STATE OF COLORADO SECRETARY OF STATE BEFORE THE ADMINISTRATIVE HEARING OFFICER 1700 Broadway #550 Denver, CO 80290 ELECTIONS DIVISION OF THE SECRETARY OF STATE, Complainant, vs. SOLOMON FOR COLORADO, Respondent.	▲ COURT USE ONLY ▲ Case Number: 2023 AHO 0008
ORDER DENYING MOTION TO DISMISS	

1. The Elections Division of the Colorado Secretary of State filed an Administrative Complaint on July 20, 2023. The Complaint alleged the failure of Respondent to have a disclaimer on a mailer supporting Matt Solomon's candidacy for Senate District 8 that was compliant with § 1-45-108.3(1).

2. In a review of the status of cases filed by the Division in 2023, administrative staff discovered that no pleadings had been filed in the case since the Administrative Complaint. Learning that, I issued a Scheduling Order on May 6, 2024 requiring Respondent to answer the Complaint, Sched. Order ¶4, and directed the parties to confer about dates for discovery, the filing of prehearing statements and the trial date. Sched. Order ¶5.

3. The May 6 Scheduling Order prompted Respondent to file the instant Motion to Dismiss based on the delay after the Administrative Complaint without a hearing being

set. Respondent says that there was some discussion of settlement between counsel for the Division and Mr. Solomon's counsel on September 28, 2023, but "there was no followup." Mot. ¶7. Mr. Solomon asserts that staff gave him permission to close the campaign account in December 2023, and having been authorized to do that, he thought the matter was at an end. Mot. ¶5. Moreover, he points to C.R.S. 1-45-111.6(6)(a) of the Fair Campaign Practice Act (FCPA) stating that "hearing officer *shall* schedule a hearing within thirty days of the filing of a complaint . . . ." [Emphasis supplied.] §2-4-401(13.7), C.R.S., says that unless the statutory context requires otherwise, "'Shall' means that a person has a duty." The statutory directive that a hearing be scheduled within 30 days of filing a complaint is also expressed in Campaign & Political Finance Rule 24.5.1, 8 Code Colo. Regs. 1505-6.

4. The question squarely placed before me is whether the Administrative Complaint should be dismissed because of the passage of time—nearly eleven months—without scheduling a hearing on the merits.

5. Answering this question starts with the Fair Campaign Practice Act (FCPA) requirement that a hearing be scheduled "within thirty days of the date that the administrative complaint was filed." § 1-45-111.7(6)(a), C.R.S.

> "Any hearing conducted by a hearing officer under this section must be in accordance with section 24-4-105; except that a hearing officer shall schedule a hearing within thirty days of the filing of the complaint, which hearing may be continued upon the motion of any party for up to thirty days or a longer extension of time upon a showing of good cause." *Id.*

6. The Motion does not assert that the delay strips the agency of subject matter jurisdiction, or that laches is a reason for dismissal or that Respondent was prejudiced by the delay.

7. The Division counters the Motion to Dismiss by arguing that the thirty day mandate in § 1-45-111.7(6)(a) is directory, even though it reads "that a hearing officer *shall schedule* a hearing within thirty days of the filing of the complaint. *Id*. [Emphasis supplied.]

8. In *Protest of McKenna v. Witt*e, 2015 CO 23 346 P.3d 35, McKenna's three water rights were adjudicated to be abandoned by the water court after they were included on an abandonment list prepared by the Division Engineer. McKenna challenged the adjudication because the abandonment list had been created later than the statute required. *McKenna* is similar to the instant case in three important respects: a) the statutory language is imperative: "the Division Engineer 'shall' prepare an abandonment list 'no later than July 1;'" b) there was noncompliance with the command; and c) the statute is silent as to the consequence of non-compliance. *Id.* at ¶ 18. The Colorado Supreme Court affirmed the trial court's decree of abandonment of McKenna's water rights notwithstanding the fact that that the abandonment list on which the decree was based was late filed. The court held "that the deadline to prepare the abandonment list under section 37–92–401(1)(a) is directional and is not a jurisdictional mandate." *Id.* at ¶ 22. The court emphasized that it is legislative intent that directs the outcome in these cases. In *McKenna*, the statute gave "wide discretion" to the water court, so long as the owner's rights were protected. *Id.* at 19.

9. Similarly, in the context of driver's license revocation hearings, mandatory language in a statute has been considered only "directory." In *DiMarco v. Dep't of Revenue, Motor Vehicle Div.*, 857 P.2d 1349 (Colo.App. 1993), the court found that legislative intent was the key to discerning whether the language of mandate was merely "directory."

> Whether the General Assembly intends a statutory provision to be directory [*1352] or jurisdictional requires consideration of "the legislative history, the language of the statute, its subject matter, the importance of its provisions, their relation to the general object intended to be accomplished by the act, and, finally, whether or not there is a public or private right involved."
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> *DiMarco*, 857 P.2d at 1351-52 (Colo. App. 1993)

In *DeMarco*, the statute at issue required that where a licensee demanded a hearing on license revocation on account of an accumulation of points, "such hearing *shall* be held within sixty days after application is made." *Id.* at 1351. [Emphasis in original.] The court concluded that the failure of the Department of Revenue to comply with the mandatory language of the statute did not deprive it of jurisdiction. *Id.* Colorado appellate courts have generally "construed time limitations imposed on public bodies as being directory rather than mandatory." *Id.*

10. The Administrative Complaint in this case asserts the violation of public rights whose importance has both a constitutional and a statutory basis. Both the electors in Colorado and the General Assembly have enacted law that channels the public's concern that the influence of money in politics creates "the potential for corruption and the appearance of corruption" and "that large campaign contributions... allow wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process." Colo. Const. art. xxviii, § 1 and § 1-45-102, C.R.S.

Addressing those concerns, voters in Colorado adopted a constitutional amendment in 1996 that calls for disclosure of who is paying for campaign materials like those at issue here and for "strong enforcement of campaign laws." That declaration has been part of the FCPA ever since.

> **1-45-102. Legislative declaration**
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> The people of the state of Colorado hereby find and declare that large campaign contributions to political candidates allow wealthy contributors and special interest groups to exercise a disproportionate level of influence over the political process; that large campaign contributions create the potential for corruption and the appearance of corruption; that the rising costs of campaigning for political office prevent qualified citizens from running for political office; and that the interests of the public are best served by limiting campaign contributions, encouraging voluntary campaign spending limits, full and timely disclosure of campaign contributions, and strong enforcement of campaign laws.
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> Section 1-45-102, C.R.S. (1997)

11. In construing the Fair Campaign Practices Act and citizen initiatives like Colo. Const. art. xxviii, the Colorado Supreme Court gives effect to the intentions of the General Assembly and the electorate, both of which have called for the strong enforcement of campaign laws. *Campaign Integrity Watchdog v. All. for a Safe & Indep. Woodmen Hills*, 2018 CO 7, ¶ 20, 409 P.3d 357, 361.

12. In the instant case, the cause of the delay in setting the hearing after the Administrative Complaint was filed is unknown. Respondent puts the responsibility for the delay on the Division.

   a. After the discussion between counsel September 28, 2023 about settlement, "there was no follow up from Mr. Baumann until May 17, 2024." Mot. ¶7. It is

equally, true, however, that there was no followup by Respondent's counsel to communicate with Mr. Baumann about settling the case.

b. Respondent asserts that the Secretary of State's Office "approved the termination of the Solomon for Colorado campaign committee" in December 2022 and that "[t]his termination conveyed to us the dismissal of this case, when coupled with no further communication." Mot. ¶5. Respondent does not say with which Division of the Secretary of State or from whom he received this communication. But Respondent and his counsel had been communicating with the Elections Division *in the prior month* about the lack of a compliant disclaimer and about Respondent's curing the violation, Mot. ¶¶2-3. Under these circumstances, it makes no sense for Respondent to infer that the enforcement matter had been dropped unless that communication came directly from Timothy Gebhardt of the Elections Division who signed the November 3, 2022 Notice of Initial Review and Opportunity To Cure.

13. If Mr. Solomon wanted to see if the enforcement of the violation alleged in the Complaint had been dropped, he knew whom and which Division to contact to find out if that was true.

14. As stated in the Scheduling Order, the FCPA and the two major constitutional amendments adopted by Colorado voters in 1996 (Amendment 15) and 2002 (Amendment 27) all call for "strong enforcement of campaign finance requirements." Colo. Const. art. xxviii, § 1; Fair Campaign Practice Act at § 1-45-102. And "Strong

enforcement" does indeed coincide with the goal of the Colorado Rules of Civil Procedure that proceedings be timely and efficient to secure the "just, speedy and inexpensive determination of every action." Colo.R.Civ.P. 1.

15. But any argument that the delay should prompt a dismissal of the well pleaded Administrative Complaint must fail, given the importance that both the electors in Colorado and the General Assembly have attached to compliance with campaign finance and disclosure regulations and their stated intention that there be strong enforcement of the campaign laws.

16. It would disserve these constitutional and statutory goals to dismiss the Administrative Complaint based on setting the hearing later than the requirement in § 1-45-111.7(6)(a). I find that the statutory mandate to set a hearing within thirty days, under the circumstances of this case, is directory only.

17. For the reasons stated above, Respondents' Motion to Dismiss is DENIED. A Scheduling Order will follow shortly, adopting the dates to which the parties have agreed for discovery, the filing of prehearing statements and the trial date.

SO ORDERED this 12th day of June, 2024.

Macon Cowles, Hearing Officer

CERTIFICATE OF SERVICE

The undersigned hereby states and certifies that one true copy of this Scheduling Order was sent via email on June 13, 2024 to the following:

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