

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 1525 Sherman Street, 4 <sup>th</sup> Floor, Denver, Colorado 80203	
<b>CAMPAIGN INTEGRITY WATCHDOG,</b> Complainant,  vs.  <b>COMMITTEE TO ELECT TIM DORE,</b> Respondent.	▲ COURT USE ONLY ▲  <b>CASE NUMBER:</b> <b>OS 2016-0028</b>
<b>DECISION</b>	

This matter involves a complaint by Campaign Integrity Watchdog (CIW) that the candidate committee supporting Tim Dore’s candidacy in the 2016 primary election for House District 64 violated Colorado’s fair campaign practice laws. Specifically, CIW contends that the Committee to Elect Tim Dore (CETD) failed to report certain campaign contributions and expenditures, failed to report electioneering communications, and violated contribution limits. Hearing of the complaint was held before Administrative Law Judge (ALJ) Robert Spencer on January 5, 2017. Pursuant to § 13-1-127(2), C.R.S., CIW was represented by its principal officer, Matthew Arnold. CETD was represented by Ryan R. Call, Esq., Hale Westfall, LLP.

### Case Summary

Mr. Dore was a candidate for House District 64 in the 2016 Republican primary election, held June 28, 2016. CETD was Mr. Dore’s candidate committee, registered as such with the Colorado Secretary of State.

Candidate committees are obligated by Colorado’s fair campaign practice laws to file periodic reports of contributions received and expenditures made. In addition, candidate committees are obligated to disclose the money spent on electioneering communications when those expenditures exceed \$1,000 in a calendar year. Candidate committees are also subject to monetary limits on the amount of contributions they may receive from any one person.

Complainant alleges that CETD violated the law in four ways. First, that CETD

failed to report as contributions the value of two robo-calls<sup>1</sup> and one television advertisement that supported his candidacy. Second, that CETD failed to report as expenditures the money spent on the two robo-calls and the TV ad. Third, that the value of the contributions identified in the first claim exceeded CETD's contribution limit. Fourth, that CETD failed to properly identify several expenditures for electioneering communications. Respondent denies these allegations.

For reasons explained below, the ALJ concludes that a portion of the second claim and a portion of the fourth claim are proven, but the remaining claims are not.

### **Findings of Fact**

1. Tim Dore was a candidate for nomination to HD 64 in the 2016 Republican primary election, held June 28, 2016.

2. CETD was Mr. Dore's registered candidate committee.

3. As a registered candidate committee, CETD had the obligation to file periodic reports of campaign contributions and expenditures with the Secretary of State.

4. In addition, candidate committees that spend more than \$1,000 in a calendar year for electioneering communications must report that spending.

5. An electioneering communication, as it pertains to a primary election, is a printed or broadcasted communication to the electorate that is made within 30 days of the primary election and unambiguously refers to a candidate.

6. When filed, campaign finance reports are posted to the Secretary of State's publicly accessible electronic filing system, known as TRACER.<sup>2</sup>

7. A committee that does not file a required report by the date it is due, or files a report that does not contain all the required information, is subject to a monetary late filing penalty.

8. Candidate committees are prohibited from accepting contributions from any one donor that exceed a limit set by law. In 2016, that limit, as applied to candidates for the state house of representatives, was an aggregate of \$400 for the primary and general elections per election cycle.

### *CETD's June 10<sup>th</sup> Robo-Call*

9. On June 10, 2016, a robo-call paid for by CETD was made to HD 64 voters. Ex. 2.

10. The June 10<sup>th</sup> robo-call contained a voice message from an individual identifying himself as "Bob Beauprez" expressly advocating Mr. Dore's election as the Republican candidate for HD 64. The robo-call disclosed that it was "Paid for by the Committee to Elect Tim Dore." Ex 2.

11. Per an invoice from Olson Strategies & Advertising to CETD, dated June

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<sup>1</sup> A robo-call is an auto-dialed telephone call conveying a pre-recorded voice message.

<sup>2</sup> The ALJ takes judicial notice of CETD's TRACER filings, available on the Secretary of State's website at <http://tracer.sos.colorado.gov/PublicSite/SearchPages/CandidateDetail.aspx?OrgID=23167&Type=CO>.

12, 2016, the cost of the June 10<sup>th</sup> “Beauprez” robo-call was \$364.20 for 6,070 completed calls. Ex. B. The invoice, which included charges for other activities by Olson Strategies & Advertising, totaled \$2,346.56.

12. CETD bank records show that this invoice was paid on June 16, 2016. Ex. A.

13. CETD’s deadline for filing reports of expenditures made during the period of June 9 to June 22, 2016 was June 27, 2016. CETD filed its report on that date.

14. CETD’s June 27, 2016 report did not disclose the expenditure for the June 10<sup>th</sup> robo-call. Ex. 5.

15. CETD’s next filing, made on July 19, 2016, disclosed an expenditure of \$5,740 to Olson Strategies & Advertising on June 24, 2016 for “Consultant & Professional Services.” Ex. 6. This disclosure may have included more than one invoice from Olson Strategies, and therefore CETD may have intended the disclosure to include the expenditure for the June 10<sup>th</sup> robo-call. However, that is not clear from the record.

16. The June 10<sup>th</sup> robo-call was an electioneering communication because it was a communication to HD 64 voters made within 30 days of the primary election that unambiguously referred to candidate Tim Dore.

17. CETD never identified the expenditure for the June 10<sup>th</sup> robo-call as an electioneering communication in any filing with the Secretary of State.

#### *CRN’s June 18<sup>th</sup> Robo-Call*

18. On June 18, 2016, a robo-call paid for by an independent expenditure committee known as Colorado Right Now (CRN) was made to HD 64 voters. Ex. 3.

19. The June 18, 2016 robo-call contained an unidentified speaker’s voice extolling Mr. Dore’s virtues as the Republican candidate for HD 64. The robo-call disclosed that it was “Paid for by the Colorado Right Now IEC.” Ex. 3.

20. CRN’s June 18<sup>th</sup> robo-call also stated that it was “Not authorized by any candidate or candidate’s committee.”

21. A June 27, 2016 filing by CRN with the Secretary of State disclosed that the cost of the June 18<sup>th</sup> robo-call was \$780. Ex. 20.

22. There is no convincing evidence that anyone associated with CRN coordinated the June 18<sup>th</sup> robo-call with Mr. Dore or anyone associated with CETD; nor is there any convincing evidence that Mr. Dore or CETD controlled any aspect of the June 18<sup>th</sup> robo-call.<sup>3</sup>

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<sup>3</sup> Complainant alleges that Bob Beauprez, who endorsed Mr. Dore’s candidacy in CETD’s June 10<sup>th</sup> robo-call, is a principal of CRN. Therefore, Complainant contends that CRN’s June 18<sup>th</sup> robo-call must have been coordinated with or controlled by CETD and Mr. Dore. The ALJ does not agree. Even if Mr. Beauprez controlled CRN, a fact not established by the record, it does not convincingly prove that CRN’s June 18<sup>th</sup> robo-call was controlled by or coordinated with CETD or Mr. Dore.

### *CETD's Electioneering Communications*

23. In addition to the June 10<sup>th</sup> robo-call, the record shows that CETD made other electioneering communications.

24. On June 27, 2016, CETD filed a report of contributions and expenditures that identified the following expenditures for "advertising":

- a. \$478 paid to Cherry Creek Radio on June 13, 2016 for "Advertising."
- b. \$700 paid to KWAY Radio on June 13, 2016 for "Advertising."
- c. \$400 paid to Main Street Broadcasting on June 15, 2016 for "Advertising."
- d. \$150 paid to Ranch Land News on June 15, 2016 for "Advertising."
- e. \$5,700 paid to Wizbang on June 21, 2016 for "Advertising."

Ex. 5.

25. CETD's reports state that these expenditures were *not* for electioneering communications. Ex. 5. This statement was not true because the expenditures were for electioneering communications. The ALJ bases this finding upon the following evidence and reasonable inferences:

- a. Each of the payments for "advertising" listed in Finding of Fact 24.a through d was made to a broadcast or print medium; specifically, a radio station or newspaper. The ALJ infers from this fact that they were for the purpose of communications supporting Mr. Dore's candidacy. Any other conclusion is highly unlikely.
- b. More likely than not, the payment to Wizbang for "advertising" (Finding of Fact 24.e) was for preparation and mailing of campaign flyers. Although the record does not contain an invoice from Wizbang corresponding to the June 21<sup>st</sup> expenditure, an earlier invoice dated June 7, 2016, shows that Wizbang was producing and mailing printed flyers endorsing Mr. Dore's candidacy. Ex. G. It is highly likely the advertising expenditure on June 21, 2016 was for a similar communication.<sup>4</sup>
- c. Each of these expenditures was made on or after May 29, 2016; the 30<sup>th</sup> day prior to the June 28<sup>th</sup> primary election.<sup>5</sup>
- d. It is reasonable to infer that each of these communications was distributed to voters in HD 64. A candidate committee would have no reasons to spend money on communications to non-voters.

26. Complainant also alleges that an expenditure of \$4,850 on June 20, 2016

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<sup>4</sup> Ex. H is a collection of flyers expressing advocating Mr. Dore's election. The record, however, is not sufficient to prove that these flyers are the ones produced and distributed by Wizbang.

<sup>5</sup> Although it is possible that one or more of the expenditures were for communications occurring prior to May 29<sup>th</sup>, the possibility is remote. The record shows that electioneering communications were promptly invoiced and paid. For example, the June 10<sup>th</sup> robo-call was invoiced and paid within six days of the date the call was made. Ex. A, B. Thus, it is highly likely the expenditures were for very recent communications.

to Summit Strategies for “Consultant & Professional Services” was an electioneering communication. Complaint, ¶ 30.e. Because this payment was not made to a broadcast or print medium and was not identified as for “advertising,” the record is not sufficient to find that it was for an electioneering communication.<sup>6</sup>

## **Discussion**

### *A. Colorado's Fair Campaign Practice Laws*

Colorado's fair campaign practice laws are found in the Colorado Constitution, the Colorado Fair Campaign Practices Act (FCPA), and regulations published by the Secretary of State. See Colo. Const. art. XXVIII; §§ 1-45-101 to 118, C.R.S.; and 8 CCR 1505-6, respectively. The laws impose duties upon candidates and their committees to register with the Secretary of State and to report campaign contributions and expenditures.

#### *Contribution and Expenditure Reporting*

The FCPA requires state-level candidate committees to periodically report to the Secretary of State their contributions received and expenditures made. Sections 1-45-118(1) and (2), C.R.S.

The FCPA adopts the definition of “contribution” set forth in § 2(5) of article XXVIII. Section 1-45-103(6)(a), C.R.S. According to § 2(5), a contribution includes not only money contributed directly to a candidate committee, but also any “payment made to a third party for the benefit of any candidate committee” and “anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination . . . or election.” Sections 2(5)(a)(I), (II), and (III), respectively. Moreover, any spending by a third party on behalf of a candidate that is coordinated or controlled by the candidate or the candidate's committee is deemed a contribution to the candidate committee. Section 5(3). The FCPA also adopts the constitutional definition of “expenditure. Section 1-45-103(10), C.R.S. According to § 2(8)(a), an expenditure includes “any payment . . . by any person for the purpose of expressly advocating the election or defeat of a candidate.”

#### *Contribution Limits*

Candidate committees are subject to a contribution limit of \$200 per donor per election cycle for the primary election and another \$200 for the general election. Art. XXVIII, § 3(1)(b); 8 CCR 1505-6, Rule 10.16.

#### *Electioneering Communications*

In addition to periodically reporting contributions and expenditures, candidate committees must report payments for electioneering communications that exceed \$1,000 per calendar year. Art. XXVIII, § 6(1) (“Any person who expends one thousand

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<sup>6</sup> Ex. F is a June 9, 2016 invoice in the amount of \$4,173.02 from Summit Strategies for direct mail production and postage. It was paid on June 10, 2016. This invoice may reflect an electioneering communication if the mailers were distributed within the 30-day window. However, the amount of the invoice and the date it was paid does not match CETD's disclosure on Exhibit 5, and therefore cannot prove the expenditure disclosed on Exhibit 5 was for electioneering communications.

dollars or more per calendar year on electioneering communications shall submit reports to the secretary of state.”) The definition of “person” includes candidate committees. Section § 2(11).

An electioneering communication is defined as:

[A]ny communication broadcasted by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences or otherwise distributed that:

(I) Unambiguously refers to any candidate; and

(II) Is broadcasted, printed, mailed, delivered, or distributed within thirty days before a primary election . . . ; and

(III) Is broadcasted to, printed in a newspaper distributed to, mailed to, delivered by hand to, or otherwise distributed to an audience that includes members of the electorate for such public office.

Section 2(7)(a).

Per Secretary of State Rule 11.5, a committee need not file electioneering communication reports separate from its regularly filed contribution and expenditure reports, if an expenditure for electioneering communication is identified as such on its regularly filed report. Disclosures of electioneering communications must include “the method of communication” as well as “the name of the candidate(s) unambiguously referred to in the electioneering communication.” 8 CCR 1505-6, Rules 11.2 and 11.4.

### *Sanctions*

Failure to file a required report when due, or failure to file a complete report of all contributions and expenditures, may result in imposition of a monetary penalty up to \$50 per day. Art. XXVIII, § 10(2); FCPA § 1-45-111.5(1.5), C.R.S. Violation of contribution limits subjects both the candidate and the candidate committee to a civil penalty of up to five times the excess amount of the contribution. Section 10(1).

#### *B. The Law Applied to the Facts*

##### *First Claim – Unreported Contributions*

In his first claim, Complainant alleges that CETD failed to report the June 10<sup>th</sup> robo-call, the June 18<sup>th</sup> robo-call, and an undated TV advertisement as contributions. None of these allegations are proven. The June 10<sup>th</sup> robo-call was not a contribution to CETD because CETD paid for it. The TV ad was not proven to be a contribution because there was no admissible evidence of the TV ad.<sup>7</sup>

The June 18<sup>th</sup> robo-call is not a contribution because there is no convincing proof that CRN coordinated its spending on this call with CETD or Mr. Dore, or that its actions were controlled by CETD or Mr. Dore. Although the constitutional definition of contribution encompasses spending by a third person that is intended to benefit a

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<sup>7</sup> Complainant offered a transcript of the TV ad (Ex. 3) but was not able to establish the authenticity of the transcript over CETD’s objection. Thus, it was not admitted. Even if it had been admitted, the allegation would fail for the same reason Complainant’s allegation regarding the June 18<sup>th</sup> robo-call fails.

candidate (art. XXVIII, §§ 2(5)(a)(II) and (III)), such a contribution is reportable by the candidate only if it is “received” by the candidate or candidate committee. FCPA § 1-45-108(1)(a)(I), C.R.S. (reporting extends to “contributions received.”) Although neither the constitution nor the FCPA define the term “received,” Secretary of State rules say that a contribution is received “on the date that it is accepted by the committee.” 8 CCR 1505-6, Rule 10.4. The word “accepted” connotes some act of possession or control over the thing being offered. See Rule 10.4.4 (“A non-monetary or in-kind contribution or donation is accepted on the date the committee takes possession of the item, or has the right to possess or use the item.”)

The notion that a contribution is received by a committee only if the committee exercises some control over the contribution is reflected in the constitutional provision dealing with independent expenditures. Per article XXVIII, § 5(3), an expenditure on behalf of a candidate becomes a contribution if it is “coordinated with or controlled by” the candidate. Conversely, if it is not coordinated or controlled by the candidate, it is an “independent expenditure” that is not countable to the candidate as a contribution. See § 2(9) (an independent expenditure is “an expenditure not controlled by or coordinated with any candidate or agent of such candidate.”) This limitation is necessary because it would be manifestly unfair and probably unconstitutional to hold the candidate liable for spending by a third party that the candidate has no control over. See generally, *Republican Party of N.M. v. King*, 741 F.3d 1089 (10<sup>th</sup> Cir. 2013) (contributions involving independent expenditures cannot be limited because there is no risk of quid pro quo corruption.)

CRN is an independent expenditure committee which, by definition, makes only independent expenditures. FCPA § 1-45-103(11.5). There is no convincing evidence that its expenditure on the June 18<sup>th</sup> robo-call was controlled by or coordinated with CETD or Mr. Dore. Therefore, it was not a contribution received by CETD and thus not reportable by CETD as a contribution.

#### *Second Claim – Unreported or Inaccurately Reported Expenditures*

This claim alleges that CETD failed to report, or inaccurately reported, its expenditures on the June 10<sup>th</sup> robo-call, the June 18<sup>th</sup> robo-call, and the TV ad. Only the first portion of this claim is proven. The second allegation is not proven because the evidence shows that the June 18<sup>th</sup> robo-call was an independent expenditure by CRN, not an expenditure by CETD. The third allegation is unproven because, as explained above, there was no admissible evidence regarding the TV ad.

The first allegation is proven. The evidence shows that CETD paid Olson Strategies & Advertising \$364.20 on June 16, 2016 for the robo-call on June 10<sup>th</sup>. The filing deadline to report expenditures made between June 6<sup>th</sup> and June 22<sup>nd</sup> was June 27, 2016; but CETD failed to disclose the expenditure on this report. This was a violation of its reporting obligation as established by § 1-45-108(1)(a)(I). The evidence suggests that CETD *may have* intended to report this expenditure as part of the disclosed expenditure to Olson Strategies contained in CETD’s July 19, 2016 report, but if so, the disclosure was misleading and inaccurate for several reasons. First, the reported date of that expenditure was June 24, 2016, whereas the date CETD paid for the June 10<sup>th</sup> robo-call was June 16, 2016. Second, the July 19<sup>th</sup> disclosure states the

payment was for “consultant & professional services,” whereas, assuming CETD intended to include the payment for the June 10<sup>th</sup> robo-call as part of this disclosure, the actual purpose was for an electioneering communication. Moreover, by lumping together several invoices for a variety of services into one disclosure, CETD effectively obscured the dates and purposes of those individual expenditures. Thus, even if CETD intended to belatedly disclose the expenditure for the June 10<sup>th</sup> robo-call as part of its July 19<sup>th</sup> report, it still failed to comply with its disclosure obligations.

#### *Third Claim – Violation of Contribution Limits*

In this claim, Complainant contends that CETD accepted contributions from a single source that exceeded its contribution limit. The validity of this claim is dependent upon the validity of Complainant’s First Claim that CRN’s June 18<sup>th</sup> robo-call was a contribution to CETD. As previously discussed, the First Claim was not proven; therefore, this claim also fails.

#### *Fourth Claim – Failure to File Electioneering Communication Reports*

Complainant alleges that CETD spent more than \$1,000 on electioneering communications in the 30 days prior to the primary election, but failed to properly report those electioneering communications. This claim is proven in part.

As found in Findings of Fact 24 and 25, CETD made five expenditures for “advertising” within the 30 day period prior to the primary election, in the total amount of \$7,428. In addition, as noted in Finding of Fact 16, CETD’s June 10<sup>th</sup> robo-call was also an electioneering communication. None of these expenditures were identified on any CETD report as electioneering communications.

CETD argues that although it may technically have been required to identify these expenditures as electioneering communications, the violation was de minimus because its reports disclosed all the relevant details of the expenditure. The ALJ does not agree. Per Secretary of State Rule 11.5, a committee is excused from filing a complete and separate electioneering communication report only if it identifies its electioneering communications on those reports, and discloses the method of communication and the name of the candidate supported or opposed. CETD failed to do these things. The purpose of article XXVIII, in part, is to foster transparency in campaign financing through “full and timely disclosure of . . . funding of electioneering communications.” CETD’s reporting failures compromised that purpose.

#### *C. Sanction*

At \$50 per day, the maximum penalty for failure to report the expenditure for the June 10, 2016 robo-call is \$9,550. This amount is calculated based upon a span to time from June 27, 2016 until the date of the hearing, a period of 191 days ( $\$50 \times 191 = \$9,550$ ). At \$50 per day, the maximum penalty for failing to report CETD’s electioneering communications is another \$9,550, for a total penalty of \$19,100.<sup>8</sup>

The maximum penalty, however, is excessive and greatly out of proportion to the

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<sup>8</sup> In arriving at this amount, the ALJ considers CETD’s failure to report its various electioneering communications to be a single violation, rather than multiple violations.



violation. The ALJ has authority to impose a lesser penalty as warranted by the particular circumstances of the case. *Patterson Recall Comm., Inc. v. Patterson*, 209 P.3d 1210, 1218-19 (Colo. App. 2009). In arriving at an appropriate penalty, the ALJ takes into consideration the fact that although CETD did not disclose its expenditure for the June 10<sup>th</sup> robo-call, the robo-call itself disclosed that it was paid for by CETD. In addition, although the electioneering communications were not disclosed as such on CETD's filings, at least the money spent and the payee were disclosed. Finally, the ALJ finds no record of prior campaign finance complaints having been lodged against CETD, nor any record that it has a history of civil penalties for late or incomplete filings. Under these circumstances, the ALJ concludes a reduced civil penalty is appropriate, and imposes a total penalty of \$2,000.

### Decision

CETD's failure to report the expenditure for its June 10<sup>th</sup> robo-calls, and its failure to accurately identify certain of its expenditures as electioneering communications, violated its reporting requirements. A sanction of \$2,000 is imposed for these violations. The Committee shall remit this amount to the Secretary of State, Campaign Finance, within 30 days of the date of service of this decision.

This decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

**Done and Signed**  
January 10, 2017



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ROBERT N. SPENCER  
Administrative Law Judge

Digitally recorded in CR#2  
Exhibits admitted  
For CIW: exhibits 1 – 3, 5, 6, 20, A – D, F - H  
For CETD: none

## CERTIFICATE OF SERVICE

I certify that I have electronically served a true and correct copy of the above **DECISION** to the parties at the following addresses:

Matthew Arnold  
Campaign Integrity Watchdog  
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Ryan R. Call, Esq.  
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this 13 day of January, 2017

  
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Office of Administrative Courts