

<p>STATE OF COLORADO SECRETARY OF STATE ADMINISTRATIVE HEARING OFFICER 1700 Broadway #550 Denver, CO 80290</p> <hr/> <p>BEFORE THE SECRETARY OF STATE, COLORADO DEPARTMENT OF STATE, <i>in re</i> ED 2022-109, 2022-110, 2022-111, 2022-112, 2022-115, 2022-116, and 2022-117</p> <p>ELECTIONS DIVISION OF THE SECRETARY OF STATE,</p> <p>Complainant,</p> <p>vs.</p> <p>COLIN LARSON; COLIN FOR COLORADO; RESTORE COLORADO LEADERSHIP FUND IEC, RESTORE COLORADO LEADERSHIP FUND 527; DANIEL COLE, COLE COMMUNICATIONS, LLC; and VICTOR’S CANVASSING, LLC.</p> <p>Respondents.</p>	<p>▲ COURT USE ONLY ▲</p> <p>CASE NUMBER</p> <p>2023-_____</p>
<p>RESPONSE TO MOTION TO DISMISS</p>	

At several stages of Colorado’s campaign finance enforcement scheme, the statute directs the Elections Division to process complaints within a given period of time. But in stark contrast to those provisions, when the Elections Division moves a complaint into the “cure” stage of the process, the General Assembly elected not to establish a statutory time limit. Because the General Assembly chose not to create such a limit, the Hearing Officer should decline Respondents Colin Larson’s and Colin for Colorado’s request that the Hearing Officer create its own limit and deny their Motion to Dismiss.

BACKGROUND

1. Factual background.

This case arises out of a campaign finance complaint filed in November of last year. Motion to Dismiss (May 22, 2023) (“Mot.”) ¶ 1. The complaint alleged improper

coordination between Colin Larson, his candidate committee, and multiple independent expenditure committees.

After receiving the complaint, the Elections Division of the Secretary of State processed the complaint under Colorado’s campaign finance enforcement statute, § 1-45-111.7. First, it notified the Respondents, including Colin Larson and Colin for Colorado (collectively, the “Larson Respondents”). Then, the Division conducted an initial review of the Complaint consistent with § 1-45-111.7(3). Following the initial review, the Division concluded (1) that the complaint stated one or more violations of Colorado campaign finance law, (2) that the complaint was timely filed, and (3) that it asserted facts sufficient to support a factual or legal basis for the alleged violation. The Division also concluded that the alleged violations were curable, and offered Respondents, including the Larson Respondents, the opportunity to cure under § 1-45-111.7(4). Mot. ¶ 2.

On March 24, 2023, after determining that the Respondents, including the Larson Respondents, were not going to cure the alleged violations, the Division moved the case into the “investigation” stage under § 1-45-111.7(5). On March 27, 2023, the Division moved to dismiss the complaint, and on May 1, 2023, the Deputy Secretary of State—the final agency decisionmaker for campaign finance matters—granted in part and denied in part the motion. Relevant here, the Deputy Secretary of State denied the Motion as to the Larson Respondents, and ordered the Division to file a complaint with a hearing officer within 14 days under § 1-45-111.7(5)(a)(IV). The Division did so, and now the Larson Respondents move to dismiss the Division’s complaint on the grounds that the Division had not complied with the “timelines for the adjudication of complaints” established in § 1-45-111.7.

2. Legal Background.

Colorado's campaign finance enforcement statute is found at § 1-45-111.7. Section 111.7 sets out a staged process for the Division's acceptance, review, and investigation of a campaign finance complaint filed by a member of the public. Relevant here, it establishes three unique stages of the process, each of which corresponds to a statutory subsection:

- § 111.7(3), "The Initial Review Stage": After it receives a complaint, the Division conducts an "initial review" of the complaint under § 1-45-111.7(3). At the Initial Review Stage, the Division screens out complaints that are not timely filed, or that fail to (1) allege a violation of Colorado campaign finance law, or (2) assert sufficient facts to support a factual and legal basis for the alleged violation. The Initial Review Stage includes a deadline. Specifically, it states that "[w]ithin ten business days of receiving a complaint, the division shall" either move to dismiss the complaint, move the complaint into the Cure Stage, or move the complaint into the Investigation Stage. § 1-45-111.7(3)(b).
- § 1-45-111.7(4), "The Cure Stage.": If a complaint passes the Initial Review Stage, and "alleges a failure to file or otherwise disclose required information, or alleges another curable violation," the Division moves the complaint into the cure stage. § 1-45-111.7(4)(a). The statute imposes a deadline on the respondent for some violations, establishing that the "respondent has ten business days from the date the notice is e-mailed or mailed to file an amendment to any relevant report that cures any deficiencies" alleged in the complaint. § 1-45-111.7(4)(b). Upon receipt of a notice of intent to cure, the Division "may ask the respondent to provide additional information," and may grant the respondent an extension of time." § 1-45-111.7(4)(e)(I). But ultimately, the Division is required to "determine whether the

respondent has cured any violation alleged in the complaint, and if so whether the respondent has substantially complied with its legal obligations” under Colorado campaign finance law. This subsection, which establishes the Division’s obligations during the Cure Stage, does not include a deadline.

- § 1-45-111.7(5), “The Investigation Stage”: For complaints that do not allege a curable violation, or for complaints that are not dismissed during the Cure Stage, the final step in the process is the Investigation Stage. § 1-45-111.7(5). During the Investigation Stage, the Division is required to “investigate” the complaint “to determine whether to file a complaint with a hearing officer. § 1-45-111.7(5)(a)(I). Like in the Initial Review Stage, but unlike in the Cure Stage, the statute imposes a deadline on the Division’s investigation: “The division shall determine whether it will file a complaint with a hearing officer within thirty days after initiating an investigation.” § 1-45-111.7(5)(a)(IV).

ARGUMENT

The Larson Respondents argue that the complaint against them should be dismissed because it is not timely filed. Specifically, the Larson Respondents allege that the Division did not timely advance the complaint out of the Cure Stage. But the statute imposes no deadline on the amount of time the Division may keep a complaint at the Cure Stage. The Motion should be denied.

1. The General Assembly did not include a time-limitation at the Cure Stage.

Throughout § 1-45-111.7, when the General Assembly intended for the Division to act within a set period of time, it indicated that intent clearly. During the Initial Review Stage, the statute directs that the Division “shall take one or more” actions “[w]ithin ten business days of receiving a complaint. § 1-45-111.7(3)(b). And once the Division moves a complaint

into the Investigation Stage, it “shall determine whether it will file a complaint with a hearing officer within thirty days after initiating an investigation.” § 1-45-111.7(5)(a)(IV).

But a similar deadline is notably absent from the Cure Stage. At the Cure Stage, the statute imposes a deadline on Respondents, but not on the Division. Where, as here, the General Assembly includes a deadline in two subsections of the statute, but omits a deadline in another, courts presume that omission was intentional. *See Abu-Nantambu-El v. State*, 2018 COA 30, ¶ 10, (quoting *Well Augmentation Subdistrict of Cent. Colo. Water Conservancy Dist. v. City of Aurora*, 221 P.3d 399, 419 (Colo. 2009)) (“[W]hen the General Assembly includes a provision in one section of a statute, but excludes the same provision from another section, we presume that the General Assembly did so purposefully.”).

The General Assembly’s decision to omit a deadline from the Cure Stage makes sense within the context of this statutory scheme. At the Initial Review and Investigation stages, the Division is in full control of the process. But at the Cure Stage, the Division may need time to sort through materials provided by the Respondent, and to analyze the factors bearing on substantial compliance. *See* § 1-45-111.7(4)(f). That task only becomes more difficult in a complex case like this one, involving nine separate respondents.

Nor does the Larson Respondents’ “repudia[tion]” of the opportunity to cure alter this analysis. Mot. ¶ 11. The subsection governing the Cure Stage, § 1-45-111.7(4), does not establish actions required of the Division once a respondent “repudiates” the opportunity to cure, and it certainly does not include language suggesting that such a repudiation would trigger an otherwise inapplicable statutory deadline. Had the General Assembly wanted to add provisions governing such a circumstance, it could have. But it did not.

Moreover, any deadline proposed by the Larson Respondents would be unadministrable and atextual. It is unclear exactly when Respondents argue the Division was

required to file its Motion to Dismiss with the Deputy Secretary. Their Motion argues only that it was filed “125 days past the notice of Initial Review and Opportunity to Cure.” Mot. ¶ 10. But there is no statutory deadline triggered by the filing of such an Initial Review. And it is unclear whether the Larson Respondents think their repudiation of cure efforts should retroactively impose a 30-day deadline following the Initial Review—which would be unadministrable—or whether they believe a different timeline should follow from that repudiation. Regardless, neither approach is supported by the text of the statute.

The Division’s Complaint before this hearing officer was timely filed within fourteen business days of the Deputy Secretary’s denial of the motion to dismiss. *See* § 1-45-111.7(5)(a)(IV). Before that, the Division’s motion to dismiss was timely filed with the Deputy Secretary of State within 30 days of when the Division moved the complaint into the Investigation Stage, *id.*, and the Division’s Notice of Initial Review was timely filed within ten business days of it receiving the original complaint, § 1-45-111.7(3)(b). The Larson Respondents do not challenge the timeliness of any of these filings, and those are the only three deadlines imposed on the Division. The Motion should be denied.

2. The time limitations in § 1-45-111.7 are directory, not mandatory.

Even if the Division was under a deadline at the Cure Stage, which it was not, its failure to abide by that deadline would not necessarily deprive the Hearing Officer of jurisdiction. As a general rule, statutory “provisions that prescribe the time within which an agency must act are presumed to be directory unless the statute suggests a contrary intent.” *In re Protest of McKenna*, 2015 CO 23, ¶ 20; *see also DiMarco v. Dept. of Rev., Motor Vehicle Div.*, 857 P.2d 1349, 1352 (Colo. 1993) (“[O]ur appellate courts have generally construed time limitations imposed on public bodies as being directory rather than mandatory, unless the General Assembly has clearly evidenced a contrary intent.”).

Although the word “shall” often “has a mandatory connotation,” *In re McKenna*, 2015 CO ¶ 19, that alone is insufficient evidence to hold that a statutory timeline is mandatory, rather than directory, *DiMarco*, 857 P.2d at 1352. And where a statute uses “affirmative language” such as “shall . . . within,” instead of “negative language” like “or not at all,” courts are more likely to hold that the time limitations were directory, not mandatory. *Id.* (collecting cases where courts held that requirements to act “within” a set period of time are directory, not mandatory).

Here, each timeline established for the Division in § 1-45-111.7 is directory, not mandatory. First, the statute is subject to the presumption that its provisions prescribing “the time within which an agency must act” are directory. *McKenna*, 2015 CO ¶ 20.

Second, the statute uses affirmative language, specifically the word “within,” as to each of the Division’s deadlines, further establishing their directory nature. *See* § 1-45-111.7(3)(b) (“Within ten business days of receiving a complaint, the division shall . . .”); § 1-45-111.7(5)(a)(IV) (“The division shall determine whether it will file a complaint with a hearing officer within thirty days . . .”).

Finally, Colorado voters have reiterated in both statute and the constitution “that the interests of the public are best served by . . . strong enforcement of campaign finance laws.” § 1-45-102; *see also* Colo. Const. art. XXVIII, § 1 (“[T]he interests of the public are best served by . . . strong enforcement of campaign finance requirements.”). That too militates in favor of not depriving this Hearing Officer of jurisdiction to hear a campaign finance enforcement proceeding on procedural grounds.

DiMarco is instructive. There, the court considered a time period relating to when a driver’s license could be revoked or suspended. 857 P.2d 1350. The relevant statute stated that, if the licensee requests a hearing prior to revocation or suspension, “such hearing *shall*

be held within sixty days after application is made.” *Id.* at 1351. It was undisputed that such a hearing was not held within 60 days, but the court declined to hold that the failure to adhere to this provision divested the agency of jurisdiction. *Id.* at 1353. “Absent explicit language revealing such, [the court] decline[d] to assume that the General Assembly intended that an agency’s procedural mistake should defeat the prime objective of the statute.” *Id.* at 1352.

The Cure Stage does not include any deadlines by which the Division must act. But if it did, failure to meet those deadlines would not deprive the Hearing Officer of jurisdiction. Because the Larson Respondents have not demonstrated any prejudice arising from the Division’s processing of the Complaint against them, their Motion should be denied.

CONCLUSION

The Motion should be denied.

Respectfully submitted this 5th day of June, 2023.

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CERTIFICATE OF SERVICE

This is to certify that I will cause the within filing to be served by email this 5th day of June, 2023, addressed as follows:

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