2016 IL App (1st) 150516-U

SIXTH DIVISION
June 30, 2016

No. 1-15-0516

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KANE COUNTY CONSERVATIVE COALITION, Petitioner, v. COREY JOHNSON and the ILLINOIS STATE BOARD OF ELECTIONS, Respondents.	)	Direct Administrative Review from the Illinois State Board of Elections No. 14-CD-109.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 ***Held:*** We confirm the decision of the State Board of Elections which found that: (1) certain expenditures were properly attributed to the respondent campaign committee; and (2) that the committee violated disclosure laws by failing to report those expenditures.

¶ 2 The respondent, Corey Johnson, filed a complaint with the Illinois State Board of Elections (Board) alleging that the petitioner, the Kane County Conservative Coalition (KCCC), violated the Illinois Election Code (Election Code) (10 ILCS 5/1-1 *et seq.* (West 2014)) by failing to disclose costs incurred for printing and mailing campaign literature pertaining to the

March 2014 Republican General Primary race for Kendall County Clerk and Recorder. The Board ruled in favor of Johnson and found that KCCC failed to disclose expenses relating to the literature. The Board ordered KCCC to amend its disclosure reports to include the expenditures, and referred the forthcoming amended reports to its staff for review and determination of an appropriate civil penalty for the late filings. KCCC has appealed that decision directly to this court pursuant to section 9-22 of the Election Code (10 ILCS 5/9-22 (West 2014)). See also 735 ILCS 5/5-113 (West 2014).

¶ 3 On appeal, KCCC contends that the Board erred by finding that KCCC was responsible to report the expenditure in question as its own. KCCC also contends that, if the expenditure was reportable, a different committee - Citizens for Koukol - should have reported it. We reject KCCC's contentions and confirm the order of the Board.

¶ 4 BACKGROUND

¶ 5 Dan Koukol ran for Kendall County Clerk and Recorder in the March 2014 Republican General Primary Election against the incumbent, Debbie Gillette. Koukol lost the primary election to Gillette. On June 10, 2014, Johnson filed a complaint with the Board alleging that KCCC violated sections 9-9, 9-11(a)(4), and 9-11(a)(12) of the Election Code (10 ILCS 5/9-9, 9-11(a)(4) and 9-11(a)(12) (West 2014)) by: (1) not identifying itself as the party responsible for sending a mailing attacking Gillette (attack mailer) which stated on its face that it was "Paid for by Kendall County Taxpayers for Good Government" (Taxpayers); and (2) not reporting contributions and expenditures related to the attack mailer. Johnson's complaint further alleged that because Taxpayers was "either the same entity as the [KCCC], or, at best a subsidiary," the KCCC violated the Election Code by, among other things, failing to report the contributions and

expenditures for the attack mailer. Johnson supported his claim with several facts linking Taxpayers to KCCC.

¶ 6 After a closed preliminary hearing at which no one appeared for the KCCC, the Board determined the complaint was filed on justifiable grounds and ordered that the matter proceed to a public hearing. 10 ILCS 5/9-21 (West 2014).

¶ 7 At the public hearing, the following evidence was adduced. Koukol had his own campaign committee, "Friends of Dan Koukol". His campaign was supported by two persons who were not members of his campaign committee: Jerry Bannister and Jon Zahm. Zahm was a professional political consultant and president of "Goliath Slayer Communications" who was the "sole representative" of the KCCC, a political action committee established since 2002, although he lived neither in Kane nor Kendall County. The KCCC had no bank account and operated solely in cash. Zahm's primary income was from political consulting, including assisting campaign committees in completing Board financial disclosure forms. Zahm produced a campaign plan and a poll for Koukol's campaign. Bannister worked on Koukol's campaign and drafted the attack mailer, including placing Taxpayers' name and return address on it to make it appear as though it had not been issued by Koukol.

¶ 8 Bannister and Zahm produced two mailers sent to Kendall County voters just before the election. One mailer was positive in tone and touted Koukol's qualifications. The other was the attack mailer, which listed the KCCC's post office box as its return address. Bannister had pointed out to Zahm that a post office box could not be purchased anonymously, so Zahm agreed to the use of KCCC's box, Post Office Box 4, in Batavia, Illinois, as the return address for the attack mailer.

¶ 9 Emails between Bannister, Koukol, and Zahm revealed that all three were involved, to some extent, with the production and attribution of the attack mailer. Bannister wrote to Zahm, "This will be a THIRD party mailing!" and "it would be best if this came from outside obviously and we need help on that. We need a return address." Zahm wrote that the attack mailer was "very powerful" and "[y]ou might want to buy a P. O. Box in Kendall County and launch it out of there. No disclosure required if we keep the spending to [$]2999[1]. Then we can call it Kendall County Taxpayers for Good Government." Bannister then asked Zahm to make changes so that it appeared that Zahm, not Bannister, was the author, including an admonition to Zahm that Zahm "scrub" Bannister's "info off." Zahm responded that he had Post Office Box 4 in Batavia, and the men exchanged various typographical and stylistic corrections to the mailer. Zahm had the only key to the post office box.

¶ 10 Zahm and Bannister also exchanged emails establishing details such as quantity, mailing lists and printing instructions. Zahm gave the final document and mailing list to a printer with instructions to print and mail the piece. He stated that Taxpayers "[w]asn't my committee" and that the cost of the attack mailer was below the reporting threshold, meaning that Taxpayers would have not have to establish itself as a political committee under Article 9 of the Election Code and file disclosure reports.

¶ 11 In an email to Bannister, Zahm said "someone run a money order to him in my name to pay for [the attack mailer]." Koukol delivered his own personal check for $2,940 to the printer, Philip Elizondo, Jr., to pay for the attack mailer. He denied holding any position of authority with Taxpayers, was uncertain if Taxpayers even existed, and if it did, he believed that it existed only to be a conduit for the one-time attack mailer. He denied that he ever reviewed or approved

[1] The reporting threshold for political committees was $5,000 at the time of the events in question, not $3,000 as Zahm believed. See 10 ILCS 5/9-1.8 (West 2014).

the attack mailer. Board records showed that the KCCC filed a quarterly report for the period in question but did not report either a contribution or an expenditure for the attack mailer.

¶ 12 Philip Elizondo, Jr., a printer who operated through Premier Mailing Service, Inc., testified that he received emailed instructions from Zahm to print and mail the attack mailer, that he issued an invoice for his work, and that Koukol paid the invoice. He denied knowing either the KCCC or Taxpayers.

¶ 13 Based on this evidence, the hearing officer issued a detailed 15-page ruling summarizing the evidence and applicable legal principles. He framed the issue before the Board as whether Taxpayers was an "independent political committee," or instead was a "subterfuge, intended to mislead potential voters from knowing the true source of the mailer." The hearing officer applied the functional approach adopted by this court in *Brennan v. Illinois State Bd. of Elections*, 336 Ill. App. 3d 749 (2002), and determined that the KCCC could not thwart the disclosure requirements by concealing the contribution and expenditures in question. The officer reached this conclusion because: (1) Zahm, Bannister, and Koukol were all involved with the attack mailer; (2) the mailing was produced "cloaked in layers of secrecy"; and (3) none of the three men acknowledged membership in Taxpayers. The hearing officer found that the funding of the attack mailer should have been disclosed, and recommended that the Board order KCCC or Friends of Dan Koukol to do so.

¶ 14 The Board adopted the hearing officer's recommendations in a final administrative order. The Board additionally found that the three men "collaboratively created, distributed and/or paid for" the attack mailer, that its distribution was not "motivated" by an exercise of their First Amendment rights, and that KCCC did not report the contribution and expenditure related to the attack mailer. As a remedy, the Board ordered the KCCC (but not Friends of Koukol, which was

not a party to the underlying case) to amend its March 2014 quarterly report to reflect the funding for, and expense of, the mailer, and that on receipt of the amended report, Board staff should review the matter further to determine whether an assessment of a civil penalty was appropriate. This appeal followed.

¶ 15 ANALYSIS

¶ 16 On appeal, the KCCC argues that: (1) the Board erred by applying a "corporate entity analysis" to associate the Taxpayers' attack mailer to the KCCC; (2) the board's factual findings were against the manifest weight of the evidence; and (3) if the attack mailer should be reported at all, it should be reported by Citizens for Koukol, not KCCC. The KCCC has abandoned the argument which it made below, that the attack mailer was anonymous political speech protected under the First Amendment to the United States Constitution, and we deem that argument to be forfeited. *Wright Development Group, LLC v. Walsh*, 238 Ill. 2d 620, 639 (2010) (argument not made in appellate brief is forfeited).

¶ 17 Judicial review of a decision of the Board is governed by the Administrative Review Law (735 ILCS 5/3-101 *et seq*. (West 2014)). Under that law, our review extends to all questions of law and fact presented by the record before us. 735 ILCS 5/3-110 (West 2014). The applicable standard of review and degree of deference we give to the Board's decision depends upon whether the question presented is one of fact, one of law, or a mixed question of law and fact. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 391 (2001). A mixed question of law and fact is one "involv[ing] an examination of the legal effect of a given set of facts." *City of Belvidere v. Illinois State Labor Relations Bd.*, 181 Ill. 2d 191, 205 (1998). Stated another way, a mixed question is one "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy

the statutory standard, or *** whether the rule of law as applied to the established facts is or is not violated." *AFM Messenger Service*, 198 Ill. 2d at 391 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)). The Board, and its hearing officer, considered how the statutory disclosure requirements applied to the evidence adduced from numerous documentary exhibits and the testimony of several witnesses. Accordingly, this case presents a mixed question of law and fact. See, *e.g.*, *Santana v. State Bd. of Elections*, 371 Ill. App. 3d 1044, 1050 (2007) (applying clearly erroneous standard to a similar non-disclosure claim).

¶ 18 An agency's decision is clearly erroneous only when the reviewing court, upon consideration of the entire record, is "left with the definite and firm conviction that a mistake has been committed." *AFM Messenger Service*, 198 Ill. 2d at 395 (quoting *U.S. v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). We may affirm an administrative agency's decision on any basis appearing in the record, regardless of the basis or reasoning provided by the agency for that decision. *Ball v. Bd. of Education of the City of Chicago*, 2013 IL App (1st) 120136, ¶ 27. "Accordingly, the salient issue is whether sufficient grounds exist in the record to justify the Board's ultimate decision." *Santana*, 371 Ill. App. 3d at 1057.

¶ 19 Article 9 of the Election Code establishes a comprehensive system ensuring public disclosure of contributions to, and expenditures by, political committees. This system "is intended to preserve the integrity of the electoral process." *Sorock v. Illinois State Bd. of Elections*, 2012 IL App (1st) 112740, ¶ 2. There are five types of political committees, each subject to regulations relevant to their particular purposes. 10 ILCS 5/9-1.8 (West 2014). The types of committees relevant to this case are candidate political committees (such as Citizens for Koukol) and political action committees (such as KCCC). Each political committee must file quarterly reports of its contributions and expenditures. 10 ILCS 5/9-10(b) (West 2014). "Willful

failure to file or willful filing of false or incomplete information" required by Article 9 is unlawful and punishable by a fine. 10 ILCS 5/9-26 (West 2014). The Board, through its regulations, has interpreted section 9-26 to provide that any attempt to "circumvent the clear intentions of the [section] by means of subterfuge" is itself a violation of Article 9 of the Election Code. 26 Ill. Adm. Code 100.90 (eff. Feb. 4, 2011); see also *Brennan*, 336 Ill. App. 3d at 765 (applying the subterfuge rule to similar facts).

¶ 20 In 2009, the General Assembly amended Article 9 to add a host of new provisions prohibiting entities (such as public officials, candidates, local political party organizations, and corporations) from forming multiple political committees. One such provision prohibits natural persons from forming multiple political action committees. 10 ILCS 5/9-2(d) (West 2014).

¶ 21 The facts of this case are similar to *Brennan* and *Santana*. In *Brennan*, 336 Ill. App. 3d 749 (2002), this court examined somewhat similar conduct and affirmed a decision of the Board imposing sanctions on an attorney who funded the production and distribution of 7,000 videotapes which were anonymously sent to voters regarding candidates in a school board election. This court affirmed the Board's findings that: (1) the attorney should have established a campaign committee within five days of incurring the expense for the videotape production and did not do so; and (2) was the *de facto* chairman of the committee that he did later establish, even though someone else was actually named as chairman in the committee's official filings. This court stated that the attorney "essentially, *was* the committee." (Emphasis in the original.) *Id.* at 763.

¶ 22 In *Santana*, Victor Santana, a political consultant, was paid by an individual to fund two related mailings on behalf of a judicial candidate. *Santana*, 371 Ill. App. 3d at 1048. The mailings stated they were from a Republican organization which was not an established political

committee on file with the Board and which the local elected Republican committeeman stated did not actually exist. Although Santana was working for the judicial candidate supported by the mailer, her political committee did not reimburse him or his supplier for it. The Board determined that Santana violated the Election Code by spending more than the threshold amount for the mailer without forming a political committee. *Id*. at 1050. The Board fined Santana and granted certain other relief. *Id*. This court affirmed, holding that section 9-3 of the Election Code "clearly provides, as clearly interpreted in *Brennan*, that a political committee is formed by the simple conduct of the actors involved in its formation." *Id*. at 1052. This court concluded, "Santana exhibited indicia of a political committee by producing and procuring campaign literature, paying for such materials with his own cash funds, and ensuring its dissemination. Based on the evidence at the hearing, the Board concluded that Santana violated all of the financial reporting requirements of section 9–10 and we cannot conclude that the Board's finding was in error." *Id*. at 1056.

¶ 23 When *Brennan* and *Santana* were decided, the General Assembly had not yet enacted section 9-2(d) of the Election Code, which limits persons to forming only one political committee.

¶ 24 KCCC first argues on appeal that the Board's decision is erroneous because the Election Code does not apply "corporate entity" alter ego or agency law so as to correlate the actions of persons involved in the political process with particular political committees. Johnson counters that the Board did no such thing, but merely followed this court's precedents and adopted a "pragmatic approach" to a case where "individuals are attempting to conceal expenditures and circumvent disclosure." In *Brennan* and *Santana*, as here, the Board looked beneath surface formalities to ascertain the actual conduct and motivations of the persons at issue. A close

examination of the hearing officer's detailed analysis, which the Board itself adopted in full, reveals that the Board's findings were largely based on the approach which this court adopted in *Brennan*. And, as Johnson points out, "corporate law concepts would be more forgiving to KCCC, because corporate law allows one person to have many corporations, but the Election Code limits Zahm to one political action committee."

¶ 25 KCCC also argues on appeal that Taxpayers did, in fact, exist as a separate entity, and that Taxpayers had a right to spend less than $5,000 on a political mailing without triggering the disclosure requirements of Article 9 or entangling itself with any other committee. KCCC claims that "any number of committees can operate without public reporting of their officers and expenditures". Though true in the abstract, that observation does not mean that a person who *has* established his own one-person political action committee, or the committee itself, can split its efforts into small segments and disguise them under assumed names to avoid the reporting requirements. By enacting the "one political committee rule" in 2011, the legislature closed the potential loophole under which a person could avoid disclosure of the source of political donations by establishing an unlimited number of political action committees, each spending under the reporting threshold. Under KCCC's theory of the case, he would actually have two political action committees – one which had sufficient assets to trigger the reporting requirements (KCCC) and a second one which was not required to file reports because too little money flowed through its coffers (Taxpayers). That theory directly contradicts both the letter and spirit of section 9-2(d) which restricts natural persons to form only one political action committee.

¶ 26 We need not resolve whether to characterize the Board's approach under any particular principle of corporation and agency law, because we simply find that the Board's order is not

clearly erroneous when viewed in light of the new statute and our holdings in *Brennan* and *Santana*. A fair reading of the evidence shows that Zahm was the main player in the scheme to produce and issue the attack mailer, making him at least an appropriate, if not the most appropriate, responsible party for reporting purposes. There was ample evidence demonstrating that Zahm, the sole member of KCCC, worked with the three men to concoct a method to disguise the true source of the attack mailer. That scheme involved taxpayers using KCCC's post office box as the return address -- a box to which Zahm was the sole key holder, Zahm's directing Bannister to "run over a money order" in Zahm's name to pay for the attack mailer, and Zahm's suggesting the Taxpayers' name.

¶ 27 Two other points support the Board's determinations. First, the Board's own regulation provides that subterfuges to avoid disclosure are punishable as non-disclosures. 26 Ill. Admin. Code 100.90. Second, there was ample evidence that Zahm was a political consultant by trade and thus had knowledge of campaign reporting thresholds and requirements. See, *e.g.*, *Brennan*, 336 Ill. App. 3d at 765 (inferring that because Brennan was involved with nine political committees, he was "certainly familiar with the reporting and disclosure requirements of the Election Code and his actions in disregarding these requirements were willful."). For these reasons, the Board's decision was not clearly erroneous.

¶ 28 Finally, KCCC argues that "only committee that can be held responsible" for the attack mailer is the Koukol committee, but no claim against the Koukol committee was before the Board or is before us. If anyone had filed such a claim, the Board would have been able to resolve the issue of which of the two committees was more properly responsible to report the attack mailer. The sole issue before us is whether the Board's decision to attribute the attack mailer to KCCC is clearly erroneous, not the hypothetical question whether, in some other

hearing that never occurred, the Board might have found that the attack mailer was properly – or more properly – attributable to the Koukol committee.

¶ 29 CONCLUSION

¶ 30 For these reasons, we confirm the decision of the State Board of Elections.

¶ 31 Confirmed.