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14 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

15 **IN AND FOR THE COUNTY OF MARICOPA**

16 STATE OF ARIZONA, ex rel. TERRY
17 GODDARD, ARIZONA ATTORNEY
18 GENERAL,

19 Petitioner,

20 v.

21 DAVID BURNELL SMITH, State
22 Representative, District 7, of the Arizona
23 House of Representatives,

24 Respondent.

NO. CV 2005-016315

**PETITION FOR WRIT OF QUO
WARRANTO**

25 1. The State of Arizona, ex rel. Terry Goddard, Arizona Attorney General,
26 pursuant to A.R.S. § 12-2041, upon his own information, petitions this Court for a Writ
27 of Quo Warranto, a finding that Respondent, David Burnell Smith has usurped, intruded
28 into or unlawfully holds or exercises the public office of State Representative, District
7, of the Arizona House of Representatives, and an Order removing Respondent from
this office.

1 2. Terry Goddard is the duly-elected Arizona Attorney General and has the
2 authority to bring this action pursuant to A.R.S. § 12-2041.

3 3. Respondent David Burnell Smith (“Smith”) ran as a candidate for State
4 Representative, District 7, of the Arizona House of Representatives in the 2004 Primary
5 and General Elections.

6 4. Smith was certified and ran as a “participating candidate” under the
7 Citizens Clean Elections Act (“Act”), A.R.S. §§ 16-940 *et seq.*, which means he
8 received public monies to fund his campaign.

9 5. Smith registered with the Arizona Secretary of State (“SOS”) to be a
10 legislative candidate in the 2004 election by filing a Statement of Organization.

11 6. Smith’s adjusted primary election spending limit was \$24,507.28.

12 7. Smith’s adjusted primary election spending limit was the sum total of his
13 original primary election spending limit of \$16,980.00 and primary matching funds in
14 the following amounts: \$1,032.00; \$4,733.09; and \$1,762.19.

15 8. Smith’s adjusted general election spending limit was \$11,320.00.

16 9. The sum of Smith’s adjusted primary election spending limit and his
17 adjusted general election spending limit is \$35,827.28. Ten percent of the sum of
18 Smith’s adjusted primary election spending limit and his adjusted general election
19 spending limit is \$3,583.00.

20 10. Smith was elected State Representative for District 7 at the 2004 General
21 Election held on November 2, 2004 and was issued a Certificate of Election on
22 November 22, 2004.

23 11. Smith was sworn into office for State Representative for District 7 and
24 began performing the duties of the office on January 10, 2005.

25 12. At its October 5, 2004 meeting, the Commission, accepted the Executive
26 Director’s recommendations and found reason to believe that violations of the Act and
27 Commission rules had occurred. In accordance with A.A.C. R2-20-209(A), the
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1 Commission also commenced an investigation of those violations.

2 13. In the course of the investigation, the Commission requested that an audit
3 be performed on Smith's campaign account.

4 14. On October 5, 2004, the Commission sent Smith an Order Requiring
5 Compliance, which set forth the provisions of the Act and Commission rules alleged to
6 have been violated and the alleged factual basis supporting the finding.

7 15. The Order required Smith to comply with A.R.S. § 16-948(C), A.R.S. §
8 16-941(A) and A.A.C. R2-20-104(D) within 14 days of the date of the Order. The
9 Order further instructed Smith that, during those 14 days, he could provide any
10 explanation to the Commission, comply with the Order, or enter into a public
11 administrative settlement with the Commission.

12 16. In response to the Order Requiring Compliance, Smith provided a written
13 response to the request for an investigation. In that response, Smith admitted several
14 times that he had overspent his primary election funding limit in those documents.

15 17. Sarvas, King & Coleman performed an audit of Smith's campaign
16 account and issued its Investigative Report for Smith for 7 ("Investigative Report") on
17 January 13, 2005.

18 18. At a public meeting held on February 10, 2005, the Commission voted to
19 approve the Investigative Report, except for paragraph 2 of page 3.

20 19. Smith was notified of this action by letter dated February 10, 2005 and
21 given 10 days to respond.

22 20. Smith provided a lengthy response to the Investigative Report, which
23 included copies of his bank statements, copies of the invoices from Constantin Querard
24 (one of Smith's vendors), and copies of checks written from his campaign account.

25 21. Upon completion of the investigation, the EIC¹ prepared a brief, entitled
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28 ¹ At its January 27, 2005 public meeting, the Commission voted to hire Gene Lemon to serve as an
External Investigative Consultant ("EIC") to complete this enforcement matter.

1 “Probable Cause Recommendation,” setting forth his position on the factual and legal
2 issues of the case and recommended that the Commission find probable cause to believe
3 that a violation of the Act and/or Commission rules had occurred.

4 22. On March 4, 2005, the EIC sent his Probable Cause Recommendation to
5 Smith and informed him that, within 5 days from his receipt of the EIC’s brief, Smith
6 could respond by setting forth his position on the factual and legal issues of the case.
7 The EIC’s Probable Cause Recommendation was also sent to Commission members on
8 March 4, 2005.

9 23. On March 14, 2005, the Commission received a written response from
10 Smith’s accountant to the EIC’s Probable Cause Recommendation. On March 14, 2005,
11 the EIC also met with Smith; Smith’s attorney Lee Miller; Robert Hubbard, an
12 accountant that Smith had hired to review his campaign account records; and Michael
13 Ricard, the attorney who represented Smith for the administrative hearing.

14 24. On March 21, 2005, the EIC issued a Probable Cause Recommendation
15 Memorandum to the Commission, stating that he intended to proceed with his probable
16 cause recommendation.

17 25. At its March 24, 2005 meeting, the Commission found probable cause to
18 believe that Smith had violated the Act and Commission rules.

19 26. On March 25, 2005, the Commission issued an Order and Notice of
20 Appealable Agency Action, finding that Smith knowingly violated A.R.S. § 16-
21 941(A)(3) by making expenditures in the primary election period in excess of his
22 adjusted primary election spending limit.²

23 27. On September 24, 2004, Smith filed an amended Pre-Primary Campaign
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25 ² The Commission also found that Smith violated A.R.S. § 16-948(C) by failing to pay monies from his campaign
26 account directly to the person providing goods and services to the campaign and by failing to identify on his
27 campaign finance reports the full name and street address of the person and the nature of the goods and services and
28 compensation for which payment has been made. Pursuant to A.R.S. § 16-942(B), the Commission assessed a civil
penalty of \$10,000.00 for the violations of A.R.S. § 16-948(C) and pursuant to A.R.S. § 16-942(D) (i.e. because the
Commission found a “knowing violation” of A.R.S. § 16-941(A)(3)), the Commission ordered that Smith repay the
sum of \$34,625.09 to the Citizens Clean Elections Fund.

1 Finance Report, which reflected overspending by Smith in the amount of \$5,995.02.

2 28. On several occasions, Smith admitted that he had overspent his adjusted
3 primary election spending limit. Specifically, in response to the Order Requiring
4 Compliance, Smith, in his cover letter, stated: "I do agree that we did over spend for
5 the Primary, that there is a balance of \$6,482.89 owed to Mr. Querard, and I agree to
6 pay that amount personally." In a letter attached as Exhibit E to his letter to the
7 Executive Director, Smith stated that, as he had explained to the Executive Director,
8 "the campaign over spent the Clean Elections budget." Smith further stated that
9 "[t]here was no intent to over spend the budget; there was an error in how much money
10 was left in the budget by Mr. Querard. When I first received the bills shortly after the
11 election, it was my understanding that those bills had been paid. My accountant
12 subsequently determined that some of the bills had not been paid and that there was an
13 additional eight thousand dollars owed to Mr. Querard." Smith further stated that "the
14 campaign had made a mistake by over spending."

15 29. During the course of his campaign, Smith signed all of the checks for his
16 campaign's expenditures, so he knew how much his campaign was spending and when.

17 30. Arizona Revised Statutes § 16-941(A)(3) provides that,
18 "[n]otwithstanding any law to the contrary, a participating candidate...[s]hall not make
19 expenditures in the primary election period in excess of the adjusted primary election
20 spending limit."

21 31. Based upon the Commission's investigation, it concluded that Smith's
22 expenditures in the primary election period exceeded his adjusted primary election
23 spending limit by \$6,039.00, which is 17% of the total amount permitted.

24 32. Arizona Revised Statutes § 16-942(C) provides that "[a]ny campaign
25 finance report filed indicating a violation of section 16-941, subsections A or B or
26 section 16-941, subsection C, paragraph 1 involving an amount in excess of ten percent
27 of the sum of the adjusted primary election spending limit and the adjusted general
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1 election spending limit for a particular candidate shall result in disqualification of a
2 candidate or forfeiture of office.”

3 33. Pursuant to A.R.S. § 16-942 and -957, and A.A.C. R2-20-215 and A.A.C.
4 R2-20-217, the Commission issued a written Order on March 25, 2005, requiring Smith
5 (1) to pay a civil penalty of \$10,000.00 to the Commission; (2) to forfeit his office of
6 State Representative for District 7; and (3) to repay to the Citizens Clean Elections Fund
7 the amount of \$34,625.09. The Order also advised Smith that he was entitled to request
8 an administrative hearing to contest the Order and to request an informal settlement
9 conference.

10 34. On March 29, 2005, Smith requested an informal settlement conference.
11 An informal settlement conference was held on April 11, 2005.

12 35. On April 21, 2005, Smith requested an administrative hearing to contest
13 the Order.

14 36. An administrative hearing was held on June 22 and 23, 2005 at the Office
15 of Administrative Hearings.

16 37. At the conclusion of the administrative hearing and after the closing of the
17 record, Administrative Law Judge (“ALJ”) Daniel G. Martin issued his Administrative
18 Law Judge Decision and Recommended Order (“ALJ Decision and Recommended
19 Order”) on August 22, 2005 and recommended that Smith’s appeal be denied and that
20 the Commission’s March 25, 2005 Order be affirmed. A copy of the ALJ Decision and
21 Recommended Order is attached hereto as Exhibit 1 and incorporated herein by
22 reference.

23 38. Specifically, the ALJ ordered that “[u]pon the effective date of the Order
24 entered in this matter, Mr. Smith shall (1) forfeit his office as State Representative for
25 District 7; (2) repay to the Citizens Clean Elections Fund the amount of \$34,625.09; and
26 (3) pay to the Commission a civil penalty in the amount of \$10,000.00.”

27 39. The ALJ’s Decision and Recommended Order was not the final
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1 administrative decision in this matter. *See* A.R.S. § 41-1092.08(F).

2 40. At a public meeting on August 25, 2005, the Commission considered the
3 ALJ's Decision and Recommended Order and, pursuant to A.R.S. § 41-1092.08(B),
4 voted to adopt and accept in full the Recommended Findings of Fact, Conclusions of
5 Law and the Recommended Order as presented by the ALJ.

6 41. On August 25, 2005 the Commission issued its Final Order to Smith in
7 which it adopted and accepted the ALJ Decision and Recommended Order to deny
8 Smith's appeal and affirm the Commission's March 25, 2005 Order and Notice of
9 Appealable Agency Action. A copy of the Commission's Final Order is attached hereto
10 as Exhibit 2 and incorporated herein by reference.

11 42. In the Final Order, the Commission notified Smith that, not later than 30
12 days after service of the Final Order, he could file with the Commission a motion for
13 rehearing or review.

14 43. Smith filed a Motion for Rehearing or Review on September 23, 2005.

15 44. At a public meeting on October 4, 2005, the Commission considered
16 Smith's Motion for Rehearing or Review.

17 45. The Commission voted to deny Smith's Motion for Rehearing or Review
18 and issued its denial on October 4, 2005. A copy of the Commission's Denial of
19 Respondent's Motion for Rehearing or Review is attached hereto as Exhibit 3 and
20 incorporated herein by reference.

21 46. The Commission's Final Order, issued on August 25, 2005, became the
22 final administrative decision in this matter on October 4, 2005, after the Commission
23 issued its denial of Smith's Motion for Rehearing or Review.

24 47. Pursuant to A.R.S. § 16-957(B), Smith had 14 days to appeal the Final
25 Order to the Superior Court: "The violator has fourteen days from the date of issuance
26 of the order assessing the penalty to appeal to the superior court as provided in title 12,
27 chapter 7, article 6."
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1 48. The deadline for filing his appeal from the Final Order expired on
2 October 18, 2005.

3 49. Smith filed a Verified Special Action Complaint on September 26, 2005,
4 prior to the Commission considering and taking action on his Motion for Rehearing or
5 Review. In that pleading, which he has not served on the Commission, Smith makes the
6 following statements:

7 a. “The Commission is an administrative agency within the meaning
8 of A.R.S. § 12-901(A).”

9 b. “The ALJ’s Decision was the final, appealable administrative
10 decision in this matter and was completed on or about August 22,
11 2005.”

12 c. “This appeal is therefore timely under A.R.S. § 12-904(A).”

13 d. “Jurisdiction to review final administrative decision is vested in the
14 superior court.”

15 e. “This court has venue over this matter.”

16 f. “As part of the record, transcripts of the June 22 and 23, 2005
17 hearing before the Commission will be designated part of the
18 record in this matter.”

19 50. In that pleading, Smith asked that the Court enter an order and judgment
20 vacating the Commission’s March 25, 2005 Disciplinary Order and the ALJ’s August
21 22, 2005 Decision upholding the Commission’s March 25, 2005 Disciplinary Order.

22 51. Arizona Revised Statutes § 12-902 provides that “[u]nless review is
23 sought of an administrative decision within the time and in the manner provided in this
24 article, the parties to the proceeding before the administrative agency shall be barred
25 from obtaining judicial review of the decision.”

26 52. Smith has failed to appeal the final administrative decision in this matter
27 pursuant to A.R.S. § 16-957(B), A.R.S. § 12-909(A) and Rule 4 of the Rules of
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1 Procedure for Judicial Review of Administrative Decisions.

2 53. Pursuant to Rule 3 of the Rules of Procedure for Judicial Review of
3 Administrative Decisions, Smith could have moved for a stay of the final administrative
4 decision if he had timely appealed.

5 54. Smith did not seek a stay of the final administrative decision within the 14
6 days he had to appeal the final administrative decision to the Superior Court.

7 55. The Commission's Final Order requiring Smith to forfeit the office of
8 State Representative for District 7 and to pay the penalties imposed by the Commission
9 can no longer be appealed.

10 56. Smith has not resigned or forfeited his office and continues to hold office.

11 57. Smith, therefore, has usurped, intruded into or unlawfully holds or
12 exercises the office of State Representative, District 7.

13 WHEREFORE, Petitioner requests the Court to enter an Order:

- 14 1. Finding that Smith has usurped, intruded into or unlawfully holds or
15 exercises the office of State Representative, District 7;
16 2. Removing Smith from the office of State Representative, District 7; and
17 3. Granting such other relief as the Court deems appropriate.

18 RESPECTFULLY SUBMITTED this 20th day of October 2005.

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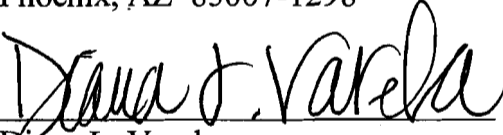
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