

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

CASE NO. OS 2006-0017

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY ELBERT COUNTY REPUBLICANS
REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY
CITIZENS FOR AN HONEST ELBERT COUNTY, JAMES BASSETT, SUSAN HART,
AND GREGORY LOPEZ**

This matter is before the Office of Administrative Courts on the complaint of the Elbert County Republicans¹ (“Complainant”) against Citizens for an Honest Elbert County, James Bassett, Susan Hart, and Gregory Lopez (“Respondents”). The complaint was filed with the Colorado Secretary of State (“Secretary”) on July 26, 2006. A revised complaint was filed with the Secretary on July 27, 2006. On July 28, 2006, the Secretary referred the complaint to the Office of Administrative Courts as required by Colo. Const. art. XXVIII, § 9(2)(a). The case was referred to an Administrative Law Judge (“ALJ”) and a merits hearing was scheduled on August 10, 2006 in Denver, Colorado.

On August 10, 2006, the parties appeared before ALJ Michelle A. Norcross. The proceedings were digitally recorded in courtroom 2. Complainant was represented by Michael J. Norton, Esq. and Rachel T. Rowley, Esq. Respondents Bassett, Hart, and Lopez each appeared *pro se*. Respondent Citizens for an Honest Elbert County (“Respondent Citizens”) was not represented. Following a discussion of the need for Respondent Citizens to be represented by counsel in this proceeding, Respondents Bassett, Hart, and Lopez requested a continuance of the hearing. Under the Colorado Constitution, Respondents are automatically granted one continuance up to thirty days, which may be extended for good cause. Complainant did not oppose the motion to continue. Accordingly, the ALJ granted Respondents’ request. The hearing was reset on December 13, 2006.

On October 16, 2006, Stephen E. Berken, Esq. entered his appearance as counsel for Respondents. The December 13 hearing was held before ALJ Norcross in Denver, Colorado. Complainant was represented by Rachel T. Rowley, Esq. and Damon Semmens, Esq. Respondents were represented by Stephen E. Berken, Esq. At hearing, the ALJ admitted Complainant’s exhibits 1, 2, 4, and 7 and Respondents’

¹ The Elbert County Republicans filed this complaint through its executive committee known as the Elbert County Republican Executive Committee.

exhibits A through L into evidence. The proceedings were digitally recorded in courtroom 2.

Parties' Positions

Complainant: Complainant contends that Respondents violated § 1-45-108(6), C.R.S. by not filing their committee registration form with the Elections Manager of the Elbert County Clerk and Recorder's office within ten days of receiving their first contribution. Additionally, Complainant argues that Respondents failed to timely file their reports of contributions and expenditures as required by § 1-45-108 (6), C.R.S. for the months of May, June, and July 2006.

Respondents: Respondents contend that they did properly register as an issue committee on April 19, 2006 by filing their committee registration form with the Elbert County Clerk and Recorder's office. With regard to the allegation that they failed to timely file their reports of contributions and expenditures, Respondents claim that due to the mishandling of the committee registration form by the Elbert County Clerk and Recorder's office, they were unable to file their May, June, and July 2006 reports.

FINDINGS OF FACT

1. In April 2006, Respondents formed an issue committee for the purpose of recalling three Elbert County Commissioners. In connection with this effort, Respondents filed two recall petitions with the Elbert County Clerk and Recorder's office under the name of Citizens for an Honest Elbert County. The first petition was filed in April 2006. The second petition was filed in June 2006.

2. As an issue committee, Respondents are required to file a committee registration form within ten business days after receiving their first contribution. Respondents received their first contribution on April 19, 2006. Accordingly, they were required to file their committee registration form by May 3, 2006. The form is required to be filed with the appropriate officer. In this case the appropriate officer is the county clerk and recorder of Elbert County.

3 The Clerk and Recorder is an elected position. Amy Fordyce is the Clerk and Recorder for Elbert County. It is the responsibility of the Elbert County Clerk and Recorder's office ("office" or "Clerk and Recorder's office") to issue marriage licenses, record real estate transactions, register voters, issue licenses plates, and handle election matters. The office employs ten people. Within the office, there is a motor vehicle division, an election division and a recording division.

4. Megan Taunton is an employee of the office. Ms. Taunton works in the election division; her job title is Elections Manager. It was Ms. Taunton who assisted Respondents in obtaining the recall petitions.

5. On April 19, 2006, Respondent Hart, the committee's register agent, went to the Clerk and Recorder's office to file the committee registration form. Because Ms. Taunton had assisted Respondents in obtaining the recall petitions, Respondent Hart took the form to Ms. Taunton; however, Ms. Taunton was not at her desk at the time. Respondent Hart took the form down the hall twenty feet and filed it at the main recording desk with a clerk named Debbie. Debbie, unfamiliar with the document, asked Respondent Hart to identify it. Respondent Hart identified it as a committee registration form. Debbie accepted the form for filing, date stamped it, received the \$6.00 recording fee, and returned the original document to Respondent Hart. At this point, Respondent Hart believed that she had properly filed the form with the county clerk and recorder as she was required to do.

6. The receipt Respondent Hart received after she filed the form with the Clerk and Recorder's office shows that the document was filed with the Elbert County Clerk and Recorder on April 19, 2006 at 12:45 p.m. The recording logbook, which is maintained by the office, also shows that the office received a filing from Citizens for an Honest Elbert County, Susan L Hart, on April 19, 2006. The committee registration form was recorded as a miscellaneous document. There is no evidence that anyone in the office informed Ms. Taunton about the filing on April 19.

7. When a committee registration form is received by the Clerk and Recorder's office, the form is transmitted to the Secretary of State's office for filing. After receiving the form, the Secretary assigns the committee an identification number, a password to log onto the Secretary's website to file reports, and sends the committee's registered agent a letter of acknowledgement informing him or her of the identification number, password and the reporting requirements. Despite the April 19 filing, by mid-May Respondents had not yet received such a letter.

8. On May 15, 2006, Respondent Bassett sent an electronic message (e-mail) to Ms. Taunton asking about the status of the committee registration. The parties' entire May 15 e-mail conversation is as follows:

Respondent Bassett: Hi Meg, Our political committee has still not shown up on the Sec of State website. It was filed with the Elbert County Clerks Office, will it show up on the state site for electronic filing?

Ms. Taunton: James, My records indicate that our office never received your filing. I would have date stamped it and given whom ever filed it a copy or if by mail I would have notified you via e-mail that we received it.

Respondent Bassett: You weren't in, it was date stamped by the clerk of courts.

Ms. Taunton: Did you give it to the girls in the front, the Real estate Recording Office? If so they have nothing to do with Elections. They probably recording [sic] it and sent it back to you. It does not need to be recorded and they can not question what you bring into the office to be recorded. It just has to be filed with the Election Office.

9. Nothing more transpired between the two parties following the May 15 e-mail exchange. There is no evidence that Ms. Taunton ever attempted to locate the April 19 form, check the office's logbook to verify the office's receipt of the form, or ask Respondents to bring in a copy for her review. Likewise, there is no evidence that Respondents took a copy of the April 19 date-stamped form into Ms. Taunton prior to August 2.

10. On July 31, 2006, Respondents received a notice from the Secretary's office informing them that on July 27, 2006 the Elbert County Republican Executive Committee had filed a complaint against them for failure to file their committee registration form along with expenditure and contribution reports.

11. After receiving notice of the complaint, on August 2, 2006, Respondent Hart presented Ms. Taunton with a copy of the committee registration form that was filed with the Clerk and Recorder's office on April 19, 2006. Ms. Taunton informed Respondent Hart that the reason she, Ms. Taunton, did not have a copy of the form or know that it had been filed was because it was not filed with her office, but filed with the Real Estate Recording Office. And, as stated by Ms. Taunton, the two are separate offices.

12. Prior to August 2, 2006, Respondents had no knowledge of any separate recording offices within the Clerk and Recorder's office. The only thing Respondents knew was that they had to file their committee registration form with the county clerk and recorder of Elbert County within ten days after receiving their first contribution, which Respondent Hart believed she did on April 19, 2006.

13. On August 2, 2006, Ms. Taunton accepted Respondents' committee registration form and date stamped it as "received" on August 2, 2006. Ms. Taunton transmitted the committee registration form to the Secretary's office. On August 15, 2006, Ms. Taunton e-mailed Respondent Hart with the user ID name and the committee's password for the filing of reports on the Secretary's website.

14. In an e-mail dated August 4, 2006, Ms. Taunton informed Respondent Hart that the committee's first contribution and expenditure report was due on August 17, 2006. Respondent Hart tried to file the committee's contribution and expenditure report with the Secretary on August 17. However, the Secretary's website was down. Respondent Hart contacted Ms. Taunton and Ms. Taunton told Respondent Hart to submit the report to her and she would file it with the Secretary as soon as the website was accessible.

15. Respondent Hart filed the committee's Report of Contributions and Expenditures with Ms. Taunton on August 17, 2006. In a letter dated August 18, 2006, Ms. Taunton confirmed that she had received Respondents' contribution and expenditure report on August 17, 2006.

16. In the August 17, 2006 report, the committee reporting receiving the following monetary contributions: \$20 on April 19, 2006; \$196.18 on May 19, 2006; \$50 on May 25, 2006; \$150 on June 8, 2006; two separate contributions of \$200 each on June 28, 2006; \$100 on July 14, 2006; and \$200 on July 20, 2006.

17. It is undisputed that the committee accepted its first contribution on April 19, 2006. As such, Respondents were required to file their committee registration form with the county clerk and recorder by May 3, 2006. The ALJ finds that when Respondent Hart filed the committee registration with the Clerk and Recorder's office on April 19, 2006, she complied with this requirement. The fact that it was received by a clerk in the main recording office is irrelevant. The committee registration form was filed, received and logged-in by the office on April 19, 2006.

18. The evidence also establishes that the form was not personally handed to or left with Ms. Taunton on April 19. However, Ms. Taunton is not the Clerk and Recorder. She is only one of ten employees of that office. And, although she holds the job title of Elections Manager, she, individually, is not the appropriate officer for filing purposes. The appropriate officer is the county clerk and recorder.

19. Prior to August 2, 2006, Respondent Hart was unaware that the office even had a separate elections division. The only reason Respondent Hart went first to Ms. Taunton's office was because Ms. Taunton had previously assisted Respondents in obtaining the recall petitions. Ms. Taunton was not at her desk on April 19 when Respondent Hart came to file the form. Therefore, Respondent Hart took the form twenty feet down the hall and filed it with the clerk at the recording desk. Respondent Hart did not want to leave the form lying in an empty office and she knew she had to file it, which she did. The ALJ finds Respondent Hart's actions prudent.

20. There is no evidence that Ms. Taunton had any knowledge of the filing prior to May 15. However, after her e-mail exchange with Respondent Bassett on May 15, Ms. Taunton was on notice that the Clerk and Recorder's office had received the form on April 19. Despite this information, Ms. Taunton made no effort verify the filing, which she could have easily done by checking the office's filing logbook. If she had, she would have seen the receipt of a document from Citizens for an Honest Elbert County on April 19. Ms. Taunton would have certainly recognized the name as she had assisted Respondents in obtaining a recall petition just one month prior.

21. On May 15, when Ms. Taunton detected what she perceived as a deficiency in the committee's filing, she or someone in the office had a duty to notify the committee of the deficiency and provide the committee seven business days to cure the

deficiency. The committee was not provided such notice or time to cure the deficiency. The ALJ finds that the office mishandled the April 19 filing and failed to provide Respondents notice of the deficiency or an opportunity to cure it.

22. It is undisputed that Respondents did not file a report of contributions and expenditures before August 2006, which they were required to do. However, this failure is solely attributable to the Clerk and Recorder's office mishandling of the April 19 filing and lack of notice to the committee regarding the filing deficiency in May 2006. As a result of the actions and inactions of the office, Respondents were unable to file their reports for the months May, June and July 2006. The committee did not even exist on the Secretary's website and had no way to file these reports.

23. The ALJ finds that Respondents made a good faith effort to comply with all their filing requirements. And, they did, in fact, comply with the requirement to file their committee registration form with the Clerk and Recorder's office by May 3, 2006. However, because their committee registration form was not properly processed by the office and they were not provided notice of any deficiency prior to receiving notice of the complaint, Respondents had no way of filing their reports until August 2006. When Respondents were finally able to file their report, they disclosed all contributions and expenditures dating back to April 19, 2006.

DISCUSSION

Respondents formed a committee for the purpose of recalling three Elbert County elected officials. Therefore, Respondents are an issue committee. As an issue committee, Respondents were required to file a committee registration form with the appropriate officer within ten business days of receiving their first contribution. The appropriate officer in this case is the county clerk and recorder.

"Appropriate officer" is defined as, "the individual with whom a candidate, candidate committee, political committee, small donor committee, or issue committee must file pursuant to section 1-45-109(1), C.R.S., or any other successor section." Colo. Const. art. XXVIII, § 2(2).

For the purpose of meeting the filing and reporting requirements of this article, candidates for state wide office, the general assembly, district attorney, district court judge, or any office representing more than one county, except candidates for school district director; the candidate committees for such candidates; political committees in support of or in opposition to such candidates; issue committees in support of or in opposition to an issue on the ballot in more than one county; small donor committees making contributions to such candidates; and persons expending one thousand dollars or more per calendar year on electioneering communications shall file with the

secretary of state. Candidates in municipal elections, their candidate committees, any political committee in support of or in opposition to such candidate, an issue committee supporting or opposing a municipal ballot issue, and small donor committees making contributions to such candidates shall file with the municipal clerk. Candidates in special district elections, except candidates for director of the regional transportation district; the candidate committees of such candidates; political committees in support of or in opposition to such candidates; issue committees supporting or opposing a special district ballot issue; and small donor committees making contributions to such candidate shall file with the clerk and recorder of the county in which the district court having jurisdiction over the special district pursuant to section 32-1-303, C.R.S., is located. **All other candidates, candidate committees, issue committees, political committees, and small donor committees shall file with the county clerk and recorder of the county of their residence.**

Section 1-45-109(1), C.R.S. (emphasis added).

Complainant argues that Respondents failed to timely file their committee registration form because they did not file it with, Ms. Taunton, the Elections Manager, of the Elbert County Clerk and Recorder's office before May 3, 2006. The ALJ finds no merit in this argument. The law requires that Respondents file their committee registration form with the county clerk and recorder of the county of their residence. The office of Clerk and Recorder is held by Ms. Fordyce. It is not held by Ms. Taunton. The form was unquestionably received by the office on April 19. It was date stamped and logged in on that same date in the office's daily recording book. Respondent Hart's decision to file the form at the main recording desk rather than leave it lying somewhere in Ms. Taunton's empty office, was a prudent one. When Respondent Hart filed the form with an employee of the office, she had every reason to believe she had filed it properly. The ALJ concludes that Respondents' committee registration form was filed with the appropriate officer on April 19, 2006.

In addition to registering as an issue committee, Respondents were required to file reports of contributions and expenditures with the appropriate officer within fifteen days of the filing of their committee registration and every thirty days thereafter until the date of the recall election has been established and then fourteen days and seven days before the recall election and thirty days following the recall election. § 1-45-108(6), C.R.S. In this case, the Respondents filed their committee registration form on April 19, 2006. As such, their first report was due by May 4, 2006. They also had a report due in June and July 2006. Respondents did not file a report until August 17, 2006. However, due to the mishandling of the April 19 filing, Respondents had no way to file their May, June or July 2006 reports.

Under § 1-45-112(1)(e), C.R.S, the county clerk and recorder, among other things, is required to, “[n]otify any person under their jurisdiction who has failed to fully comply with the provisions of this article . . .” Additionally, under § 1-45-109(4)(a), C.R.S., any report that is deemed incomplete by the appropriate officer must be accepted on a conditional basis and the committee must be notified by mail as to any deficiencies. Thereafter, the committee has seven business days from the date of mailing of such notice to cure the deficiency. On May 15, 2006, Ms. Taunton learned from Respondent Bassett that the form had been filed with the office on April 19, 2006. Ms. Taunton apparently believed the form had not been properly filed; yet, she took no steps to verify the filing, send written notice of the deficiency to any member of the committee, or provide Respondents seven business days to cure the defect. Because the April 19 form was mishandled by the county clerk and recorder’s office and the procedures in §§ 1-45-109(4)(a) and 1-45-112(1)(e), C.R.S. were not followed, Respondents had no way to comply with the reporting requirements for the months of May, June and July 2006.

CONCLUSIONS OF LAW

1. Pursuant to Colo. Const. art. XXVIII, § 9(2)(a), the ALJ has jurisdiction to conduct a hearing in this matter.
2. If the ALJ determines that a violation of the FCPA has occurred, the ALJ’s decision must include the appropriate order, sanction or relief authorized by Article XXVIII of the Colorado Constitution.
3. Colo. Const. art. XXVIII, § 9(1)(f) provides that the hearing is conducted in accordance with the Colorado Administrative Procedure Act (APA), § 24-4-101, *et seq.*, C.R.S. Under the APA, the proponent of an order has the burden of proof. § 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. The ALJ concludes that Complainant has failed to establish by a preponderance of the evidence that Respondents violated § 1-45-108(6), C.R.S. by failing to file their committee registration form with the appropriate officer within ten business days of receiving their first contribution.
5. The ALJ concludes that Complainant has established by a preponderance of the evidence that Respondents violated § 1-45-108 (6), C.R.S. by failing to file their reports of contributions and expenditures with the appropriate officer within fifteen days after filing their committee registration form and for the months of June and July 2006.

AGENCY DECISION

It is the Agency Decision of the ALJ that Respondents' complied with the requirement to file their committee registration form with the appropriate officer within ten days after receiving their first contribution, as required by § 1-45-108(6), C.R.S. It is the further Agency Decision of the ALJ that Respondents did not comply with the requirement to file their reports of contributions and expenditures for the months of May, June and July 2006 as required by § 1-45-108(6), C.R.S. 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 Article XXVIII.

Respondents' failure to file their reports of contributions and expenditures for the months of May, June and July, 2006 is a violation of the FCPA. It is undisputed that Respondents did not file a Report of Contributions and Expenditures until August 17, 2006. One sanction authorized for a failure to file pursuant to § 1-45-108, C.R.S. is a \$50 per day fine for each day the required filing was not made. See Colo. Const. art. XXVIII, § 10(2)(a).

Under § 10(2)(a), "[t]he appropriate officer shall impose a penalty of fifty dollars per day for each day that a statement or other information required to be filed pursuant to . . . sections 1-45-108, 1-45-109 or 1-45-110, C.R.S., or any successor sections, is not filed by the close of business on the day due." The ALJ is not "the appropriate officer" for purposes of this section and is therefore not required to impose a \$50 per day sanction. Moreover, the Colorado Constitution permits the ALJ to set aside or reduce a penalty upon a showing of good cause. Colo. Const. art. XXVIII, § 10(2)(b)(I). In this case, a strict application of the \$50 per day sanction in § 10(2)(a) would result in a fine of \$5,250 (105 days x \$50 per day). Under the circumstances of this case, the ALJ finds a penalty of \$5,250 excessive and unsupported. Despite Respondents timely and proper filing on April 19, the Clerk and Recorder's office failed to process the form and transmit it to the Secretary's office. As such, Respondents were never recognized as an issue committee on the Secretary's website. Prior to August 2006, Respondents had no user ID, no password, or a place to file any reports on the Secretary's website. As soon as the Clerk and Recorder's office transmitted the committee registration form to the Secretary's office, Respondents were able to file their report, which they did and made full disclosures. The ALJ is also mindful of the fact that despite the requirement to do so, the office never provided Respondents with notice of a filing deficiency or an opportunity to cure the deficiency in May when the office first learned about the filing discrepancy. If the office had, Respondents would have had an opportunity to get the situation straightened out long before August and file their report(s) before August 17, 2006.

Respondents were required to file contribution and expenditure reports for the months of May, June and July, 2006. They did not. This is a violation of § 1-45-108(6), C.R.S. However, the ALJ is not imposing any penalty, fine, or other sanction against Respondents for this violation as the violation was caused solely by the actions and inactions of the Clerk and Recorder's office.

This decision is subject to review with 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

November 27, 2006

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 transmitting an electronic copy and placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Stephen E. Berken, Esq.
1159 Delaware Street
Denver, CO 80204
(e-mail: berkenpub@aol.com)

Rachel T. Rowley, Esq.
Burns Figa and Will, PC
6400 Fiddlers Green Circle, Suite 1000
Greenwood Village, CO 80111
(e-mail: Rrowley@bfw-law.com)

and

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

on this ____ day of November 2006