

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	▲ COURT USE ONLY ▲
CAMPAIGN INTEGRITY WATCHDOG, Complainant, v. COLORADO PIONEER ACTION and COLORADO RIGHT NOW, Respondents and COLORADO SECRETARY OF STATE, Limited Purpose Intervenor.	
DECISION	

Campaign Integrity Watchdog (CIW) filed two complaints alleging that Colorado Pioneer Action (CPA) and Colorado Right Now (CRN) violated Colorado’s fair campaign practice laws by failing to register as political committees, failing to file required campaign finance reports, and accepting donations in excess of the donation limit applicable to political committees. CPA and CRN deny these allegations. A hearing of a limited issue in Case No. OS 2016-0014 was held before Administrative Law Judge (ALJ) Hollyce Farrell on September 29 and November 15, 2016. Following that hearing, the two complaints were consolidated for hearing, which was held before ALJ Robert Spencer on March 29 and 30, 2017. Pursuant to § 13-1-127(2), C.R.S., CIW was represented by its principal officer, Matthew Arnold. Respondent was represented by Douglas Abbott, Esq., Holland & Hart LLP. The Colorado Secretary of State was not represented at the hearing.

Summary of the Cases

CPA is a non-profit corporation established in April 2015 under § 501(c)(4) of the Internal Revenue Code. Section 501(c)(4) provides tax-exempt status to non-profit organizations established for the promotion of social welfare. According to CPA’s website, it was founded by former Congressman Bob Beauprez “to advanc[e] conservative policy and positive change to create a more free, more prosperous Colorado.”

CPA was actively involved in the 2016 primary and general elections. Among other things, it solicited and spent money to promote candidates who shared its values, and to oppose candidates who did not. On October 3, 2016, in anticipation of making “electioneering communications,” Mr. Beauprez formed CRN and caused it to be

registered with the Secretary of State as an independent expenditure committee (IEC) that would, as required by law, report the financial activity related to its electioneering communications.

In Case No. 2016-0014, CIW alleges that CPA accepted contributions and made expenditures in excess of \$200 to support or oppose a number of political candidates. CIW alleges that because CPA's major purpose was to support or oppose political candidates, it was a "political committee" required to register with the Secretary of State and to report to the Secretary all its contributions and expenditures. CIW also contends that CPA accepted contributions from single sources exceeding the lawful limit. Similarly, CIW alleges that CRN is a political committee that should have registered as such, and that it too accepted contributions exceeding the lawful limit. In Case No. 2016-0030, CIW makes essentially the same allegations, but with respect to CPA and CRN's support of two additional candidates. CIW seeks substantial monetary penalties for these violations.

CPA and CRN deny CIW's allegations. CPA contends that it did not meet the definition of a political committee because it did not engage in "express advocacy" on behalf of any candidate, did not coordinate its activities with any candidate, and did not have the major purpose of supporting or opposing candidates. Although CIW agrees that CPA did not engage in express advocacy, there is a dispute as to whether it coordinated its activities with any candidate and whether it had the major purpose of supporting or opposing candidates.

CRN does not deny that its major purpose was supporting and opposing political candidates, but asserts that because it duly registered as an IEC and did not coordinate its spending with any candidate, it had no obligation to register as a political committee. Again, there is a dispute as to whether CRN coordinated its activities with any candidate.

In an order dated February 13, 2017, the ALJ denied CPA and CRN's motion to dismiss the bulk of CIW's complaints. Specifically, the ALJ rejected Respondents' legal argument that an entity spending money to support or oppose political candidates is not a political committee unless the entity engages in express advocacy or coordinates its activities with a candidate.

Because the legal issues were largely resolved by the ALJ's denial of Respondents' motion to dismiss, the primary issue remaining for hearing was the factual question of whether CPA had the major purpose of supporting or opposing candidates for political office. In addition, the possible presence of coordination remains an important factual issue because coordinated spending would subject both respondents to penalties for violation of contribution limits.

For reasons explained below, the ALJ concludes that although Respondents did not coordinate their activities with any candidate, CPA's major purpose was to support or oppose the nomination and election of selected candidates. That being the case, CPA was obligated to register and report as a political committee. Had CPA done so, it would have satisfied all legal obligations and there would have been no need for Mr.

Beauprez to establish CRN or any IEC. Therefore, resolution of the allegations against CPA also resolves the allegations against CRN.

Findings of Fact

CPA

1. CPA is a Colorado non-profit corporation claiming tax exempt status under § 501(c)(4) of the Internal Revenue Code. Section 501(c)(4) provides tax exempt status to non-profit organizations established for the promotion of social welfare. CPA filed its articles of incorporation with the Colorado Secretary of State on April 9, 2015. Ex. 2.

2. According to CPA's website, it was founded by former Congressman Bob Beauprez "to advanc[e] conservative policy and positive change to create a more free, more prosperous Colorado." CPA believes "there is a unique need to identify, encourage and support leaders who believe in pro-growth pro-freedom principles and are able to effectively communicate those principles to a broad cross-section of the public." Specific programs include: "resourcing candidates and leaders," "developing infrastructure," and "creating an environment that encourages policy reform." Ex. 4.

3. CPA's website solicited donations to further its mission. Ex. 5.

4. In addition to being a former member of Congress, Mr. Beauprez is a businessman, a former chairman of the Colorado Republican Party, and the 2014 Republican nominee for governor.

5. On July 10, 2016, Mr. Beauprez authored a guest column in the Colorado Springs Gazette that included the following statement relating to CPA's purpose:

[L]ast year I founded Colorado Pioneer Action, an organization devoted to encouraging principled, inspired, conservative citizens to participate in our representative democracy.

Colorado Pioneer Action has no questionnaire or pledge. We support common-sense, free-market conservative policies and leaders who have demonstrated the principles and character necessary to exercise the judgment to effectively represent the best interests of their constituents and the great state of Colorado.

Don't mistake our focus on character for a willingness to let moderates slide by. We have no use for those who betray our principles. Character, principles and empathy are all required of leaders who represent their communities well.

I have a message for every Coloradan who loves liberty, wants to make a difference, and is ready to serve for all the right reasons: We will stand with you, and together we will re-establish Colorado as the greatest state in the greatest nation on Earth.

Ex. 6.

6. Although CPA has a board of directors, Mr. Beauprez, as chairman of CPA, controls all its spending and approves all its political advertisements.

7. During 2016, prior to the June 28th primary and November 8th general elections, CPA received in excess of \$660,000 in contributions¹ to fund activities that included numerous political advertisements favorable to some Republican candidates and unfavorable to other candidates.

8. Colorado's campaign finance law requires any entity that receives contributions or makes expenditures in excess of \$200 to support or oppose one or more political candidates to register as a political committee and report its contributions and expenditures to the Secretary of State. However, to pass constitutional muster, these obligations may be imposed upon an entity only if the entity's major purpose is to support or oppose the nomination or election of one or more candidates.

9. CPA did not register with the Secretary of State as a political committee.

CRN

10. Colorado campaign finance law also requires any person or entity that expends \$1,000 or more during a calendar year on "electioneering communications" to report to the Secretary of State the money received and money spent to make those communications. An electioneering communication is any communication to voters within 30 days of a primary election or 60 days of a general election that unambiguously refers to a candidate.

11. To satisfy the obligation to report electioneering communications, Mr. Beauprez formed CRN, and caused it to be registered with the Secretary of State on June 3, 2016 as an IEC. Spending by an IEC is, by law, required to be independent of the coordination or control of any candidate. Colo. Const. art. XXVIII, § 2(9).

12. CRN's registration form declared that its purpose was to:

Support or oppose candidates running for state legislative races.
Support conservative candidates value pro-economic growth and limited government policies. Oppose candidates in conflict with these principles.

Ex. 7.

13. CRN did not register as a political committee.

14. CPA and CRN are separate legal entities; however, both organizations were founded by Mr. Beauprez and Mr. Beauprez controlled the spending of both organizations. Throughout 2016, Justin Prendergast, an individual with considerable experience in campaign management, served as both CPA and CRN's administrative officer.

¹ CPA argues that the donations it received were not "contributions" as defined by campaign finance law because its activities were not coordinated with any candidate. The ALJ rejected this argument in the Order Regarding Respondents' Partial Motion to Dismiss, dated February 13, 2017.

15. Between June 7 and September 13, 2016, CPA transferred \$311,000 to CRN to fund its electioneering communications. Ex. 20; 54. CRN received an additional \$360,000 in contributions from two other entities; \$10,000 from Warm Homes Warm Hearts and \$350,000 from Ready Colorado. Ex. 20; 53; 57.

16. During 2016, within the 30 and 60 day electioneering communication windows, CRN funded numerous political advertisements supporting some candidates for political office and opposing others.

17. Mr. Beauprez controlled all CRN expenditures and approved all CRN electioneering communications.

18. CRN reported to the Secretary of State the contributions it received and the expenditures it made to support or oppose those candidates.

19. In December 2016, following the November general election, CRN paid its remaining bank balance of \$17,164 to CPA and terminated its registration as an IEC.

Coordination

20. In Case No. 2016-0014, CIW alleged that at least some of CPA and CRN's spending was coordinated with one or more candidates for political office, including Josh Hosler, Colleen Whitlow, Ben Lyng, and Monica Wasden.

21. During hearings on September 29 and November 15, 2016, ALJ Hollyce Farrell received evidence and argument regarding that limited issue. In an order dated January 25, 2017, ALJ Farrell found no coordination occurred.

22. After consolidation of the cases, the undersigned ALJ adopted ALJ Farrell's decision as the law of the case. At the full hearing of the combined cases on March 29 and 30, 2016, the ALJ allowed CIW the opportunity to submit any newly discovered evidence that might tend to prove coordination between CPA or CRN and Hosler, Whitlow, Lyng or Wasden. No convincing evidence was presented; therefore, the ALJ adopts and incorporates ALJ Farrell's findings and conclusions as if fully set forth herein.

23. In Case No. 2016-0030, CIW alleged that CPA and CRN coordinated with candidates Tim Dore and Heidi Ganahl on spending to support their campaigns. The evidence, however, does not support these allegations.

24. Mr. Dore was a candidate for re-election to House District (HD) 64 in the 2016 Republican primary election. On June 10, 2016, Mr. Dore's candidate committee placed a robo-call to voters in HD-64 supporting Mr. Dore's campaign.²

25. The robo-call was a recorded message from Bob Beauprez asking listeners to "vote for the proven conservative Tim Dore." The message stated that it was "paid for by the Committee to Elect Tim Dore." Ex. 47.

26. Mr. Beauprez recorded the message at the Dore committee's request, but

² A robo-call is an auto-dialed telephone call conveying a pre-recorded voice message.

he did so in his personal capacity as a well-known name in conservative Republican political circles. The message was not recorded on behalf of CPA or CRN and did not reference either of those organizations. Mr. Beauprez received no compensation for recording the message and neither CPA nor CRN spent money to pay for the robo-call.

27. On June 18, 2016, CRN placed a robo-call to HD-64 voters supporting Mr. Dore's campaign. This robo-call did not contain the recorded message previously prepared by Mr. Beauprez.

28. The CRN robo-call was a pre-recorded message by an unidentified speaker praising Tim Dore as a conservative who "represents us, not them." The robo-call disclosed that it was "Paid for by the Colorado Right Now IEC" and was "not authorized by any candidate or candidate committee." Ex. 48.

29. CRN also paid for a TV ad that contained the same recorded message as the CRN robo-call, accompanied by flattering photos of Mr. Dore. The TV ad contained the same disclaimer that it was paid for by CRN and was not authorized by any candidate or candidate committee. Ex. 49.

30. Neither Mr. Dore nor anyone associated with his campaign asked CRN to place or pay for the TV ad or robo-call, nor did they coordinate the content with CRN.

31. In summary, there is no convincing evidence of coordination between either CPA or CRN and Mr. Dore or his candidate committee.³ Although Mr. Beauprez prepared one robo-call message at the request of the Dore campaign committee, he did so in his personal capacity as a well-known figure in Republican politics, and not on behalf of CPA or CRN.

32. Ms. Ganahl was a candidate for election as a Regent of the University of Colorado. Jonathan Anderson, an attorney with Holland & Hart LLP, was listed on the Secretary of State's website as a point of contact for Ms. Ganahl's candidate committee. Ex. 51. Mr. Anderson is also on CPA's board of directors, and his law firm represents Respondents in this matter.

33. Mr. Anderson testified that he was listed as a point of contact for the Ganahl committee because he filed the committee's registration, and for a time his firm filed the Ganahl committee's contribution and expenditure reports. However, he did not coordinate any spending by CPA or CRN on behalf of Ganahl, and personally had nothing to do with the Ganahl campaign after filing its registration a year before the election. The ALJ finds this testimony persuasive that no coordination occurred between CPA or CRN and the Ganahl campaign.

Major Purpose

34. The law is well-settled that an entity cannot be constitutionally held to the requirements of a political committee unless the entity has "*the major purpose*" of

³ The ALJ made a similar finding with respect to CIW's complaint against Mr. Dore. See *Campaign Integrity Watchdog v. Comm. to Elect Tim Dore*, Case No. OS 2016-0028, Decision dated Jan. 10, 2017.

supporting or opposing the nomination or election of a political candidate.

35. The evidence is convincing that CPA's major purpose was to support or oppose the nomination or election of multiple political candidates. The evidence supporting this finding falls into three categories: (1) CPA organizational documents and declarations; (2) statements of CPA's founder, Bob Beauprez, on behalf of CPA; and (3) CPA's pattern of spending. Each will be addressed in turn.

36. CPA organizational documents and declarations:

a. CPA's Articles of Incorporation generically describe CPA as "a non-profit corporation for the promotion of social welfare," but provide no specifics as to CPA's purpose. Ex. 2.

b. CPA's website is more specific. As noted above, the website describes CPA's purpose as "advancing conservative policy and positive change to create a more free, more prosperous Colorado." CPA believes "there is a unique need to *identify, encourage and support leaders* who believe in pro-growth pro-freedom principles and are able to effectively communicate those principles to a broad cross-section of the public." Specific programs to accomplish that goal include: "*resourcing candidates and leaders*," "developing infrastructure," and "creating an environment that encourages policy reform." Ex. 4 (emphasis added). It is clear from the italicized language that although supporting political candidates may not be CPA's only purpose, it is a major purpose.

c. On September 21, 2016, CPA sponsored a conference to have a "private conversation about Colorado Pioneer Action's *impact in the 2016 Colorado Primary Election & a look at strategic priorities ahead of the November General Election*." Ex. 40 (emphasis added). According to a power point presentation, CPA's first strategic priority for the general election was the election of Heidi Ganahl as CU Regent, with a secondary strategy of supporting candidates in three senate district (SD) races. Ex. 40a, pp. 11, 12. The conference agenda thus shows that CPA was focused upon influencing the 2016 primary and general election results.

d. Section 501(c)(4) organizations, such as CPA, are required to file with the IRS an annual Form 990 disclosing, among other things, the organization's "primary exempt purpose." CPA's 2015 filing stated that its primary accomplishment was "to educate the voting public *regarding various public officials and candidates* for office." Ex. 65, line 28 (emphasis added). Mr. Beauprez testified that although CPA "scaled up" in 2016, its 2016 Form 990, when filed, would reflect a similar primary accomplishment.

e. Mr. Beauprez formed CRN in June 2016 to further promote CPA's goals and make legally required reports during the electioneering communications window. According to its IEC registration statement, CRN's express purpose was to "support or oppose candidates running for state legislative races." Ex. 7.

37. Bob Beauprez's statements on behalf of CPA: As noted above, on July

10, 2016, Mr. Beauprez authored a guest column in the Colorado Springs Gazette that described CPA as “an organization devoted to encouraging principled, inspired, conservative citizens to participate in our representative democracy”; that “support[s] common-sense, free-market conservative policies and leaders”; and that has “no use for those who betray our principles.” Ex. 6. These statements by CPA’s founder again indicate a major purpose of promoting candidates who share CPA’s principles and opposing those who do not.

38. CPA’s pattern of spending: On January 1, 2016, CPA had a bank balance of \$102,944. Ex. 41a, p. 172. Throughout 2016, it solicited and received contributions of \$664,389 to support its activities.⁴ As of December 30, 2016, its balance was \$68,906. Ex. 41a, p. 215. Thus, CPA’s total expenditure in 2016 was \$698,427.

39. CPA’s pattern of spending throughout 2016 confirms that its major purpose was to support or oppose selected political candidates. The following itemization, drawn from CPA’s financial records, shows that during 2016 CPA spent approximately \$419,558 to support or oppose specific political candidates:⁵

<u>Date</u>	<u>Expense</u>	<u>Purpose</u>
1/04/16 thru 7/01/16	\$ 20,730	Cumulative total of payments made on roughly a weekly basis to post Facebook ads promoting Republican primary election candidates Josh Hosler (HD-15) and Bob Gardner (SD-12). See Facebook postings included within Ex. 10; 61b.
1/20/16 thru 5/23/16	\$ 45,000	Cumulative total of eight payments made to self-described investigative journalist Dan Njegomir (d/b/a NewsSpeak Media) and Dede Laugesen (d/b/a Windhover Media), working together as Colorado Government Watch, to find unfavorable information regarding primary candidates Gordon Klingenschmitt (SD-12) and Janak Joshi (HD-16). Ex. 41a, pp. 73, 76, 93, 94, 113-116. Ex. 63 includes the agreements for Njegomir and Laugesen to do the research requested by CPA. According to Mr. Njegomir, he and Ms. Laugesen were to share what they found with CPA and publicly disclose the negative information they uncovered. CPA used the negative information in political ads disparaging Klingenschmitt and Joshi.
1/20/16	\$ 3,600	Payment to the Jackson-Alvarez Group, a political

⁴ CIW calculates total contributions to be \$614,389. However, CIW overlooks a \$50,000 contribution received on March 7, 2016. Ex. 41a, p. 180.

⁵ The ALJ takes judicial notice of the Secretary of State’s electronic filing system, TRACER, which shows that the candidates identified in this finding were all actively seeking nomination or election to office. See <http://tracer.sos.colorado.gov/PublicSite/Homepage.aspx>.

		consultant, for “research” associated with the HD-12 primary election race. Ex. 41b, p. 74; 41d, p. 16.
2/08/16	\$ 5,500	Payment to the Jackson-Alvarez Group for “research” associated with the SD-12 primary election race. Ex. 41b, p. 80; 41d, p. 18.
3/31/16	\$ 3,975	Payment to Summit Strategies to assemble mailers used in the SD-12 primary election. Ex. 41b, p. 100; 41d, p. 33. Ex. 22 and 23 are mailers CPA used to oppose Klingenschmitt’s nomination.
4/01/16	\$ 3,500	Payment to Flat Creek Management LLC to develop a website promoting Rod Bockenfeld’s nomination for election to HD-56. Ex. 41b, p. 101; 41d, p. 36.
4/05/16	\$ 9,917	Payment to Jackson-Alvarez Group for candidate “research” associated with the SD-12 and SD-4 races. Ex. 41b, p. 103; 41d, p. 34.
4/21/16	\$ 15,000	Payment to Public Opinion Strategies LLC for a poll of 300 likely Republican voters in SD-12. Ex. 41b, p. 105; 41e. Per CPA administrative officer Justin Prendergast, polling was used for “message testing” to help CPA develop its strategies.
5/24/16	\$ 1,000	Payment to Aegis Strategic for opposition research of Janak Joshi and Lori Saine (HD-63). Ex. 41c, p. 118; 41d, p. 39.
6/07/16	\$ 67,000	Transfer to CRN for electioneering communications (mailers) prepared by Summit Strategies LTD opposing Jess Loban (SD-4) and Gordon Klingenschmitt. Ex. 11; 20; 41c, p. 123. See mailers included within Ex. 30c to 30j.
6/08/16	\$ 9,000	Payment to Flat Creek Management LLC to develop websites promoting selected candidates. Ex. 41c, p. 125. See website content promoting candidates including Josh Hosler, Bob Gardner, Kevin Priola (SD-25), and Nancy Doty (SD-26). Ex. 9; 61c.
6/10/16	\$ 24,000	Transfer to CRN for electioneering communications (mailers) prepared by Aegis Strategic LLC to support Larry Liston and oppose Janak Joshi in the primary election race. Ex. 12; 20; 21.
6/13/16	\$100,000	Transfer to CRN for electioneering communications prepared by multiple vendors supporting Colleen Whitlow and opposing Lori Saine in the HD-63

		primary race; supporting Larry Liston and opposing Janak Joshi in the HD-16 race; and supporting candidates Tim Dore (HD-64), Ben Lyng (SD-4), Susan Beckman (HD-38), and Bob Gardner (SD-12) in the primary election races. Ex. 13; 14; 20; 21.
6/14/16	\$ 8,000	Payment to Magellan Strategies for polling of likely Republican primary voters in HD-63. Ex. 41c, p. 126; 41d, p. 44.
9/08/16	\$ 500	Payment to Magellan Strategies for polling of likely voters in the CU Regent race. Ex. 41c, p. 143; 41d, p. 56.
9/13/16	\$120,000	Transfer to CRN for electioneering communications primarily supporting Heidi Ganahl in the CU regent general election. Ex. 41c, p. 144; 41g, h; 54 to 58.
12/06/16	(\$ 17,164)	Returned contribution from CRN. Ex. 42, p. 35.
Total	<u>\$419,558</u>	

40. During the same period, CPA spent \$278,869 on activities that are not proven to be directly related to its support or opposition of identified political candidates, itemized as follows:

- a. \$4,452 spent on meetings and events, including expenses for parking, meals, speakers, and conference room rental. Ex. 41.
- b. \$162,500 spent on donations to other organizations not controlled by CPA or Mr. Beauprez, itemized as follows:

<u>Date</u>	<u>Expense</u>	<u>Purpose</u>
6/30/16	\$ 6,500	Steamboat Institute. Ex. 41d, p. 49.
7/28/16	\$ 3,500	Compass Colo. Ex. 41c, p. 135; 41d, p. 50. ⁶
9/22/16	\$50,000	Colo. Health Care Research Inst. Ex. 41a, p. 203. ⁷
10/04/16	\$70,000	Trees of Liberty. Ex. 41c, p. 153.
10/24/16	\$32,500	Trees of Liberty. Ex. 41a, p. 206.

⁶ In its written closing argument, CIW refers to a Compass Colorado website as evidence that CPA's donation was for the express purpose of publishing articles supporting Heidi Ganahl and opposing her opponent in the CU Regent race. However, this information was not offered as evidence at the hearing, and the ALJ declines to take judicial notice of the content of the website.

⁷ Mr. Beauprez expected CPA's donation would support legislators opposing Amendment 69, a ballot initiative designed to finance universal health care. Although the donation could arguably be counted as an expenditure indicating CPA's major purpose of supporting or opposing candidates, the ALJ did not include it in that category because the recipient organization's focus was defeating a specific ballot issue.

c. \$111,917 spent on overhead expenses, such as fundraising, staff salaries, legal fees, filing fees, postage, bank fees, office supplies, gifts, etc. Ex. 41a.

41. CPA engaged in no spending other than that disclosed by its financial records. Ex. 41. Adding all categories of spending yields total spending by CPA during 2016 of approximately \$698,427 (\$419,558 + \$278,869).

42. These figures show that in 2016 CPA spent a considerable majority of its funds (60%) to directly support or oppose multiple political candidates in the primary and general elections ($\$419,558 / \$698,427 = 60\%$). If roughly half of CPA's overhead expense ($\$111,917 / 2 = \$55,958$) is also counted as aiding the support or opposition of candidates, the percentage of its activity for that purpose rises to 68 percent ($\$475,516 / \$698,427 = 68\%$) of its spending.

43. At the hearing, Mr. Beauprez testified that although the spending identified in Finding of Fact 39 was all related to people who were candidates for office, much of the spending was not intended to support their nomination or election. For example, the Facebook ads were intended only to further CPA's conservative principles by publicly identifying and thanking political leaders who shared its principles.

44. Furthermore, according to Mr. Beauprez, the spending on negative research into the background of certain candidates, such as Joshi and Klingenschmitt, was to hold them accountable for not adhering to conservative principles.

45. Similarly, Mr. Beauprez explained that the money spent on polling in select house and senate districts was in large part to evaluate voter attitudes and principles, not just to influence the election.

46. Mr. Beauprez's explanations are not persuasive. There is no doubt that Mr. Beauprez created CPA to further conservative principles, and that CPA was guided by those principles when it chose the candidates it wished to support or oppose. However, that does not alter the essential fact that the money CPA spent was intended to support or oppose the nomination or election of those candidates. During testimony before ALJ Farrell on September 29, 2016, Mr. Beauprez admitted that CPA and its contributors found certain candidates acceptable and others not, and that CPA's focus in the primary election was on "marquee" races. Similarly, CPA's administrative officer, Justin Prendergast, admitted that the purpose of CPA's political advertisements was to benefit the candidates it liked and to make candidates it opposed "unelectable." The fact that CPA's spending on political advertisements stopped when the election was over is further proof that its ultimate goal was to support the nomination or election of the candidates it supported and to defeat of the candidates it opposed.

47. Given the facts described above, the ALJ finds that CPA's major purpose was to support the nomination or election of candidates who shared its political viewpoint, and to oppose those who did not.

Discussion

Colorado Fair Campaign Practice Law

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; FCPA §§ 1-45-101 to 118, C.R.S.; and 8 CCR 1505-6, respectively. These laws impose duties upon candidates and various entities involved in political activities, including political committees, to register with the Secretary of State and to report campaign contributions and expenditures. The laws also impose limits upon the amount of contributions that may be received by candidates and political committees from individual donors. Violation of these laws can result in substantial civil monetary penalties.

CIW alleges that CPA and CRN are political committees that should have registered as such and reported their campaign contributions and expenditures. CIW seeks substantial monetary penalties for their alleged failure to do so.

The outcome of CIW's complaint depends upon the resolution of both legal and factual disputes. The legal dispute involves the correct interpretation of the constitutional definition of "political committee." The factual dispute depends upon whether CPA's "major purpose" was to support or oppose the nomination or election of one or more candidates; and whether CPA or CRN coordinated its activities with any candidate.

Legal Dispute - Definition of a Political Committee

Article XXVIII defines a political committee 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.

Colo. Const. art. XXVIII, § 2(12)(a) (emphasis added).

An "expenditure" is defined, in relevant part, to mean "any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of *expressly advocating* the election or defeat of a candidate."

Art. XXVIII, § 8(a) (emphasis added).

In *Colo. Ethics Watch v. Senate Majority Fund*, 269 P.3d 1248 (Colo. 2012), the Colorado Supreme Court held that "express advocacy" is term of art with a well-understood meaning limited to words such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject," or other "synonymous words or phrases that clearly advocate for or against the election of a candidate." *Id.* at 1254-55. Thus, money spent for political campaign advertising supporting or opposing a candidate is not an expenditure unless the advertising contains one or more of these

“magic” words or phrases. The parties agree that none of CPA or CRN’s campaign advertising involved use of magic words; therefore, there have been no “expenditures.”

A “contribution” is defined, in relevant part, to mean:

The payment, loan, pledge, gift, or advance of money, or guarantee of a loan, made to any candidate committee, issue committee, *political committee*, small donor committee, or political party.

Art. XXVIII, § 2(5)(a)(I) (emphasis added).

Although CIW agrees that neither CPA nor CRN made expenditures, CIW asserts that CPA and CRN received contributions in excess of \$200 to support or oppose candidates, and therefore they both meet the definition of a political committee.

CPA and CRN disagree. Although they do not dispute that they received donations in excess of \$200 to support or oppose candidates, they contend that an entity is not a political committee unless it either engages in express advocacy or its activities are coordinated with a candidate. They deny doing either of these things. CPA and CRN raised these arguments in a prehearing motion to dismiss, which the ALJ denied in his Order Regarding Respondents’ Partial Motion to Dismiss, dated February 13, 2017. That order is adopted as part of this decision.

Factual Dispute - the “Major Purpose” Test

In this discussion, the ALJ will focus upon CPA’s activities because resolution of CPA’s status will also resolve the complaint against CRN.

Though not expressly included in the constitutional definition of a political committee, federal and Colorado courts have held that, unless an organization is controlled by a candidate, the organization cannot be held to the obligations of a political committee unless the organization’s “major purpose” is to support or oppose one or more candidates. The source of this requirement is *Buckley v. Valeo*, 424 U.S. 1 (1976), where the Supreme Court held that to avoid vagueness that might result in the infringement of First Amendment rights, the federal definition of “political committee” could only “encompass organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate.*” *Id.* at 79 (emphasis added). This has become known as the *Buckley* “major purpose” test.

In 2007, the Tenth Circuit held that because the definition of political committee found at article XXVIII, § 2(12)(a) did not include the *Buckley* major purpose test, that section could not be constitutionally applied to an entity whose major purpose was not to support or oppose a candidate. *Colo. Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1156 (10th Cir. 2007) (“*CRLC*”). The Colorado Court of Appeals followed this reasoning in *Alliance for Colo. Families v. Gilbert*, 172 P.3d 964, 972 (Colo. App. 2007). Because the record before the court of appeals in *Gilbert* was not sufficient to determine ACF’s major purpose, the court remanded the case to the administrative law judge to make the necessary additional findings. *Id.* at 873.

Thus, although the major purpose test is not expressly included within article

XXVIII's definition of a political committee, the ALJ cannot constitutionally apply that definition to CPA unless the evidence proves that CPA's major purpose was to support or oppose the nomination or election of one or more political candidates.⁸

An entity's major purpose may be determined from (1) an examination of the entity's "central organizational purpose" or (2) comparison of the entity's "independent spending with overall spending" to determine its preponderant purpose. *CRLC* at 1152 (citing *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*")). Similarly, in *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013), the court affirmed that determination of an entity's major purpose should be a multi-factor "contextual inquiry." *Id.* at 798. Although no Colorado state court has specifically adopted a method to determine the major purpose of an entity alleged to be a political committee, the court of appeals in *Gilbert* said the inquiry should be guided by *CRLC* and "other relevant authority."⁹ *Gilbert* at 973. The ALJ understands this guidance to require a multi-factor contextual inquiry that considers CPA's statements of its central organizational purpose, the scope of its activities and publications, and a comparison of its spending on activities that support or oppose a candidate with its overall spending.

The ALJ is unaware of any case law that defines the span of time relevant to the major purpose inquiry for political committees. However, in the context of an issue committee, where "a major purpose" of supporting or opposing ballot issues is an express part of the definition,¹⁰ the legislature has decreed that the entity's *annual* expenditures should be examined. Section 1-45-103(12)(b), C.R.S. There appears to be no principled reason to use a different span of time for political committees.

Applying these rules, the ALJ concludes that CPA's major purpose, at least through the end of 2016, was to support or oppose the nomination or election of multiple political candidates. It is clear from CPA's statements on its website, on its 2015 Form 990, and from the public statements made by its founder and chairman, Bob Beauprez, that at least one of its major purposes is to support candidates for public office who share CPA's conservative views.

The clinching proof that this is "the" major purpose, however, is what CPA actually did. As noted by the Colorado Court of Appeals in *Cerbo v. Protect Colo. Jobs, Inc.*, 240 P.3d 495 (Colo. App. 2010), "[w]hat an organization actually does must carry

⁸ In *Colo. Ethics Watch v. Gessler*, 363 P.3d 727 (Colo. App. 2013), the court of appeals struck down the Secretary of State's rule that engrafted the major purpose test onto the constitutional definition of a political committee. The court held that "[b]ecause the provisions are clear, there is no gap for the Secretary to fill, and he does not have the authority to add a 'major purpose' requirement, even in an attempt to codify judicial precedent." *Id.* at 732. This ruling, however, does not relieve the ALJ of the obligation to follow judicial precedent. Per *Buckley*, *CRLC*, and *Gilbert*, the ALJ cannot constitutionally apply § 2(12)(a) to CPA unless it has the required major purpose.

⁹ In the context of an issue committee, where "a major purpose" of supporting or opposing a ballot issue must be shown, the Colorado Court of Appeals has identified three non-exclusive factors to consider: (1) the organization's stated purpose; (2) the purpose of its activities and annual expenditures; and (3) the scope of the issues addressed in its publications. *Independence Inst. v. Coffman*, 209 P.3d 1130, 1139 (Colo. App. 2008); *Cerbo v. Protect Colo. Jobs, Inc.*, 240 P.3d 495, 501 (Colo. App. 2010).

¹⁰ See Colo. Const. art. XXVIII, § 2(10)(a)(I).

more weight that its stated purposes so that an organization's 'regulable conduct [does not] escape regulation merely because [its] stated purposes were misleading, ambiguous, fraudulent, or all three.'" *Id.* at 502 (citing *League of Women Voters v. Davidson*, 23 P.3d 1266, 1275 (Colo. App. 2001)). As noted in Finding of Fact 42, CPA spent a considerable majority of its funds in 2016, at least 60 percent, on activities that supported or opposed the nomination or election of selected political candidates. That this was CPA's major purpose is also evident from its September 21, 2016 conference that focused upon CPA's "impact in the 2016 Colorado Primary Election" and its discussion of the "strategic priorities ahead of the November General Election." Finding of Fact 36.c. These facts leave little doubt that CPA's major purpose in 2016 was to support or oppose the nomination or election of selected candidates.

In its closing brief, CPA argues that some of its spending, such as the money spent for Facebook ads, should not be counted as support for candidates because the ads "do not reference any election, or name any opposition candidate."¹¹ The ALJ disagrees. To be counted as a political committee, the major purpose of CPA's spending must be "to support or oppose the nomination or election of one or more candidates." Art. XXVIII, § 2(12)(a). It is evident from the fact that the Facebook ad expenses were incurred in the six months prior to the primary election and then stopped when the election was over, and made only favorable comments about primary candidates, that the ads were intended to support the nomination of those candidates. CPA's September 2016 conference agenda that highlighted its "impact in the 2006 Colorado Primary Election" leaves no doubt that the Facebook ads were intended to influence the primary election results.

The ALJ also rejects CPA's argument that it is arbitrary to focus only on its activities in one calendar year. If CPA had a long history of involvement in activities other than supporting or opposing political candidates, it might be unfair to focus only upon its activities in 2016. *See generally, Cerbo*, 240 P.3d at 502 ("[w]here an organization has a track record of engaging in a variety of activities over a relatively long period of time, it may indicate that supporting or opposing a particular ballot issue is not a major purpose of the organization.") However, CPA filed its articles of incorporation in April 2015, the year before the 2016 elections in which it participated, and only a few months before many of the candidates it chose to support or oppose officially declared their candidacy. This timing strongly suggests that CPA's major purpose was to influence the outcome of the 2016 elections, a fact it candidly touted in its September 2016 conference. Under these circumstances, CPA's 2016 activities fairly represent its major purpose.

Campaign Finance Violations

A. Registration

Because CPA's major purpose was to support or oppose the nomination or election of candidates, it became a political committee once it "accepted or made

¹¹ See Respondents' Written Closing Argument, p. 10.

contributions or expenditures in excess of \$200 in furtherance of that effort. Art. XXVIII, § 2(12)(a). It was then obligated to register with the Secretary of State as a political committee. Section 1-45-108(3), C.R.S. Its failure to do so is a violation of the FCPA, as alleged in CIW's First Claim for Relief (Case Nos. OS 2016-0014 and 0030).

B. Reporting

As a political committee, CPA was obligated to report to the Secretary of State its contributions received, expenditures made, and obligations entered into. Section § 1-45-108(1)(a), C.R.S. Its failure to do so is a violation of the FCPA, as alleged in CIW's Second Claim for Relief (Case Nos. OS 2016-0014), Fourth Claim for Relief (Case No. OS 2016-0014), and Seventh Claim for Relief (Case No. OS 2016-0030).

As a political committee, CPA was also obligated to identify spending on electioneering communications, as required by article XXVIII, § 6 and FCPA § 1-45-107.5(6), C.R.S. An electioneering communication is defined by article XXVIII, § 2(7)(a) as a communication that unambiguously refers to a candidate and is broadcast or delivered to an audience of voters within 30 days of a primary election or 60 days of a general election. Per Secretary of State Rule 11.5, a committee may satisfy its reporting obligation by indentifying electioneering communications within its regularly filed periodic reports. Because CPA did not file any required periodic reports, its failure to report its electioneering communications also violated the law, as alleged in CIW's Eighth Claim for Relief (Case No. OS 2016-0030).

C. Contribution Limits

In its Third Claim for Relief (Case Nos. OS 2016-0014 and 0030), CIW alleges that by accepting contributions in excess of \$575 from single donors, CPA violated the contribution limits of article XXVIII, § 3(5) and Secretary of State Rule 10.16(f). Although the allegation is factually correct, the case law is clear that contribution limits cannot be constitutionally applied to organizations making only independent expenditures. *Citizens United v. FEC*, 558 U.S. 310, 365-66 (2010) (striking down limits on independent spending for political advertisements); *Republican Party of N.M. v. King*, 741 F.3d 1089, 1095-96 (10th Cir. 2013).¹²

Per article XXVIII, § 2(9), an independent expenditure is one that "is not controlled by or coordinated with" any candidate or agent of a candidate. Because CPA made only independent expenditures, it is not subject to article XXVIII's contribution limits. CIW's Third Claim for Relief is therefore dismissed.

D. Claims Against CRN

The conclusion that CPA is a political committee is dispositive of CIW's claims

¹² Although the ALJ has no jurisdiction to decide facial challenges to the constitutionality of a law, the ALJ may address as applied challenges. *Horrell v. Dep't of Admin.*, 861 P.2d 1194, 1198 n. 4 (Colo. 1993) (an administrative agency may evaluate whether an otherwise constitutional statute has been unconstitutionally applied with respect to a particular action.)

against CRN. Had CPA fulfilled its obligation of registering as a political committee and filing the required reports, there would have been no need or obligation to set up a separate IEC to report CPA's electioneering communications. Thus, the alleged violations by CRN are moot because they are subsumed within CPA's violations. CIW's claims against CRN, including its Fourth Claim for Relief in Case No. OS 2016-0030, are dismissed.¹³

Sanction

If a violation of the fair campaign finance law is proven, the ALJ is authorized by article XXVIII, § 9(2)(a) to issue "any appropriate order" and impose any sanction or relief authorized by article XXVIII. Section 10(2)(a) authorizes a sanction of up to \$50 per day for each day a required document is filed late. An ALJ, however, has discretion to impose a penalty less than the maximum amount, as warranted by the circumstances. *Patterson Recall Committee, Inc. v. Patterson*, 209 P.3d 1210, 1218-19 (Colo. App. 2009).

Because CPA failed to register as a political committee, it is subject to a maximum penalty of \$50 per day for every day its registration was not filed. That period runs from January 7, 2016, when it first received contributions exceeding \$200, to March 29, 2017, the first day of the consolidated hearing. That is a period of 446 days, for a maximum "failure to register" penalty of \$22,300.

CPA is also subject to a maximum penalty of \$50 per day for every day it failed to file required periodic reports which, per § 1-45-108(2)(a)(I), C.R.S., were due on January 15, 2016; May 2, 16, and 31, 2016; June 13 and 27, 2016; August 1, 2016, September 6 and 19, 2016; October 3, 17, and 31, 2016; and December 8, 2016. Adding up the delinquency for each of these 13 required reports from the date due to March 29, 2017 yields a total of 3,101 days. This equates to a maximum "failure to report" penalty of \$155,050.

The total maximum penalty is therefore \$177,350 (\$22,300 + \$155,050). This penalty, however, is grossly excessive given that CPA's failure to register and report was due to an erroneous interpretation of the definition of a political committee, rather than an intentional violation of the fair campaign practice law. Under the circumstances, the ALJ deems a monetary penalty of ten percent of the maximum, or **\$17,735**, to be a sufficient sanction. The penalty shall be remitted to the Secretary of State, Campaign Finance, within 60 days of the date of service of this decision.

In addition, the ALJ orders that, within 30 days of the date of service of this decision, CPA register with the Secretary of State as a political committee and file the required contribution and expenditure reports for calendar year 2016 and forward.

¹³ CIW's Sixth Claim for Relief in Case No. OS 2016-0030, alleging that CRN failed to file "48-hour Notice of Independent Expenditure Reports," was previously dismissed. See Order Regarding Respondents' Partial Motion to Dismiss, dated February 13, 2017.

Attorney Fees

On March 24, 2017, CPA filed a response to CIW's motion to compel compliance with CIW's document production subpoenas. In the same pleading, CPA asked for sanctions due to CIW's violation of the ALJ's oral order precluding CIW and its principal officer, Mr. Arnold, from publicly disclosing, other than at the hearing, the financial information produced to CIW by CPA. The ALJ addressed the matter on the record at the hearing, and concluded that CPA had substantially complied with CIW's document production subpoenas, but that CIW and Mr. Arnold violated the ALJ's order prohibiting public disclosure of CPA's financial information. As a sanction, the ALJ awarded CPA the attorney fees it incurred investigating and responding to the violation.

Although the ALJ has no authority to hold any party in contempt, the ALJ does have authority to award attorney fees as a sanction for any action by a party that is interposed for harassment, or that unnecessarily expands the proceeding by improper conduct including abuses of discovery procedures. See § 1-45-111.5(2), C.R.S. To prevail on a claim for attorney fees, the claimant has the burden of proving the claim by a preponderance of the evidence. *Remote Switch Systems, Inc. v. Delangis*, 126 P.3d 269, 275 (Colo. App. 2005).

As noted in § 1-45-111.5(2), if the party against whom attorney fees are sought is not represented by an attorney, the ALJ must consider § 13-17-102(6), which reads in pertinent part:¹⁴

(6) No party who is appearing without an attorney shall be assessed attorney fees unless the court finds that the party clearly knew or reasonably should have known that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious.

The ALJ takes into account that CIW's hearing representative and officer, Matthew Arnold, is not an attorney, but finds that he "clearly knew or reasonably should have known" that his conduct was improper.¹⁵ At a telephone case management conference held on February 15, 2017, the ALJ directed CPA to comply with Mr. Arnold's document production subpoenas. To address CPA's concern that its financial information not be publicly disclosed unless and until it was found to be a political committee that was obligated to make public disclosures, the ALJ ordered that Mr. Arnold limit the use of CPA's financial information to "within the confines of use of this case at hearing and on appeal." The ALJ also advised Mr. Arnold that he could file an appropriate motion in the future if he thought "leeway from that order" was required. During the discussion, Mr. Arnold acknowledged CPA's concern about disclosure of its financial information to the media, and agreed that a limit on public disclosure was "fine and reasonable."

¹⁴ Section 13-17-102(5), which must also be considered, is not relevant to the facts of this case.

¹⁵ Although § 13-17-102(6) speaks only to the non-attorney's knowledge that his claim was "substantially frivolous, substantially groundless, or substantially vexatious," the ALJ interprets the knowledge requirement to broadly apply to any improper conduct by a non-attorney.

On March 15, 2017, Mr. Arnold filed a motion to set aside the non-disclosure order because he felt he needed to disclose protected information to defend himself against adverse media coverage. CPA opposed the motion and on March 20, 2017 the ALJ denied it.

According to documents attached to CPA's motion for sanctions, Mr. Arnold violated the ALJ's order by disclosing to a journalist financial information that he obtained from documents produced by CPA.¹⁶ When this apparent violation was discussed at the hearing on March 29, 2016, Mr. Arnold admitted that the financial information he disclosed came from the documents produced by CPA. Mr. Arnold was clearly aware of the ALJ's order, but had no valid excuse for violating it.

The ALJ takes judicial notice of OAC records which show that as of March 20, 2017, Mr. Arnold, or behalf of CIW, had filed 68 fair campaign practice act complaints.¹⁷ Given that level of experience, it is reasonable to expect that he understands his obligation to abide by court orders and the consequences that may follow from intentional violation of those orders. Because Mr. Arnold was personally responsible for violation of the ALJ's order, he is personally responsible for paying the fee award.

In his written response to CPA's request for fees, Mr. Arnold asserts it would be unfair to sanction him "when the Court itself publicly released the same information, including the release of actual documents, to self-professed "journalists" working with Respondent."¹⁸ It is not clear what "release of actual documents" Mr. Arnold is referring to; however, Office of Administrative Court (OAC) records of fair campaign practice act case are open to public inspection unless a request to seal a given record has been made and granted. It is certainly possible that if Mr. Arnold filed documents with the OAC that he obtained through discovery without identifying them as documents that should be sealed, a member of the public may have accessed them. However, this does not excuse Mr. Arnold's intentional violation of the ALJ's order.

In calculating the amount of the award, the ALJ applies the "lodestar" method. Under this method, the court first determines the number of hours reasonably expended on the litigation, and then multiplies that number by a reasonable hourly rate. *Mercantile Adjustment Bureau, LLC, v. Flood*, 278 P.3d 348, 352 (Colo. 2012). The affidavit of CPA's counsel states that he spent 2.1 hours investigating and drafting a response to Mr. Arnold's violation of the ALJ's order, and that his usual hourly rate is \$485 per hour. The ALJ finds the hours and rate reasonable, and therefore calculates the reasonable attorney fee award to be \$1,018.50.

Decision

Colorado Pioneer Action is a political committee that failed to register as such and failed to file the required reports. It is ordered to register and file the required reports within 30 days of the date of service of this decision. It is also ordered to pay to

¹⁶ See Respondents' Response to CIW's Motion to Compel and Request for Sanctions, Ex. B, p. 2.

¹⁷ A court may take judicial notice of its own records. *Doyle v. People*, 2015 CO 10, ¶ 11.

¹⁸ See Complainant's Response to Respondent's Itemization of Legal Fees, p. 2.

the Secretary of State, Campaign Finance, a monetary penalty of \$17,735 within 60 days of the date of service of this decision.

Mr. Arnold is ordered to pay attorney fees in the amount of \$1,018.50 to Colorado Pioneer Action 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

April 25, 2017



Robert N. Spencer
Administrative Law Judge

Digitally recorded in CR#2

Exhibits admitted

For CIW: exhibits 1 through 24; 29; 30c through 30i, 30k (pp. 1, 14, 16), and m; 31 through 42; 45; 47 through 61; 63; and 65

For Respondents: none

CERTIFICATE OF SERVICE

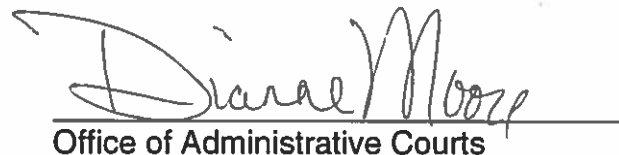
I certify that a true and correct copy of this **DECISION** was served via electronic transmission to:

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Matthew D. Grove
Assistant Solicitor General
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on this 26 day of April, 2017.



Office of Administrative Courts