

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

CASE NO. OS 2006-0009

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY CHARLES H. BUCKNAM
REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY
VICTOR MITCHELL, CHRISTOPHER EGAN and JEAN EGAN**

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon the complaint of Charles H. Buckham that Victor Mitchell, a candidate for state representative, received contributions from Christopher and Jean Egan in excess of the contribution limits imposed by Colorado's political campaign finance laws.

Procedural Background

Mr. Bucknam filed his complaint with the Secretary of State on April 24, 2006. On April 26, 2006, as required by Colo. Const. art. XXVIII, § 9(2)(a), the Secretary of State referred the complaint to the ALJ for hearing and decision. Hearing was originally scheduled for May 11, 2006, but on May 10, 2006 defendant Mitchell requested a continuance as provided by § 9(2)(a). By agreement of the parties, and upon good cause shown, the hearing was rescheduled for June 30, 2006. Hearing was held on that date at the Office of Administrative Courts. Written closing arguments were filed July 12, 2006 and this case became ripe for decision on that day. Jerri L. Hill, Esq., represented the complainant, Mr. Bucknam. The defendants are all represented by Scott E. Gessler, Esq.

Preliminary Matters

1. On May 19, 2006, the Egans, who are residents of Massachusetts, filed a motion to dismiss the complaint for lack of personal jurisdiction and personal service. Bucknam filed his opposition to the motion on June 5, 2006. On June 14, 2006, the ALJ entered an Order Denying the Motion to Dismiss, finding that the Egans' participation in a Colorado state election by mailing a contribution to a state candidate was sufficient "minimum contacts" to warrant exercise of personal jurisdiction, and that personal service was not required by controlling law.

2. At the hearing, Bucknam narrowed the issues by withdrawing his allegation that Mitchell violated the law by accepting the Egans' contribution before his name was placed on the primary ballot. See Complaint, ¶ 4, third subparagraph. The hearing thus proceeded on the sole issue identified below.

Issue Presented

Victor Mitchell is a Republican candidate for House District 45. On February 9, 2006, he deposited checks for \$500 each from Christopher and Jean Egan. Because Mr. Mitchell recognized that the checks were each over the \$400 combined contribution limit for the primary and general elections, he directed his campaign staff to send the Egans each a refund check of \$100. The return checks were dated and mailed the day prior to Mitchell's deposit of the Egans' \$500 checks. The issue presented is whether, despite writing refund checks for the excess contribution in advance of depositing the contribution checks, the defendants nonetheless violated the law when Mitchell deposited the \$500 checks. The ALJ concludes that defendants did not violate the law.

Findings of Fact

1. On August 23, 2005, Victor Mitchell, a Republican, filed an affidavit with the Secretary of State declaring his candidacy for election to House District 45.

2. In early February 2006, Christopher and Jean Egan, both residents of Massachusetts, each mailed Mr. Mitchell a check in the amount of \$500, representing contributions to his campaign. Pursuant to the contribution limits prescribed by § 3(1)(b) of Article XXVIII of the Colorado Constitution, no candidate for state representative may accept more than two hundred dollars for each primary election and \$200 for each general election. This represents a combined cap of \$400 for the two elections.

3. Recognizing that the \$500 checks were in excess of the combined cap, Mr. Mitchell contacted his committee's bookkeeper and compliance officer, Mr. Scott Shires, for advice. At Mr. Mitchell's request, Mr. Shires called an employee of the Secretary of State's office who said that it would be appropriate to deposit the \$500 checks and write refund checks of \$100 each. This advice was consistent with Mr. Shires' general experience when dealing with contributions in excess of legal limits. Consistent with his experience and the advice given by the Secretary of State employee, Mr. Shires wrote checks to the Egans for \$100 each on February 8, 2005, and then deposited the Egans' \$500 checks in the campaign account on February 9, 2005.

4. The refund checks to the Egans cleared the campaign committee's account sometime after February 9, 2006.

5. On April 14, 2006, Mr. Mitchell filed a Report of Contributions and Expenditures with the Secretary of State for the period of January 1, 2006 through March 31, 2006. Mr. Mitchell reported the Egans' \$500 checks as contributions, and the \$100 refund checks as "returned" contributions.

Discussion and Conclusions of Law

Colorado's Campaign Finance Laws

The primary campaign finance law in Colorado is Article XXVIII of the Colorado Constitution, which was approved by the people of Colorado in 2002. Article XXVIII

imposes contribution limits, encourages voluntary spending limits, imposes reporting and disclosure requirements, and vests enforcement authority in the Secretary of State. Colorado also has statutory campaign finance law, known as the Fair Campaign Practices Act (FCPA), §§ 1-45-101 to 118, C.R.S., which was originally enacted in 1971, repealed and reenacted by initiative in 1996, substantially amended in 2000, and again revised by initiative in 2002 as the result of the adoption of Article XXVIII. The Secretary of State, pursuant to regulations published at 8 CCR 1505-6, further regulates campaign finance practices.

Regulation of Contributions

Article XXVIII limits contributions made to candidate committees. Candidates for state representative may accept no more than \$200 from any one person for each of the primary and general elections. Likewise, contributors may not make contributions in excess of these limits. Colo. Const. art. XXVIII, §§ 3(1)(b). Violators are subject to significant civil penalties. Colo. Const. art. XXVIII, § 10.

Pursuant to the Secretary of State's implementing regulations, "a contribution is considered made or received as of the date that it is accepted by the committee ... [I]n the case of a contribution by check, the date accepted is the date that the check is deposited into the committee's ... account." 8 CCR 1505-6, Rule 4.3(a).

Bucknam argues that because Mitchell deposited the \$500 checks into the campaign committee account on February 9, 2006, he accepted the \$500 contribution on that date and was in violation of the contribution limit even though he mailed refund checks of \$100 the day before. According to Bucknam, the refund checks did not cure the violation because they did not clear the committee's account until after the contribution checks were deposited, and therefore, for at least a time, the campaign had the use of the full \$500. Bucknam contends Mitchell should have returned the contribution checks without cashing them.

Defendants, on the other hand, argue that Bucknam's interpretation is a hyper-technical reading of the law that is not consistent with accepted practice or with common sense. In the defendants' view, the transaction was no different than a customer giving a merchant a \$20 bill to pay for a \$10 item, and receiving a \$10 bill in change. Just because the merchant takes possession of the \$20 bill while simultaneously giving the customer back his excess \$10 does not mean the customer paid \$20 for the item, or that the merchant made \$20 on the transaction. What is important is the net effect of the transaction.

Defendants also point to Rule 4.9 of the Secretary of State's regulations that, they argue, creates a "safe harbor" of 30 days to return excess contributions. Rule 4.9 reads:

Any contributions received in excess of contribution limits shall be returned to the contributor within thirty (30) days.

According to defendants, Mitchell complied with this safe harbor because he issued refund checks within 30 days of depositing the contribution checks.

The ALJ agrees with defendants that there was no excess contribution because checks refunding the excess were mailed before the contribution was deposited. The ALJ, however, does not agree with defendants that Rule 4.9 creates a safe harbor.

The Net Transaction Was Not an Excess Contribution

According to the Uniform Commercial Code, checks drawn on a bank that are payable on demand are negotiable instruments. Section 4-3-104, C.R.S. In modern commerce, such checks are considered the equivalent of cash. The case of *Updike v. People*, 92 Colo. 125, 18 P.2d 472 (1933) illustrates the point. In *Updike*, the defendant contended that his obtaining of a check by fraud was not theft because the check was not a “thing of value.” The Supreme Court disagreed, saying that, “It is of no consequence whether the property fraudulently obtained was money or check, as long as it was a thing of value, and in this instance, of exactly the same value, indeed, when it represents precisely the same thing.” *Id.* (italics added). Given that a valid check is negotiable and as good as cash as soon as it leaves the possession of the maker, it is the net effect of a simultaneous exchange of checks that determines whether an excess contribution was made. Having written and mailed a valid check for \$100 before depositing the check for \$500, Mitchell effectively made a net deposit of only \$400.

Rule 4.9 Is Not a Safe Harbor

The ALJ does not agree that Rule 4.9 creates a safe harbor. Such a safe harbor would contradict the express language of Rule 4.3(a), which states without exception that a contribution is made, received and accepted on the date it is deposited.

In construing an administrative rule or regulation, the same basic rules of construction are used as are applicable to the interpretation of a statute. *Johnson v. Colorado State Board of Agriculture*, 15 P.3d 309, 311 (Colo. App. 2000). In interpreting statutes, we consider statutes as a whole and attempt to give consistent, harmonious, and sensible effect to all their parts. *State v. Nieto*, 993 P.2d 493, 501 (Colo. 2000).

Rules 4.3(a) and 4.9 are harmonized only if Rule 4.9 is interpreted to mean that an *illegal* contribution must be returned within 30 days. Such an interpretation not only avoids a conflict with Rule 4.3(a), but also makes practical sense because it is important to ensure that illegal contributions are promptly refunded. Rules, like statutes, are to be given effect according to their plain and ordinary meaning. *Gerrity Oil and Natural Gas Corp. v. Magness*, 923 P.2d 261, 265 (Colo. App. 1995). Nothing in the ordinary meaning of the language of Rule 4.9 suggests that an excess contribution is not a violation just because the excess is refunded within 30 days.

To the extent defendants argue that the verbal advice of the Secretary of State’s employee was to the contrary and is entitled to deference, the ALJ does not agree. In the first place, in the absence of direct testimony by the employee, there is question about what advice was actually given. It is not clear that the employee said that refunding an excess contribution by check *days after* a contribution is deposited excuses the violation. The fact that Mr. Shires acted consistently with the employee’s

advice, and wrote and mailed the refund check *before* he deposited the contribution, suggests the employee's advice was limited to the scenario of a simultaneous refund. As explained above, a simultaneous refund is not an excess contribution and therefore does not implicate Rule 4.9. However, even if the employee's advice was to the effect that Rule 4.9 creates a safe harbor, such advice is not entitled to deference because there is no evidence the employee's advice represents the official interpretation of the Secretary of State, as opposed to the employee's personal opinion.

The ALJ also rejects Bucknam's counter-argument that Rule 4.9 required Mitchell to return the same check he received. The language of Rule 4.9 supports a contrary conclusion. The reference to contributions received "*in excess*" of contribution limits implies that only the excess need be returned, not the entire contribution.

Potential for Abuse

The gravamen of Bucknam's complaint is that if a candidate is allowed to refund an excess contribution by contemporaneously mailing a refund check for the excess, it will lead to evasion of the contribution limit if the refund check is not cashed. This possibility, however, does not demand a different interpretation. Once a refund check has been written and mailed, it is a negotiable instrument out of the control of the maker. The maker no longer has the free use of the funds as they have been obligated to honor the check. The only way the maker would be free to use that money is if he has an understanding with the contributor that the refund check will not be cashed. In that case, the refund check is a sham and does not offset the excess contribution. That is not this case. In this case, there is no evidence or even suggestion that the refund check was a sham.

Summary

Because Mitchell refunded the excess contribution before depositing the Egans' checks, no net contribution in excess of the contribution limit was made or received.

AGENCY DECISION

The Egans did not make, and Mitchell did not accept or receive, an excess contribution. There has been no violation of Colo. Const. art. XXVIII, § 3(1). This decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

DONE AND SIGNED

July 14, 2006

ROBERT N. SPENCER
Administrative Law Judge

Digitally recorded in CR #2
Exhibits admitted
For complainant: exhibit 1
For defendants: exhibits A, B

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:

Jerri L. Hill, Esq.
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and

William Hobbs
Secretary of State's Office
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on this ___ day of July 2006.

Technician IV