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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	▲ **COURT USE ONLY** ▲ Case Number: 13 CA 0137
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REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply 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:

This brief complies with C.A.R. 28(g). It is 17 pages in length and consists of 4011 words.

The brief complies with C.A.R. 28(k). 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.

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.A.R. 32.

/s/ Jessica K. Peck, Esq.
ATTORNEY FOR APPELLANT

Appellant, Thomas E. Cave, through undersigned counsel, hereby submits this Reply Brief.

I. INTRODUCTION

This appeal involves a matter of first impression under Colorado law, contemplating the proper definition(s) of the terms "solicit" and "promise to solicit" as they appear under the Colorado Fair Campaign Practices Act, C.R.S. §1-45-105.5(1)(a) ("FCPA"). The key question: whether a registered lobbyist's agreement to co-host a fundraiser for a covered person under the FCPA (here a candidate for the Colorado General Assembly) constitutes an agreement to either "solicit" or "promise to solicit" contributions for such covered person.

The ALJ's findings of fact in the Agency Decision below are not in dispute. The ALJ found that Defendant McGihon is a registered lobbyist, and that she agreed to co-host a fundraiser for a candidate for the general assembly while the general assembly was in session. If co-hosting a candidate fundraiser amounted to "solicitation" of a contribution on behalf of that candidate, then Defendant McGihon's conduct would violate FCPA. However, the ALJ determined that co-hosting a fundraiser, as a matter of law, does not amount to "solicitation," or "promise to solicit," a contribution for such candidate. Based on that legal

conclusion, the ALJ dismissed the complaint below, and determined that the action was groundless and frivolous and awarded attorney's fees against Plaintiff Cave.

The issue on this appeal is whether the ALJ's legal conclusion as to the definition of "solicit," or "promise to solicit," is incorrect, and thus whether the ALJ's decision below is reversible.

II. ANSWER BRIEF

Defendant McGihon spends the majority of her 48-page Answer Brief seeking to re-litigate the ALJ's findings of fact. The validity of these findings of fact are not before this court on appeal. If McGihon wished to challenge these findings, she could have filed a motion for reconsideration in the proceedings below, or filed her own notice of appeal with this Court. She did neither and thus, her response largely concerns irrelevant issues.

In spite of the irrelevance of these challenges, her Answer Brief is illuminating in one respect: she appears to argue that her counsel could have prosecuted the case before the ALJ in a more thorough fashion than that presented by Cave's counsel, and therefore the attorney fee award below is justified on that basis. Relative quality of prosecuting a case is not the standard for determining groundlessness of a case. Instead, the standard is whether any credible evidence is

offered for each element of a claim. Not only did Cave produce such evidence, the ALJ himself made all necessary requisite findings of fact to demonstrate that McGihon violated the FCPA.

Nevertheless, despite making findings of fact that state a claim under, support, and even demonstrate a violation of, the FCPA against Defendant McGihon, the ALJ dismissed the complaint as frivolous and groundless and awarded $18,000 in attorney's fees against Plaintiff Cave and his attorney Jessica Peck. For the reasons set forth below, and through those provided in the Opening Brief, the ALJ's decision should be reversed.

III. ARGUMENT

Defendant McGihon makes only two short challenges to the arguments in the Opening Brief against the merits of the ALJ's decision. The remainder of the Answer Brief is devoted to the attorney fee award below, and includes another request for more attorney fees on this appeal.

A. McGihon's Challenge to the Standard of Review on Appeal is Irrelevant.

In the Opening Brief, Plaintiff Cave argued that the ALJ erred in dismissing the complaint under Rule 12(b) for failure to state a claim. Opening Brief at p. 9.

Plaintiff Cave further argued that, because the ALJ's dismissal was based on the ALJ's incorrect conclusion of law, specifically that hosting a fundraiser does not constitute "solicitation" under the FCPA, the standard of review for the Court of Appeals is *de novo.* Opening Brief at p. 9-10.

In the Answer Brief, Defendant McGihon asserts that the ALJ did not dismiss case under Rule 12(b), but rather under Rule 41(b). Therefore, asserts McGihon, the Court of Appeals should not conduct a *de novo* review of the ALJ's decision, but rather a review based on the "weight of the evidence." Answer Brief at p. 10.

1. ALJ Did Not Dismiss Under Rule 41 (b).

While McGihon advises this Court that the ALJ dismissed the complaint under Rule 41(b), she fails to provide a citation to the location in the record where the dismissal under Rule 41 (b) occurred. Answer Brief at p. 9. Undersigned counsel has searched the record, and was unable to locate any references to Rule 41 or Rule 41(b). Moreover, McGihon does not specify whether the action was supposedly dismissed under Rule 41(b)(1) or Rule 41(b)(2).

As set forth in Opening Brief, the ALJ dismissed the complaint based on McGihon's renewal of her Rule 12(b) motion that she filed prior to the hearing.

Opening Brief at p. 9 (Rec. Vol. 3, Tr. 10/1/12, P. 57, L. 20, "We would move to dismiss on the same grounds, Your Honor. We think there is no basis for this complaint.")

2. Regardless of the Basis for Dismissal, the Standard of Review is the Same.

In any event, a dismissal under Rule 41(b) would not alter the standard of review by this Court on the merits of this case, and therefore this issue raised in the Answer Brief is irrelevant. The ALJ dismissed the complaint based on his incorrect legal conclusion as to the FCPA's definition of "solicitation". In this appeal, Plaintiff Cave requests a review of that legal conclusion. Legal conclusions of an ALJ are subject to *de novo* review by the Court of Appeals. *Hopkins v. Industrial Claim Appeals Office*, 2011 WL 6425616 (Colo. App. 2011). Similarly, agency interpretations of statutes are subject to *de novo* review. *Id.*

B. The Definition of Solicitation.

In the only portion of the Answer Brief that responds to the merits of the issues raised in the Opening Brief, McGihon discusses the meaning of "solicitation" under the FCPA and how that term should be interpreted. Answer Brief at pp. 11. McGihon cites *Webster's Third New International Dictionary* as

the only source of guidance this Court should look to for the statutory interpretation of the term "solicit." Answer Brief at p. 11.

In the Opening Brief, Plaintiff Cave set forth a thorough legal discussion of the meaning of the terms "solicit" and "promise to solicit," including analogies to cases in other jurisdictions, as well as under federal law, that have adopted similar statutory schemes to the FCPA. Plaintiff Cave did not find any authority on this issue in the State of Colorado, and therefore, the interpretation of these terms is a matter of first impression in Colorado.

As set forth in the Opening Brief, 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 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). Under that interpretation, Defendant McGihon's conduct would have violated the FCPA. Moreover, 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 76, 106 (D.C.Cir. 2005) (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 an unlawful "promise to solicit".

Defendant McGihon has failed to cite any case law, let alone cases from a jurisdiction that contains a solicitation ban, that upheld co-hosting a fundraiser or engaging in fundraising activity for a covered candidate as a permissible activity for a registered lobbyist. Moreover, Defendant McGihon herself admitted that her activity constituted a "technical violation" of the FCPA. Opening Brief at pp. 8-9.

As a matter of law, engaging in fundraising activity, including specifically agreeing to co-host a fundraiser for a covered candidate, constitutes at a minimum a "promise to solicit" a contribution on behalf of the candidate, if not solicitation of such a contribution. Therefore, the ALJ made an incorrect legal conclusion on this issue, and the decision below should be reversed.

D. The Attorney Fee Award Should Be Reversed.

1. Basis for Award of Fees.

McGihon argues that the ALJ's attorney fee award was based on C.R.S. §1-45-111.5(2), and not on C.R.S. §13-17-102. This argument is also irrelevant. While §1-45-111.5 applies to the FCPA proceeding below, that section incorporates by reference the legal standards applicable to a fee award under

C.R.S. §13-17-102. Therefore, the fee award under §1-45-111.5(2) must be based on a finding that the claim or defense is substantially frivolous, substantially groundless, or substantially vexatious. C.R.S. §1-45-111.5(2). Moreover, §1-45-111.5(2) provides that "no attorney fees may be awarded under this subsection (2) unless the . . . administrative law judge . . . has considered the provisions of section 13-17-102 (5) and (6)." Therefore, §1-45-111.5 incorporates by reference the provisions of §13-17-102, and the standard of review, and analysis for review of such an award are the same. *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 275 P.3d 674, 686 (Colo. App. 2010) (interpreting, using C.R.S. § 13-17-102 for guidance, the meaning of those terms as applied under C.R.S. § 1-45-111.5(2)).

2. Groundlessness of Claim I.

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. v. Isaacs*, 679 P. 2d 1063 (Colo. 1984). The test for groundlessness assumes the 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 (Colo. App. 1995).

In the Answer Brief, rather than address the legal standard for groundlessness of the complaint, McGihon appears to challenge the evidentiary

rulings of the ALJ below and confuse the quality and type of evidence with the quantity of evidence for purposes of groundlessness of a claim or complaint in general. Throughout 11 pages of the Answer Brief, McGihon points out that the "evidence at the hearing was unreliable," Answer Brief at p. 20, the "actual verbiage of the invitation waned," Answer Brief at p. 21, Plaintiff did not call sufficient witnesses, Answer Brief at p. 21, 23, Plaintiff's evidence "was severely lacking in credibility," Answer Brief at p. 22, the "actual source" of Plaintiff's evidence is unknown, and Plaintiff did not use sufficient "discovery devices available to him," Answer Brief at p. 24.

Despite the fact that the ALJ found that "Defendant McGihon agreed to co-host a fundraiser for candidate Primavera and thereby agreed to be named as a co-host <u>on the invitation</u> to the fundraiser event," [Rec. Vol. 1, P. 268, FOF 6], McGihon nevertheless spends pages in the Answer Brief arguing that "there simply is no factual basis in the record about . . . an actual invitation," Answer Brief at p. 18, Cave failed to produce "an actual invitation," Answer Brief at p. 20, "the actual verbiage of the invitation waned," Answer Brief at p. 21, and Cave did not produce "any evidence of the invitation." Answer Brief at p. 27.

The standard for groundlessness is whether the allegations of the complaint are supported by <u>any</u> credible evidence at trial. *Western United Realty, Inc. v.*

Isaacs, 679 P. 2d 1063 (Colo. 1984). The ALJ's findings of fact speak for themselves. Sufficient documentary and testimonial evidence was submitted at the hearing to support the findings made by the ALJ. Those findings support a claim under the FCPA, and also support the finding of a violation of the FCPA by McGihon, depending on the definition of "solicit," or "promise to solicit," under Colorado law. Claim I of the complaint was not groundless and the ALJ's award of attorney's fees based on a finding of groundlessness should be reversed.

3. Groundlessness of Claim II.

As set forth in the Opening Brief, Claim II was based on the same legal theory as Claim I, and involved Defendant McGihon being named as a co-host of a fundraiser for various other political candidates for the general assembly. [Rec. Vol. 1, P. 8]. When the ALJ made the determination that the inclusion of McGihon's name on a fundraiser invitation did not amount to solicitation, and rendered the complaint dismissible, Plaintiff Cave determined that it would be futile to pursue his case any further. 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]. McGihon acknowledges that "Cave abandoned the second claim." Answer Brief at p. 30.

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 was improper. C.R.S. §13-17-102(5); *Seismic Int'l Research Corp.,* 793 F. 2d at 232. Neither McGihon in the Answer Brief, nor the ALJ in the Agency Decision or proceedings below, analyzed the standard for an award of attorney's fees under §13-17-102(5), when a claim is voluntarily dismissed as soon as it became known that the claim could not prevail. An award of fees under the FCPA provides that "no attorney fees may be awarded under this subsection (2) unless the . . . administrative law judge . . . has considered the provisions of section 13-17-102 (5) and (6)."

In the Agency Decision, the ALJ inconsistently held that Claim II was voluntarily dismissed through "acquiescence of counsel" [Rec. Vol. 1, P. 272, COL 10], and that "Claim II was never voluntarily dismissed." [Rec. Vol. 1, P. 272, COL 10]. Because the ALJ did not clarify the basis for the finding of groundlessness of Claim II, 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 claim lacked substantial justification.)

Even if Claim II was not voluntarily dismissed, 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 supported by exhibits attached to the complaint and 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 in failing to make detailed findings under §13-17-102(5), and the fee award must be reversed to the extent it was based on the groundlessness of Claim II.

4. Frivolousness.

As set forth in the Opening Brief, 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 (Colo. 1984). This 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 (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 (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.)

McGihon fails to understand the distinction between groundlessness and frivolousness ("'substantially frivolous' as opposed to 'substantially groundless' is a distinction that is 'of no import.'" Answer Brief at p. 31.) Therefore, the analysis in the Answer Brief is not helpful.

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.

5. Vexatiousness.

In the Answer Brief McGihon argues that the fee award was based on the vexatiousness and bad faith filing of the complaint. McGihon fails to cite any references in the record to support such a basis for the award, in further violation of C.A.R. 28(k). McGihon simply argues that Cave "presented no evidence at the hearing." Answer Brief at p. 33. As set forth above, the ALJ's findings of fact speak for themselves, were based on the evidence submitted by Cave, and support a claim under the FCPA.

The ALJ in the Agency Decision did not make any findings based on the vexatiousness or bad faith filing of the complaint. Therefore, such a basis for the award would be improper. *In re Aldrich,* 945 P. 2d 1370, 1379 (Colo. 1997) (Trial Court is required to make detailed findings to support fee award.)

E. McGihon's Request for Attorney Fees on this Appeal Should be Denied.

1. C.A.R. 28 (k) Violations in Answer Brief.

Throughout the Answer Brief, Defendant McGihon makes incorrect references to actions allegedly taken, and issues allegedly raised or decided, in the proceedings below without citing the precise location in the record where such issues were raised, in violation of C.A.R. 28(k). Examples include McGihon's assertion that the complaint was dismissed below under Rule 41(b), Answer Brief at p. 9, that Cave's complaint was dismissed because there was not an "authentic and reliable event invitation," Answer Brief at p. 7, the ALJ found Cave offered only a "facsimile of an invitation," Answer Brief at p. 4, the ALJ determined Cave's primary witness was not familiar with the "actual invitation," Answer Brief at p. 4, and the attorney fee award was based on the vexatiousness and bad faith of the complaint, Answer Brief at p. 32, among others. The instances of C.A.R. 28(k) violations are too numerous to specifically identify.

While C.A.R. 28 violations do not necessarily require that an answer brief be stricken, such violations can be sanctionable. See, e.g., *Martin v. Essrig*, 277 P.3d 857, 860 (Colo. App. 2011) (Attorney admonished and sanctioned for filing briefs that were "virtually devoid of citations to the record, a standard of review, or legal authority supporting his position.") Therefore, having filed a brief in violation of the Court rules, McGihon is hardly in a position to be asking for an award of fees in her favor.

2. Appeal is Not Frivolous.

In any event, to support her claim for an award of fees on appeal, McGihon must show that Cave's Opening Brief is frivolous, and thus fails to present a rational argument based on the evidence and law to support the appeal. *Mission Denver Co. v. Peirson,* 674 P. 2d 363 (Colo. 1984). In support of this showing, McGihon argues that the record below contains no "evidence about the wording of the actual invitations to the two events." Answer Brief at p. 35. McGihon further argues there is no rational argument for asserting McGihon violated the campaign finance laws.

While these incorrect arguments may go to the alleged frivolousness or groundlessness of the proceedings below, but they do not address the frivolousness of this appeal. This appeal is based on an unsettled question of law, specifically, the definition of "solicit,' or "promise to solicit," under the FCPA. The Opening Brief presents a coherent explanation of the incorrect legal decision made by the ALJ. The arguments in the Opening Brief are supported by legal authority. As a result, it would be inappropriate to assess attorney fees against Plaintiff Cave for prosecuting this appeal. *McLaughlin v. BNSF Ry. Co.,* 300 P.3d 925, 940 (Colo.App.,2012) (denying attorney fees on appeal where "district court's

judgment was not so plainly correct and the legal authority not so clearly against the railroad's position that its appeal of the issue was frivolous.")

IV. 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 under which relief could 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 and §1-45-111.5(2). 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 and §1-45-111.5(2). For these reasons, the ALJ's award of attorney fees should be reversed.

This appeal is based on a coherent assertion of error by the ALJ, and is supported by legal authority. Therefore, an award of attorney fees to McGihon under C.A.R. 38 (d) would be improper.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2013 a true and correct copy of the foregoing REPLY BRIEF was filed and served electronically via Integrated Colorado Courts E-Filing System to Mark Grueskin, Attorney of Record for the Respondent.

/s/ Jessica K. Peck, Esq.
ATTORNEY FOR APPELLANT

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, in accordance with C.A.R. 30(f).