

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

CASE NO. OS 2004-0014

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY MARIA GARCIA BERRY
REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY
TAXPAYERS AGAINST CONGESTION**

This matter is before the Administrative Law Judge on the complaint of Maria Garcia Berry (Berry) against Taxpayers Against Congestion. The complaint was filed with the Colorado Secretary of State on July 29, 2004. The Secretary of State referred the complaint to the Division of Administrative Hearings on July 30, 2004, as required by Colo. Const. art. XXVIII, sec. 9(2)(a). The complaint alleges that the Respondents violated certain provisions of the Fair Campaign Practices Act, Section 1-45-101 *et seq.*, C.R.S. (2003) (the FCPA).

The hearing on this complaint was conducted on August 13, 2004 before Administrative Law Judge Donald E. Walsh. The hearing was digitally recorded in Courtroom C from 9:00 a.m. to 10:00 a.m.

Berry was present at the hearing and was represented by Stephen H. Kaplan, Esq. Respondent Taxpayers Against Congestion (the Committee) was present through, and represented by, their registered agent, Dennis Polhill.

Colo. Const. art. XXVIII, sec. 9(1)(f) provides that this hearing is conducted in accordance with the Colorado Administrative Procedure Act, Section 24-4-105, C.R.S. Under that statute the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. Berry is the proponent of an order that a civil penalty be assessed against the Committee for this violation. Accordingly, Berry has the burden of proof.

Complainant's exhibits one through nine were admitted into evidence without objection. The defendant offered no exhibits.

The Administrative Law Judge issues this Agency Decision pursuant to Colo. Const. art. XXVIII, sec. 9(1)(f), (2)(a) and Section 24-4-105(14)(a), C.R.S. (2003).

FINDINGS OF FACT

1. "Taxpayers Against Congestion" is an issue Committee registered with the Colorado Secretary of State as of May 28, 2004. The Committee's purpose is stated

as: "Oppose FasTracks & other RTD boondoggles & support candidates of similar views." The registered agent and treasurer for the Committee is Dennis Polhill. Pursuant to this filing the Secretary of State assigned the Committee the identification number of: 20045644591.

2. The Committee is required to file regular reports with the Secretary of State disclosing the amount of contributions received and expenditures incurred during each reporting period. Pursuant to these requirements the Committee filed a report on July 6, 2004 for the reporting period including May 28, 2004 through June 30, 2004. The Committee reported that they had no contributions or expenditures during the reporting period. Dennis Polhill as the registered agent for the Committee signed this report.

3. The Committee filed a report on July 16, 2004 for the reporting period including July 1, 2004 through July 14, 2004. The Committee reported that they had no contributions or expenditures during the reporting period. Dennis Polhill as the registered agent for the Committee signed this report.

4. There have been numerous public events, campaign events, educational events, and RTD hearings since May 2004. During these events and specifically during June 2004, individuals who have identified themselves as members of the Committee have handed out numerous flyers identified on the letterhead as having come from the Committee. These are in fact flyers sponsored by the Committee and acknowledged as such by Polhill. They contain the name of the Committee, its PO Box number and website address. The address is the same address used in the registration of the Committee with the Secretary of State. The flyers are on a glossy type paper and are in color at the top. The messages contained within the flyers are in concert with the purpose of the Committee, that is, to oppose FasTracks. Uncontroverted testimony established that it costs approximately \$1.00 per copy to make a color copy at Kinko's. Additionally, it was established that thousands of these flyers have been distributed at numerous venues over the last several months previous to the hearing.

5. The Committee operates a web site with the URL of <http://www.taxpayersagainstcongestion.org>. In order to set up a web site the sponsor must pay a fee in order to reserve the domain name it seeks. The website contains archives that go back to May 28, 2004, the date of the registration of the Committee with the Secretary of State. The website at the top of the page states "TAXPAYERS AGAINST CONGESTION" and contains the PO Box number used in the registration of the Committee with the Secretary of State. Dennis Polhill, as the registered agent of the Committee, was aware that the Committee was receiving the value of the cost of setting up the Committee's website.

6. The testimony of Polhill clearly established that he was aware of the flyers in question and pointed out that the underlying information in the flyer was obtained from the Independence Institute. He stated that the flyers were distributed on behalf of

the Committee, stating further that you could also say they are being distributed on behalf of individuals that are handing them out. Polhill also acknowledged “We may owe some people for some of the things that they have paid for out of their own pocket but at this point we have not been invoiced for any of that by any of our volunteers.” He also acknowledged the Taxpayers Against Congestion website as “our’ website. Polhill stated that Randall O’Toole had sent him an email with the out of pocket expenses for the website but that he did not consider that as an invoice. In a newspaper article in the Denver Business Journal dated July 30-August 5, 2004, a Randall O’Toole is quoted as saying that he is paying for the Committee’s website. He states, “I expect they’ll eventually pay me back if they get any money.” This article was admitted into evidence without objection.

7. The only evidence introduced at hearing to indicate the length of time the information went unreported are the two filings by the Committee. Thus, there is no evidence of a continuing violation beyond July 14, 2004.

DISCUSSION

Article XXVIII of the Colorado Constitution defines contribution as follows:

Section 2(5)(a) “Contribution” means:

- (I) The payment, loan, pledge, gift, or advance of money, or guarantee of a loan, made to any . . . issue committee . . . ;
 - (II) Any payment made to a third party for the benefit of any . . . issue committee . . . ;
 - (III) The fair market value of any gift or loan of property made to any . . . issue committee . . . ;
- (b) “Contribution” does not include services provided without compensation by individuals volunteering their time on behalf of a[n] . . . issue committee . . . ;

Article XXVIII of the Colorado Constitution defines expenditure as follows:

Section 2(8)(a) “Expenditure” means any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly . . . supporting or opposing a ballot issue or ballot question. An expenditure is made when the actual spending occurs or when there is a contractual agreement requiring such spending and the amount is determined.

(b) “Expenditure” does not include:

- (I) Any news Articles, editorial endorsements, opinion or commentary writings, or letters to the editor printed in a newspaper, magazine or other periodical not owned or controlled by candidate or political party;
- (II) Any editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party;
- (III) Spending by persons, other than political parties, political committees and small donor committees, in the regular course and scope of their business or payments by a membership organization for any communication solely to members and their families;

It is clear from the definitions above that the Committee had reportable contributions and expenditures. Polhill acknowledges that items of value have been

procured on behalf of the Committee, stating that if the Committee has the money they may have to repay some of these individuals for their expenditures.

CONCLUSIONS OF LAW

1. Pursuant to Colo. Const. Art XXVIII section 9, the ALJ has jurisdiction to conduct a hearing in this matter and to impose appropriate sanctions.
2. The acceptance by the Committee of the value of the cost of setting up its website during the period of May 28, 2004 through June 30, 2004 was a reportable contribution and expenditure under Section 1-45-108(1)(a)(I), C.R.S. (2003).
3. The acceptance by the Committee of the value of the cost of reproducing flyers carrying its message during the period of May 28, 2004 through June 30, 2004 was a reportable contribution and expenditure under Section 1-45-108(1)(a)(I), C.R.S. (2003).
4. The Taxpayers Against Congestion issue committee violated Section 1-45-108(1)(a)(I), C.R.S. (2003) when it did not report any contributions or expenditures in its report of July 6, 2004.
5. The Taxpayers Against Congestion issue committee violated Section 1-45-108(1)(a)(I), C.R.S. (2003) when it did not report any contributions or expenditures in its report of July 16, 2004.
6. The issues in a hearing conducted by an administrative law judge under Article 28 of the Colorado Constitution are limited to whether any person has violated Sections 3 through 7 or 9(1)(e) of Article 28, or Sections 1-45-108, 114, 115 or 117, C.R.S. Colo. Const. art. XXVIII, sec. 9(2)(a). If an administrative law judge determines that a violation of one of these provisions has occurred the administrative law judge's decision must include the "appropriate order, sanction or relief authorized by [article 28]" Colo. Const. art. XXVIII, sec. 9(2)(a). Accordingly, any order issued by the Administrative Law Judge in this case must relate to a violation of one of the identified constitutional or statutory provisions, and any sanction must be authorized by Article 28 of the Constitution.
7. A sanction authorized by Article 28 for a violation of the reporting requirements of 1-45-108 is the imposition of a penalty of fifty dollars per day for each day that information required to be filed, is not filed by the close of business on the day due. Colo. Const. Art XXVIII, sec 10(2)(a). Since the instant violation is a violation of section 1-45-108, the sanction mandated by that section is an "appropriate . . . sanction" as required. Colo. Const. art. XXVIII, sec. 9(2)(a).

AGENCY DECISION

1. The Committee violated Section 1-45-108(1)(a)(I), C.R.S. (2003) because it failed to report contributions and expenditures as required. The violation occurred on June 30, 2004, the first reporting period for which they failed to report the contributions and expenditures. The violation continued at least until July 14, 2004, when the Committee again failed to report the required contributions and expenditures. There is no evidence of record to indicate a violation beyond July 14, 2004.

2. The first day after the violation for which a penalty may be imposed is July 1, 2004. Since the information still had not been reported as of the second report with an effective ending date of July 14, 2004, the period of time for which a penalty shall be imposed ends on July 14, 2004, because there was no evidence that the violation continued after the second reporting period of July 14, 2004.

3. Consistent with the foregoing findings of fact and conclusions of law, the ALJ hereby imposes a penalty of \$700.00 against the Taxpayers Against Congestion issue committee.

DATED: August 27, 2004.

DONALD E. WALSH
Administrative Law Judge

Complainant's Exhibits

1. Secretary of State Committee Registration Form
2. Secretary of State Letter to Taxpayers Against Congestion dated May 28, 2004
3. Secretary of State Report of Contributions and Expenditures Rec'd July 6, 2004
4. Secretary of State Report of Contributions and Expenditures Rec'd July 16, 2004
5. Taxpayers Against Congestion Flyer "Ten Reasons to Oppose FasTracks"
6. Taxpayers Against Congestion Flyer "The FasTracks Index"
7. Flyer "RTD 67& tax increase & the FasTracks plan
8. Printout of Website Pages (Multiple pages)
9. Newspaper Article, Denver Business Journal, July 30-August 5, 2004

Defendant's Exhibits

None

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:

Stephen H. Kaplan, Esq.
Kaplan Kirsch & Rockwell LLP
1675 Broadway, Suite 2300
Denver, CO 80202

Taxpayers Against Congestion
Dennis Polhill, Registered Agent
PO Box 16721
Golden, CO 80402-6012

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

on this ____ day of September, 2004.

Administrative Assistant