STATE OF COLORADO SECRETARY OF STATE ADMINISTRATIVE HEARING OFFICER 1700 Broadway #550 Denver, CO 80290	
BEFORE THE SECRETARY OF STATE, COLORADO DEPARTMENT OF STATE, *in re* ED 2022-109, 2022-110, 2022-111, 2022-112, 2022-115, 2022-116, and 2022-117 ELECTIONS DIVISION OF THE SECRETARY OF STATE, Complainant, vs. COLIN LARSON; COLIN FOR COLORADO; RESTORE COLORADO LEADERSHIP FUND IEC, RESTORE COLORADO LEADERSHIP FUND 527; DANIEL COLE, COLE COMMUNICATIONS, LLC; and VICTOR'S CANVASSING, LLC. Respondents.	▲COURT USE ONLY▲ CASE NUMBER 2023 AHO 0003
MARCIE LITTLE'S RESPONSE TO MOTION FOR ATTORNEYS' FEES	

INTRODUCTION

This case was initiated by the Elections Division of the Colorado Secretary of State ("SOS") and adjudicated by an administrative hearing officer within the Colorado Department of State. The proceedings were prompted by a complaint I, Marcie Little, filed on November 7, 2022, pursuant to C.R.S. 1-45-111.7(2)(a), regarding potential campaign finance violations.

According to C.R.S. 1-45-111.7(2)(a), any individual who believes a violation has occurred concerning article XXVIII, this article 45, or related rules may file a complaint with the SOS. Believing a violation had indeed occurred, I submitted my complaint within the stipulated 180 days from when I became aware, or should

have become aware through reasonable diligence, of the alleged violation as per C.R.S. 1-45-111.7(2)(b).

Following my complaint, the Election Division conducted a preliminary review in accordance with C.R.S. 1-45-1117(3). Although the Election Division recommended dismissing the case due to "insufficient evidence" (as noted in Larson Respondents' Motion for Attorney Fees, pg. 2, paragraph #4), the Deputy Secretary or his designee chose to proceed with the case involving the Larson Respondents. This decision was based on the belief that the complaint had sufficiently identified one or more violations of article XXVIII and that there were adequate facts to support each alleged violation, as required by C.R.S. 1-45-111.7(3)(b)(III).

The case proceeded through the investigative and enforcement procedures outlined in C.R.S. 1-45-111.7(5). Ultimately, a final order favoring the Larson Respondents was issued on May 1, 2024. On May 22, 2024, 21 days after the order, the Larson Respondents filed a Motion for Attorney Fees with the Administrative Hearing Officer. In this motion, they named me, Marcie Little, as the original complainant and requested a hearing to determine whether to award attorney fees and costs, allegedly amounting to $24,200, to be paid by me, the SOS, or shared between us. Since filing the complaint, I have not had any involvement in, nor control over, the subsequent enforcement actions taken by the Elections Division.

ARGUMENT

A) Not a Party to the Complaint

The Larson Respondents' request for attorney fees was submitted in accordance with C.R.S. 1-45-111.5(2). See Larson Respondents' Motion, pg. 1, paragraph #1. This subsection states:

"A party in any action brought to enforce the provisions of article XXVIII of the state constitution or of this article 45 is 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 hearing officer that the action, or any part thereof, lacked substantial justification or that the action, or any part thereof, was commenced for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including abuses of discovery procedures available under the Colorado rules of civil procedure." C.R.S. 1-45-111.5(2) (emphasis added).

I am neither an attorney nor a named party in this case. I did not initiate or bring the action, either in whole or in part. I filed a complaint with the SOS pursuant to C.R.S. 1-45-111.7(2)(a) based on my belief, informed by the known facts, that there

was a violation of campaign finance laws and regulations. The SOS, in accordance with Colorado law, reviewed the complaint and independently determined whether to bring a formal action. It was the SOS, not I, who filed the action. Therefore, it is the SOS, not I, who is the named complainant.

Accordingly, the Hearing Officer lacks statutory authority to order me to pay any portion of the attorney fees and lacks personal jurisdiction over me in this context. I am not a party to the case. I am neither the complainant nor one of the respondents.

The Larson Respondents misunderstand the distinction between filing a complaint with the SOS and being a complainant in the resulting action.

B) Pro Se Requires Higher Standard for Award of Attorney Fees than Represented Parties

Even if I were considered a party, the standard for awarding attorney fees to non-represented parties is significantly higher. C.R.S. 1-45-111.5(2) states:

"Notwithstanding any other provision of this subsection (2), no attorney fees may be awarded under this subsection (2) unless the court or hearing officer, as applicable, has first considered and issued written findings regarding the provisions of section 13-17-102 (5) and (6)." Pursuant to C.R.S. 13-17-102(6), "**No party who is appearing without an attorney** shall be assessed attorney fees **unless the court finds that the party clearly knew or reasonably should have known** that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious…." (Emphasis added.)

I am not a party to this case. I have not appeared before the hearing officer, nor has an attorney appeared on my behalf. While I did file a complaint with the SOS that led to this action, I did so pro se. At no time have I been represented by an attorney in any part of this action.

Accordingly, if the hearing officer were to determine that I was a party in this action, they must first establish that I clearly knew or reasonably should have known that my "action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious" before awarding attorney fees against me (C.R.S. 13-17-102(6)). This is a significantly higher standard than merely showing that the action lacked "substantial justification," as the Larson Respondents assert (see Larson Respondents' Motion, pg. 2, paragraph #3). There must be a clear demonstration that I knew or should have reasonably known this.

The fact that the SOS, at the highest levels, decided to bring the action demonstrates its reasonableness at the time the complaint was filed. While the

Hearing Officer may determine that the action itself lacked substantial justification at some point during the investigation or proceedings, it is a different matter to assert that I reasonably should have known this when I filed my complaint, especially when the SOS independently corroborated that it merited investigation and enforcement action.

C) Definition of "Substantial Justification"

According to C.R.S. 1-45-111.5(2), "'lacked substantial justification' means substantially frivolous, substantially groundless, or substantially vexatious."

For the hearing officer to award attorney fees to be paid by a party or attorney for a party, it must demonstrate that the party or attorney brought or continued an action that was "substantially frivolous, substantially groundless, or substantially vexatious." Mere success on the merits, as achieved by the Larson Respondents, is not sufficient.

I was not a party to the action, nor was I represented in it. However, for the sake of argument, even if I were a represented party, I would not be liable for attorney fees here. It is crucial to note that the statutory standard for me to file a complaint with the SOS is not "substantial justification." It is simply that I must "believe" there has been a violation, as outlined in C.R.S. 1-45-111.7(2)(a). That is the extent of the requirement.

Frivolous

"A claim or defense is considered frivolous when the proponent cannot present any rational argument based on the evidence or law in support of that claim or defense." This definition is established in the case of W. United Realty, Inc. v. Isaacs, 679 P.2d 1063, 1069 (Colo. 1984). Not only was the complaint I submitted to the SOS rational, but the SOS independently determined that it "alleged facts sufficient to support a factual or legal basis for each violation," as outlined in C.R.S. 1-45-111.7(3)(b)(III).

Groundless

"A claim or defense is considered groundless when the allegations of the complaint, though sufficient to survive a motion to dismiss for failure to state a claim, lack credible evidence during trial," as outlined in W. United Realty, Inc. v. Isaacs, 679 P.2d 1063 (Colo. 1984) (quoting International Technical Instruments, Inc. v. Engineering Measurements Co., 678 P.2d 558, 563 (Colo. App. 1983), and Wheeler v. T.L. Roofing, Inc., 74 P.3d 499 (Colo. App. 2003)).

I supported my claim with evidence in my initial filing with the SOS, including relevant TRACER filings and social media posts, demonstrating why I believed a violation had occurred. The Larson Respondents themselves note that the Election Division initially recommended dismissal based on new evidence presented after my complaint, particularly regarding the registered agent's error in the suspicious TRACER submissions (see Larson Respondents' Motion, pg. 2, paragraph #5).

This illustrates that an action can meet the substantial justification test at the outset but later lack sufficient evidence during hearing after discovery. Essentially, although not a party subject to this analysis, I could file a substantially justified complaint with the SOS, leading to a justified action by the SOS. However, if it becomes apparent during the action that there's no longer substantial justification to continue it, the SOS, having sole control over the action's continuation, would need to dismiss the case to avoid incurring fees by the Larson Respondents. Only then would attorney fees and costs become warranted. This scenario is beyond my control and should not hold me responsible for incurred costs in the interest of justice.

Vexatious

"A 'vexatious' claim is defined as one brought or maintained in bad faith," as clarified in Mitchell v. Ryder, 104 P.3d 316, 321 (Colo. App. 2004). Additionally, "Bad faith may encompass conduct that is arbitrary, vexatious, abusive, or stubbornly litigious. It may also involve actions aimed at unwarranted delay or disregarding truth and accuracy," as highlighted in W. United Realty, Inc. v. Isaacs, 679 P.2d 1063, 1069 (Colo. 1984).

There is no evidence or support indicating that my filing was vexatious; it was not. It arose from a genuine concern for upholding campaign finance laws and ensuring a fair electoral landscape for all candidates.

Prevailing is not the same as lacking substantial justification

Prevailing alone does not necessarily indicate that an action lacked substantial justification. As stated in Wheeler v. T.L. Roofing, Inc., 74 P.3d 499, 505 (Colo. App. 2003) (quoting W. United Realty, Inc. v. Isaacs, 679 P.2d 1063, 1066 (Colo. 1984)), "This test does not apply to meritorious actions that prove unsuccessful." Additionally, Romberg v. Slemon, 778 P.2d 315 (Colo. App. 1989), emphasizes that attorney fees should not be awarded simply because a party did not prevail, as they may be awarded at the discretion of the court. Similarly, in Remote Switch Sys., Inc. v. Delangis, 126 P.3d 269, 275 (Colo. App. 2005), it is noted that a determination denying relief does not automatically render the claims frivolous.

D) General Intent for the Compliant Process

As previously mentioned, filing a complaint with the SOS differs from initiating the action itself. It's more akin to lodging a police report. Article 45 of Title 1 outlines a process intended for the SOS to evaluate complaints before initiating a formal action. This screening step helps prevent respondents from incurring unnecessary expenses due to unsubstantiated claims. Similar to a police report, formal action is only taken after a demonstration of sufficient support, including an investigative phase. The Larson Respondents themselves acknowledge this analogy by likening the SOS to a "prosecutor" in their motion (see Larson Respondents' Motion, pg. 2, paragraph #6).

Imposing any part of the Larson Respondents' attorney fees on me in this case could deter others from raising legitimate concerns to the SOS in the future. This outcome would echo the chilling effect of retaliating against a whistleblower, potentially stifling justice rather than fostering it. The responsibility to prevent undue complaints rests with the SOS, not with awarding attorney fees. Notably, one aspect of substantial justification is to avoid substantial vexation. Seeking attorney fees against someone not involved in the case to teach a lesson, when they didn't make the decision to initiate the case, is itself vexatious.

If the SOS proceeds with an unjustified action, it bears the responsibility for potential attorney fees resulting from that decision. Crucially, the individual raising the concern to the SOS lacks control over or insight into the SOS's investigation. I had no influence over whether the case should be dismissed after additional evidence was presented; that decision lies solely with the SOS.

Regarding the Larson Respondents' argument about a clerical "error" as the core issue (see Larson Respondents' Motion, pg. 2, paragraph #5), this detail emerged during the investigation, not at the time of my initial submission regarding a suspected violation. Whether the SOS should have pursued the action after learning this information is beyond my influence or control.

Moreover, the attorney fees incurred by the Larson Respondents were primarily a consequence of the SOS's decision to initiate the action, not due to my initial complaint. I did not compel the SOS to act; I simply alerted them to an issue. The expenses arose directly from the SOS's decision to proceed with the action. It was only after the SOS initiated the action that the Larson Respondents incurred, or should have incurred, most of their legal fees and costs.

CONCLUSION

I agree and align with the Election Division's argument, which was outlined in their response to the Larson Respondents' Motion for Attorney's Fees and expand upon it. For the aforementioned reasons and arguments, I object to the request for an additional hearing as well as a favorable judgement for attorney's fees from myself.

Larson Respondents' Motion for Attorney's Fees and hearing should be denied.

Respectfully submitted this 31st day of May 2024.

NAME OF FILER

/s/ Marcie Little

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CERTIFICATE OF SERVICE

I hereby certify that this Response To Motion for Attorney Fees dated this 31nd day of May, 2024, was served via email to peter.baumann@coag.gov and st@westglp.com

/s/ Marcie Little
Marcie Little