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	▲COURT USE ONLY▲
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.	CASE NUMBER 2023 AHO 0003

ELECTIONS DIVISION'S RESPONSE TO EXCEPTIONS

This case involved allegations of improper coordination between the Colin for Colorado candidate committee and various other entities including an independent expenditure committee, several independent expenditure committees, all through the use of a common consultant, Daniel Cole. The administrative complaint was initiated at the direction of the final agency decisionmaker in campaign finance matters, the Deputy Secretary of State, who—consistent with the General Assembly's statutory requirements—ordered the Division to file its complaint in this matter.

Following a hearing, at which the Hearing Officer expressed concern about the significant overlap between the various entities and organizations, the Hearing Officer concluded that the Division had failed to prove unlawful coordination by a preponderance of the evidence.

Having won, Colin Larson and Larson for Colorado (collectively, the "Larson Respondents") moved for an award of attorneys' fees under section 1-45-111.5(2). Mot. for Attorney Fees ("Mot.") (May 22, 2024). In denying that Motion, the Hearing Officer found that the Division had presented evidence of several facts that "constituted circumstantial evidence that supported an inference of coordination." Initial Dec. ¶ 25. In light of this evidence, the Hearing Officer roundly dismissed the Larson Respondents' contention that the Division's complaint was frivolous or groundless. *Id.* ¶¶ 27-28. The Hearing Officer's factual findings on that point—entitled to deference—should not be disturbed.

Moreover, the Fee Motion should be rejected for an additional reason: the Division was specifically ordered to file its complaint with the Hearing Officer by the final agency decisionmaker, a procedure blessed by the General Assembly. That alone is sufficient to conclude that the Division's initiation of this action was substantially justified.

The Deputy Secretary should affirm the decision of the Hearing Officer.

BACKGROUND

This action arose out of a series of third-party campaign finance complaints filed by Marcie Little against several entities, including the Larson Respondents. *See generally* CF 188-200.[1] The core allegations relevant here were that the "various respondents engaged in illegal coordination with Rep. Larson and his own candidate committee," CF 190, specifically through the use of a common consultant, Daniel Cole, CF 196.

After reviewing and investigating the complaints under section 1-45-111.7(3), (4), and (5), the Division filed a Motion to Dismiss the Complaints with the Deputy Secretary of State—the final agency decisionmaker in campaign finance matters—under section 1-45-

[1] The Division cites to the consecutively paginated Record served on the parties in this case as the Court File ("CF").

111.7(5)(a)(IV). CF 167. The Deputy Secretary granted that Motion, in part, but denied it as to several of the Respondents, including the Larson Respondents. CF 196-97.

Specifically, the Deputy Secretary concluded that "Cole's multiple involvements with [independent expenditure committees] as well as in direct consultation with Rep. Larson for his candidate campaign, creates a sufficient inference of illegal coordination to support a plausible foundation for pursuing a hearing on the coordination charge." CF 196. The Deputy also determined that Larson's and Cole's "paper pronouncements" of non-coordination "must be evaluated at a live formal hearing, . . .where the hearing officer can assess the demeanor, body language, and credibility of the witnesses, and where third parties who were not identified as respondents to the initial underlying complaints may be compelled by subpoena to provide relevant information." CF 197.

Accordingly, the Deputy Secretary "directed [the Division] to file a Formal Complaint with a hearing officer within fourteen days of [his] Order." CF 198; *see also* CF 188 ("[T]he Deputy Secretary . . . directs the division to file a Formal Complaint under CPF Rule 24, 8 CCR 1505-6, before a hearing officer on the campaign finance violations identified herein[.]"). This followed the General Assembly's directive, that "if the deputy secretary denies the motion [to dismiss filed under § 1-45-111.7(5)(a)(IV)], the division has fourteen business days to file a complaint with a hearing officer[.]" § 1-45-111.7(5)(a)(IV).

Complying with the Deputy's Order and the statutory requirement, the Division initiated a hearing before the Hearing Officer. CF 201. It subpoenaed Daniel Cole, and also engaged in discovery as contemplated by the Deputy's Order, including obtaining documents and information from Axiom Strategies related to a disputed payment for a mailer. *See generally* CF 198 (noting that a "formal hearing is also necessary to develop the facts and

circumstances" relating to that mailer); *see also* CF 357 (the mailer in question, introduced as Ex. 11 at hearing).

The case then proceeded to a hearing. Following the Hearing, the Hearing Officer issued an Initial Decision concluding, among other things, that the actions of the Respondents, and Cole, particularly during the Division's investigation, "invite a conclusion of coordination and control." CF 398. Ultimately, though, the Hearing Officer concluded that the Division had failed to prove, by a preponderance of the evidence, the campaign violations alleged in the administrative complaint. CF 404.

The Larson Respondents moved to recover fees from both the original complainant, Marcie Little, and the Division. CF 442. The Hearing Officer found that the Motion "cite[d] no caselaw that is relevant to the main contention of the Motion, mainly, that the filing of an Administrative Complaint and the evidence at trial showed that the action lacked 'substantial justification.'" CF 518. The Hearing Officer also reviewed the evidence available to the Division both when it filed its Administrative Complaint and at trial and found that evidence established "more than plausibility" that unlawful coordination occurred, and that there was "much circumstantial evidence of coordination." CF 525.

Ultimately, the Hearing Officer dismissed the Motion for Fees, concluding that "the Administrative Complaint did not lack substantial justification, nor was it commenced for delay or harassment, nor was the case unnecessarily expanded by improper conduct." CF 525. The Hearing Officer also found that the Division acted "in good faith, with no hint of animus, forthrightly acknowledging in opening and closing statements that the Division's case rested primarily on circumstantial evidence." *Id.*

The Larson Respondents timely designated the record and filed Exceptions to the Hearing Officer's initial decision.

LEGAL STANDARD

Under section 1-45-111.5(2), fees may be imposed only where the hearing officer determines that the action—in this case, the administrative complaint filed by the Division[2]—"lacked substantial justification or . . . was commenced for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct." In this context, "lacked substantial justification" means "substantially frivolous, substantially groundless, or substantially vexatious." *Id.* "[A] claim is frivolous if its proponent can present no rational argument based on the evidence or the law to support it. *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 275 P.3d 674, 686 (Colo. App. 2010). "A claim is vexatious if it is brought or maintained in bad faith to annoy or harass another." *Id.*

On exceptions, the Hearing Officer's "findings of evidentiary fact . . . shall not be set aside by the agency on review of the initial decision unless such findings are contrary to the weight of the evidence." § 24-4-105(15)(b). "[E]videntiary facts generally include the detailed factual or historical findings on which a legal determination rests." *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1245 (Colo. 2001) (citation omitted). The agency also defers to the Hearing Officer's "assessment of the credibility of the testimony and the weight to be given to the evidence." *Koinis v. Colo. Dep't of Pub. Safety*, 97 P.3d 193, 195 (Colo. App. 2003).

ARGUMENT

In their Exceptions, the Larson Respondents base their claim for fees on the argument that the Division's administrative complaint "was clearly groundless." Larson Exceptions at

[2] On Exceptions review, the Larson Respondents appear to abandon any claim for fees from the original complainant, Marcie Little. The Division does not represent Little, and presents no argument concerning allegations against Little.

2. As the Hearing Officer concluded, that argument is unfounded considering the circumstantial evidence of coordination presented by the Division at the hearing.

Moreover, the Division had "substantial justification" for filing the administrative complaint, as that term is used in section 1-45-111.5(2), in the form of an order from the final agency decisionmaker requiring it to file that complaint and proceed to a hearing.

The Hearing Officer's decision should be affirmed.

I. The Administrative Complaint was not groundless.

A "groundless" complaint is one "not supported by *any* credible evidence." *Merrill Chadwick Co. v. Oct. Oil Co.*, 725 P.2d 17, 19 (Colo. App. 1999) (emphasis added). The Hearing Officer correctly concluded that the Division's complaint was supported by ample evidence—albeit circumstantial—to support its complaint. And "in determining the sufficiency of evidence, the law makes no distinction between direct and circumstantial evidence." *People v. Buckner*, 2022 COA 14, ¶ 83; *In re Estate of Ramstetter*, 2016 COA 81, ¶¶ 53-54 (holding that circumstantial evidence enjoys the same status as direct evidence); Colo. Pattern Civ. Jury Instructions, 3:9 (2024) ("The law makes no distinction between the effect of direct evidence and circumstantial evidence.").

First, the Hearing Officer's determination on this point is entitled to—at minimum—considerable deference.[3] In concluding that the Division's complaint was no groundless, the Hearing Officer relied on his assessment of the evidence presented at the hearing and, importantly, the credibility of the key witness. *See, e.g.*, CF 521 ("I found it to be odd and out

[3] Section 1-45-111.5(2)—a vestige of the campaign finance enforcement scheme that preceded the decision in *Holland v. Williams*, 457 F. Supp. 3d 979 (D. Colo. 2018)—entitles a "Hearing Officer" to impose an award of fees. Consistent with the Procedural Order entered in this matter, the Division assumes without argument that a Hearing Officer's decision on a Motion for Fees under section 1-45-111.5(2) is an initial decision subject to review by the Deputy Secretary.

of character that Mr. Cole could not remember whether he did work for Ready Colorado that benefitted Mr. Larson's race."); CF 523 (noting that the evidence compiled during the Division's investigation of this matter "almost crie[d] out for a hearing so that witnesses can be placed under oath and observed while answering questions[.]"); CF 524 (compiling "other facts that . . . constitute circumstantial evidence that support an inference of coordination").

Each of these was a finding of evidentiary fact that can only be set aside if it is "contrary to the weight of the evidence." 24-4-105(15)(b). This standard "requires more and better-quality evidence to overturn a determination than does the substantial evidence standard," and "the findings of a hearing officer are entitled to particular weight" where the credibility of witness testimony is at issue. *Samaritan Inst. v. Prince-Walker*, 883 P.2d 3, 9-10 (Colo. 1994).

No such "better-quality evidence" exists here. As the Deputy, upon review of the Division's Motion to Dismiss, and the Hearing Officer both noted, the credibility of witnesses was the critical question in this case precisely because the interconnected nature of the various entities presented clear circumstantial evidence of coordination.

Because the Hearing Officer's assessment of the evidence is entitled to considerable deference, and because that assessment was not contrary to the weight of the evidence, the Hearing Officer's decision not to award fees should remain undisturbed.

II. Substantial justification for the Division' Complaint also came in the form of the Deputy Secretary's Order.

Because a review of the Hearing Officer's assessment of the evidence supports the Hearing Officer's conclusion, the Deputy Secretary need not go further. However, even if the Deputy disagrees with the Hearing Officer as to the evidence, substantial justification for the Division's complaint came in the form of the Deputy's initial Order on the Motion to

Dismiss. As a matter of law, the Division cannot have filed a complaint lacking substantial justification when it was ordered to file that complaint by the final decisionmaker under a procedure blessed by the General Assembly.

In section 1-45-111.7(5)(a)(IV), the General Assembly addressed what should happen after the Deputy Secretary denies a motion to dismiss filed by the Elections Division. Rather than enable the Division to apply its independent judgment as to whether to file an administrative complaint in such cases, the General Assembly concluded that the Division should be required "to file a complaint with a hearing officer." § 1-45-111.7(5)(a)(IV). Consistent with this statutory requirement, when the Deputy Secretary denied the Division's Motion to Dismiss in part here, he expressly ordered the Division "to file a Formal Complaint with a hearing officer within fourteen days[.]" CF 199.

The final agency decisionmaker—the ultimate authority as to campaign finance violations in Colorado—ordered the Division to pursue a hearing before the Hearing Officer. This alone establishes substantial justification for the Division's Complaint. It had no choice—it was statutorily and legally obligated to file the Complaint, which it did.

Under such circumstances, it would be an absurd result to enable Respondents to recover attorneys' fees from the Division or its attorney. § 1-45-111.5(2). Where, as here, the Deputy Secretary concludes a hearing is warranted based on a sufficient inference of prohibited coordination, the General Assembly has not only authorized the Division to initiate such a hearing, it requires the Division to do so. That requirement establishes the justification for the Division's complaint as a matter of law.

CONCLUSION

The Hearing Officer correctly concluded that the Division had substantial justification for filing its Administrative Complaint. The Deputy Secretary should affirm that decision.

Respectfully submitted this 6th day of August, 2024.

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CERTIFICATE OF SERVICE

This is to certify that I will cause the within filing to be served by email this 6th day of August 2024, addressed as follows:

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