



BEFORE THE SECRETARY OF STATE

STATE OF COLORADO

CASE NO. OS 2004-0015

AGENCY DECISION

IN THE MATTER OF THE APPEAL FILED BY THE COMMITTEE TO ELECT JIM SULLIVAN AND JIM SULLIVAN REGARDING THE PENALTY IMPOSED BY THE DOUGLAS COUNTY CLERK AND RECORDER

On August 20, 2004, Jim Sullivan (“Sullivan”) and the Committee to Elect Jim Sullivan (“Committee”) (collectively referred to as “the Appellants”) filed an appeal with the Colorado Secretary of State regarding a penalty imposed on July 21, 2004, by the Douglas County Clerk and Recorder against the Committee for violations of Colo. Const. Article XXVIII, sec. 7, and Section 1-45-108 (1)(a)(II) of the Fair Campaign Practices Act, Sections 1-45-101 *et seq.*, C.R.S. (2004) (“the FCPA”). In that appeal, Sullivan and the Committee sought an order from the Secretary of State or an appointed administrative law judge setting aside or reducing the penalty imposed by the Douglas County Clerk and Recorder. The Secretary of State transmitted the appeal to the Colorado Division of Administrative Hearings (“Division”) on August 20, 2004.

Hearing in the form of legal argument was conducted in this matter on December 9, 2004. Appellants were represented by Charles E. Norton, Esq. of Icenogle, Norton, Smith & Blieszner. The complaining party before the Douglas County Clerk and Recorder, Charles Bucknam (“Bucknam” or “Appellee”), was represented by Jerri L. Hill, Esq. Carole R. Murray, in her capacity as Douglas County Clerk and Recorder (“County Clerk”), was represented by Samuel J. Light, Esq., of Light, Harrington, & Dawes, P.C. Following the hearing the parties were provided with additional time within which to file supplemental written closing arguments, which both Appellant and Appellee submitted. The hearing was digitally recorded in Courtroom E, commencing at 9:00 a.m. The Administrative Law Judge (ALJ) issues this Agency Decision pursuant to Article XXVIII, Section 10(2)(b)(I) and Section 24-4-105(14)(a), C.R.S. (2004).

ISSUE PRESENTED

On July 21, 2004, the County Clerk imposed a penalty of \$4,450 on the Committee for violations of Colo. Const. Article XXVIII, sec. 7, and Section 1-45-108 (1)(a)(II) of the FCPA, based on the Committee’s failure in its November 10, 2003 report of contributions and expenditures to disclose the occupation and employer of four

individuals who contributed \$100 or more. Appellants seek an order setting aside or reducing for good cause pursuant to Colo. Const. Article XXVIII, sec. 10(2)(b)(I).

PROCEDURAL BACKGROUND

On February 9, 2004, Bucknam filed a complaint with the Secretary of State alleging Appellants and various additional respondents had violated certain provisions of Article XXVIII of the Colorado Constitution and the FCPA, as well as the Secretary of State's Rules Concerning Campaign and Political Finance, 8 CCR 1505-6. The Secretary of State referred Bucknam's complaint to the Division on February 12, 2004, for the purpose of conducting a hearing pursuant to Colo. Const. Art. XXVIII, sec. 9(2)(a). On February 23, 2004, the Division served the Committee by mail with a notice of hearing on the Bucknam complaint.

Hearing on the complaint, originally scheduled for February 27, 2004, was conducted before Deputy Chief Administrative Law Judge Marshall A. Snider on April 13, 2004. Judge Snider issued an Agency Decision on May 19, 2004, which decision was mailed to the parties on May 20, 2004. In the Agency Decision Judge Snider found against Bucknam's claims with respect to Appellants except as follows: Judge Snider determined that Appellants violated Secretary of State Rule 4.10, 8 CCR 1505-6 when they failed to return corporate contributions within 30 days ("Rule 4.10 violation") and also determined the Committee violated Colo. Const. Art. XXVIII, sec. 7 and Section 1-45-108(1)(a)(II), C.R.S. (2003) of the FCPA because its November 10, 2003 report of itemized contributions failed to disclose the occupation and employer of four individuals who contributed \$100 or more ("reporting violation").

Although he found these violations, Judge Snider did not impose any penalty against Appellants. With respect to the Rule 4.10 violation, Judge Snider determined that he lacked jurisdiction to enforce the Secretary of State's rules. Judge Snider additionally determined that he lacked jurisdiction to impose a penalty for any reporting violation. ALJ Snider reasoned that pursuant to Colo. Const. Art. XXVIII, sec. 10(2)(a), a penalty for a reporting violation can only be imposed by "the appropriate officer," who, under the circumstances of the case, was the Douglas County Clerk and Recorder, not the ALJ. In his decision, Judge Snider did not explicitly remand the case to the County Clerk and did not discuss whether the County Clerk could still act in the case.

On May 26, 2004, upon receipt of the Agency Decision, the Committee filed an amended disclosure report.

Bucknam did not appeal the Agency Decision. However, on May 23, he sent an e-mail to the County Clerk requesting the County Clerk, as the appropriate officer, to impose a penalty on the Committee pursuant to Colo. Const. Art. XXVIII, sec. 10(2)(a) for the Committee's reporting violation as determined by Judge Snider. Bucknam did not seek the imposition of any penalty for the Rule 4.10 violation found by Judge Snider. With respect to the reporting violation, Bucknam requested the imposition of a fine of at

least \$10,050, representing \$50 per day from the asserted reporting deadline of November 3, 2003, through the date of the e-mail, a total of 201 days. In response to Bucknam's e-mail, Appellants filed a letter with the County Clerk on June 9, 2004, requesting that no fine be imposed.

On June 24, 2004, the County Clerk issued a Notice of Show Cause Hearing notifying the Committee to appear at a hearing to show cause why a penalty should not be imposed against the Committee for violations of Colo. Const. Art. XXVIII and Section 1-45-108(1)(a)(II), C.R.S. (2003) in connection with the reporting violations determined to have occurred in Judge Snider's Agency Decision. The County Clerk also notified counsel for Appellants and Bucknam of the show cause hearing by letter dated June 24, 2004.

The show cause hearing was conducted by the County Clerk on July 13, 2004. The County Clerk was represented at that proceeding by Samuel L. Light, Esq. Appellants were represented by Charles E. Norton, Esq. and Bucknam was represented by Jerri L. Hill, Esq. At the commencement of the hearing, the County Clerk defined the purpose of the hearing as "not to revisit" Judge Snider's determination that the Committee had failed to disclose in its November 10, 2003 report the occupation or employer of four individuals who contributed \$100 or more. (Tr. 3)¹ The County Clerk explicitly limited the hearing to receiving evidence and holding argument on whether a penalty should be imposed for the reporting violation found by ALJ Snider. (Tr. 4). At the hearing, Bucknam testified and both the Committee and Bucknam offered exhibits. In addition, counsel for the Committee and Bucknam offered legal arguments. Post-hearing closing briefs were filed by both parties on July 19, 2004.

On July 21, 2004, the County Clerk issued a Notice of Imposition of Penalty for Violation of Const. Art. XXVIII, sec. 7 and C.R.S. § 1-45-108(1)(a)(II) by Committee to Elect Jim Sullivan. In connection with that Notice the County Clerk imposed a penalty against the Committee in the amount of \$4,450 for the Committee's failure in its November 10, 2003 report of contributions and expenditures to disclose the occupation and employer of four individual who contributed \$100 or more. The County Clerk indicated in her Notice that the Committee "may appeal such penalty pursuant to the provisions of Colo. Const. Art. XXVIII, sec. 10(b) (*sic*), to the extent applicable to this matter."

On August 20, 2004, Appellants filed an appeal with the Secretary of State regarding the County Clerk's determination to impose the \$4,450 penalty against the Committee. The Secretary of State transmitted the appeal to the Division on the same day. Hearing on this matter before the Division was conducted on December 9, 2004, and was followed by post-hearing submissions.

¹ The transcript of the July 13, 2003 proceedings before the County Clerk are referenced by the designation "Tr." and page number.

PRELIMINARY MATTERS

1. Prior to the December 9, 2004 hearing, the County Clerk submitted to the ALJ a certified record of the proceedings in this matter before the Douglas County Clerk and Recorder. The parties stipulated to the completeness of the record.

2. In advance of the December 9, 2004 hearing, the parties also stipulated to the admissibility in this proceeding of briefs filed with the Secretary of State by Bucknam on August 20, 2004 and by Appellants on August 30, 2004.

3. At the commencement of the hearing, the parties stipulated that they did not wish to present any evidence or additional exhibits in connection with the hearing. As a consequence, the December 9, 2004 hearing was limited to legal argument.

ADDITIONAL FINDINGS OF FACT

The following findings of fact relevant to the current proceeding are derived from the Agency Decision of Judge Snider, the exhibits admitted during the July 13, 2004 show cause hearing before the County Clerk, and the County Clerk's July 21, 2004 notice of imposition of penalty.

1. At the time of the hearing before ALJ Snider, Sullivan was a county commissioner in Douglas County, Colorado. Sullivan was first elected county commissioner in 1988. (Agency Decision, Finding of Fact No. 1).²

2. The Committee is a candidate committee that was organized to receive contributions and make expenditures under Sullivan's authority as a candidate for Douglas County commissioner. The Committee remained open in the fall of 2003. (Ag. Dec. #3).

3. Sullivan was subject to term limits in 2003 and for this reason was not able to run again for county commissioner in 2004. In the summer of 2003 some citizens of Douglas County organized the placement of an issue on the ballot that would have eliminated term limits for Douglas County commissioners. If the term limit ballot issue had passed Sullivan would have been able to run for county commissioner in 2004. (Ag. Dec. #4).

4. The term limit ballot issue was defeated in the November 2003 election. Sullivan was therefore unable to run for Douglas County commission in 2004. (Ag. Dec. #12).

² Hereinafter the Agency Decision Findings of Fact will be referenced as "Ag. Dec." followed by the paragraph number of the referenced finding of fact.

5. In late September 2003 certain individuals in Douglas County organized a fundraising event to raise money to support the term limit ballot issue. Funds raised at this event or contributed to the Committee at a later time were placed into the Committee's bank account. These funds were not used to support Sullivan's candidacy for county commissioner because, at the time of the event, Sullivan was unable to run for another term as commissioner. (Ag. Dec. #5).

6. Sullivan then considered running for state representative in House District 45. On November 26, 2003, he filed the paperwork necessary to become a candidate for that office. However, Sullivan never formed a candidate committee for a House District 45 race, did not accept any campaign contributions after November 26, 2003, and never established a bank account for a House District 45 campaign. By January 20, 2004, and continuing through the hearing before ALJ Snider, Sullivan had decided not to run for the House District 45 seat in the Colorado House of Representatives. (Ag. Dec. #13 and #15).³

7. On November 10, 2003 the Committee filed with the County Clerk a report of itemized contributions for contributions of \$20 or more. Four entries in this report failed to include the occupation and employer of contributors of \$100 or more. The four contributors whose occupation and employer were not listed, and the amounts of their contributions, were: T. Timothy Kershisnik (\$250); Timothy E. Roberts (\$250); Paul Masovero (\$500); and Bob Brooks (\$250). (Ag. Dec. #41). The contribution report contained the full name and address for each of these contributors along with the date accepted and contribution amount for each of these contributions. (Show Cause Hearing Exhibit 7). The Committee did not disclose the occupations and employers of these individuals because it did not have this information. There was no evidence that the Committee made any attempt to determine this information. (Ag. Dec. # 42).

8. The Committee's November 10, 2003 contribution report included entries for 35 separate contributions. The entries for the remaining 31 disclosures included the contributor's occupation and employer information (if applicable) for each contributor. (Show Cause Hearing Exhibit 7).

9. The County Clerk accepted the Committee's November 10, 2003 report of contributions without notifying the Committee of any deficiency. (County Clerk's Notice of Imposition of Penalty, numbered paragraph 2).

10. Judge Snider issued his Agency Decision on May 19, 2004, and it was mailed to the parties on May 20, 2004. On May 26, 2004, upon receipt of the Agency Decision, the Committed filed an amended disclosure report that contained the required

³ Based on the fact that Sullivan is currently the elected representative from House District 45, the ALJ takes administrative notice that sometime after Judge Snider heard the case and issued his Agency Decision, Sullivan changed his mind and successfully ran for the run House District 45 seat.

occupation and employer information with respect to the reporting violation found by Judge Snider.

11. The County Clerk imposed a penalty of \$4,500 on the Committee solely in relation to the Committee's failure to include the occupations and employers of four contributors of \$100 or more listed on the Committee's November 10, 2003 contribution and expenditure report filed with the County Clerk. In calculating the \$4,450 penalty, the County Clerk determined a \$50 per day fine should be imposed from February 27, 2004, the date of the originally scheduled hearing before Judge Snider, until May 26, 2004, the date on which the Committee filed its amendment to its November 10, 2003 contribution and expenditure report providing the omitted employer and occupation information for the four contributors in question. (County Clerk's Notice of Imposition of Penalty).

12. The Committee accepted a number of contributions of \$1,000 or more in October and/or November 2003, within 30 days of the November 2003 election. (Show Cause Hearing Exhibit 7).

13. There is no indication that Sullivan faced a primary election in 2003.

14. There is no indication that Appellants received any contribution of \$1,000 or more at any time within thirty days preceding the date of a primary or general election.

15. There is no indication Appellants expended more than \$1,000 in one calendar year on electioneering communications as defined by Colo. Const. Art. XXVIII, sec. 2(7).

DISCUSSION

Nature of Proceeding

1. Appellants seek an order from the ALJ setting aside or reducing the \$4,500 penalty imposed by the County Clerk against the Committee for its failure to include the occupations and employers of four contributors of \$100 or more in its November 4, 2003 itemized report of contributions above \$20. Neither party contests the specific findings or conclusions determined by Judge Snider in his Agency Decision. Both parties agree that the issue to be determined in this matter is whether good cause has been shown to set aside or reduce the penalty imposed by the County Clerk.

Jurisdiction of ALJ

2. Although Bucknam originally raised the issue of whether the ALJ has subject matter jurisdiction in this proceeding, both parties now contend the ALJ does have jurisdiction to consider whether the penalty imposed by the County Clerk should

be set aside or reduced. However, the issue of subject matter jurisdiction may not be waived. *In re Marriage of Haddad*, 93 P.3d 617 (Colo. App. 2004). The ALJ therefore considers this issue on her own motion.

3. Subject matter jurisdiction concerns the authority of the court to decide a particular matter. *In re Marriage of Tonnessen*, 937 P.2d 863 (Colo. App. 1996). It is defined as a court's power to resolve a dispute in which it renders judgment. *Trans Shuttle, Inc. v Public Utilities Commission*, 58 P.3d 47 (Colo. 2002). A court has subject matter jurisdiction if it has been empowered by the sovereign from which the court derives its authority to entertain the type of case at issue. *Horton v. Suthers*, 43 P3d 611 (Colo. 2002). Subject matter jurisdiction is generally dependent on the nature of the claim and the relief sought. *Trans Shuttle, Inc, supra*, 58 P.3d at 50.

Colo. Const., Art. XXVIII, sec. 10(2)(b)(l) provides:

Any person required to file a report with the secretary of state and upon whom a penalty has been imposed pursuant to this subsection (2) may appeal such penalty by filing a written appeal with the secretary of state no later than thirty days after the date on which notification of the imposition of the penalty was mailed to such person's last known address in accordance with paragraph (a) of this subsection (2).⁴ Except as provided in paragraph (c) of this subsection (2), the secretary of state shall refer the appeal to an administrative law judge. Any hearing conducted by an administrative law judge pursuant to this subsection (2) shall be conducted in accordance with the provisions of section 24-4-105, C.R.S. . . . The administrative law judge shall set aside or reduce the penalty upon a showing of good cause, and the person filing the appeal shall bear the burden of proof. The decision of the administrative law judge shall be final and subject to review by the court of appeals pursuant to section 24-4-106(11), C.R.S., or any successor proceeding.

Colo. Const., Art. XXVIII, sec. 10(2)(c), in turn, provides:

Upon receipt by the secretary of state of an appeal pursuant to paragraph (b) of this subsection (2), the secretary shall set aside or reduce the penalty upon a showing of good cause.

Section 10(2) of Article XXVIII thus permits persons required to file a report with the Secretary of State and upon whom a Section 10(2) penalty has been imposed to file an appeal of the penalty with the Secretary of State. The secretary may either

⁴ Colo. Const., Art. XXVIII, sec. 10(2)(a) provides that "the appropriate officer" shall impose a penalty of \$50 per day for specified reporting and disclosure violations of Art. XXVIII and the FCPA.

determine the appeal directly or may refer the appeal to an administrative law judge. In either case, the issue to be determined in such an appeal is whether good cause exists to set aside or reduce the penalty. Accordingly, persons are authorized to file a Section 10(2)(b)(1) penalty appeal with the Secretary of State and an administrative law judge has jurisdiction to consider a Section 10(2)(b)(l) penalty appeal if each of the following pre-conditions have been met: 1) the appellant is a “person” required to file a report with the Secretary of State; 2) a penalty has been imposed on the appellant pursuant to Section 10(2); 3) the appellant has filed a timely appeal with the Secretary of State; and 4) the Secretary of State has chosen not to hear the matter herself but instead has referred the appeal to an administrative law judge.

In this case it is uncontested that: both Sullivan and the Committee are “persons” pursuant to Article XXVIII, Colo. Const. XXVIII, sec. 2(11); the County Clerk imposed a penalty on the Committee pursuant to Art. XXVIII, sec. 10(2); the Committee filed a timely appeal of that penalty with the Secretary of State; and the Secretary of State referred the appeal to an administrative law judge. The remaining jurisdictional issue is whether the Committee is “required to file a report with the secretary of state.” The ALJ determines that Appellants were not persons required to file a report with the Secretary of State within the meaning of Art. XXVIII, sec. 10(2)(b)(l) and thus concludes she lacks subject matter jurisdiction to consider this appeal.⁵

Under Article XXVIII, sec. 2(1), persons and entities subject to reporting requirements must file those reports with the “appropriate officer,” as defined in Section 1-45-109(1). Pursuant to Section 1-45-109(1), the appropriate officer for reporting purposes with respect to candidates for the general assembly and their candidate committees is the Secretary of State. The appropriate officer as defined at Section 1-45-109(1) with respect to candidates for county commissioner and their candidate committees is the county clerk and recorder. As a consequence, Sullivan’s reporting obligation as a Douglas County Commissioner required him, in general, to file reports with Douglas County Clerk and Recorder, the appropriate officer for Sullivan’s elective office. Furthermore, the particular report at issue in this case and the one upon which the County Clerk imposed the penalty in question, was a report filed by the Committee with the County Clerk in connection with Sullivan’s county commissioner status.

Under these circumstances, Sullivan, in his role as county commissioner, and the Committee, as Sullivan’s county commissioner candidate committee, were not persons “required to file a report with the secretary of state.” Instead, for the purposes of the report and penalty at issue here, they were persons required to file a report with the Douglas County Clerk and Recorder. Consequently, neither Sullivan nor the Committee may appeal to the Secretary of State pursuant to Colo. Const. XXVIII, sec.

⁵ The question of whether an appellant is a person “required to file a report with the secretary of state” raises the issue of subject matter jurisdiction rather than the Appellant’s capacity to sue and thus raises issues as to the ALJ’s authority to consider the question at issue here. See *Ashton Properties v. Overton*, 03CA0292 (Colo. App., decided August 26, 2004).

10(2)(b)(l) the penalty imposed by the County Clerk in this matter and the ALJ lacks jurisdiction to consider Appellants' appeal in this matter.

4. The parties raise several arguments in support of their contention that Appellants were persons required to file a report with the Secretary of State, thereby conferring jurisdiction on the ALJ to hear this matter. These arguments are unpersuasive.

a. The parties assert that because the Secretary of State is the appropriate officer in connection with Sullivan's campaign for House District 45, Appellants are persons "required to file a report with the secretary of state." However, in this case the County Clerk imposed her fine solely in connection with the Committee's November 10, 2003 report of contributions and expenditures, which was a report filed in connection with Sullivan's status as a county commissioner and had nothing to do with Sullivan's House District 45 campaign or his filing obligations in connection with that campaign.

Furthermore, as of the time of Judge Snider's Agency Decision in this matter upon which the County Clerk relied in imposing her penalty, Appellants had no obligation to file any reports with the Secretary of State in connection with Sullivan's House District 45 candidacy. Under Article XXVIII and the FCPA, reporting requirements are triggered when contributions of \$20 or more are received. Section 1-45-108(1)(a)(l). As reflected in the Agency Decision, as of the April 2004 hearing before Judge Snider, Sullivan did not have an active House District 45 campaign and such campaign had not received or accepted any contributions. Because no contributions had been received or accepted by Sullivan or a committee in connection with Sullivan's House District 45 campaign as of at least the date of the hearing before Judge Snider, Appellants had no obligation to file any report with the Secretary of State, the appropriate officer for general assembly candidates.

Consequently, as of the time the Committee filed its November 2003 contribution and expenditure report concerning which the County Clerk imposed the penalty at issue in this matter and as of the date of Judge Snider's Agency Decision, the findings of which the County Clerk relied in determining to impose such penalty, Appellants had no obligation to file any report with the Secretary of State and were not persons required to file a report with the Secretary of State.⁶

b. The parties also rely on the provisions of Section 1-45-108(2.5) relating to reporting receipt of certain contributions of \$1,000 or more, and Section 1-45-109(1), relating to reports of electioneering expenses, in support of the assertion that Appellants

⁶ The fact that Sullivan later changed his mind and successfully campaigned for the House District 45 seat does not affect this analysis in any way. Such information is not an official part of the record and was not relied upon in any way by the County Clerk in imposing the penalty at issue in this proceeding; the penalty was imposed solely in connection with a report filed by Appellants in connection with Sullivan's status as a county commissioner.

were persons required to file a report with the Secretary of State. This argument is also unpersuasive.

Section 1-45-108(2.5) requires “all candidate committees, political committees, issue committees and political parties” to file a report with Secretary of State if such entities receive a contribution of \$1,000 or more within 30 days of primary or general election. The Committee did receive a number of contributions of \$1,000 or greater in October and/or November 2003. However, there is no indication any primary was involved here and because 2003 was not a general election year, these contributions were not received within 30 days of a primary or general election.⁷ Consequently, the contributions of \$1,000 or greater received by the Committee in October and/or November of 2003 did not trigger the filing requirement of Section 1-45-108(2.5).

Section 1-45-109(1) requires persons expending \$1,000 or more per calendar year on electioneering expenses to file reports with the Secretary of State. As defined by Article XXVIII, sec. 2(7)(a), in order to constitute an electioneering communication the communication in question must be “broadcasted, printed, mailed, delivered or distributed within thirty days before a primary election or sixty days before a general election.” There is no evidence in the record indicating Appellants expended any sums for electioneering communications within 30 days of a primary or 60 days of a general election. Consequently, the filing requirement of Section 1-45-109(1) with respect to electioneering communications, like the filing requirement of Section 1-45-108(2.5) discussed above, was not applicable to Appellants at any time relevant to this matter.

Because nothing in Section 1-45-108(2.5) or in Section 1-45-109(1) as it relates to electioneering communications, imposed an obligation on Appellants to file any reports with the Secretary of State at any time relevant to the penalty at issue in this proceeding, those sections did not render Appellants persons required to file a report with the Secretary of State.

c. By relying on the above-described filing requirements of Sections 1-45-108(2.5) and 1-45-109(1), the parties, in essence, are arguing that any provision of FCPA that potentially could have obligated Appellants to file a report with the Secretary of State is sufficient to establish the jurisdictional prerequisite that Appellants are persons “required to file a report with the secretary of state.” The ALJ disagrees.

A court’s primary task in construing a constitutional amendment is to look at the language and if possible apply the provision according to its clear terms in order to give effect to the electorate’s intent in enacting the amendment. *City of Aurora v. Acosta*, 892 P.2d 264 (Colo. 1995); *Davidson v. Sandstrom*, 83 P.3d 640 (Colo. 2004). Words

⁷ The odd year election of November 2003 determined with certainty that Sullivan was term-limited in his position of county commissioner. There is no evidence that any contributions were received or accepted by the Committee at any time after November 2003. There is also no evidence in the record of contributions of \$1,000 or more being received within 30 days of the November 2004 general election.

and phrases should be given their ordinary, commonly understood meaning. *Rocky Mountain Animal Defense v. Colo. Division of Wildlife*, 02CA0503 (Colo. App., decided March 25, 2004). Thus, when the language of an amendment is clear and unambiguous, the amendment must be enforced as written. *Davidson v. Sandstrom*, *supra*.

As defined in by *Webster's New Twentieth Century Dictionary*, Unabridged, 2d Edition, "require" means "to demand, to ask or claim as of by right or authority, to insist on having; to order, to command. . . to have need or necessity for; to render necessary or indispensable." In light of this definition, a person is only "required" to file a report if a provision of the FCPA or Colo. Const., Article XXVIII actually orders, commands, necessitates, or compels such filing. A person is not "required" to file a report merely because a reporting obligation exists in the abstract under which the person would be required to file a report only if some contingent future event occurs. The reporting obligation under such circumstances is speculative and inchoate: it may never actually come to fruition or render necessary or indispensable the filing of any report. Thus, attributing to the word "require" its plain and commonly understood meaning, Appellants were not persons required to file a report with the Secretary of State merely because some speculative future event might bring them within such filing obligation.

Furthermore, the parties' proposed interpretation of the word "required" to include speculative future filing requirements such as those contained in Sections 1-45-108 and 109, would render superfluous the entire opening phrase—"any person required to file a report with the secretary of state"—of Article XXVIII, sec. 10(2)(b)(I). This is because the contingent filing requirements of Sections 1-45-108 and 109, taken together, would cover all possible persons who might be covered by Colo. Const. Art. XXVIII and the FCPA, regardless of whether or not they have any actual, existing obligation to file a report with the Secretary of State.

For example, Section 1-45-108(2.5) covers "all" political parties and all committees with the exception of small donor committees and requires such entities to file with the Secretary of State if they receive contributions of \$1,000 or more within 30 days of a general election or primary. Section 1-45-109(1), as relevant here, requires "all persons" expending \$1,000 or more per calendar year on electioneering communications to file reports with the Secretary of State. Because committees and parties always have the potential to receive the contributions covered by Section 1-45-108(2.5) and all "persons" have the potential to expend the threshold amount on electioneering communications in a calendar year, as identified in Section 1-45-109(1), under the parties' suggested reading of Article XXVIII, sec. 10(2)(b)(I) the entire universe of entities covered by the FCPA and Colo. Const., Art. XXVIII would fall within the category of persons "required" to file a report with the Secretary of State. The parties' suggested construction would thus render extraneous the Section 10(2)(b)(I) prerequisite that a person be required to file a report with the Secretary of State in order to be permitted to appeal a penalty since all possible subjects of Article XXVIII and the FCPA would fall into that category. Because it is presumed that an entire statute or

constitutional provision is intended to be effective, *People v. Phillips*, 652 P.2d 575 (Colo. 1982), the ALJ declines to accept the parties' overbroad reading of the language of Article XXVIII, sec. 10(2)(b)(I).

d. The parties' interpretation of the Art. XXVIII, sec.10(2)(b)(I) jurisdictional prerequisites for appealing a penalty would also compel the ALJ to separate the condition regarding filing with the Secretary of State from the requirement regarding the imposition of a fine, such that a person who is obligated to file a report with the Secretary of State would be authorized to appeal any penalty to the secretary, even one totally unrelated to that Secretary of State filing requirement. The ALJ declines to read Art. XXVIII, sec. 10(2)(b) in that manner. A more logical reading is that the penalty imposed and the report required to be filed with the Secretary of State must be related, so that the right of appeal is limited to penalties imposed in connection with a specific report required to be filed with the Secretary of State.

e. Appellants direct the ALJ to a prior determination before the Division of Administrative Hearings, asserting at least one ALJ has made a contrary determination regarding the jurisdictional issue presented in this proceeding. However, the language relied on in the case cited by Appellants does not constitute a necessary ruling in the case and is therefore merely *dicta*. The ALJ is unaware of any prior decisions from the Division that have directly confronted the jurisdictional issue raised in this matter and therefore determines this is a matter of first impression concerning which prior decisions from the Division are of minimal assistance.

f. Bucknam argues that the ALJ should read Article XXVIII, sec. 10(2)(b)(I) to permit this appeal because a more restrictive reading would foreclose all possibility of appealing to the Secretary of State any penalties imposed by a local officer. Buchnam contends that such a reading would result in an imbalance of remedies under Art. XXVIII, sec. 10(b) (allowing administrative appeals with respect to penalties imposed by the Secretary of State but not allowing administrative appeals with respect to penalties imposed by a local officer) and would raise potential equal protection concerns. While the ALJ recognizes that the interpretation of Art. XXVIII, sec. 10(2)(b)(I) arrived at in this decision forecloses appeals to the Secretary of State with respect to penalties imposed by local level officers, the ALJ must construe the section as it is actually written. Furthermore, there is no indication that the ALJ's interpretation of this provision is inconsistent with the intent of the voters. Finally, the fact that the ALJ has found Section 10(2)(b)(I) does not permit Appellant's appeal in the present forum does not indicate an appeal is unavailable in another forum.⁸

⁸ Appellant's counsel indicated at the hearing that Appellants have also filed an action in District Court which is pending at this time. Jurisdiction may ultimately be determined to be appropriate in that forum.

CONCLUSIONS OF LAW

The ALJ lacks subject matter jurisdiction to consider Appellants' appeal of a penalty imposed against the Committee by the Douglas County Clerk and Recorder on July 21, 2004, because, with respect to the issues raised in this appeal, Appellants are not "persons required to file a report with the secretary of state," as required by Colo. Const., Art. XXVIII, sec. 10(2)(b)(I). Accordingly, the ALJ lacks jurisdiction to determine whether Appellants have established good cause to set aside or reduce that penalty.

AGENCY DECISION

Appellants have filed an appeal pursuant to Colo. Const. Art. XXVIII, sec. 10(2)(b)(I) of a penalty imposed on the Committee by the Douglas County Clerk and Recorder on July 21, 2004. Section 10(2) of Article XXVIII permits persons required to file a report with the Secretary of State and upon whom a penalty has been imposed pursuant to Section 10(2) to file an appeal of the penalty with the Secretary of State. Because Appellants are not persons required to file a report with the Secretary of State, they are not authorized to file this Section 10(b)(1) penalty appeal with the Secretary of State and the administrative law judge lacks jurisdiction to consider the appeal. Consequently, this matter is dismissed for lack of subject matter jurisdiction.

DONE AND SIGNED

January ____, 2005

JUDITH F. SCHULMAN
Administrative Law Judge

CERTIFICATE OF SERVICE

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

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

Samuel J. Light
Light, Harrington & Dawes, P.C.
1512 Larimer Street, Suite 550
Denver, CO 80202

Charles E. Norton, Esq.
Icenogle, Norton, Smith & Blieszner
821 Seventeenth Street, Suite 600
Denver, CO 80202

and to:

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

on this ____ day of January, 2005.

Secretary to Administrative Law Judge

OS040015ag