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COURT OF APPEALS, STATE OF COLORADO **2 East 14th Avenue** **Denver, Colorado 80203**	
Appeal from the Office of Administrative Courts **Administrative Law Judge Matthew E. Norwood** **Case No. OS 20120010**	
Petitioner-Appellant: **THOMAS E. CAVE** **v.** **Respondent-Appellee:** **ANNE McGIHON**	▲COURT USE ONLY▲
Attorneys for Appellee: Mark G. Grueskin, No. 14621 Heizer Paul Grueskin LLP 2401 15th Street, Suite 300 Denver, CO 80202 Phone: (303) 376-3703 Fax: (303) 595-4750 E-mail: mgrueskin@hpgfirm.com	Case No.: 2013 CA 137

ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g). It contains 8,187 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

For the party raising the issue:

☒It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p.__), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

☒It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.AR. 32.

s/Mark G. Grueskin
Mark G. Grueskin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF ISSUES PRESENTED

Did the Administrative Law Judge ("ALJ") correctly dismiss a complaint, alleging that a registered lobbyist had violated campaign finance laws by soliciting contributions for a non-incumbent legislative candidate during the legislative session, given the total lack of evidence in the record that the lobbyist solicited or agreed to solicit funds from any person?

Did the ALJ correctly award attorneys' fees for campaign finance claims that were substantially groundless, frivolous, and vexatious, namely that the lobbyist (Anne McGihon) solicited or agreed to solicit contributions for a legislative candidate while the legislature was in session (the "First Claim")?

Did the ALJ correctly award attorneys' fees for campaign finance claims that were substantially groundless, frivolous, and vexatious, namely that McGihon solicited or agreed to solicit contributions for a political party to benefit a specific legislative candidate while the legislature was in session (the "Second Claim")?

Should this Court grant attorneys' fees to McGihon for a frivolous appeal of the ALJ's decision?

STATEMENT OF FACTS

In 2012, Anne McGihon was a registered to lobby members of the Colorado General Assembly. Vol. 1 at 000267, ¶1. In late February, she allowed her name to be placed on an invitation for an event that was being held on Diane Primavera's behalf. Primavera was a non-incumbent candidate for the Colorado State House of Representatives. *Id.* at ¶3

Soon after her name appeared on the invitation, McGihon withdrew from the group that was co-hosting the event. She did nothing to promote this event or raise funds for Primavera. *Id.* at 000268, ¶6. When this matter attracted public and media attention, one local newspaper incorrectly attributed to her a statement that she made "a mistake" by lending her name to this event. McGihon never spoke with the reporter of the article or authorized Primavera or her campaign to make any statement using her name. *Id.* at 000268-69.

There is no evidence in the record about McGihon's role on behalf of the House Majority Project during the 2012 legislative session. *Id.* at 000268, ¶7. The House Majority Project was an arm of the Democratic Party, entitled to receive contributions from lobbyists and their principals during the legislative session pursuant to C.R.S. § 1-45-105.5(1)(c)(I).

STATEMENT OF PROCEEDINGS BELOW

Through counsel (the Open Government Institute), Thomas Cave filed a campaign finance complaint under Section 9 of Article XXVIII of the Colorado Constitution, alleging that McGihon had violated C.R.S. § 1-45-105.5(1)(a). That statute prohibits any lobbyist from soliciting or agreeing to solicit contributions for a candidate for the state legislature, even if that candidate is not then a member of either the House of Representatives or the Senate. Cave alleged that McGihon violated this statute twice, first by allowing her name to be used on a fundraising invitation for Primavera and also by soliciting or agreeing to solicit contributions for the House Majority Project.

Cave filed his complaint with the Secretary of State, and the Secretary forwarded the matter to the Office of Administrative Courts. Before the proceedings began, the Administrative Law Judge ("ALJ") requested a statement from Cave clarifying that office's jurisdiction over the matter. Cave filed such a statement, and the ALJ proceeded to set the matter for hearing. McGihon objected to the ALJ's jurisdiction and filed a motion to dismiss for failure to state a claim upon which relief could be granted. The parties briefed the matter, and the ALJ decided that, even though there was no penalty for the statutory violation broached

by Cave's complaint, he could hear and decide the matter. *Id.* at 000055-56. A hearing on the merits was scheduled for October 1, 2012.

At the hearing and in order to establish liability under the First Claim, Cave attempted to establish that McGihon allowed her name to be used on an invitation, soliciting contributions for Primavera. However, Cave offered as an exhibit only a facsimile of an invitation as published on Compass Colorado, a statewide political blog.[1] The blog article used descriptive language that was so derogatory and irrelevant that the ALJ asked that the narrative be stricken if the exhibit was to be admitted. Cave's counsel agreed to this request. *Id.* at 000269, ¶9, Vol. 3, Oct. 1 Tr., 35:11-25.

Cave's primary witness, Shawn Coleman, did not know whether the blog posting was reflective of the actual invitation to the Primavera event. Coleman could not say whether the exhibit reflected the language of the emailed invitations he received from unknown sources in late February or early March; he had not actually compared their wording. Coleman never received an actual invitation himself and was unable to establish what the original invitation actually said. Vol. 3, Oct. 1 Tr., 36:22-40:5. Cave did not offer the testimony of any person who

[1] A blog is "a type of personal column posted on the Internet" that may deal with general issues or specialized topics such as politics. *Too Much Media, LLC v. Hale*, 20 A.3d 364, 369 n.2 (N.J. 2011) (citations omitted).

could allege that he or she had received such an invitation. As a result, the ALJ refused to admit this exhibit, given its inherent lack of reliability. Vol. 3 at 000268, ¶11.

Cave presented no other evidence to establish that McGihon had done anything to solicit funds for the Primavera event. *Id.* at ¶4-5. Cave called McGihon as a witness, but the main of her testimony focused on a statement attributed to her in *The Brighon Blade*, a local newspaper. McGihon testified she did not make the statement printed in the paper, and the ALJ refused to admit a copy of the newspaper as an exhibit. *Id.* at ¶12. Without proof of the wording of an invitation or any other evidence of solicitation of contributions for Primavera, the ALJ granted McGihon's motion to dismiss the First Claim after Cave had finished presenting his case-in-chief.

Cave presented no evidence at all in support of the allegations comprising his Second Claim dealing with the House Majority Project's event. *Id.* at ¶7. At the conclusion of Cave's presentation of evidence, the ALJ granted McGihon's motion to dismiss the Second Claim as well. Cave did not object to the motion to dismiss concerning his Second Claim, *id.* at 000269, ¶14, as he had when McGihon sought to dismiss both the First and Second Claims prior to hearing. But the dismissal was not done at Cave's initiation and occurred only after Cave had the

opportunity to present a prima facie case and failed to do so. Before the ALJ and this Court, Cave paints this dismissal as having been "voluntary." *Id.*

Given Cave's failures to produce any authentic, reliable, relevant, and admissible evidence in support of his First Claim and any evidence at all in support of his Second Claim, McGihon filed a motion seeking attorneys' fees and costs. A hearing on that motion was held before the ALJ, and upon its conclusion, the ALJ awarded fees and costs to McGihon in the amount of $17,712.38. Of that amount, Cave and his attorney were both liable for the full amount except that Cave's attorney was solely responsible for $400.00 of this amount, due to a missed hearing time. This appeal followed.

SUMMARY OF ARGUMENT

Cave filed a campaign finance complaint against McGihon – and then stopped. He did no discovery. He served no subpoenas. He asked no questions. And he obtained no authentic documents that bore upon McGihon's involvement with a non-incumbent legislative candidate. Seven months to the day after he filed his complaint, he showed up at hearing before an administrative law judge with a partisan blog posting and a newspaper article, in addition to a couple of public documents that merely established that McGihon was a lobbyist and Primavera was a candidate. He had no other evidence to suggest that McGihon, a registered

lobbyist, had done anything other than comply with campaign finance laws – specifically, C.R.S. § 1-45-105.5(1)(a).

At the end of Cave's case-in-chief, the ALJ correctly found Cave's evidentiary showing to be so lacking in substance as to warrant dismissal of his complaint. Regarding Cave's First Claim, the ALJ dismissed the claim because Cave had not produced an authentic and reliable event invitation. That failure was central, inasmuch as that document would establish whether McGihon had solicited any contributions and also because Cave had failed to establish through extrinsic evidence any such solicitation or any promise to solicit contributions.

Regarding Cave's Second Claim, the ALJ dismissed the claim because Cave did not produce any evidence about the event held to benefit an arm of the Democratic Party, any solicitations for attendance at that event, any promise to solicit contributions, or any nexus between that event and "specifically designated candidates for the general assembly." C.R.S. § 1-45-105.5(1)(c)(I). Realizing this failure when the motion to dismiss was made, Cave acquiesced. He had no option; he had rested and informed the ALJ he had no other witnesses. But this passive acceptance of the inevitable can hardly be viewed as a voluntary dismissal, which is how Cave portrays the event to this Court.

As such, attorneys fees were correctly awarded to McGihon for the costs incurred due to this substantially groundless, substantially frivolous, and substantially vexatious complaint. Like the decision to dismiss Cave's complaint, the ALJ correctly awarded fees. Both of those decisions should be upheld by this Court.

Additionally, because there is no factual basis to support McGihon's solicitations of contributions or agreements to solicit contributions, this Court should find that this appeal – lacking an evidentiary basis – is frivolous and award attorneys' fees to McGihon that were incurred since the ALJ ruled.

LEGAL ARGUMENT

I. The ALJ did not err by finding that Cave's case failed on the merits.

A. Standard of Review and Compliance with C.A.R. 28(k)

Cave incorrectly asks this Court to engage in de novo review of this matter as if the ALJ had granted a motion to dismiss based on C.R.C.P. 12(b)(5). Opening Brief at 9-10. While McGihon made such a motion to dismiss prior to hearing, it was denied, Vol. 1 at 000055-56, and she does not contest that ruling here.

The motion to dismiss, granted by the ALJ, was made at the conclusion of Cave's case-in-chief. Such a motion is offered pursuant to C.R.C.P. 41(b), which provides:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render judgment until the close of all the evidence.

If the court so acts, its decision will be treated as "an adjudication upon the merits." C.R.C.P. 41(b). The rules of civil procedure are made applicable to administrative hearings through C.R.S. § 24-4-106(4).

The review of a C.R.C.P. 41(b) dismissal is quite different than review of the granting of a motion to dismiss under C.R.C.P. 12(b)(5), which is designed to test a complaint's sufficiency. In the case of the latter, all of the complaint's allegations are deemed to be true and are viewed in the light that is most favorable to the plaintiff. *Rosenthal v. Dean Witter Reynolds, 908 P.2d 1095, 1099-1100 (Colo. 1995).*

In considering whether to grant a dismissal under C.R.C.P. 41(b), a trial court does not create any presumptions or cast any inferences that are uniquely favorable to the plaintiff. *Public Service Co. of Colo. v. Bd. of Water Works of*

Pueblo, 831 P.2d 470, 479 (Colo. 1992). Instead, the trial court "is afforded wide discretion," and its decision will not be reversed without a showing that its findings and conclusions were "so manifestly against the weight of evidence as to compel a contrary result." *American Guar. & Liab. Ins. Co. v. King*, 97 P.3d 161, 165 (Colo. Ct. App. 2003) (citations omitted).

Under C.R.C.P. 41(b), the court's inquiry addresses "whether judgment in favor of the defendant is justified on the evidence presented…. Thus, the trial court sitting as trier of fact may determine the facts and render judgment against the plaintiff." *Id.* at 165. The allegations in the complaint are no longer the sole basis upon which the motion is evaluated and are not presumed to be true. Instead, they are tested by the adversarial process. The lower court's factual findings, even in the face of conflicting evidence, are "binding on review." *Campbell v. Commercial Credit Plan, Inc.*, 670 P.2d 813, 814 (Colo. Ct. App. 1983).

Thus, Cave's predicate for outlining a standard of review is not correct. Likewise, his proposed de novo standard of review does not apply here.

As to identifying where in the record this issue was preserved, Cave is non-specific. However, there are several record references on pp. 10-11 of his Opening Brief, and in the scheme of things, that is probably enough to provide McGihon and this Court with a sense of the record references that relate to his argument.

B. The dismissal of the First Claim was proper.

The First Claim deals with the allegation that McGihon, as a registered lobbyist, solicited or agreed to solicit campaign contributions for a non-incumbent legislative candidate while the legislature was in session. If proven, that misstep could violate state campaign finance law. C.R.S. § 1-45-105.5(1)(a). The legal issue presented is whether McGihon's name appeared on a document that solicited campaign contributions or whether there was extrinsic evidence that McGihon had otherwise promised to solicit such donations. There is no dispute that the text of the invitation was not admitted into evidence.

1. "Solicit" means to actively initiate contact by means of a request.

In assessing the meaning of a statutory term, a court's obligation is to give full effect to the legislative intent, and to accomplish that end, it will give the words in question their plain and ordinary meaning. *Skruch v. Highlands Ranch Metro. Dists. Nos. 3 & 4*, 107 P.3d 1140, 1142 (Colo. Ct. App. 2004) (general rules of construction applied to campaign finance statutes).

In Colorado, "solicit" has a very specific meaning. "'Solicit' means to approach with a request or plea." *Atmel Corp. v. Vitesse Semiconductor Corp*., 30 P.3d 789, 793 (Colo. Ct. App. 2001), citing *Webster's Third New International Dictionary* 2169 (1986). This definition connotes "actively initiated contact."

Atmel, supra, 30 P.3d at 793. Using the dictionary definition for terms in a campaign finance statute is entirely appropriate to establish the word's plain and ordinary meaning. *Colorado Ethics Watch v. City & County of Broomfield*, 203 P.3d 623, 625 (Colo. Ct. App. 2009); *Skruch, supra*, 107 P.3d at 1142-43.

Without the actual invitation before him, the ALJ could not determine whether there had been a fundraising "request or plea" that did, or even appeared to, come from McGihon. Without any other extrinsic evidence of McGihon's actions to raise campaign funds, the ALJ could not find that McGihon had promised to solicit contributions for Primavera. Given the absence of such evidence here, there was nothing in the record that would justify a ruling in favor of Cave.[2]

2. The cases cited by Cave do not support his position on appeal.

Cave relies primarily on out-of-state case law to argue that a solicitation was established, based on the fact that McGihon's name had been placed on an invitation to a Primavera event. His reliance on those cases is misplaced.

First, Cave cites *Green Party of Conn. 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, 192 (2d

[2] Cave's complaint only contained a document that purported to be a copy of the invitation but which was not submitted in its original form. Instead, it was written or otherwise placed on the letterhead of the Open Government Institute. *See* Vol. 1 at 000006. That document was never offered as an exhibit at hearing.

Cir. 2010), for the proposition that the "exact definition" of "solicit" is the "subject of active litigation." Opening Brief at 12. Under that district court opinion, Cave maintains that "solicitation" includes a variety of acts undertaken by lobbyists including attending a fundraiser or forwarding tickets to such an event. *Id.* at 12-13. According to Cave, "Under the law in Connecticut, Defendant McGihon's conduct would violate the solicitation ban." Opening Brief at 13-14, citing *Green Party*, *supra*, 580 F.Supp. 2d at 340.

Actually, that is not the case. The Second Circuit specifically invalidated Connecticut's ban on solicitation of campaign contributions by lobbyists. And it did so in the appeal of the *Green Party* district court decision cited by Cave. Finding that the solicitation ban was not narrowly tailored, the Second Circuit invalidated it on First Amendment grounds. *Green Party of Conn.*, 616 F.3d at 209-210. Thus, McGihon's conduct is constitutionally protected in Connecticut.

Second, Cave cites the *Shays v. FEC* decisions, 337 F.Supp. 2d 28 (D.D.C. 2004), *aff'd* 414 F.3d 76 (D.C. Cir. 2005) for the propositions that Congress anticipated a broad construction of the term "solicitation" and that it means more than a direct "ask" for money. Opening Brief at 12-14. Perhaps so, but the federal legislation was enacted for the purpose of eliminating the influence of so-called "soft money" in politics. As the Court noted, that is basically an all-or-nothing

proposition, and a limited construction of "solicit" would undermine Congressional intent. 414 F.3d. at 105-06 (terminology to be construed in light of "Congress's intent to shut down the soft-money system").

There is a very different policy underpinning for the lobbyists' ban on soliciting contributions. That prohibition seeks to avoid any quid pro quo between legislators and lobbyists while the former are acting upon policies of importance to the latter. After all, "[t]he hallmark of corruption is the financial quid pro quo: dollars for political favors." *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). How that policy end is met by applying the ban to non-incumbents, such as Primavera, is woefully unclear. In fact, limiting the source of non-incumbents' contributions for the duration of the legislative session but permitting those same contributions the day before the session starts and the day after it is over is inexplicable. This, too, is a provision that fails a narrow tailoring test. *Green Party of Conn.*, 616 F.3d at 209-210, citing *Citizens United v. FEC*, 130 S. Ct. 876, 908-909 (2010); *see also* Vol. 3, Oct. 1 Tr., 10:5-11:2 (McGihon argued that this statute violated her First Amendment rights, although the ALJ never needed to address that issue).

Thus, because the purposes of the two statutes are so different, the federal court's interpretation of "solicit" does not govern or even apply to the analysis in

this case. *North Colo. Medical Ctr. v. Committee on Anticompetitive Conduct*, 914 P.2d 902, 906 (Colo. 1996) (in general, "a court may refuse to engraft a federal statutory scheme, with its distinct definitions, policies, and concepts, onto a related state statutory scheme"). *Shays* sought to eradicate the role of "soft money" in the modern political system. C.R.S. § 1-45-105.5 is more modest in scope and supports an entirely unrelated policy objective.

Thus, *Green Party* is supportive of McGihon's position, and *Shays* is neither binding or persuasive. This case law should not be seriously considered by the Court in evaluating Cave's appeal.

II. The ALJ correctly awarded attorneys' fees to McGihon.

A. Standard of review; compliance with C.A.R. 28(k)

Cave correctly states that this Court may overturn an award of attorneys' fees only if it also finds that the ALJ abused his discretion and that the pertinent legal issues are subject to de novo review. Opening Brief at 15. Notably, a trial court is vested with "broad discretion" in determining whether to award such fees and costs. *In re Application of Talco, Ltd*., 769 P.2d 468, 476 (Colo. 1989). The reasonableness of the amount of the award is not at issue here, but if it were, it "will not be disturbed on review unless it is patently erroneous and unsupported by

the evidence." *Melssen v. Auto-Owners Ins. Co.*, 2012 COA 102, P67 (Colo. Ct. App. 2012).

Cave does not specifically point to the record to establish his preservation of issues for appeal, but again, there are several related record citations in various places in the brief. McGihon does not object to those citations.

B. Attorneys' fees were correctly awarded because Cave's campaign finance complaint was substantially groundless.

Cave, in his Opening Brief, objects to the ALJ's finding that his action was substantially groundless. Opening Brief at 18-24. In so doing, he cites to the general attorneys' fees statute, C.R.S. § 13-17-102, but fails to even refer to the specific attorneys' fees provision in the Fair Campaign Practices Act, the statute that governed the proceeding below and provided the basis for the ALJ's decision. Vol. 1 at 000271, ¶6. That statute specifies:

> A party in any action brought to enforce the provisions of article XXVIII of the state constitution or 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 or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Colorado rules of civil procedure. Notwithstanding any other provision of this subsection (2), no attorney fees may be awarded under this subsection (2) unless the

> court or administrative law judge, as applicable, 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.**

C.R.S. § 1-45-111.5(2) (emphasis added).

A claim or defense is groundless "if the allegations in the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial." *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984). In other words, a complainant may have a valid legal theory, but he "can offer little or nothing in the way of evidence to support the claim." *Id.* Here, Cave's complaint did withstand a pre-hearing motion to dismiss, but then he made no serious effort at hearing to establish the facts and provide evidence that would support his legal theory. For that reason, his claims were groundless.

1. The ALJ did not abuse his discretion in granting attorneys' fees in connection with Cave's First Claim.

Cave maintains that "McGihon permitted the use of her name as a co-host on an invitation to a fundraising event for candidate Primavera." Opening Brief at 19. There was no evidence, however, of the wording of the actual invitation; that document was never admitted as an exhibit at hearing. In fact, the actual invitation was never even *offered* as an exhibit. The only record references are a facsimile of

an invitation printed on the stationary of the Open Government Institute as an exhibit to the original complaint but never admitted at hearing, and the partial summary of the partisan blog posting in the ALJ's order used just for the purpose of awarding attorneys' fees. Vol. 1 at 000014, 000268, ¶¶9-10. There simply is no factual basis in the record about any representations, attributable to McGihon, in an actual invitation.

a. The question of whether McGihon solicited any contributions for Primavera is a question of fact.

On appeal, Cave contends that the question of what constitutes a solicitation is an issue of law. Opening Brief at 19-20 ("this determination involves the legal interpretation of a statute"). But below, Cave was clear that this inquiry was entirely factual in nature. "Still, we're talking about solicitation and what it means. And that is a question of fact." Vol. 3, Oct. 1 Tr., 66:6-8. On appeal, Cave cannot change his position that a factual issue is really a legal issue. *In re Marriage of Lamm*, 682 P.2d 67, 68 (Colo. Ct. App. 1984) (party who admits a matter in the trial court waives the ability to contest that issue on appeal).

Cave's hearing statement is well-grounded in precedent and logic. For instance, matters dealing with a party's intent or knowledge are "factual determinations solely within the province of the ALJ." *City & County of Broomfield*, 203 P.3d at 625 (applied to campaign finance laws). What may have

appeared on a piece of paper or in an email is likewise a question of fact. *United Cable TV of Jeffco v. Montgomery LC, Inc.*, 942 P.2d 1230, 1234 (Colo. Ct. App. 1996). Cave cannot prove his case without establishing certain fundamental factual matters, including the existence and wording of the document that contains McGihon's name.

Because establishing the existence of a solicitation is factual in nature, and because a prohibition on solicitation is unambiguous, the burden was upon Cave to adduce admissible facts to prove that McGihon solicited or agreed to solicit – that is, made a request for – contributions for Primavera. *See generally In re Tennant*, 516 S.E.2d 496, 500 (W.Va. 1999) (judicial candidate who made a request for funds, even if joking as he claimed, solicited campaign contributions).

b. The actual invitation was never offered as an exhibit at hearing.

Based on the evidence in the record, the ALJ could not find that the facts necessary to comprise a solicitation existed here.

The actual invitation was never offered or admitted as an exhibit, making it impossible for the ALJ to assess whether McGihon solicited funds for Primavera or promised to do so. The wording of the invitation was critical in prosecuting this campaign finance complaint. Without it, Cave could not prove that McGihon made or promised to make "a request or plea" that reflected "actively initiated

contact" – in other words, a solicitation. *Atmel Corp.*, *supra*, 30 P.3d at 793. Instead, Cave sought to establish the existence of a solicitation or an agreement to solicit based on an inherently unreliable mock-up of the key document.

This Court must defer to the ALJ's factual findings where they are supported by the hearing record and if there is conflicting evidence in the record, those factual determinations are binding on appeal. *Vondra v. Colo. Dep't of Corr.*, 226 P.3d 1165, 1167 (Colo. Ct. App. 2009). Here, the ALJ's found that no evidence that would establish a solicitation of contributions by McGihon or an agreement on her part to solicit contributions. Vol. 1 at 000268, ¶8.

Cave has not established that the ALJ abused his discretion in finding that there was no solicitation, based on the record below. For purposes of establishing liability, this Court will look to the record that was actually generated to determine whether the record contains sufficient evidentiary support for the hearing officer's decision. *Shiplet v. Colo. Dep't of Revenue*, 266 P.3d 408, 410 (Colo. Ct. App. 2011). Here, the record is sufficient to establish Cave's failure to produce the central document in the case – an actual invitation.

c. The evidence offered at hearing was unreliable.

Cave learned of the invitation from "several organizations and lobbyists and other folks" who forwarded materials to Shawn Coleman, an employee of Cave's

counsel. Vol. 3, Oct. 1 Tr., 36:22-25. Cave did not call as witnesses any of these organizational representatives, lobbyists, or individuals to testify at hearing about the invitation they allegedly received. At hearing, Coleman could not recall any of the names of these various sources. *Id.* at 36:25-37:13. Nor did he know how they received the documents forwarded to him. *Id.* at 45:5-13. All he could be sure of was that he did not personally know the people who sent the documents to him. *Id.* at 37:14-17.

Coleman's comfort level about the actual verbiage of the invitation waned when asked about the comparability of the two secondary sources of which he had knowledge – the emails he received purporting to include invitations and the invitation posted on Compass Colorado, the political blog. When the topic first came up, Coleman stated the two documents were "identical." Vol. 3, Oct. 1 Tr., at 38:23-39:1. Upon just a bit of reflection, he said they were actually "substantively equivalent." *Id.* at 39:5-7. After additional questioning, Coleman agreed they were only "substantially similar." *Id.* at 40:12-14. Coleman's confidence eroded due to his failure to compare the actual wording of the proffered blog posting to the emailed attachments he received from anonymous sources. *Id.* at 40:1-5.

Coleman never identified which elements in the two document formats were the same. As such, the ALJ had no basis on which to conclude what language pertaining to McGihon was contained in both the emailed versions and the blog version. Similarly, the ALJ had no basis on which to conclude that these two secondary sources – the emails and the blog – were the same document as the original invitation, because Coleman admitted he never received the original invitation as an intended recipient and potential attendee at the Primavera event. *Id*. at 37:18-22. Thus, Coleman never actually saw a document known to be the original event invitation.

The blog posting, offered as Cave's Exhibit D, was severely lacking in credibility. Its accuracy and actual source was and remains unknown. *See In re Does*, 337 S.W.3d 862, 863 (Tex. 2011) (addressing postings on political blog by anonymous sources); *Stone v. Paddock Publications, Inc.*, 961 N.E.2d 380, 394 (Ill. App. Ct. 1st Dist. 2011) (there has been a "proliferation of the seemingly limitless vehicles" for anonymous political speech "on the Internet and the various forms of social media"). Coleman testified that he was not involved with the blog that purported to publish the invitation. More importantly, he could not identify who was, and he did not know who had placed the information on the internet from which the proffered exhibit was taken. Vol. 3, Oct. 1 Tr., 40:15-41:19. In short,

Coleman sought to sponsor an exhibit without knowing how it was generated, who generated it, or whether it was a precise, approximate, or totally inaccurate copy of an original. The ALJ was correct to exclude the exhibit from the record as being inherently unreliable.[3]

d. No other evidence of "solicitation" was offered at hearing.

Cave presented no other evidence that McGihon took any steps to suggest she was seeking to raise money for Primavera. He adduced no evidence that McGihon contacted friends or business associates to attend the Primavera event. There was no evidence that she gave her mailing, phone, or email lists to the campaign so the invitation could be sent to people who would see her name and act in response. Cave did nothing to establish that McGihon had made some agreement to solicit funds for the Primavera campaign. Neither did he call as a witness an actual recipient of this invitation. Even though she was called as a witness by Cave, McGihon was never asked if she knew anyone on Primavera's publicly disclosed contributor list from the period when the event was scheduled to occur. And Coleman testified he was unaware of any other act on McGihon's part that amounted to a solicitation of campaign funds for Primavera. *Id.* at 47:13-20.

[3] Cave felt this exhibit should be viewed in the light most favorable to the Complainant, but the ALJ properly observed that this standard did not apply after a complainant completes his presentation of evidence. *Id.* at 65:19-66:5.

A judge cannot impose liability, and therefore is warranted in dismissing a complaint, if the record is entirely silent on the central issue before him. *Kettering v. American Bldg. Maintenance Co.*, 426 P.2d 974, 975 (Colo. 1967) (trial court correct to dismiss complaint when plaintiff, in negligence action, could not produce any evidence to establish causation). The ALJ acted properly within this authority.

e. Cave failed to conduct any discovery to prove "solicitation."

As the ALJ noted, this case did not present the situation of a hurry-up hearing, as can occur under section 9 of Article XXVIII which provides for a hearing within 15 days after the complaint is filed. Colo. Const., art. XXVIII, § 9(2)(a). Cave had months – seven (7) months, to be exact – to conduct discovery and assemble a factual case in support of his allegations. For whatever reason, he did nothing to help make an evidentiary case to support his allegations during the period between the filing of the complaint and the date of hearing. Vol. 1 at 000269, ¶15.

Cave used none of the discovery devices available to him. *Id.* He did not contact McGihon or her counsel to determine whether the blog posting was accurate. *Id.; see Colo. Citizens for Ethics in Gov't v. Comm. for the Am. Dream*, 187 P.3d 1207, 1221-1222 (Colo. Ct. App. 2008) (complainant failed to contact

respondent's staff or members to determine efficacy of its campaign finance complaint). He did not seek documents, formally or informally, from McGihon, Primavera, or the Primavera campaign. Vol. 1 at 000269, ¶15. He sought no prehearing admissions. Vol. 3, Dec. 11 Tr., 25:25-26:2; 27:2-4. He never deposed McGihon or served upon her a subpoena for hearing or deposition seeking documents. *Id.* at 25:12-21; 27:7-18. In fact, McGihon was unaware of any attempts on Cave's part to obtain information from anyone associated with this matter from the date of filing the complaint through the date of hearing. Vol. 1 at 000269, ¶15.

As a result, the ALJ aptly described Cave as a party who "conducted no discovery whatsoever" and "nominally attempted to establish its… claim at trial." *Id.*, ¶20, citing *Western United Realty, Inc., supra*, 679 P.2d at 1069. That lack of diligence is an appropriate consideration for a lower court in determining whether to award attorneys' fees. *Id.*

f. No evidence was offered at the attorneys' fees hearing about an actual invitation.

Beyond the October 1, 2012 hearing on the merits, Cave could have attempted to mitigate the groundlessness of his complaint by producing an actual invitation that supported his position at the attorneys' fees hearing, held on

December 11. But that hearing's record, too, is silent about the wording of the invitation.

Had Cave introduced an actual invitation, his claim in this Court that credible evidence need not be admitted in order to avert an award of attorneys' fees might be more persuasive. But in the case Cave cites, *Harrison v. Smith*, 821 P.2d 832, 835 (Colo. Ct. App. 1992), the district court refused to admit sworn affidavits at trial and later awarded attorneys' fees for the period that included the months during which plaintiffs were aware of the contents of the sworn statements. The sworn affidavits were sufficient to limit, albeit not eliminate, the attorneys' fees award. *Id.*

Here, though, the blog posting simply was not credible and thus does not fall within *Harrison*. Instead of sworn affidavits, Cave sought to introduce an unauthenticated blog posting whose author he could not identify and the similarity of which to an original document no one could establish. Coleman had no idea who was associated with that blog, just as he could not testify what the original invitation said. And the organizations and people who allegedly transmitted documents to him, portrayed to be copies of the event invitation, were also unknown to Coleman.

Thus, at no point in the proceedings (including the attorneys' fees hearing) did Cave produce any evidence of the invitation that allegedly triggered his complaint. That he still did not produce credible evidence at that late hour represents reason enough to reject the grounds for appeal advanced here.

g. The policy behind private enforcement of campaign finance laws is not relevant to the award of attorneys' fees here.

Cave also argues that Article XXVIII is enforced by private citizens, and the enforcement mechanism allows for no private gain by complainants. Opening Brief at 21. The ALJ responded to Cave's argument that policy considerations mitigated against an award of fees. While the chilling of campaign finance enforcement is pertinent where private citizens proceed alone in this process, that concern was not present here as Cave was represented by counsel. As such, there was no countervailing factor of a party proceeding pro se, as contemplated by C.R.S. § 13-17-102(6).

2. The ALJ did not abuse his discretion in granting attorneys' fees in connection with Cave's Second Claim.

Cave also complained that McGihon's name on a political party fundraising invitation violated C.R.S. § 1-45-105.5. At least as to the First Claim, Cave attempted to introduce evidence to make out a prima facie case. As to the Second Claim, he did not do so. He offered no testimony or exhibits to suggest that

McGihon had violated the law. At the close of Cave's case, McGihon moved to dismiss the Second Claim. Cave did not object, and the ALJ correctly granted that motion.

a. The total lack of evidence offered made this claim groundless.

A claim – such as the Second Claim against McGihon – that is dropped at trial because there is no evidence to sustain it is the very essence of a groundless allegation. *Engel v. Engel*, 902 P.2d 442, 446 (Colo. Ct. App. 1995) (claim dropped on morning of trial because no evidence could be introduced to support it warranted award of attorneys' fees). This standard also applies to cases filed under Article XXVIII related to campaign finance violations. *Colo. Citizens for Ethics in Gov't v. Comm. for the Am. Dream*, 187 P.3d 1207, 1221-22 (Colo. Ct. App. 2008). There, the Complainant failed to conduct any pre-filing investigation. Upon receipt of documents provided pursuant to subpoena on the morning of hearing, complainant dismissed an allegation of a campaign finance violation. Yet, the fact that it alleged violations without having made a pre-filing investigation or otherwise sought to acquire additional information from the respondent was sufficient to warrant the award of fees. *Id.*

Cave failed to conduct any pre-filing investigation. Cave attached an altered copy of the House Majority Project invitation to his complaint; at minimum,

someone deleted the "TO" line in what purports to be an emailed invitation. Vol. 1 at 000008. Cave did not even attempt to introduce this document, and its placement on the Open Government Institute letterhead and the alteration noted above made its authenticity questionable. But the point is, Cave made no record in attempting to introduce this document, and no witness testified to the substance or distribution of such an invitation or any other details related to this event. There was no evidence at all before the ALJ to suggest that McGihon violated any campaign finance statute. Thus, the award of attorneys' fees was fully warranted.

b. Cave did not voluntarily dismiss the Second Claim.

The ALJ noted that Cave did not resist – and thus "acquiesced" to – McGihon's C.R.C.P. 41(b) motion to dismiss, but that does not mean that Cave voluntarily dismissed this claim. C.R.S. § 1-45-111.5(2), citing C.R.S. § 13-17-102(5) (no attorneys' fees are assessed if "a voluntary dismissal is filed as to any claim… 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").

Cave is incorrect that his lack of objection to McGihon's motion to dismiss made the dismissal voluntary. A voluntary act springs from one's own free will, unconstrained by the wishes or acts of others. *West v. Roberts*, 143 P.3d 1037,

1043 (Colo. 2006); *Kwiatkoski v. People*, 706 P.2d 407, 409 (Colo. 1985). Voluntariness thus implies that the actor in question exercises a certain level of initiative. Acceptance of one's fate – acquiescence – is hardly synonymous with a proactive attempt to craft one's fate – voluntariness.

In practical terms, Cave did not get to the end of his case and then move for dismissal of the Second Claim. He finished his direct examination of all of his witnesses. Then, he rested and informed the Court that he had no other witnesses. Vol. 3, Oct. 1 Tr., 50:3-5.

At that point, McGihon moved to dismiss Cave's Second Claim. *Id.* at 50:24-51:22. Had McGihon made no such motion, the ALJ would have decided the matter based on the substance of the parties' evidence.

Once McGihon's motion to dismiss was before the ALJ, Cave explained that he focused on the Second Claim more at the outset of the litigation. Evidently, as time went by during the pendency of this matter, Cave abandoned the Second Claim. *Id.* at 54:24-55:9. He did not file the appropriate pleadings with the Court or even inform McGihon of that fact. Thus, McGihon spent time preparing to defend a claim that would never materialize, making the award of attorneys' fees the only just result.

c. Cave did not make a record below to preserve issues for the appellate court's consideration.

As to the possible success of the Second Claim, Cave argues that he saw the writing on the wall based on the ALJ's evidentiary rulings on the First Claim. As a result, he did not present his case on the Second Claim. Opening Brief at 21-22.

Cave's responsibility was to lodge objections or make offers of proof in order to preserve issues for appeal. *Hock v. New York Life Ins. Co.*, 876 P.2d 1242, 1259 n.2 (Colo. 1994); *People v. Douglas*, 2012 COA 57, P62 (Colo. Ct. App. 2012). Even if he thought he would "lose" on the issue, he still had to make a record. Having failed to do so, he cannot now claim that he established facts that made a case that McGihon had violated the campaign finance laws. Thus, his Second Claim was groundless.

C. Attorneys' fees were properly awarded because Cave's complaint was substantially frivolous.

Before the ALJ, McGihon addressed whether the complaint was substantially frivolous or groundless, Vol. 1 at 000062, ¶10, or substantially vexatious. *Id.* at 000064, ¶23. A claim is frivolous if its proponent can present no rational argument based on the evidence or law in support of it. *In re Application of Talco, supra*, 769 P.2d at 476. Whether the facts make out a case for "substantially frivolous" as opposed to "substantially groundless" is a distinction

that "is of no import." *Id.* at 477. Where the facts pleaded by a complainant are without substantial justification, attorneys fees are warranted under either label. *Id.*

Here, the ALJ cited the all-encompassing standard for award of attorneys' fees ("substantially frivolous, substantially groundless, and substantially vexatious"), Vol. 1 at 000272, ¶10 and 000274, ¶22, but did not break out these arguments separately. As in *Talco*, this distinction is secondary. The ALJ awarded fees because of the utter lack of factual support for the legal allegations before him. "There is no evidence that the Respondent engaged in any conduct prohibited by Section 1-45-105(1)(a)(I)." *Id.* at 000270, ¶5. Thus, the ALJ's reference to "substantially frivolous" was not error.

D. The ALJ did not abuse his discretion in granting attorneys' fees in because of the vexatiousness of Cave's approach to this litigation.

Cave did nothing to verify and support the factual allegations in his complaint, either as to his First or Second Claims. In seven months since the filing of the complaint, Cave bypassed every reasonable or prudent opportunity to create an evidentiary basis for the allegations in his complaint. McGihon should not be responsible for Cave's failures in this regard.

The campaign finance statute specifically provides that a claim lacks substantial justification if it is "substantially vexatious." C.R.S. § 1-45-111.5(2).

A vexatious claim is one that is pursued in bad faith. *Byrd v. People*, 58 P.3d 50, 59 (Colo. 2002). The standard for bad faith in this context is clear.

> **[I]f the record reveals that counsel or any party has brought**, maintained, or defended **an action in bad faith, the rationale for awarding attorney fees is even stronger**. Bad faith may include conduct which is arbitrary, vexatious, abusive, or stubbornly litigious. It also may include conduct aimed at unwarranted delay or disrespectful of truth and accuracy.

Western United Realty, Inc., supra, 679 P.2d at 1069. A party demonstrates bad faith when it presents no evidence on an asserted claim and, being given the opportunity to dismiss one or more claims, refuses to do so but proceeds to hearing where its claims "were not close to being proven." *Becker v. Becker*, 68 P.3d 567, 569 (Colo. Ct. App. 2003).

Cave's litigation presence in this matter fits that bill. He presented no evidence at hearing; he strenuously objected to McGihon's pretrial motion to dismiss; and given the ALJ's granting of McGihon's motion to dismiss at the end of Cave's case, he did not even begin to fulfill his burden of proof. If he did not have legally probative evidence when his complaint was filed (aside from Rule 11 issues), Cave could have stipulated to McGihon's Motion to Dismiss, withdrawn his complaint, or undertaken discovery. What he was not permitted to do was to proceed to hearing without assembling some substantial evidence that his claims were true. This was a case where the Complainant knew or should have known

that he was presenting arguments that were substantially vexatious. *Bockar v. Patterson*, 899 P.2d 233, 235 (Colo. Ct. App. 1994).

Bad faith is also established where parties, such as Cave, use the judicial process to pursue a patently political agenda. In a case in which defamation was alleged regarding statements in a recall petition, the Court concluded "plaintiffs filed their claims in bad faith because they had used the courts when the political system was available to them." *Lockett v. Garrett*, 1 P.3d 206, 212 (Colo. Ct. App. 1999) (citing district court's opinion). Likewise, Cave and his counsel sought to embarrass Primavera and McGihon with grandiose allegations in the Complaint, for instance, but with no substantive follow-up at hearing.

The ALJ correctly held, then, that Cave's course of conduct in this matter was substantially vexatious, and the award of attorneys' fees and costs was well warranted.

III. This Court should award attorneys' fees because McGihon must defend against this frivolous appeal.

A. Standard of review; Rule 28(k) compliance

This issue arises under the Court's jurisdiction under C.A.R. 38(d). Because this issue could not be raised until an appeal was filed, there is nothing in the record about this claim for relief. However, the terms of C.A.R. 28(k) do not

require it, because this is not one of the issues denominated there that an ALJ could decide.

B. McGihon should receive her fees and costs for defending both the ALJ's decision and the award of attorneys' fees in this appeal.

A party that must defend against a frivolous appeal is entitled to attorneys' fees. C.A.R. 38(d). An appeal is frivolous if it lacks substantial justification. *Artes-Roy v. City of Aspen*, 856 P.2d 823, 828 (Colo. 1993). An appeal lacks substantial justification "if the proponent can present no rational argument based on the evidence or law" in support of its claims, or "the appeal is prosecuted for the sole purpose of harassment or delay." *Wood Bros. Homes, Inc. v. Howard*, 862 P.2d 925, 934-935 (Colo. 1993); *see* C.R.S. § 1-45-111.5(2) (a matter lacks substantial justification where it is **"**substantially groundless or substantially vexatious"). An award of attorneys' fees is appropriate at the appellate level if the appeal itself is not legally or factually merited. *Front Range Home Enhancements, Inc. v. Stowell*, 172 P.3d 973, 977 (Colo. Ct. App. 2007).

Cave here can present no rational argument why McGihon would have ever been found to have violated the campaign finance laws under the evidence used to advance Cave's First Claim for Relief. The record reflects an absolute absence of evidence about the wording of the actual invitations to the two events and the lack

of testimony that her actions represented either solicitations of contributions or an agreement to solicit contributions for Primavera's campaign.

Certainly, there is no rational argument for asserting McGihon violated any law vis-à-vis the Second Claim, as Cave chose to forego any evidentiary presentation on his issue at all. Based on these facts alone, Cave's appeal of the award of attorneys' fees for the Second Claim lacks substantial justification and is therefore frivolous.

If this Court agrees to order an award for fees and costs incurred due to this appeal, that question should be remanded to the ALJ for the limited purpose of determining the amount of the attorneys' fees and costs attributable to this appeal. *See* C.A.R. 39.5; *Martin v. Essrig*, 277 P.3d 857, 862 (Colo. Ct. App. 2011).

CONCLUSION

The ALJ did not abuse his discretion in finding that the limited facts in the record did not constitute a solicitation of campaign contributions. He also ruled correctly that, because of the sparse record created and the failure over seven months to engage in rudimentary discovery in order to develop a more substantive case, Cave was liable for attorneys' fees as to both of his claims. This Court should uphold those rulings and also award attorneys' fees to McGihon for this frivolous appeal.

Respectfully submitted this 24th day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2013 a true and correct copy of the foregoing **ANSWER BRIEF** was filed and served via the Integrated Colorado Courts E-Filing System to the following:

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s/Amy Knight
Amy Knight

In accordance with C.A.R. 30(f), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.