

<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 SECOND MOTION TO DISMISS</p>	

The Elections Division respondents to the Second Motion to Dismiss filed by Colin Larson and Colin for Colorado (collectively, the “Larson Respondents”). Because the time limit for setting a hearing is directory, not mandatory, the Motion should be denied.

BACKGROUND

1. Factual background.

This case arises out of a campaign finance complaint filed with the Elections Division in November of last year. Second Motion to Dismiss (November 28, 2023) (“2d 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. Ultimately, after the administrative process played out according to section 111.7, the Division filed a Complaint with the Hearing Officer on May 19, 2023. 2d Mot. ¶ 5. Larson and his candidate committee (collectively, the “Larson Respondents”) then moved to dismiss the Complaint on May 22, 2023.

On November 6, 2023, this case was transferred from the previous Hearing Officer to a new Hearing Officer. Min. Order (Nov. 9, 2023). The new Hearing Officer acknowledged the “unacceptable delay” in reviewing and ruling on the Larson Respondent’s first Motion to Dismiss, and made a commitment “to have no further undue delays in resolving issues that are well pleaded and ripe for decision.” *Id.*

On November 21, 2023, the Hearing Officer denied the Motion to Dismiss. Order Denying Motion to Dismiss. One week later, the Larson Respondents filed a second Motion to Dismiss, this time alleging that the hearing had not been set within thirty days of the Division’s Complaint being filed with the Hearing Officer. 2d Mot.

ARGUMENT

The Larson Respondents argue that the Complaint against them should be dismissed because the hearing was not set within thirty days of the Complaint being filed. But the time limitations in section 1-45-111.7 and the associated rules are directory, not mandatory. The Motion should be denied.

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

The Larson Respondents argue that the Complaint should be dismissed because a hearing on the Complaint was not set within 30 days. 2d Mot. ¶ 13 (citing § 1-45-111.7(6)(a)). The Larson Respondents then suggest that the prior Hearing Officer’s failure to abide by that time limitations deprives the Hearing Officer of jurisdiction over this matter.

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 set in section 1-45-111.7, including the deadline for setting a hearing at section 111.7(6)(a), 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 the deadline for scheduling a hearing, further establishing its directory nature. *See* § 1-45-111.7(6)(a) (“[A] hearing officer shall schedule a hearing within thirty days of the filing of the complaint . . .”)

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.”). Against this backdrop, it would be unjust to penalize the enforcement body—here, the Elections Division—for the failures of a neutral hearing officer. Section 111.7(6)(a) directs the *hearing officer*, to take action. Yet the Larson Respondents seek to penalize the *Elections Division* with dismissal of their Complaint.

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 1352.¹

This case is on all-fours with *DiMarco*. It is undisputed that the hearing was not set within thirty days. But “absent explicit language revealing such,” the new Hearing Officer should not presume that the General Assembly intended for the former Hearing Officer’s procedural mistakes to shield an alleged campaign finance offender from scrutiny.

CONCLUSION

The Motion should be denied.

¹ Like in *DiMarco*, Larson has not asserted a “claim of any actual prejudice resulting from the delay.” *See* 857 P.2d at 1353.

Respectfully submitted this 14th day of December, 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 14th day of December, 2023, addressed as follows:

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