

STATE OF COLORADO
Department of State
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Jena M. Griswold
Secretary of State
Christopher P. Beall
Deputy Secretary of State

BEFORE THE COLORADO DEPUTY SECRETARY OF STATE 1700 Broadway, Suite 550 Denver, Colorado 80290	AHO CASE No: <u>2023-021</u>
IN THE MATTER OF THOMAS DUNAGAN	Election Division Case No: <u>2023-23</u>
FINAL AGENCY ORDER	

This matter comes before Christopher P. Beall, Colorado Deputy Secretary of State (“Deputy Secretary”), under section 1-45-111.7(6)(b) of the Colorado Fair Campaign Practices Act (“FCPA”) and section 24-4-105 of the Colorado Administrative Procedures Act (“APA”), upon the Deputy Secretary’s own motion and upon the exceptions filed by the Elections Division (“Division”) of the Secretary of State’s Office in response to the Initial Decision issued by the Secretary’s Administrative Hearing Officer (“AHO”) and duly served upon the Parties on February 13, 2024. The Deputy Secretary, being fully informed by the briefing of the Division and a full review of the record, including the transcript of the hearing before the AHO and all of the materials entered into evidence, issues this Final Agency Order.

Except so far as is noted in this Order, the Deputy Secretary adopts the Findings of Facts and the Conclusions of Law set out by the AHO in the Initial Decision (“ID”), attached and incorporated herein by reference. See Attachment A, *infra*. The Deputy Secretary rejects the Respondent’s principal defense that the underlying complaint was untimely, and he also sets aside certain of the AHO’s Conclusions of Law which are erroneous as a matter of law, modifies others as discussed below, and in light of the findings of multiple violations of campaign finance law, imposes a penalty of **\$1,250.00**.

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I. BACKGROUND

Thomas Dunagan (“Respondent”) was the Republican candidate for Prowers County Coroner in the November 2022 election, which he won. ID at ¶¶ 38, 42. He now also serves as chair of the Prowers County Republican Party. ID at ¶ 38; TR 66:11.

Mr. Dunagan announced his candidacy for the position of county coroner in February 2022 and duly filed his candidate committee registration. *Id.* at ¶ 43. Mr. Dunagan listed himself as the registered agent and his wife, Raelyn Dunagan, as the filing agent for his eponymously named committee. *Id.* Mr. Dunagan was one of two candidates for the Republican nomination for the coroner’s office during the June 28, 2022, primary, which he won.¹ See [2022 Prowers County Primary Election Official Results](#). Mr. Dunagan was again successful in the general election on November 8, 2022, beating out his unaffiliated opponent Marjorie (“Marge”) Campbell. See [2022 Prowers County General Election Official Results](#).

On July 5, 2023, nearly eight months after the close of voting on Mr. Dunagan’s candidacy, a campaign finance complaint was filed against Mr. Dunagan by Angela Riner, who was a former employer of Mr. Dunagan, alleging that Ms. Riner had written a \$400 check to Mr. Dunagan on March 22, 2022, *i.e.*, three months before the primary election, for Mr. Dunagan to use toward his campaign, and that Mr. Dunagan had accepted other campaign contributions, but that he had failed to report any of these contributions with the Secretary of State’s Office as required. See “Order of Dismissal,” *In re Thomas Dunagan*, Elec. Div’n No. 2023-18 (Oct. 31, 2023). The Deputy Secretary dismissed the citizen complaint filed by Ms. Riner on the grounds that she knew of the basis for her allegations of campaign finance violations for more than 180 days before she filed her citizen complaint on July 3, 2023. See *id.*

On August 10, 2023, some five weeks after Ms. Riner filed the first citizen complaint but before that case was resolved, Mr. Dunagan’s former opponent from the general election, Ms. Campbell, filed her own citizen complaint against Mr. Dunagan, this time alleging that the evidence of numerous campaign banners and campaign signs during the 2022 election, photos of which she attached to her citizen complaint, was inconsistent with what she had come to learn in 2023 was the absence of any campaign finance disclosure reporting by Mr. Dunagan. Hrg. Ex. 1. In the complaint itself, Ms. Campbell

¹ Both the testimony at the hearing and the AHO’s own decision reflects confusion over the date of the 2022 primary – it was held on June 28, 2022, not March 7, 2022, as Mr. Dunagan repeatedly, but mistakenly, stated during the hearing, and as the AHO repeated in his initial decision. See TR 40:1-6, 67:23-25; ID ¶¶ 30, 39, 42, 48, 58.

indicated that she learned of the alleged violations – listed as, (1) failure to report an expenditure, (2) failure to report a contribution, and (3) inaccurate or incomplete filing – in “June 2023.” *Id.* The underlying citizen complaint did not itself reveal what occurred in “June 2023” to cause Ms. Campbell to learn of Mr. Dunagan’s failure to report any campaign spending or contributions. *See id.* Although Ms. Campbell was not called to testify at the hearing, her responses to the Division’s investigation, which were submitted under penalty of perjury and accepted into evidence during the hearing, stated that Ms. Campbell learned of Mr. Dunagan’s failure to file any disclosures of contributions or expenditures after she learned of Ms. Riner’s plan to file the initial complaint against Mr. Dunagan in the summer of 2023:

So when I looked it up, and saw Mr. Dunagan had reported NOTHING, I decided it might perhaps convince you to look into this man ... in depth!

Hrg. Ex. B; ID ¶ 55.e.

Following its internal review of Ms. Campbell’s underlying complaint, and after the earlier complaint by Ms. Riner had been dismissed on statute of limitations grounds, the Division filed its own formal administrative complaint with the Administrative Hearing Officer on December 7, 2023, pursuant to section 1-45-111.7(5),² alleging that Mr. Dunagan had violated Colorado campaign finance laws by failing to report campaign expenditures and, in an addition from the allegations that Ms. Campbell had proffered, also by failing to include required “paid for by” disclaimers on certain electioneering communications. Administrative Complaint (“Compl.”) at ¶¶ 33-42.

This case initially was set to go to hearing before the AHO on January 5, 2024. ID at ¶ 1. On January 3, 2024, however, the hearing was continued without objection. *Id.* On February 6, 2024, the AHO conducted a virtual hearing on the Division’s Complaint under section 1-45-111.7(6)(a) using the Microsoft Teams video-conference platform, after which the hearing officer issued an initial decision containing numerous factual findings *Id.*

In particular, the AHO found that Mr. Dunagan made several electioneering communications. *Id.* at ¶ 45, 46, 48. As part of his campaign, Mr. Dunagan ordered two sets of yard signs, two 4-foot by 8-foot

² Under section 1-45-111.7(5), the Division acts as the prosecutor in all hearings on campaign finance complaints. § 1-45-111.7(5)(a)(V) (“If the division files a complaint with a hearing officer under this subsection (5), it is responsible for . . . effectively prosecuting the complaint.”); *see also Colo. Dep’t of State v. Unite for Colo.*, 2024COA31, ¶ 14, 2024 WL 1317637 (Mar. 28, 2024). No longer are such complaints litigated by the underlying citizen complainants, as was the case under the FCPA before it was amended in 2019. *See, e.g., Day v. Chase for Colo.*, 2020 COA 84, ¶¶ 5, 6, 479 P.3d 1.

banners, and postcards. *Id.* at ¶ 31. Mr. Dunagan and his wife also used their personal printer to create flyers and labels for water bottles. *Id.* at ¶¶ 32-33. Mr. Dunagan distributed the yard signs, banners, postcards, flyers, and water bottles on various occasions between announcing his candidacy and the November 2022 general election. *Id.* at ¶¶ 30-36.

Most of Mr. Dunagan's electioneering communications contained no "paid for by" disclaimers at all. *Id.* at ¶ 52. Only one set of yard signs contained a disclaimer that stated, "Paid for by Thomas Dunagan" and incorrectly identified his wife as the registered agent. *Id.* at ¶¶ 34, 52-53. Mr. Dunagan paid \$920 for one set of yard signs and \$133.75 on the postcards. *Id.* at ¶¶ 34, 35. Mr. Dunagan never identified how much he spent on the other communications. *Id.* at ¶¶ 31, 34, 36, 46, 47. The AHO found that Mr. Dunagan made the conscious choice not to search his bank and credit card records to identify the amounts he spent on the other communications. *Id.* at ¶ 47. Mr. Dunagan did not have a segregated bank account for his candidate committee—he used his personal bank account instead. *Id.* at ¶ 30. Mr. Dunagan accepted "approximately" \$245.05 worth of contributions, which he listed as cash on hand in his initial campaign finance report, rather than as contributions, see Hrg. Ex. 7; TR 61:5-24, 64:19 to 65:1, and he put this money in his personal bank account, commingling the campaign contributions with his personal funds. *Id.* at ¶ 37; TR 61:5-24, 64:19-25.³ He did not report any contributions or expenditures. *Id.* at ¶ 44. He instead routinely filed periodic reports in the Secretary's TRACER reporting system that indicated zero contributions or expenditures. *Id.* at ¶ 44. To this day, including during his formal opportunity to cure the deficient filings in this case, Mr. Dunagan has failed to amend or update his campaign finance reports for the 2022 election cycle to accurately reflect the financial activities of his campaign. *Id.* at ¶ 18, 27; Hrg. Ex. 7; see also [TRACER – Finance History for Thomas Dunagan](#) (showing no amendments or updates to Mr. Dunagan's campaign finance reports as of the date of this Final Agency Order).

The AHO ultimately concluded that Mr. Dunagan had failed to report expenditures related to electioneering communications in violation of section 1-45-107.5(4)(a), as well as failing to report contributions in violation of sections 1-45-108(1)(a)(I) and 1-45-107.5(4)(b)(I). *Id.* at ¶ 50. The AHO also

³ The fact that Mr. Dunagan used his personal bank account for campaign funds first came to light during his own testimony at the hearing. See TR 51:23-53:1; 64:19-65:3; 79:23-81:21.

concluded that Mr. Dunagan violated section 1-45-108.3 for failing to include a required “paid for by” disclaimer on his electioneering communications, except for the yard signs that included a disclaimer that incorrectly identified Mr. Dunagan’s wife as the registered agent for his candidate committee. *Id.* at ¶¶ 51-54. Finally, while noting the clear, self-admitted factual predicate that Mr. Dunagan had failed to deposit contributions to his campaign in a separate account bearing the name of his candidate committee at a financial institution, *id.* at ¶¶ 30, 37, 44, the AHO did not offer any conclusion as to this apparent violation of the constitutional requirement for establishing, maintaining, and preserving the records of a separate bank account for a candidate committee. See COLO. CONST. art. XXVIII, § 3(9).

Despite finding multiple violations of Colorado campaign finance law, as well as setting out the factual basis for a self-admitted violation of a constitutional requirement, the AHO dismissed the case against Mr. Dunagan for lack of “subject matter jurisdiction” after he concluded that Ms. Campbell, the underlying citizen complainant, filed her citizen complaint more than 180 days after she knew or should have known of Mr. Dunagan’s potential violations. *Id.* at ¶¶ 61-65.

II. ISSUES ON REVIEW

The Division timely filed exceptions to the Initial Decision, presenting the following issues for review:⁴

1. Whether the hearing officer erred by concluding that the Division bore the burden of proving that the underlying citizen complainant, Ms. Campbell, timely filed her citizen complaint.
2. Whether the hearing officer erred by concluding that Ms. Campbell knew or should have known, by the exercise of reasonable diligence, of Mr. Dunagan’s violations more than 180 days before she filed the citizen complaint.

On February 13, 2024, the Deputy Secretary initiated review of the Initial Decision on his own motion pursuant to sections 1-45-111.7(6)(b) and 24-4-105(14)(a)(II). Procedural Order at 2. The Deputy Secretary presents the following issues for review in addition to those raised by the Division:

⁴ Neither Mr. Dunagan nor any legal counsel on his behalf filed any exceptions or a response to the Division’s exceptions. Mr. Dunagan appears not to have responded in any way to the issuance of the Procedural Order setting this matter for review.

3. Whether the hearing officer erred by concluding section 1-45-111.7(2)(b)'s 180-day limit was a jurisdictional limitation rather than an affirmative defense.
4. If the hearing officer improperly dismissed the Division's complaint, then what sanction is appropriate in this case.

III. STANDARDS OF REVIEW

A hearing officer's findings of evidentiary fact may be set aside by the Deputy Secretary on review of an initial decision only if they are contrary to the weight of the evidence. § 24-4-105(15)(b). Evidentiary facts are the detailed factual or historical findings upon which a legal determination rests. *State Bd. of Med. Exam'rs v. McCroskey*, 880 P.2d 1188, 1193 (Colo. 1994). By contrast, the Deputy Secretary may substitute his judgment for that of a hearing officer with respect to an ultimate conclusion of fact. See § 24-4-105(15)(b). Findings of ultimate fact involve a conclusion of law, or at least a mixed question of law and fact, and settle the rights and liabilities of the parties. *Reiff v. Colo. Dep't of Health Care Policy & Fin.*, 148 P.3d 355, 357 (Colo. App. 2006).

Interpretation of a regulation by the agency charged with its enforcement is generally entitled to deference and must be accepted if it has a reasonable basis in law and is warranted by the record. *Id.* at 358. The Deputy Secretary may also modify the initial decision, or any sanction or relief entered therein, in conformity with the facts and the law. § 24-4-105(15)(b); *see also Colo. Real Estate Comm'n v. Hanegan*, 947 P.2d 933, 936 (Colo. 1997) (holding that an agency is afforded wide discretion to modify an initial decision's recommended sanction within the parameters of its authority). The Deputy Secretary reviews questions of law and the application of law to undisputed facts de novo. *See Winter v. Indus. Claim Appeals Office*, 2013 COA 126, ¶¶ 7-8, 321 P.3d 609, 612.

IV. ANALYSIS

A. Mr. Dunagan failed to meet his burden to show the citizen complaint was untimely.

1. The AHO erred by concluding that the 180-day statute of limitations in Section 1-45-111.7(2)(b) is jurisdictional.

First, the Deputy Secretary turns to whether the AHO erred when he dismissed the Division's Complaint for lack of subject matter jurisdiction based on the AHO's conclusion that Ms. Campbell knew or should have known of Mr. Dunagan's violations more than 180 days before she filed her citizen complaint. ID at ¶¶ 61-65. In essence, the AHO treated the 180-day filing deadline not as a statute of limitation, but instead as a non-claim statute, that is, a legislative provision that "prohibits the initiation of litigation after the prescribed date and, therefore, is jurisdictional in effect." *Brown v. Walker Com., Inc.*, 2022 CO 57, ¶ 36, 521 P.3d 1014, 1022 (Colo. 2022).⁵

The AHO's treatment of section 1-45-111.7(2)(b) as a jurisdictional non-suit statute was plain error in this case because the Deputy Secretary, as the agency's final decision-maker on FCPA matters, has already determined that the 180-day timeline set forth in section 1-45-111.7(2)(b) is an affirmative defense, that is, not a jurisdictional provision to be established by the petitioner as part of a petitioner's case-in-chief, but rather an affirmative defense whose burden of proof rests squarely on a respondent to show that the limitation period expired before the underlying complainant filed her citizen complaint. See *In re Staiert*, ED No. 2020-30, at 16 ("To the extent Respondent argues that the statute of limitations started to run on an earlier date, Respondent had the opportunity to present a factual showing on this question, but she has failed to meet her burden of establishing the **affirmative defense**." (emphasis added), *aff'd*, Case No. 21-cv-31235 (Denver Dist. Ct. Feb. 6, 2023) (unpublished), *aff'd*, Case No. 23-CA-0501 (Colo. App. Mar. 21, 2024) (unpublished); see also *Crosby v. Am. Family Mut. Ins. Co.*, 251 P.3d 1279, 1283 (Colo. Ct. App. 2010) ("The argument that a claim is barred by a statute of limitations is an affirmative defense on which [the defending party] bears the burden of proof."); *Martinez v. Nash Finch Co.*, 2013 U.S. Dist. LEXIS 138351, at *14 [2013 WL 5400413] (D. Colo. Sept. 26, 2013) ("The Defendant

⁵ In *Brown*, the Court recited the test for distinguishing between a statute of limitation, which is not jurisdictional, and a non-claim statute, which is, and focused on whether the language of the statutory provision reveals a legislative intent to cut off the existence of a claim entirely or rather simply to allow for a defense to liability from the claim. See *id.*, 2022 CO 57 ¶ 37, quoting *Pub. Serv. Co. v. Barnhill*, 690 P.2d 1248, 1251 (Colo. 1984), and *LIMB Bank, N.A. v. Landmark Towers Ass'n*, 2017 CO 107, ¶ 27, 408 P.3d 836, 841 (Colo. 2017).

argues that the Plaintiffs' . . . claims are time-barred, and therefore judgment must enter in its favor on these claims. On this affirmative defense, the Defendant has the burden of proof.”).

The agency's statutory interpretation in *Staiert* is binding on the AHO because he is lower in the adjudicative hierarchy of the agency, where the FCPA dictates that the AHO's initial decisions are subject to review by the Deputy Secretary as the final agency decision maker. See § 1-45-111.7(6)(b) (“Any initial decision made by a hearing officer . . . is subject to review by the deputy secretary.”). “Interpretation of a regulation by the agency charged with its enforcement is generally entitled to great deference and must be accepted if it has a reasonable basis in law and is warranted by the record.” *Reiff*, 148 P.3d at 358. “It is commonly recognized that ALJs ‘are entirely subject to the agency on matters of law.’”) *Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993) (quoting Antonin Scalia, “The ALJ Fiasco--A Reprise,” 47 U. Chi. L. Rev. 57, 62 (1979)). “Once the agency has ruled on a given matter, [moreover,] it is not open to reargument by the administrative law judge; . . . although an administrative law judge on occasion may privately disagree with the agency's treatment of a given problem, it is not his proper function to express such disagreement in his published rulings or decisions.” Joseph Zwerdling, “Reflections on the Role of an Administrative Law Judge,” 25 Admin. L. Rev. 9, 12-13 (1973).

In this case, the agency responsible for interpreting the FCPA has already concluded that the 180-day statute of limitation in section 1-45-111.7(2)(b) is **not** jurisdictional, and is **not** a non-claim statute, *Brown*, 521 P.3d at 1021-22, and therefore, the AHO was bound and required to comply with that prior conclusion of law.⁶ Accordingly, the Deputy Secretary sets aside the AHO's decision to dismiss the action for lack of subject matter jurisdiction.

⁶ Even had the Deputy Secretary not already resolved any doubt about whether the 180-day period is a non-claim, jurisdictional statute, a textual analysis of the provision – section 1-45-111.7(2)(b) – demonstrates that it has none of the markers of a non-claim statute because there is no verbiage stating that the Secretary is “deprived of jurisdiction” or that a timely filing is a “condition precedent” to the existence of the claim, and as such, the provision cannot be treated as being jurisdictional. See, e.g., *Barnhill*, 690 P.2d at 1251; *UMB Bank, N.A. v. Landmark Towers Ass'n*, 2017 CO 107, ¶ 30, 408 P.3d 836 (Colo. 2017). Moreover, the Secretary's rules for formal administrative complaints in campaign finance matters do not impose a pleading burden on the Division to plead the timeliness of the underlying citizen complaint as an element of the Division's initial case-in-chief. Instead, the FCPA only requires that the Division plead and prove that it filed the formal administrative complaint within thirty days of issuing a notice of investigation under section 1-45-111.7(5)(a)(IV), something it did in this case. See Compl. ¶ 8,

2. The Deputy Secretary sets aside the AHO's ultimate conclusion that Ms. Campbell failed to timely file her citizen complaint.

Next, the Division contends that the AHO erred when he concluded that Ms. Campbell knew or should have known of the alleged violations for more than 180 days before filing her complaint. The purpose of a statute of limitations is to promote justice, avoid unnecessary delay, and prevent the litigation of stale claims. *Murry v. GuideOne Specialty Mut. Ins. Co.*, 194 P.3d 489, 491 (Colo. App. 2008). A campaign finance complaint “must be filed [with the Secretary’s Office] no later than one hundred eighty days after the date on which the complainant either knew or should have known, by the exercise of reasonable diligence, of the alleged violation.” § 1-45-111.7(2)(b). This administrative statute of limitation in section 1-45-111.7 follows Colorado’s civil discovery rule standard. See § 13-80-108(1). The discovery rule requires a fact-intensive analysis of the particular circumstances applicable to a particular complainant. See *Morris v. Goff*, 91 P.3d 1050, 1056-57 (Colo. 2004).

The moment in time when the statute of limitations begins to run, referred to as the “accrual” date, is the point when a person has “knowledge of the facts essential to the cause of action, not knowledge of the legal theory supporting the cause of action.” *Crosby*, 251 P.3d at 1285 (citing *Murry*, 194 P.3d at 492). In assessing a complainant’s knowledge, “[a]ctual knowledge’ is knowledge ‘of such information as would lead a reasonable person to inquire further.’” *Murry*, 194 P.3d at 492 (quoting *Black’s Law Dictionary* 888 (8th ed. 2004)). Additionally, complainants must exercise reasonable diligence in discovering the “triggering event or circumstance” of their campaign finance complaints. § 1-45-111.7(2)(b); *Sulca v. Allstate Ins. Co.*, 77 P.3d 897, 900 (Colo. App. 2003). The reasonable diligence requirement “imposes an objective standard and does not reward denial or self-induced ignorance.” *Sulca*, 77 P.3d at 900. Ultimately, Mr. Dunagan – as the party asserting the affirmative defense – bears the burden of proving the elements of the defense, *i.e.*, that Ms. Campbell knew or with the exercise of reasonable diligence should have known of the fact that Mr. Dunagan had failed to make accurate

disclosures of his contributions and expenditures.⁷ *Taheri*, 23CA0501 at ¶ 14 (quoting *Crosby*, 251 P.3d at 1283); see also Colo. Regs. 1505-6, Rule 24.10.2. Ms. Campbell filed the underlying citizen complaint on August 10, 2023. Hrg. Ex. 1. Mr. Dunagan therefore had the burden of proving that Ms. Campbell knew or should have known about his campaign finance violations on or before February 10, 2023.⁸

Here, in treating the statute of limitation issue as one of jurisdiction, the AHO seems to have placed the burden of proof fell on the Division, not Mr. Dunagan, for the question of when Ms. Campbell knew or should have known of the Mr. Dunagan's reporting failures, and in light of that erroneous allocation of the burden of proof, also erroneously concluded that Ms. Campbell "either knew or should have known" of Mr. Dunagan's violations for far longer than the 180 days that reached back to February

⁷ The Deputy Secretary concludes that it is unnecessary to ascertain whether Mr. Dunagan sustained his burden of proof for the statute of limitation as it might pertain to the Division's claim for violating the "paid for by" disclaimer requirements. Because Ms. Campbell never alleged a disclaimer violation in her underlying complaint, there was no occasion to determine whether she knew or reasonably should have known of the facts of those violations. As such, regardless of whether Mr. Dunagan carried his burden of proof with respect to the timelines of Ms. Campbell's claim of a contribution-reporting violation, the Division's claim based on its own investigation of the disclaimer violations could not be barred under section 1-45-111.7(2)(b).

The fact that the FCPA allowed the Division to add its disclaimer claim to its formal Administrative Complaint, pursuant to section 1-45-111.7(5)(a)(V), further buttresses the Deputy Secretary's conclusion, *supra*, that the FCPA's statute of limitation provision is not a jurisdictional non-suit statute. In particular, were that limitation provision to be jurisdictional, then the Division would have no power to "supplement[] or amend[]" a case to bring a timely claim when the underlying complainant's claim is untimely. *But see* § 1-45-111.7(5)(a)(V) (establishing that if the Division prosecutes a formal administrative complaint before a hearing officer, it is responsible for "supplementing or amending the complaint with such additional or alternative claims or allegations as may be supported by the division's investigation, amending the complaint to strike allegations or claims that are not supported by the division's investigation."). This legal authority to "strike" an untimely claim so long as there is a timely one in the case means that the limitation period for filing an initial citizen complaint cannot be jurisdictional. *See, e.g., Barnhill*, 690 P.2d at 1251.

⁸ Failure to plead an affirmative defense in a party's answer waives it. *See, e.g., Town of Carbondale v. GSS Properties, LLC*, 169 P.3d 675, 681 (Colo. 2007); 8 Code Colo. Regs. 1505-6, Rules 24.1, 24.3.1, 24.7.1; Colo. R. Civ. P. 8(b)-(c). Here, Mr. Dunagan waived the statute of limitations defense by failing to file an answer to the Administrative Complaint. Indeed, the failure to answer the Administrative Complaint could have been treated as a default by the Division, with the Division moving for a default judgment. *See* C.R.C.P. 55(a). The Division elected not to move forward with an entry of default, and instead, it effectively consented to trying its claims against Mr. Dunagan on the merits by appearing and litigating the case at the hearing.

Moreover, when an opposing party chooses to litigate the merits of an otherwise-waived, untimely affirmative defense, that party similarly waives the procedural objection it might have relied upon. *Town of Carbondale*, 169 P.3d at 679-80 ("[W]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.") (*citing* Colo. R. Civ. P. 15(b)). Because the Division did not object when Mr. Dunagan raised the statute of limitations defense for the first time at the hearing, the Deputy Secretary must analyze the merits of Mr. Dunagan's statute of limitations defense.

10, 2023. ID at ¶ 60. Because this finding constitutes one of ultimate fact, the Deputy Secretary may substitute his judgment for that of the hearing officer. See, e.g., § 24-4-105(15)(b); *McCroskey*, 880 P.2d at 1193. For reasons set forth below, there is a reasonable basis in law and substantial evidence in the record to set aside the AHO's determination that the underlying citizen complaint was untimely.

- a. There is insufficient evidence to show Ms. Campbell had actual knowledge of Mr. Dunagan's violations on or before February 10, 2023.

The Deputy Secretary first turns to whether Ms. Campbell had actual knowledge of Mr. Dunagan's violations more than 180 days before she filed her citizen complaint. Here, the only evidence regarding Ms. Campbell's actual knowledge of Mr. Dunagan's campaign finance violations are Ms. Campbell's written answers that she gave under penalty of perjury in response to the Division's requests, her citizen complaint, which also was signed, albeit not under penalty of perjury, and the testimony elicited at the hearing from the Division concerning its investigation. Hrg. Ex. 1; Hrg. Ex. B.⁹

Perhaps most importantly, Mr. Dunagan testified in his case-in-chief about Ms. Campbell's knowledge of his alleged violations. Mr. Dunagan testified, "I don't believe she *knew* I [SIC] or *thought* I did something wrong." TR 69:5-6 (emphasis added). Stated another way, Mr. Dunagan conceded he had no evidence that Ms. Campbell had *actual knowledge* of his campaign finance violations on or before February 10, 2023. It was unreasonable, therefore, for the AHO to infer in the face of Mr. Dunagan's own confession of Ms. Campbell's lack of actual knowledge that Ms. Campbell did indeed have actual knowledge of Mr. Dunagan's campaign finance violations. This point was undisputed by the parties – Ms. Campbell did not have actual knowledge for more than 180 days before filing her citizen complaint. Thus, in the face of this lack of dispute on the lack of actual knowledge, it was error for the AHO to infer otherwise, particularly without hard evidence to the contrary.

And there is no documentary evidence showing that Ms. Campbell had actual knowledge of Mr. Dunagan's violations more than 180 days before she filed the citizen complaint. In the citizen complaint,

⁹ It appears that the AHO faulted the Division for not calling Ms. Campbell as a witness. ID at ¶ 55(a). ("Complainant Majorie Campbell was listed as a "May Call" witness, but the Division chose not to call her as a witness at the hearing."); see also ID at ¶ 61 ("[The Division] argued in closing that the statute of limitations...is an affirmative defense on which Respondent has the burden of proof...But if the statute of limitations bars a claim, it deprives the court or agency of subject matter jurisdiction[.]"). As the AHO acknowledged, Mr. Dunagan could have called Ms. Campbell as a witness as well if he wanted. TR 13:15-23. Because *Mr. Dunagan* had the burden to prove that the citizen complaint was untimely, it was *his* responsibility to proffer sufficient evidence to support his affirmative defense.

Ms. Campbell wrote that she learned of Mr. Dunagan's violations in June 2023. Hrg. Ex. 1. In written requests for information, the Division asked Ms. Campbell to identify the "exact date" that she learned of the alleged violations, to which Ms. Campbell responded that she had "NO idea of EXACT dates or times for anything," but that she discovered the violations somewhere around the end of May 2023. Hrg. Ex. B at ¶ 1(a). Ms. Campbell had not specifically thought Mr. Dunagan violated campaign finance laws until she reviewed his TRACER filings around the end of May 2023. *Id.* at ¶ 1(c). Ms. Campbell explained that she looked up Mr. Dunagan's TRACER filings in May after talking with Ms. Riner, who was then considering filing a complaint of her own against Mr. Dunagan. *Id.* at ¶ 1(b). Ms. Campbell encouraged Ms. Riner to file the first complaint, which Ms. Riner eventually did on July 3, 2023. *Id.* at ¶ 4(b); *ID* at ¶ 55(c).

Finally, Timothy Gebhardt testified on behalf of the Division. TR 14:3-16:2. Mr. Gebhardt is the campaign and political finance enforcement manager for the Colorado Secretary of State's office. TR 15:21-16:2. Mr. Gebhardt manages a team that is tasked with reviewing, processing, and investigating campaign and political finance complaints. *Id.* As part of their investigation, Mr. Gebhardt's team determined Ms. Campbell became aware of Mr. Dunagan's violations in May or June of 2023. TR 28:25-29:25. The Division questioned Ms. Campbell about her knowledge of Mr. Dunagan's expenditures, and Ms. Campbell said she did not review any of his TRACER filings in 2022. TR 30:6-24. Rather, Ms. Campbell "was operating under the assumption that Mr. Dunagan had followed the regulations by reporting expenditures in the Tracer system[.]" *Id.*

In sum, the great weight of the evidence shows that Ms. Campbell did not have actual knowledge of Mr. Dunagan's violations more than 180 days before she filed the citizen complaint. The Deputy Secretary therefore concludes Mr. Dunagan failed to meet his burden to show that Ms. Campbell had actual knowledge of his campaign finance violations on or before February 10, 2023, and hereby sets aside the AHO's conclusions to the contrary.

- b. There is insufficient evidence to show Ms. Campbell should have known of Mr. Dunagan's violations on or before February 10, 2023.

The Deputy Secretary next turns to whether Ms. Campbell, through the exercise of reasonable diligence, should have known of Mr. Dunagan's violations on or before February 10, 2023. § 1-45-111.7(2)(b); *Sulca*, 77 P.3d at 900. Part of this analysis includes whether the Ms. Campbell was aware of facts on or before February 10, 2023, that would have prompted a reasonable person to investigate whether Mr. Dunagan had reported the contributions, such inquiry notice constituting what is known as constructive knowledge. See *Lombard v. Colorado Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571 (Colo. 2008).

With respect to constructive knowledge, the AHO seems to have rested his ultimate conclusions in large part on inferences he drew from the documentary evidence, *i.e.*, the written materials the parties submitted, which mostly centered on Ms. Campbell's written response to the Division's questions. See ID at ¶¶ 57-60. In particular, the AHO inferred that, because Ms. Campbell wrote that she had had multiple conversations with Ms. Riner after the 2022 primary, those conversations "certainly included Riners' contention that Mr. Dunagan had not reported the \$400 that they gave to his campaign [sic] March 22, 2022[.]" ID at ¶ 58. Notably, the Initial Decision does not identify when Ms. Campbell and Ms. Riner discussed Mr. Dunagan's possible violations. There is no dispute they discussed Mr. Dunagan's violations at some point—Ms. Campbell said as much in her written answers to the Division. Hrg. Ex. B at ¶ 1(b). The critical question is *when* these conversations occurred. A careful review of the record does not support an inference that these conversations occurred on or before February 10, 2023.

As the order of dismissal in ED No. 2023-18 explains, Ms. Riner became suspicious of Mr. Dunagan around December 19, 2022—the last day he worked for Ms. Riner. See "Order of Dismissal," *In re Dunagan*, ED No. 2023-18 at 4.¹⁰ Ms. Riner did not decide to review Mr. Dunagan's TRACER reports until after a discussion with acquaintances in April 2023 in which someone mentioned Mr. Dunagan did not report any contributions during his campaign. *Id.* Ms. Riner did not actually review Mr. Dunagan's TRACER reports until June 2023. *Id.* at 6.

It is entirely possible that Ms. Campbell and Ms. Riner did not speak about Mr. Dunagan's campaign finance violations until May or June 2023, and certainly long after February 10, 2023. And there

¹⁰ The AHO took notice of ED No. 2023-18 at the request of both parties. TR 97:8-14.

is no evidence in the record to suggest Ms. Campbell and Ms. Riner discussed Mr. Dunagan's violations after the June 2022 primary but before the November 2022 general election because Ms. Riner herself did not suspect anything until *after* the general election. See *id.* at 4. Again, it was Mr. Dunagan's burden to prove that Ms. Campbell's citizen complaint was untimely. Mr. Dunagan could have called either Ms. Campbell or Ms. Riner as witnesses to prove that their conversations took place more than 180 days before Ms. Campbell filed the citizen complaint. He did not.

Finally, the AHO appears to infer that Ms. Campbell had constructive knowledge of Mr. Dunagan's violations in part because she was also a candidate during the same election, albeit one who said she struggled with TRACER filings. See ID at ¶ 59 ("The inference is strong that when she was struggling with her own Tracer filings in 2022 that she would naturally have looked at the Dunagan Tracer filings to see what her opponent was doing and what he was reporting and who was giving to her opponent's campaign.").

A complainant's familiarity with campaign finance law and TRACER is an important factor to consider when analyzing constructive knowledge. See *In re Staiert*, ED 2020-30, Order of Remand, at 7-8. But it is too big of a leap to conclude that Ms. Campbell had an obligation to check Mr. Dunagan's TRACER filings just because the two were opponents in the general election. "The 'exercise of reasonable diligence' standard for purposes of the discovery rule requires that the complaining party 'act with some promptness where the facts and circumstances....[would] place a reasonable person of common knowledge and experience on notice that a claim *against another party might exist.*' *Taheri*, 23CA0501 at ¶ 19 (citing *Abrasives-South, Inc. v. Korte*, 226 F. Supp. 3d 584, 587 (D.S.C. 2016)) (emphasis added). Simply running for office does not place a person on notice that their opponent might be breaking the law. Creating a legal presumption of that sort would obligate candidates to assume the worst about their opponents without any evidence of wrongdoing. That presumption would give candidates an "obligation to continuously research candidate filings...without any notice or information concerning a possible violation." *Id.* at ¶ 18. Moreover, the Deputy Secretary concludes, based on the experience of the agency charged with campaign finance regulation, that it is simply unreasonable and unwarranted to expect that candidates for a down-ballot county office in a very small-population jurisdiction, where the total number of votes cast between them was less than 5,000 votes in the

aggregate, will have the inclination or the need to persistently monitor their adversary's TRACER account to find evidence of a campaign finance violation.

There must be something more to create inquiry notice or constructive knowledge of a possible campaign finance violation. Here, there is nothing in the record that was before the AHO about the specifics of the late-filing penalties that were levied against Ms. Campbell during her candidacy, including whether those penalties were waived.¹¹ See Hrg. Ex. B at ¶ 6. To the contrary, the evidence in the record reflects that the Ms. Campbell had little familiarity with TRACER requirements despite being a past candidate for office. In response to the Division's questions, she explicitly stated that she was "not at all familiar" with campaign finance laws and the complaint process. Hrg. Ex. B at ¶ 6. There is no evidence that Ms. Campbell had ever filed a campaign finance complaint before this one. Ms. Campbell said she was "not technologically gifted" and suggested that this may have been part of the reason for the prior penalties that initially had been levied against her. See *id.* Ms. Campbell said she "didn't have any to spend" on her own campaign because she was still financially recovering from a fire that destroyed her home in the previous year. *Id.* at ¶ 2(c). She did not expect to have to campaign because she "won any election I ever ran for." *Id.* And as Mr. Gebhardt explained in his testimony, Ms. Campbell was understandably operating under the assumption Mr. Dunagan was following the law. TR 30:6-24.

Consequently, the Deputy Secretary also sets aside the AHO's ultimate conclusion that Ms. Campbell had constructive knowledge of Mr. Dunagan's campaign finance violations more than 180 days before she filed the citizen complaint because that conclusion is contrary to the weight of the evidence.

¹¹ While not part of the record before the AHO at the hearing, Ms. Campbell's two late-filing penalties were both waived by the Secretary. See [TRACER – Waiver History](#). Indeed, in Ms. Campbell's second waiver request on December 10, 2022, she wrote, "I am an elderly person and I cannot navigate these various computer pages! as I've said before.....i will never run for a government office again! what a joke and just another way to grab money!!!" *Id.* This comment further buttresses the unreasonableness of any inference that Ms. Campbell had any knowledge of Mr. Dunagan's TRACER filings.

B. The Deputy Secretary adopts the AHO's findings of fact and conclusions of law regarding Mr. Dunagan's violations.

Although the Deputy Secretary sets aside the portions of the Initial Decision that found Ms. Campbell knew or should have known of Mr. Dunagan's campaign finance violations more than 180 days before she filed her citizen complaint, the Deputy Secretary does accept and adopt the AHO's findings of facts and conclusions of law regarding Mr. Dunagan's failure to report \$1,053.75 in contributions and expenditures. See ID at ¶¶ 42-50.

The AHO also concluded that Mr. Dunagan's electioneering communications, except the second set of yard signs that included a largely compliant "paid for by" disclaimer, violated section 1-45-108.3 by not including a required disclaimer. ID at ¶¶ 51-54. The Deputy Secretary notes that the underlying citizen complaint did not identify a missing or improper disclaimer as an alleged violation, but the Administrative Complaint did. *Compare* Hrg. Ex. 1, *with* Compl. at ¶¶ 33-39. It was appropriate for the Division to pursue that claim despite its absence from the citizen complaint because the Division is empowered to supplement or amend a formal complaint with additional claims as supported by the Division's investigation. See § 1-45-111.7(5)(a)(V). Consequently, the Deputy Secretary adopts the AHO's findings of fact and conclusions of law regarding Mr. Dunagan's failure to include required "paid for by" disclaimers. ID at ¶¶ 51-54.

V. SANCTION

Section 1-45-111.5(1) provides the Secretary with rulemaking authority "as may be necessary to enforce and administer any provision of [the FCPA]." As applicable here, the Secretary has exercised this authority by promulgating Rule 23.3, "Settlement of complaints and fine structure for violations." 8 CCR 1505-6, Rule 23.3. Because portions of Rule 23.3 speak directly to the violations at issue here, the Deputy Secretary finds it persuasive in guiding his discretion as to the appropriate penalty.

For failing to file complete and accurate reports, the rules suggest a fine of \$100 per report plus 5 percent of the activity not accurately reported. 8 CCR 1505-6, Rule 23.3.3(b)(1). If a person fails to mitigate a disclaimer violation prior to the election, the rules contemplate "a fine of at least 10 percent of the cost of the noncompliant communication including the cost to broadcast." 8 CCR 1505-6, Rule 23.3.3(d)(2). And finally, the state constitution's provision on campaign finance penalties specifies that for

any violation of any of the constitution's requirements, the penalty shall be "at least double and up to five times the amount contributed, received, or spent in violation of the applicable" constitutional provision. Colo. Const. Art. XXVIII, § 10(1).

Once the specific fine amount is determined, the following mitigating or aggravating factors are also considered:

- (a) Nature and extent of the violation;
- (b) Timing of the violation (including proximity to the election);
- (c) Ability or effort to mitigate the violation;
- (d) Evidence of an intentional act or a pattern or practice of misconduct;
- (e) Extent to which the harm cause[d] by the violation or the value of the violation cannot be reasonably calculated.

8 CCR 1505-6, Rule 23.3.5(a) – (e). The Rule further clarifies that "[o]ther aggravating or mitigating factors may be taken into consideration in reaching a just and equitable outcome." 8 CCR 1505-6, Rule 23.3.5(f).

Here, the AHO did not recommend a sanction. See *generally* ID. The Division recommends a sanction of at least \$600. Division's Exceptions at 10; see *also* TR 78:1-83:10. The Division's recommendation is based in part on an assumption that Mr. Dunagan spent \$1,500 on unreported, noncompliant communications. See CF, p. 72. The Division came to that number by assuming that Mr. Dunagan paid approximately \$400 on the water bottles and banners. See *id.*; see *also* ID at ¶ 45. The Deputy Secretary agrees with the AHO that it is improper to assume Mr. Dunagan spent \$400 on water bottles and banners without evidence to support the assumption.

Instead, the Deputy Secretary will begin the sanction analysis assuming Mr. Dunagan spent \$1,053.75 on noncompliant communications and that he accepted \$240.05 in campaign contributions that he failed to deposit in a separate bank account for his campaign. See ID ¶ 45. Per the guidance of Rule 23.3.3(d)(2), the Deputy Secretary concludes that the base amount for Mr. Dunagan's disclaimer violations is \$105.38. With respect to Mr. Dunagan's failure to file complete and accurate reports, the Deputy Secretary finds that Mr. Dunagan failed to file two reports accurately. See Hrg. Ex. 2; see *also* CF, p. 75. The Deputy Secretary declines to assume there was at least one additional inaccurate report, as the Division suggests. Per the guidance of Rule 23.3.3(b)(1), the Deputy Secretary concludes that the

base amount for Mr. Dunagan's failure to file two complete and accurate reports is an additional \$252.69. The base fine amount under the constitution for Mr. Dunagan's failure to establish a separate bank account for his campaign and to maintain the records of that account for use in the event of a complaint is at least another \$480.10 (two times the \$240.05 that Mr. Dunagan admitted he received in contributions that were deposited in his personal bank account). These amounts – \$105.38 + \$252.69 + \$480.1 – total up to a potential base fine amount of \$838.17.

The Deputy Secretary now turns to the mitigating and aggravating factors outlined in Rule 23.3.5 to determine the specific total penalty to be imposed. Particularly relevant here are the nature and extent of Mr. Dunagan's violations, Mr. Dunagan's ability or effort to mitigate the violations, evidence of a pattern or practice of misconduct, and the extent to which the value of the violation cannot be reasonably calculated. 8 CCR 1505-6, Rule 23.3.5(a), (c) – (e). The Deputy Secretary is struck by how challenging it is in this case to determine the true dollar amount of Mr. Dunagan's contributions and expenditures. It is clear based on the record that Mr. Dunagan had more contributions and expenditures than just \$1,053.75. See ID at ¶¶ 44, 46. But it is impossible to know with certainty the exact dollar amount of those contributions and expenditures because Mr. Dunagan did not cooperate with the Division's investigation, see ID at ¶ 47, and because it was discovered for the first time at hearing that Mr. Dunagan transferred contributions to his personal bank account. ID at ¶ 30. Failure to establish a separate bank account for Mr. Dunagan's candidate committee is a serious violation of the state constitution, which states:

All contributions received by a candidate committee, issue committee, political committee, small donor committee, or political party shall be deposited in a financial institution in a separate account whose title shall include the name of the committee or political party. All records pertaining to such accounts shall be maintained by the committee or political party for one-hundred eighty days following any general election in which the committee or party received contributions unless a complaint is filed, in which case they shall be maintained until final disposition of the complaint and any consequent litigation. *Such records shall be subject to inspection at any hearing held pursuant to this article.*

COLO. CONST. art. XXVIII, § 3(9). It is clear that the very purpose of this constitutional requirement is to ensure transparency, and indeed, to maintain a set of financial records for reference in the event there is an allegation of campaign finance violations. Mr. Dunagan should not benefit from a lower sanction simply because the true dollar value of his violations is obscured by his own stonewalling and commingling of funds.

As counsel for the Division aptly said during his closing summation at the hearing:

We also learned something new today that I think is particularly important and particularly troubling. We learned that Mr. Dunagan did accept contributions during his race for county coroner in 2022. Not only were those contributions not reported . . . Far more important than that, in our opinion, Your Honor, is that those contributions were comingled with Mr. Dunagan's personal funds. ***That is about as serious a campaign finance violation as there is.***

TR 80:9-19 (emphasis added).

Finally, the Deputy Secretary notes that not only does Mr. Dunagan currently hold an office of public trust, but it is one specifically charged with adherence to and execution of Colorado law. Mr. Dunagan's position imbues him not only with authority in his community, but also a responsibility to set an example of circumspect attentiveness to all of the obligations that the law imposes. Moreover, Mr. Dunagan also is the sitting chair of the county's dominant political party, and in this role, his conduct will reflect on all other members of his political party and on the candidates whom he may recruit or cultivate for his party. Because Mr. Dunagan has taken upon himself these significant responsibilities and is therefore an exemplar to his community, the Deputy Secretary must ensure that the penalty amount here is sufficient not only to deter Mr. Dunagan from future violations but also as vindication of the voters' mandate that in Colorado "the interests of the public are best served by . . . providing full and timely disclosure of campaign contributions . . . and strong enforcement of campaign finance requirements." COLO. CONST. art. XXVIII, §1.

Taking all mitigating and aggravating factors into account, the Deputy Secretary hereby concludes that a total penalty amount of \$1,250.00, which is approximately 1.5 times the base fine amount, is the just and appropriate amount to be levied for Mr. Dunagan's violations.

VI. CONCLUSION

For the reasons stated above, the Deputy Secretary enters this Final Agency Order adopting the Findings of Fact and Conclusions of Law set forth in the Initial Decision except as discussed above. The Deputy Secretary orders Mr. Dunagan to tender payment of a penalty of \$1,250.00 promptly upon service of this Final Agency Order.

{Attachment A – Initial Decision}

DONE and ORDERED this 31st day of May 2024.

CHRISTOPHER P. BEALL



Deputy Secretary of State

This decision becomes final upon electronic mailing.

Pursuant to section 24-4-105(14)(c), C.R.S., a party who has failed to file an exception to the AHO's initial decision is deemed to have waived their right to judicial review of the Final Agency Order except for those portions different from the content of the initial decision.

Any party may appeal the portions of the Final Agency Order that have modified the Initial Decision, including specifically, all or part of the fine imposed in this Order, by commencing an action for judicial review before the District Court in the City & County of Denver within thirty-five (35) days after the date of service of this Order. See §§ 1-45-111.7(6)(b) and 24-4-106(4), C.R.S.

In addition, the underlying citizen complainant also is entitled to seek judicial review of the Final Agency Order by a state district court under section 24-4-106(4). See § 1-45-111.7(5)(b), C.R.S.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this **FINAL AGENCY ORDER** was served on the following parties via electronic mail on May 31, 2024:

Peter Baumann, Senior Assistant Attorney General
Colorado Department of Law
Peter.baumann@coag.gov

Thomas Dunagan
Dunagan0916@gmail.com

Courtesy copy to Elections Division:
cpfcomplaints@coloradosos.gov

Courtesy copy to Administrative Hearing Officer:
AdministrativeHearingOfficer@coloradosos.gov

Courtesy copy to Complainant Marjorie Campbell
Nightnursemc50@yahoo.com

/s/ Christopher P. Beall
Deputy Secretary of State

ADMINISTRATIVE RECORD AND EXHIBITS

2. The Administrative Record consists of the pleadings in the Tracer file under docket No. ED2023-23¹ as well as those in the Administrative Hearing Officer Docket² on or before February 6, 2024. The Record also includes the 34 page pdf file containing the Division’s Exs. 1 through 7, the two separate pdf files with Respondent’s Exs. A and B, and the 8 page pdf file containing the Division’s demonstrative exhibits used in closing argument.

3. Without objection, the exhibits in the table below were admitted at the beginning of the hearing. The Division submitted Exs. 1-7 in a single pdf file of 34 pages. In the body of this Decision, I will refer to exhibit numbers and give the page number of the pdf to which the Decision refers.

Exhibit No.	Item
DIVISION’S EXHIBITS	
1	Marjorie L. Campbell Complaint of violations, pp. 1-18
2	Discovery responses, pp. 18-20
3	Facebook photos, pp. 21-26
4	Thomas Dunagan Committee Registration, Feb. 23, 2022, p. 27
6	Tracer Financial Summary for Thomas Dunagan Candidate Committee, p. 29
7	June 7, 2022 - Report of Contributions and Expenditures, Thomas Dunagan Candidate Committee, pp. 30-34
RESPONDENT’S EXHIBITS	
A	Elections Division Request for Information from Marjorie L. Campbell, Sept. 6, 2023
B	Marjorie Campbell’s response to the Division’s Requests, Oct. 11, 2023

¹ <https://tracer.sos.colorado.gov/PublicSite/SearchPages/ComplaintDetail.aspx?ID=845>

² Docket No. 2023-0021, Thomas Dunagan, Candidate Committee, <https://www.sos.state.co.us/pubs/elections/HearingOfficerDocket/index.html>

4. Respondent objected to Ex. 5, p. 28 of the pdf and not listed above. The Hearing Officer reserved ruling on the objection pending testimony to lay the foundation for its admissibility. The exhibit was not offered again during the hearing, so it was not admitted as evidence.

APPLICABLE LAW

5. This hearing was conducted in accordance with section 24-4-105 and section 1-45-111.7 6(a) and (b) of the Colorado Revised Statutes.

6. Pursuant to § 1-45-111.7(6)(a), C.R.S., this initial determination is subject to review by the Deputy Secretary of State for issuance of a final agency decision.

7. Campaign finance in Colorado is governed by Article XXVIII of the Colorado Constitution¹, Article 45 of Title 1 of the Colorado Revised Statutes, and the Secretary of State's Campaign & Political Finance ("CPF") Rules, 8 CCR 1505-6. These laws address contribution and spending limits, electioneering communications, various campaign finance registration, disclosure and disclaimer requirements, and prohibitions on certain kinds of campaign finance activities.

8. § 1-45-111.7 of the Fair Campaign Practices Act ("FCPA") sets forth Colorado's campaign finance complaint process. As required by the federal court in *Holland v. Williams*, No. 16-cv-00138-RM-MLC, 2018 U.S. Dist. LEXIS 245935, at *5 (D. Colo. June 29, 2018) no underlying citizen complaint alleging a violation of Colorado's campaign finance law may proceed without first undergoing the administrative review that is now specified in § 111.7 of the FCPA. Under § 111.7, the Division independently reviews citizen complaints and then determines whether to pursue its own charges before a hearing officer.

9. If the Division makes an initial determination that an underlying complaint alleges any violations that are curable, the Division is required to notify the respondent and provide an opportunity to cure. See § 1-45-111.7(3)(b)(II). If the Division determines that there is insufficient

evidence to support the alleged campaign finance violation, the Division must file a motion to dismiss the underlying complaint with the Deputy Secretary. See § 1-45-111.7(5)(a)(IV). The Division has no authority to dismiss an underlying complaint without approval from the Deputy Secretary.

10. **Statute of limitations.** Where the Division seeks sanctions against a candidate based on a citizen complaint of a violation of the FCPA, that citizen complaint must have been filed with the Secretary of State “no later than one hundred eighty days after the date on which the complainant either knew or should have known, by the exercise of reasonable diligence, of the alleged violation.” § 1-45-111.7(2)(b), C.R.S.

11. The Elections Division makes an initial determination about whether a complaint has been timely filed in its initial review under § 1-45-111.7(3)(a)(2)(I). However, if a complaint is untimely, the Secretary of State does not have subject matter jurisdiction to proceed with the case, because jurisdiction is conferred by the Colorado Constitution and Colorado statutes. *Isbam v. People*, 82 Colo. 550, 567-68, 262 P. 89, 96 (1927); *People v. Wilson*, 251 P.3d 507, 509 (Colo. App. 2010).

SUMMARY OF TESTIMONY

Timothy Gebhardt

Timothy Gebhardt gave the following testimony after first being duly sworn.

12. Mr. Gebhardt is the Campaign and Political Enforcement Manager in the Elections Division of the Colorado Secretary of State. He manages a team of three legal analysts who review and investigate complaints of violations of the Fair Campaign Practices Act. He explained in detail the process for investigating such complaints. The initial review is completed within ten days of receiving a citizen complaint. They investigate whether the complaint was timely, whether it alleges

violations of the Act and whether it alleges sufficient facts to support an inquiry about whether campaign finance violations have occurred.

13. If the team concludes that there has been a violation, they give the respondent an opportunity to cure. If the violation is not cured, then there is a further investigation phase that lasts 30 days during which the investigators decide about whether to move to dismiss the complaint or file a hearing officer complaint. In this case, they decided to file a hearing officer complaint.

14. Ex. 1 is Marjorie Campbell's initial complaint. When it was received, it went through an investigation process. This was the second complaint lodged against Thomas Dunagan for campaign finance violations. The first one was by Angela Reiner. That complaint was dismissed as untimely, following the factual investigation. But the Marge Campbell complaint was investigated. It appeared to be timely filed, it alleged violations of the Fair Campaign Practices Act, and it set forth the factual basis for those violations. The three criteria were met, so they offered Respondent a chance to cure.

15. Ex. 3 includes images taken from the Thomas Dunagan Facebook page. Tracer is the state campaign finance system and disclosure site. It is the system where candidates and committees file reports that are required by law.

16. Ex. 4 is the Thomas Dunagan candidate committee registration form. It lists Thomas Dunagan as the registered agent.

17. Ex. 6 is the candidate committee page which specifies the dates of reports made by the candidate. It shows no expenditures – zero – for 2022. Exhibit 7 is report of contributions dated June 7, 2022. It shows zero contributions and no expenditures.

18. The investigation team reviewed all the reports filed by Thomas Dunagan and they all showed zero expenditures and zero contributions.

19. The team concluded that the complaint was timely filed. Ms. Campbell said it was June 2023 when she first discovered the violation. The statute requires that citizen complaints be filed within 180 days of the time that the complainant knew or should have known about the violation. She became aware of the violation in May or June 2023, so the August 2023 complaint was timely.

20. The complainant ran for coroner against Thomas Dunagan. She was aware of Mr. Dunagan's campaign materials. But she did not retrieve Mr. Dunagan's Tracer filings in 2022.

21. The Enforcement Division received 100 complaints in 2023. Mr. Dunagan was somewhat difficult to deal with during the investigation phase. He did not reply to requests for information. Most respondents do cooperate with the Division. But Mr. Dunagan was noncompliant. Many cases that are filed are the result of a candidate or candidate, committees, honest mistakes, or difficulties that they have interpreting the rules.

22. Responding to Mr. Dunagan's questions, Mr. Gebhardt testified that his team reviews all the pertinent documents. He thinks he has seen Ex. A, the Elections Division September 26, 2023 letter to Complainant Marjorie Campbell asking a series of questions. He reviewed Ex. B., Marjorie Campbell's answers to those questions, during the cure phase—after the initial investigation. He acknowledged seeing ¶ 1(a) of Ex. B wherein Marge Campbell said she learned about potential violations at the end of May or the first of June. The witness' attention was drawn to ¶ 1(b) where, referencing the primary election that occurred in March 2022, Ms. Campbell says:

“I had talked with Angela Reiner and her husband on multiple occasions after Mr. Dunagan won in the primary, and I knew that they were filing a complaint.”

23. Mr. Gebhardt testifies that he interprets this to mean that Ms. Campbell learned of the violation of the campaign finance laws after the primary election. The Complainant said she had no reason to doubt that appropriate reporting had been done before that time.

24. Mr. Dunagan testified that according to Marge Campbell's Complaint [Ex. A] and her responses [Ex. B] to the questions from the Secretary of State, she learned about possible violations *after* the primary—which he points out was in March 2022.

25. Mr. Dunagan then read into the record Ms. Campbell's response in Ex. B., ¶ 2(c).

I hadn't thought specifically about him violating campaign finance laws, but I was in no way surprised. In fact, I have known him personally to be purposefully deceitful, conniving, and absolutely lying and dishonest. (i.e. anything from telling members of the community that he had already been appointed as the "Interim Prowers County Coroner", which was blatantly false, up to telling the community that he had asked me to stay on as a deputy for him (I had been a deputy for about 25 years), which is categorically denied!

26. On Ex. 7, he reported funds that he had on hand at the beginning of the reporting period: \$245.05.

27. The difficulty Mr. Gebhardt said that they had with Mr. Dunagan during the investigation phase was in getting responses from Mr. Dunagan to the investigators' requests for information. Yes, there was a first complaint filed by Ms. Riner, and Mr. Dunagan was more cooperative in responding to requests for information regarding that complaint. And Mr. Dunagan did complete a form indicating his intent to cure. But he did not cure.

28. Mr. Gebhardt does not know the final reporting date for 2022 without the elections calendar in front of him. He does not have an answer for whether Ms. Campbell should have known about any problems with his [Mr. Dunagan's] filings while she was making her own filings with the Secretary of State.

Thomas Dunagan

Thomas Dunagan gave the following testimony after first being duly sworn.

29. He is the elected Coroner of Prowers County. His responsibility is to determine the cause and manner of death of people in the jurisdiction. It is a part time position. He does have deputies that can fill those responsibilities when he is not available.

30. He announced his candidacy in February 2022. The primary election was March 7, 2022. On the Committee Registration form, Ex. 4, he listed himself as the Registered Agent and his wife Raelyn Dunagan as the filing agent. He was aware of the reporting duty, to report all campaign contributions. He did not know that he had to report expenditures of his own money for the campaign. He paid for yard signs from his personal bank account. His Candidate Committee had no bank account.

31. He ordered yard signs twice, made with two different designs. He ordered the second set with the disclaimer, but he can't find receipts indicating when that was or how much he paid. He also purchased post cards and two banners that were 4 ft. X 8 ft.

32. He also printed flyers using the printer that he and his wife have at home. Some of them were in color, and some were in black and white, like the one shown in Ex. 2 at p. 20 of the exhibit packet. He handed those out at Walmart and the rodeo. He is not sure how many of those he printed.



Ex. 3, p. 23 of the Election Division exhibit packet

33. The water bottles were a big hit with people. It is super-hot in southeast Colorado in the summer, so people liked being offered water. He and his wife printed out little labels on their printer at home and then stuck them on the water bottles.

34. He looked for receipts for expenditures and sent the investigators what he could find. Ex. 2, p. 18 is the receipt for \$920.00 that he spent for yard signs. The receipt is dated March 24, 2022, but he can't be certain if that was his first or second order of yard signs. One set of yard signs had no disclaimer and the other had the disclaimer "Paid for by Thomas Dunagan" and identifying his wife as the Registered Agent.

35. Ex. 2, p. 19 is a receipt for postcards: \$133.75.

36. He did display the yard signs and he distributed flyers right up to the election. Ex. 3, p. 26 is a photo from his Facebook page that shows both banners on display as of October 22, 2022. Postcards were on the table for people to take. He was unable to find receipts that indicate what he paid for the banners.

37. He did accept contributions to his campaign. The \$245.05 shown on Ex. 7 is the approximate total amount that he received as contributions to his campaign. The donations were received either in cash, or he put the money into his personal account.

38. Mr. Dunagan does intend to run for reelection as Coroner, or to run for some other office. He is the Chair of the Prowers County Republicans.

39. Mr. Dunagan testified that the Campbell complaint is untimely. The primary was March 2022. The first Complaint filed against him [ED2023-18] was filed by a funeral home operator who was afraid of losing business if he were elected. As for Marge Campbell, who ran against him for Coroner, she made a personal attack in her response, Ex. B, to the Division's questions.

40. Mr. Dunagan knows that he made mistakes in how he handled campaign contributions and expenses and he has learned a lot and will do better in the future.

41. Responding to additional questioning by the Assistant Attorney General, Mr. Dunagan says that the previous complaint was filed by Angela Riner in July 2023.

FINDINGS AND CONCLUSIONS

42. Thomas Dunagan was a candidate in two elections during 2022. The first was during the primary election in March 2022 in which he emerged as the Republican candidate for Prowers County Coroner; the second was the general election for that office in November 2022.

43. He announced his candidacy in February 2022 and duly filed the Thomas Dunagan Candidate Committee registration with the Colorado Secretary of State as required by law. Ex. 4. The registration listed himself as the Registered Agent and his wife Raelyn Dunagan as the Filing Agent.

44. He timely filed the other reports required of candidates, except that they all reported zero in contributions and zero in expenditures during that reporting period. He said that he thought he did not have to report the spending of his own money for the campaign. But he DID accept at least \$245.05 from others, indicated not as a contribution but as “Funds on Hand at the Beginning of Reporting Period” in the June 7, 2022 Report of Contributions and Expenditures, Ex. 7, p. 30. But whether this money was received in cash, transfer or checks he did not remember nor did he provide the Division with evidence based on bank records. Mr. Dunagan either pocketed the contribution or deposited it to his personal account.

45. The Division proved that Mr. Dunagan spent on his campaign for Coroner unreported amounts of at least \$920 plus tax on yard signs March 24, 2022 and \$133.75 on postcards June 6, 2022. In closing, the Division asked the Hearing Officer to assume that Respondent spent approximately \$400 on two banners and water bottles. I cannot do that without evidence, and there was none to support that assumption.

46. Mr. Dunagan spent \$920 for just one set of yard signs. Ex. 2. But there were two sets of yard signs that he ordered and paid for. The first set of 100 signs had no disclaimer at all (left below). The second set—how many yard signs we do not know—contained a disclaimer that incorrectly identified his wife Raelyn Dunagan as the Registered Agent (on the right below).



Detail from Ex. 3, p. 25 of the Election Division exhibit packet



Ex. 3, p. 21 of the Election Division exhibit packet

47. The Division characterized Mr. Dunagan as being non-responsive to their requests for information about how much he actually spent for various materials used in his campaign. Mr. Dunagan put on no evidence about why he would have any more difficulties accessing his bank account or credit card electronic records than anyone else. I take judicial notice of the wide availability and ease of customer access to credit card and bank records by customers with reasonable facility over the internet. C.R.E. 201. Mr. Dunagan has enough internet savvy to file Tracer reports online. Reasonable inferences from this are a) that Mr. Dunagan chose not to search bank and credit card records to obtain the information requested by the Division, and; b) withholding from the Division the amount that he spent for the second set of yard signs and the cost of the two banners was a conscious choice that he made.

Failures to report contributions and expenditures

48. The banners, yard signs, flyers printed at home and water bottles with “**VOTE Tommy Dunagan**” were all electioneering communications as defined by Colo. Const. art. xviii, §2(7) and §

1-45-103(9) of the FCPA. The evidence showed that yard signs were purchased March 24, 2022 and the postcards on June 6, 2022—between the primary March 7 and the general election November 8 for County Coroner in 2022.³ Mr. Dunagan spent more than \$1,000 on these electioneering communications.

49. Mr. Dunagan’s failure to report the expense of these electioneering communications was a violation of § 1-45-107.5(4)(a) of the FCPA and Campaign & Political Finance Rule 10.3, 8 Code Colo. Regs. 1505-6. There is no reporting exemption from this requirement for a candidate who spends his own money on these independent expenditures.

50. Mr. Dunagan’s failure to report contributions to his campaign, including his own contributions, is a violation of § 1-45-108(1).

- a. His failure to report contributions of twenty dollars or more is a violation of § 1-45-108(1)(a)(I).
- b. His failure to report contributions of two hundred fifty dollars or more (including his own) is a violation of § 1-45-107.5(4)(b)(I), which has additional reporting requirements as to donors making contributions at that scale.

Disclaimer requirement

51. § 1-45-107.5(5)(a) of the Fair Campaign Practices Act requires that a disclaimer be put on all electioneering communications.

³ The date of the primary was established by Mr. Dunagan’s testimony; the date of the general is taken from the Secretary of State’s 2022 Election Calendar available at <https://www.sos.state.co.us/pubs/elections/calendars/2022ElectionCalendar.pdf> (accessed Feb. 11, 2024)

52. Most of Mr. Dunagan’s campaign materials contained no disclaimer at all. The second set of yard signs, whose cost is unknown, contained the disclaimer “Paid for by Thomas



Image of Dunagan for Coroner yard sign taken from ¶ 20 of the Division’s Administrative Complaint

Dunagan Registered Agent Raelyn Dunagan.” The clearest image of the disclaimer in this set of yard signs is in the Admin. Compl. ¶ 20, a screen shot of which is shown to the left. The Division finds fault, Admin. Compl. ¶¶ 19-20 and ¶38, with that disclaimer because it failed to include the name of the actual Registered Agent, which Ex. 4 shows to be the candidate himself.

53. Section 1-45-107.5(5)(a)(II) requires the disclaimer to identify “a natural person who is the registered agent *if the person identified in subsection (5)(a)(I) is not a natural person.*” [Emphasis supplied.] The disclaimer did include “Paid for by Thomas Dunagan” and Thomas Dunagan, a natural person, is the name of the Candidate Committee. Ex. 4. I therefore do not read § 1-45-107.5(5)(a) to require disclosing a registered agent⁴ in addition to saying “Paid for by Thomas Dunagan” because the person identified as paying for the communication is a natural person. Disclosing Raelyn Dunagan as the registered agent was incorrect—she was the Committee’s Designated Filing Agent, Ex. 4—but I do not read the FCPA to impose sanctions for incorrectly identifying the registered agent where the registered agent did not have to be identified at all.

54. All the rest of Mr. Dunagan’s electioneering communications, except the second set of yard signs, violated § 1-45-108.3 by not including any part of the disclaimer required by 1-45-107.5(5)(a).

⁴ The registered agent for the Thomas Dunagan Candidate Committee was the very same Thomas Dunagan.

Timeliness of the initial complaint and subject matter jurisdiction

55. I have made the findings above with awareness that my decision is only the Initial Decision and that the final agency decision is made by the Deputy Secretary. I turn my attention now to a fundamental jurisdictional question: was the citizen complaint that initiated this case timely filed? To make that finding, I have considered the following evidence.

- a. Complainant Marjorie Campbell was listed as a “May Call” witness, but the Division chose not to call her as a witness at the hearing. So the evidence we have from her is limited to the sworn answers in response to the Division’s Requests, Oct. 11, 2023, Ex. B.
- b. Ms. Campbell was vague about when she learned of the alleged violations. “I have NO idea of EXACT dates or times for anything....It would have been somewhere around the end of May/first of June 2023, I suspect.” Ex. B, ¶ 1(a).
- c. Angela Riner filed an earlier Fair Campaign Practices Act (“FCPA”) complaint against Mr. Dunagan, ED2023-18, on July 5, 2023 that the Deputy Secretary dismissed as untimely. Ms. Campbell states that Mr. Dunagan used to work for Angela Riner and her husband, and she intimates that there were bad feelings between Complainant Riner and Mr. Dunagan. Ex. B, ¶ 4(b). Ms. Campbell said she encouraged Ms. Riner, owner of a mortuary in Lamar, to file the earlier complaint against Mr. Dunagan. *Ibid.*
- d. Ms. Campbell was herself a candidate for the office of Coroner. She ran as an Independent and struggled with her own Tracer filings. “I kept getting [my Tracer filings] wrong ...and getting fined, but at least I TRIED!!” Ex. B, ¶ 6. There was a lot of animus between Ms. Campbell and Mr. Dunagan that went beyond their just

ving for the same elected office, as expressed in Ex. B, ¶ 1(c). Asked when she first looked at Respondent’s Tracer filings, she responded, “I have no idea.” Ex. B, ¶ 3(a) and (b).

- e. Asked by the Division what occurred to make her aware of potential violations, Ms. Campbell responded:

“I had talked with Angela Reiner and her husband on multiple occasions after Mr. Dunagan won in the primary, and I knew that they were filing a complaint. So when I looked it up, and saw Mr. Dunagan had reported NOTHING, I decided it might perhaps convince you to look into this man ... in depth!”

Ex. B., ¶ 1(b).

56. The FCPA has a very short statute of limitations. Citizen complaints must be filed with the Secretary of State “no later than one hundred eighty days after the date on which the complainant either knew or should have known, by the exercise of reasonable diligence, of the alleged violation.” § 1-45-111.7(2)(b), C.R.S. The Campbell Complaint was filed August 10, 2023. The Complaint is timely if Ms. Campbell knew or had reason to know of potential violations anytime on or after February 11, 2023.

57. As fact finder, I am not bound to accept as dispositive the assertion of Complainant that she learned of the violation “somewhere around the end of May/first of June 2023, I suspect.” Ex. B, ¶ 1(a). I can “properly consider any reasonable inferences and circumstances tending to weaken or discredit such evidence.” *Weingarten v. Bd. of Assessment Appeals*, 876 P.2d 118, 121 (Colo. App. 1994). As fact finder, it is my duty to determine the credibility of witnesses and exhibits, weigh the evidence, and resolve conflicts, inconsistencies, and disputes inherent in the evidence. *People v. Bernard*, 2013 COA 79, ¶ 16, 305 P.3d 433, 435-36. It is for the fact finder to make “inferences and

conclusions drawn from conflicting evidence.” *Olson v. Hillside Cmty. Church Sbc*, 124 P.3d 874, 877 (Colo. App. 2005).

58. Ms. Campbell acknowledges having a hand in ginning up the Riner Complaint, ED2023-18, against Mr. Dunagan—a complaint that the Secretary dismissed as untimely. The Riners owned a mortuary that might lose business if Candidate Dunagan became Coroner Dunagan. Competing for the Coroner’s job was Candidate Campbell. Ms. Campbell discussed possible violations by Dunagan with the Riners “on multiple occasions after Mr. Dunagan won the primary”—which was held in March 2022, not March 2023. Furthermore, the Complainant acknowledges having encouraged the Riners to file a complaint against Mr. Dunagan. The discussions she had with the Riners certainly included Riners’ contention that Mr. Dunagan had not reported the \$400 that they gave to his campaign March 22, 2022, Admin. Compl. ¶ 13, because that was the basis of the Riner complaint in ED2023-18.

59. Furthermore Ms. Campbell had struggles of her own in making the required filings with the Secretary of State’s office and was fined a couple of times for missteps. And she knew during the leadup to the election that Mr. Dunagan was using campaign paraphernalia, because he posted photos of them on his Facebook page, and she was a friend of his on Facebook. Ex. B, ¶ 2(A) and (b). In addition, she didn’t like Mr. Dunagan, describing him as “deceitful, conniving, ...lying and dishonest.” Ex. B, ¶ 1(c). The inference is strong that when she was struggling with her own Tracer filings in 2022 that she would naturally have looked at the Dunagan Tracer filings to see what her opponent was doing and what he was reporting and who was giving to her opponent’s campaign.

60. Taking the findings set forth above and considering all the evidence, weighing each piece against the others, I find that Ms. Campbell either knew or should have known, by the exercise

of reasonable diligence, of the alleged violation” by Mr. Dunagan of the FCPA more than 180 days prior to her filing the Complaint, Ex. 1, on August 10, 2023.

61. Counsel for the Division argued in closing that the statute of limitations—i.e., whether the initial Complaint was timely filed—is an affirmative defense on which Respondent has the burden of proof. It certainly is listed with other affirmative defenses in C.R.C.P. 8(c) that ought to be “set forth affirmatively” either in answer to a complaint or in a Rule 12 motion to dismiss. But if the statute of limitations bars a claim, it deprives the court or agency of subject matter jurisdiction, which is conferred by the Colorado Constitution and Colorado statutes enacted by the General Assembly. *Isbam v. People*, 82 Colo. 550, 567-68, 262 P. 89, 96 (1927); *People v. Wilson*, 251 P.3d 507, 509 (Colo. App. 2010).

62. In this case, subject matter jurisdiction of the Secretary of State to hear an Administrative Complaint is conferred by the FCPA and particularly by §§ 1-45-111.5(1)(a) and 1-45-111.7, C.R.S. The jurisdiction of the Secretary to investigate and pursue sanctions for violations of the FCPA is conditioned on the initial complaint being filed “no later than one hundred eighty days after the date on which the complainant either knew or should have known, by the exercise of reasonable diligence, of the alleged violation.” § 1-45-111.7(2)(b), C.R.S.

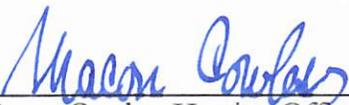
63. “Subject matter jurisdiction concerns a court's authority to hear and rule on a certain class of cases and is conferred by the state constitution and statutes. *See People ex rel. K.W.*, 317 P.3d 1237, 2012 COA 151, ¶ 10. A challenge to a court's subject matter jurisdiction is not waivable and may be raised at any time. *Herr v. People*, 198 P.3d 108, 111 (Colo. 2008). If a court does not have subject matter jurisdiction, it is deprived of any authority to act from the outset of the case. *People v. Martinez*, 350 P.3d 986, 2015 COA 33, ¶ 30.” *People ex rel. C.N.*, 2018 COA 165, ¶ 15, 431 P.3d 1219, 1223. Because a lack of subject matter jurisdiction means that a court has no power to hear a case or

enter a judgment, it is an issue that may be raised at any time. *Currier v. Sutherland*, 218 P.3d 709, 714 (Colo. 2009).

64. C.R.C.P. 12(h)(3) puts the matter emphatically: “Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”

65. Accordingly, having found that the initial complaint of Ms. Campbell was filed more than 180 days after she knew or should have known of a potential violation, the Division’s Administrative Complaint in this matter must be, and the same hereby is, dismissed.

DONE this 13th day of February 2024.



Macon Cowles, Hearing Officer