

STATE OF COLORADO SECRETARY OF STATE ADMINISTRATIVE HEARING OFFICER 1700 Broadway #550 Denver, CO 80290 <hr/> BEFORE THE SECRETARY OF STATE, COLORADO DEPARTMENT OF STATE, <i>in re</i> ED 2022-99 ELECTIONS DIVISION OF THE SECRETARY OF STATE, Complainant, vs. SOLOMON FOR COLORADO. Respondents.	 ▲ COURT USE ONLY ▲ CASE NUMBER 2023 AHO 0008
RESPONSE TO MOTION TO DISMISS	

The Elections Division files this Response to Respondent Solomon for Colorado’s Motion to Dismiss. 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 October 2022. Compl. ¶ 12 (July 20, 2023). The complaint alleged that Solomon for Colorado had distributed a mailer during the 2022 election that lacked a compliant disclaimer statement. *Id.* ¶ 13–14. According to Respondent, the lack of a disclaimer on the mailer was a result of the Committee’s designer having “swapped fonts and artwork,” resulting in the disclaimer being “hidden behind the new art.” *Id.* ¶ 17; *see also* Mot. to Dismiss ¶ 9 (May 17, 2024) (noting that the allegations arose from something that had “escaped the attention” of the graphic designer).

The Division filed a complaint with an administrative hearing officer in July of last year. As the Court noted, this matter “appears to have escaped attention in the transfer of cases from the Office of Administrative Courts to the Hearing Officer within the Department of State.” Scheduling Order ¶ 2 (May 6, 2024).¹ On May 17, 2024, Respondent Solomon for Colorado filed a Motion to Dismiss on the basis that a hearing had not been set within 30 days of the Division’s July 30, 2023, complaint. Mot. to Dismiss ¶ 14.²

ARGUMENT

Respondent argues that the Complaint 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.

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.”). This reasoning arises out of “[t]he doctrine of *Nullum Tempus* (*quod nullum tempus occurrit regi*—time does not run

¹ The Motion notes communication between undersigned counsel and counsel for the Committee in September 2023. Mot. to Dismiss ¶ 7. Although the contents of those conversations are covered by Colo. R. Evid. 408, and are immaterial to deciding this Motion, the Division disputes the characterization of those conversations and how they were left.

² The Motion also references the date of the third-party campaign finance complaint, but the 30-day setting requirement applies to the Division’s complaint with a hearing officer, not the filing of a campaign finance complaint with the Division. *See* § 1-45-111.7(6)(a) (stating that a hearing on the Division’s complaint shall be set within thirty days).

against the king)”. *Elections Division v. Larson et al.*, Order Denying Second Mot. to Dismiss, ¶ 9 (Dec. 27, 2023) (attached as Exhibit 1). As the Court previously noted in ruling on an identical Motion, the public policy basis of this doctrine is founded in the preservation of “the public rights, revenues, and property from injury and loss, by the negligence of public officers.” *Id.* (quoting *Shootman v. DOT*, 926 P.2d 1200, 1203 (Colo. 1996)).

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 Respondent seeks to penalize the *Elections Division* with dismissal of its 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 1352.³

This case is on all-fours with *DiMarco* and *Larson*. 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.

³ Like in *DiMarco* and *Larson*, Solomon for Colorado has not asserted a “claim of any actual prejudice resulting from the delay.” *See* 857 P.2d at 1353.

Respectfully submitted this 30th day of May, 2024.

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CERTIFICATE OF SERVICE

This is to certify that I will cause the within filing to be served by email this 30th day of May, 2024, addressed as follows:

Solomon for Colorado
C/O Registered Agent Matt Solomon
Matt@tactical101.com
Respondent

/s/ Peter G. Baumann