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Secretary of State

BEFORE THE SECRETARY OF STATE
STATE OF COLORADO

CASE NO. OS 2009-0001

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY COLORADO ETHICS WATCH
REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY
COLORADO LEAGUE OF TAXPAYERS**

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon the complaint of Colorado Ethics Watch (CEW) that Colorado League of Taxpayers (CLT) violated the reporting laws relating to electioneering communication spending.

The Secretary of State received CEW's complaint February 20, 2009. Pursuant to Colo. Const. art. XXVIII, § 9, the Secretary forwarded the complaint to the Office of Administrative Courts for hearing. Hearing was initially set for March 5, 2009, but continued upon CLT's request and reset by agreement of the parties for April 15, 2009. Hearing was held that date at the Office of Administrative Courts. Luis Toro, Esq. represented CEW. Scott E. Gessler, Esq., Hackstaff Gessler, LLC, represented CLT.

Issues

CEW alleges that CLT produced two flyers mailed to voters in Garfield County opposing Steve Carter's bid to be elected County Commissioner. The pieces were mailed within the 60 days preceding the November 2008 general election, and therefore constituted "electioneering communications" within the meaning of Article XXVIII of the Colorado Constitution. CLT paid the invoice for production and mailing of the mail pieces, but did not report that spending to the Secretary of State as required by Article XXVIII, § 6 and § 1-45-108(2), C.R.S. of the Colorado Fair Campaign Practices Act.

CLT does not deny that it violated the law in the manner alleged by CEW, and filed a Confession of Judgment which the ALJ accepted. Therefore, CLT's violation of the law as alleged in CEW's complaint has been established. The issue remains what sanction should be imposed for that violation.

For reasons explained below, the ALJ imposes a civil penalty of \$7,150.

Findings of Fact

The relevant facts are established by the allegations in the complaint, as admitted by the Confession of Judgment. They are:

1. CLT is a Colorado nonprofit corporation.
2. Sometime between the 5th and 18th of September, 2008, CLT caused to

be mailed to voters in Garfield County, Colorado, two flyers unambiguously referring to Steve Carter and opposing his election to the office of Garfield County Commissioner.

3. The general election was held November 4, 2008.
4. Production and mailing of the Carter mail pieces cost just under \$2,400.
5. CLT paid for the Carter mail pieces by an undated check processed on September 19, 2008.
6. The mail pieces constituted electioneering communications under Colorado law.
7. Any person who spends \$1,000 or more on electioneering communications within a calendar year must report such spending to the Secretary of State.
8. CLT is a "person" within the meaning of state law and was therefore required to file an electioneering report, but failed to do so.
9. CLT's electioneering report was due September 29, 2008. As of the date of CEW's complaint, dated and filed February 20, 2009, CLT had not filed the required report.

Discussion and Conclusions of Law

Colorado's Campaign Finance Laws

The primary campaign finance law in Colorado is Article XXVIII of the Colorado Constitution, which was approved by the people of Colorado in 2002. Article XXVIII imposes contribution limits, encourages voluntary spending limits, imposes reporting and disclosure requirements, and vests enforcement authority in the Secretary of State. Colorado also has statutory campaign finance law, known as the Fair Campaign Practices Act (FCPA), §§ 1-45-101 to 118, C.R.S., which was originally enacted in 1971, repealed and reenacted by initiative in 1996, substantially amended in 2000, and again substantially revised by initiative in 2002 as the result of the adoption of Article XXVIII. The Secretary of State, pursuant to regulations published at 8 CCR 1505-6, further regulates campaign finance practices.

Electioneering Communication Reports

Colo. Const. art. XXVIII, § 6 requires that:

Any person who expends one thousand dollars or more per calendar year on electioneering communications shall submit reports to the secretary of state in accordance with the schedule currently set forth in 1-45-108(2), C.R.S. ... Such reports shall include spending on such electioneering communications, and the name, and address, of any person that contributes more than two hundred and fifty dollars per year to such person described in this section for an electioneering communication. In the case where the person is a natural person, such reports shall also include the occupation and employer of such natural person. The last

such report shall be filed thirty days after the applicable election

“Person” is defined by § 2(11) to include any “committee, association, corporation ... or other organization or group of persons,” and therefore includes CLT. Section 2(7)(a) defines an “electioneering communication” as:

any communication broadcasted by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences or otherwise distributed that:

- (I) Unambiguously refers to any candidate; and
- (II) Is broadcasted, printed, mailed, delivered, or distributed within thirty days before a primary election or sixty days before a general election; and
- (III) Is broadcasted to, printed in a newspaper distributed to, mailed to, delivered by hand to, or otherwise distributed to an audience that includes members of the electorate for such public office.¹

CLT admits that the Carter mail pieces were electioneering communications that had to be reported as required by Article XXVIII, § 6 and § 1-45-108(2). The parties agree that CLT’s report was due September 29, 2008, but it was not filed. CLT is thus in violation of the reporting requirements of Article XXVIII, § 6 and § 1-45-108(2).

Sanction

Article XXVIII, § 9(2)(a) directs the ALJ to enter “any appropriate order, sanction or relief authorized” by that article. The presumptive sanction for violation of reporting requirements, authorized by § 10(2)(a), is a penalty of \$50 per day for each day a required report is not filed.

CLT’s report of its electioneering communication spending was due September 29, 2008, but was not filed. Therefore the \$50 per day sanction begins the following day, September 30, 2008. Although CEW argues that CLT still had not filed the required report as of the day of trial, no evidence was offered to prove that assertion. As the proponent of an order imposing a penalty, CEW bears the burden of proving the period over which the violation occurred. See § 24-4-105(7), C.R.S. of the Colorado Administrative Procedure Act, as applied by Colo. Const. art. XXVIII, § 9(1)(f). The Confession of Judgment establishes only that CLT failed to file the required report through the date of CEW’s complaint, February 20, 2009. The period of violation established by the complaint and Confession of Judgment is therefore 143 days (September 30, 2008 to February 20, 2009). The authorized, and presumptive, civil penalty for this period is \$7,150 (143 days x \$50 per day).²

¹ Secretary of State regulation 8 CCR 1505-6, Rule 9.4 adds a requirement that the communication be susceptible to “no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” The Carter mail pieces meet this additional test.

² The ALJ rejects CLT’s alternative argument that the period of the fine should be limited by the 180-day complaint filing deadline of Article XXVIII § 9(2)(a). That provision prohibits the filing of stale complaints, but does not limit a respondent’s liability for failing to file a timely report to just 180 days.

The ALJ has discretion to reduce the penalty if appropriate. *Patterson Recall Committee, Inc. v. Patterson*, No. 08CA0662 (Colo. App. April 16, 2009), ___ P.3d ___ (Colo. App. 2009). CLT argues that it is appropriate to reduce the presumptive penalty because it is an unsophisticated organization with limited resources. However, it offered no evidence to support that contention.³ It also argues that it should be given consideration for its Confession of Judgment, which promotes judicial economy. Though CLT's Confession of Judgment is worthy of consideration, the ALJ does not find it sufficient justification in this case to deviate from the presumptive civil penalty. The appropriate penalty is the presumptive penalty of \$7,150.

Agency Decision

Colorado League of Taxpayers violated the reporting requirements of Colo. Const. art. XXVIII, §6 and § 1-45-108, C.R.S. of the FCPA by failing to file a report of its electioneering activities opposing the election of Steve Carter. A penalty of \$7,150 is imposed against CLT for this violation. The Committee shall remit the penalty to the Secretary of State within 30 days of the issuance of this decision.

Done and Signed

April 24, 2009



ROBERT N. SPENCER
Administrative Law Judge

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³ The ALJ takes judicial notice that CLT was the respondent in a prior matter before the Office of Administrative Courts wherein CLT was found to be in violation of electioneering communication reporting requirements involving a similar mail piece. CLT is therefore not a stranger to this issue. See Case No. OS 2008-0026, Agency Decision dated Sept. 19, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

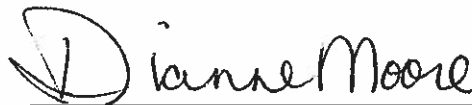
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William Hobbs
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on this 27 day of April 2009.



Court Clerk