

**BEFORE THE SECRETARY OF STATE**

**STATE OF COLORADO**

**CASE NO. OS 2004-0019**

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**AGENCY DECISION**

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**IN THE MATTER OF THE COMPLAINT FILED BY CHARLES H. BUCKNAM REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY TED HARVEY, COPIC POLITICAL COMMITTEE and COMMITTEE TO ELECT TED HARVEY**

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On September 7, 2004, Complainant Charles H. Buchnam filed a complaint with the Colorado Secretary of State against Ted Harvey, COPIC Political Committee and Committee to Elect Ted Harvey, alleging violations of Colo. Const. Article XXVIII and the Fair Campaign Practices Act, Sections 1-45-101 *et seq.*, C.R.S. (2004) ("the FCPA"). The Secretary of State transmitted the complaint to the Colorado Division of Administrative Hearings on September 7, 2004, for the purpose of conducting a hearing pursuant to Article XXVIII, Section 9(2)(a) of the Colorado Constitution.

Hearing was held in this matter November 29, 2004. Charles H. Bucknam ("Bucknam" or "Complainant") appeared personally and was represented by Jerri L. Hill, Esq. Ted Harvey ("Harvey") appeared on his own behalf and on behalf of the Committee to Elect Ted Harvey ("Harvey Committee"). COPIC Political Committee ("COPIC Committee") was represented by Mark G. Grueskin of Issacson, Rosenbaum, Woods & Levy. Following the hearing the parties were provided with additional time within which to file written closing argument, which both parties submitted. The hearing was digitally recorded in Courtroom A. The Administrative Law Judge (ALJ) issues this Agency Decision pursuant to Article XXVIII, Section 9(2)(a) and Section 24-4-105(14)(a), C.R.S. (2004).

**ISSUE PRESENTED**

Bucknam asserts Ted Harvey and the Harvey Committee accepted excess aggregate contributions in violation of Article XXVIII, Section 3(1)(b) of the Colorado Constitution and violated Rule 4.9, 8 CCR 1505-6 of the Secretary of State's Rules Concerning Campaign and Political Finance ("Campaign Finance Rules") by failing to timely return illegal contributions. Additionally, Bucknam asserts the COPIC Committee violated Article XXVIII by making contributions in excess of the limit per recipient, by accepting contributions in excess of the limit, and by failing to itemize on required reports to the Secretary of State contributions in excess of \$20.

## **FINDINGS OF FACT**

### **General Findings**

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Harvey was a candidate the Colorado House of Representatives during the 2003-2004 election cycle and was elected to the Colorado House of Representatives in the November 2, 2004 general election.

2. The Harvey Committee is a candidate committee that was organized to receive contributions and make expenditures under Harvey's authority as a candidate for the Colorado House of Representatives.

3. The election cycle for Colorado House of Representatives for the November 2, 2004 general election commenced December 6, 2002 and ended December 2, 2004.

4. Pursuant to Section 11-70-101 *et seq.*, the establishment of trusts by physician, dentists or health care institutions is authorized for the purpose of providing general liability insurance to said physicians, dentists or health care institutions for, among other things, claims based on malpractice. COPIC Trust was created pursuant to Section 11-70-101 *et seq.*, as a self-insured medical insurance entity for Colorado physicians.

5. COPIC Insurance Company is a not-for-profit stock insurance company.

6. COPIC Trust is a holding company of COPIC Insurance Company. One hundred percent of COPIC Insurance Company stock is owned by COPIC Trust. Both COPIC Trust and COPIC Insurance Company write insurance.

7. The COPIC Committee was created by and is sponsored by COPIC Trust and COPIC Insurance Company as a political committee. It is a person other than a natural person that has accepted or made contributions or expenditures in excess of \$200 to support or oppose the nomination or election of one or more candidates.

8. Bucknam filed his written complaint in this matter with the Secretary of State on September 7, 2004.

### **Contributions to COPIC Committee Through COPIC Insurance Company Policyholders**

9. As provided by Section 11-70-101 *et seq.*, health care trusts such as COPIC Trust are membership organizations whose members make contributions to the

trust. In the case of COPIC Trust and as provided by the COPIC Trust Agreement, in order to become members and receive the membership benefit of being insured, individuals must complete an application and be accepted. Accepted members of COPIC Trust must comply with membership obligations, including compliance with risk management rules and payment of contributions. Because COPIC is a not-for-profit venture, excess revenue is periodically returned to the insured member physicians as a distribution in the form of credits for premiums.

10. Individual physicians become members either of COPIC Trust or COPIC Insurance Company. Both entities have similar membership obligations and procedures for membership fees and applications. An individual who participates in COPIC Insurance Company is also participating in the programs of the Trust. Because individuals who are members of COPIC Insurance Company are insured, they are also participants in and members of the Trust. COPIC Insurance Company could not exist without COPIC Trust.

11. COPIC members must renew their memberships in COPIC Trust or COPIC Insurance Company annually. For the policy year beginning April 1, 2004, COPIC Insurance Company sent members renewal applications that provided each member with a negative option to permit up to \$19 of any subsequently-declared policyholder distribution monies otherwise due to that member to be allocated to COPIC's Political Action Committee. Specifically, for policy year 2004, the COPIC Insurance Company application included a form ("the PAC letter") which stated:

During the policy year for which you are making application, COPIC will allocate no more that (*sic*) \$19 of your policyholder distribution monies, if any policyholder distribution is declared by COPIC's Board of Directors and if your application for coverage is accepted by the company, to its Political Action Committee (PAC) or other accounts for the purpose of supporting Tort Reform in the State of Colorado. If you object to this, please check this box. . . .

A similar letter was sent to COPIC Trust policyholders for policy year 2004.

12. COPIC Trust and COPIC Insurance Company have received contributions for the benefit of the COPIC Committee as a result of the PAC letter; however, it is not a condition of membership or renewal that policyholders agree to the allocation of up to \$19 in distributions to the COPIC Committee. Both COPIC Trust and COPIC Insurance Company honor requests of members who do not wish to have any portion of their distributions allocated to the COPIC Committee.

13. For policy year 2004, COPIC Insurance Company received authorizations from 748 policyholders to have up to \$19 of their distributions allocated to the COPIC Committee. The COPIC Insurance Company Board of Directors chose to allocate to the

COPIC Committee \$9 of each \$19 contribution and chose to allocate \$10 of each \$19 contribution to a COPIC small donor committee. As a consequence, for the 2004 policy year, a total of \$6,732 (748 members x \$9) in COPIC Insurance Company policyholder donations were allocated to the COPIC Committee. These policyholder donations came from persons who were simultaneously members of COPIC Insurance Company and participants in the activities of COPIC Trust.

14. COPIC Committee received the \$6,732 contribution during the reporting period May 28, 2004 through June 30, 2004, and on July 5, 2004, timely filed a report of contributions with the Secretary of State indicating receipt of a contribution in that amount. The Committee listed the \$6,732 as a “non-itemized contribution (\$19.99 or less)” and thus did not itemize this contribution by individual donor.

**Other Contributions to COPIC Committee**

15. In addition to the \$6,732 contribution referenced above, COPIC Committee received and deposited in its account the following transfers of funds at issue in this case and reported them to the Secretary of State as follows:

Amount	From	Date Rec'd (approx)	Date Reported
\$ 1,000	COPIC Ins. Co.	July 1, 2003	Sept. 29, 2003 <sup>1</sup>
\$15,000	COPIC Trust	July 31, 2003	Sept. 29, 2003
\$ 1,000	COPIC In. Co.	August 18, 2003	Sept. 29, 2003
\$ 4,000	COPIC Trust	December 31, 2003	January 16, 2004
\$ 6,000	COPIC Trust	February 2, 2004	April 15, 2004

16. One hundred and eighty days from the date Bucknam’s complaint was filed with the Secretary of State (September 7, 2004) is March 11, 2004.

**Contributions By COPIC Committee To State Senate and House Campaigns**

17. In December 2003, COPIC Committee made \$200 contributions to each the election campaigns of the following members of/candidates for Colorado House of Representatives or Colorado Senate: Ted Harvey, Nancy Spence, Jim Dyer, Bob Hagedorn, Bill Cadman, Dale Hall, Don Lee, Bob McCluskey, Shawn Mitchell, and Tom Wiens.

18. COPIC Committee timely reported each of these contributions to the Secretary of State on or about December 31, 2003.

19. On June 9, 2004, the COPIC Committee made additional contributions in the amount of \$400 (consisting of two separate \$200 checks) to each of the election

<sup>1</sup> This contribution was inadvertently reported as a contribution from COPIC Trust although it was actually from COPIC Insurance Company.

campaigns of the above-listed members of/candidates for Colorado House of Representatives or Colorado Senate. As a result, COPIC Committee sent checks totaling \$600 in one election cycle to each of these individuals.

20. On or about July 5, 2004, COPIC timely reported to the Secretary of State all the contributions it made in June 2004 to the election campaigns of the above-listed members of/candidates for Colorado House of Representatives or Colorado Senate.

21. It was the intent of COPIC Committee to limit to \$400 its contributions in one election cycle to the House of Representatives and Senate members/candidates listed above. The \$600 donations were the result of an error, specifically, an inadequate system for tracking donations from one calendar year to the next.

22. COPIC Committee first learned of its error when Bucknam filed his complaint with the Secretary of State. At that time, George D. Dikeou, COPIC Committee's legislative consultant, personally wrote to eight of the recipients on September 28, 2004, informing them that a complaint had been made alleging COPIC Committee had made contributions to them totaling \$600 in one election cycle. The letter requested the recipients to immediately return \$200 by check made payable to COPIC PAC. Dikeou did not send a letter to Representative Harvey because Harvey had already refunded \$200 to COPIC Committee. He also did not send a letter to Bill Cadman because Cadman had not deposited one of the June 2004 COPIC Committee checks and had already returned it to COPIC Committee.

23. In response to the September 28, 2004 COPIC Committee letter, each of the candidates returned one of the original \$200 checks or refunded \$200 to COPIC Committee as requested, with the exception of Representative Shawn Mitchell.

24. Refunds/returns to COPIC Committee were made as follows: Representatives Cadman and Wiens each returned one of the original June 2004 checks to COPIC Committee without having endorsed, deposited, or presented it for payment. Consequently, no "payment" was made on either of these checks. The Committee to Elect Bob McCluskey deposited both \$200 checks it received from COPIC Committee, but refunded \$200 to COPIC Committee on September 30, 2004, which was 13 days after the check was originally deposited for payment by the McCluskey campaign on September 17, 2004. The Harvey Committee refunded \$200 to COPIC Committee on September 7, 2004, the day Harvey first learned of the problem. This was more than 30 days after the Harvey Committee had deposited the contributions in July 2004. Finally, the candidate committees for Representatives Spence, Lee, and Hall and Senators Dyer and Hagedorn also refunded \$200 to COPIC Committee as requested. However, as was true with the Harvey Committee, these refunds occurred more than 30 days after these campaigns had received and deposited COPIC Committee's contribution checks.

## **Harvey Committee Acceptance of COPIC Committee Contributions**

25. As noted above, during the 2004 election cycle the Harvey Committee accepted \$600 in aggregate contributions from COPIC Committee (a \$200 check in December 2003 and two \$200 checks in June 2004). The Harvey Committee did so inadvertently and with no intent to violate Colorado's campaign finance provisions. The campaign had a volunteer treasurer who was under the misapprehension that applicable contribution limits related to calendar years rather than election cycles. As soon as the Harvey Committee learned on September 7, 2004, that it had accepted excess contributions from COPIC Committee, it immediately refunded \$200 to COPIC Committee that same day.

26. The Harvey Committee accurately reported receipt between December 2003 and July 2004 of \$600 in aggregate contributions from COPIC Committee for the 2004 primary and general elections.

## **DISCUSSION**

### **Harvey Committee Acceptance of Excess Contributions**

1. The FCPA, in combination with Article XXVIII of the Colorado Constitution, together comprise Colorado's campaign finance law. As a fundamental part of Colorado's campaign finance regulation, Colo. Const. Art. XXVIII, sec. 3 establishes political contribution limits. In particular, Colo. Const. Art. XXVIII, sec. 3(1)(b) provides that "no 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 . . .two hundred dollars to any one state senate [or] state house of representatives . . . candidate committee." A candidate committee is defined in pertinent part as "a person, including the candidate, or persons with the common purpose of receiving contributions or making expenditures under the authority of a candidate." Colo. Const. Art. XXVIII, sec. 2(3). A person includes a committee. Colo. Const. Art. XXVIII, sec. 2(11).

2. Bucknam asserts the Harvey Committee violated Colo. Const. Art. XXVIII, sec. 3(1)(b) by accepting contributions from COPIC Committee in excess of the permitted amount.

It is uncontested that Ted Harvey was a candidate for state office, specifically the State House of Representatives, in the 2004 election cycle and that the Committee to Elect Ted Harvey was his candidate committee. It is also undisputed that the Harvey Committee received and deposited a December 2003 \$200 contribution check from COPIC Committee and two additional June 2004 \$200 contribution checks from COPIC Committee.

A contribution is considered accepted the date it is deposited into a committee's account. Rule 4.2,<sup>2</sup> Secretary of State Rules Campaign and Political Finance, 8 CCR 1506-6 (Campaign Finance Rules). Thus, the Harvey Committee, a candidate committee, violated Colo. Const. Art. XXVIII, sec. 3(1)(b) by accepting total aggregate contributions from COPIC Committee of \$600 for the primary and general election, which is \$200 in excess of the total limit of \$400 for the 2004 primary and general elections.<sup>3</sup>

3. Ted Harvey and the Harvey Committee do not contest that they violated Colo. Const. Art. XXVIII, sec. 3(1)(b) by accepting an aggregate contribution from COPIC Committee in excess of the \$400 contribution limit. Harvey asserts, however, that the violation was inadvertent. As established by the evidence, the campaign, including its volunteer treasurer, was not aware it had accepted an excess contribution from COPIC Committee until the complaint was filed in this matter. As soon as the campaign became aware of the error, it immediately attempted to rectify the situation by returning the excess funds to COPIC Committee, which it did on September 7, 2004, the same day the campaign learned of the problem.

4. Bucknam seeks imposition a fine on Harvey and the Harvey Committee in the amount of five times the aggregate contributions in excess of the contribution limit the Harvey Committee received from COPIC Committee. Colo. Const. Art. XXVIII, sec. 10(1) provides that any person who violates Article XXVIII shall be subject to a civil penalty of "at least double and up to five times the amount contributed or received in violation of the article." That section further provides that candidates shall be personally liable for penalties imposed upon the candidate's committee. The ALJ is thus required under the circumstances of this case to impose a fine pursuant to Colo. Const. Art. XXVIII, sec. 10. However, in view of the lack of intent on the part of the Harvey Committee to violate Article XXVIII, its good faith but mistaken belief that it had complied with the requirements of Article XXVIII, combined with the committee's immediate efforts to rectify the situation upon learning of the error, and the limited magnitude of the error, it is appropriate to impose only a minimal fine.

5. Bucknam also seeks a determination that Harvey and the Harvey Committee violated then-existing Campaign Finance Rule 4.10, which provided that "[a]ny contributions received in excess of contribution limits shall be returned to the contributor within thirty (30) days."<sup>4</sup> Bucknam asserts such a violation occurred

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<sup>2</sup> Effective September 29, 2004, this provision is now codified as Campaign Finance Rule 4.3.

<sup>3</sup> The parties agree that the \$200 limit specified by Colo. Const. Art. XXVIII, sec. 3(1)(b) "for a primary or general election" for state House of Representatives entails two separate limitations of \$200 each, one for the primary election and one for the general election. The parties do not interpret this section as establishing a total \$200 limit for the primary and general election combined. The ALJ agrees with this interpretation.

<sup>4</sup> Effective September 29, 2004, this provision is now codified as Campaign Finance Rule 4.9.

independent of any alleged violation of Article XXVIII or the FCPA.<sup>5</sup> The ALJ concludes she has no jurisdiction to address this issue.

While the ALJ may consider the Secretary's rules in construing Article XXVIII and the FCPA and in determining whether violations of these provisions have occurred, there is no directive in Article XXVIII, the FCPA, or the Campaign Finance Rules that authorizes the ALJ independently to enforce the those rules. The ALJ thus has no jurisdiction to determine independent or discrete violations of the Secretary's rules unrelated to statutory or constitutional provisions and declines to do so in this case. Consequently, the ALJ thus makes no determination as to whether the actions of Harvey and the Harvey Committee violated Campaign Finance Rule 4.10.

### **COPIC Committee Making Excess Contributions**

6. Bucknam asserts COPIC Committee violated Colo. Const. Art. XXVIII, sec. 3(1)(b) by making aggregate contributions in December 2003 and June 2004 in excess of the permitted amount to the election campaigns of the following members of/candidates for Colorado House of Representatives or Colorado Senate: Ted Harvey, Nancy Spence, Jim Dyer, Bob Hagedorn, Bill Cadman, Dale Hall, Don Lee, Bob McCluskey, Shawn Mitchell, and Tom Wiens. The ALJ concludes that COPIC Committee violated this section with respect to its donations to the Harvey, Spence, Dyer, Hagedorn, Hall, Lee, McCluskey and Mitchell campaign committees but did not violate this section with respect to its donations to the Cadman and Wiens campaign committees.

7. It is undisputed that COPIC Committee is a group of persons that have accepted or made contributions or expenditures in excess of \$200 to support or oppose the nomination or election of one or more candidates and is therefore a political committee. Colo. Const. Art. XXVIII, sec. 2(12). As noted, Colo. Const. Art. XXVIII, sec. 3(1)(b) prohibits political committees from making aggregate contributions of more than \$200 for a primary and \$200 for a general election to a state senate or state house of representative candidate committee. As defined in Colo. Const. Art. XXVIII, sec. 2(5)(a)(I), a contribution includes "a payment . . . made to any candidate committee. . . ." Further, the Secretary of State has adopted rules attempting to define when a contribution occurs. Campaign Finance Rule 4.2 (currently Rule 4.3), entitled "Contributions—when counted," provides in pertinent part at subsection (a) that "[a] contribution is considered made or received as of the date that it is accepted by the committee or party. In the case of a contribution by check, the date accepted is the date that the check is deposited into the committee's or party's account."

8. The evidence established that COPIC Committee made \$200 contributions to each of the above campaign committees in December 2003, and on June 9, 2004, made \$400 in additional contributions (consisting of two separate \$200

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<sup>5</sup> Bucknam does not seek imposition of any sanction for this alleged violation.

checks) to each of those campaigns. As a result, COPIC Committee sent checks totaling \$600 in one election cycle to each of these individuals. The evidence also established that the Harvey, Spence, Dyer, Hagedorn, Hall, Lee, McCluskey and Mitchell campaign committees deposited each of the checks for payment. In contrast, neither the Wiens nor the Cadman campaign committees deposited the second \$200 June 2004 check. Instead, the Wiens and Cadman campaigns returned these checks to COPIC Committee uncashed.

9. Bucknam contends that as a result of the June 2004 donations, COPIC Committee made excess contributions of \$200 to each of the ten campaign committees, resulting in a total excess contribution with respect to these campaigns of \$2,000. The ALJ concludes, however, that excess contributions were made only with respect to the checks that were actually deposited for payment by the recipient campaigns. Thus, excess contributions occurred with respect to the Harvey, Spence, Dyer, Hagedorn, Hall, Lee, McCluskey and Mitchell campaign committees but not with respect to the Wiens or Cadman campaigns.

Pursuant to Colo. Const. Art. XXVIII, sec. 2(5)(a)(I), and Campaign Finance Rule 4.2, a payment is considered “made” for the purposes of becoming a contribution when it is accepted by the committee. If the contribution is by check, acceptance is the date the check is deposited into the committee’s account. Of the ten campaign committees involved, only eight deposited both of the June 2004 checks. Consequently, only these eight campaign committees accepted the contributions for the purposes of Campaign Finance Rule 4.2 and thus the excess \$200 contributions were “made” only to these eight campaigns. With respect to the Wiens and Cadman campaigns, because the excess \$200 checks were never deposited, such checks were never “accepted” for the purposes of Rule 4.2, and the contributions are thus considered not to have been made. As a result, pursuant to Colo. Const. Art. XXVIII, sec. 2(5)(a)(I), COPIC Committee “made” excess contributions of \$200 payment with respect to the Harvey, Spence, Dyer, Hagedorn, Hall, Lee, McCluskey and Mitchell campaign committees but not with respect to the Wiens or Cadman campaigns. The total excess contribution by COPIC Committee was therefore \$1,600.

10. Bucknam appears to argue that Rule 4.2 is contrary to the intent of Article XXVIII and the FCPA with respect to its determination of when a contribution occurs and therefore should be disregarded by the ALJ. An agency’s interpretation of its own governing statute authority as established in its rules or otherwise is entitled to great weight. *Mile High Greyhound Park, Inc. v. Colorado Racing Commission*, 12 P.3d 351 (Colo. App. 2000). The ALJ determines the rule is not inconsistent with Article XXVIII and the FCPA and instead merely clarifies and supplements those provisions. Thus, no basis exists to disregard that rule, even assuming the ALJ had such authority.

11. COPIC Committee contends that the \$200 payment to Representative McCluskey should not be considered a contribution. The Committee points out that although the McCluskey campaign deposited both of the June 2004 \$200 checks, it

refunded \$200 to COPIC Committee within 13 days of the deposit. Relying on Campaign Finance Rule 4.10 (currently 4.9), which provides “any contributions received in excess of contribution limits shall be returned to the contributor within thirty days,” COPIC maintains the \$200 payment to the McCluskey campaign was timely rejected. COPIC therefore argues the \$200 contribution was thus effectively never accepted and under the rule was thus never “made.” The ALJ is unpersuaded by this argument.

Rule 4.2 (currently Rule 4.3) defines when a contribution is made for the purpose of determining when it is counted as, or considered to be, a contribution. With regard to payments by check, the rule indicates a payment is “made” and is considered to be a contribution when the check is deposited in the payee committee’s account. The McCluskey campaign deposited the check in question on September 17, 2004, and did not refund the \$200 contribution until 13 days later. Under these circumstances, COPIC’s \$200 payment was “made” on September 17, 2004, and was considered to be a contribution at that time. Contrary to COPIC’s argument, nothing in Rule 4.10 changes this result. Rule 4.10 does not define when a contribution has been “made” by the contributor and does not alter the definition of acceptance established in Rule 4.2; it merely provides a grace period within which recipients may return improper contributions. Consequently, COPIC made an excess contribution to the McCloskey campaign committee, effective September 17, 2004.

12. The remainder of the checks in question were all deposited in the recipient campaign committees’ accounts and were either refunded more than 30 days after being deposited by the candidate committees (Harvey, Spence, Dyer, Hagedorn, Hall, and Lee), or were never refunded at all (Mitchell). For the reasons stated above, in each of these cases COPIC Committee made excess contributions because the excess amounts were deposited by the campaign committee in question. Moreover, any untimely (pursuant to Rule 4.10) refund of the excess contribution by the campaign committees did not alter the fact that COPIC “made” the contribution.

13. COPIC emphasizes, and the ALJ finds, that it acted inadvertently in making the excess contributions in question and without any intent to violate campaign finance requirements, as shown in part by the fact that it accurately reported to the Secretary of State all of these contributions. The Committee also took immediate steps to rectify its error as soon as it discovered the problem. COPIC Committee’s lack of intent and ameliorative actions do not alter the fact that excess contributions were made but may be considered in determining an appropriate sanction.

### **COPIC Committee Reporting of \$6,732 Contribution**

14. Bucknam asserts that in its July 5, 2004 report to the Secretary of State COPIC Committee improperly reported its receipt of \$6,732. He contends that because the sum was a contribution of \$20 or more, the contribution should have been itemized and that failure to do so violated Section 1-45-108(1) and Campaign Finance Rule 4.1. The ALJ disagrees.

Section 1-45-108(1) provides that “political committees . . . shall report to the appropriate officer their contributions received, including the name and address of each person who has contributed twenty dollars or more. . . .”

Campaign Finance Rule 4.1 provides that all contributions received by committees “of \$20 or more during a reporting period shall be listed individually on the contribution and expenditure report. All other receipts and contributions under \$20 may be reported in total as non-itemized contributions for the reporting period. [1-45-108(1)]”

Thus, if the \$6,732 received by COPIC Committee constituted a contribution of \$20 or more, COPIC Committee was required to itemize the contribution and list the name and address of each contributor. Because the ALJ determines the \$6,732 sum did not constitute a “contribution” as defined Colo. Const., Article XXVIII, sec. 2(5), the ALJ concludes no reporting violation occurred here.

15. Article XXVIII, sec. 2(5)(a)(I) of the Colorado Constitution defines a contribution to include a payment made to any political committee. However, Article XXVIII, sec. 2(5)(b) excludes from the definition of contribution “a transfer by a membership organization of a portion of a member’s dues to a . . . political committee sponsored by such membership organization.” The ALJ concludes that the \$6,732 sum in this case is excluded from the definition of contribution because it constituted a transfer from COPIC Insurance Company, a membership organization, of a portion of the dues of individual members of COPIC Insurance Company to COPIC Committee, a political committee sponsored by COPIC Insurance Company.

16. Bucknam contends the exclusion from the definition of Article XXVIII, sec. 2(5) “contribution” relating to the transfer of membership dues to sponsored political committees does not apply here because COPIC Insurance Company is not a membership organization and the funds transferred did not constitute member’s dues. The ALJ disagrees with both assertions.

17. First, both COPIC Trust and COPIC Insurance Company are membership organizations. COPIC Trust was created pursuant to Section 11-70-101 *et seq.*, as a self-insured medical insurance entity for Colorado physicians. As provided by Sections 11-70-101(2)(a), 11-70-103, 11-70-105, and 11-70-106, health care trusts such as COPIC Trust are membership organizations whose members make contributions to the trust. COPIC Trust is a holding company of COPIC Insurance Company and owns 100% of its stock. The uncontroverted evidence in this matter established that COPIC Insurance Company is also a membership organization, with similar membership requirements and procedures as COPIC Trust. Additionally, by virtue of being insured through COPIC Insurance Company, individuals who participate in and are members of the Insurance Company are automatically participants in and members of the Trust.

Article XXVIII does not define the term “member.” Thus, the term should be given its commonly accepted meaning. *People v. Trusty*, 53 P.3d 668 (Colo. App.

2001). As defined by *Webster's New Twentieth Century Dictionary, Unabridged, 2<sup>nd</sup> Edition*, a member is a "person belonging to some association, society, community, party, etc." With respect to both COPIC Trust and COPIC Insurance Company, in order to become a member and receive the membership benefit of being insured, individuals must complete an application, be accepted and pay contributions. Such individuals, once accepted, thus belong to an association and are "members" of COPIC Trust and COPIC Insurance Company, as that term is commonly understood.

18. Furthermore, contrary to Bucknam's assertions, the \$9 payments made by COPIC Insurance Company policyholders and members in this matter constituted membership dues.

As a condition and obligation of membership in COPIC, individuals must make annual payments of contributions to COPIC. Because COPIC is a not-for-profit venture, excess revenue is periodically returned to the insured member physicians as a distribution in the form of credits for premiums. In 2004, 748 COPIC Insurance Company members authorized COPIC Insurance Company to allocate to COPIC Committee a portion of the funds being returned to members from their original payments.<sup>6</sup> Ultimately, as reported to the Secretary of State on July 5, 2004, COPIC Insurance Company made a donation of \$6,732 to COPIC Committee, an amount equal to a \$9 contribution of distribution funds from 748 COPIC Insurance Company members.<sup>7</sup>

Bucknam does not appear to dispute that the initial payments made by members to COPIC Insurance Company constituted "dues." Bucknam argues, however, that the potential distributions authorized by policyholders to be transferred to COPIC Committee were not dues because the distributions are not "money owed" by the policyholders but instead were moneys belonging to each policyholder. The ALJ disagrees.

Article XXVIII does not define the term "dues." Thus, the term should be given its ordinary meaning. *People v. Trusty, supra*. As defined by *Webster's New Twentieth Century Dictionary, Unabridged, 2<sup>nd</sup> Edition*, dues is "a sum of money paid or to be paid by a member of an organization, usually for the rights of membership." The Colorado Court of Appeals has similarly defined the term: "[t]he term 'dues,' as applied to clubs and other membership organizations, refers to sums paid toward support and maintenance of same as a requisite to retain membership." *Capitran Inc. v. Great Western Bank*, 872 P.2d 1370, 1373 (Colo. App. 1994).

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<sup>6</sup> Members were instructed that ultimate allocation of a sum of no more than \$19 of each member's policyholder distribution monies to COPIC Committee was conditioned upon declaration of a distribution by COPIC's Board of Directors and acceptance by the company of the application for insurance coverage.

<sup>7</sup> As noted, an additional \$10 from each consenting member was allocated by COPIC Insurance Company to a small donor committee. That contribution is not at issue in this proceeding.

In this case, the initial sums paid by applicants or policyholders to COPIC Insurance Company were personal contributions that were required to be paid as a condition of membership. Thus, the initial payments were “dues,” as commonly defined. Furthermore, the fact that the authorized donations were to come from excess funds COPIC Insurance Company would otherwise have refunded to policyholders did not alter the status of those funds as “dues.” The fees in question were initially required as a condition of membership and at all times the monies in question were related to the support and maintenance of the organization.<sup>8</sup> In view of these facts, the donated funds retained their character as “dues” throughout.

19. Finally, the evidence is undisputed that COPIC Committee is a political committee as defined by Article XXVIII, sec. 2(12) and that it was created and is sponsored by COPIC Insurance Company and COPIC Trust. Consequently, the \$9 donations in question (cumulated to a total of \$6,732) constituted a transfer by COPIC Insurance Company, a membership organization, of a portion of members’ dues to a political committee sponsored by such membership organization. As such, as provided by Article XXVIII, sec. (5)(b), the transfers are excluded from the definition of “contribution” within the meaning of Article XXVIII, sec (5)(a).

20. Because the \$9 transfers in question (cumulated to \$6,732) were not contributions, the provisions of Section 1-45-108(1)(a) and Campaign Finance Rule 4.1 requiring political committees to provide itemized reports for contributions of \$20 or more are not applicable to those transfers. Consequently, COPIC Committee did not violate Section 1-45-108(1)(a) and Campaign Finance Rule 4.1 when it reported receipt of the \$6,732 transfer on its July 5, 2004 report to the Secretary of State as an unitemized donation of \$6,732.

### **COPIC Committee Accepting Excess Contributions**

#### **A.**

#### **\$6,732 Transfer From COPIC Insurance Company**

21. Bucknam asserts that by accepting the \$6,732 transfer from COPIC Insurance, COPIC Committee violated the contribution limit established by Colo. Const. Article XXVIII, sec. 3(5). The ALJ disagrees.

Article XXVIII, sec. 3(5) provides that “[n]o political committee shall accept aggregate contributions or pro-rata dues from any person<sup>9</sup> in excess of five hundred

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<sup>8</sup> The initial payments were made to support the COPIC’s core mission of providing malpractice insurance to health care providers. The \$9 donations were made to promote tort reform, a goal directly related to that core mission.

<sup>9</sup> A “person” means any “natural person, partnership, committee, association, corporation, labor organization, political party, or other organization or group of persons,” Article XXVIII, sec. 3(5), and therefore would include COPIC Insurance Company.

dollars per house of representatives election cycle.” In this case, the ALJ has found the \$6,732 in question was excluded from the Article XXVIII, sec. 2(5) definition of “contribution” as a transfer by a membership organization of a portion of a member’s dues to a political committee sponsored by such membership organization. Article XXVIII, sec. 2(5)(b). Therefore, the transfer is not countable as an “aggregate contribution” for the purposes of Article XXVIII, sec. 3(5) and COPIC Committee’s action in accepting the transfer did not contravene that section’s \$500 limit.

## **B.**

### **Earlier Transfers From COPIC Insurance Company and COPIC Trust**

22. Bucknam asserts that by accepting a total of approximately \$25,000 in contributions from COPIC Trust from July 2003 through February 2004 and by accepting a total of approximately \$2,000 in contributions from COPIC Insurance Company from July 2003 through August 2003 (in addition to the \$6,732 discussed above), see Finding of Facts, paragraph 15, COPIC Committee violated the \$500 contribution limit established by Colo. Const. Article XXVIII, sec. 3(5). The ALJ concludes that Bucknam’s claims in this regard are barred by Colo. Const. Article XXVIII, sec. 9(2)(a).

Article XXVIII, sec. 9(2)(a) provides that any person who believes that violations of provisions of Colo. Const. Article XXVIII or the FCPA have occurred may file a written complaint with the Secretary of State “no later than one hundred eighty days after the date of the alleged violation.” In this case, Bucknam filed his complaint with the Secretary of State on September 7, 2004. One hundred and eighty days prior to that date is March 11, 2004. Consequently, Bucknam is barred from raising allegations of any alleged violations of Article XXVIII or the FCPA that occurred prior to March 11, 2004. Because each of the contributions in question was made prior to March 11, 2004, Bucknam’s claims concerning these contributions are barred by the 180-day limit established by Article XXVIII, sec. 9(2)(a).

23. Bucknam argues the 180-day limit does not apply because Article XXVIII, sec. 5 references “aggregate contributions,” thereby permitting consideration of all contributions accepted within a house of representatives election cycle despite the provisions of Article XXVIII, sec. 9(2)(a). The ALJ disagrees. The aggregate contribution reference in Article XXVIII, sec. 5 merely indicates that a political committee may accept *in toto* from any person within a house of representative election cycle no more than \$500, regardless of whether the payment is given in one lump sum or in increments. The section does not override the 180-day limit with respect to violations that fully occurred more than 180 days before the complaint was filed. In this case each of the complained of contributions exceeded the \$500 limit and each was accepted (received and deposited) more than 180 days before Bucknam filed his complaint. Therefore, Bucknam’s complaint with regard to these contributions is barred.

24. In an overlapping argument Bucknam contends that the aggregate contributions language of Colo. Const. Article XXVIII, sec. 3(5) should be construed to extend the 180-day limit of Article XXVIII, sec. 9(2)(a) until the total excess contributions during an election cycle can be determined. The ALJ is unconvinced the proposed construction is warranted.

The extension suggested by Bucknam is not explicit in Colo. Const. Article XXVIII, sec. 3(5) or in sec. 9(2)(a) and no reason exists to infer an intent to create such an extension. The provisions themselves are unambiguous and should therefore be interpreted and applied as written, according to their clear terms and commonly understood meaning. *Havens v. Board of County Commissioners*, 58 P.3d 1165 (Colo. App. 2002); *People v. Johnson*, 77 P.3d 845 (Colo. App. 2003).

Art. XXVIII, sec. 3(5) unambiguously indicates that political committees may not accept aggregate contributions from any person in excess of \$500 within a house of representatives election cycle. Thus, a violation of Art. XXVIII, sec. 3(5) occurs as soon as a political committee, within a house of representatives election cycle, accepts aggregate contributions in excess of \$500 from any person. Art. XXVIII, sec. 9(2)(a) provides that written complaints must be filed with the Secretary of State “no later than” 180 days “after the date of the alleged violation.” It is therefore apparent that complaints alleging violations of Sec. 3(5) must be filed with the Secretary of State within 180 days of the date the political committee in question exceeded the Sec. 3(5) \$500 contribution limit. There is thus no basis according to the plain and clear meaning of these provisions to infer an extension of the limitation period to include all contributions received by a political committee during an entire house of representatives election cycle, regardless of when the contribution limit of Sec. 3(5) was exceeded.

Construing the provisions as written and without imposing the blanket extension sought by Bucknam effectuates the clear intent of Article XXVIII, sec. 9(2)(a) that complaints under Article XXVIII and the FCPA to be handled promptly and expeditiously and while the issues are fresh and germane. Further, construing Article XXVIII, sec. 9(2)(a) in this manner does not undermine the equally important enforcement goals of that section and of Article XXVIII, sec. 3(5); members of the public remain free to file timely, sequential complaints, as needed, to resolve allegations that a political committee has accepted multiple excessive contributions more than 180 days apart but within the same election cycle.

25. Bucknam maintains the 180-day limit must take into consideration the fact that contributions may not initially violate the limit unless they are cumulated with subsequent contributions. As a result, Bucknam argues the 180-day limit should be applied only to the final contribution that places the aggregated contributions over the contribution limit. While Bucknam’s argument in this regard has merit, it is unrelated to the factual situation presented here. In this case each of the individual contributions complained of exceeded the \$500 limit. Thus, as to these contributions the 180-day limit runs from the date each individual contribution was accepted. In each case, for

each of the contributions in question, receipt and acceptance (deposit) occurred more than 180 days before Bucknam filed his complaint. His complaint with respect to these contributions is therefore barred by the provisions of Article XXVIII, sec. 9(2)(a).

26. Bucknam also asserts the 180-day limit should run from the date the contributions were reported, rather than the date they were deposited/accepted. The ALJ disagrees. With respect to this issue Bucknam is asserting COPIC accepted excess contributions; he is not claiming reporting violations. The alleged violation therefore occurred at the time the contribution was accepted, not when it was reported.<sup>10</sup>

27. Bucknam additionally argues the 180-day period should be tolled to the earliest date when the violation was discoverable, which he argues was the date of reporting. This argument, if sustained, would only allow consideration of the final \$6,000 contribution made by COPIC Trust on February 2, 2004 and reported by COPIC Committee on April 15, 2004, because this is the only contribution at issue that was reported within the 180-day limit. However, Bucknam, who bears the burden of proof in this matter,<sup>11</sup> has failed to establish the first date on which he actually discovered or should have discovered this contribution. Therefore, no factual predicate has been established for tolling the 180-day limitation period, even if tolling were appropriate for such reason.

More important, Bucknam has failed to establish any basis for tying the 180-day limitation in Article XXVIII, sec. 9(2)(a) to discovery of the violation. Cases relied on by Bucknam in support of this proposition all relate to statutory limitations of personal actions set forth in Section 13-80-101 *et seq.*, and are thus inapposite here. Section 13-80-101 *et seq.* defines limitations in part in terms of when a cause of action “accrues,” see Sections 13-80-101 through 107, and further explicitly identifies, by specific cause of action, when accrual occurs for each identified type of action. Section 13-80-108, C.R.S. In certain cases, accrual is defined as the date the action occurred, see, *e.g.*, Section 13-80-108(2) (wrongful death cause of action accrues on the date of death) and Section 13-80-108(4) (debt cause of action accrues when debt becomes due). In other cases, accrual is defined as the date on which the event in question was discovered or should have been discovered by the exercise of reasonable diligence. See, *e.g.*, Section 13-80-108(3) (fraud, misrepresentation, deceit, or concealment) and Section 13-80-108(7) (wrongful possession).

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<sup>10</sup> In contrast, the 180-day limit with respect to a reporting violation would occur when the report was filed or when it should have been filed.

<sup>11</sup> Bucknam seeks a determination and order that the Harvey Committee and COPIC Committee violated Article XXVIII and the FCPA and are subject to fines and is thus the proponent of an order to that effect. Pursuant to Art. XXVII, sec. 9(1)(f), this matter is conducted pursuant to the provisions of the Administrative Procedure Act, Section 24-4-105, C.R.S. Under that statute the proponent of an order has the burden of proof.

Unlike the statutory provisions discussed in the cases cited by Bucknam, the limitation provision at issue here does not define the limitation period in terms of when the cause of action “accrues,” nor does it define “accrual.” Instead, Article XXVIII, sec. 9(2)(a) simply states that a complaint shall be filed no later than 180 days “after the date of the alleged violation.” Under these circumstances, cases discussing when a cause of action accrues and whether additional time should be allowed for reasonable discovery of a precipitating event simply have no relevance here. The limitation period imposed by Article XXVIII, sec. 9(2)(a) makes no reference to and no allowance for a cause of action “accruing” and does not permit a period of time to discover the event that triggers such accrual; instead, sec. 9(2)(a) merely states that complaints shall be filed within 180 of the date of a violation. This provision is unambiguous and must be construed in accordance with its plain meaning. *Havens v. Board of County Commissioners, supra*; *People v. Johnson, supra*. By its clear terms, the 180-day limitation period imposed by Article XXVIII, sec. 9(2)(a) runs from the date of the violation without regard to either “accrual” or “discovery.”

29. Bucknam’s argument for the extension of the Article XXVIII, sec. 9(2)(a) based on cases addressing “continuous treatment” and “substantial completion” is similarly unconvincing. The cases cited in support of this argument, like those cited in support of an extension or tolling to allow for discovery of alleged violations, address to statutory limitations of personal actions governed by Section 13-80-101 *et seq.*, and thus have no applicability here.

30. Accordingly, Bucknam’s allegations that COPIC Committee accepted excess contributions of approximately \$25,000 from COPIC Trust from July 2003 through February 2004 and approximately \$2,000 COPIC Insurance Company from July 2003 through August 2003 are barred by Colo. Const. Article XXVIII, sec. 9(2)(a).<sup>12</sup>

### **CONCLUSIONS OF LAW**

1. The ALJ has jurisdiction over this matter. Article XXVIII, Section (9)(2)(a).
2. Ted Harvey and the Harvey Committee violated Colo. Const. Art. XXVIII, sec. 3(1)(b) by accepting an aggregate contribution from COPIC Committee in excess of the \$400 contribution limit.
3. The ALJ lacks jurisdiction to determination whether the actions of Harvey and the Harvey Committee violated Campaign Finance Rule 4.10, 8 CCR 1505-6.

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<sup>12</sup> Because the ALJ finds the above-described claims are barred by the 180-day limitation and because the ALJ has determined the \$6,732 transfer to COPIC Committee was not a contribution as defined by Article XXVIII, the ALJ need not address Bucknam’s assertion that COPIC Trust and COPIC Insurance Company are the same entity for the purposes of contribution limits under Article XXVIII.

4. COPIC Committee violated Colo. Const. Art. XXVIII, sec. 3(1)(b) by making contributions in December 2003 and June 2004 in excess of the permitted amount to the election campaigns of the following members of/candidates for Colorado House of Representatives or Colorado Senate: Ted Harvey, Nancy Spence, Jim Dyer, Bob Hagedorn, Dale Hall, Don Lee, Bob McCluskey, and Shawn Mitchell. COPIC Committee did not violate this section with respect to its donations to the campaign committees of Bill Cadman and Tom Wiens.

5. COPIC Committee was not required to itemize its receipt of \$6,732 and did not violate Section 1-45-108(1) and Campaign Finance Rule 4.1. when it reported receipt of that sum.

6. COPIC Committee did not violate the contribution limit established by Colo. Const. Article XXVIII, sec. 3(5) by accepting the \$6,732 transfer from COPIC Insurance Company.

7. Bucknam's allegations that COPIC Committee accepted excess contributions of approximately \$25,000 from COPIC Trust from July 2003 through February 2004 and approximately \$2,000 COPIC Insurance Company from July 2003 through August 2003 are barred by Colo. Const. Article XXVIII, sec. 9(2)(a).

### **AGENCY DECISION**

1. The issues to be determined in a hearing conducted by an ALJ under Article XXVIII of the Colorado Constitution are limited to whether a violation of sections 3 through 7, or 9(1)(e) of Article XXVIII, or Sections 1-45-108, 114, 115 or 117, C.R.S. has occurred. Colo. Const. Art. XXVIII, sec. 9(2)(a). If an ALJ determines in a final agency decision that a violation of one of these provisions has occurred, the ALJ's decision shall include any appropriate order, sanction or relief authorized by Article XXVIII.

2. The ALJ has found that Ted Harvey and the Harvey Committee violated Colo. Const. Art. XXVIII, sec. 3(1)(b) by accepting an aggregate contribution of \$600 from COPIC Committee, which was \$200 in excess of the \$400 contribution limit. Colo. Const. Art. XXVIII, sec. 10(1) provides that any person who violates a provision of Article XXVIII relating to contribution limits shall be subject to a civil penalty of at least double and up to five times the amount contributed or received in violation of Article XXVIII. Pursuant to this section, imposition of a civil penalty of at least twice the amount of the improper contribution is mandatory and the ALJ lacks discretion to enter an order for a lesser penalty amount. Furthermore, candidates are personally liable for penalties imposed upon the candidate's committee. The ALJ has found that Harvey and his campaign committee did not intend to violate Article XXVIII, had a good faith but mistaken belief that they had complied with the requirements of Article XXVIII, and immediately refunded the excess contribution of \$200 upon learning of it. In addition, the ALJ has found that the magnitude of the error—acceptance of an excess

contribution of \$200—is limited. Accordingly, the ALJ concludes that the minimum penalty of twice the amount of the contribution is appropriate. The ALJ therefore imposes on Ted Harvey and the Harvey Committee a civil penalty to be paid to the Secretary of State in the total amount of \$400. Ted Harvey is personally liable for that amount.

3. The ALJ has also determined that COPIC Committee violated Colo. Const. Art. XXVIII, sec. 3(1)(b) by making contributions in excess of the permitted amount to the election campaigns of the following members of/candidates for Colorado House of Representatives or Colorado Senate: Ted Harvey, Nancy Spence, Jim Dyer, Bob Hagedorn, Dale Hall, Don Lee, Bob McCluskey, and Shawn Mitchell. In each case the excessive contribution amounted to \$200, for a total of \$1,600 in excess contributions. As is the case with Harvey and the Harvey Committee's acceptance of excess contributions, the ALJ has found that COPIC acted inadvertently in making the excess contributions in question and without any intent to violate campaign finance requirements, as shown in part by the fact that it accurately reported all the contributions. The Committee also took immediate steps to rectify its error as soon as it discovered the problem. Accordingly, the ALJ concludes that the minimum penalty of twice the amount of the contributions in question is appropriate. The ALJ therefore orders COPIC Committee to pay a civil penalty to the Secretary of State in the amount of \$3,200.

4. In all other respects the complaint is dismissed.

DONE AND SIGNED  
February \_\_\_\_, 2005

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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

Ted Harvey  
3010 Wyecliff Lane  
Highlands Ranch, CO 80126

Committee to Elect Ted Harvey  
21149 Woodside Lane  
Parker, CO 80138

Mark G. Grueskin, Esq.  
Issacson, Rosenbaum, Woods & Levy, P.C.  
633 17<sup>th</sup> Street, Suite 2200  
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

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