

The Honorable Betsey Bayless
Arizona Secretary of State

April 2, 1999
No. I99-009 (R98-009)

Question Presented

Whether Arizona Revised Statutes Annotated ("A.R.S.") § 16-918 imposes a duty on the Secretary of State to (i) assess financial penalties for late campaign finance report filings, and (ii) refer the matter to the Attorney General's Office for possible criminal prosecution, when the individual who is responsible for filing the campaign finance report initially files a "no activity" report, but later amends the report to reflect contributions and expenditures.

Summary Answer

The Secretary of State has authority to assess financial penalties if she determines that the individual responsible for filing a campaign finance report failed to make a good faith effort to ascertain if the false "no activity" report was accurate at the time of filing. Further, the Secretary of State needs to refer the filing or signing of a false "no activity" report to the Attorney General for criminal investigation only if she has reason to believe that the responsible party filed the "no activity" report, or the authorized individual signed the report, knowing that it contained a material, false statement.

Background

The Legislature has mandated that political committees, candidates' campaign committees, and exploratory committees (collectively, "committees") periodically file campaign finance reports disclosing contributions received and disbursements made during the reporting period. A.R.S. § 16-913(A) - (C) and (J). The responsibility for filing the report falls on the treasurer of a political committee, or on a candidate in the case of a candidate's campaign committee, or on the designating individual in the case of an exploratory committee. *See* A.R.S. §§ 16-913(D) and -918(B). Pursuant to A.R.S. § 16-905(G), the designating individual is the person who has established an exploratory committee. For ease of reference, this Opinion uses the designation "responsible party" to include a treasurer of a political committee, a candidate in the case of a candidate's campaign committee, or the designating individual in the case of an individual's exploratory committee. *See* A.R.S. §§16-913(J) and -918(A), (B).

Statewide and legislative candidate committees must file their reports with the Secretary of State. A.R.S. § 16-916.⁽¹⁾ When a committee neither receives contributions nor makes disbursements during the time frame encompassing a particular campaign finance report, either the committee treasurer or the candidate may file a form indicating that there has been "no activity." A.R.S. § 16-913(D). Any report filed pursuant to A.R.S. § 16-913, however, must "be signed by the committee treasurer or the candidate or the designating individual if the treasurer is unavailable and shall contain the certification of the signer under penalty of perjury that the report is true and complete." A.R.S. § 16-913(I).

If a committee fails to timely file the required campaign finance report, then the

political committee, the candidate (of a candidate's campaign committee), or the designating individual (of an exploratory committee) is liable to pay a ten dollar per-day late penalty. A.R.S. § 16-918(B). A failure to file occurs if (1) the report is not filed timely, (2) the report is filed, but not signed, or (3) a "good faith effort is not made to substantially complete the report" A.R.S. § 16-918(D). The Secretary of State may not accept a campaign finance report unless the penalties are paid. A.R.S. § 16-918(B).

Once the Secretary of State determines that there may have been a failure to file a campaign finance report, she must send written notice to "the political committee and the candidate, in the case of the candidate's campaign committee, or to the designating individual, in the case of an individual's exploratory committee" within fifteen days. A.R.S. § 16-918(A). If the responsible party fails to file the report within fifteen days after receiving the notice, the penalty increases to \$25.00 a day for each subsequent day that the filing is late. At this point, the Secretary of State must notify the Attorney General pursuant to A.R.S. § 16-924. *See* A.R.S. § 16-918(C).⁽²⁾

Analysis

A. The Secretary of State Has Statutory Authority to Assess Financial Penalties Only After Determining That a Responsible Party Filed a False "No Activity" Report Without Making a Good Faith Effort to Determine Whether Activity Occurred.

You have asked whether the Secretary of State must charge late fees when an individual responsible for filing a campaign finance report files a "no activity" report and then files an amended report indicating that there had, in fact, been contributions or disbursements during the reporting period. The Secretary of State should not routinely assess a late fee every time there is a discrepancy between the original report and the amended report. Assessing financial penalties is authorized by statute only if the responsible party filed a false "no activity" report without making a good faith effort to determine whether the committee received or disbursed funds during the relevant reporting period. *See* A.R.S. §§16-913 and -918(E)(3) ("there is a failure to make and file a campaign finance report" if "[a] good faith effort is not made to substantially complete the report"). Violators of A.R.S. § 16-913 are subject to the civil and nomination or election penalties prescribed in A.R.S. § 16-918. A.R.S. § 16-913(J).

1. Determining Whether a Filing Violation Occurred

If, after reviewing the original "no activity" and amended reports, the Secretary of State cannot determine whether the responsible party was unaware that the committee received or disbursed funds when the "no activity" report was filed, the Secretary of State should evaluate available facts and may request that the responsible party provide additional information and documentation to justify the discrepancy. The Secretary of State may wish to consider whether the committee has a pattern of filing amended reports, the reasons for and significance of the

amendment, and the verbal or written justification provided by the responsible party or committee. In accordance with the standards in A.R.S. § 16-918, the Secretary of State should then evaluate the available information to determine if the responsible party violated A.R.S. § 16-913. Subsection 16-918(D)(3) requires a "good faith effort" to substantially complete the report mandated by A.R.S. § 16-913. Section 16-918(E), in turn, provides a "good cause" defense to an enforcement action brought pursuant to that section.

In deciding whether the responsible party made a good faith effort to provide an accurate and complete original report, the Secretary of State must evaluate the circumstances surrounding each case. *See, e.g., Lake Havasu City v. Mohave County*, 138 Ariz. 552, 560, 675 P.2d 1371, 1379 (App. 1983) ("[a]n act is done in good faith when it is reasonable under the circumstances"); *Geomet Exploration, Ltd. v. Lucky McUranium Corp.*, 124 Ariz. 55, 60, 601 P.2d 1339, 1343 (1979) ("good faith may be defined as honesty of purpose and absence of intent to defraud"); *NLRB v. Stanislaus Implement and Hardware Co.*, 226 F.2d 377, 380 (9th Cir. 1955) ("'[g]ood faith' is a state of mind which can be resolved only through an application of the facts in each particular case"). Among the factors the Secretary of State may consider in making this good faith determination are whether the responsible party (i) intended to conceal or defraud, (ii) was dilatory in filing the amended report, (iii) filed the initial false "no activity" report without efforts to ascertain whether there was activity during the relevant period, and (iv) included minor or major changes in reporting contributions and expenditures on the amended report.⁽³⁾

Additionally, the Secretary of State should consider whether illness or absence from the State or other factors contributed to the responsible party's failure to ascertain and provide an accurate account of a committee's financial activity during the reporting period. *See* A.R.S. § 16-918(E) (the "good cause" constituting a defense to an enforcement action under this section includes "an illness or absence from this state at the time the campaign finance report was due or the written notice of delinquency was delivered if the illness or absence reasonably prevented the treasurer, designating individual or candidate from filing the report or receiving written notice"). The good cause defense, however, by its terms, would not apply to a "no activity" filing that the responsible party knew was false.

2. Assessing Financial Penalties for Amended Filings

If, after evaluating the original filing, the amended report, and the available facts, the Secretary of State believes that the original "no activity" report was filed in bad faith, she should send written notice to the political committee and to the candidate (or the designating individual) that the complete and accurate campaign finance report required by A.R.S. § 16-913 was delinquent. *See*

A.R.S. § 16-918(A). The Secretary of State must send this notice by certified mail within fifteen days after determining that a responsible party may have failed to file a complete and accurate campaign finance report. *Id.* The notice must adequately describe the nature of the failure and provide a statement of the penalties identified in A.R.S. § 16-918(A).

Because the Secretary of State cannot accept a campaign finance report until penalties owed under either A.R.S. §§16-918 or -924 are paid, filing an amended report will not stop the financial penalties from accruing unless the penalties are paid at that time. *See* A.R.S. § 16-918(B). Thus, the financial penalties for filing a false "no activity" report accrue at ten dollars a day from the day after the report was initially due through the date that the late penalty is paid (up to a maximum of four hundred and fifty dollars). *Id.*

If the penalty is not paid within fifteen days after receiving a notice of delinquency, the Secretary of State should notify the Attorney General of the violation, who may, in turn, serve the responsible party with a compliance order.⁽⁴⁾ *See* A.R.S. §§16-918(C) and -924(A). If the penalty is not paid within fifteen days, the fine increases to twenty-five dollars a day (up to a maximum of one thousand dollars).⁽⁵⁾ *Id.*

3. Challenging an Assessment of Financial Penalties

If a committee or responsible party contests the Secretary of State's assessment of financial penalties under A.R.S. § 16-918, the procedural rights provided in the Uniform Administrative Appeals Procedures Act ("Act"), A.R.S. §§41-1092 to -1092.12, are available, including notice, a hearing, and an informal settlement conference. If the Secretary of State refers the matter to the Attorney General pursuant to A.R.S. § 16-924(A), the procedural rights in A.R.S. § 16-924 are applicable to the extent that those rights are not inconsistent with or do not diminish any right provided in the Act. *See* A.R.S. §§ 41-1092.02(D) ("notwithstanding any other administrative proceeding or judicial review process established in statute or administrative rule, this article applies to all appealable agency action and to all contested cases") and 41-1002(B) (the procedural rights created by the administrative procedure chapter are "in addition to those created and imposed by other statutes" and "[t]o the extent that any other statute would diminish a right created or duty imposed by the [administrative procedure] chapter, the other statute is superseded by this chapter").

B. The Secretary of State Has a Duty to Make Criminal Referrals to the Attorney General If the Secretary of State Has Reason to Believe That the Responsible Party Who Filed, or the Authorized Individual Who Signed, the "No Activity" Report Knew That It Contained a

Material, False Statement.

You also asked whether the Secretary of State should report the filing of a false "no activity" report to the Attorney General for possible criminal prosecution. Again, before making a criminal referral to the Attorney General, the Secretary of State should evaluate the circumstances surrounding the filing of the allegedly false report.

Because A.R.S. § 16-913(I) requires that each campaign finance report be signed by the "committee treasurer or the candidate or the designating individual if the treasurer is unavailable" and contain the signer's certification "under penalty of perjury" that the report is true and complete, signing a false report may constitute perjury. A person commits perjury by making "a false sworn statement in regard to a material issue. . . **believing it to be false.**"⁽⁶⁾ A.R.S. § 13-2702(A)(1) (emphasis added). The Secretary of State should evaluate the evidence to determine if the signer certified a false sworn statement that was material and believed to be false. Similarly, a person may commit a fraudulent scheme and practice or engage in the presentment of a false instrument for filing when the person files a campaign finance report with the Secretary of State that contains false information. See A.R.S. §§ 13-2311 and 39-161. Therefore, the Secretary of State need only refer the filing of a false "no activity" report to the Attorney General for criminal investigation if she has reason to believe that the responsible party filed the "no activity" report or the authorized individual signed the report knowing that it contained a material, false statement.

Conclusion

The Secretary of State has authority to assess financial penalties when the individual responsible for filing the campaign finance report files a false "no activity" report if the Secretary of State determines that the person who filed the report filed it without making a good faith effort to ascertain that it was accurate at the time of filing. Further, the Secretary of State needs to refer the filing or signing of a false "no activity" report to the Attorney General for criminal investigation only if she has reason to believe that the responsible party filed the "no activity" report, or the authorized individual signed the report, knowing that it contained a material, false statement.

¹ Committees for county and school candidates must file their reports with the county recorders and committees for city and town candidates must file with the city and town clerks. *Id.* Although this Opinion addresses the Secretary of State's duties in relation to false campaign finance reports filed by statewide and legislative candidates committees, county recorders and town clerks have the same duties with respect to false campaign finance reports filed by county,

city, and town candidates.

² The county attorney must be notified for a violation regarding a county office, and the city or town attorney must be notified for a violation regarding a city or town office. *Id.*

³ Although not controlling in Arizona, the Secretary of State may consider the standard for violation of federal election law. Under the Federal Elections Campaign Act of 1971 ("FECA"), 2 U.S.C. § § 431 to 455, if the Federal Elections Commission ("Commission") determines that there has been a "knowing and willful" failure to file a campaign finance report, the responsible party is liable for civil penalties. 2 U.S.C. § 437g(a)(5)(b). In contrast, a committee will be deemed in compliance with the FECA "[w]hen the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required. . . ." 2 U.S.C. § 432(i). The FECA, therefore, allows the Commission discretion to impose civil penalties after evaluating whether the committee exercised its best efforts to comply with FECA requirements.

⁴ In the case of a violation regarding a county office, the county recorder should notify the county attorney; in the case of a violation regarding a city or town office, the city or town clerk should notify the city or town attorney. *Id.*

⁵ "In addition to the enforcement actions prescribed by this section, a person who was a candidate for nomination or election to any local or state office and who after written notice pursuant to this section failed to make and file a campaign finance report as required by this chapter is not eligible to be a candidate for nomination or election to any local or state office for five years after the last failure to make and file a campaign finance report occurred." A.R.S. § 16-918(F).

⁶ A material issue is one "which could have affected the course of outcome of any proceeding or transaction." A.R.S. § 13-2701(1).

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