

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

**CASE NO. OS 20050006**

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**AGENCY DECISION**

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**IN THE MATTER OF THE COMPLAINT FILED BY LELAND GILBERT REGARDING  
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY ALLIANCE FOR  
COLORADO FAMILIES.**

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**History of the Case**

This case concerns a complaint filed March 28, 2005 with the Secretary of State by Leland Gilbert against Alliance for Colorado Families (“ACF”). The complaint alleges that the Defendant ACF is a political committee and that it accepted 32 contributions of more than \$500 per House of Representatives election cycle as prohibited under Colo. Const. art. XXVIII, Section 3(5).

The Secretary of State referred the complaint to an Administrative Law Judge (“ALJ”) as provided by Colo. Const. art. XXVIII, Section 9(2)(a). Prehearing conferences were held on April 14, 2005 and on May 6, 2005. The parties agreed that no hearing was immediately required as the issues were primarily legal ones. Instead, the parties agreed to have the ALJ determine whether a violation occurred. The parties agreed this could be done via a stipulated set of facts and motions for summary judgment. In the event a violation was proven, the parties agreed that a separate hearing would be held on the issue of proper sanction.

After the completion of briefing, the ALJ, on July 5, 2005, issued an Order Granting Summary Judgment as to Liability. The Order concluded that ACF was liable for a violation of Section 3(5). A hearing as to appropriate sanction was therefore held August 30, 2005. At the hearing and throughout this case Scott Gessler, Esq. represented the Complainant. Edward Ramey, Esq. represented ACF throughout this case and at the hearing as well.

In order that the issues in this matter may be clear to the reader, the ALJ will restate the matters determined in the Order Granting Summary Judgment as to Liability. This Agency Decision will then discuss the issue of proper sanction.

**Issues Presented**

The first issue is whether ACF is a “political committee.” ACF spent money for a radio advertisement likening Colorado House of Representatives candidate Kent Lambert to the character Eddie Haskell from the 1950’s television show *Leave it to Beaver*. If the payment for the radio ad was done to “support or oppose the nomination

or election of one or more candidates,” ACF is a “political committee.” This quoted language comes from the definition of “political committee” at Colo. Const. art. XXVIII, Section 2(12)(a).

Section 3(5) prohibits a political committee from accepting contributions in excess of \$500 from any one person. It is undisputed that ACF accepted more than \$500 from a single person prior to the expense on the radio ad. ACF argues that even if paying for the radio ad made it a political committee, all of its contributions *preceded* this expense. According to ACF, the fact that the radio ad may have made it a political committee cannot be applied retroactively in time to contributions received before it bought the ad.

ACF also argues that its major purpose is not the support or opposition of candidates, but rather promoting public awareness of issues of importance to Colorado families, which includes the election of individuals to state or local public office. ACF’s opening brief at 6. It argues that this single incident of paying for the radio ad is insufficient to show that its “major purpose” is the nomination or election of a candidate. It argues that this “major purpose” must be shown under the case of *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). ACF argues that absent such evidence, a sanction imposed for such an advertisement would be unconstitutional.

### **Findings of Fact**

Based upon the evidence, the ALJ makes the following Findings of Fact:

#### *The Stipulated Facts of the Parties*

1. The Stipulated Facts provide as follows:
  - 1) The Alliance for Colorado Families paid for the production of a radio advertisement entitled “Eddie Haskell.”
  - 2) The Alliance for Colorado Families paid radio stations to broadcast the Eddie Haskell advertisement.
  - 3) The Alliance for Colorado Families expended more than \$1,000 for the production and broadcast of the Eddie Haskell advertisement.
  - 4) The Eddie Haskell advertisement was broadcast multiple times on radio stations in October, 2004, November, 2004, or both.
  - 5) The audience that heard the radio broadcasts included voters in Colorado State House District 18.
  - 6) A true and accurate transcript of the Eddie Haskell advertisement is contained in Exhibit 1.
  - 7) A true and accurate recording of the Eddie Haskell advertisement is contained on the readable compact disc at Exhibit 2.

8) The exhibits contained in the complaint filed by Gilbert are true and correct copies of reports filed by the Alliance for Colorado Families, and accurately reflect the contributions received by the Alliance for Colorado Families.

2. Exhibit 1 reads as follows:

Script of "Eddie Haskell" Radio Advertisement

Eddie Haskell. You know the smarmy little guy on Leave It To Beaver?

Now we've got our own Eddie Haskell right here in Colorado Springs, House candidate Kent Lambert.

And his latest little scheme is the kind of dirty trick only an Eddie Haskell could think of.

Kent Lambert and his dirty tricksters decided that twenty-four hour surveillance of his opponent was a nifty idea. Just hire a private investigator and stake out the opponent's home, twenty-four seven.

So why did he do it? Because he knows that twenty-two-year resident Mike Merrifield has been fighting for our community for a long time. Representative Merrifield has been fighting for affordable health care for all and good schools for our kids.

We saw right through Eddie Haskell when he said, "Gee, you look lovely tonight, Mrs. Cleaver." And we see through Kent Lambert's adolescent game of hide the ball.

This election is too important for childish tricks. We need mature leadership.

Don't let Eddie Haskell, er, Kent Lambert, represent you in the State House.

Paid for by the Alliance for Colorado Families.

3. Although not specifically stipulated to, the ALJ makes additional findings of fact as these facts are uncontested by the parties:

a. ACF is an organization or a group of two or more persons, including natural persons.

b. Kent Lambert and Mike Merrifield were opponents in a general election in November 2004 for a seat in the Colorado House of Representatives representing State Representative District 18. The seat represented at least some part of Colorado Springs.

c. In its opening brief at p. 8, ACF states that the production of the advertisement is included in the October 29, 2004 payment to Skew Media. Based on this uncontested fact, the ALJ finds that October 29, 2004 is the earliest date established by the evidence that ACF made an expenditure to support or oppose a candidate. There is insufficient evidence of any expenditure prior to that date.

d. There is insufficient evidence that ACF received any contributions after it made this expenditure.

4. The ALJ finds in addition that the radio advertisement was made to oppose the election of Kent Lambert and to support the election of Mike Merrifield to the Colorado House of Representatives. Aside from criticizing Lambert by likening him to Eddie Haskell, the ALJ makes this finding of fact based on the following:

a. The advertisement identifies Lambert as a “house candidate.”

b. It identifies Merrifield as his “opponent.”

c. It identifies Merrifield as a “Representative,” one who has been “fighting for affordable healthcare for all and good schools for our kids.”

d. It ties the election to the behavior ascribed to Lambert when it says: “This election is too important for childish tricks. We need mature leadership.”

e. It tells listeners not to let Lambert represent them in the State House.

5. As disclosed in Stipulated Fact 8 and the exhibits contained in the complaint, ACF accepted numerous contributions from persons or organizations in excess of \$500.

6. As disclosed in Stipulated Fact 8 and the exhibits contained in the complaint the contributions were made during the election cycle for the November 2004 election.

### **Conclusions of Law**

Based on the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law

*Is ACF is a Political Committee?*

1. Colo. Const. art. XXVIII, Section 2(12)(a) defines a “political committee:”

“Political committee” means any person, other than a natural person, or any group of two or more persons, including natural 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.

2. The parties do not dispute, and the ALJ has found, that ACF is an organization or a group of two or more persons. As such, ACF is a “person” as defined in Colo. Const. art. XXVIII, Section 2(11).

3. Also undisputed, based on Stipulated Fact 8 and the exhibits contained in the complaint, ACF has accepted numerous contributions in excess of \$200. The radio advertisement, as agreed to in Stipulated Fact 3, is an expenditure of greater than \$1,000.

4. The question then is whether ACF accepted the contributions or made the expenditures *to support or oppose the nomination or election of one or more candidates*. The ALJ has found in Finding of Fact 4 above and concludes here that the expenditure was made to support Merrifield and to oppose Lambert in the election.

5. The ALJ therefore concludes that ACF became a “political committee” as defined in Colo. Const. art. XXVIII, Section 2(12)(a) on October 29, 2004: the time it made the expenditure for the production of the advertisement. There is insufficient evidence in the record that ACF made any expenditure to support or oppose the election of a candidate prior to that time.

*The Prohibition at Section 3(5)*

6. Colo. Const. art. XXVIII, Section 3(5) provides:

No political committee shall accept aggregate contributions or pro-rata dues from any person in excess of five hundred dollars per house of representatives election cycle.

7. As disclosed in Stipulated Fact 8 and the exhibits contained in the complaint, ACF accepted numerous contributions from persons in excess of \$500. There is insufficient evidence that it accepted these contributions on or after October 29, 2004, the earliest date the Complainant has established that ACF was a political committee.

*May the Prohibition at Section 3(5) be Applied Retroactively?*

8. ACF argues correctly that, to the extent it became a political committee, the only evidence is that it did so after all contributions had been received. There is insufficient evidence of any contributions after it made the expenditure for the radio ad. The question then is whether the prohibition on accepting contributions in excess of \$500 runs retroactively from the date ACF became a political committee.

9. “Contribution” is defined in pertinent part at Colo. Const. art. XXVIII, Section 2(5)(a)(I):

The payment, loan, pledge, gift, or advance of money, or guarantee of a loan, made to any candidate committee, issue committee, *political committee*, small donor committee, or political party. [Emphasis added.]

From this, ACF argues that the payment is not a “contribution” unless the recipient has already met the definition of a “political committee.”

10. The definition of “political committee” set forth above, contains the phrase “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.” (Emphasis added.) ACF argues that until the political committee has accepted contributions or made expenditures, it is not yet a political committee and any payments to it are not yet a “contribution.”

11. But this argument is essentially circular, at least as to the definition of the word “contribution.” The effect of the reading by ACF would be that a “contribution” could never be a “contribution” unless made to a political committee, but a political committee cannot become a political committee until it receives a “contribution.”

12. Under this interpretation, an organization could form for a purpose unrelated to the support of a candidate, accept money over the \$500 limit, and then later decide to change purpose and spend this money on the candidate. (In fact, assuming there was “express advocacy,” this is the very scenario in this case.) This would circumvent the restriction of Section 3(5) and would place the new political committee in an advantageous position *vis-à-vis* other political committees that had declared their support for a particular candidate from the start.

13. Moreover, the language of Section 3(5) does not support ACF’s position that the \$500 limit is prospective only. The prohibition in Section 3(5) is “per house of representatives election cycle.” Section 2(6)(a) defines the election cycle as:

The period of time beginning thirty-one days following a general election for the particular office and ending thirty days following the next general election for that office;

As Section 3(5) includes the entire election cycle as the relevant time period, any expenditure made during the election cycle is prohibited.

14. The purpose of Colo. Const. art. XXVIII, as set out in Section 1, is to limit the potential for corruption and the appearance of corruption from large campaign contributions to political candidates. The interpretation urged by ACF runs counter to this purpose and is not supported by the language of Section 3(5). For these reasons, the ALJ concludes that once an organization becomes a political committee, it is subject to the \$500 contribution limit in Section 3(5) for the entire House of Representatives election cycle. This limit applies retroactively to contributions already received.

*Must ACF’s “Major Purpose” be the Support or Opposition of a Candidate?*

The ALJ will initially discuss his authority to determine constitutional questions. The parties are in agreement that he cannot. Yet, while it is true that an agency cannot pass upon the constitutionality of the legislation under which it acts, *Kinterknecht v. Industrial Commission*, 175 Colo. 60, 485 P.2d 721 (1971), the ALJ, on behalf of the agency, has jurisdiction to consider “as applied” constitutional challenges. *Horrell v. Department of Administration*, 861 P.2d 1194, 1198, n. 4 (Colo. 1993). Whether a “major purpose” must be shown in ACF’s case is such an “as applied” challenge.

According to ACF, *Buckley v. Valeo*, 424 U.S. 1 (1976) at 79 requires evidence that ACF’s “major purpose” was the nomination or election of a candidate and that, absent such evidence, Section 3(5)’s prohibition would be unconstitutionally vague. But

*Buckley v. Valeo*'s discussion of the "major purpose" test at 79 is not as restrictive as argued by ACF. In *Buckley* the Court found that in the case of political committees whose major purpose it is to support the nomination or election of a candidate, there was sufficient assurance that expenditures were in the core area sought to be addressed by Congress. The Court reasoned that limits on expenditures by such political committees were then not impermissibly vague.

But the Court did not say that such a major purpose was always required. Rather, it found that where the assurance of the major purpose was absent, regulation would not be impermissibly broad if the communication were to "expressly advocate" the election or defeat of a clearly identified candidate. *Id.* at 80. In other words, so long as there is "express advocacy," there is no "major purpose" requirement. *Buckley* describes such express advocacy as "words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44, note 52.

ACF also relies on *McConnell v. Federal Election Commission*, 540 U.S. 93 at 170 (2003) to argue that it must be shown that ACF's "major purpose" is the nomination or election of a candidate. The discussion of the "major purpose" language in fact appears at footnote 64 on page 170 of *McConnell*. The footnote merely cites *Buckley* for the proposition that expenditures by political parties are "by definition, campaign related," and that regulation of such expenditures survives a vagueness challenge. Nothing in this footnote disturbs the holding in *Buckley* that "express advocacy" may be regulated even in the absence of evidence that the organization's major purpose was the election or defeat of a candidate.

#### *Was the Eddie Haskell Advertisement "Express Advocacy?"*

The Colorado Court of Appeals considered the *Buckley* test and determined that regulation of expenditures is only permitted for communications that "expressly advocate the election or defeat of a clearly identified candidate." *League of Women Voters v. Davidson*, 23 P.3d 1266, 1277 (Colo. App. 2001), quoting *Buckley* at 80.

The "express advocacy" language was subsequently incorporated in Colo. Const. art. XXVIII in Section 2(8)(a):

"Expenditure" means any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of *expressly advocating* the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question. An expenditure is made when the actual spending occurs or when there is a contractual agreement requiring such spending and the amount is determined.

(Emphasis added.)

ACF has not argued that it qualifies for any of the exceptions to the definition of "expenditure" at Section 2(8)(b).

The ALJ has relied on Finding of Fact 4 above to determine that the Eddie Haskell advertisement constitutes an effort “to support or oppose the nomination or election of one or more candidates” as this relates to the issue of whether ACF meets the definition of a political committee. Based on Finding of Fact 4, the ALJ also concludes that the expenditure for the Eddie Haskell radio ad constitutes “express advocacy” on the part of ACF under the test set out in *League of Women Voters, supra*.

### **Proper Sanction**

As described above, after the ALJ made the Findings of Fact and Conclusions of Law, a hearing was held August 30, 2005 at the Office of Administrative Courts as to sanction. No additional evidence was presented at that hearing, although the parties agreed that the cost of the radio ad was approximately \$18,000. The parties presented argument as to the proper method to calculate sanction.

Colo. Const. art. XXVIII, Section 9(2)(a) provides that if the ALJ determines that a violation has occurred the ALJ’s decision shall include any “appropriate order, sanction, or relief authorized by this article.” Section 10(1) provides that “Any person who violates any provision of this article relating to contribution or voluntary spending limits shall be subject to a civil penalty of at least double and up to five times the amount contributed, received, or spent in violation of the applicable provision of this article.” Section 3(5) is a contribution limit.

In his complaint, Complainant urged that the sanction in this case be calculated by use of a table attached to his complaint. The table lists \$821,101.54 of contributions to ACF that exceeded \$500 for the period September 30, 2004 to October 28, 2004. This figure the Complainant argues should be multiplied by the maximum five times set out in Section 10(1) to arrive at a figure of \$4,105,507.54.

Such a penalty is excessive. It is true that the ALJ considered the entire election cycle in determining what contributions could be considered in determining whether ACF met the definition of “political committee.” By doing so, the ALJ rejected ACF’s argument that it could not become a political committee unless contributions *followed* any support or opposition to a candidate. But this retroactive look does not require the ALJ to consider all contributions made prior to the radio ad in determining sanction.

Rather, it is the radio ad itself that should be the focus. The \$18,000 ACF paid for the advertisement provides some indication of the amount of sanction to be imposed. If we know a political committee has the wherewithal to make such a large expense in violation of the state Constitution, then a fine less than this amount will likely have no deterrent effect and will be regarded as “the cost of doing business.” Linking the fine to the amount spent in violation of article XXVIII is supported by Section 10(1), as it provides that the penalty should be “at least double and up to five times the amount contributed, received or *spent*.” Emphasis added.

Another consideration relates to the issue discussed above, the advantage an organization may have if it collects money over the \$500 limit and then converts to a

political committee late in a campaign. Such an organization would have an advantage over a political committee that “played by the rules,” *i.e.* identified itself as a political committee from the outset and had its contributions limited to \$500. Any sanction imposed should deter the taking of this kind of unfair advantage. This would apply both to the scenario of a secret plan from the beginning to change into a political committee, or to that of an expenditure by mistake later in the process. This consideration argues for a fine based on the expenditure made, as such an expenditure is partly made possible by collecting contributions unhindered by the \$500 limit.

With these considerations in mind, the ALJ imposes a fine against ACF of a \$36,000: double the amount spent on the radio ad. This doubling is indicated by Section 10(1), one of the sanctions “authorized by this article” in Section 9(2)(a). The ALJ has chosen not to make this amount higher for a number of reasons. First, the amount by itself is very large. Second, while considerations of deterrence require at least a doubling, there was no evidence in aggravation presented. There was no indication that ACF planned ahead of time to change into a political committee. There is no evidence of any violations by ACF in the past.

#### **AGENCY DECISION**

It is therefore the Agency Decision that ACF be fined \$36,000 for the violation of Colo. Const. art. XXVIII, Section 3(5) as set forth above. This penalty shall be paid to the Department of State’s cash fund created in Section 24-21-104(3), C.R.S. This decision is final and subject to review by the Court of Appeals, pursuant to Section 24-4-106(11), C.R.S. Colo. Const. art XXVIII, Section 9(2)(a).

#### **DONE AND SIGNED**

September 6, 2005

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MATTHEW E. NORWOOD  
Administrative Law Judge

## CERTIFICATE OF SERVICE

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

Scott Gessler, Esq.  
1228 15<sup>th</sup> Street, Suite 409  
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Edward Ramey, Esq.  
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and to

William A. Hobbs  
Deputy Secretary of State  
Department of State  
1560 Broadway, Suite 200  
Denver, CO 80203

on this \_\_\_\_ day of \_\_\_\_\_, 2005.

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Technician IV