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

KUHN FOR CONGRESS	)	Civil No. 2:13-cv-03337-PMD WWD
Plaintiff,	)	
vs.	)	OBJECTIONS TO REPORT AND RECOMMENDATION
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

PLANTIFF KUHN FOR CONGRESS'S WRITTEN OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

In the instant action, the United States Magistrate Judge and the Defendant Federal Election Commission completely missed the point of the Plaintiff's filing this lawsuit in the Federal District Court and the point of the Plaintiff's Complaint and Argument. The Plaintiff, Kuhn For Congress, does not challenge the decision of the Federal Election Commission to fine the Plaintiff $8,800 for late filing of its April, 2013, Quarterly Report. To the contrary, Plaintiff admits that it filed the Quarterly Report late and the Plaintiff admits that it should pay a fine.

The reason for the lawsuit is that the Defendant's fine is extremely egregious for a mere late filing of a report that is not even election sensitive. The Plaintiff's Complaint and Memorandum do challenge the amount of the fine of $8,800 as being arbitrary and capricious. Moreover, the Plaintiff complains that the FEC's statutes and procedures are unconstitutional as applied to the First, Fifth, and Eighth Amendments. Furthermore, Plaintiff clearly argues that the

FEC did not do an adequate job of notifying the Plaintiff that it was under review for violation of the FEC's reporting deadlines. Also, the Plaintiff argues that the FEC's staff, either inadvertently or intentionally, thwarted the Plaintiff's ability to represent itself at the FEC's in-house administrative-fines proceeding. The FEC staff did this by telling the Plaintiff that it had no chance to successfully argue its case at the administrative-fines hearing because the three permissible grounds for challenges to the administrative fine were extremely narrow, that all the Plaintiffs arguments were outside the permissible grounds for challenges, and that Kuhn For Congress "might as well appeal directly to the Federal District Court." Therefore, Kuhn for Congress effectively did not have an opportunity to be heard at the FEC's in house administrative-fines proceeding and now, under the recommendation of the United States Magistrate Judge, Kuhn For Congress will still not have an opportunity to be heard in this case. This is a Constitutional lack of Due Process. The Plaintiff pleads for the Court to allow it Due Process.

Moreover, because of the statements of the United States Magistrate in his letter to the Plaintiff and Defendant, dated August 22, 2014 (Exhibit A), the Plaintiff is under the impression that the Magistrate Judge did not even read "Plaintiff Kuhn For Congress's Memorandum to Deny Defendant's Motion to Dismiss," filed with the Federal District Court on July 29, 2014. In this letter the United States Magistrate states: "I have carefully reviewed the motion, the response to the motion, and the Commission's reply." Nowhere does he state that he also reviewed the Plaintiff's following Memorandum. It is no wonder that the United States Magistrate then states in his letter: "My review of these papers leads to the inexorable conclusion that the Commission's argument in support of the motion to dismiss is correct." If the United States Magistrate had also reviewed the Plaintiff's Memorandum (which contains the

Plaintiff's legal argument) there could hardly be any way that the Magistrate could come to "the inexorable conclusion that the Commission's argument in support of the motion to dismiss is correct."

The Plaintiff's argument is not that the FEC is correct in stating how it proceeded under its guidelines (in fact, Plaintiff admits that the FEC is correct in its statement of its own guidelines); the Plaintiff's legal argument is the Defendant's guidelines and internal statutes are arbitrary and capricious and unconstitutional. Also, the Plaintiff's legal argument is that the fine itself is capricious and arbitrary and unconstitutional; the Plaintiff's legal argument is that the FEC denied Kuhn For Congress all Due Process under the law. Moreover, the Plaintiff's factual argument is that the FEC effectively blocked Kuhn For Congress from appealing within the FEC's in-house system of review. Therefore, Kuhn for Congress is pleading to argue its case in this Honorable Court. And, the Plaintiff is pleading that this Honorable Court read the Plaintiff's Memorandum, filed with this Honorable Court on July 29, 2014.

SPECIFIC OBJECTIONS TO PROPOSED FINDINGS OF FACT

Paragraph 1. Admit.

Paragraph 2. Admit, except that an Agent or other member of the committee may file the reports electronically.

Paragraph 3. Admit.

Paragraph 4. Admit.

Paragraph 5. Admit, except that the Federal District Court does have judicial review of the Federal Agency.

Paragraph 6. Admit.

Paragraph 7. Admit.

Paragraph 8. Admit as stated. However, the fact that the FEC promulgated regulations and implemented an administrative fines mechanism does not mean that the regulations are not arbitrary and capricious. This is, in fact, Plaintiff's argument: Just because the FEC promulgates internal regulations does not automatically make them fair and sensible. In fact, this is precisely why we have Federal Judicial review in the United States: We want to have checks and balances on what Federal Agencies unilaterally promulgate and implement and we want the Judiciary to have the power to veto regulations and internal statues that are arbitrary and capricious.

Paragraph 9. Admit.

Paragraph 10. Admit, except that the April, 2013, Quarterly Report was filed by the Plaintiff as soon as humanly possibly once the Candidate found out that it was late. As soon as John Kuhn personally found out that his Committee had not filed a Quarterly Report, he immediately had the Report filed. There was no delay whatsoever once he found out. Just because the FEC sent his campaign an email saying that his filing was late does not actually mean that John Kuhn actually received the email. (See, Paragraph 16.)

Paragraph 11. Paragraph 11 is exactly one of the points in contention by the Plaintiff. The FEC states that "These penalty schedules take into account whether the untimely (or not filed) report was election sensitive, how late is was filed, the dollar amount of receipts and disbursements it detailed, and the number of prior violations by the respondent. The Plaintiff meets two of these four points, on the third point the Plaintiff did all it humanly could considering the circumstance, and the fourth point the FEC makes is completely and unadulterated arbitrary and capricious.

First, this particular report was not election sensitive because it was due to be filed after the election was lost by the candidate. Therefore, the fine should be significantly lower.

Second, the Plaintiff had no prior violations whatsoever. In fact, the FEC did not take into account at all. The Plaintiff had filed all three prior election sensitive reports on a timely basis. This is crucial because it proves that the Candidate wanted to make sure everyone (his opponents, the Press, and any other human being) saw his expenditures and receipts (donations) on a timely basis during the election. Extremely important is that Candidate did, in fact, accomplish that. That is the only thing that should be paramount to the FEC and that was accomplished: That anyone could see the candidate's full expenditures and receipts right through the election on a timely basis. Therefore, the fine should be minimal according to the Commission's own internal statute.

Third, how late the report was filed should be decidedly tempered by the fact that the Candidate was not actually notified by the Commission for over three months after the report was due. The Candidate did not receive the only notification the Commission claims to have sent the Candidate, a May 3, 2013 email to the Committees Treasurer (who was no longer involved because she had a baby ten days after the election and because the Candidate lost). The FEC should absolutely have to mail an actual letter to the Candidate (in addition to an email that could be in a spam folder, or be lost on a server due to size regulations, or might not even have gone out at all if there was a glitch in the cyber-world somewhere) noticing the Candidate that it has not filed one of its quarterly reports. Indeed, the Commission is going to initiate an administrative-fines proceeding against the Kuhn Committee (which it did in July, 2013) without ever actually sending the Committee a mailed letter? That is unbelievable. And, it certainly does not constitute Notice of a very important judicial proceeding against the Candidate's

Committee. This is an egregious violation of due process (as argued in the Plaintiff's Memorandum, filed with this Honorable Court on July 29, 2014). This even violates every iota of sensibility when it comes to Notice in a normal Judicial Proceeding, such as in this Honorable Court where every proceeding has to be Notified to all parties by mail and by formal filing. Finally, once the Candidate found out that his Committee had not filed the April, 2013, Quarterly report on a timely basis with the FEC, he immediately remedied the problem by filing the report. This shows a good-faith effort by the Candidate to file immediately, just as the fact that the Candidate filed all prior reports on a timely basis shows a good-faith effort to file and to notify the public. Should this good-faith effort, coupled with several mitigating circumstances, legitimately end up in a fine of Eight-Thousand-Eight-Hundred Dollars to the Candidate for a late filing of a non-election sensitive Quarterly Report? Plaintiff contends that this is the very definition of arbitrary and capricious on the part of the FEC.

Fourth, how can the Commission get any more arbitrary and capricious than by basing its Committee fines on "the dollar amount of receipts and disbursements it detailed?" This is a late filing of an information-only Quarterly Report. This is not the late filing of a lawsuit, or the late or the late paying of someone's rent, or the late filing of a tax return. In fact, even the IRS does not fine a person or entity as a percentage of the amount of tax the person or entity owes. The IRS, for the egregious violation of late filing a tax return, still only fines a set amount based upon how late the return is. (This is not to be confused with the fact that the IRS will charge interest as a percentage of the tax that is overdue, if any tax is overdue. Yet, even in that worse-case-scenario, the IRS is still only charging a percentage of late tax due – not a percentage of arbitrary amounts that go through a person's checking account the year the tax is due.) Compare that with the FEC, which does exactly that: Bases a Campaign's late filing fee upon the arbitrary amount

of how much money just so happened to go through the Campaign's checking account that quarter! This would be kin to the Probate Court arbitrarily basing the fee for late filing of a Motion in Probate Count on the amount of the Gross Probate Estate! For example, if the Gross amount of a person's probate is zero, we will fine him nothing for late filing; if the gross probate is $500,000 we will fine him $15,000; and, if the gross estate is $1 Million, we will fine him $30,000 for a mere late filing! No, that would not be a simple fine by the probate court for late filing; that would be an egregious and capricious and arbitrary levy for a late filing. However, by their own admission, that is exactly how the FEC comes up with its fine for late filing of an information-only quarterly election report: It fines the Candidate based simply on how many dollars just-so-happened to go through the candidates campaign bank account that month: If the candidate raised $1,000 that month, the late filing fee is about $30. If the candidate raised $343,963 that particular quarter, his late filing fee for the informational report is $8,800! If the candidate just so happens to raise $500,000 for the quarter in question, then the Candidate's fine by the FEC is $10,450. You cannot possibly get more arbitrary and capricious than this. Moreover, think of the chilling effect this will have on American Citizens (like schoolteachers) who are thinking about filing to run for United States Congress: "Mam, don't forget that if you file a late quarterly informational report to the FEC you are facing average fines of approximately $8,800." "Oh, and Mam, no excuses allowed whatsoever, not even after you have filed several reports on time and the election is over." "It's $8,800 under the FEC 'civil money penalty,' take it or leave it, Mam."

Paragraph 12. Admit.

Paragraph 13. Admit.

Paragraph 14. Admit

Paragraph 15. Admit

Paragraph 16. The FEC states: "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." The FEC emailed a letter? That is not actually mailing a letter. And, to whom? Because the Kuhn Committee did not get the email. In fact, the Kuhn For Congress computers were gone at that point because the election was over. And its treasurer? We don't think so. She was home with her newborn baby at that time. How about to the Candidate himself? Absolutely not, because he did not receive the email. There are many, many, many reasons why one may not receive an email. Why would not the FEC be required to actually mail the letter by US Mail, the same way almost every institution in the United States requires if they are going to Notify someone of some important deadline that has enormous fines attached to it? (Oh, because they make their own rules and statutes.) Certainly the IRS does not operate by email. Certainly the Federal Courts do not operate by email. This is definitely not Notice. Under no stretch of the imagination can an email by the FEC be considered notice to the Candidate of a late report or, worse yet, of an internal hearing. Therefore, the Proposed Findings of Fact and Conclusions of Law certainly cannot state in Paragraph 16 that which it states: "That letter (sic, email, not letter) advised 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." In fact, we can clearly see that the Committee did not warn that civil penalties might result from the Committee's failure to file the report." Because the email was not received by eth Committee, or by anyone associated with the Committee, the Committee had no idea that it was subject to civil penalties, and the Committee still had no idea that an internal hearing would be held to fine the Committee.

Paragraph 17. This paragraph jumps right to the conclusion that "The Kuhn Committee filed its April 2013 Quarterly Report on August 20, 2013, or more than 120 days after the statutory deadline for filing the report." First, this is not a "statutory deadline." This is an administrative agency deadline. Second, what about notice to the Candidate that there is going to be an internal FEC hearing – an "administrative fines proceeding?" There was no written notice to the Candidate whatsoever that there would be an "administrative-fines proceeding against the Kuhn Committee." This is a blatant violation of a person's Due Process by the Federal Election Commission. Surely the Commission should be required to notify a Candidate by United States Mail. The Commission did not even notify the Candidate or the Committee or the Treasurer by email that the Commission was conducting a hearing.

Paragraphs 18, 19 and 20. The Commission initiated an administrative-fines proceeding against the Kuhn Committee and on July 23, 2013, the Commission decided by a 5-0 vote to find the Committee had violated 52 U.S.C. $30104(a). This all took place without the Candidate having any idea the FEC was having a hearing for fining him. In fact, this all took place without any notice to the Committee or the Candidate whatsoever. This is Unconstitutional and a violation of Due Process.

Paragraphs 21 and 22. The Commission arbitrarily and capriciously fined the Kuhn Committee $8,800 at a hearing he was not even informed that he should attend.

Paragraph 23. The paragraph states, "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, AR 051-052). Finally! A letter from the FEC to the Kuhn Committee. And, voilà, the Candidate indeed finds

out about the administrative hearing and the $8,800 penalty since the FEC finally mailed an actual letter by U.S. Mail. Of course, this is the first time the Candidate even finds out that the April, 2013, Quarterly Report was not filed; let alone, the first time the Candidate finds out there was to be a hearing and there was to be a fine. The Plaintiff repeats its complaint: The FEC cannot operate without Notice and without Due Process.

Paragraphs 25. As soon as former Candidate John Kuhn received the July 24, 2013, letter from the Commission, he immediately called the Commission to see why he was in trouble and see why he was being fined the outrageous fine of $8,800 for a late informational report that he did not even know was not filed. This was in early August, 2013. At that time he got Sari Pickerall of the FEC on the telephone to ask her what had happened and why the letter he just received from the Commission said, "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." Unfortunately, after Ms. Pickerall listed to Mr. Kuhn's reasons why the quarterly report was not filed, Ms. Pickerall informed Mr. Kuhn that "he might as well not waste his time challenging the FEC's finding because none of Mr. Kuhn's reasons were going to fit in the thee permissible grounds for challenges to an administrative fine and that he might as well just proceed with appealing to the Federal District Court. Mr. Kuhn took the FEC at their word, and did not bother to file an internal challenge to the Commissions finding and decided to appeal to the Federal District Court, as Ms. Pickerall suggested. The FEC staff should not tell a Candidate there is no point to appeal internally if that is going to estop the Candidate from appealing to the Federal District Court. However, in this case, that is exactly what happened and, therefore, Kuhn For Congress has not had its hearing or day in court. Worse yet, the Kuhn Committee did not even know about the first administrative proceeding against it

where the determination was made by the FEC to fine the Committee the egregious amount of $8,800 for a late filing of a non-election-sensitive information-only quarterly report.

Paragraphs 26 and 27. The notification letter that the Kuhn Committee had lost the internal hearing is way too late in the proceeding to notify the Candidate that the internal proceeding is even happening. One cannot notify a candidate by writing after the hearing that there has been a hearing, and worse yet, a definitive determination has been made at the hearing. Again, utter lack of Notice and utter lack of Due Process. The Commission has violated its own statute, 52 U.S.C. Sec. 30109(a)(4)(C)(ii), 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.'"

Paragraph 28. Does not apply because the Commission did not notify the Candidate in writing, by either email or written letter in the U.S. Mail, that the first internal hearing was going to take place on July 23, 2013. Furthermore, the FEC staff informed the Candidate that it would be a waste of time to appeal the decision so the Candidate did not challenge the finding within the FEC internally.

Paragraph 29 and 30. Not relevant since the Commission did not give the Candidate notice to the original violation and hearing, and the Commission told the Candidate not to bother with its internal appeal because the grounds to appeal are limited to issues the Candidate did not have according to the FEC Staff member.

Paragraphs 31-36. The very reason that the Plaintiff has to petition to the U.S. District Court is because the Plaintiff has been actually been denied Due Process by lack of Notice and has been effectively denied Due Process by statements made by the FEC's own staff. And, because of this, the Plaintiff still has not had its "day in court."

CONCLUSIONS

Under Paragraph 2 of the "Conclusions Of Law" of the United States Magistrate's PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, it states: Under the Administrative Procedure Act, "courts must uphold agency action unless it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" The Plaintiff has demonstrated, unequivocally, that the Federal Election Commission arbitrarily and capriciously fined Kuhn For Congress $8,800 for the late filing of a non-election-sensitive, information-only report (after the Committee had already filed all three prior reports on a timely basis). The FEC did this by: 1. Not notifying the Candidate in writing, by U.S. Mail or otherwise, that it was initiating an administrative-fines proceeding, thereby not giving the Candidate any Notice whatsoever, 2. By failing to give Mr. Kuhn Due Process by telling him that the second hearing was "a waste of his time" because he could not fit within the FEC internal guidelines for internal appeal, and 3. By fining the Committee capriciously by basing the fines on whatever "the amount of money that happens to go through the campaign checking account that quarter."

Furthermore, the proposed finding under Paragraph 13, "The $8,800 civil penalty assessed by the FEC against the Plaintiff was properly calculated pursuant to FECA and the FEC's regulations…" is irrelevant because it is the basis for the calculations themselves that are "arbitrary and capricious." This is a violation of the Plaintiff's Constitutional Rights, as delimitated in the Plaintiff's Memorandum.

Paragraph 15 of the Conclusions of Law misses the whole point of the Plaintiff's Complaint and argument. The Plaintiff is not arguing the "best efforts" defense. The Plaintiff surly fails under the "best efforts" defense. Rather, the Plaintiff is proving exactly what is argued throughout this whole brief, and which we have clearly stated in our Conclusions directly

above: The Magistrate correctly states that "under the Administrative Procedures Act, courts must uphold agency action unless it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" And, that is exactly the Plaintiffs complaint and argument: In this case the FEC's fine is arbitrary and capricious; in this case the FEC's Notice was arbitrary and capricious and not in accordance with the law, and the FEC's self-created internal regulations, regulating punishments for late filings, are arbitrary and capricious and not in accordance with law. Therefore, the Defendants Motion to Dismiss should be denied and the Plaintiff should finally have its day in court (since the FEC did not give this Committee its day in court because of its lack of Notice and its Staff admonition to the Committee that appealing internally to the FEC was "a waste of time.").

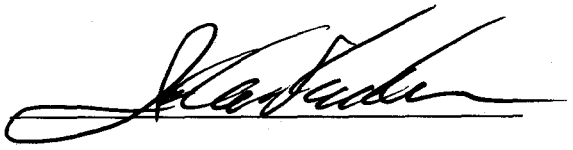
Also of grave importance in this matter is the opening paragraph of the FEC's Rule 12(b)(6) Motion to Dismiss in which the FEC states point-blank: "The motion should be granted, because the FEC did not act arbitrarily, capriciously, or otherwise contrary to law in assessing a civil money penalty against Kuhn For Congress for its failure to timely file a statutorily mandated campaign-finance disclosure report in April 2013, as required by the Federal Election Campaign Act." In fact, Kuhn For Congress has just shown, unequivocally, that the FEC did, in fact, act arbitrarily, capriciously and otherwise contrary to law in assessing its extremely arbitrary fine on Kuhn For Congress and did so while blocking Kuhn For Congress from legitimate Due Process. Moreover, clearly Kuhn For Congress has a Claim and the Claim has not been waived by Kuhn For Congress; contrarily, the Claim has been very effectively blocked by the FEC and its Staff by failing to give Notice to the Committee of the first hearing and then misleading the Committee as to the second hearing.

Finally, the Plaintiff has demonstrated that the chilling effect that the FEC is creating on a normal American desiring to run for Public Office is significant and the FEC should be required to remove the chilling effect by promulgating more reasonable fines and regulations. This Constitutional argument is also under the sole review by the Federal District Court because it is a Constitutional argument and cannot even be heard at the Administrative level. The Administrative rules and procedure do not apply when the Constitutionality of the Federal Agency's regulations comes into question.

For the reasons stated above, Plaintiff respectfully requests that this Honorable Court deny the Defendant's motion to dismiss and allow Plaintiff adequate due process based on an adverse agency decision.

Respectfully submitted,

Date: October 16, 2014



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