



**GOVERNOR'S REGULATORY REVIEW COUNCIL
M E M O R A N D U M**

MEETING DATE: February 2, 2016

AGENDA ITEM: D-1

TO: Members of the Governor's Regulatory Review Council (Council)

FROM: Chris Klemmich, Staff Attorney

DATE: January 22, 2016

SUBJECT: Supplemental Information on Five-Year-Review Report from the Citizens Clean Elections Commission

Introduction

On January 5, 2016, Mr. Eric Spencer, State Election Director, submitted a public comment to the Council, on behalf of the Secretary of State's office (Secretary), requesting that the Council return the five-year-review report of the Citizens Clean Elections Commission (Commission), declare R2-20-109(F) and (G) materially flawed, and order that the Commission repeal the offending provisions. On January 21, 2016, Mr. Thomas Collins, Executive Director of the Commission, submitted a public comment in response to the Secretary's request.

This memorandum is intended to provide members with information that may assist the Council in answering two primary questions that relate to these two comments. First, what impact, if any, does the Voter Protection Act (VPA) have on the Council's ability to exercise its authority under A.R.S. § 41-1056(E)? Second, what are the legal arguments made by the Secretary when it asserts that R2-20-109(F) and (G) are "materially flawed", and what is the legal basis for the Commission's rebuttal?

Applicability of the Voter Protection Act

The Commission argues that the Council would effectively be superseding the rulemaking requirements established in the Clean Elections Act (CEA) if it voted to amend or repeal any of the Commission's rules. The Secretary disagrees with the Commission's interpretation of the VPA.

The Commission warns the Council that it would violate the VPA if it seeks to amend or repeal any of the Commission's rules, as 2012 amendments to A.R.S. § 41-1056 did not "further the purposes" of the CEA. The Commission states that A.R.S. § 16-956(C) "exclusively governs the Commission's rule-making process." *See* Commission Response, page 4. From this

statement, it appears as though the Commission considers the five-year-review process to a part of the rulemaking process. Staff disagrees with such an approach.

The five-year-review process relates to an agency's review of an existing rule or rules, "to determine whether any rule should be amended or repealed." A.R.S. § 41-1056(A). The rulemaking process relates to action taken by an agency to amend, repeal, create, or otherwise modify a rule. The two processes are treated as separate and distinct by the legislature and the Council. For example, none of the 21 statutes that comprise A.R.S. Title 41, Chapter 6, Article 3 (Article 3), related to the regular rulemaking process, discuss the five-year-review process. Staff does not believe that the 2012 amendments to A.R.S. § 41-1056, which relate solely to the five-year-review process, can be characterized as an infringement upon the Commission's rulemaking process.

In addition, staff does not accept the Commission's argument that amendments to A.R.S. § 41-1056(E) do not "further the purposes" of the CEA. The Commission, under A.R.S. § 16-956(C), is exempted only from Article 3. Statutes related to the Council's processes are in Article 5 of Title 41, Chapter 6, as was the case in 1998 when the CEA was passed. If the drafters of the CEA and the voters of the state intended to insulate the Commission from review of its rules, an exemption from Article 5 would have been written into the CEA. It was not. Therefore, the very narrow exemption language that is used in the CEA, which is applicable only to rulemaking, indicates that voters intended for the Commission's rules to be reviewed by the Council. In staff's view, therefore, the legislature did "further the purposes" of the CEA when it strengthened an existing review and oversight process that voters intended the Commission to face scrutiny from.

Accordingly, staff concludes that the VPA does not preclude the Council from requiring, under A.R.S. § 41-1056(E), the Commission to repeal or amend any of its rules.

R2-20-109(F) and (G)

The Secretary has identified five provisions of R2-20-109(F) and (G) that should be declared "materially flawed" by the Council. In response, the Commission has stated its justifications for the promulgation of each of these provisions. The Secretary and the Commission, in staff's view, have each articulated persuasive legal arguments that provide the Council with more than enough information to make an informed vote. Staff does not believe that the Council will benefit from having its own attorney "muddy the waters" by making additional persuasive arguments. As a result, the following is a brief summary of the most pertinent arguments, as identified by staff, related to the core issue before the Council: whether R2-20-109 is materially flawed.

1. Subsection (F)(2)

The Secretary argues that this regulation is invalid for a number of reasons. Most notably, in the Secretary's view, the Commission is not authorized to adopt rules that implement statutes in A.R.S. Title 16, Chapter 6, Article 1 (Article 1). The Secretary bases this assertion on A.R.S. § 16-956, found in A.R.S. Title 16, Chapter 6, Article 2 (Article 2), which calls on the Commission

to “[e]nforce this article” and to “adopt rules to carry out the purposes of this article”. *See* A.R.S. §§ 16-956(A)(7), (C). Accordingly, the Secretary asserts that the Commission is without authority to enact rules under statutes found in Article 1, including A.R.S. § 16-917.

The Commission disagrees by noting that, within Article 2, A.R.S. § 16-941(D) provides that “any person who makes independent expenditures related to a particular office cumulatively exceeding five hundred dollars in an election cycle” must file certain reports with the Secretary. To be able to fully enforce Article 2, the Commission argues, it is reasonable to require parties to provide the Commission with materials, in accordance with A.R.S. § 16-917, that may demonstrate a violation of Article 2 statutes.

2. Subsection (F)(3)

The Secretary asserts that the rule improperly references A.R.S. § 16-913, an Article 1 statute related to the filing of comprehensive campaign finance reports, in order for the Commission to, for the first time, assert jurisdiction over campaign finance reports. The Secretary acknowledges A.R.S. § 16-942(B), under which the Commission may issue penalties for “a violation by or on behalf of any candidate of any reporting requirement imposed by this chapter [Title 16, Chapter 6]...” but notes that the statute is “terribly confusing”. *See* Secretary Comment, page 6.

The Secretary provides three reasons why the Commission cannot enforce campaign finance reporting requirements in races involving privately-financed candidates. First, A.R.S. § 16-942(B) includes the phrase “the candidate and the candidate’s campaign account”, but only participating candidates have campaign accounts. Second, A.R.S. § 16-942(B) references an “adjusted primary or general election spending limit”, which is only applicable to participating candidates. Third, the Secretary cites to references throughout the balance of A.R.S. § 16-942 that are evidence that the independent expenditures, referenced in subsection (B), must involve participating candidates.

The Commission responds that, among other points, the reference to a candidate’s campaign account refers to any candidate’s campaign account, because all candidates who establish political committees have bank accounts for their campaigns. The Commission reemphasizes its position that the plain language of A.R.S. § 16-942(B) contradicts the Secretary’s arguments, as the statute includes the phrases “in addition to any other penalties imposed by law” and “any candidate of any reporting requirement imposed by this chapter”.

3. Subsections (F)(4)-(F)(11)

The Secretary reasserts the position taken with respect to subsection (F)(2): that the Commission is not authorized to adopt rules that implement statutes in Article 1. In this instance, the statute of concern to the Secretary is A.R.S. § 16-914.02, related to the reporting of independent expenditures. Additionally, the Secretary makes a number of assertions that the Council can take note of, but they will not be addressed in this memorandum, as they relate more to policy considerations related to what the Secretary believes to be Commission overreach.

The Commission argues that it is not overreaching, and that the rule is within its authority because 1) the Commission has authority over independent expenditure reporting under A.R.S. §§ 16-941(D) and 16-958, and 2) because it has general authority, presumably under A.R.S. § 16-942(B), over violations of reporting requirements.

4. Subsection (F)(12)

Again, the Secretary reasserts the position taken with respect to subsections (F)(2) and (F)(4)-(F)(11): that the Commission is not authorized to adopt rules that implement statutes in Article 1. In this instance, the Secretary is referencing A.R.S. § 16-901(20)(f), which is a “primary purpose” test placed into the definition of “political committee” by the legislature in April 2015. The Secretary again makes a number of assertions that will not be addressed in this memorandum, as they relate more to policy considerations. In response, the Commission reiterates its position that the rule is within the Commission’s regulatory authority, as it has jurisdiction over report required under the entirety of Title 16, Chapter 6.

Please note that, in staff’s opinion, concerns about the Commission’s rulemaking process, raised by the Secretary as part of this portion of its comment, are not within the Council’s purview.

5. Subsection (G)

Under the plain language of A.R.S. § 16-941(B):

Notwithstanding any law to the contrary, a nonparticipating candidate shall not accept contributions in excess of an amount that is twenty per cent less than the limits specified in section 16-905, subsections A through E, as adjusted by the secretary of state pursuant to section 16-905, subsection H. Any violation of this subsection shall be subject to the civil penalties and procedures set forth in section 16-905, subsections J through M and section 16-924.

Under the plain language of A.R.S. § 16-942(C):

Any campaign finance report filed indicating a violation of section 16-941, subsections A or B or section 16-941, subsection C, paragraph 1 involving an amount in excess of ten percent of the sum of the adjusted primary election spending limit and the adjusted general election spending limit for a particular candidate shall result in disqualification of a candidate or forfeiture of office.

The Secretary, based on this statute, argues that it is the role of the Secretary, and not the Commission, to enforce campaign contribution limits for privately-financed candidates. A.R.S. § 16-905 outlines the Secretary’s enforcement process, which does not include the Clean Elections Commission. In addition, A.R.S. § 16-941(B) expressly incorporates A.R.S. § 16-924, which the Secretary claims exclusive enforcement of. Under this view, the Secretary retains exclusive authority to enforce campaign contribution limits, and the subsection should be repealed.

The Commission argues that A.R.S. § 16-941(B) and A.R.S. § 16-942(C) provide the Commission with authority over the contribution limits of nonparticipating candidates. The Commission states that the *Horne* decision rejected the Secretary's argument, and the Clean Elections Institute decision states that it is the Commission's duty to enforce A.R.S. § 16-941(B).

Conclusion

To summarize, staff does not accept the Commission's arguments related to the VPA, but believes that the Commission and the Secretary have both made reasonable legal arguments with respect to the substance of R2-20-109(F) and (G).

That the comments from the Secretary and the Commission combine to tally 26 single-spaced pages is a testament to the complexity of the issues before the Council. It is for members, not staff, to determine the "correct" interpretation of the relevant statutes and rules. As the Commission notes, in my December 18th memorandum to the Council, I recommended approval of the Commission's report. I maintain that recommendation, based upon the administrative law principle that the Commission's interpretation of its own statutes, while not infallible, would ordinarily be given great weight by a court. *See* U.S. Parking Sys. v. City of Phoenix, 772 P.2d 33, 34 (Ariz. Ct. App. 1989).

The Council is a not a judicial body, however, and members are not bound by legal precedent or principles of administrative law. The Council's responsibilities, under A.R.S. 41-1056, are straightforward. A member may vote to take action on a rule if he or she "determines" that a rule is materially flawed. As no requirements are set forth in the Council's statutes or rules as to how that determination must be made, members may use their own informed judgment when casting their vote on this report.