

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

CASE NO. OS 20050019

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY CHARLES H. BUCKNAM
REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY
REPRESENTATIVE MIKE MAY, ARCH COAL, INC., GREENBERG, TRAURIG,
HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A. STATE POLITICAL COMMITTEE,
ET. AL.**

This matter is before the Office of Administrative Courts on the complaint of Charles Bucknam ("Complainant") against Representative Mike May ("Representative May"), Arch Coal, Inc. ("Arch Coal"), and Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A. State Political Committee ("Greenberg Traurig PAC"). The complaint was filed with the Colorado Secretary of State on June 29, 2005. On July 1, 2005, the Secretary of State referred the complaint to the Office of Administrative Courts as required by Colo. Const. art. XXVIII, § 9(2)(a).

Hearing on the complaint was conducted in Denver, Colorado, on September 1, 2005, before Administrative Law Judge ("ALJ") Michelle A. Norcross. The hearing was digitally recorded in Courtroom 1. Complainant was represented by Jerri L. Hill, Esq. Arch Coal was represented by Michael Carrigan, Esq. Greenberg Traurig PAC was represented by Richard Westfall, Esq. and Kent Holsinger, Esq. Representative May appeared without counsel. At hearing, the ALJ admitted Complainant's exhibits 1, 3 through 8, and Arch Coal's exhibits A, B, and C into evidence. At the request of Complainant's counsel, the record was held open until September 12, 2005 for receipt of Complainant's hearing brief on the issue of federal preemption.

Parties' Positions

Representative May - Complainant alleges that Representative May violated § 1-45-108(1)(a)(II) of the Fair Campaign Practices Act ("FCPA") by failing to report the name of the employer of one of his \$100 contributors in his April 15, 2005 Report of Contributions and Expenditures.

Respondent - Representative May admits that on April 15, 2005, when his candidate committee filed its Report of Contributions and Expenditures, it failed to disclose the name of the employer for \$100 contributor Elaine Lotito. As soon as he learned that Ms. Lotito was employed when she made her contribution, Representative May

instructed his committee to file an amended report identifying Ms. Lotitio's employer. The amended report was filed on July 15, 2005.

Arch Coal - Complainant alleges that Arch Coal Candidate Committee ("ACCC") violated §§ 1-45-108(1), (2) and (3), C.R.S. by failing to register with the Colorado Secretary of State as a political committee prior to making a monetary contribution to the candidate committee of Jim Sullivan and by failing to file periodic reports. Additionally, Complainant argues that ACCC violated § 3 of Article XXVIII of the Colorado Constitution by making a corporate contribution to the Sullivan candidate committee.

Respondent - Arch Coal denies that it violated any of Colorado's campaign laws and further denies that it is the same entity as ACCC. Arch Coal seeks to dismiss Complainant's complaint on the basis that Complainant's allegations are against ACCC, not Arch Coal the corporation, and therefore Complainant filed suit against the wrong entity.

Greenberg Traurig PAC - Complainant alleges that Greenberg Traurig PAC violated §§ 1-45-108(1), (2) and (3), C.R.S. by failing to register with the Colorado Secretary of State as a political committee prior to making a monetary contribution to the candidate committee of Tom Wiens ("Wiens candidate committee") and by failing to file periodic reports. Additionally, Complainant argues that Greenberg Traurig PAC violated Colorado's campaign contribution laws when it accepted contributions in excess of \$500 during the past election cycle.

Respondent - Greenberg Traurig PAC contends that it is a duly registered federal political committee and as such it is required to comply with the requirements of the Federal Election Commission Act ("FECA"), which it claims it has done. Greenberg Traurig PAC argues that Complainant's complaint should be dismissed because Colorado's campaign contribution limits and filing requirements are preempted by federal campaign laws.

Pre-hearing Motion

On August 16, 2005, Greenberg Traurig PAC filed a motion for summary judgment requesting dismissal of the complaint on the theory that Complainant's allegations, specifically the claim relating to the monetary contribution made to the Wiens candidate committee, falls outside the 180-day time limit in § 9(2)(a), Article XXVIII of the Colorado Constitution and is therefore time barred. On August 24, 2005, Complainant filed a response to the motion arguing that the Wiens candidate committee accepted the contribution within the 180-day time limit and therefore it is not time barred. The ALJ denied the motion on the basis that there were material facts still in dispute and that Greenberg Traurig PAC had not established it was entitled to judgment as a matter of law.

Motions made at Hearing

1. Arch Coal At the close of Complainant's case-in-chief, Arch Coal made a motion to dismiss the complaint on the basis that Complainant's complaint is against ACCC, not Arch Coal the corporation. During his case-in-chief, Complainant admitted that the monetary contributor disclosed in Jim Sullivan's campaign reports is ACCC. Complainant also conceded that the allegations in his complaint are against ACCC, not Arch Coal. Complainant explained that the reason he identified Arch Coal as a respondent in this case is because he was unable to find an address or registered agent for ACCC.

It is a fundamental common law concept, without need of citation, that for litigation there must be a controversy and for a controversy there must be adverse parties, that is, a person seeking to establish a right and a person against whom the right is asserted or a duty of liability may be imposed. *Baker v. District Court in and for County of Larimer*, 199 Colo. 416, 609 P.2d 628 (Colo. 1980). The evidence presented at hearing did not establish, by a preponderance of evidence, that Arch Coal is the same entity as ACCC. Based on a review of the complaint, the campaign reports filed by Jim Sullivan, and Complainant's testimony, the ALJ found that the adverse party is ACCC not Arch Coal. Complainant has the responsibility of including the name and address of each respondent alleged to have committed a violation of the FCPA (8 CCR 1505-6, Rule 6.3). In this case it is undisputed that the party alleged to have violated the law is ACCC, not Arch Coal, Inc. Accordingly, the ALJ granted Arch Coal's motion and dismissed it from the complaint and the proceedings.

2 Greenberg Traurig PAC Greenberg Traurig PAC also made a motion to dismiss the complaint at the close of Complainant's case-in-chief. In support of its motion, Greenberg Traurig PAC argues: (a) the deposit made to the Wiens candidate committee is time barred; and (b) federal election laws preempt Complainant's remaining allegations concerning registration requirements and campaign contribution limits. The ALJ denied the motion at hearing taking the issues under advisement and allowed the parties to submit written legal argument on federal preemption.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Finding of Fact:

Representative May

1. During the last election cycle, Representative May ran as a candidate for state office. In connection with his candidacy, he established a candidate committee called the Committee to Elect Mike May ("Committee"). Traci May, Representative May's wife, was the Committee's Registered Agent.

2. On April 15, 2005, the Committee filed a Report of Contributions and Expenditures for the reporting period December 1, 2004 through March 31, 2005.

3. The April 15 report shows that contributor Elaine Lotito gave a \$100 monetary contribution to the Committee on February 23, 2004. The name of her employer is listed in the April 15 report as “not available”.

4. When the Committee filed the April 15 report, it disclosed employer “not available” because both Representative May and his wife believed that Ms. Lotito was not working when she made the contribution.

5. On July 1, 2005, Representative May was named as a Respondent in this case. In his complaint, Complainant alleges that Representative May and his Committee violated election laws when they failed to disclose the name of Ms. Lotito’s employer in the April 15 report.

6. As soon as Representative May and his wife learned about the allegations in the complaint, they contacted Ms. Lotito and inquired whether she was working at the time she made the \$100 contribution. It turns out that she was. In February 2004, Ms. Lotito had been working part-time as an officer administrator/dental technician for Martin Harman, DDS.

7. As soon as Representative May and his wife learned that Ms. Lotito had been working in February 2004, the Committee immediately filed an Amended Report of Contributions and Expenditures disclosing the name of Ms. Lotito’s employer in February 2004. The amended report was electronically filed with the Colorado Secretary of State’s office on July 15, 2005.

8. Ms. Lotito is a long time friend of the May family. Over the years she has known the May family, she has been employed on and off. At the time she made her contribution to the Committee, Representative May and his wife reasonably believed that Ms. Lotito was in a period of unemployment. As soon as they discovered they were incorrect and she was working, they corrected the mistake in the April 15, 2005 report.

Greenberg Traurig PAC

9. Greenberg Traurig PAC is a federal political committee and is registered as such with the Federal Election Commission (“FEC”).

10. As of the date of the hearing in this case, Greenberg Traurig PAC had not separately registered as a political committee with the Colorado Secretary of State’s office.

11. Greenberg Traurig PAC has offices in thirteen states. It has established a federal political committee to which many of its attorneys contribute.

12. On December 31, 2004, Greenberg Traurig PAC accepted the following contributions: \$600 from Benjamin Aguilera of Phoenix AZ; \$1,250 from James Altenach of Atlanta, GA; \$1,250 from Ceasar Alvarez of Miama, FL; \$1,500 from David Amerine of Washington DC; \$2,000 from Alan Annex of New York, NY; \$1,500 from David Ashburn of Tallahassee, FL; \$750 from Charles Auslander of Miami, FL; \$850 from James Bacchus of Orlando, FL; \$600 from Andrew Balog of Miami, FL; \$850 from Jonathan Bell of Boston, MA; \$1,250 from Normal Benford of Miami, FL; \$1,500 from Howard Berman of New York, NY; \$600 from Karen Bitarliebers of New York, NY; \$1,500 from Daniel Black of Santa Monica, CA; \$1,500 from Louis Bovasso of Santa Monica, CA; \$2,000 from Francis Brogan of Ft. Lauderdale, FL; \$2,000 from Michael Cherniga of Tallahassee, FL; and \$1,500 from Frances Citera of Chicago, IL.

13. Greenberg Traurig PAC, as a registered federal political committee, may accept individual contributions up to \$5,000 per calendar year.

14. On March 16, 2005, the Wiens candidate committee accepted a \$200 monetary contribution from Greenberg Traurig PAC. Wiens candidate committee reported this contribution to the Colorado Secretary of State in a Report of Contributions and Expenditures dated April 15, 2005.

15. The March 2005 check was a replacement check for a contribution made by Greenberg Traurig PAC to Wiens candidate committee in September 2004. Wiens candidate committee returned the September 2004 proceeds to Greenberg Traurig PAC and deposited the replacement check in its account on March 16, 2005. The total amount of Greenberg Traurig PAC's contribution to Wiens candidate committee during the last election cycle was \$200.

DISCUSSION

Disclosure Required for Contributions of \$100 or More

Complainant asserts that Representative May violated § 1-45-108(1)(a)(II) of the FCPA, which provides as follows:

In the case of contributions made to a candidate committee . . . the disclosure required by this section shall also include the occupation and employer of each person who has made a contribution of one hundred dollars or more to such committee. . .

It is undisputed that in his April 15, 2005 Report of Contributions and Expenditures, Representative May failed to disclose the employer of one of his \$100 contributors, Elaine Lotito, a fact he was required to disclose under the FCPA. The evidence establishes that it was an honest mistake and as soon as he and learned that Ms. Lotito was employed when she made the contribution, he immediately amended his

report and identified Ms. Lotito's employer. The amended Report of Contributions and Expenditures was filed with the Secretary of State on July 15, 2005.

Campaign Contribution Limits

Complainant asserts that Greenberg Traurig PAC violated § 3(5) of Article XXVIII by accepting individual contributions in excess of \$500 during a single election cycle.

[N]o political committee shall accept aggregate contributions or pro-rata dues from any person in excess of five hundred dollars per house of representative election cycle.

Colo. Const., art. XXVIII, § 3(5).

Complainant has the burden of proof to establish, by a preponderance of the evidence, that Greenberg Traurig PAC, by accepted individual contributions in excess of \$500, violated Colorado's campaign laws. Greenberg Traurig PAC, as a registered federal political committee, is authorized under FECA to accept individual contributions up to \$5,000 per calendar year. See 2 U.S.C. § 441a(a)(1).

The FECA of 1971 and amendments thereto establish, among other things, limitations on contributions and expenditures regarding federal candidates and political committees. In the area of campaign contributions for election to federal office and those made to a federal political committee, the FECA contains an express preemption clause that supersedes state law. More specifically, the provisions of the Federal Election Campaign Act of 1971, as amended, and rules and regulations issued thereunder, supersede and preempt any provision of State law concerning the limitation on contributions and expenditures regarding Federal candidates and political committees. See 2 U.S.C. § 453 and 11 C.F.R. § 108.7(b)(3).

Congress's preemption power extends over both state and local laws and occurs in three situations: express preemption, filed preemption, or conflict preemption. *Southwestern Bell v. Johnson County Bd.*, 199 F.3d 1185 (10th Cir. 1999). In this case, it is clear that Congress expressly intended to preempt state law in the area of campaign contributions to federal political committees. Greenberg Traurig PAC, as a federal political committee, is subject to the contribution limits established by the FECA and not those set out in § 3 of Article XXVIII of the Colorado Constitution. Therefore, the ALJ finds no violation of § 3(5) of Article XXVII of the Colorado Constitution. Additionally, as discussed in greater detail below, Complainant has not established that Greenberg Traurig PAC is a "political committee" as defined in the Colorado Constitution. And the campaign contribution limits in § 3(5) of Article XXVIII apply only to political committees.

Registration Requirements for Political Committees

Complainant alleges that Greenberg Traurig PAC violated §§ 1-45-108(1)(a)(I) and (3), C.R.S. by failing to register as a political committee and file expenditure reports with the Colorado Secretary of State. A “political committee” is defined as:

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.

Colo. Const. art. XXVIII, § 2(12)(a).

Greenberg Traurig PAC contends that as federal political committee properly registered with the FEC it does not need to separately register as a political committee with the Colorado Secretary of State. In support of this argument it relies on the language in § 1-45-108(3.5), C.R.S. Section 1-45-108(3.5) reads:

Any political committee that has registered with the federal election commission may file with the appropriate officer a copy of the registration filed with the federal election commission and, insofar as such registration contains substantially the same information required by subsection (3) of this section, the political committee shall be considered to have registered with the appropriate officer for purposes of subsection (3) of this section and, therefore, shall be authorized to accept or make contributions as permitted by law. Any political committee that satisfied the requirements of this subsection (3.5) shall be subject to all other legal requirements pertaining to contributions and disclosure that are applicable to political committees.

It is undisputed that Greenberg Traurig PAC is not registered as a political committee with the Colorado Secretary of State’s office. As such, Complainant argues that Greenberg Traurig PAC is in violation of § 1-45-108(3) because it became a political committee when it made a \$200 monetary contribution to Wiens candidate committee. Complainant’s argument is not supported by the plain language of § 1-45-108(3) or § 2(12)(a) of Article XXVIII.

In order to trigger the filing requirement in §§ 1-45-108(1)(a)(I) and (3), Greenberg Traurig PAC must be found to be a state political committee and there is no evidence in this record that it is. The only evidence of a contribution or expenditure to support the election of a candidate is the \$200 monetary contribution to Wiens candidate committee that was made in March 2005. Aside from the \$200 contribution to Wiens candidate committee, there is no evidence that Greenberg Traurig PAC accepted

or made contributions or expenditures **in excess of \$200** to oppose or support the nomination or election of one or more Colorado candidates in the last election cycle. Complainant has failed to establish that Greenberg Traurig PAC is a “political committee” as defined in § 2(12)(a) of Article XXVIII. Therefore, Greenberg Traurig PAC was under no duty to register as a political committee or file a report of expenditures with the Colorado Secretary of State’s office.

CONCLUSIONS OF LAW

1. Pursuant to Colo. Const, art. XXVIII, § 9(2)(a), the ALJ has jurisdiction to conduct a hearing in this matter and to impose appropriate sanctions.

2. This issues in a hearing conducted by an ALJ under Article XXVIII of the Colorado Constitution are limited to whether any person has violated Sections 3 through 7 or 9(1)(e) of Article XXVIII, or Sections 1-45-108, 114, 115, or 117, C.R.S. Colo. Const. art. XXVIII, § 9(2)(a). If an ALJ determines that a violation of one of these provisions has occurred, the ALJ’s decision must include the appropriate order, sanction or relief authorized by Article XXVIII. Colo. Const. art. XXVIII, § 9(2)(a).

3. Colo. Const. art. XXVIII, § 9(1)(f) provides that the hearing is conducted in accordance with the Colorado Administrative Procedure Act (APA)¹. Under the APA, the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. In this instance, Complainant is the proponent of an order seeking civil penalties against Respondents for violations of the FCPA. Accordingly, Complainant has the burden of proof.

4. Complainant has established that Representative May violated §1-45-108(1)(a)(II), C.R.S. when he and his candidate committee failed to report the name of employer of one of his \$100 contributors in his April 15, 2005 Report of Contributions and Expenditures.

5. Complainant failed to establish that Arch Coal is the same entity as ACCC for purposes of this complaint. The alleged campaign finance violations are made against ACCC, not Arch Coal. Accordingly, Arch Coal is not a party to this action and is dismissed from the complaint.

6. Complainant has failed to establish that Greenberg Traurig PAC violated § 3(5) of Article XXVIII of the Colorado Constitution by accepting campaign contributions in excess of \$500.

7. Complainant has failed to establish that Greenberg Traurig PAC violated §§ 1-45-108(1)(a)(I) or (3) by not registering as a political committee or filing reports of expenditures with the Colorado Secretary of State’s office.

¹ Section 24-4-101, *et seq.*, C.R.S.

AGENCY DECISION

Representative May

It is the Agency Decision of the ALJ that Representative May failed to comply with the reporting requirements of § 1-45-108(1)(a)(II), C.R.S. in that he did not disclose the name of the employer of one of his \$100 contributors when he filed his April 15, 2005 Report of Contributions and Expenditures.

Once a violation of the FCPA has been established, the ALJ must include in the Agency Decision the appropriate order, sanction or relief authorized by law. Colo. Const. art. XXVIII, § 9(2)(a). One sanction that may be applied by the ALJ is the imposition of a \$50 fine for each day the required filing has not been made. See Colo. Const. art. XXVIII, § 10(2)(a). Representative May should have included the name of Ms. Lotito's employer in his April 15, 2005 report. He made the corrected filing on July 15, 2005. The period between April 15, 2005 and July 15, 2005 is 60 days. A strict application of the \$50 per day sanction would result in a fine of \$3,000. The ALJ finds this amount excessive under the facts of this case.

Alternatively, Colo. Const. art. XXVIII, § 10(1) permits the ALJ to impose a civil penalty of at least double and up to five times the amount contributed, received, or spent in violation of the applicable provisions of Article XXVIII. The amount of the contribution received from Ms. Lotito was \$100. The ALJ finds that a civil penalty of twice the amount of the contribution is the more appropriate sanction under the facts of this case. Complainant did establish a reporting requirement violation. However, Representative May presented evidence of mitigating circumstances in that he reasonably believed Ms. Lotito was not working when she contributed money to his campaign and when he learned about this mistake, he immediately filed a corrected report. Therefore, the ALJ imposes a civil penalty of \$200 against Representative May for a single violation of § 1-45-108(1)(a)(II), C.R.S. The penalty is to be paid in accordance with the requirements of the Secretary of State's rules, policies and procedures.

Arch Coal

It is the Agency Decision of the ALJ that Arch Coal, Inc. is not the same entity as ACCC. Complainant seeks relief against ACCC, but named and served Arch Coal, Inc. Arch Coal, Inc. is not the party in interest. Arch Coal, Inc. is dismissed from this complaint.

Greenberg Traurig PAC

It is the further Agency Decision of the ALJ that Greenberg Traurig PAC did not violate the FCPA or Article XXVIII of the Colorado Constitution in any respect alleged in Complainant's complaint. The complaint as to Greenberg Traurig PAC is dismissed.

This decision is subject to review by the Colorado Court of Appeals, pursuant to Section 24-4-106(11), C.R.S. Colo. Const., art. XXVIII, sec. 9(2)(a).

DONE AND SIGNED

September 23, 2005

MICHELLE A. NORCROSS
Administrative Law Judge

CERTIFICATE OF SERVICE

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

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and

William Hobbs
Secretary of State's Office
1700 Broadway, Suite 250
Denver, CO 80290

on this ____ day of September 2005.
