

<p>COLORADO SECRETARY OF STATE 1700 BROADWAY, SUITE 200 DENVER, CO 80290</p> <hr/> <p>BEFORE THE DEPUTY SECRETARY OF STATE, COLORADO DEPARTMENT OF STATE, <i>in re</i> ED 2022-23:</p> <p>ELECTIONS DIVISION OF THE SECRETARY OF STATE,</p> <p>Complainant,</p> <p>vs.</p> <p>THOMAS DUNAGAN,</p> <p>Respondent.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>PHILIP J. WEISER, Attorney General PETER G. BAUMANN, No. 51620 Senior Assistant Attorney General* 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: (720) 508-6152 Email: peter.baumann@coag.gov *Counsel of Record <i>Attorneys for Elections Division of the Secretary of State</i></p>	
<p style="text-align: center;">ELECTIONS DIVISION'S EXCEPTIONS TO THE INITIAL DECISION</p>	

Under section 24-4-105(14)(a)(II) of the Administrative Procedures Act, section 1-45-111.7(6)(b) of the Fair Campaign Practices Act, and the Deputy Secretary’s Procedural Order dated February 13, 2024, the Elections Division submits these Exceptions to the Initial Decision issued in this matter.

INTRODUCTION

This matter arises out of a campaign finance complaint filed against the now-elected Coroner in Prowers County, Thomas Dunagan. During the 2022 election for

Coroner, Dunagan spent over \$1,000 on campaign communications, including yard signs, banners, and branded water bottles, and raised approximately \$245. It's also undisputed that Dunagan reported none of these contributions and none of these expenditures. Dunagan also admitted at the hearing that he did not deposit the contributions to his campaign into a separate bank account.

Noting these violations, as well as the failure to include compliant disclaimers on various electioneering communications, the Hearing Officer nonetheless dismissed the Division's complaint after concluding that the original citizen complaint against Dunagan was untimely. But in doing so, the Hearing Officer erred by placing the burden for proving the statute of limitations issue on the Division, as opposed to Mr. Dunagan.

Once the burden is properly allocated, the record does not support a conclusion that the original complainant knew or should have known of the alleged violations more than 180 days before the original complaint was filed. The Deputy Secretary should affirm the Hearing Officer's findings and conclusions as to the merits of the Division's Complaint, but reverse the conclusion that the original complaint was untimely.

BACKGROUND

I. The 2022 Election for Prowers County Coroner

Thomas Dunagan announced his candidacy for Prowers County Coroner in February 2022. Initial Decision ¶ 30. His Candidate Committee was also named

“Thomas Dunagan.”¹ During the 2022 election, Dunagan ordered yard signs, post cards, banners, and water bottles. Initial Decision ¶¶ 30–33. It’s unknown exactly how much was spent on all of these items. *See generally* Initial Decision ¶ 47 (drawing “reasonable inference[]” that Dunagan “chose not to search bank and credit card records to obtain the information requested by the Division” in discovery). However, the following amounts are undisputed:

Item	Amount	Citation
Post Cards	\$133.75.	Ex. 2 ² at 2; Initial Decision ¶ 45.
First order of yard signs	\$920 plus tax.	Ex. 2 at 1; Initial Decision ¶ 45.
Second order of yard signs	Unknown.	Initial Decision ¶¶ 31–46–47
Banners	Unknown.	Initial Decision ¶¶ 31, 47
Fliers	Unknown	Initial Decision ¶ 32
Water bottle	Unknown	Initial Decision ¶ 32
TOTAL	At least \$1,053.75	

It was also undisputed that Dunagan accepted contributions in support of his campaign. Initial Decision ¶ 37. Dunagan believes he accepted approximately \$245 in contributions. *Id*; *see also* Tr. at 61:1–18. Dunagan admitted that he did not have a separate bank account for his campaign, and that these contributions “[i]f they went into a bank, [they went into his personal] bank account.” Tr. at 64:19–65:1.

¹ For ease of reference, these Exceptions will refer to the committee as “the Committee,” and Mr. Dunagan by his name.

² References to exhibits are to the exhibits offered, and admitted, at the hearing. Any additional materials attached to these Exceptions will be referenced as appendices.

Despite spending over \$1,000 on his campaign, and raising approximately \$245, not including any in-kind contributions Dunagan made to his own campaign, Dunagan reported no campaign finance activity. Initial Decision ¶ 44. As the Hearing Officer concluded, Dunagan “timely filed” required reports of contributions and expenditures, but each of those reports “reported zero in contributions and zero in expenditures.” *Id.*

Moreover, nearly all of Dunagan’s campaign materials lacked a “paid for by” disclaimer. *Id.* ¶ 52. One set of yard signs did include a disclaimer, but it incorrectly identified Dunagan’s wife as the Committee’s registered agent. *Id.* ¶ 46.

Dunagan prevailed in the 2022 election, and currently serves as the Coroner in Prowers County. *Id.* ¶ 29. He is also the chair of the Prowers County Republican Party. Tr. at 66:9–11. He intends to run for elected office again. *Id.* at 66:1–4.

II. The Original Campaign Finance Complaint

On August 10, 2023, the Division received a campaign finance complaint against Dunagan filed by his political opponent in the 2022 election, Marjorie Campbell. Ex. 1 at 1; Initial Decision ¶ 39. According to Campbell, she first became aware of Dunagan’s failure to report contributions and expenditures “around the end of May/first of June 2023.” Ex. B;³ Initial Decision ¶ 55.b. Campbell also noted that she had spoken with an acquaintance of hers, Angela Riner “on multiple occasions after Mr. Dunagan won in the primary” in March 2022, and “knew [the

³ Exhibit B was an email from Marge Campbell to the Elections Division, sworn under penalty of perjury. Ex. B.

Riners] were filing a complaint.”⁴ Ex. B. Campbell also noted that she played no role in the Riner complaint “[o]ther than encouragin” Riner to file the complaint. Ex. B.

Campbell was not called to testify at the hearing. Initial Decision ¶ 55.a. Tim Gebhardt, who oversaw the Divison’s review and investigation of the Campbell complaint, testified that the Elections Division’s investigation had concluded that the complaint was timely filed. Initial Decision ¶ 19.

III. The Initial Decision

A half-day hearing was held on February 6, 2024. Initial Decision ¶ 1. It was held remotely. The Hearing Officer heard testimony from Dunagan and Gebhardt, and received six exhibits from the Division, and two from Dunagan. *Id.* ¶ 3.

After the hearing, the Hearing Officer concluded that the Committee had failed to report its contributions and expenditures, and failed to include disclaimers on its electioneering materials. *Id.* ¶¶ 50, 54. The Hearing Officer also found that the Committee did not have its own bank account, *id.* ¶ 30, and that Dunagan “either pocketed the contribution[s]” he received in support of his candidacy or “or deposited [them] to his personal account.” *Id.* ¶ 44.

The Hearing Officer also concluded, however, that the Campbell complaint was not filed within 180 days of when Campbell knew or should have known of the violations alleged in her complaint. *Id.* ¶ 60. The Hearing Officer based this conclusion off inferences drawn from Exhibit B. *Id.* ¶¶ 58–59.

⁴ The Riner complaint was ultimately dismissed as untimely. Initial Decision ¶ 55.c.

In so holding, the Hearing Officer rejected the Division’s argument that the statute of limitations in campaign finance matters is an affirmative defense on which respondents bear the burden. *Id.* ¶ 61. Having found that the statute of limitations had run, the Hearing Officer dismissed the Division’s complaint. *Id.* ¶ 65.

LEGAL STANDARD

On exceptions review, the Deputy Secretary should only set aside the hearing officer’s findings of evidentiary fact if they are contrary to the weight of the evidence. § 24-4-105(15)(b). However, as to questions of “ultimate fact,” which involve “a conclusion of law, or at least a mixed question of law and fact, and settle the legal rights and liabilities of the party,” the Deputy Secretary “may substitute [his] judgment for that of an ALJ . . . so long as the [Deputy Secretary’s] finding as a reasonable basis in law and is supported by substantial evidence in the record.” *Reiff v. Colo. Dept. of Health Care Pol’y & Fin.*, 149 P.3d 355, 357 (Colo. App. 2006). The Deputy reviews questions of law and application of law to undisputed facts *de novo*. See, e.g., *Winter v. Indus. Claim Appeals Office*, 2013 COA 126, ¶¶ 7–8.

ARGUMENT

The Hearing Officer erred in holding that a campaign finance respondent does not bear the burden for proving the expiration of the statute of limitations. Once that burden is properly allocated, the record reflects substantial evidence that the original complainant neither knew, nor should have known, of the violations

alleged in her complaint more than 180 days before her August 10, 2023, campaign finance complaint.

If the Campbell complaint was timely filed, there is no dispute that Respondent committed numerous, egregious violations of Colorado campaign finance law. The Deputy Secretary should reverse the Hearing Officer's conclusions that the Campbell complaint was not timely filed, affirm the conclusions as to Dunagan's violations, and impose a penalty of at least \$600.

I. The statute of limitations is an affirmative defense on which Dunagan bore the burden of proof.

As the Initial Decision notes, the statute of limitations is an affirmative defense. Initial Decision ¶ 61 (citing Colo. R. Civ. P. 8(c)). And the general rule is that “[t]he burden of proving an affirmative defense rests upon the defendant asserting the defense.” *Western Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1057 (Colo. 1992).

At the hearing, the Division asked the Hearing Officer to take notice of the final agency order in *In re Staiert*. Tr. at 85:14–86:11. Just last week the Colorado Court of Appeals upheld the Final Agency Order in that matter. And in doing so, the Court of Appeals affirmed that the statute of limitations in section 1-45-111.7(2) “is an affirmative defense on which the defendant bears the burden of proof.” *Taheri v. Beall*, No. 23CA501 ¶ 14 (Colo. App. March 21, 2024), *motion to publish pending* (citing *Crosby v. Am. Fam. Mut. Ins. Co.*, 251 P.3d 1279, 1283 (Colo. App. 2010) attached as Appendix A.

Because the general rule applies in campaign finance cases, the Hearing Officer erred by holding that the Division bore the burden of proving that the statute of limitations had *not* run. That conclusion should be reversed.

II. Substantial evidence exists to reverse the Hearing Officer’s conclusion of ultimate fact that Campbell knew or should have known of the alleged violations more than 180 days before her complaint.

Despite bearing the burden of establishing timeliness, Dunagan chose not to call Campbell to testify at the hearing. As a result, the record before the Hearing Officer was sparse. It included 1) the complaint itself, Ex. 1, 2) the Division’s conclusion that the complaint was timely filed, Initial Decision ¶ 19, and Exhibit B, an email from Campbell sworn under penalty of perjury.

That email was sent in response to an inquiry from the Division, which asked directly: “What is the exact date you learned of the alleged violations? If you cannot provide an exact date, please provide an approximate date and explanation.” Ex. A. To this question, Campbell responded: “It would have been somewhere around the end of May/First of June 2023, I suspect.” Ex. B. This aligns with Campbell’s complaint, which indicates that she first learned of the alleged violation in June 2023. Ex. 1 at 1.

Campbell’s assertion that she first learned of the alleged violations in late-May or early-June 2023 was sworn under penalty of perjury. Ex. B. That alone is sufficient evidence to conclude the complaint was timely filed.

Moreover, the inferences the Hearing Officer drew from the remainder of Exhibit B are too thin a reed on which to support the Initial Decision’s ultimate conclusion. For example, the Hearing Officer notes that Campbell “acknowledges

having a hand in ginning up” a previous complaint against Dunagan. Initial Decision ¶ 58. And also that Campbell “discussed possible violations by Dunagan with the Riners ‘on multiple occasions after Mr. Dunagan won the primary,’” *Id.* (quoting Ex. B).

But it’s important to distinguish between the substance of the two complaints. The Riner complaint, as the Hearing Officer noted, involved Dunagan’s failure to report a \$400 contribution. Initial Decision ¶ 58.⁵ Campbell’s complaint dealt only with Dunagan’s failure to disclose his expenditures. Ex. 1 at 2. Thus, even if Campbell did have knowledge of Dunagan’s failure to report contributions based on her discussions with the Riners, that would not necessarily mean she knew, or should have known, that Dunagan was failing to report his expenditures.

Nor do Campbell’s own struggles to timely file reports of contributions and expenditures give rise to the inference that she would have “looked at the Dunagan Tracer filings to see what her opponent was doing and what he was reporting[.]” Initial Decision ¶ 59. That inference is not supported by testimony in the record. Instead, it is equally likely that Campbell assumed Dunagan was spending the same time and energy she was spending to accurately and timely report his expenditures.

Ultimately, the best evidence in the record is Campbell’s own, sworn, statement that she did not have reason to know of the violations alleged in her

⁵ The parties agreed at the hearing that the Hearing Officer could take notice of the final agency decision in the Riner complaint. Tr. at 97:8–14.

complaint until late-May or early-June 2023. Well within the 180-day statute of limitations. § 1-45-111.7(2)(b). Dunagan bore the burden of establishing the untruthfulness of that sworn statement, and failed to do so.

III. The Deputy Secretary should impose a fine of no less than \$600.

If the Deputy Secretary determines there is substantial evidence in the record from which to conclude that the Campbell complaint was timely filed, then the Hearing Officer's findings and conclusions as to Dunagan's violations should not be disturbed.

At the hearing, the Division requested a penalty of no less than \$600. Tr. at 83:1–10. This penalty reflects the factors found at 8 CCR 1505, Rule 23.3, and also the severity of the violations found by the Hearing Officer. The Division incorporates by reference its penalty analysis from the hearing. *See* Tr. at 78:1–83:10.

CONCLUSION

The Elections Division respectfully requests that the Deputy Secretary reverse the Hearing Officer's conclusion that the Campbell complaint was not timely filed, affirm the Hearing Officer's findings and conclusions that Dunagan violated Colorado campaign finance law, and impose a fine of no less than \$600.

Respectfully submitted this 4th day of April, 2024.

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CERTIFICATE OF SERVICE

This is to certify that I will cause the within filing to be served this 4th day of

April, 2024, by email, addressed as follows:

Thomas Dunagan Candidate Committee
c/o Registered Agent Thomas Dunagan
Dunagan0916@gmail.com
Respondent

/s/ Peter G. Baumann