STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17th Street, Suite 1300 Denver, Colorado 80202	
THOMAS CAVE Complainant, **v.** **ANNE MCGIHON,** Respondent.	▲ COURT USE ONLY ▲ **CASE NUMBER:** **OS 20120010**
AGENCY DECISION	

This matter is a complaint pursuant to Colo. Const. art. XXVIII, sec. 9(2)(a) and the Fair Campaign Practices Act ("FCPA"), Section 1-45-101, C.R.S. *et seq.* Jessica K. Peck, Esq., appeared on behalf of the Complainant and Mark G. Grueskin, Esq., appeared on behalf of the Respondent.

Background

The complaint and supplemental complaint

On March 2, 2012, the Office of Administrative Courts ("OAC") received a complaint by the Complainant forwarded from the Secretary of State. The complaint asserted that the Respondent, whom he identified as a registered lobbyist, permitted herself to be listed as a "host" for a March 11, 2012 fundraiser for Dianne Primavera, a Colorado House of Representatives candidate. He further asserted that the General Assembly was in session and that Respondent's conduct was prohibited by Section "1-45-1-5.5(1)(a)," C.R.S. This will be referred to as "claim 1." No "contribution" was identified and the complaint sought no sanction.

On March 5, 2012, Richard Walker, a paralegal with the OAC, wrote to the Complainant's counsel on behalf an administrative law judge ("ALJ") of the OAC, not the undersigned. The letter asked the Complainant to confirm that his citation to "1-45-1-5.5(1)(a)" referred to "1-45-105.5(1)(a)." The letter also asked the Complainant to clarify the OAC's jurisdiction. The question likely arose because subsection 105.5 is not one of subsections of the FCPA set out at art. XXVIII, sec. 9(2)(a) for review by an ALJ.

Subsection 105.5 provides in pertinent part:

> (1)(a) No professional lobbyist ... shall make or promise to make a contribution to, or solicit or promise to solicit a contribution for:
>
> (I) A member of the general assembly or candidate for the general assembly, when the general assembly is in regular session;

On March 15, 2012, the Complainant and Ms. Peck responded. They confirmed that Section 1-45-105.5(1)(a) was meant. They also gave Section 1-45-111(1.5)(a) as authority for an ALJ to hear the case. That subsection provides for ALJ review of any violation of "this article," article 45 of title 1:

> (a) Any person who believes that a violation of ... this article has occurred may file a written complaint with the secretary of state .... The complaint shall be subject to all applicable procedures specified in section 9 (2) of article XXVIII of the state constitution.

In their response, the Complainant and Ms. Peck added a "supplemental facts to original allegations." These supplemental facts alleged a second violation ("claim 2"). This claim regarded the Respondent allegedly co-sponsoring a February 2012 fundraiser for the Colorado Democratic Party's "House Majority Project." The original complaint had touched on this fundraiser but did not fully assert it as an allegation of wrongdoing. The supplemental facts made explicit that the Complainant was alleging that the Respondent's conduct in relation to this February 2012 fundraiser was also a violation.

The motion to dismiss

A hearing was held in this matter July 20, 2012. At the hearing, counsel for Respondent orally moved to dismiss the complaint. He argued that because no "contribution" (as defined at Section 1-45-103(6), C.R.S.) was identified and no penalty sought, the complaint should be dismissed per C.R.C.P. 12(b)(5), failure to state a claim upon which relief could be granted. No evidence was taken at that hearing. A briefing schedule was agreed to with the parties and they made written submissions.

Section 1-45-111.5(1.5)(b) provides for ALJ review of any violation of "this article" not listed in art. XXVIII, sec. 9(2)(a).

> (b) Any person who commits a violation of ... this article that is not specifically listed in section 9 (2) (a) of article XXVIII of the state constitution shall be subject to any of the sanctions specified in section 10 of article XXVIII of the state constitution or in this section.

Section 10 of article XXVIII in turn provides:

> (1) Any person who violates any provision of this article relating to contribution or voluntary spending limits shall be subject to a civil penalty of at least double and up to five times the amount contributed, ...
>
> (2) (a) The appropriate officer shall impose a penalty of fifty dollars per day for each day that a statement or other information required to be filed pursuant to section 5, section 6, or section 7 of this article, or sections 1-45-108, 1-45-109 or 1-45-110, C.R.S., or any successor sections, is not filed by the close of business on the day due.

Respondent's motion argued that because there was no "contribution," (as defined at Section 1-45-103(6), C.R.S.) there was nothing to multiply two to five times per section 10(1). Nor was there, per the motion, any "statement or information required" that would subject the Respondent to the $50 per day penalty.

In an order dated August 14, 2012, the ALJ determined that the argument had the effect of making the "promise to make a contribution to, or solicit or promise to solicit a contribution" language in Section 1-45-105.5(1)(a) unenforceable. The ALJ determined that the hearing could go forward for the purpose of simply establishing that the Respondent had engaged in the prohibited conduct. The motion to dismiss was therefore denied and a hearing was held October 1, 2012, courtroom 4.

The hearing and the motion for attorney fees

Following the presentation of the Complainant's evidence, the Respondent again moved to dismiss both claims 1 and 2, and that motion was granted. Respondent's counsel requested an opportunity to file a motion for attorney fees and to have an evidentiary hearing regarding that motion. A briefing schedule was agreed to and an evidentiary hearing was later scheduled for December 11, 2012.

The Respondent filed her motion for attorney fees and costs October 12, 2012. The Complainant filed his response November 1, 2012.

Findings of Fact

Based upon the evidence presented at the hearings, the ALJ makes the following findings of fact:

Findings of fact related to the alleged violations by the Respondent

1. The Respondent Ann McGihon was a professional lobbyist as defined in Section 24-6-301(6), C.R.S.

2. The Colorado General Assembly was in session in February 2012.

3. As of November 30, 2011, Dianne Primavera was a candidate for the office of state representative in the 2012 election.

4. At some point in time, there was an email for a Dianne Primavera fundraiser. The email is not in evidence.

5. At some point in time prior to March 4, 2012, there was an invitation to an event in support of Ms. Primavera's legislative bid. The invitation may or may not have been the same as the email. The invitation is not in evidence.

6. The Respondent's name was used with her permission on the invitation. She later asked for her name to be removed from the invitation.

7. There is no evidence that the Respondent co-sponsored a February 2012 fundraiser for the Colorado Democratic Party's "House Majority Project."

8. There is no evidence that the Respondent made or promised to make a contribution, or solicited or promised to solicit a contribution for a member of the General Assembly or a candidate for the General Assembly, when the General Assembly was in regular session.

Findings of fact related to the request for attorney fees

9. At the hearing, the Complainant sought to have admitted as evidence exhibit D. Exhibit D was not admitted as evidence and its content is discussed only as it relates to the issue of attorney fees. Exhibit D appears to be an email invitation from Dianne Primavera for a reception to benefit "Primavera for HD-33." It appears as an attachment to a document, apparently a blog post, titled: "house Dems host illegal fundraiser." The Complainant only sought admission of the attachment, the invitation, and not the blog post to which it is attached. The copy of exhibit D in the record (but not admitted) has the blog post portion crossed out.

10. On the invitation the Respondent is identified as a "host," a member of the "Host committee" and as "Former Rep. Anne McGihon." The invitation goes on to provide: "Host: $250 Co-Host: $175 Friend: $100 Guest: $50 (Suggested)." Whether all amounts were "Suggested" or just the $50 for "Guest" is not clear from the invitation.

11. The Complainant did not offer exhibit D through the Respondent. Exhibit D was offered through a Shawn Coleman, whose testimony was that he had seen a copy of a similar email invitation. Ms. Primavera was not called as a witness to identify the invitation. The ALJ denied Complainant's motion to admit exhibit D into evidence.

12. The Complainant also sought to introduce a copy of a newspaper article, exhibit E. The exhibit was not admitted and again is discussed here only as it relates to the request for attorney fees. The article, dated March 4, 2012, concerned the Complainant's complaint against the Respondent and contained the following passage:

> McGihon, when reached by e-mail Wednesday afternoon, said she had withdrawn her name as a host of the fundraiser and said she has not personally given any money to Primavera's campaign.

> "As a former legislator, I mistakenly lent my name to an event. I regret this technical error, which happened because I believe in electing more strong women to the state Legislature," McGihon said in statement [sic] issued Wednesday.

13. At hearing, the Respondent denied making a spoken statement to the reporter, Joe Rubino, the apparent author of exhibit E. She was not asked about any written "statement issued Wednesday." The reporter was not called as a witness and no "statement issued Wednesday," if it exists, was offered. The ALJ denied Complainant's motion to admit exhibit E into evidence.

14. The Complainant presented no evidence in support of claim 2 regarding the Respondent co-sponsoring a February 2012 fundraiser for the "House Majority Project." Complainant's counsel acquiesced to the Respondent's motion to dismiss this aspect of the complaint following the presentation of Complainant's evidence at the October 1, 2012 hearing. Complainant's counsel did not affirmatively move to dismiss this aspect of the complaint herself and so it was not voluntarily dismissed as described in Section 13-17-102(5), C.R.S.

15. The Complainant and his counsel used none of the discovery techniques described at C.R.C.P. 26 through 36 in order to obtain information regarding his complaint. There was sufficient time to do so between the time of the complaint in early March and the hearing October 1. At no time prior to the filing of the complaint or afterwards did the Complainant or his counsel contact the Respondent personally, or through counsel once she was represented, to find out if the statements in the blog post or the newspaper article were true. At no time prior to the filing of the complaint or afterwards did the Complainant or his counsel make any request, formally or otherwise, for documents from the Respondent. At no time prior to the filing of the complaint or afterwards did the Complainant or his counsel make any attempt to contact Ms. Primavera or her campaign regarding any of the matters at issue in this case. At no time prior to the filing of the complaint or afterwards did the Complainant or his counsel make any attempt to contact persons associated with the House Majority Project, related to claim 2. The Respondent has not learned of any attempt by anyone, other than persons working on her defense, to obtain information regarding the facts alleged in the complaint in this matter.

16. The Respondent has incurred $17,712.38 in attorney fees and costs to defend this action. This total is set forth in exhibit 2. The reasonableness of these expenses is undisputed. The Complainant presented no evidence or argument that these expenses were excessive or unreasonable. The expenses are found to be reasonable.

17. Although notice of the December 11, 2012 hearing was sent to her, Complainant's counsel had the date wrong and believed the hearing was the following day. This resulted in having to reschedule the hearing from 9:00 a.m. to 2:30 p.m. The

Respondent incurred an additional expense of $400 in attorney fees as a result of this delay.

Conclusions of Law

Based upon the foregoing findings of fact, the ALJ enters the following conclusions of law:

Conclusions of law related to the alleged violations

1. In his original and supplemental complaint, the Complainant alleged that the Respondent violated the provision of Section 1-45-105.5(1)(a)(I), which again provides:

> No professional lobbyist ... shall make or promise to make a contribution to, or solicit or promise to solicit a contribution for:
>
> (I) A member of the general assembly or candidate for the general assembly, when the general assembly is in regular session;

2. The allegations relate to the March 2012 fundraiser (claim 1) for Dianne Primavera as well as the February 2012 fundraiser for the Colorado Democratic Party's "House Majority Project" (claim 2).

3. Again, Section 1-45-111.5(1.5), C.R.S. provides:

> (a) Any person who believes that a violation of ... this article has occurred may file a written complaint with the secretary of state .... The complaint shall be subject to all applicable procedures specified in section 9 (2) of article XXVIII of the state constitution.
>
> (b) Any person who commits a violation of ... this article that is not specifically listed in section 9 (2) (a) of article XXVIII of the state constitution shall be subject to any of the sanctions specified in section 10 of article XXVIII of the state constitution or in this section.

4. Hearings per section 9(2) of article XXVIII are to be held before an ALJ and conducted in accordance with the provisions of Section 24-4-105, C.R.S. Colo. Const. art. XXVIII, sec. 9(1)(f). Section 24-4-105(7) provides that the proponent of an order has the burden of proof. The Complainant is the proponent of the order and has the burden of proof.

5. There is no evidence that the Respondent engaged in any conduct prohibited by Section 1-45-105.5(1)(a)(I).

Conclusions of law related to the request for attorney fees.

6. Section 1-45-111.5(2) provides:

> A party in any action brought to enforce the provisions of ... this article shall be entitled to the recovery of the party's reasonable attorney fees and costs from any attorney or party who has brought or defended the action, either in whole or in part, upon a determination by the office of administrative courts that the action, or any part thereof, lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment .... Notwithstanding any other provision of this subsection (2), no attorney fees may be awarded under this subsection (2) unless the ... administrative law judge ... has first considered the provisions of section 13-17-102 (5) and (6), C.R.S. For purposes of this subsection (2), "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

7. Sections 13-17-102 (5) and (6) provide:

> (5) No attorney fees shall be assessed if, after filing suit, a voluntary dismissal is filed as to any claim or action within a reasonable time after the attorney or party filing the dismissal knew, or reasonably should have known, that he would not prevail on said claim or action.
>
> (6) No party who is appearing without an attorney shall be assessed attorney fees unless ....

8. The Respondent asserts that this action of the Complainant lacked substantial justification as described in Section 1-45-111.5(2) and seeks reimbursement of the $18,112.38 ($17,712.38 plus $400) she incurred in defending it. The Complainant opposed this. The parties discussed this matter at the December 11, 2012 hearing in terms of claims 1 and 2, as identified above, and so will the ALJ. But because the ALJ concludes that attorney fees should be assessed as to both claims, it is not necessary to allocate what amount of fees and costs were attributable to each claim.

Claim 2

9. The case for attorney fees in relation to claim 2 is clear cut; no effort was made to present evidence in support of this claim. "[A] claim ... is groundless if the allegations in the complaint ... are not supported by any credible evidence at trial." *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984). In *Colorado Citizens for Ethics in Government v. Commission for the American Dream*, 187 P.3d 1207, 1219-1220 (Colo. App. 2008) the Court upheld an ALJ's imposition of attorney

fees on a party in a campaign finance case where the party dismissed a claim at hearing. At 1220 the Court cited *Engel v. Engel*, 902 P.2d 442, 446 (Colo. App. 1995) and *Bilawsky v. Faseehudin*, 916 P.2d 586, 590 (Colo. App. 1995) for the proposition that an action may be substantially groundless even though dismissed on the morning of trial.

10. In this case, the Complainant only acquiesced, through counsel, to the Respondent's motion to dismiss claim 2 after the presentation of his evidence. Claim 2 lacked substantial justification in that it was substantially frivolous, substantially groundless, and substantially vexatious. The Complainant never voluntarily dismissed the claim (a basis not to assess attorney fees per Section 13-17-102 (5)). Section 13-17-102 (6) is inapplicable as the Complainant was represented.

Claim 1

11. In Complainant's November 1, 2012 response to Respondent's motion for attorney fees, second unnumbered page, he argues that claim 1 is not frivolous in that it survived the motion to dismiss. But the denial of the motion to dismiss was made purely on legal grounds prior to the presentation of any evidence. The Respondent had moved to dismiss per C.R.C.P. 12(b)(5), failure to state a claim. *Western United Realty, supra* at 1069 provides that a claim may still be groundless even though it is sufficient to survive a motion to dismiss for failure to state a claim. The ALJ's August 14, 2012 order denying the motion to dismiss was in no way an endorsement of the quality of the evidence.

12. Also on the second page of his response, the Complainant asserts that the Respondent "admitted knowledge of an invitation that included her name in violation of state law." As reflected in the findings of fact above, the Respondent made no admission as to any violation of the law.

13. Complainant appears to argue that the invitation, exhibit D, should have been admitted, but does not articulate why. Again, Mr. Coleman, through whom the exhibit was offered, could provide no authentication of the exhibit other than the fact that he had seen a similar copy. Ms. Primavera, the person the email identifies as "from," was not called as a witness. As such, there was no proper authentication of the exhibit per C.R.E. 901. Moreover, exhibit D was offered for proof of the matter asserted, specifically, that the Respondent was a "host" of the event. The assertion is hearsay and not admissible per C.R.E. 802.

14. As to exhibit E, newspaper articles are self-authenticating. C.R.E. 902(6). If the reporter, the author of exhibit E, had been called to testify and had testified that the Respondent made the statement to him, the statement would be an admission by a party opponent, not hearsay per C.R.E. 801(d)(2). But the proffered newspaper article indicates that the statement was sent to the reporter by email and was not made orally. Without proper authentication that the statement was the Respondent's, it is hearsay within hearsay.

15. On page 2 of his November 1, 2012 response, Complainant asserts that "McGihon, through her testimony, claimed that she had never spoken to the reporter and that she did not remember talking with the reporter who authored the article at issue." The response goes on to say: "Cave had no reason to know that McGihon would contradict her own public statements...." Yet Respondent's testimony is entirely consistent with the content of the newspaper article. The article does not say that the Respondent spoke to the reporter; it attributes the statement to Respondent via a "statement issued Wednesday."

16. Complainant's counsel does not assert through affidavit or otherwise that she talked to the reporter, asked about the "statement issued Wednesday" or asked to obtain a copy of it. The "statement issued Wednesday," if it exists, was not offered as evidence.[1] At no time did Complainant's counsel contact the Respondent to find out if the statement attributed to her was true. In this case, unlike some campaign finance cases in which the hearing is held in 15 days, there was adequate time to conduct discovery. Such discovery would have revealed to the Complainant the problems of proof he discovered, apparently for the first time, at hearing. Discovery is permitted in administrative cases per Section 24-4-105(4), C.R.S.

17. In any case, the Complainant could not have relied on the statements in the newspaper article to make claim 1; the article came out after the March 2 receipt of the complaint by the OAC. C.R.C.P. 11(a) requires an attorney, prior to signing a pleading, to confirm "that to the best of his knowledge, information, and belief *formed after reasonable inquiry*, that it is well grounded in fact ...." Emphasis added. *Colorado Citizens for Ethics in Government, supra* at 1221-1222, upheld the ALJ's assessment of attorney fees for the lack of pre-complaint investigation.

18. On page 2 of his response, the Complainant also asserts that his prosecution is not groundless in that "based on prior administrative law cases ... [exhibit D] should have been admitted." Although these cases are not identified, the ALJ understands this to be a reference to the relaxed standard of evidence applicable to administrative hearings per Section 24-4-105(7). Complainant's counsel referenced this authority at the October 1 hearing. In light of the serious authenticity and hearsay problems related to exhibits D and E, the Complainant had no reasonable expectation that these documents would be admitted even under this relaxed standard.

19. The Complainant has not referenced the nine factors listed in *Industrial Claims Appeals Office v. Flower Stop Marketing Corp.*, 782 P.2d 13 (Colo. 1989). These factors or guidelines do not support admission. Exhibits D and E were not written and signed (factor 1), were not sworn to (factor 2) and were not corroborated (factor 6). The case turns on the credibility of the witnesses (factor 7) and there was no adequate explanation for the failure to call the declarants to testify (factor 8). The

[1] In argument, Respondent's counsel suggested that the reporter's source may have been a confidential one. The article implies that the statement is in response to the reporter's own email: "when reached by e-mail Wednesday afternoon," and is a news release: "[a] statement issued Wednesday."

invitation was offered through Mr. Coleman, not Ms. Primavera or the Respondent. The reporter was not called and Respondent was not asked about any written "statement issued Wednesday."

20. *Western United Realty, supra,* at 1066 approves of the discussion of attorney fees in *International Technical Instruments, Inc. v. Engineering Measurements Co.*, 678 P.2d 558 (Colo. App. 1983) and notes specifically the fact that the party against whom attorney fees were assessed in that case "conducted no discovery whatsoever" and "nominally attempted to establish its ... claim at trial." This description equally applies to the Complainant's efforts in this case. *Western United Realty* at 1069 also provides that a showing of bad faith, while it makes the case for attorney fees stronger, is not required.

21. Prosecution of violations of Section 1-45-105.5(1)(a)(I) is assigned to private citizens per Colo. Const. art. XXVIII, sec. 9(2)(a). A private citizen unschooled in the law might be unable to have his or her documents admitted when the opposing party is represented by counsel. The imposition of attorney fees in such an instance could improperly chill enforcement of these laws. But this concern does not apply to this case where the Complainant is represented. Complainant has made no argument that fees should not be imposed based on his lack of sophistication.

22. The ALJ therefore concludes that claim 1 also lacked substantial justification in that it was substantially frivolous, substantially groundless, and substantially vexatious. As with claim 2, the Complainant never voluntarily dismissed the claim (a basis not to assess attorney fees per Section 13-17-102 (5)). Section 13-17-102 (6) is inapplicable as the Complainant was represented.

23. Because the Respondent's additional $400 expense on December 11, 2012 to attend the initial 9:00 a.m. hearing was the fault of Complainant's counsel, and not the Complainant, she alone should be required to reimburse this expense.

Agency Decision

It is therefore the Agency Decision of the Secretary of State that no violation of Section 1-45-105.5(1)(a)(I) has been proven. It is furthermore the Agency Decision that the Complainant and the Complainant's counsel are jointly and severally liable per Section 1-45-111.5(2) for the $17,712.38 amount. Complainant's counsel only is responsible for the $400 of attorney fees related to the additional expense on December 11, 2012.

This Agency Decision is final and will be subject to review by the Court of Appeals pursuant to Section 24-4-106(11), C.R.S.

DONE AND SIGNED

December 17, 2012.

MATTHEW E. NORWOOD
Administrative Law Judge

Exhibits admitted:

For the Complainant: exhibits B and C. Exhibits D and E were offered but not admitted.

For the Respondent: exhibits 1 and 2. Exhibit 2 is an affidavit of Respondent's counsel. It contains an attachment also identified as exhibit 1 setting out his billings to the Respondent.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this **AGENCY DECISION** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Mark Grueskin, Esq.
2401 15th Street, Suite 300
Denver, CO 80202

Jessica Peck, Esq.
100 Fillmore, 5th Floor
Denver, CO 80206

and to

Suzanne Staiert
Deputy Secretary of State
Department of State
1700 Broadway, Suite 270
Denver, CO 80290

on this 19 day of December 2012

Diane Moore
Office of Administrative Courts