COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue Denver, CO 80203 Lower Court: STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17th Street, Suite 1300 Denver, CO 80202 Administrative Law Judge Matthew E. Norwood Case No. OS 20120010 **THOMAS E. CAVE,** Petitioner-Appellant Vs. **ANNE MCGIHON,** Respondent-Appellee	DATE FILED: June 5, 2013 12:00 AM ▲ **COURT USE ONLY** ▲ Case Number: 13 CA 0137
Attorney Name: Jessica K. Peck Atty. Reg. No.: 41299 Address: 1616 17th Street, Suite 576 Denver, CO 80202 Phone No.: 720-628.5756 Email: Jessica@JPDenver.com	

OPENING BRIEF

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

I. STATEMENT OF THE ISSUES

A. The Administrative Law Judge ("ALJ") erred in dismissing the action under C. R. C. P., Rule 12(b)(5) for failure to state a claim.

B. The ALJ erred in entering an award of attorney's fees in favor of Defendant-Appellee Anne McGihon and against Plaintiff-Appellant Thomas E. Cave ("Cave") and his attorney Jessica Peck, Esq. ("Peck").

II. STATEMENT OF THE CASE

A. Nature of the Case.

This case arises from a violation of Colorado's Fair Campaign Practices Act, codified as amended at C.R.S. §1-45-101, *et seq*. ("FCPA"). Specifically, this case involves the conduct of Anne McGihon ("Defendant McGihon"), a registered lobbyist, and her decision to host a fundraising event for a candidate for the general assembly, while the general assembly was in session, constituting a violation of the FCPA. This appeal is filed pursuant to C.R.S. §24-4-106(11), from an Agency Decision of Administrative Law Judge Matthew E. Norwood ("ALJ").

B. Course of Proceedings and Disposition in Administrative Hearing.

After becoming aware of e-mail invitations to two separate political fundraisers naming Defendant McGihon as a co- host of the events, Plaintiff Cave, a concerned private citizen, filed a Complaint on March 1, 2012, with the Colorado

Secretary of State. The Complaint was filed as provided under Article XXVIII, Section 9(2)(a) of the Colorado Constitution. [Rec. Vol. 1, P. 1-8]. The Complaint sought a declaration that Defendant McGihon's conduct violated C.R.S. §1-45-105.5(1)(a), a part of the FCPA that prohibits professional lobbyists from soliciting contributions in support of a candidate for the general assembly, while the general assembly is in session. The Complaint asserted two claims against Defendant McGihon, based on two separate fundraising events, including one for general assembly candidate Dianne Primavera ("Claim I"), and one for the House Majority Project ("Claim II"). The Complaint was referred to the OAC for assignment to the ALJ. [Rec. Vol. 1, P. 28].

Although the provisions for private enforcement of the FCPA contemplate a speedy procedure, including a mandatory hearing within 15 days of the filing of the Complaint, Defendant McGihon chose to protract the proceedings by mounting challenges to the FCPA, and the Complaint, prior to obtaining a hearing on the merits of the claims against her. Therefore, Defendant McGihon challenged the jurisdiction of the ALJ to hear the Complaint. This challenge was denied. On July 20, 2012, Defendant McGihon moved to dismiss the Complaint under C.R.C.P. 12(b)(5), alleging that the Complaint failed to state claims upon which relief could be granted. On August 14, 2012, the ALJ denied the Motion to Dismiss. [Rec.

Vol. 1, P. 52]. The matter was ultimately set for a hearing on the merits on October 1, 2012.

At the October 1, 2012 hearing, Plaintiff Cave, through his attorney Peck, presented evidence through testimony of witnesses, including Defendant McGihon, and through the admission of exhibits, to support his claims under C.R.S. §1-45-105.5(1)(a) for declaratory relief against McGihon. Midway through the hearing, Defendant McGihon renewed her Motion to Dismiss under C.R.C.P. 12(b)(5) for failure to state claims upon which relief can be granted. [Rec. Vol. 3, Transcript Oct. 1, 2012 Hrg., P. 57, L. 4, 20].[1] The ALJ granted the Motion to Dismiss with respect to Claim I. [Rec. Vol. 3, Tr. 10/1/12, P. 66, L. 20-22]. Plaintiff Cave then voluntarily dismissed Claim II. [Rec. Vol. 3, Tr. 10/1/12, P. 55, L.10-14]. Defendant McGihon moved for an award of attorney's fees. The ALJ set the matter for hearing on December 11, 2012. [Vol. 3, Tr. 10/1/12, P. 66, L. 22-25]. An Agency Decision was entered on December 17, 2012 setting forth the ALJ's Findings of Fact and Conclusions of Law.

III. STATEMENT OF FACTS

During 2012, Defendant McGihon was a registered lobbyist in the State of Colorado, and therefore, a professional lobbyist as defined under Colorado

[1] Hereinafter references to Rec. Vol. 3, Transcript of October 1, 2012 Hearing shall be as follows: Rec. Vol. 3, Tr. 10/1/12, P.___ L. ____).

campaign finance law. [Rec. Vol. 1, P. 267, Finding of Fact 1].[2] During February 2012, the General Assembly was in session. [Rec. Vol. 1, P. 267, FOF 2]. In November 2011, Dianne Primavera became a candidate for the office of state representative for the November 2012 election. [Rec. Vol. 1 P. 267, FOF 3]. An invitation to a fundraiser in support of Ms. Primavera's legislative bid was sent out by e-mail in February 2012. [Rec. Vol. 1, P. 268, FOF 4 and 5]. Defendant McGihon agreed to act as co-host of the fundraiser, and thus gave permission to include her name as a host of the fundraising event in the invitation. [Rec. Vol. 1, P. 268, FOF 6]. An additional e-mail invitation to a fundraiser in February 2012, to support The House Majority Project, and seven candidates for the general assembly, named Defendant McGihon as a co-host of the event. [Rec. Vol. 1, P. 8].

Because it is illegal under Colorado law for a professional lobbyist to solicit contributions for a candidate for the general assembly, when the general assembly is in session, Plaintiff Cave, acting as a concerned citizen, filed the Complaint with the Office of the Colorado Secretary of State, seeking a declaration that Defendant McGihon's co-hosting of the fundraiser events violated Colorado's campaign finance laws. [Rec. Vol. 1, P. 1-8]. The Complaint was based on McGihon's agreement to include her name on the invitations as a co-host of the fundraisers,

[2] Hereinafter, the ALJ's Findings of Fact in the Agency Decision shall be referred to as FOF ___.

while McGihon was a professional lobbyist in Colorado, and the general assembly was in session. [Rec. Vol. 1, P. 1-8].

Shortly after the Complaint was filed, and after McGihon learned that her conduct was being called into question by "bloggers" over the internet, McGihon withdrew her name from the list of co-hosts for the Primavera fundraiser. [Rec. Vol. 3, Tr. 10/1/12, P. 27, L. 10-18; Rec. Vol. 1, P. 268, FOF 6]. At the October 1, 2012 hearing, Defendant McGihon stated that she requested her name be removed as a host of the fundraiser because she wanted to avoid "exactly this [lawsuit]." [Rec. Vol. 3, Tr. 10/1/12, P. 27, L.17-18]. In a newspaper article dated March 4, 2012, Defendant McGihon was quoted as saying that she had withdrawn her name as a host of the fundraiser and that "I mistakenly lent my name to an event. I regret this technical error…." [Rec. Vol. 2, P. 282].

IV. SUMMARY OF ARGUMENT

The ALJ erred in dismissing the Complaint under C.R.C.P. Rule 12(b)(5) for failure to state claims upon which relief can be granted. The Complaint alleges violations of the Colorado Fair Campaign Practices Act ("FCPA"). Specifically, the Complaint alleges that a registered lobbyist unlawfully solicited contributions for a candidate for the general assembly while the general assembly was in session. The ALJ improperly interpreted the meaning of the term "solicitation" under the

FCPA, and thereby improperly determined that the Complaint failed to state claims upon which relief can be granted.

In addition, the ALJ erred in awarding attorney fees against the complainant and his counsel under C.R.S. §13-17-102. The Complaint was not frivolous, because it was based on a valid legal theory under the FCPA. Also, the Complaint was not groundless, because it was supported by evidence at the hearing, including evidence that became the basis for the ALJ's findings of fact in the Agency Decision. Finally, the ALJ failed to make the findings necessary to support an award of fees as required under C.R.S. §13-17-102.

V. ARGUMENT

A. Dismissal of Claim I under C.R.C.P. 12 (b) (5) Was Error.

1. Dismissal of Claim.

At the hearing on the merits of the Complaint, Defendant McGihon moved to dismiss Claim I of the Complaint under C.R.C.P., Rule 12(b)(5). [Rec. Vol. 3, Tr. 10/1/12, P. 57, L. 4 and 20]. The motion was granted by the ALJ. [Rec. Vol. 3, Tr. 10/1/12, P. 66, L. 20-22; Rec. Vol. 1, P. 267].

2. Standard of Review.

Dismissal of a complaint for failure to state a claim is reviewed *de novo* by the Court of Appeals. *Colborne Corp. v. Weinstein*, 2010 WL 185416, at * 1

(Colo. App. Jan. 21, 2010). Legal conclusions of an administrative law judge are subject to *de novo* review by the Court of Appeals. *Hopkins v. Industrial Claim Appeals Office,* 2011 WL 6425616, at *1 (Colo. App. Dec. 22, 2011). Similarly, agency interpretations of statutes are subject to *de novo* review. *Id*.

3. Basis of Claim I.

The Complaint was filed as provided under Article XXVIII, Section 9(2)(a) of the Colorado Constitution. The Complaint sought a declaration that Defendant McGihon's conduct violated C.R.S. §1-45-105.5(1)(a). Section 105.5(1)(a) is a part of the FCPA that prohibits professional lobbyists from soliciting contributions in support of a candidate for the general assembly, while the general assembly is in session. To establish a claim under Section 105.5(1)(a), a complainant must allege four elements including that (1) a professional lobbyist (2) solicited, or promised to solicit, a contribution (3) in support of a candidate for the general assembly (4) while the general assembly was in session. C.R.S. §1-45-105.5(1)(a).

In support of this claim, Plaintiff Cave alleged in the Complaint, and established at the hearing, that Defendant McGihon is a professional lobbyist (element 1) [Rec. Vol. 1, P. 267, FOF 1]; that the general assembly was in session during February 2012 (element 4) [Rec. Vol. 1, P. 267, FOF 2]; that Dianne Primavera was a candidate for the general assembly (element 3) [Rec. Vol., P. 267,

FOF 3], and that Defendant McGihon agreed to co-host a fundraiser for candidate Primavera and thereby agreed to be named as a co-host on the invitation to the fundraiser event (element 2) [Rec. Vol. 1, P. 268, FOF 4, 5 and 6].

4. ALJ's Erroneous Basis for Dismissal.

The ALJ determined that Plaintiff Cave failed to allege, and/or prove, the second element of a claim under Section 105.5(1)(a), i.e., that Defendant McGihon "solicited or promised to solicit a contribution" for candidate Primavera. The ALJ determined that Defendant McGihon's agreement to co-host a fundraiser, or to include her name as a co-host on an invitation to a fundraiser for a candidate, does not amount to "solicitation of a contribution" or a "promise to solicit a contribution" under Section 105.5(1)(a). [Rec. Vol. 3, Tr. 10/1/12, P. 63, L. 7-10; Rec. Vol 3., Tr. 10/1/12, P. 64, L. 9-11; Rec. Vol. 3, Tr. 10/1/12, P. 59, L. 24-25]. On that basis, the ALJ determined that Plaintiff Cave failed to state a claim for relief under Section 105.5(1)(a), and dismissed the claim under C.R.C.P., Rule 12(b)(50. [Rec. Vol. 1, P. 267].

5. The ALJ Erred Because Agreeing to Co-Host a Fundraising Event Constitutes "Solicitation of A Contribution" or a "Promise to Solicit a Contribution."

Solicitation is a broad term that can mean a variety of things. *Martin Tractor Company v. F.E.C.*, 627 F. 2d 375, 383 (D.C. Cir. 1980). It is a term

contained in numerous campaign finance laws. See, *e.g.*, Federal Election Campaign Act, 2 U.S.C.A. §441b; Connecticut Campaign Finance Reform Act, C.G.S.A. §9-610(e, h), 9-612(g)(2). The exact definition of the term is the subject of active litigation. *Shays v. F.E.C.*, 337 F. Supp. 2d 28 (D.D.C. 2004); *Shays v. F.E.C.*, 414 F. 3d 76 (D. C. Cir. 2005); *Green Party of Connecticut v. Garfield*, 590 F. Supp. 2d 288 (D. Conn. 2008), *aff'd in part, rev'd in part on other grounds*, 616 F. 3d 189 (2d Cir. 2010). See also *Martin Tractor Co.*, 627 F. 2d at 383.

For purposes of the Federal Election Campaign Act, federal courts have held that Congress anticipated a broad construction of the term solicitation. *Shays v. F.E.C.*, 414 F. 3d at 106. Thus, the Federal Election Commission's regulation defining "solicitation" as including only verbal and written requests for funds was struck down by the D. C. Circuit. *Shays v. F.E.C.*, 337 F. Supp. 2d 28. The Court held that the need to remedy the influence of money in politics required a more general definition of the term solicitation that would embrace more subtle conduct. *Id.*; *Shays v. F.E.C.*, 414 F. 3d at 102.

For purposes of the solicitation ban under the Connecticut Campaign Finance Reform Act, "solicitation" includes lobbyists "participating in fundraising activities for covered candidates," lobbyists "attending a fundraiser," or lobbyists "forwarding tickets to a fundraiser." *Green Party of Connecticut*, 590 F. Supp. 2d

at 340. Solicitation has also been defined to include "a charity brochure on starving children" which does not actually "ask" for a donation. *Shays v. F.E.C.*, 414 F. 3d at 105.

For purposes of the federal exemption from state sales tax laws, 15 U.S.C. §381(a), the U. S. Supreme Court has held that "solicitation of orders" covers those activities that are entirely ancillary to a direct request for purchases. *Wisconsin Department of Revenue, v. William Wrigley, Jr., Co.*, 505 U. S. 214 (1992).

Courts facing the task of defining the term "solicitation" agree that it is not possible to state a general rule demarcating where solicitation begins or ends. Rather, such Courts agree that each case must be judged on its own merits, and ultimately the determination is a question of fact dependent upon the nature of the communication and the circumstances under which it is transmitted. *Martin Tractor Company*, 627 F. 2d at 383; *Indiana Department of Revenue v. Kimberly-Clark Corporation*, 416 N. E. 2d 1264 (Ind. 1981).

Under Colorado's FCPA, not only is "solicitation" banned, but also any "promise to solicit." Therefore, the banned activity in Colorado was legislatively intended to have a broader meaning than just "solicitation."

In this case, Defendant McGihon agreed to list her name as a co-host for a fundraiser for a covered candidate. Under the law in Connecticut, Defendant

McGihon's conduct would violate the solicitation ban. *Green Party of Connecticut*, 590 F. Supp. 2d at 340 (Connecticut solicitation ban covers lobbyists "participating" in fundraising activities). Under federal election laws, Defendant McGihon's conduct would also likely be determined to amount to solicitation. *Shays v. F.E.C.*, 414 F. 3d at 106 (Congress anticipated a broad meaning of the term solicitation). Even if agreeing to co-host a fundraiser for a covered candidate did not amount to solicitation, it could have been a "promise to solicit" donations for a covered candidate in violation of Colorado law.

Under the established law in this area, Defendant McGihon's conduct violated the solicitation ban under the Colorado FCPA, and at a minimum, created a question of fact that should have been determined on the merits at the hearing. The ALJ erred in determining otherwise and the ALJ's decision must therefore be reversed.

B. ALJ Erred in Awarding Attorney's Fees.

1. Fee Award.

In the Agency Decision, the ALJ found that the Complaint was substantially groundless, substantially frivolous and substantially vexatious. [Rec. Vol. 1, P.

265-276, Conclusions of Law 8, 10, 22].[3] Based on these findings, the ALJ ordered that Plaintiff Cave, and his attorney Peck, be jointly and severally liable for $17,712.38 of Defendant McGihon's attorneys fees and costs. [Rec. Vol. 1, P. 274].

2. Standard of Review.

The Court of Appeals reviews an attorney fees award for abuse of discretion. *Haystack Ranch, LLC v. Fazzio*, 997 P. 2d. 548, 556 (Colo. 2000); *Colorado Citizens for Ethics in Government v. Committee for American Dream*, 187 P. 3d 1207, 1220 (Colo. App. 2008). Thus, the award must be supported by the record. *Wheeler v. T. L. Roofing, Inc.*, 74 P. 3d 499, 505 (Colo. App. 2003). But the legal analysis employed by a trial court in reaching its decision on attorney fees is reviewed *de novo*. *Colorado Citizens for Ethics in Government, supra*. Moreover, to the extent the attorney fee award is based on a statute, such statutory interpretation is subject to *de novo* review. *Id*.

3. ALJ Erred in Finding that Complaint is Frivolous.

A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense. *Western United Realty, Inc. v. Isaacs*, 679 P. 2d 1063, 1069 (Colo. 1984). This

[3] [3] Hereinafter, the ALJ's Conclusions of Law in the Agency Decision shall be referred to as COL ___.

test does not apply, however, to meritorious actions that prove unsuccessful, legitimate attempts to establish a new theory of law, or good faith efforts to extend, modify, or reverse existing law. *Id. See also Nienke v. Naiman Group, Ltd,* 857 P. 2d 446, 460 (Colo. App. 1992) (Award of attorney fees was an abuse of the trial court's discretion where plaintiff's issue was one of first impression in Colorado and plaintiff made a legitimate effort to extend the law); *Montoya v. Bebensee,* 761 P. 2d 285, 291 (Colo. App. 1988) (Claims involving novel questions of law for which no determinative authority existed at time complaint was filed, were not frivolous, groundless or vexatious).

In this case, the ALJ dismissed Claim I under Rule 12(b)(5) based on the ALJ's interpretation of the term "solicitation" under C.R.S. §1-45-105.5(1)(a). The ALJ held that the term "solicitation" does not include placing one's name as a co-host on the invitation to a fundraising event. [Rec. Vol. 3, Tr. 10/1/12, P. 63, L. 7-10; Rec. Vol. 3., Tr. 10/1/12, P. 64, L. 9-11; Rec. Vol. 3, Tr. 10/1/12, P. 59, L. 24-25]. Because the basis Claim I of the Complaint was Defendant McGihon's inclusion of her name as a co-host on an invitation to a fundraiser event, the ALJ concluded that the Complaint failed to state a claim under C.R.S. §1-45-105.5(1)(a), and therefore was frivolous.

The ALJ's award of attorney fees based on a finding of frivolousness of Claim I and Claim II is error. The FCPA was enacted less than ten years ago. The term "solicitation" contained within the FCPA has not been defined by the Colorado courts. As set forth above, the definition of the term "solicitation" is being actively litigated in jurisdictions around the country, including the federal courts under federal campaign finance laws. Plaintiff Cave made a legitimate, good faith attempt to establish the contours of the law in an area where no determinative authority exists in Colorado. *Montoya,* 761 P. 2d 285, 291.

During the October 1, 2012, hearing, the ALJ acknowledged that Plaintiff Cave was attempting to "advance the law," and concluded that "there is no problem with frivolousness" of the Complaint. [Rec. Vol. 3, Tr. 10/1/12, P. 75, L. 16-24]. Counsel for Defendant McGihon also conceded that he "was not alleging frivolousness" of the Complaint. [Rec. Vol. 3, Tr. 10/1/12, P. 77, L. 13-15]. The award of attorney fees, to the extent it is based on frivolousness of Claim I and Claim II of the Complaint, is contrary to existing law, contrary to the findings made by the ALJ at the hearing, and is an abuse of discretion by the ALJ that must be reversed.

4. ALJ Erred in Finding that Complaint is Groundless.

A claim or defense is groundless if the allegations of the complaint are not supported by any credible evidence at trial. *Western United Realty, Inc.*, 679 P. 2d 1063, 1069. The test for groundlessness assumes proponent has a valid legal theory but can offer little or nothing in the way of evidence to support the claim. *Bilawsky v. Faseehudin,* 916 P. 2d 586, 586, 590 (Colo. App. 1995). In determining the award of attorney fees, the trial court is required to consider not only the admission of credible evidence at trial, but also whether there existed credible evidence available to plaintiff to support his claims, even if such evidence had not been admitted into evidence at trial. *Harrison v. Smith,* 821 P. 2d 832, 835 (Colo. App. 1991).

Even if a claim is groundless, no attorney fees shall be assessed if, after filing suit, a voluntary dismissal is filed as to any claim within a reasonable time after the attorney dismissing the claim knew, or reasonably should have known, that he would not prevail on such claim. C.R.S. §13-17-102(5). *Seismic Int'l Research Corp v. South Ranch Oil Co, Inc.*, 793 F. 2d 227, 232 (10th Cir. 1986).

In deciding whether to award attorney fees, and in assessing the amount of such fees, the district court, or administrative law judge, must consider the factors set forth C.R.S. §13-17-103(1). *In re Aldrich,* 945 P. 2d 1370, 1378 (Colo. 1997).

The district court is required to make findings explaining why the conduct lacked substantial justification and discuss how the court arrived at the dollar amount of the award. *Id.*; *Bilawsky v. Faseehudin*, 916 P. 2d 586, 590. Only relevant factors under the attorney fee statute should be addressed. *Parker v. Davis*, 888 P. 2d 324, 326 (Colo. App. 1994). Conclusory statements that a claim is frivolous, or groundless, are insufficient for purposes of appellate review and inadequate to satisfy the statutory requirement of specificity. *In re Aldrich*, 945 P. 2d at 1379.

a. Claim I. At the hearing, Plaintiff Cave offered testimonial and documentary evidence in support of all of the allegations in the Complaint, which evidence formed the basis for the ALJ's Findings of Facts in the Agency Decision. All of the elements of a violation under C.R.S. §1-45-105.5(1)(a) are established by the ALJ's own Findings of Fact, including that (1) Defendant McGihon was a professional lobbyist [Rec. Vol. 1, P. 267, FOF 1], (2) Dianne Primavera was a candidate for the general assembly [Rec. Vol. 1, P. 267, FOF 3], (3) the general assembly was in session [Rec. Vol. 1, P. 267, FOF 2], and (4) Defendant McGihon permitted the use of her name as a co-host on an invitation to a fundraising event for candidate Primavera. [Rec. Vol. 1, P. 268, FOF 5 and 6]. As discussed earlier, although the ALJ determined that being named as a co-host on an invitation does not amount to solicitation under the FCPA, and therefore

found one of the elements of the claim had not been established, this determination involves the legal interpretation of a statute, and does not infer that the Complaint was groundless, or that Plaintiff Cave did not offer evidence in support of the "solicitation" element of the claim.

In the Agency Decision, the ALJ made extensive findings of fact in an attempt to support the attorney fee award. Such findings include the fact that two exhibits offered by Plaintiff Cave were not admitted into evidence [Rec. Vol. 1, P. 268, FOF 9, 11, and 12], additional witnesses that could have been called were not called [Rec. Vol. 1, P. 268-9, FOF 11 and 13], and Plaintiff Cave did not use more extensive discovery techniques as permitted by law, such as submitting requests for interrogatories or issuing subpoenas [Rec. Vol. 1, P. 269, FOF 15], among other findings. While the ALJ can identify additional discovery that could have been performed, such additional steps were not needed in this case. All of the allegations in the Complaint were established at the hearing, and were ultimately included in the ALJ's Findings of Fact. The fact that a complainant could have performed more discovery is not a factor under C.R.S. §13-17-102. The only factor is whether the claim is not supported by any credible evidence at the hearing. *Parker v. Davis*, 888 P. 2d at 326 (Only relevant factors under the attorney fee statute should be addressed). As stated above, all of the elements of

the claims in the Complaint were supported by evidence at trial, and such evidence became the basis for the ALJ's findings of fact.

Moreover, private enforcement of the FCPA by concerned citizens is conducted at their own expense, and under circumstances in which they often seek declaratory relief, and therefore will not expect a damage or penalty award, or any remuneration of any kind. A private citizen's decision to use his resources judiciously is likewise not a proper factor to be considered in support of an award of attorney fees under C.R.S. §13-17-102.

b. Claim II. At the October 1, 2012, hearing, after the ALJ made the determination that the inclusion of Defendant McGihon's name on an invitation as a co-host of a fundraiser did not amount to solicitation under the FCPA for purposes of Claim I, Plaintiff Cave determined that it would be futile to pursue his case any further. Claim II was based on the same legal theory as Claim I, and involved Defendant McGihon being named as a co-host on a fundraiser for other political candidates for the general assembly. [Rec. Vol. 1, P. 8]. Therefore, midway through the hearing, Plaintiff Cave voluntarily agreed to dismiss Claim II. [Rec. Vol. 3, Tr. 10/1/12, P. 55, L. 10-15]. Because Plaintiff Cave voluntarily dismissed this claim as soon as it became known to him that he would not prevail

on this claim, an award of attorney fees is improper. C.R.S. §13-17-102(5); *Seismic Int'l Research Corp.*, 793 F. 2d at 232.

The ALJ held that Claim II was groundless because "no effort was made to present evidence in support of this claim." [Rec. Vol. 1, P. 271, COL 9]. The ALJ also held that Complainant "acquiesced, through counsel," to the dismissal of Claim 2. [Rec. Vol. 1, P. 272, COL 10]. The ALJ further held, apparently alternatively, that Claim II was never voluntarily dismissed. [Rec. Vol. 1, P. 272, COL 10]. Based on the ALJ's findings, which are contradictory, the basis for the attorney fee award on Claim II is not clear. If Complainant "acquiesced" to dismissal of Claim II, then such dismissal was voluntary. If Claim II was dismissed, then there would have been "no effort made to present evidence in support of this claim" and such lack of effort could not properly be the basis for a finding of groundlessness. Therefore, as a preliminary matter, the ALJ did not clarify the basis for the finding of groundlessness of Claim II, and the award of attorney fees based on groundlessness of Claim II is improper. *In re Aldrich*, 945 P. 2d 1370, 1379 (Colo. 1997) (Trial Court is required to make detailed findings explaining why the conduct lacked substantial justification.)

In any event, if Claim II was voluntarily dismissed, i.e., if Plaintiff Cave "acquiesced" to the dismissal of Claim II as the ALJ found, then the only issue

remaining would be whether the requirements of C.R.S. §13-17-102(5) had been met. Specifically, the remaining issue is whether Plaintiff Cave dismissed Claim II as soon as he knew, or should have known, that he would not prevail on that claim. *Seismic Int'l Research Corp.*, 793 F. 2d at 232. The lack of any submission of evidence at the hearing on Claim II would not properly be a factor if the claim had been dismissed. The ALJ made no findings as to whether Claim II was dismissed as soon as it should have been. Such detailed findings are required to support an award of attorney fees. *In re Aldrich*, 945 P. 2d at 1379. Therefore, to the extent Claim II was voluntarily dismissed, the ALJ failed to make the proper findings under §13-17-102(5), and therefore erred in awarding attorney fees on that basis.

If Claim II was not voluntarily dismissed, as the ALJ also alternatively held, then the issue is whether the allegations of Claim II were supported by any credible evidence. *Western United Realty, Inc.*, 679 P. 2d 1063, 1069. Three of the four elements needed to establish the violation alleged in Claim II had already been established through the evidence admitted through Claim I. [Rec. Vol. 1, P. 267, FOF 1, 2, and 3]. The allegations supporting the fourth element, whether Defendant McGihon engaged in "solicitation," was based on an invitation to a fundraiser for the House Majority Project supporting several covered candidates. The invitation was attached to the Complaint, and available as evidence to be

offered at trial, if Plaintiff Cave had chosen to pursue Claim II at the hearing, which he chose not to do. Therefore, the allegations of Claim II were either proven at trial, to the extent they became part of the ALJ's findings of fact, or were able to be supported by evidence at trial. *Harrison v. Smith*, 821 P. 2d at 835.

Regardless of whether Claim II was voluntarily dismissed, or not, the ALJ erred in finding that Claim II was groundless, and the fee award must be reversed to the extent it was based on the groundlessness of Claim II.

VI. CONCLUSION

The ALJ erred in dismissing the Complaint under C.R.C.P. Rule 12(b)(5) for failure to state claims upon which relief can be granted. The ALJ improperly interpreted the meaning of the term "solicitation" under the FCPA, and thereby improperly determined that the Complaint failed to state claims upon which relief can be granted. This decision of the ALJ should be reversed.

In addition, the ALJ erred in awarding attorney fees against the complainant and his counsel under C.R.S. §13-17-102. The Complaint was not frivolous, because it was based on a valid legal theory under the FCPA. Also, the Complaint was not groundless, because it was supported by evidence at the hearing, including evidence that became the basis for the ALJ's findings of fact in the Agency Decision. Finally, the ALJ failed to make the findings necessary to support an

award of fees as required under C.R.S. §13-17-102. For these reasons, the ALJ's award of attorney fees must be reversed.