Ethics Watch

May 6, 2011

Honorable Scott E. Gessler
Secretary of State of Colorado
1700 Broadway, Suite 250
Denver, CO 80290

Re: Colorado Ethics Watch Supplemental Comments on Proposed Revisions to the Rules Regarding Campaign and Political Finance, 8 C.C.R. 1505-6.

Dear Secretary Gessler:

Colorado Ethics Watch ("Ethics Watch") is a nonpartisan, nonprofit watchdog group that holds public officials and organizations legally accountable for unethical activities that undermine the integrity of state and local government. Ethics Watch respectfully submits the following supplemental comments on the proposed revisions to the Rules Regarding Campaign and Political Finance, 8 C.C.R. 1505-6 (the "Rules") in anticipation of the rulemaking hearing currently scheduled for May 3, 2011. These comments supplement the comments filed by Ethics Watch on January 26, 2011 and May 3, 2011 regarding the proposed changes to issue committee disclosure requirements.

We have reviewed the comments submitted by Clear the Bench Colorado ("CTBC") and wish to correct the record. CTBC falsely asserts that it registered as an issue committee "[b]ased on the advice from the Secretary of State." As you are aware, this matter was litigated before Administrative Law Judge Robert Spencer. Attached for the record is the Final Agency Decision in Office of Administrative Courts Case No. OS 2010-0009.

Judge Spencer's findings of fact demonstrate that CTBC elected to disregard the formal written advice of the Secretary of State to "refile CTBC's registration as a political committee and identify the specific judges you will either be supporting or opposing the retention of." Finding of Fact No. 13 (internal quotation omitted). CTBC, presumably on advice of counsel, elected to disregard this advice and instead submit a draft registration as an issue committee. Findings of Fact Nos. 15 and 16. Elections Division staff "was uncertain as to whether a committee opposing judicial retention, such as CTBC, should register as a political committee or an issue committee, and in fact had accepted such a committee as a political committee in the past." Finding of Fact No. 17. CTBC's experience in no way supports the proposed Rule.

Very truly yours,

Luis Toro
Director

Enclosure

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STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17th Street, Suite 1300 Denver, Colorado 80202	
IN THE MATTER OF THE COMPLAINT FILED BY COLORADO ETHICS WATCH REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY CLEAR THE BENCH COLORADO	▲ COURT USE ONLY ▲ CASE NUMBER: OS 2010-0009
FINAL AGENCY DECISION	

This matter is before the Administrative Law Judge (ALJ) upon complaint by Colorado Ethics Watch (CEW) alleging that Clear the Bench Colorado (CTBC) violated the Colorado fair campaign practice laws by failing to register as a political committee. CTBC denies that it is required to register as a political committee, and asserts that it is properly registered as an issue committee.

Luis Toro, Esq., and Aaron Goldhammer, Esq., represent the Complainant, Colorado Ethics Watch. Scott Gessler, Esq. and Mario Nicolais, Esq., represent the Respondent, CTBC.

Case Summary

CTBC is a committee opposing the retention of three Colorado Supreme Court justices - - Justice Michael Bender, Justice Alex Martinez, and Justice Nancy Rice.[1] CTBC is registered with the Secretary of State as an issue committee, and has filed the contribution and expenditure reports required of an issue committee.

On May 5, 2010, CEW filed a complaint with the Secretary of State alleging that CTBC is actually a political committee, and should have registered as such. Furthermore, CEW alleged that CTBC received two contributions in excess of the limits applicable to political committees. It sought appropriate sanctions for those infractions.

The parties filed cross motions for summary judgment. There was no dispute that CTBC had a major purpose of expressly advocating against the retention of the justices, received contributions and made expenditures in excess of $200 for this purpose, is not registered as a political committee, and received two contributions in excess of the limit applicable to political committees. CEW contended the law is clear

[1] CTBC also opposed the retention of Chief Justice Mary Mullarkey, until Justice Mullarkey announced she would not seek retention.

that CTBC's advocacy against the justices made it a political committee, and therefore summary judgment should be granted in CEW's favor.

Although CTBC did not dispute most of CEW's factual allegations, it raised three defenses that it said warranted summary judgment in its favor. First, it said CTBC is an issue committee not a political committee, and that it has complied with all its obligations as an issue committee. Second, it said CEW's claims were barred by the statute of limitations. Third, it argued that CEW was equitably estopped from claiming that CTBC is a political committee because, according to CTBC, it relied upon a directive from the staff of the Secretary of State to register as an issue committee. CTBC sought an award of attorney fees for what it claimed was CEW's groundless, frivolous, and vexatious complaint.

On July 23, 2010, the ALJ entered summary judgment in favor of CTBC because, at the time CEW filed its complaint on May 5, 2010, none of the justices targeted by CTBC had yet filed a declaration of intent to seek retention, and therefore were not yet "candidates" as defined by Colo. Const. art. XXVIII, § 2(2). Because the justices were not yet candidates, CTBC was not a political committee, as defined by article XXVIII, § 2(12). The ALJ, however, granted CEW permission to file a supplemental complaint, based upon evidence that since the date of its original complaint, Justices Bender, Rice, and Martinez had filed declarations of intent to seek retention and thus were "candidates" for office, and CTBC had still not registered as a political committee.

CEW filed its supplemental complaint August 2, 2010. As before, CEW alleges that CTBC is a political committee because it continues to accept contributions and make expenditures in excess of $200 with the major purpose of expressly defeating the retention of Justices Bender, Rice, and Martinez, who are now candidates as defined by article XXVIII, § 2(2).[2] CTBC continues to defend on the grounds that, even though the targeted justices are now candidates for retention, CTBC still does not meet the definition of a political committee. CTBC also continues to assert the affirmative defense of equitable estoppel.

Hearing on the merits of CEW's supplemental complaint was held at the Office of Administrative Courts September 15, 2010.[3] For reasons explained below, the ALJ concludes that CTBC now meets the definition of a political committee, and should have registered as such. The ALJ also rejects CTBC's affirmative defense of equitable estoppel. However, the ALJ finds that CTBC reasonably relied upon the Secretary of State's acceptance of its registration as an issue committee, and therefore imposes no sanction upon CTBC for its failure to register as a political committee.

Findings of Fact

The following facts are supported either by stipulation of the parties or by a preponderance of the evidence in the record as a whole:

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[2] There is no allegation that CTBC has accepted excess contributions since the time that the three justices became candidates for retention.

[3] CTBC's motion to dismiss for failure to state a claim, or alternatively for summary judgment, was denied at the outset of the hearing.

1. CTBC is a committee formed in April 2009. Its director and active member is Matthew Arnold.

2. The terms of Justice Michael Bender, Justice Alex Martinez, and Justice Nancy Rice as justices of the Colorado Supreme Court are due to expire. In order to retain their judicial offices, they must run for retention in the November 2010 general election.

3. From its inception in April 2009, CTBC has expressly advocated against the retention of Justices Bender, Martinez, and Rice, and has solicited contributions and made expenditures for that purpose.

4. Justice Bender filed a Declaration of Intent to Run for Retention with the Secretary of State on May 28, 2010. Justice Rice filed her declaration on or about July 6, 2010, and Justice Martinez filed his declaration on or about July 9, 2010.

5. As a result of these filings, all three justices are "candidates" as defined by Colo. Const. art. XXVIII, § 2(2).

6. Since the date that Justices Bender, Rice, and Martinez became candidates, CTBC has accepted contributions and made expenditures in excess of $200 in support of its purpose of opposing their retention.

7. Since the date that Justices Bender, Rice, and Martinez became candidates, CTBC has continued to expressly advocate against their retention.

8. CTBC's major purpose is to oppose the retention of those justices it believes do not follow the "rule of law." The following evidence supports this finding:

a. The parties stipulate that CTBC has "a" major purpose of opposing the retention of the targeted justices, though they disagree that it is "the" major purpose.[4]

b. In addition to advocating the defeat of the targeted justices, CTBC's registration form (Exhibit E, p. 3) states that its purpose is to, "Educate voters on the importance of judges observing the principles of the 'rule of law' in deciding cases;" and "Educate Colorado voters on their right to non-retain judges who do not follow these principles." These additional purposes, however, are entirely collateral to CTBC's purpose of defeating those justices that do not meet its standards. The ALJ agrees with CEW's view that the discussion of voter "education" is simply the "windup to the pitch" that certain justices must not be retained. There is no evidence that CTBC ever had an independent purpose of voter education, apart from its ultimate goal of removing targeted justices.

c. CTBC was first formed in April 2009. It has no "track record" of advocating any matter other than the non-retention of justices in the upcoming election. All its expenditures in the current election cycle have been for that purpose.

d. A sample of CTBC's press releases for the week of July 21 to 28, 2010,

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[4] Citing *Buckley v. Valeo,* 424 U.S. 1, 79 (1976), CTBC suggests that to be a political committee, it must have *the* major purpose of supporting or opposing a candidate. It contends that simply having *a* major purpose of supporting or opposing a candidate is not sufficient. Because CTBC has *the* major purpose of opposing the justices' retention, the ALJ need not decide whether *a* major purpose is sufficient.

which is representative of CTBC's advocacy, show that CTBC's primary goal is to defeat the justices it considers unworthy of holding office:

> - the "point" of Clear The Bench Colorado is to hold "the current justices accountable to the Colorado Constitution, the rule of law, and the citizens whose rights they are sworn to uphold." Exhibit 7, p. 1.
>
> - "a grassroots movement called Clear the Bench Colorado . . . aims to get Coloradans to vote out three ultra-liberal Supreme Court justices." Exhibit 7, p. 2.
>
> - "Haley starts out with a reasonably accurate summation of the "judicial push" (to vote "NO" on the unjust justices of the Colorado Supreme Court . . .) " Exhibit 7, p. 3.
>
> - "Be a citizen, not a subject - get informed, then exercise your right to vote "NO" this November on the four (er, three remaining) 'unjust justices' . . . " Exhibit 7, p. 4.

e. In those statements that do contain some information that might be considered educational, such as Mr. Arnold's discussion of the judicial performance commission, it is imbedded in the context of an argument that the judicial performance system is unequal to the task of holding judges accountable, and therefore voters must "get informed, then exercise your right to vote "NO" this November on the four (er, three remaining) 'unjust justices'. . ." Exhibit 7, p. 7.

f. CTBC's primary, if not sole, purpose is summarized in the name selected for it by Mr. Arnold - - "Clear the Bench Colorado."

9. Political committees are subject to a contribution limit of $525 from any one person per election cycle.[5] Issue committees are subject to no contribution limit.

10. CTBC initially attempted to register with the Secretary of State as a political committee on April 20, 2009, stating that its purpose was "judicial retention." Exhibit B.

11. The Secretary of State rejected that registration. In an e-mail to Mr. Arnold dated May 1, 2009, the Secretary explained that the reason for rejection was "Purpose too vague also might fall under definition of issue committee." Exhibit C.

12. The e-mail was followed by a letter to Mr. Arnold dated May 4, 2009. Exhibit 10. That letter stated, in pertinent part:

> The Committee's purpose is too vague. Per Rule 2.4 of the Secretary of State's Rules Concerning Campaign and Political Finance *"...a political committee or small donor committee shall identify the types of candidates being supported or opposed, such as party affiliation or public policy position, and if known, the specific candidates being supported or opposed."*

13. The letter advised Mr. Arnold to refile CTBC's registration as a political

[5] *See* Colo. Const. art. XXVIII, §§ 3(5), as adjusted by § 3(13) and 8 CCR 1505-6, rule 12.7.

committee and identify "the specific judges you will either be supporting or opposing the retention of."

14. Unlike the May 1st e-mail, the letter made no mention of the possibility of filing as an issue committee.

15. Mr. Arnold did not re-register as a political committee. Instead, he sent an e-mail to Kristine Reynolds, a staff member of the Secretary of State's Elections Division, providing a draft registration form as an issue committee, and asking for advice as to "the proper classification and status of CTBC." Exhibit E.

16. The draft registration contained the following, revised, statement of purpose:

> 1. Educate Colorado voters on the importance of judges observing principles of the "rule of law" in deciding cases;
>
> 2. Educate Colorado voters on their right to non-retain judges who do not follow these principles;
>
> 3. Advocate for the non-retention of justices statewide who demonstrate a consistent pattern of deciding cases in contravention of the Colorado Constitution, established statutory law, legal precedent, and "rule of law" principles (naming judges as necessary to educate voters).

17. The staff of the Elections Division was uncertain as to whether a committee opposing judicial retention, such as CTBC, should register as a political committee or an issue committee, and in fact had accepted such a committee as a political committee in the past. *See* Exhibits 13 and D.

18. After holding an internal policy meeting to discuss the issue, the Elections Division determined that CTBC should register as an issue committee. As a result of that meeting, a representative of the Elections Division prepared a memo documenting that, "After much discussion our initial thought that they [CTBC] should register as an issue committee was agreed upon." Exhibit F. This memo was subsequently posted to the Secretary of State's website and was publicly available.[6]

19. The Deputy Secretary of State attended the policy meeting, and therefore was aware of the Election Division's position that committees opposing judicial retention should register as issue committees.

20. On June 9, 2009, the Elections Division formally accepted CTBC's registration as an issue committee. Exhibit G.

21. The Secretary of State has never adopted a regulation to codify the Election Division's position that committees opposing judicial retention should register as issue committees. Although a draft regulation was discussed at a Campaign Finance Advisory Panel meeting on June 18, 2009 (Exhibit H), opinion was divided and

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[6] The Elections Division continues to support this position. Exhibits I, J, K, L, N.

the regulation was not adopted.[7]

22. While the litigation of this case was pending, CTBC petitioned the Secretary of State to conduct emergency rulemaking to adopt a rule requiring committees supporting or opposing judicial retention to register as issue committees. The Secretary declined to do so. In a letter to CTBC's attorney, dated August 4, 2010 (Exhibit 12), the Director of the Elections Division advised CTBC that:

> . . . the question as to what type of committee is appropriate, remains without definitive answer.
>
> The Secretary of State recognizes that there are credible arguments on both sides of this matter. Neither the Fair Campaign Practices Act nor the Colorado Constitution provides guidance as to how an organization like Clear the Bench shall be classified. In the event the law is not clear, it is ultimately left to the judicial branch to decide what a statute or constitutional provision means. The Secretary of State only provides guidance, in the form of rulemaking, to assist persons and organizations who are subject to relevant laws.
>
> This current request has been made while litigation is ongoing between Colorado Ethics Watch and Clear the Bench. The Office of Administrative Courts will adjudicate the matter more quickly and with greater authority than is possible in emergency rulemaking. Furthermore, the proximity to the 2010 general election complicates the feasibility of adopting an emergency rule.
>
> Due to the role of the court, the fact that a rule could be implemented just weeks before the general election, and the continuing litigation in this case, the Secretary of State is declining to issue an emergency rule as requested.

23. The Secretary of State, therefore, has not made a formal decision that committees opposing or supporting judicial retention must file as issue committees and not political committees. Although staff members of the Elections Division hold this belief and have given this advice to others, the Secretary of State has refused to adopt this position by formal rule making, and instead has deferred to the outcome of this litigation.

24. The parties to this litigation are CEW and CTBC. The Secretary of State is not a party to this litigation.

25. CEW is a private organization that is neither an agent of, nor in privity with, the Secretary of State. Therefore, CEW is not responsible for or bound by advice given to CTBC by the staff of the Elections Division.

26. CEW has made no representations to CTBC upon which CTBC has detrimentally relied.

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[7] This panel is composed of representatives of the Elections Division as well as interested members of the public. The panel is an advisory body only.

Discussion and Order

Colorado's Campaign Finance Laws

The primary campaign finance law in Colorado is Article XXVIII of the Colorado Constitution, which was approved by the voters in 2002. Article XXVIII imposes contribution limits, encourages voluntary spending limits, imposes reporting and disclosure requirements, and creates an enforcement process. Colorado also has statutory campaign finance law, known as the Fair Campaign Practices Act (FCPA), §§ 1-45-101 to 118, C.R.S., which was originally enacted in 1971, repealed and reenacted by initiative in 1996, substantially amended in 2000, and again substantially revised by initiative in 2002 as the result of the adoption of Article XXVIII. The Secretary of State, pursuant to regulations published at 8 CCR 1505-6, further regulates campaign finance practices.

Definition of a Political Committee

The validity of CEW's complaint depends upon the accuracy of its allegation that CTBC is a political committee. If CTBC is not a political committee it has no obligation to register as such.

A political committee is defined by Colo. Const. art. XXVIII, § 2(12)(a), as follows:

> "Political committee" means any person, other than a natural person, or any group of two or more persons, including natural persons that have accepted or made contributions or expenditures in excess of $200 to support or oppose the nomination or election of one or more *candidates*.

Emphasis added.

Though not specifically mentioned in § 2(12), a political committee must also have as its "major purpose" the nomination or election of a candidate (or the defeat thereof). *Alliance for Colorado's Families, v. Gilbert,* 172 P.3d 964, 970 (Colo. App. 2007)(citing *Buckley v. Valeo,* 424 U.S. 1 (1970)).

A "candidate" is defined by § 2(2), as follows (in pertinent part):

> "Candidate" means any person who seeks nomination or election to any state or local office that is to be voted on in this state at any primary election, general election, school district election, or municipal election. *"Candidate" also includes a judge or justice of any court of record who seeks to be retained in office pursuant to the provisions of section 25 of article VI.* A person is a candidate for election if the person has publicly announced an intention to seek election to public office or retention of a judicial office and thereafter has received a contribution or made an expenditure in support of the candidacy.

Emphasis added.

Colo. Const. art. VI, § 25, in turn, states, in pertinent part:

> A justice of the supreme court, or a judge of any other court of record,

> who shall desire to retain his judicial office for another term after the expiration of his then term of office *shall file with the secretary of state*, not more than six months nor less than three months prior to the general election next prior to the expiration of his then term of office, *a declaration of intent to run* for another term.

Emphasis added.

When language of a constitutional amendment is clear and unambiguous, the amendment must be enforced as written. *Davidson v. Sandstrom,* 83 P.3d 648, 654 (Colo. 2004). Although the court's obligation is to give effect to the intent of the electorate, in giving effect to that intent the court must look to the words used, reading them in context and according them their plain and ordinary meaning. *Sanger v. Dennis,* 148 P.3d 404, 412 (Colo. App. 2006).

The constitutional provisions cited above are clear that a justice becomes a "candidate" when that justice files a declaration of intent to run for retention with the Secretary of State. Once a justice becomes a candidate, any committee whose major purpose is the defeat of that candidate's retention in office and has accepted or spent over $200 to expressly advocate against the candidate's retention, becomes a political committee within the meaning of § 2(12).

CTBC is a Political Committee

There is no dispute that Justices Bender, Rice, and Martinez have all filed declarations to run for retention as required by article VI, § 25, and therefore are all "candidates" within the meaning of art. XXVIII, § 2(2). CTBC is therefore a political committee because its major purpose is the defeat of those justices' retention in office, and it has accepted contributions and made expenditures in excess of $200 to expressly advocate against their retention. These undisputed facts place CTBC squarely within § 2(12)'s definition of political committee. Because CTBC meets that definition, it was obligated to register as such with the Secretary of State, as required by § 1-45-108(3), C.R.S. That obligation ripened when CTBC cumulatively spent, or accepted, in excess of $200 for the first time following Justice Bender's filing of his declaration of intent to run.

CTBC is Not an Issue Committee

Political committees and issue committees are mutually exclusive. The definition of political committee excludes issue committees, and the definition of issue committee excludes political committees. *See* art. XXVIII, §§ 2(12)(b) and 2(10)(b), respectively. Thus, because CTBC meets the definition of a political committee, it cannot be an issue committee as well.

Moreover, CTBC does not meet the definition of an issue committee. An issue committee is defined by § 2(10) to be a group of two or more persons that "has a major purpose of supporting or opposing *any ballot issue or ballot question*" and has accepted or spent in excess of $200. Art. XXVIII, § 2(10)(a). The terms "ballot issue" and "ballot question" are not defined in article XXVIII, but are terms of art defined elsewhere in constitutional and statutory law that predated the electorate's adoption of article XXVIII.

Voters are presumed to know the law when they adopt constitutional amendments. *Common Sense Alliance v. Davidson,* 995 P.2d 748, 754 (Colo. 2000)("The electorate, as well as the legislature, must be presumed to know the existing law at the time they amend or clarify that law.")

"Ballot issue" is defined in article X, § 20(2)(a) as a "non-recall petition or referred measure in an election." This definition is part of the constitutional amendment known as TABOR (Taxpayer Bill of Rights), adopted in 1992. Ballot issue is also defined in statute at § 1-1-104(2.3), C.R.S. as a "state or local government matter arising under section 20 of article X of the state constitution [TABOR], as defined in sections 1-41-102(4) and 1-41-103(4), respectively." It also appears at § 1-40-102(1), C.R.S. where it is defined as "a nonrecall, citizen-initiated petition or legislatively-referred measure which is authorized by the state constitution, including a question as defined in sections 1-41-102(3) and 1-41-103(3)."[8] Sections 1-1-104(2.3) and 1-40-102(1) were adopted in 1993. Therefore all these definitions of ballot issue were law when the electorate adopted article XXVIII in 2002.

"Ballot question" is defined in statute as a "state or local government matter involving a citizen petition or referred measure, other than a ballot issue." Section 1-1-104(2.7), C.R.S. This provision was adopted in 1993, and was therefore law when article XXVIII was adopted in 2002.

All these definitions have the common requirement that a ballot issue or ballot question, whatever the subject, be a citizen initiated petition or a legislatively referred measure. Because judicial retention elections are mandated by article VI, § 25, they are neither citizen initiated nor legislatively referred, and thus are not "ballot issues" or "ballot questions."

The fact that article VI, § 25 requires that "a question" be placed on the "ballot" to determine whether a justice shall be retained, does not mean that the retention election becomes a "ballot question." As noted above, the term "ballot question" is a term of art defined in law well before article XXVIII was adopted. Had the drafters of article XXVIII intended to include advocacy of judicial retention within the scope of an issue committee, they could be expected to say so. Instead, the electorate used terms of art that were already defined in law and do not encompass retention elections.

Stretching the definition of "ballot question" to include retention elections creates an internal conflict in article XXVIII because a committee opposing or supporting a retention election would then be both a political committee and an issue committee simultaneously. This, however, is impossible because, as previously noted, the committees are mutually exclusive. Conflicting interpretations should be avoided. In order to effectuate legislative intent, courts must consider statutes as a whole and attempt to give consistent, harmonious, and sensible effect to all their parts. *State v. Nieto*, 993 P.2d 493, 501 (Colo. 2000); *Harwood v. Senate Majority Fund,* LLC, 141 P.3d 962, 964 (Colo. App. 2006)("Where ambiguities do exist, courts must interpret the constitutional provision as a whole in an attempt to harmonize all its parts.") The only interpretation that results in harmony between the definitions of political and issue

[8] Sections 1-41-102 and 1-41-103 implement TABOR's odd-year election requirement.

committees is to restrict the terms "ballot question" and "ballot issue" to their historical denotation as citizen-initiated or legislatively referred measures, only.

CTBC attempts to avoid an internal conflict by adopting a strained construction of § 2(12). CTBC argues that the definition of political committee at § 2(12) does not include committees opposing judicial retention because § 2(12)(a) applies only to committees that "support or oppose the nomination or *election* of one or more candidates." Emphasis added. Although CTBC concedes that Justices Bender, Rice, and Martinez are "candidates" as defined in § 2(2), it argues that they are seeking "retention" and not "election," and therefore do not fall within the definition of § 2(12)(a).

The ALJ rejects this interpretation because it flies in the face of the plain language of § 2(2), which specifically defines "candidate" to include a justice "who seeks to be retained." Nothing in this or any other constitutional provision suggests that a justice seeking to be retained is not running for "election." To the contrary, § 2(2) itself refers to a justice who seeks retention as a "candidate for election," and article VI, § 25, which describes the retention process, is titled "Election of Justices and Judges." Furthermore, § 25 specifies that if a majority of votes cast are in favor of retention, then the judge or justice is "elected to a succeeding full term." All this is consistent with the commonly understood meaning of the word "election," which means "the act of choosing." *Webster's New Universal Unabridged Dictionary* 582 (2nd ed. 1983). Clearly, a justice seeking to be retained in office is seeking to be chosen, or elected, to remain in that office.

The ALJ also finds unpersuasive the argument that because retention elections are in some ways similar to recall petitions, they should be treated as such. The fact that § 1-45-108(6), C.R.S. requires a committee for the recall of an elected official to register as an issue committee has little significance because public officials facing a recall are not defined as "candidates" by § 2(2). To the contrary, § 1-12-118(1) specifically states that the name of the person subject to recall "shall not appear on the ballot as a candidate for office." *See also* 8 CCR 1505-6, Rule 10.3 which permits an incumbent to open an issue committee to oppose his recall because he "is not a candidate for the successor election." Furthermore, although recall is similar to retention in that the office holder faces a "yes" or "no" vote, there are substantial dissimilarities. Most notably, recalls are initiated by citizen petition and seek to remove an official from office prior to the end of his or her term in office. Article XXI, § 1. Retention elections, on the other hand, are required by law and occur only at the end of the judge or justice's term of office. Article VI, § 25. Because a recall petition is not the same thing as a retention election, and is governed by different rules, it is not a compelling point of comparison.

Nor is the ALJ is bound by the Election Division's decision to accept CTBC's registration as an issue committee, or by the current belief of its staff that committees opposing or supporting judicial retention should register as issue committees. In taking those positions, the Elections Division did not have the benefit of the extensive briefing and evidence presently before the ALJ.

Deference to an agency interpretation is not given when the interpretation misapplies or misconstrues the law, *Huddleston v. Bd. of Equalization,* 31 P.3d 155, 160

(Colo. 2001); or is contrary to the plain meaning of a statute or contrary to legislative intent, *Barnes v. Dept. of Revenue, Motor Vehicle Div.*, 23 P.3d 1235, 1236 (Colo. App. 2000); or has been inconsistent in the past. *Lobato v. Industrial Claim Appeals Office,* 105 P.3d 220, 223 (Colo. 2005). Furthermore, even if deference is due, it is weak where the agency's interpretation has not been adopted by rule making or other formal adjudication. *Christensen v. Harris County,* 529 U.S. 576, 587 (2000). In recognition of these and other factors, the Elections Division has prudently declined CTBC's request for emergency rulemaking and instead has deferred to the outcome of this litigation, where the ALJ's decision on behalf of the agency will be based upon a fully developed record and will be subject to judicial review.

In summary, a fair reading of the plain language of article XXVIII, §§ 2(2) and 2(12), as applied to facts that are either undisputed or are proven by the evidence, shows that CTBC is a political committee and must be registered as such.

CEW is Not Equitably Estopped

Equitable estoppel is an affirmative defense which must be proven by the party asserting it.

> The essential elements of an equitable estoppel as related to the party estopped are: (1) [c]onduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially....

V Bar Ranch LLC v. Cotten, 233 P.3d 1200, 1210 (Colo. 2010)(quoting *City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 76 (Colo. 1996)).

For the purposes of this discussion, the key element is that estoppel can only be asserted against a "party" that made a false representation or concealed material facts, and that the party asserting the defense must have relied upon the conduct of the "party" to be estopped. The defense does not apply in this case because there is no evidence that CEW, the party to be estopped, made any false representation or concealed any material facts; nor is there any evidence that CTBC relied to its detriment upon any conduct by CEW. It is the Secretary of State, through its Elections Division staff, that made the representations upon which CTBC relied, not CEW. However, the Secretary of State is not a party to this litigation.

CTBC seeks to sidestep this problem arguing that CEW acted as an agent of the Secretary of State in bringing this litigation, or acted in privity with the Secretary by doing so. The ALJ does not agree. Article XXVIII, § 9(2) is carefully designed to keep the Secretary of State out of the litigation process. Under that provision, "any person"

who believes there has been a violation of the fair campaign practice laws may file a written complaint "with the secretary of state." Article XXVIII, § 9(2)(a). The Secretary is then obligated to "refer the complaint to an administrative law judge." *Id.* The ALJ, after holding a hearing in accordance with § 24-4-105 of the Administrative Procedure Act, renders a decision which is "final and subject to review by the court of appeals." *Id.* "The secretary of state and the administrative law judge are not necessary parties to the review." *Id.* Nothing in § 9(2) gives the Secretary any ability to control or oversee the conduct of the litigation,[9] and nothing suggests that the person bringing the complaint does so on behalf of the Secretary or is an agent of the Secretary.[10]

CTBC relies upon a number of cases that recognize privity between the government and its citizens in certain matters of public interest: *Atchison, Topeka & Santa Fe Rwy. Co. v. Bd. of County Comm'rs,* 95 Colo. 435, 37 P.2d 761 (1934)(judgment against a county in a matter of general interest, such as the levy and collection of a tax, is binding not only on the county as the named defendant but also upon taxpayers not named as defendants); *McNichols v. City and County of Denver,* 101 Colo. 316, 74 P.2d 99, 102 (1937)(judgment against a governmental body in a matter of general interest to all its citizens and taxpayers is binding upon the latter, though they are not parties to the suit); *Lance v. Davidson,* 379 F.Supp. 2d 1117, 1125 (D. Colo. 2005)(in a challenge to legislative redistricting, individual citizens stand in privity with the General Assembly, which was a party to prior litigation); *Lance v. Dennis,* 444 F.Supp. 2d 1149, 1159 (D. Colo. 2005)(the extent to which individuals are privies of the state depends on whether the issue asserted by the private citizen and previously asserted by a public entity is a matter of general interest to all the people); *Satsky v. Paramount Communications, Inc.,* 7 F. 3rd 1464, 1470 (10th Cir. 1993)(when a state litigates common public rights, such as claims based upon damage to natural resources, the citizens of that state are represented in such litigation by the state and are bound by the judgment)(citing *Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979)).

These cases are not persuasive authority here because this is not a case where the Secretary of State has been party to prior litigation that could preclude CEW's claim. Rather, CTBC seeks to attribute to CEW positions informally taken by staff members of the Secretary of State. CTBC has cited no authority, and the ALJ is aware of none, that would create privity between the Secretary and CEW under these circumstances.

The Appropriate Sanction

Despite the failure of CTBC's defense of equitable estoppel, its reasonable reliance upon the Election Division's acceptance of its registration as an issue committee is worthy of consideration in determining the appropriate sanction. Pursuant to § 9(2), the ALJ has discretion to impose any "appropriate order, sanction, or relief" authorized by article XXVIII. The word "appropriate" is intended to give the ALJ

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[9] The design of § 9(2) wisely insulates the Secretary, who has political party affiliation, from allegations of political influence in the prosecution of fair campaign violations.

[10] Only after the final decision has been rendered may the Secretary choose to become a party by filing an enforcement action. If the Secretary chooses not to do so, then the person bringing the complaint may pursue "a private cause of action to enforce the decision." *Id.*

discretion to "limit otherwise harsh results." *Patterson Recall Committee,. Inc., v. Patterson,* 209 P.3d 1210, 1219 (Colo. App. 2009). This includes the "discretion to impose no sanction at all." *Id.*

In view of CTBC's reasonable reliance upon the Election Division's acceptance of its registration as an issue committee, and the Elections Division's advice that such a registration was appropriate, any monetary penalty against CTBC would be inequitable and unduly harsh. The ALJ therefore imposes none.

However, inasmuch as CTBC is a political committee, it must promptly register as such. It shall accomplish such registration within twenty (20) days of this decision, and thereafter abide by the rules applicable to political committees.

This decision is final and subject to review by the court of appeals, as provided by Colo. Const. art. XXVIII, § 9(2)(a) and § 24-4-106(11), C.R.S.

Attorney Fees

In granting summary judgment to CTBC against CEW's initial complaint, the ALJ awarded CTBC its attorney fees per § 1-45-111.5(2) because CEW's complaint, as then stated, lacked substantial justification. The ALJ, however, found that the amount of fees to be awarded might depend upon how much of CTBC's attorney's prior effort would assist in the defense of CEW's supplemental claim. The ALJ therefore deferred determination of the proper amount of fees to be awarded until after the merits of the supplemental complaint had been resolved. Because CEW's supplemental complaint has merit, no fees will be awarded for effort by CTBC's attorney that was reasonably necessary to defend against the supplemental complaint.

CTBC is directed to submit, no later than October 11, 2010, an itemization of those fees it incurred in defense of the dismissed claim.

Done and Signed
September 22, 2010

ROBERT N. SPENCER
Administrative Law Judge

Digitally recorded CR #1
Exhibits admitted:
CEW's exhibits: 1-17
CTBC's exhibits: A-O

CERTIFICATE OF SERVICE

I certify that I have served a true and correct copy of the above **FINAL AGENCY DECISION** by depositing same in the U.S. Mail, postage prepaid, at Denver, Colorado addressed to:

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this 23 day of September, 2010.

Dianne Moore
Court Clerk