOR D.A. 2004

This matter arises from a complaint filed with the Colorado Secretary of State on July 20, 2004, by Complainant Charles Bucknam. The Secretary of State referred the complaint to the Division of Administrative Hearings on July 22, 2004, as required by Colo. Const. Art. XXVIII, Sec. 9(2)(a). The complaint alleges that all Respondents violated certain provisions of Article XXVIII of the Colorado Constitution and that the Respondents Wilson and The Committee Eva Wilson for D.A. 2004 (Wilson Committee) have additionally violated the Fair Campaign Practices Act, Section 1-45-101 to 118, C.R.S. (2003) (the FCPA).

Hearing was commenced on August 3, 2004, before Administrative Law Judge Nancy Connick. Complainant was represented by Jerri L. Hill, Esq. Eva Wilson and Tom Jackson appeared *pro se*. All other Respondents filed answers adopting those filed by Wilson and the Wilson Committee but did not appear. After the ALJ considered and denied Respondents' motion to dismiss, Respondents Wilson and Jackson both moved for a continuance based on the availability of their witnesses. Complainant did not object, and the hearing was continued until August 17, 2004. At the continued hearing, all claims related to a contribution by Karen Meskis and to Respondent Ann Tomsic were dismissed. Since the claims against Meskis were the only FCPA claims asserted in the complaint, the only remaining claims are those arising pursuant to Article XXVIII. The record was held open at the conclusion of the hearing to allow Complainant to submit substitute copies of Exhibits 1-7, which were received on August 18, 2004, at which time this matter was ready for the issuance of an Agency Decision.

¹ The spelling of Daniel Dailey's name in the caption has been changed to reflect the correct spelling.

ISSUES PRESENTED

Complainant raises issues under Article XXVIII of the Colorado Constitution:

1. Did Wilson and the Wilson Committee violate contribution limits by accepting during the primary election cycle contributions that, on their own or when combined with prior ones, exceeded \$200 and were not designated as separate contributions of up to \$200 for the primary election and up to \$200 for the general election? If so, should they be fined five times the aggregate contributions in excess of \$200 accepted? If so, should Wilson and the Wilson Committee be required to return the excessive contributions to the contributors?
2. Did the 16 individually named Respondents other than Eva Wilson (16 Contributors) violate the contribution limits by contributing during the primary election cycle contributions that, on their own or when combined with prior ones, exceeded \$200 and were not designated as separate contributions of up to \$200 for the primary election and up to \$200 for the general election? If so, should they be fined five times the aggregate contributions in excess of \$200?

FINDINGS OF FACT

1. At all times relevant, Wilson was a candidate for District Attorney in the 18th Judicial District. The primary election was held on August 10, 2004.
2. Wilson and the Wilson Committee accepted contributions from the 16 contributors in late June and July, 2004:
 - a. A contribution of \$200 from Tom Jackson on July 1, 2004. Jackson had previously made contributions totaling \$200.
 - b. A contribution of \$200 from Dianne Demers on July 7, 2004. Demers had previously made a contribution or contributions totaling \$200.
 - c. Contributions of \$200 each from Roger Allott, Daniel Dailey, John Hower, and Don Klemme on July 12, 2004. These Respondents had each previously made a contribution or contributions totaling \$200.
 - d. A contribution of \$400 from Lee Johnson on July 12, 2004.
 - e. A contribution of \$250 from Karl Knapp on July 12, 2004.
 - f. A contribution of \$300 from Patricia Moschner on July 12, 2004.
 - g. A contribution of \$100 from Pamela Gordon on July 12, 2004. Gordon had previously made a contribution or contributions totaling \$300.

- h. A non-monetary contribution of \$200 from Charles Free on July 10, 2004. Charles Free had previously made a contribution or contributions totaling \$200.
- i. A non-monetary contribution of \$400 from Lora Free on July 10, 2004.
- j. A non-monetary contribution of \$400 from Meghan Free on July 10, 2004.
- k. A non-monetary contribution of \$275 from Tom Wiens on July 10, 2004.
- l. A contribution of \$400 from Jim Engh on June 28, 2004.
- m. A non-monetary contribution of \$38.28 from Kathy Holscher on June 26, 2004. Holscher had previously made a contribution or contributions totaling \$199.69.

3. In the Itemized Contribution Statements filed with the Secretary of State listing the above contributions, Wilson and the Wilson Committee did not identify whether the contributions were for the primary election or the general election. The reasonable inference from the record is that these contributions were not separately identified as being for the primary or general election.

4. The Secretary of State adopted Rule 4.7 effective January 6, 2004, in order to implement Colo. Const. Art. XXVIII.² This rule allowed state candidate committees to accept the monetary limit for primary and general contributions from a person, including a political committee, at the same time. The rule required, however, that the contribution be given separately (with one check written for the primary and another for the general) and so noted by the contributor. The registered agent was also required to make the same notation on the contribution report. Further, general election contributions could not be disbursed until after the primary election.

5. During the 2004 legislative session, the Colorado Legislature passed H.B. 04-1121, amending in part Section 1-45-103.7, C.R.S., on Contribution Limits, which became effective May 21, 2004. Based on its review of the law, advice from the

² Rule 4.7 reads as follows:

State candidate committees may accept the monetary limit for the primary and general contributions from a person, including a political committee, at the same time. However, each contribution must be given separately (one check written for the primary and one check written for the general) and so noted by the contributor. The registered agent shall make the same notation on the contribution and expenditure report in which the contributions were received. Those contributions received and accepted on behalf of the general election may not be disbursed until the day after the primary election for use in the general election. If a candidate or the candidate committee has a deficit after the primary election, the candidate may accept contributions to be applied to the deficit remaining from that previous election. The contributions must not exceed the aggregate contribution limit for that contributor if for a state candidate. All contributions received that are designated for a previous election deficit must not exceed that deficit. A deficit remains from a previous election if the post-election contribution and expenditure report indicates a deficit. [Article XXVIII, Section 3(1)]

Attorney General's office, and conversations with legislators, the Secretary of State determined that this law superceded Rule 4.7. The Secretary of State then stopped enforcing Rule 4.7 and began the rule-making procedure to repeal it. The Secretary of State's office also started providing advice that contributors were no longer required to issue two separate checks representing their primary and general election contributions but could instead write a single check for an amount up to the combined total of the permissible contributions for the primary and general elections. The office further advised that campaign committees were no longer required to note whether contributions were for the general or primary elections, although they might want to do so. Thus, in the view of the Secretary of State's office, after May 21, 2004, in a district attorney's race, nothing prohibited a single monetary or non-monetary contribution of \$400 that contained no designation separating it into two contributions, one designated for the primary election and the other for the general election.

6. Sometime during the week of June 13, 2004, Tom Jackson, treasurer and registered agent for the Wilson Committee, contacted Sherry Wofford, an employee of the Secretary of State's office authorized to answer questions regarding campaign finance issues, and inquired about the requirements for accepting a contribution from a contributor who had already contributed \$200. At that time, Wofford told Jackson that due to the passage of H.B. 04-1121, the office was no longer enforcing Rule 4.7 and that separate checks and notations for primary and general election contributions were no longer required. Jackson relied on this advice in accepting the contributions described in paragraph 2 and in giving advice to contributors. After the filing of the complaint in this matter and the commencement of this hearing, Jackson again contacted Wofford and also William Compton, Director of Elections in the Secretary of State's office, to reconfirm that his handling of the above contributions was, in their view, correct and in accordance with Article XXVIII. Both affirmed that it was.

DISCUSSION AND CONCLUSIONS OF LAW

The heart of the complaint filed in this matter is that the 16 contributors made illegal contributions and Wilson and the Wilson Committee accepted their illegal contributions in violation of Article XXVIII, Colo. Const., because the contributions were excessive, *i.e.*, more than \$200 for the primary election and \$200 for the general election. Although Complainant believes that the Colorado Constitution allows a total of \$400 to be contributed all at one time, he contends that this total must be comprised of two separate \$200 contributions, *e.g.*, two separate checks, one designated for the primary and the other for the general election. While none of the total contributions at issue exceeds \$400, Complainant complains that the contributions were not separately designated for the primary election or the general election. He therefore charges that all Respondents are subject to civil penalties from two to five times the amount contributed pursuant to Art. XXVIII, Sec. 10 and that Wilson and the Wilson Committee must return the excess contributions pursuant to Rule 4.10, 8 CCR 1505-6, which requires that contributions received in excess of contribution limits be returned to contributors within 30 days.

Complainant relies on the contribution limits of Art. XXVIII, Sec. 3(1)(b), Colo. Const.:

. . . [N]o person, including a political committee, shall make to a candidate committee, and no candidate committee shall accept from any one person, aggregate contributions for a primary or a general election in excess of the following amounts:

. . .
(b) Two hundred dollars to any one . . . district attorney candidate committee.

Complainant then points to the Secretary of State's authority to administer and enforce all provisions of Article XXVIII [Art. XXVIII, Sec. 9(b)], together with the principle that the interpretation of a statute by the agency charged with administering it is accorded deference. *Stell v. Boulder County D.S.S.*, 92 P.3d 910, 915 (Colo. 2004).

Complainant relies on Rule 4.7 to help define and give substance to what contributions for a primary and election are, such that one can determine whether a contributor has exceeded the \$200 aggregate limit for each. In Complainant's view, Rule 4.7 does this by specifying that such contributions must be made and recorded separately, even though they are allowed to be given at the same time. For example, in a district attorney's race, when a person wishes to give both contributions at once by check, even after the enactment of H.B. 04-1121, Complainant contends that the contributor must write two separate checks for \$200 *and* note that one is for the primary election and that the other is for the general election. Without this notation and the registered agent's subsequent notation on reports filed with the Secretary of State, Complainant asserts that the presentation of two separate checks alone would still violated Article XXVIII. For in-kind contributions, Complainant argues that the contributor must divide the contribution in two to make two separate contributions, denoting that one is for the primary election and the other for the general election, with the registered agent making similar notations on contribution reports.

Complainant's reliance on Rule 4.7 as an indicator of the Secretary of State's interpretation of Article XXVIII, however, is misplaced. At the point in time relevant to this proceeding, the Secretary of State's office was no longer enforcing Rule 4.7, was affirmatively advising campaigns that its provisions were no longer effective, and was taking steps to repeal it. The Secretary of State was thus no longer interpreting the language of Art. XXVIII, § 3(1) regarding contributions for a primary election and for a general election to require the restrictions of Rule 4.7. Applying the principle of deference to an administrative agency's interpretation of the law it is charged with enforcing, the Secretary of State's interpretation of Article XXVIII at all times relevant to this proceeding was that a contributor could make and a District Attorney campaign committee could accept a single \$400 contribution without dividing it into two separate contributions of \$200 and designating them as primary and general election

contributions. The ALJ should give deference to this interpretation, which is also in harmony with the language of Art. XXVIII, Sec. 3(1).

The origin of the requirements for separate checks and record-keeping requirements differentiating contributions for primary and general elections was Rule 4.7. The constitution itself does not prohibit making contributions for primary and general elections simultaneously and does not impose the record-keeping previously associated with Rule 4.7. Rather, Article XXVIII only imposes the monetary limit for aggregate contributions for primary and general elections. Nothing in the Secretary of State's current interpretation of Article XXVIII or the constitutional contribution limits prohibits the contributions made here, since none of them exceeded the combined limit of \$400, \$200 for the primary election and \$200 for the general election.

The ALJ also notes that all the contributions at issue here occurred after the passage of H.B. 04-1121. H.B. 04-1121, effective May 21, 2004, allows a candidate committee to accept the aggregate contribution limit specified in Article XXVIII, Sec. 3(1) for a primary or a general election at any time and essentially to spend them anytime. Since a district attorney candidate committee can accept and spend the combined \$400 limit at any time, there is no longer any reason to identify whether a particular contribution is for the primary or the general election.³ The language of this bill is consistent with and further supports the ALJ's interpretation of Article XXVIII, Sec. 3(1).

AGENCY DECISION

It is the Agency Decision that the complaint in this matter is dismissed.

DONE AND SIGNED

September 2, 2004

NANCY CONNICK
Administrative Law Judge

³ Complainant contends that the language of H.B. 04-1121 applies only to candidates and candidate committees and not to contributors, such that candidates and candidate committees could accept certain contributors that would still be prohibited for contributors to make. The ALJ is not persuaded by this argument.

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:

Eva Wilson
6288 Cheyenne Court
Parker, CO 80134

Eva Wilson for D.A. 2004
P.O. Box 2347
Parker, CO 80134

Ann Tomsic
16508 Oakmore Place
Parker, CO 80134

Jim Engh
509 Castle Pines Dr. 5
Castle Rock, CO 80108

Kathy Holscher
7305 South Potomac Street
Centennial, CO 80134

Tom Jackson
7305 South Potomac Street
Centennial, CO 80134

Dianne Demers
3072 South Biscay Circle
Aurora, CO 80013

Roger Allott
2945 South Moline Place
Aurora, CO 80014

Lee Johnson
7756 South Flanders
Centennial, CO 80116

Daniel Dailey
20859 East Grand Place
Aurora, CO 80115

John Hower
7297 South Nelson Street
Littleton, CO 80127

Don Klemme
5802 Singletree Lane
Parker, CO 80134

Karl Knapp
6390 North Mountain View Road
Parker, CO 80134

Patricia Moschner
6246 Riviera Court
Parker, CO 80134

Pamela Gordon
7305 South Potomac Street
Centennial, CO 80112

Charles Free
7202 Dove Court
Parker, CO 80134

Lora Free
7202 Dove Court
Parker, CO 80134

Meghan Free
7202 Dove Court
Parker, CO 80134

Tom Wiens
5567 Perry Park Road
Sedalia, CO 80135

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

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

on the _____ day of September, 2004.

Administrative Assistant

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