

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 1525 Sherman Street, 4 <sup>th</sup> Floor, Denver, Colorado 80203	
<b>COLORADO GOVERNMENT WATCH</b> Complainant,  vs.  <b>JEFFCO UNITED and SUPPORT JEFFCO KIDS,</b> Respondents.	<b>▲ COURT USE ONLY ▲</b>  <b>CASE NUMBER:</b>  <b>OS 2015-0021</b>
<b>FINAL AGENCY DECISION</b>	

Colorado Government Watch (CGW) alleges that Respondents each accepted contributions and made contributions and expenditures in excess of \$200 to support the recall of three Jefferson County School District R-1 board members in the November 3, 2015 election, and therefore were required to register as issue committees and report their contributions and expenditures to the Secretary of State as required by Colorado's fair campaign practice laws. Hearing of the complaint was held at the Office of Administrative Courts before Administrative Law Judge (ALJ) Robert Spencer on December 8, 2015. Pursuant to § 13-1-127(2), C.R.S., CGW was represented by its director and principal officer, Denise "Dede" Laugesen. Respondents were represented by Edward T. Ramey, Esq., Tierney Paul Lawrence LLP.

### Case Summary

Three members of the Jefferson County School District R-1 board of education were the subject of a recall petition that appeared on the Jefferson County ballot in the November 3, 2015 election. Prior to the election, JeffCo United (United) and Support JeffCo Kids (SJK) each made sizeable contributions to a registered issue committee known as JeffCo United for Action (JU4A). There is no dispute that JU4A's primary purpose was to support recall of the three board members.

CGW alleges that because United and SJK each contributed more than \$200 to JU4A, they both meet the definition of an issue committee and should have registered as issue committees and reported their contributions and expenditures to the Secretary of State as required by § 1-45-108, C.R.S. of the Fair Campaign Practice Act (FCPA). Failure to register and file required reports subjects an entity to civil penalties of up to \$50 per day per violation.

To qualify as an issue committee, an entity must have "a major purpose" of supporting or opposing a ballot issue or question. United and SJK both argue that they did not have a major purpose of supporting the recall election, and therefore they did not meet the definition of an issue committee and had no registration or reporting obligation.

For reasons explained below, the ALJ concludes that United meets the major purpose test and therefore is an issue committee, but that SJK is not.

## **Findings of Fact**

### *The Recall Election*

1. The official ballot for the November 3, 2015 election in Jefferson County, Colorado included a question pertaining to the recall of three of the five Jefferson County School District R-1 board members. The three members subject to recall were Julie Williams, John Newkirk, and Ken Witt.

2. Per § 1-12-118(1), C.R.S., the election of a successor is held at the same time as the recall election. The names of the successors seeking to replace the recalled members were also on the ballot.

3. In addition to the three members subject to recall, the remaining two school board positions were open for election, and the names of the persons seeking election to those two offices were also on the ballot.

### *United and Its Activities*

4. United is 501(c)(4) social welfare organization that filed articles of incorporation as a Colorado nonprofit corporation on May 1, 2015. Ex. A.

5. According to United's articles of incorporation, it was created "for social welfare purposes." Ex. A.

6. United acknowledges that following its incorporation, it set up two additional committees, JU4A and JeffCo United Forward (JUF). JU4A was registered with the Secretary of State as an issue committee on June 29, 2015.<sup>1</sup> Its purpose was "to recall certain board members of Jefferson County School Board." Ex. 1.

7. JUF was registered with the Secretary of State as an independent expenditure committee on September 11, 2015. Per the Secretary of State's website, TRACER, its purpose was "to advocate for the election of responsible candidates to the Jefferson County School Board in both the regular school board election and the 2015 recall election."<sup>2</sup>

8. According to JU4A's report of contributions and expenditures filed with the Secretary of State, United contributed \$25,000 on July 10, \$65,000 on July 18, and made a \$3,000 non-monetary contribution to JU4A on July 15, 2015. Ex. C.

9. These donations, totaling \$93,000, were just over 35 percent of the \$265,313.25 in contributions that JU4A received to support the recall election. Ex. 1.

10. Prior to the election, United ran several advertisements in the online edition of the Arvada Press. One advertisement, titled "8 Steps to Move JeffCo Schools Forward," expressly advocated, in steps 3, 5, and 7, the recall of Williams, Newkirk, and

<sup>1</sup> Respondents' counsel aptly referred to United, JU4A, and JeffCo United Forward as a "family" of related entities.

<sup>2</sup> TRACER may be accessed at <http://tracer.sos.colorado.gov/PublicSite/homepage.aspx>. The ALJ takes judicial notice of TRACER's public files, viewed December 9, 2015.

Witt. It also expressly advocated, in steps 1, 2, 4, 6, and 8, the election of five new board members. Ex. 4. Two other advertisements asked voters to, "Vote for Recall Successor Candidates Rupert, Harmon and Mitchell." Ex. F.

11. There is no evidence in the record that, since its incorporation in May 2015, United engaged in any activity other than that related to the recall of Williams, Newkirk, and Witt, the election of their replacements, and the election of candidates to the two open seats.

12. As of the date of the hearing, United had not registered with the Secretary of State as an issue committee nor had it filed reports of its contributions and expenditures.

### *SJK and Its Activities*

13. SJK is also a 501(c)(4) social welfare organization. It was formed on January 16, 2014, almost two years before the recall election. It was not set up by United and had no relationship to United, JU4A, or JUF.

14. SJK maintains a webpage that describes its mission as follows:

*Our mission is to educate the Jeffco Community on the importance of supporting public education for ALL kids in Jeffco, inform the community on the current events, and to support a school board that understands the importance of educating ALL kids in Jeffco.*

See <http://www.supportjeffcokids.org>, last viewed December 9, 2015.

15. Exhibit 5 contains excerpts from "archives" posted to SJK's website. These documents show that from February 2014 through November 2015, SJK was actively involved in many issues involving education in Jefferson County. Very few of these activities directly involved the recall election.

16. While the documents on the website and in Exhibit 5 show that SJK was disenchanted with the conduct of Williams, Newkirk and Witt and supported their recall, the overall picture of SJK is that it was broadly interested in the quality of education in Jefferson County and the recall was not a major part of its activity.

17. According to JU4A's report of contributions and expenditures filed with the Secretary of State, SJK made \$6,000 in monetary contributions to JU4A in July 2015. Ex. D. This was less than three percent of the \$265,313.25 in contributions that JU4A received to support the recall election. Ex. 1.

## **Discussion**

### *Colorado's Campaign Finance Laws*

The primary campaign finance law in Colorado is article XXVIII of the Colorado Constitution, which was approved by the voters in 2002. Article XXVIII imposes contribution limits, encourages voluntary spending limits, imposes reporting and disclosure requirements, and creates an enforcement process. Colorado's statutory campaign finance law, FCPA §§ 1-45-101 to 118, C.R.S., was originally enacted in 1971, repealed and reenacted by initiative in 1996, substantially amended in 2000, and

again substantially revised by initiative in 2002 as the result of the adoption of article XXVIII. The Secretary of State, pursuant to regulations published at 8 CCR 1505-6, further regulates campaign finance practices.

#### *Definition and Responsibilities of an Issue Committee*

Article XXVIII, § 2(10)(a) defines an issue committee as:

[A]ny person, other than a natural person, or any group of two or more persons, including natural persons:

(I) That has a major purpose of supporting or opposing any ballot issue or ballot question; or

(II) That has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.

Some of the terms in this definition are further defined. A "person" is defined by § 2(11) to include associations, corporations, or "other organization or group of persons." An "expenditure" is defined by § 2(8)(a) to mean any payment "for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or question." A "contribution" is defined by § 2(5)(a)(I) to include any "payment" made to another issue committee. By rule, the Secretary of State has interpreted the "or" between subparagraphs (I) and (II) to mean "and", thus requiring proof that the entity has both "a major purpose" of ballot advocacy *and* proof that its contributions or expenditures exceeded the \$200 threshold. 8 CCR 1505-6, Rule 1.9.

Issue committees whose purpose is the recall of any elected official are obligated to register with the Secretary of State within ten days of accepting or making contributions or expenditures in excess of \$200 in support or opposition of the recall. Section 1-45-108(6), C.R.S. Reports of contributions and expenditures must be filed with the Secretary within 15 days of registration, every 30 days thereafter until the date of the election, and 30 days following the election. *Id.* Failure to comply with these requirements subjects the committee to substantial civil monetary penalties and other appropriate orders, sanction or relief. See article XXVIII, §§ 9(2)(a) and 10(2)(a); and FCPA §§ 1-45-111.5(1.5) and (3).

#### *The Requirement of "a Major Purpose"*

Neither Respondent disputes that it made contributions in excess of \$200 to support the recall election. However, they both contend that support of the recall was not a major purpose of their organization, and therefore they are not subject to the registration and reporting obligations of an issue committee.

Although "a major purpose" is not defined in article XXVIII, the Colorado Court of Appeals in *Independence Institute v. Coffman*, 209 P.3d 1130 (Colo. App. 2008), held that the term was not unconstitutionally vague or overbroad. In doing so, the court sought to give effect to the electorate's intent in adopting article XXVIII to "require disclosure of contributions made to entities that exist to influence election outcomes as to ballot issues, and not to require disclosure of contributions to entities that do not have

such influence as a major purpose.” *Id.* at 1139. To determine whether an entity has a major purpose of engaging in ballot advocacy, the court suggested that a trial court “compare the purposes stated in its charter, articles of incorporation, and by-laws; the purposes of its activities and annual expenditures; and the scope of issues addressed in its print and electronic publications.” *Id.* Further, the court tacitly approved the ALJ’s consideration of the length of time the organization had been in existence, its original purpose, its organizational structure, the various issues with which it had been involved, and the amount of money expended on ballot advocacy in proportion to its annual budget. *Id.*

In light of *Independence Institute*, the legislature passed HB 10-1370 amending the FCPA to add the following definition of “major purpose”:

“[M]ajor purpose” means support or opposition of a ballot issue or ballot question that is reflected by:

(I) An organization’s specifically identified objectives in its organizational documents at the time it is established or as such documents are later amended; or

(II) An organization’s demonstrated pattern of conduct based upon its:

(A) Annual expenditures in support of or opposition to a ballot issue or ballot question; or

(B) Production of funding, or both, of written or broadcast communications, or both, in support or opposition to a ballot issue or ballot question.

Section 1-45-103(12)(a), C.R.S.<sup>3</sup>

Before HB 10-1370 became law, the Court of Appeals again addressed the scope of the major purpose test. *Cerbo v. Protect Colorado Jobs, Inc.*, 240 P.3d 495 (Colo. App. 2010).<sup>4</sup> In *Cerbo*, the court reiterated that an organization may be deemed an issue committee “if one of its major purposes is supporting a ballot issue; supporting a ballot issue need not be the organization’s sole purpose.” *Id.* at 501. Furthermore, the court concluded that an organization has a major purpose of supporting a ballot issue if such support “constitutes a considerable or principal portion of the organization’s total activities.” *Id.* To make that determination, the court endorsed the factors discussed by *Independence Institute*. In addition, the court made several observations that are particularly relevant to the present case. Specifically, the court believed that the ALJ “placed undue weight on the fact that PCJ had purposes other than supporting the [ballot] initiative;” and “gave too much weight to activities that PCJ merely considered undertaking while giving too little weight to what it actually did.” *Id.* at 502.

The ALJ will apply this guidance to each Respondent in turn.

<sup>3</sup> At one point, the Secretary of State by rule further defined the major purpose test; however, that rule was struck down as arbitrary and capricious by *Colo. Ethics Watch v. Gessler*, 2013 COA 172, ¶¶ 26-35.

<sup>4</sup> *Cerbo* was announced 12 days before HB 10-1370 was signed into law.

### *United Had a Major Purpose of Supporting the Recall*

The evidence is compelling that one of United's major purposes was to support the recall election. This conclusion is supported by the following evidence:

(1) United was incorporated just six months before the election. Although this does not necessarily prove that it was formed for the purpose of influencing the election, the timing is suggestive of that conclusion.

(2) United's articles of incorporation shed little light on its purpose, other than the vague statement that it was organized "for social welfare purposes." However, within two months of its formation it set up another entity, JeffCo United for Action (JU4A), for the express purpose of supporting the recall. This step strongly suggests that United was focused on supporting the recall election.

(3) Although three months later United set up another committee to support the election of new board members, JUF, that fact alone does not mean that the recall was not a major purpose. *Cerbo*, 240 P.3d at 502 (the fact that an entity has purposes other than supporting a ballot issue is not dispositive). Moreover, because the three replacement members could not be elected unless the incumbents were recalled, the two purposes were closely intertwined.

(4) United sponsored on-line newspaper ads specifically advocating the recall of the three board members. Again, the fact that the ads also advocated the election of new board members does not mean the recall was not a major purpose.

(5) United contributed \$93,000 to the recall effort in two monetary and one non-monetary donation. Although there is no evidence in the record of United's total spending since the date of its incorporation in May 2015, the size of this donation in the context of a local school board recall election suggests the recall effort was a major focus of United's existence.<sup>5</sup>

(6) United's creation of JU4A, its multiple donations to JU4A, and its ads advocating the recall, amounted to a "demonstrated pattern of conduct" in support of the recall election.

(7) There is no evidence that United ever engaged in any other activity, other than supporting the recall election and the election of new board members. Although United points out that it has been in existence for less than seven months, and suggests that it may engage in other activities in the future that do not involve issue advocacy, that possibility does not prevent United from being considered an issue committee. As stated by the court in *Cerbo*, the ALJ must give primary consideration to what United "actually did," not what it "merely consider[s] undertaking." *Id.*

United argues that it should not be penalized for "doing the right thing" by establishing an issue committee, JU4A, to specifically support the recall effort. This argument, however, overlooks the fact that by setting up an intermediate committee,

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<sup>5</sup> By contrast, according to TRACER, United made no donation in excess of \$500 to JUF, the independent expenditure committee formed to support the election of new board members.

United cloaked the identities of its contributors from public disclosure. The disclosure by JU4A that United was one of its major contributors provided little information to the electorate about who was actually funding the recall, and defeated the transparency that is a primary goal of the fair campaign practice laws. Article XXVIII, § 1 (“The people of the state of Colorado hereby find and declare that . . . the interests of the public are best served by . . . providing for full and timely disclosure of campaign contributions.”) That vital public interest is served only if United, being itself an issue committee, discloses its contributors.

United also suggests it would somehow be unconstitutional to base a finding of major purpose on just the brief period from its creation to the date of the election. United cites no persuasive authority in support of this argument, and the ALJ is aware of none.<sup>6</sup> To the contrary, the fact that United was created so close to the recall election is some evidence that influencing the recall was its major purpose.

In sum, because United had a major purpose of supporting the recall election, it was an issue committee obligated to register and file reports of its contributions and expenditures.

*The Evidence is Not Sufficient to Prove that SJK  
Had a Major Purpose of Supporting the Recall*

In contrast to United, the evidence supporting the allegation that SJK had a major purpose of supporting the recall election is scant. Specifically:

- (1) SJK was incorporated in January 2014, 22 months before the recall election.
- (2) In that time, as shown by the documentation in Exhibit 5, SJK was actively involved in many educational activities and concerns in Jefferson County, besides the recall election.
- (3) SJK was organized for unspecified “social welfare purposes,” but its mission statement shows that it was focused on enhancing the quality of education in Jefferson County. The mission statement makes no mention of the recall election.
- (4) SJK was unrelated to United or JU4A, and had no relationship with any other issue committee.
- (5) SJK donated a very small portion (less than 3 percent) of the total monies collected by JU4A to support the recall.
- (6) SJK’s website did contain material advocating the recall of Williams, Newkirk, and Witt, but such advocacy was a small part of its education-related

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<sup>6</sup> *Common Sense Alliance v. Davidson*, 995 P.2d 748 (Colo. 2000), cited by United, provides no support for United’s argument because it involved a predecessor statute that was worded differently than the law that exists today. At the time *Davidson* was decided, the campaign finance law defined an issue committee as two or more persons that “have associated themselves . . . for the purpose of” ballot advocacy. The majority, over a vigorous dissent, held that this language could not be applied to an organization that was formed for purposes other than issue advocacy, but later engaged in activities related to a specific ballot issue.

activities.

Under these circumstances, the ALJ is not convinced that SJK had a major purpose of supporting the recall election.

### *Sanction*

Because United failed to register as an issue committee and file required reports, it is subject civil monetary penalties and other sanctions as permitted by article XXVIII, §§ 9(2) and 10(2), and FCPA §§ 1-45-111.5(1.5) and (3), C.R.S.

Colo. Const. art. XXVIII, § 10(2)(a) and FCPA § 1-45-111.5(1.5) authorize a civil monetary penalty of \$50 per day for each day a statement or other information required to be filed with the Secretary of State is not filed by the close of business on the day due.<sup>7</sup> Applied to this case, the late filing penalties could be as much as \$13,350, calculated as follows:

a) Failure to register: Per § 1-45-108(6), United was required to register no later than July 20, 2015, which was ten days after it made its first donation to JU4A exceeding \$200. United had not registered as an issue committee as of the date of the hearing, a span of 141 days from the date it was obligated to register. At \$50 per day, the maximum failure-to-register penalty is \$7,050.

b) Failure to report: United made three donations in July 2015. Per § 1-45-108(6), it was required to report these contributions within 15 days of its registration, or no later than August 4, 2015. United had filed no disclosure reports as of the date of the hearing, a span of 126 days from the date it was obligated to do so. At \$50 per day, the maximum failure-to-report penalty is \$6,300.

The ALJ has discretion to impose a penalty less than the maximum amount, or indeed no penalty at all if warranted by the circumstances. *Patterson Recall Committee, Inc. v. Patterson*, 209 P.3d 1210, 1218-19 (Colo. App. 2009). In this case, Complainant has not sought a monetary penalty, and the ALJ can see no useful purpose in imposing anything close to the maximum penalty given the absence of evidence of prior violations, intentional disregard of the law, or other aggravating factors. The ALJ therefore imposes a reduced monetary penalty of \$1,000.

In addition to monetary penalties, the ALJ may order any other "appropriate order, sanction, or relief authorized by" article XXVIII. Art. XXVIII, § 9(2). Furthermore, FCPA § 1-45-111.5(3) specifically requires the ALJ to "direct the issue committee to file any such report [required by § 108] within ten days containing all required disclosure of any previously unreported contributions or expenditures." Consistent with this authority, the ALJ orders United to register with the Secretary of State as an issue committee and file all required contribution and expenditure reports.

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<sup>7</sup> Curiously, FCPA § 1-45-111.5(3) states that the ALJ "may, in addition to any other penalty, impose a penalty not to exceed twenty dollars for each contribution received and expenditure made by the issue committee that was not timely reported." It is unclear whether this was intended to limit the total per day civil penalty to \$20 per day, or to allow the ALJ to impose an additional \$20 per day. Because the ALJ imposes a penalty in this case less than \$20 per day, the point need not be decided in this decision.



## Decision

The evidence is not sufficient to show that Support for JeffCo Kids had a major purpose of supporting the recall of three Jefferson County School District R-1 board members at the November 3, 2015 election; therefore the claim that it was an issue committee required to register with and report to the Secretary of State is not proven.

The evidence is sufficient to prove that JeffCo United had a major purpose of supporting the recall of the board members; and therefore it was required to register and report as an issue committee.

As a sanction for failing to comply with its registration and reporting obligations, the ALJ imposes the following sanctions:

(1) Within **30 days** of the date of mailing of this decision, JeffCo United shall pay to the Secretary of State, Campaign Finance, a civil penalty of \$1,000; and

(2) Within **10 days** of the date of the mailing of this decision, JeffCo United shall register with the Secretary of State as an issue committee and file all required contribution and expenditure reports.

This decision is final and subject to review by the court of appeals, as provided by Colo. Const. art. XXVIII, § 9(2)(a) and § 24-4-106(11), C.R.S.

**Done and Signed**  
December 11, 2015



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ROBERT N. SPENCER  
Administrative Law Judge

Hearing digitally recorded in CR#2  
Exhibits admitted  
For Complainant: exhibits A - F  
For Respondents: exhibits 1 – 5

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above **FINAL AGENCY DECISION** was served upon the parties listed below by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

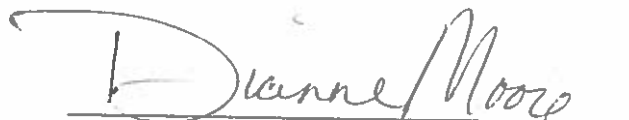
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and

Suzanne Staiert  
Deputy Secretary of State  
1700 Broadway, Suite 270  
Denver, CO 80290

on this 15 day of December, 2015

  
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Court Clerk