STATE OF COLORADO
SECRETARY OF STATE
Administrative Hearing Office
1700 Broadway, Suite 550
Denver, CO 80290

Case Number: 2023 AHO 32
(*in re* ED 2024-55 and 2024-56)

ELECTIONS DIVISION OF THE SECRETARY OF STATE,

Complainant,

v.

ARVIDSON FOR SENATE,

Respondent.

AMENDED ORDER DENYING MOTION TO DISMISS

1. This is the longer Order Denying Motion to Dismiss referenced in the short Order, without reasoning, that I issued yesterday.

2. This case arises under the Fair Campaign Practices Act (FCPA), §1-45-101, et seq., CRS. Complainant is the Elections Division of the Colorado Secretary of State. Respondent is a campaign committee, Arvidson for Senate, which distributed yard signs and mailers in support of Tim Arvidson's candidacy in the Republican primary for Colorado State Senate in District 2 in June 2024.

3. Complainant seeks total fines of $264.75 for two violations alleged in the Administrative Complaint. Count 1 alleges the failure to include a disclaimer on yard signs in violation of 1-45-108.3(3), CRS. Count 2 alleges the failure to report over $3,000 for a

mailer on May 25 and $647.50 for yard signs on May 28 as expenditures for "electioneering communications" in the committee's June 3, 2024 Tracer report.

4. Respondent filed a Motion to Dismiss that is not anchored to a specific subpart of C.R.C.P. Rule 12(b).[1] Nor is authority cited that would entitle Respondent to a dismissal under either Rule 12(b)(1) or 12(b)(5). The Motion asserts three reasons as to why the Complaint should be dismissed.

a. First, Respondent claims the Secretary of State has no jurisdiction to hear claims at all under the Fair Campaign Practices Act, §1-45-101, et seq., C.R.S., because Colo. Const. art. xxviii, § 12 repealed all of the Secretary's enforcement powers under section 1–45–111.

b. Second, Respondent claims it had no duty to place a disclaimer on the yard signs because at the time of purchase, it had not yet spent $1,000 on electioneering communications.

c. Third, Respondent claims the reporting violation on June 3 was cured by amendments on July 27 and August 12—before the Administrative Complaint was filed—rendering moot the original violation.

5. In deciding a motion to dismiss, the allegations of the complaint must be taken as true, and they must be viewed in the light most favorable to Complainant. *Asphalt Specialties, Co., Inc. v. City of Commerce City*, 218 P.3d 741, 744 (Colo. App. 2009).

[1] It was not obvious which subpart of C.R.C.P. Rule 12(b) was the basis for the Motion. Only in the single sentence of the Conclusion in Respondent's Reply are both 12(b)(1) and 12(b)(5) even mentioned.

Assertions of fact not part of the complaint are disregarded, as any disputes about the facts are matters to be heard and determined at and after the hearing.

THE SECRETARY'S JURISDICTION

6. In 1974, Colorado enacted the Campaign Reform Act (CRA). The CRA included registration and reporting requirements for candidate committees. §1-45-108(1), CRS (1989).[2] The Colorado Secretary of State was vested with a full set of enforcement tools in the CRA. The CRA was repealed and reenacted as the Fair Campaign Practices Act (FCPA) by an initiative, Amendment 15, adopted by the voters in the general election of Nov. 5, 1996. Like the CRA, the FCPA vested enforcement duties in the Secretary of State.

7. On November 5, 2002, the citizens of Colorado approved a ballot initiative titled "Amendment 27: Campaign Finance." That initiative amended the Colorado Constitution by the addition of a new provisions, thereafter placed into the Colorado Constitution as Article xxviii. The initiative also amended part of Colorado's Fair Campaign Practices Act, § 1-45-101 et seq., C.R.S. (2002) by placing limits on the amounts and types ·of contributions permitted during an election. It also, as noted in Respondent's Motion, repealed §1-45-111 which had vested the Secretary of State with certain duties in relation to campaign finance. It did not wipe those duties out, however. Rather, it placed them into Colo. Const. art. xxviii, §9. After the passage of Amendment 27, more of the enforcement

[2] I have visibility in Lexis only back to 1993 and in Westlaw only to the1989 version of the Campaign Reform Act.

power for violations of campaign finance and disclosure rules was placed into the hands of private parties. And thereafter until 2018, article xxviii of the Colorado Constitution was the primary campaign finance law in Colorado. *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 17, 269 P.3d 1248, 1253.

8. *Holland v. Williams*, 457 F. Supp. 3d 979, 996 (D. Colo. 2018) held Colo. Const. art. xxviii, §9(2)(a) and §1-45-111.5(1.5)(a), CRS—the sections of the Constitution and the FCPA that placed enforcement into the hands of private parties—to be unconstitutional. Other provisions in art. xxviii were left untouched by the *Holland* case and are still important parts of campaign finance law.

9. "*Holland* left Colorado's campaign finance laws without an enforcement mechanism," *Day v. Chase for Colo.*, 2020 COA 84, ¶ 6, at a time when the election cycle was in full swing. Therefore, days after *Holland* was issued, Secretary of State Wayne Williams promulgated emergency enforcement rules[3] first codified in 8 CCR 1505-6 and then adopted by the General Assembly in Senate Bill 19-232. The enforcement authority in SB 19-232 is embodied in Section 1-45-111.7, C.R.S. (2024). It is that section that is the basis of the enforcement action in the instant Administrative Complaint.

[3] It was on the strength of these then-emergency rules, which now have become codified at section 1-45-111.7, that the federal court in Holland denied the plaintiff's motion for a permanent injunction. *Holland v. Williams*, No. 16-cv-00138-RM-MLC, 2018 U.S. Dist. LEXIS 245935 (D. Colo. June 29, 2018) (D. Colo. June 29, 2018) (denying plaintiff's request for a permanent injunction against the campaign finance enforcement regime established in section 9(2)(a) because "[i]n light of the new rules defendant has adopted, there is no danger of that violation recurring at this time," and retaining jurisdiction to enforce the court's declaration that section 9(2)(a) is facially unconstitutional).

10. Section 1-45-111.7 provides that when a complaint is filed, the Elections Division reviews it and either (1) dismisses it; (2) provides the respondent an opportunity to cure the alleged violation; or (3) conducts additional review to determine whether to file a complaint with a hearing officer." *Id*. Where the Division files a complaint with a hearing officer, as it did here, the hearing officer holds a hearing and issues an initial decision, which is subject to review by the Deputy Secretary, who issues a final agency order. § 1-45-111.7(6). That is the path we are on in this case.

11. The first ground asserted by Respondent as entitling it to dismissal of the Complaint—that the Secretary of State has no jurisdiction to hear claims at all under the Fair Campaign Practices Act, §1-45-101, et seq., C.R.S. is decided pursuant to C.R.C.P. 12(b)(1). There is no factual determination required to rule on this part of Respondent's Motion to Dismiss.

12. As shown above, the Secretary of State is lawfully authorized to pursue the claims alleged in the Administrative Complaint. And this administrative court has jurisdiction to hear those claims. Respondent's argument, for the reasons set forth above, is without merit. The Motion to Dismiss for want of jurisdiction under C.R.C.P. 12(b)(1) is DENIED.

YARD SIGN DISCLAIMER

13. Respondent next argues for dismissal of Count 1 asserting that when it paid for the yard signs May 28, 2024, it had not yet crossed the $1000 threshold that triggers the disclaimer and reporting requirements. Respondent asserts that that the Complaint fails to

State grounds upon which relief can be granted. This part of Respondent's Motion to Dismiss is properly considered under C.R.C.P. 12(b)(5).

14. The purpose of C.R.C.P. 12(b)(5) is to test the legal sufficiency of the complaint to determine whether the plaintiff has asserted a claim or claims upon which relief can be granted. In evaluating a motion to dismiss under C.R.C.P. 12(b)(5), the court must accept as true all averments of material fact and must view the allegations of the complaint in the light most favorable to the plaintiff. *Ashton Props., Ltd. v. Overton,* 107 P.3d 1014, 1018 (Colo.App.2004).

15. The facts set forth in the complaint show that Respondent spent $3,500 on May 25 and $647.50 for yard signs on May 28. Those two facts, even without more, create a fact issue about whether or not the $1,000 threshold had been crossed at the time the yard signs were purchased, and thus required a disclaimer and reporting as an electioneering expense.

16. "Dismissal of claims under C.R.C.P. 12(b)(5) is proper only where a complaint fails to give defendants notice of the claims asserted." *Hemmann Mgmt. Servs. v. Mediacell, Inc.*, 176 P.3d 856, 858 (Colo. App. 2007). [Internal citation and quotation marks omitted.] Clearly the Administrative Complaint, pled in detail, provides Respondent with adequate notice of the facts and the law on which the two counts of the Complaint are based. Where claims contain allegations which, if established upon trial, would entitle one to relief, a motion to dismiss would be erroneous to grant. *Colo. Nat'l Bank v. F. E. Biegert Co.*, 165 Colo. 78, 438 P.2d 506 (1968).

17. The second ground asserted by Respondent as entitling it to dismissal of the Complaint— that it had no duty to place a disclaimer on the yard signs because at the time of purchase, it had not yet spent $1,000 on electioneering communications—presents an issue of fact that must be determined at trial. The Motion to Dismiss Count 1 under C.R.C.P. 12(b)(5) is DENIED.

CURE OF REPORTING VIOLATION

18. Respondent argues that the failure to report any part of the May 25 $3,500 campaign expense or the May 28 $647.50 expense as expenses incurred for electioneering communications was cured by its amended reports on July 27 and August 12. The committee further argues that having cured the violation, it makes the violation disappear, and since there was no violation, the count alleging a violation should be dismissed. This part of Respondent's Motion to Dismiss is properly considered under C.R.C.P. 12(b)(5)—failure to state a claim.

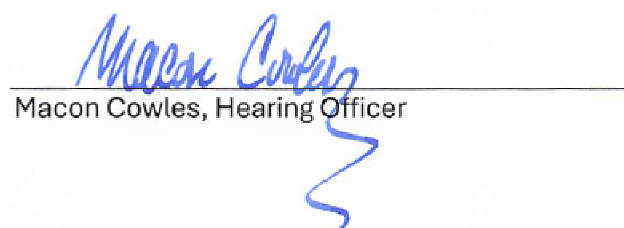
19. Respondent's argument misses the whole *raison d'être* for campaign finance laws: that they are designed to provide required information to inform the electorate during an election cycle, and particularly *prior* to the election in which the committee has been an actor and its reports were available to the electorate. The purposes and findings section of of Colo. Const. art. xxviii declares the importance of "full and timely disclosure of . . .[the] funding of electioneering communications, and strong enforcement of campaign finance requirements." Colo. Const. art. xxviii, §1.

20. The allegations of the Complaint do in fact state a claim upon which relief may be granted for the reporting violations. If under any theory of law the Enforcement Division would be entitled to relief, then the complaint is sufficient. *Denver & R. G. W. R. R. v. Wood*, 28 Colo. App. 534, 476 P.2d 299 (1970).

21. The Motion to Dismiss as to Count 2 is DENIED.

22. Respondent's Motion to Dismiss is DENIED in its entirety.

SO ORDERED this 16th day of December 2024.



CERTIFICATE OF SERVICE

The undersigned hereby states and certifies that one true copy of the Amended Order Denying Motion to Dismiss herein was sent via email on December 16, 2024 to the following:

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