UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

KUHN FOR CONGRESS, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 2:13-3337 (PMD-BHH) MEMORANDUM

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S PETITION FOR REVIEW

Lisa J. Stevenson
Deputy General Counsel – Law

Kevin Deeley
Acting Associate General Counsel

Erin Chlopak
Acting Assistant General Counsel

Benjamin A. Streeter III
Attorney

FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

March 27, 2014

Table of Contents

Page

Table of Authorities

Page

Cases

Statutes and Regulations

Miscellaneous

SUMMARY OF THE CASE

Plaintiff Kuhn for Congress ("Kuhn Committee" or "the Committee") seeks judicial review of the final administrative decision of the Federal Election Commission ("FEC" or "Commission") to assess an $8,800 civil money penalty for the Committee's failure to timely file a statutorily mandated campaign-finance disclosure report in April 2013. The Kuhn Committee does not dispute its reporting violation and asserts that "[t]he Candidate would be perfectly fine with paying a reasonable fine" for its failure to file its April 2013 Quarterly Report until "four months and a week after it was due." (Petition for Review ("Pet.") at 3.)

The Commission determined the amount of the civil penalty — $8,800 for failing to disclose an estimated $343,963 of campaign activity — in accordance with the FEC's regulatory schedule of penalties.

The Kuhn Committee never challenged the Commission's determination or civil penalty calculation during the administrative process and its attempt to do so for the first time in this administrative review action is improper. But even if that were not the case, the Kuhn Committee's petition should still be dismissed because none of the Committee's new arguments demonstrates that the Commission's administrative determination or civil penalty calculation were unreasonable. FEC regulations and the administrative record demonstrate the propriety and reasonableness of the Commission's penalty calculation, the regulatory "best efforts" defense expressly excludes the circumstances the Kuhn Committee invokes in an attempt to rely on that defense for its untimely campaign-finance disclosure, and the administrative record clearly contradicts the Committee's arguments about being denied due process.

The only question before the Court in this case is whether the Commission's action was reasonably supported by the administrative record. Because the Kuhn Committee cannot

demonstrate that the Commission's determination was unreasonable, the petition for review should be dismissed.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Reporting Requirements for Political Committees

The Federal Election Campaign Act, 2 U.S.C. §§ 431-457 ("FECA"), requires every "political committee" — which includes candidate campaigns, political parties, and other political organizations, *see* 2 U.S.C. § 431(4)-(6) — to designate a treasurer to maintain the committee's financial records. *See* 2 U.S.C. § 432(a)-(d). The treasurer must sign and file reports that detail, among other things, the committee's receipts and disbursements. 2 U.S.C. § 434(a)-(b). FECA establishes a periodic schedule for such reports. Under that schedule, a candidate committee must file (i) a pre-election report 12 days before the relevant election; (ii) a post-election report 30 days after the relevant election; and (iii) quarterly reports 15 days after each calendar quarter ends, "except that the report for the quarter ending December 31 shall be filed no later than January 31 of the following calendar year." 2 U.S.C. § 434(a)(2)(A)(i)-(iii). Authorized committees for candidates seeking election to the United States House of Representatives file their reports directly with the Commission. 2 U.S.C. § 432(g)(3).

B. FECA's Enforcement Procedures

The Federal Election Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), 437g. FECA establishes a detailed administrative process for the Commission to review alleged violations of the Act. *See* 2 U.S.C. § 437g(a); *see also* 11 C.F.R. §§ 111.3-111.24 (regulations governing

Commission's enforcement process). Under FECA's general enforcement process, if at least four of the FEC's six Commissioners vote to find "reason to believe" that a violation has occurred, the Commission's Office of General Counsel can conduct an investigation that leads to a recommendation as to whether there is "probable cause to believe" a violation has occurred. 2 U.S.C. § 437g(a)(1)-(3). If at least four Commissioners then vote to find such probable cause, the Commission must attempt to resolve the matter by "informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement" with the respondent. 2 U.S.C. § 437g(a)(4)(A)(i). If the Commission is unable to resolve the matter through voluntary conciliation, the Commission may file a de novo civil suit against the respondent in federal district court. 2 U.S.C. § 437g(a)(6).

For more than twenty years, the Commission was required to employ these general enforcement procedures for *all* violations of FECA — even the most straightforward violations in which committees simply failed to file their reports on time (or at all). In 1999, however, Congress amended FECA to create a streamlined enforcement system for violations of the periodic filing requirements. *See* Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, § 640, 113 Stat. 430, 476-477 (1999) (codified at 2 U.S.C. § 437g(a)(4)(C)).[1] Specifically, Congress authorized the Commission to directly assess civil money penalties for violations of 2 U.S.C. § 434(a), which establishes, *inter alia*, the deadlines for political committees' disclosure reports. Pursuant to this authority, after the Commission finds reason to believe a committee and its treasurer have failed to file a report (or filed a report late), the Commission may

[1] Congress recently amended FECA to extend the Commission's Administrative Fines program through December 31, 2018. Extension of Admin. Penalty Auth. of Federal Election Commission, Pub. L. 113-72 § 1, 127 Stat. 1210, 1210 (Dec. 26, 2013).

> require the person to pay a civil money penalty in an amount determined ... under a schedule of penalties which is established and published by the Commission and which takes into account the amount of the violation involved, the existence of previous violations by the person, and such other factors as the Commission considers appropriate.

2 U.S.C. § 437g(a)(4)(C)(i)(II). By eliminating the probable cause determination and conciliation period that applies to other FEC enforcement matters, this "administrative fines" program "create[d] a simplified procedure for the FEC to administratively handle reporting violations." H.R. Rep. No. 106-295, at 11 (1999). That procedure, "much like traffic tickets, . . . let[s] the agency deal with minor violations of the law in an expeditious manner." 65 Cong. Rec. H5622 (daily ed. July 15, 1999) (statement of Rep. Maloney). A respondent who objects to the Commission's imposition of an administrative fine may seek judicial review of that fine in federal district court "by filing in such court . . . a written petition requesting that the determination be modified or set aside." 2 U.S.C. § 437g(a)(4)(C)(iii).

C. The Commission's Administrative-Fines Regulations

In 2000, the Commission promulgated regulations implementing FECA's administrative-fines mechanism. *See* Administrative Fines, 65 Fed. Reg. 31,787 (May 19, 2000) (codified as amended at 11 C.F.R. §§ 111.30-111.46). These regulations establish the procedures that the Commission follows in cases that the Commission determines are appropriate for treatment under the administrative-fines process. 11 C.F.R. § 111.31.

The Commission's regulations define overdue reports as "late" up until a certain number of days after the due date; after that date, the report is defined as "not filed." 11 C.F.R. § 111.43(e)(2). Reports that are not election sensitive — including the quarterly reports due in April of each year, 11 C.F.R. § 104.5(a)(1) — are "late" if filed within thirty days of their due date, and they are considered "not filed" after that point. 11 C.F.R. § 111.43(e)(1).

The Commission's regulations also establish the schedules of civil penalties authorized by 2 U.S.C. § 437g(a)(4)(C)(i)(II). *See* 11 C.F.R. §§ 111.43(a)-(c). These penalty schedules take into account whether the untimely (or not filed) report was election sensitive, how late it was filed, the dollar amount of the receipts and disbursements it detailed, and the number of prior violations by the respondent. *See id.* The Commission's general schedule of civil penalties for untimely and not filed disclosure reports that are not "election sensitive" is set forth in section 111.43(a) of the Commission's regulations.

When the Commission finds reason to believe that a political committee has violated 2 U.S.C. § 434(a), the Commission notifies the committee of that finding. 11 C.F.R. § 111.32. The notification includes the factual and legal basis for the finding, the amount of the proposed civil penalty, and an explanation of the respondent's right to challenge both the reason-to-believe finding and the amount of the penalty. *Id.* Upon receipt of this notification, the respondent may either pay the penalty or challenge the finding or proposed penalty. 11 C.F.R. § 111.33. By statute, the "Commission may not make any determination adverse" to a person regarding a reporting disclosure requirement "until the person has been given written notice and an opportunity to be heard before the Commission." 2 USC § 437g(a)(4)(C)(ii).

If a respondent wishes to challenge the Commission's reason-to-believe finding or proposed penalty, the respondent must file a written response that "detail[s] the factual basis supporting its challenge and include[s] supporting documentation" within 40 days of the Commission's finding. 11 C.F.R. § 111.35(a), (e). There are three possible grounds for such a challenge: (1) factual errors in the Commission's finding (such as if the report was, in fact, timely filed); (2) inaccurate calculation of the penalty; or (3) a showing that

> The respondent used best efforts to file in a timely manner [but] was prevented from filing in a timely manner by reasonably unforeseen

> circumstances that were beyond the control of the respondent; and . . . [t]he respondent filed no later than 24 hours after the end of these circumstances.

11 C.F.R. § 111.35(b)(1)-(3). The regulations provide that "reasonably unforeseen circumstances" beyond a filer's control that would satisfy this "best efforts" defense include events such as a failure of Commission computers or Commission-provided software despite respondent seeking technical assistance from the Commission, severe weather, and natural disasters, 11 C.F.R. § 111.35(c), but do not include causes such as negligence, delays caused by committee vendors or contractors, or staff illness, inexperience, or unavailability. *See* 11 C.F.R. § 111.35(d).

Timely filed challenges to the Commission's reason-to-believe finding are reviewed by the Commission's "Reviewing Officer," 11 C.F.R. § 111.36(a), a member of the Commission's staff who is not involved in the reason-to-believe finding. After considering the respondent's submission, along with the reason-to-believe determination and any supporting documentation, 11 C.F.R. § 111.36(b), the Reviewing Officer submits a written recommendation to the Commission, 11 C.F.R. § 111.36(e), that is also provided to the respondent, 11 C.F.R. § 111.36(f). The respondent may file a written response to the recommendation within ten days. *Id.* That response cannot raise any new arguments beyond those in the original written response, except in direct response to the Reviewing Officer's recommendation. *Id.*

After receiving the Reviewing Officer's recommendation and any timely additional response from the respondent, the Commission makes a final determination by an affirmative vote of four Commissioners as to whether the respondent violated 2 U.S.C. § 434(a) and, if so, the amount of the civil penalty. 11 C.F.R. § 111.37(a)-(c). When the Commission makes a final determination under this procedure, the reasons provided by the Reviewing Officer for his

recommendation serve as the reasons for the Commission's action, unless otherwise indicated by the Commission. 11 C.F.R. § 111.37(d).

FECA provides that any person assessed an administrative fine pursuant to the Commission's administrative fines program may obtain judicial review of the Commission's final determination in the federal district court in which the person resides by filing a written petition requesting that the determination be modified or set aside. 2 U.S.C. § 437g(a)(4)(C)(iii). The Commission's regulations make clear, however, that "the respondent's failure to raise an argument in a timely fashion during the administrative process shall be deemed a waiver of the respondent's right to present such argument in a petition to the district court under 2 U.S.C. § 437g." 11 C.F.R. §111.38.

II. THE ADMINISTRATIVE DETERMINATION CHALLENGED IN THIS CASE

John R. Kuhn was a candidate in the Republican Party's 2013 special election primary campaign for the South Carolina First District House of Representative seat. (Pet. ¶¶ 1, 2.) Plaintiff Kuhn for Congress was Mr. Kuhn's principal campaign committee. (AR001-002.)

Kuhn for Congress registered with the Commission in January 2013 as the principal campaign committee for Mr. Kuhn's special election campaign by filing its FEC Form 1. (*Id.*) Under 2 U.S.C. § 434(a)(4)(A), the Kuhn Committee's April 2013 quarterly report was due on April 15, 2013, after the special election primary held on March 19, 2013, (Pet. at 2), which the candidate lost.

On March 22, 2013, the Commission sent an April Quarterly Report Notice to all congressional committees, including the Kuhn Committee, reminding the committees of the upcoming due dates for quarterly disclosure reports to the FEC. (AR006-008, AR009, AR013.) That Notice alerted recipients that "The Commission provides reminders of upcoming filing

dates as a courtesy . . . and the lack of prior notice does not constitute an excuse for failing to comply with any filing deadline." (AR007.)

The Kuhn Committee failed to timely file its April 2013 Quarterly report. (Pet. at 8, 10). On May 3, 2013, the FEC's Assistant Staff Director emailed the Kuhn Committee a letter notifying the Committee and its treasurer that the April 2013 Quarterly Report had not been filed by the statutory deadline. (AR014-015, AR016.) That letter urged the Committee to file the report immediately and warned that civil money penalties might result from the Committee's failure to timely file the report. (AR014.)

Ultimately, the Kuhn Committee did not file its April 2013 Quarterly Report until August 20, 2013 (Pet. at 10), more than 120 days after the statutory deadline for filing the report. 2 U.S.C. § 434(a)(2)(A)(iii). Because the Kuhn Committee's April 2013 Quarterly Report was filed more than 30 days after it was due, the Commission deemed the report "not filed" under the applicable FEC regulation, 11 C.F.R. §111.43(e)(1).

The Commission initiated an administrative-fines proceeding against the Kuhn Committee for its unfiled April 2013 Quarterly Report, and the matter was designated as AF No. 2751. (AR032-035.) On July 23, 2013, the Commission decided by a vote of 5 – 0 to find "reason to believe" that the Kuhn Committee had violated 2 U.S.C. § 434(a) by failing to file the required April 2013 Quarterly Report.[2] (AR036-037.) In the absence of reported campaign activity, *i.e.* the committee's total receipts and disbursements for the period covered by the unfiled report, the Commission estimated $343,963 of campaign activity pursuant to the formula specified in the Commission's regulations. AR035-038; *see* 11 C.F.R. § 111.43(d)(2)(i) (explaining formula for estimating unreported campaign activity of political committees). Based

[2] The Commission's procedures for voting on reason-to-believe findings in administrative fines matters are available at http://www.fec.gov/directives/directive_52.pdf (Sept. 10, 2008).

on the Commission's schedule of civil money penalties at 11 C.F.R. § 111.43, the Commission calculated the appropriate penalty for the Kuhn Committee's reporting violation to be $8,800. (AR038.)

The Commission notified the Kuhn Committee and its treasurer, Amanda Michelle Perry, of its reason-to-believe determination in a letter dated July 24, 2013, that was successfully delivered the following day. (AR038-050, AR051-052.) In addition to informing the Kuhn Committee and its treasurer of the Commission's reason-to-believe determination and civil penalty calculation, the letter explained that any challenge to the Commission's reason-to-believe finding and/or civil penalty calculation must be submitted to the Commission in writing and received within 40 days of that finding, *i.e.* by September 1, 2013. (AR038-039.) The letter further explained the three permissible grounds for challenges to an administrative fine: "(1) a factual error in the RTB finding; (2) miscalculation of the calculated civil money penalty by the FEC; or (3) your demonstrated use of best efforts to file in a timely manner when prevented from doing so by reasonably unforeseen circumstances that were beyond your control." (AR039.) The letter provided specific examples of circumstances that would be considered reasonably unforeseen and beyond the Committee's control as well as circumstances that do not meet that standard. (AR039.) In addition to providing these details, the letter attached a copy of the Commission's administrative-fine regulations. (AR042-050.) Finally, the letter warned that "'failure to raise an argument in a timely fashion during the administrative process shall be deemed a waiver' of your right to present such argument in a petition to the U.S. district court under 2 U.S.C. § 437g." (AR039 (quoting 11 C.F.R. § 111.38).)

The Kuhn Committee never submitted any administrative challenge to the Commission's reason-to-believe determination or civil penalty calculation.

On October 31, 2013, the Commission approved, by a vote of 6 – 0, the Reports Analysis Division's recommendation to make a final determination that the Kuhn Committee and its treasurer violated 2 U.S.C. 434(a), and to assess a civil money penalty of $8,800.[3] (AR057-058.) The Commission notified the Kuhn Committee and its treasurer of its final determination in a letter dated November 5, 2013, and successfully mailed to the Committee's address of record the next day. (AR059-064.) The notification letter advised the Kuhn Committee and its treasurer that their "failure to raise an argument in a timely fashion during the administrative process shall be deemed a waiver of [their] right to present such an argument in a petition to the district court under 2 U.S.C. § 437g." (AR060 (citing 11 C.F.R. § 111.38).)

III. PROCEDURAL HISTORY

The Kuhn Committee, purporting to appear *pro se*, filed its initial petition for review of the Commission's administrative determination in this Court on December 2, 2013. (Docket No. 1) After being ordered by this Court "to bring this case into proper from" (Docket No. 8), the Committee re-filed its petition through its attorney on January 6, 2014 (Docket No. 13), and properly served its petition for review three weeks later (*see* Docket Nos. 19 - 21).

---

[3] The Kuhn Committee ultimately reported $522,776 of campaign activity, more than $178,000 of campaign activity above the estimated $343,963 of activity upon which the $8,800 civil penalty was based. (AR059.) The Commission's regulations would have yielded a higher penalty if the actual amount of the Committee's campaign activity had been disclosed earlier. *See* 11 C.F.R. § 111.43 (a) (providing that civil penalty for $450,000-$549,999.99 of campaign activity is $10,450). The Kuhn Committee received the lesser $8,800 civil money penalty proposed in connection with the Commission's reason-to-believe finding, because the Commission's regulatory formula yielded an underestimate of the level of activity in this case. (AR059.)

ARGUMENT

I. STANDARD OF REVIEW

When district courts determine whether an FEC administrative determination should "be modified or set aside," 2 U.S.C. § 437g(a)(4)(C)(iii), that review is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Under the APA, "courts must uphold agency action unless it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Va. Agric. Growers Ass'n, Inc. v. Donovan*, 774 F.2d 89, 93 (4th Cir. 1985) (quoting 5 U.S.C. § 706(2)(A)); 5 U.S.C. § 706(2)(A), (C).

"[I]n reviewing agency action" the "district court sits as an appellate tribunal," and "the question whether [the agency] acted in an arbitrary and capricious manner is a legal one which the district court can resolve on the agency record." *Univ. Med. Ctr. of S. Nev. v. Shalala*, 173 F.3d 438, 440 n.3 (D.C. Cir. 1999). Indeed, judicial review of final agency action is based exclusively on the administrative record that was before the Commission. 5 U.S.C. § 706; *Trinity Am. Corp. v. EPA*, 150 F.3d 389, 401 n.4 (4th Cir. 1998) ("Review of agency action is limited to the administrative record before the agency when it ma[d]e[] its decision."). "The agency record does not refer simply to the facts presented to the agency but also includes the reasons given by the agency for taking the action. And a reviewing court may look only to these *contemporaneous* justifications in reviewing the agency action." *Dow Agrosciences LLC v. Nat'l Marine Fisheries Serv.* 707 F.3d 462, 467-68 (4th Cir. 2012) (emphasis in original).

"Judicial review of agency action is highly deferential and begins with a presumption of validity." *Am. Whitewater v. Tidwell*, 959 F. Supp. 2d 839, 849 (D.S.C. 2013) (citing *Natural Res. Def. Council v. EPA,* 16 F.3d 1395, 1400 (4th Cir.1993)). The standard of review "is a narrow one"; "[t]he Court is not empowered to substitute its judgment for that of the agency."

Va. Agric. Growers Ass'n, Inc., 774 F.2d at 93 (citations and internal quotation marks omitted). Rather, the agency's action must be upheld if "the agency . . . provide[s] an adequate explanation for its actions . . . [that] show[s] a 'rational connection between the facts found and the choice made.'" *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 350 (4th Cir. 2001) (citation omitted); *see Ohio Valley Envtl. Coal v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) (same).

This case, moreover, involves application of the Commission's own regulations rather than the statute itself, and when a reviewing court is asked to evaluate an agency's "interpretation of its own regulations, . . . [t]his kind of review is highly deferential, with the agency's interpretation 'controlling unless plainly erroneous or inconsistent with the regulation.'" *Ohio Valley Envtl. Coal*, 556 F.3d at 193 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Likewise, "'[a]gencies are entitled to select their own methodology as long as that methodology is reasonable, and [the court] must defer to such agency choices.'" *Am. Whitewater*, 959 F. Supp 2d at 849 (citing *Ohio Valley Envtl. Coal*, 556 F.3d at 201) (internal quotation marks omitted).

In the context of judicial review of final agency action, "[t]he entire case on review is a question of law, and only a question of law[,] [a]nd because a court can fully resolve any purely legal question on a motion to dismiss, there is no inherent barrier to reaching the merits at the 12(b)(6) stage." *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993); *see Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009) (same); *Klock v. Kappos*, 731 F. Supp. 2d 461, 465 (E.D. Va. 2010) ("[I]n an action brought under the APA, there is no material fact at issue but only a question of law."). "[T]he sufficiency of the complaint is the question on the merits, and there is no real distinction in this context between the question

presented on a 12(b)(6) motion and a motion for summary judgment." *Marshall Cnty. Health Care Auth.*, 988 F.2d at 1226; *Batchelor v. Cornerstone Bank*, No. 5:13-cv-781, __ F. Supp. 2d __, 2013 WL 5309578, at *3 (E.D.N.C. Sept. 19, 2013) (granting 12(b)(6) motion to dismiss APA challenge to final determination by Federal Deposit Insurance Corporation and explaining that "the court may consider the administrative record without converting the motion to one for summary judgment"). The party challenging the agency action bears the burden of proof to show that it is entitled to relief. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 884-85 (1990).

II. THE COMMISSION'S DETERMINATION SHOULD BE AFFIRMED

A. The Kuhn Committee Waived Its Arguments by Failing to Present Any Challenge to the FEC During the Administrative Proceedings

FEC regulations explicitly state that an administrative-fines "respondent's failure to raise an argument in a timely fashion during the administrative process shall be deemed a waiver of the respondent's right to present such argument in a petition to the district court under 2 U.S.C. § 437g." 11 C.F.R. §111.38; *see Robertson v. FEC*, 45 F.3d 486, 491 (D.C. Cir. 1995) (explaining that agencies are entitled to prescribe their own procedures, including requirements that parties give timely notice as to the nature of any challenges to agency authority).

This regulatory rule is consistent with the well-settled, general principle that "it is inappropriate for courts reviewing appeals of agency decisions to consider arguments not raised before the administrative agency involved." *Pleasant Valley Hosp., Inc. v. Shalala*, 32 F.3d 67, 70 (4th Cir. 1994) ("'A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.'") (quoting *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946)). "[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has

erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952); *see Transit Homes, Inc. v. United States*, 299 F. Supp. 950, 956 (D.S.C. 1969) ("[T]he rule is well-established that a party may not raise on judicial review an alleged error in the process of administrative adjudication, not raised before the administrative body, which was correctible by the administrative agency if otherwise meritorious.").

Not only is this waiver rule explicitly articulated in the Commission's regulations and well established through judicial opinions, but the Commission directly notified the Kuhn Committee and its treasurer of the regulatory rule in the Commission's July 24, 2013 reason-to-believe letter, which both quoted and cited 11 C.F.R. §111.38, and also attached copies of the Commission's administrative-fines regulations. (AR038-050.)

As noted above, *see supra* p. 9, the Kuhn Committee failed to submit *any* administrative challenge to the Commission's reason-to-believe determination or civil penalty calculation. (*See* AR059-060.) The Committee's belated challenges to the Commission's final determination and civil penalty are improperly asserted for the first time in this litigation, and are therefore not properly before the Court. 11 C.F.R. §111.38; *see Pleasant Valley Hosp., Inc.*, 32 F.3d at 70. For this reason alone, the Kuhn Committee's arguments challenging the FEC's administrative determination must be rejected and its petition for review should be dismissed.

B. Even if the Kuhn Committee Had Not Waived Its Arguments, the Civil Penalty Assessment Should Be Upheld

1. The Kuhn Committee Failed to Timely File Its April 2013 Quarterly Report

The Kuhn Committee admits that it failed to timely file its April 2013 Quarterly Report. The Committee's petition for judicial review explicitly acknowledges that "the report was due

April 15, 2013" and was not filed until "August 20, 2013, *four months and a week after it was due*." (Pet. at 3 (emphasis added).)

The Administrative Record confirms that the Kuhn Committee's April 2013 Quarterly Report was not timely filed. (AR054-058.) Because the report was filed more than 30 days after it was due, the Commission properly treated the report as "not filed" under the applicable Commission regulation, 11 CFR §111.43(e)(1).

These undisputed facts, which are confirmed by the Administrative Record, demonstrate that the Commission's administrative determination that the Kuhn Committee violated FECA's reporting requirements resulted from a proper and straightforward application of FECA and Commission regulations, and was plainly reasonable and not arbitrary or capricious. *See Ohio Valley Envtl. Coal*, 556 F.3d at 192; *Am. Whitewater*, 959 F. Supp. 2d at 848-49.

2. The Commission Calculated the Kuhn Committee's Civil Penalty in Accordance With FEC Regulations

Where, as here, the Commission lacks sufficient information to determine a committee's actual level of campaign activity during the relevant two-year election cycle, FEC regulations provide a formula for estimating a committee's level of campaign activity for purposes of determining the appropriate civil penalty. *See* 11 C.F.R. § 111.43(d)(2)(i).

Here, the Commission estimated the Kuhn Committee's level of unreported campaign activity at $343,963, (AR035, AR038), and, in accordance with the regulatory schedule of penalties for unreported campaign activity in non-election-sensitive reports in the range of $250,000 to $349,999.99, determined that the appropriate penalty for the Kuhn Committee was $8,800. *See* AR038; 11 CFR §111.43(a). The $8,800 civil penalty amounted to about 2.6 percent of the Kuhn Committee's estimated unreported campaign activity.[4] The Commission

[4] The Committee's belated filing reflected a substantially higher level of unreported

adopted the preliminary civil penalty calculation in its final determination (AR054-058).

The Commission's calculation of the Kuhn Committee's civil penalty was the result of a proper and straightforward application of the Commission's regulatory schedule of penalties for reporting violations like the one at issue here. *See* 11 CFR §111.43(a). Under the "highly deferential" standard applicable to interpretations of agency regulations by the agency that promulgated them, the Commission's direct application of its own rules "must be upheld." *See Am. Whitewater*, 959 F. Supp. 2d at 848-49. Indeed, the Kuhn Committee itself acknowledges that its reporting violation warrants some level of penalty. (*See* Pet. at 3 ("The Candidate would be perfectly fine with paying a reasonable fine for missing the due date for filing four months and a week late.").)

3. All of the Committee's Arguments for Reversal of the Commission's Determination Lack Merit

a. The Kuhn Committee's Preference for a Smaller Fine Does Not Demonstrate That the Commission Acted Unreasonably

The Kuhn Committee's petition purports to challenge the civil penalty, for the first time, based on the Committee's subjective assessment that "[a] fine of approximately $300 for late reporting is reasonable," but the $8,800 civil penalty imposed by the Commission against the Kuhn Committee was too high. (Pet. at 3-4.) In support of its belated objection to the civil penalty imposed by the Commission, the Kuhn Committee asserts that the $8,800 fine "is excessive, punitive, [and] egregious, . . . does not look good for the Federal Election

---

campaign activity for the relevant period than the Commission had estimated — $522,776 of actual election activity versus $343,963 of estimated election activity. (*Compare* AR059, *with* AR038.) The Kuhn Committee thus would have owed a higher penalty had it filed over thirty days after its quarterly report was due but before the Commission made its reason-to-believe finding. *See supra* note 3; 11 CFR §111.43(a) (designating civil penalty of $10,450 for $450,000-$549,999.99 of unreported campaign activity). The $8,800 civil penalty amounts to only about 1.7 percent of the Kuhn Committee's *actual* unreported campaign activity.

Commission," and "does not reflect a government that is supposed to be 'by the people, of the people, for the people." (*Id.* at 4.)

Although the Committee might prefer to pay a much smaller civil penalty, its subjective assessment of the appropriate fine for its admitted violation is irrelevant and fails to demonstrate that the Commission acted in a manner that was unreasonable, arbitrary, or unlawful. As explained above, *see supra* Part II.B.2, the amount of the Kuhn Committee's civil penalty was specifically dictated by the Commission's regulations, *see* 11 CFR §111.43(a), which were promulgated pursuant to a specific delegation of authority by Congress. 2 U.S.C. § 437g(a)(4)(C)(i)(II) (providing that the FEC may impose civil money penalty as part of administrative-fines program "in an amount determined under a schedule of penalties which is established and published by the Commission and which takes into account the amount of the violation involved, the existence of previous violations by the person, and such other factors as the Commission considers appropriate"). "[W]hen Congress delegates 'authority to the agency to elucidate a specific provision of [a] statute by regulation[, s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" *McDaniels v. United States*, 300 F.3d 407, 411 (4th Cir. 2002) (citation omitted; alterations in original); *see Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 207 (4th Cir. 1989) ("[A] substantive or legislative rule, pursuant to properly delegated authority, has the force of law, and creates new law or imposes new rights or duties.").

Moreover, the FEC regulations, including the penalty schedule applied in this case, took effect only after being submitted to Congress for its review pursuant to 2 U.S.C. § 438(d). *See* FEC, Final Rule; Transmittal of Regulations to Congress, 65 Fed. Reg. 31,787 (May 19, 2000). As explained in the Commission's Explanation and Justification of its administrative-fines

regulations, the regulatory schedule of penalties was specifically designed to "fairly and equitably assess civil money penalties that reflect the nature and scope of the violation," *i.e.*, to be proportional to the offense. *Id.* at 31,793.

The $8,800 civil penalty imposed on the Kuhn Committee amounts to about 1.7 percent of the Kuhn Committee's actual unreported campaign activity. The Committee's proffered "reasonable" alternative fine of $300 would amount to a mere 0.06 percent of the Committee's unreported activity, an amount so low that committees might well opt to pay the fine "as a cost of doing business" rather than comply with FECA's reporting requirements. Courts in this district, however, have recognized that civil penalties are designed to "discourag[e] future violations" and that "[t]o serve this function, the amount of the civil penalty must be high enough to ensure that [violators] cannot simply absorb the penalty as a cost of doing business." *Friends of the Earth v. Laidlaw Envtl. Servs.*, 890 F. Supp. 470, 491-92 (D.S.C. 1995).

The Kuhn Committee also hypothesizes that "no person or entity had any interest in this report" (Pet. at 3), which "was due . . . 27 days after the Candidate lost the election" (*id.*). Even setting aside the absence of any legal or factual basis for the Kuhn Committee's assumption, the Committee ignores the distinction in the Commission's regulations between reports that are election-sensitive and those that are not. Committees that fail to timely file election-sensitive reports are subject to a separate civil penalty table that imposes fines in amounts greater than those contained in the penalty scheduled applied here. *Compare* 11 C.F.R. § 111.43(a), *with* 11 C.F.R. § 111.43(b). An election-sensitive report that is "not filed" and has a similar estimated level of activity would yield a penalty of $9,900 under that table. Thus the $8,800 civil penalty that the Kuhn Committee purports to challenge here already reflects the fact that the untimely report was not "election sensitive," and the Kuhn Committee's reliance on this fact fails to

demonstrate anything unreasonable, arbitrary, or unlawful about the Commission's determination.

The administrative record clearly demonstrates that the administrative fine imposed on the Kuhn Committee was the result of the Commission's straightforward and proper application of the regulatory penalty schedule to the facts of this case, and the amount of the fine is not unreasonable in light of the Committee's substantial volume of unreported campaign activity. The Kuhn Committee thus cannot demonstrate any legal basis for disturbing the civil penalty assessed by the Commission pursuant to the explicit requirements of FEC regulations.

b. The Kuhn Committee Cannot Maintain a Best-Efforts Defense

The Commission's regulations provide that an administrative-fines respondent may challenge a reason-to-believe finding on the grounds that the respondent "used best efforts to file in a timely manner" but was prevented from doing so "by reasonably unforeseen circumstances" beyond the respondent's control. 11 C.F.R. § 111.35(b)(3); *see also* 2 U.S.C. § 432(i). The circumstances the Commission considers "reasonably unforeseen" include systemic failures such as a breakdown of Commission computers or Commission-provided software, 11 C.F.R. § 111.35(c)(1); widespread disruptions to the internet (not specific to the respondent or its internet service provider), 11 C.F.R. § 111.35(c)(2); or severe weather or a disaster-related incident, 11 C.F.R. § 111.35(c)(3). The Commission's regulations categorically exclude from the best-efforts defense any errors that arise from staff negligence; delays caused by committee vendors or contractors; illness, inexperience, or unavailability of the treasurer or other staff; and a committee's failure to know filing dates. *See* 11 C.F.R. § 111.35(d).

The Kuhn Committee asserts, for the first time in its petition for review, that it "used its best efforts to file [the April 2013 Quarterly Report] on time" but the report "did not get filed on

time . . . due to a lot of extenuating circumstances." (Pet. at 4.) Specifically, the Committee cites alleged difficulties finding someone "willing to serve as Campaign Treasurer"; the collective lack of experience or knowledge regarding FEC filing obligations on the part of the candidate, treasurer, and alternate treasurer; the treasurer's pregnancy and delivery of her baby "12 days earlier than expected"; and alleged errors by the Committee's accountant. (Pet. at 4-10.)

Even setting aside the untimeliness of the Kuhn Committee's attempt to rely on the best-efforts defense, none of these circumstances, individually or collectively, satisfies the regulatory requirements for the best-efforts defense, *i.e.*, that the Committee "used best efforts to file in a timely manner" but was prevented from doing so "by reasonably unforeseen circumstances" beyond the Committee's control. 11 C.F.R. § 111.35(b)(3). On the contrary, the Kuhn Committee's alleged "extenuating circumstances" fall clearly within the categories of circumstances explicitly *excluded* from the best-efforts defense, *i.e.*, errors that arise from staff negligence; delays caused by committee vendors or contractors; and illness, inexperience, or unavailability of the treasurer or other staff. *See* 11 C.F.R. § 111.35(d). The Kuhn Committee's belated attempt to rely on the "best efforts" defense plainly fails to meet the regulatory requirements of that defense.

c. The Kuhn Committee Was Afforded Due Process

The Kuhn Committee asserts that its "constitutional right to due process under the Fifth and Fourteenth Amendments of the United States Constitution" was violated because the Committee supposedly was deprived of "the right to appeal this judgment to the Commission on its merits." (Pet. at 10-11 (emphasis added).) This is incorrect and directly contradicted by the Administrative Record in this case.

As explained in greater detail above, *supra* p. 9, the FEC notified the Kuhn Committee and its treasurer of the Commission's preliminary, reason-to-believe determination on July 24, 2013. (AR038-50.) In that letter, the Commission explicitly informed the Committee of the steps it needed to take to "challenge the RTB finding and/or calculated civil money penalty," and further admonished that failure to raise an argument with the Commission would be deemed a waiver of the right to present any such argument in court. (AR038-039 (citing 11 C.F.R. § 111.38).) The Kuhn Committee's failure to challenge the Commission's reason-to-believe determination or civil penalty calculation through the administrative process does not demonstrate that the agency deprived the Committee of due process, but rather that the Committee failed to avail itself of the administrative process that was expressly available to it. *See Palmer v. City Nat'l Bank of W. Va.*, 498 F.3d 236, 248 (4th Cir. 2007) ("To prove a due process claim, a litigant must show that it was deprived of a protected interest without due process of law.").

The Committee's due process argument appears to be based at least in part on allegations concerning a phone call in August 2013 (Pet. at 11; *see* AR065-068), after the Committee had received the Commission's reason-to-believe letter that outlined the procedures for pursuing an administrative challenge to the Commission's reason-to-relieve determination and proposed civil penalty. The Committee argues that statements by FEC staff explaining that the "factors [the candidate] wished to argue" did not support a best-efforts defense "den[ied] the Plaintiff *the right* to appeal to the Commission on the very issue that existed and created the late filing." (Pet. at 11 (emphasis added).) That assertion is incorrect. The Commission staff's explanation that the Kuhn Committee's proposed "best efforts" defense did not appear to meet the regulatory criteria did not deny the Committee the right to challenge the Commission's determination, nor did the

explanation otherwise violate the Kuhn Committee's due process rights. And the Kuhn Committee's subjective view (Pet. at 11) that the circumstances outlined in its petition for review should excuse its reporting violation or warrant a dramatic reduction of its penalty likewise fail to demonstrate any due process violation. "Whether a deprivation of constitutional rights has occurred is not dependent upon the subjective feelings or beliefs of a plaintiff. In order to properly maintain a due process claim, a plaintiff must have been, in fact, deprived of a constitutionally protected liberty or property interest." *Tigrett v. Rector and Visitors of Univ. of Va.*, 290 F.3d 620, 628 (4th Cir. 2002). The Kuhn Committee cannot identify any due process violation here.

CONCLUSION

For the reasons stated above the Court should grant the Commission's motion and dismiss the Kuhn Committee's petition for review.

Respectfully submitted,

Lisa J. Stevenson
Deputy General Counsel – Law

Kevin Deeley
Acting Associate General Counsel

Erin Chlopak
Acting Assistant General Counsel

Benjamin A. Streeter III
Attorney

FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

March 27, 2014