

STATE OF COLORADO
Department of State
1700 Broadway, Suite 550
Denver, CO 80290



Jena M. Griswold
Secretary of State
Christopher P. Beall
Deputy Secretary of State

BEFORE THE
COLORADO DEPUTY SECRETARY OF STATE
1700 Broadway, Suite 550
Denver, Colorado 80290

IN THE MATTER OF

ELECTIONS DIVISION of the SECRETARY OF STATE,
Complainant,

vs.

HUSCH BLACKWELL LLP, and JOHN DOE(s)
Respondents.

AHO Case No. 2023-019

(Elec. Div'n Case Nos:
2023-03 & -11)

**PROCEDURAL ORDER REGARDING AHO'S ORDER GRANTING MOTION TO DISMISS
(with attached copy of same)**

Pursuant to section 24-4-105(16)(a), C.R.S., of the Colorado Administrative Procedures Act, section 1-45-111.7(6)(b), C.R.S., of the Colorado Fair Campaign Practices Act, and Rule 24.18 of the Secretary of State's Rules Concerning Campaign and Political Finance, 8 CCR 1505-6, service is hereby effected of the attached copy of the Order Granting Motion to Dismiss issued on today's date by the Secretary of State's Administrative Hearing Officer ("AHO") in the above-referenced matter.

The Colorado Deputy Secretary ("Deputy Secretary") hereby serves this Procedural Order Regarding AHO's Order Granting Motion to Dismiss ("Procedural Order") upon the parties to notify all concerned of their rights, responsibilities, and deadlines should any party seek review by the Deputy Secretary of this dispositive order terminating the underlying case.

This case remains open across the period of potential appeal and review by the Deputy Secretary. The Deputy Secretary is not bound by the AHO's recommended ruling. If the Deputy Secretary takes up

Main Number - (303) 894-2200
Administration - (303) 860-6900
Fax - (303) 869-4860

(303) 869-4867 - TDD/TTY
www.ColoradoSoS.gov - Website
administration@ColoradoSoS.gov - E-mail

this case for review, the Deputy Secretary may issue a Final Agency Order with a different result than that recommended by the AHO or the Deputy Secretary may remand the matter to the AHO for further consideration.

In order to challenge AHO's recommendation to dismiss this case, a party must file exceptions with the Deputy Secretary pursuant to the procedures outlined in subsections 24-4-105(14), (15) and (16), C.R.S. and this Order.

I. General Filing Requirements

All requests and pleadings must be filed in writing electronically with the Deputy Secretary and not with the OAC. The email address for filing exceptions is: OACAppeals@ColoradoSoS.gov.

Any party that files a pleading or related document with the Deputy Secretary must also serve a copy of such pleading or related document upon the opposing party.

II. Exceptions

Pursuant to section 24-4-105, a party may appeal the AHO's order recommending dismissal of this case to the Deputy Secretary by means of the exceptions review process ("Exceptions"). In order to appeal the dismissal, a party must file "Exceptions to the Initial Decision" according to the deadlines and procedures outlined below:

A. Designation of Record

Any party who seeks to reverse or modify the AHO's order shall file a Designation of Record within twenty (20) days from the date of this Order. Any party that wishes to challenge any factual findings in the AHO's order must also designate relevant transcript(s), or parts thereof, if any, of the proceedings before the AHO in their Designation of Record. A transcript is not necessary if the requested review is limited to a pure question of law.

Within ten (10) days after service of the Designation of Record, any other party, including the Deputy Secretary, may file a "Supplemental Designation of Record" including any additional transcripts, or parts thereof, of the proceedings before the AHO. The Supplemental Designation of Record shall specify all or part of the Record to be additionally included in the appeal.

A party ordering transcript(s) is responsible for ordering and filing such transcripts with the Deputy Secretary. It is recommended that a party contact the AHO and a certified court reporter for information on how to order a transcript.

B. 30-Day Deadline for filing Exceptions

Exceptions are due within thirty (30) days after the date of this Procedural Order. A party may request an extension of time to file Exceptions prior to thirty (30) days after the date of this Procedural Order. An extension of time will be granted for good cause.

The parties should be aware that delays in receiving an ordered transcript will **not** result in an automatic extension of the deadline for filing Exceptions. Rather, a proper motion for such relief must be filed.

C. Deadlines for Responses, Replies, and Proposed Orders

Responses: Either party may file a response to the other party's Exceptions within fourteen (14) days from the date of the Exceptions filing.

Replies: Either party may file a reply to the other party's response to Exceptions within seven (7) days from the date of the responsive filing.

Proposed Orders: Either party may file a proposed final agency order. Such proposed order may be filed together with the party's Exceptions, response, or reply.

III. Computation and Modification of Time

All time periods are calculated pursuant to Colorado Rules of Civil Procedure Rule 6.

IV. Oral Arguments

The Deputy Secretary may permit oral argument upon request by either party. Such request must be filed with the exceptions, response, or reply. If permitted, each party will be allotted a defined time limit for oral argument. The requesting party will present first and may reserve time for rebuttal. The Deputy Secretary will be permitted to ask questions. Oral argument must be confined to the arguments and evidence presented during the hearing or in the exceptions and responses thereto. Evidence or arguments outside the record may not be presented during oral argument.

V. Final Order

The Deputy Secretary may affirm, set aside, or modify any, all, some, or no parts of the AHO's order, including any of its Findings of Fact, Conclusions of Law, and recommended dismissal, sanction or other penalty within the Deputy Secretary's authority. Under most circumstances, the Deputy Secretary will issue a Final Agency Order at the conclusion of his review. On occasion, however, the Deputy Secretary may conclude that either the factual basis or legal analysis, or both, in the underlying decision by the AHO are insufficient to complete an appropriate review. In such instance, the Deputy Secretary will remand the case back to the AHO with instructions. The AHO may thereafter conduct further proceedings and ultimately issue a subsequent initial decision upon remand. The parties will have the same appeal rights with respect to any subsequent initial decision as they had with the original Initial Decision.

The ultimate Final Agency Order is subject to judicial review under section 24-4-106. However, when neither party has timely appealed the underlying decision from the AHO through Exceptions, and the Deputy Secretary has chosen not to initiate review of the underlying decision on his own motion, the Initial Decision becomes a Final Agency Order after thirty days of service of this Order by operation of law. See § 24-4-105(14)(b)(III), C.R.S. Under these circumstances, neither party has a right to seek judicial review of the underlying decision in the District Court. See § 24-4-105(14)(c), C.R.S.

IT IS SO ORDERED.

DONE and **ORDERED** this 29th day of February 2024.

CHRISTOPHER P. BEALL


Deputy Secretary of State

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this **PROCEDURAL ORDER REGARDING AHO'S ORDER GRANTING MOTION TO DISMISS** along with the accompanying **ORDER GRANTING MOTION TO DISMISS** by Administrative Hearing Officer Macon Cowles was served on the following parties via electronic mail on February 29, 2024:

Complainant –

Peter Baumann, Senior Assistant Attorney General
Colorado Department of Law
Peter.Baumann@CoAG.gov

Respondent –

Jamie H, Stein, Esq.
jamie.steiner@huschblackwell.com

Underlying Citizen Complainants

Charles Wolfersberger
charles@wolfersbergerLLC.com

Natascha O'Flaherty
natascao@comcast.net

Administrative Hearing Officer Macon Cowles –

AdministrativeHearingOfficer@ColoradoSOS.gov

Elections Division –

Colorado Secretary of State, Elections Division
cpfcomplaints@coloradosos.gov

/s/ Christopher P. Beall
Deputy Secretary of State

<p>STATE OF COLORADO SECRETARY OF STATE BEFORE THE ADMINISTRATIVE HEARING OFFICER 1700 Broadway #550 Denver, CO 80290</p> <hr/> <p>ELECTIONS DIVISION OF THE SECRETARY OF STATE,</p> <p>Complainant,</p> <p>vs.</p> <p>HUSCH BLACKWELL LLP, and JOHN DOE(S)</p> <p>Respondents.</p>	<p>Case Number: 2023 AHO 0019</p> <p>In re ED2023-03 and ED2023-11</p>
<p>ORDER GRANTING MOTION TO DISMISS</p>	

This Order addresses Respondent Husch Blackwell’s Motion to Dismiss. Disposition of this matter was conducted in accordance with section 24-4-105 and section 1-45-111.7 6(a) and (b) of the Colorado Revised Statutes. For the reasons stated hereinafter, the Motion to Dismiss is granted.

1. The Administrative Complaint filed by the Division is rooted in an Informal Complaint No. ED2023-03 filed by Charles Wolfersberger, District Manager of, and designated election official for, the Granby Ranch Metro District (GRMD) May 2, 2023 Special District Election for GRMD Board Members. The Informal Complaint alleged that Husch Blackwell has violated Colorado campaign finance law by (1) failing to report an expenditure and (2) failing to register a committee.

2. The procedural background of this case is well stated in the Order of the Deputy Secretary issued April 3, 2023 and especially that of October 16, 2023 at pp. 3-7. Those Orders recited the facts that were then apparent through investigation by the Division, granting in part the

Division's Motions to Dismiss the Informal Complaints but denying the Motion as to other Respondents on certain causes of action.

3. The April 3rd Order directed the Division to use its authority and resources to investigate whether Husch Blackwell was operating as a political committee in connection with the May 2, 2023 election to the Board of the Granby Ranch Metro District.

4. A few days after the election, however, another Informal Complaint, ED2023-11, was filed against Husch Blackwell and others by Natascha O'Flaherty. This Complaint added additional information to the investigation. Ms. O'Flaherty alleged that Husch Blackwell opposed her election by attending the GRMD candidate forum, writing a letter critical of her based on that forum, then distributing it and a separate letter to the two homeowners' associations. Ms. O'Flaherty's Complaint and Mr. Wolfersberger's were consolidated September 22, 2023 and pursued thereafter as one case by the Division, which leads to the issue before this court.

5. After a more in-depth investigation, the Division moved to dismiss the Informal Complaints against Husch Blackwell based on facts set out in detail on pp. 5-7 in the Deputy Secretary's Order of October 16, 2023. Because "the major purpose" of Respondent is running a law firm and not the nomination or election of candidates, the Deputy Secretary concluded that Husch Blackwell was not a political committee which had to register and report under the Fair Campaign Practice Act. Dep. Sec'y Order, 10/16/23, p. 9.

6. However, the Deputy Secretary directed the Division to file a hearing officer Complaint pursuant to § 1-45-111.7(5)(a)(4), C.R.S.,

"on the issue of whether Husch Blackwell violated any campaign finance reporting requirements for *independent expenditures* as such are defined by the Colorado Constitution, COLO. CONST. art. XXVIII, §2 (9), and required to be disclosed by

the FCPA, § 1-45-107.5(4). To the extent such a hearing identifies an as-yet unidentified third party involved in *independent expenditures* related to the GRMD election who failed to make any required reports or disclosures concerning those *independent expenditures*, the Deputy Secretary directs the Division to commence proceedings regarding such information pursuant to the FCPA. See § 1-45-111.7(7)(b)(I).” [Emphasis supplied.]

Id. at 7.

7. Accordingly, the Division filed an Administrative Complaint on November 3, 2023, and Respondent Husch Blackwell filed a timely Motion to Dismiss on February 1, 2023.

8. **Standard of Review.** “Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are viewed with disfavor.” *Begley v. Ireson*, 2017 COA 3, ¶ 7. “In reviewing a motion to dismiss, [the Court] accept[s] all matters of material fact in the petition as true and view[s] the allegations in the light most favorable to the plaintiff.” *Abu-Nantambu-El v. State*, 2018 COA 30, ¶ 8. “Under this standard . . . a party must plead sufficient facts that, if taken as true, suggest plausible grounds to support a claim for relief.” *Id.* (citing *Warne v. Hall*, 2016 CO 50, ¶ 24). “A claim has facial plausibility when the plaintiff pleads factual content that allows a court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

9. The Administrative Complaint asserts two causes of action. Claim One alleges Respondent made an independent expenditure but failed to register as required under § 1-45-107.5(3)(a). Claim Two alleges Respondent failed to report an independent expenditure under § 1-45-107.5(4)(a). A threshold element of each of these claims is that there be a cognizable “expenditure” making it subject to regulation under the FCPA. The only independent expenditures that would be subject to the FCPA are those that are made or used for the purpose of expressly advocating for or against a candidate for the GRMD Board. § 1-45-103, C.R.S. Colo. Const. Art.

xxviii, §2(8)(a). An expenditure that is not used for express advocacy does not trigger a registration or reporting requirement under § 1-45-107.5, the statutory basis for the Administrative Complaint.

10. There is no allegation in any of the 51 paragraphs of the Administrative Complaint that the CORA requests to GRMD and ancillary services provided by Husch Blackwell or others for whom or with whom it acted were used for express advocacy. There are allegations:

- a. That Respondent made independent expenditures. ¶ 2.
- b. That election related CORA requests were made. ¶ 12.
- c. That Respondent briefly represented two potential candidates for the GRMD Board. ¶¶ 19-20.¹
- d. That a client paid Respondent \$3,600 for the CORA requests and related services of the law firm and that Respondent refused to identify the client. ¶¶ 28-29.
- e. That the Deputy Secretary believes it is “plausible that the materials obtained through the CORA requests were likely used ‘for the purpose’ of expressly advocating for or against a candidate for the GRMD board by the undisclosed client,” and “[b]ecause the amount the client paid for the CORA work is more than \$1,000, Husch Blackwell’s work may constitute a contribution to an independent expenditure committee.” ¶ 35.

11. There was litigation swirling around Granby Ranch Metro District in 2023. Husch Blackwell represented the two developers of GRMD and another Metro District that were defendants in a lawsuit brought by GRMD. In addition, there were three different HOAs with something at stake in the litigation. With all of this—the litigation and the culture surrounding it—one can imagine a number of reasons why the lawyers might be poking around in connection with the Board election and candidates. What is hard to imagine is that specific acts of express advocacy, if any there were, would not have made it to the attention of the two citizen complainants or the Division over the last ten months.

¹ These “potential” candidates did not become actual candidates because they were unqualified and therefore their candidate self-nomination forms were rejected by GRMD. Admin. Compl. ¶ 19.

12. Returning to the Administrative Complaint, there is no allegation that Respondent's work and the information produced because of the CORA requests made its way into express advocacy of any kind. There is no assertion of that nor is there an assertion of other facts that could reasonably lead to an inference of express advocacy.

13. To trigger either a registration or a reporting requirement under the FCPA, an independent expenditure must first be *an expenditure*. A cognizable expenditure under the FCPA is defined by Colo. Const. Art. xxviii, §2(8)(a):

“Expenditure” means 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 or supporting or opposing a ballot issue or ballot question. An expenditure is made when the actual spending occurs or when there is a contractual agreement requiring such spending and the amount is determined.

14. That express advocacy by Hush Blackwell or its clients is “plausible”, the argument used in ¶¶ 43 and 49 of the Administrative Complaint is a legal conclusion “and therefore not at all entitled to an assumption that [it is] true” when challenged in a motion to dismiss. *Warne v. Hall*, 2016 CO 50, ¶ 27, 373 P.3d 588, 596 (finding assertions of malice or animosity in a Complaint untethered to specific facts to be conclusory and therefore not entitled to the assumption that they are true). Plausibility in the Deputy Secretary's denial of the motion to dismiss was an invitation for the Division to allege specific facts that make it plausible in the Administrative Complaint. Without those facts, the Complaint is vulnerable to a C.R.C.P. 12(b)(5) motion.

15. This is not a case where the specific facts indicating express advocacy are known only to Respondent. It's refusal to identify who paid \$3,600 for 25 CORA requests certainly raises the antennae, inviting closer scrutiny. Someone is purposefully concealing having spent lawyers' time, and money, making 25 CORA requests and analyzing the results and how it can be used. But if there were express advocacy either for or against any candidate, surely that is within the knowledge

of the citizens who complained, especially Ms. O’Flaherty who was successfully elected to the Board, and Mr. Wolfersberger who is the District Manager and designated election official of GRMD. Even though Husch wrote a letter to a newspaper critical of a candidate, and that letter was circulated to the several hundred GRMD electors, there is no assertion in the Administrative Complaint that express advocacy occurred, using the magic words or synonyms of *Buckley v. Valeo*, 424 U.S. 1, 79, 96 S. Ct. 612 (1976). Anything less than an assertion of direct advocacy removes the \$3,600 from the definition of “expenditure” that would require registration or reporting. *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 41.

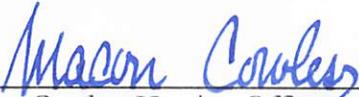
16. The Deputy Secretary explained the law clearly in his Order of April 3, 2023 at pp. 5-6 under the heading, “The underlying allegations fail to support a plausible theory that Husch Blackwell made an ‘expenditure’ that should have been reported.”

[T]he Campaign and Political Finance article of the Colorado Constitution – Article XXVIII – defines an “expenditure” as “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 or supporting or opposing a ballot issue or ballot question.” COLO. CONST. art. XXVIII, § 2(8)(a). As various judicial decisions have highlighted, this constitutional definition depends on whether the spending is “for the purpose of expressly advocating” in favor or against a candidate or ballot measure. See, e.g., *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 26, 269 P.3d 1248, 1255; see also *Campaign Integrity Watchdog LLC v. Colo. Republican Party Indep. Expenditure Comm.*, 2017 COA 32, ¶ 25, 395 P.3d 1192, 1197.

Moreover, the law is clear that "express advocacy" is limited to speech that contains either the "magic words" which explicitly exhort the audience to vote for or against a candidate in an upcoming election, or substantially similar synonyms of those “magic words.” See *Colo. Ethics Watch*, 2012 CO ¶ 26 (citing *Buckley v. Valeo*, 424 U.S. 1, 44, n.52 (1976)); *Campaign Integrity Watchdog v. All. for a Safe & Indep. Woodmen Hills*, 2018 CO 7, ¶ 25, 409 P.3d 357, 362. Thus, it is not sufficient to constitute a reportable “expenditure” to show that a person has expended some amount of money in support of a candidate, but rather, such a payment constitutes an “expenditure” that may have to be reported to the Secretary of State’s office only when the payment is made for advocacy that contains express, explicit words exhorting the audience to vote in a particular way for or against a candidate or ballot measure.

For the reasons set forth above, Respondents Motion to Dismiss is GRANTED. The hearing set for March 8, 2024 at 9:00 AM is vacated. Pursuant to § 1-45-111.7(6)(a), C.R.S., this initial determination is subject to review by the Deputy Secretary of State for issuance of a final agency decision.

SO ORDERED this 29th day of February 2024.



Macon Cowles, Hearing Officer