

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-003007

05/02/2013

HON. JOHN REA

CLERK OF THE COURT
L. Gilbert
Deputy

KATHLEEN WINN, et al.

WILLIAM MORRIS FISCHBACH III

v.

MARICOPA COUNTY ATTORNEYS OFFICE,
THE, et al.

MICHAEL R MCVEY

JOSEPH KANEFIELD
MICHAEL D KIMERER
MARY R O'GRADY
LARRY L DEBUS
OFFICE OF ADMINISTRATIVE
HEARINGS

MINUTE ENTRY

These consolidated actions are brought seeking declaratory and injunctive relief regarding the Order Requiring Compliance issued October 11, 2012, by the Maricopa County Attorney's Office ("MCAO"), directed to petitioners Attorney General Tom Horne, Kathleen Winn, and related entities. The petitioners pray for a declaration that MCAO issued the Compliance Order without legal authority and for an injunction preventing MCAO and the Arizona Office of Administrative Hearings from holding further hearings on the Compliance Order.

All parties agreed that the Court could resolve the issues on the basis of the written and oral arguments.

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The Court finds that the petitions are meritorious and the petitioners are entitled to the relief requested.

Factual background

MCAO begin an investigation of allegations that there had been illegal coordination between the Tom Horne for Attorney General campaign and an independent expenditure committee supporting Mr. Horne's election called Business Leaders for Arizona. After concluding that criminal charges were not appropriate, MCAO forwarded its evidence to the Arizona Secretary of State by letter of September 18, 2012, for a determination by the Secretary of whether a civil enforcement action should commence. County Attorney Montgomery's letter stated that he expected General Horne would have a conflict of interest in pursuing a civil enforcement against himself and suggested that Secretary Bennett had the authority to simply refer the matter to MCAO since the office had done the underlying investigation and was ready to proceed.

On September 20, 2012, Secretary Bennett responded by issuing a Reasonable Cause Notice "pursuant to A.R.S. § 16-924" and by letter to County Attorney Montgomery referring the matter to MCAO because, according to the letter, the Attorney General had previously declared a conflict of interest and the Secretary had authority to hire counsel under ARS 41-192(E) and a session law.

On October 11, 2012, MCAO issued the challenged Order Requiring Compliance. The Order found violations of the campaign finance statutes and ordered remedial action. The petitioners exercised their right under § 16-924(A) for an administrative hearing. In that forum they moved to dismiss relying on essentially the same arguments as they make here. The Administrative Law Judge ("ALJ") concluded that MCAO was not legally authorized to issue the Order Requiring Compliance and ruled that the administrative appeal should be dismissed. Under the applicable rules, the ALJ's ruling went to County Attorney Montgomery for review and, unsurprisingly, the County Attorney agreed with the arguments made by MCAO to the ALJ and reversed the ALJ's ruling. The present petitions followed.

Issue

The parties raise and argue several issues, including the constitutionality of Arizona's campaign finance limits, § 16-905, and whether General Horne has a conflict of interest such that acceptance of the Secretary's referral under § 16-924(A) or even allowing his office to forward the referral to another office or person would violate § 38-503(B). However, the Court finds that the only issue requiring decision is whether MCAO accepted the referral from the Secretary and issued the Order Requiring Compliance with proper legal authority.

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Legal discussion

The County Attorney's letter to Secretary Bennett of September 18, 2012, triggered the process described in § 16-924(A). If the filing officer for campaign finance reports designated by § 16-916(A) has reasonable cause to believe that a person has violated any provision of Title 16, the filing officer notifies the chief law enforcement officer of the jurisdiction. Since the Secretary of State was the filing officer for the office of Attorney General, the applicable provision of § 16-924(A) states that "the secretary of state shall notify the attorney general for a violation regarding a statewide office or the legislature." The County Attorney's letter regarding the Tom Horne for Attorney General campaign obviously presented a problem not contemplated by the drafters of § 16-924(A).

The Secretary's referral to MCAO and MCAO's acceptance and subsequent actions were clearly not authorized by the express language of § 16-924(A). MCAO offers several justifications for the ad hoc procedure used.

The Attorney General already declared a conflict. After MCAO's investigation of the Tom Horne for Attorney General campaign was reported in the media, the Secretary of State began receiving public records requests. Some of those requests raised legal issues for which the Secretary needed legal counsel. The normal legal counsel for the Secretary of State is the Attorney General. Apparently recognizing the conflict of interest in the Attorney General's office advising the Secretary on these matters, by letter of April 16, 2012, the Attorney General appointed outside counsel "for the purpose of advising and representing the SOS in matters concerning public records requests for documents concerning Tom Horne's campaign." The letter went to state: "This approval is limited to those services necessary to the issues described above."

The Court finds that the Attorney General's letter of April 16, 2012, is limited to its express terms and is not a *carte blanche* check to the Secretary to continue to unilaterally determine the scope of the Attorney General's conflict of interest and proper role in matters beyond the public records requests.

The Secretary's right to appoint counsel other than the Attorney General. Section 41-192(E) provides that if the Attorney General determines that he is disqualified from providing legal services or representation on behalf of a state agency he shall notify the agency affected and the agency is authorized to employ attorneys to provide the representation or service. In addition, in Laws 212, Chapter 361, § 25, the Legislature declared: "Notwithstanding § 41-192, Arizona Revised Statutes, the secretary of state may hire independent counsel in place of the attorney general through December 31, 2014."

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However, in taking a referral pursuant to §16-924(A), the law enforcement officer is not representing or providing legal services to the referring filing officer. The law enforcement officer taking the referral is representing the state, county, or town, depending on the particular office involved in the referral. The Court finds that the statute and session law do not provide authority for the referral to MCAO.

MCAO's independent basis under § 16-905. This statute sets forth specific limitations on campaign contributions. Subsection K states that any qualified elector may file “a sworn complaint” with the Attorney General or County Attorney of the county in which a violation of “this section” is believed to have occurred and the county attorney shall investigate the complaint “for possible action.”

It is true that MCAO's Order Requiring Compliance contains a handful of passing references to § 16-905, including the brief assertion on page 12 that the County Attorney instituted a review “pursuant to § 16-905(K).” However, the bulk of the Order discusses “Coordinated Expenditures are In-Kind Contributions,” “Campaign Finance Reports,” and “Corporate and Limited Liability Company Contributions,” none of which arise under § 16-905.

In the County Attorney's letter of September 18, 2012, to Secretary Bennett, forwarding MCAO's investigation materials to the Secretary, County Attorney Montgomery states that the submission is for the Secretary's review of allegations of violations of Title 16, “specifically, improper coordination between the candidate and the independent expenditure committee in violation of A.R.S. 16-901(14) and 16-917.” The Secretary of State's Reasonable Cause Notice was issued “pursuant to A.R.S. § 16-924” and found reasonable cause to believe that the named persons had violated provisions of Title 16, “specifically A.R.S. § 16-917.”

The Court finds that § 16-905(K) does not support MCAO's authority to issue the broad Order Requiring Compliance that leads us here. It is unnecessary to reach the issue of whether a search warrant affidavit fulfills the statutory condition of a sworn complaint.

The Attorney General has a conflict of interest and cannot take the referral. Section 38-503(B) provides that “any public officer” who has “a substantial interest in any decision of a public agency . . . shall refrain from participating in any manner as an officer . . . in such decision.” MCAO argues that General Horne is certainly conflicted from taking the referral under § 16-924(A) and is conflicted under the statute from even allowing his office to send the Secretary's referral to another enforcement officer. This is a strong argument. Even the Attorney General acknowledges in his written argument that the matter must be referred from his office. He seems to disagree over whether a suitably screened at will employee in his office can determine to whom the referral will go.

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However, even if MCAO is completely correct as to the scope of General Horne's conflict of interest, there is still no justification for completely ignoring the clear language of § 16-924(A).

Policy considerations. The grant of special action and injunctive relief is discretionary. In determining whether to exercise its discretion and grant relief, the Court must evaluate the effect of its decision on public policy. Some things are clear: If this process is terminated, the Secretary's referral will eventually go to some agency and that agency may very well come to the same conclusion as MCAO and issue its own Order Requiring Compliance. The Secretary's Reasonable Cause Notice was issued over seven months ago, why delay the resolution of these important issues further? Are we not just dancing on the point of a needle? The Court finds two compelling reasons for its decision.

First, the statute is clear as to the authorized procedure. Going through the seemingly formalized dance of the Secretary referring the matter to the Attorney General and the Attorney General recusing himself and the matter going to another agency is not senseless or meaningless. The fact that observance of the express statutory procedure would require a few extra steps in these circumstances does not justify simply abandoning it. Statutes may be construed broadly in the interests of justice, but they cannot be ignored. Ignoring a clear statute for the sake of expediency means that we are no longer under a rule of law but the rule of some official or court's notion of convenience and practicality.

More important in this case, what are the limits of one official's ability to evaluate and declare the conflicts of interest of another official? In this case, the Secretary and MCAO determined that the Attorney General would obviously have to recuse himself so why go to the trouble of presenting the matter to him and allowing him to decide? The question is where this attitude would end. Perhaps the Attorney General would take to himself the power to make his own findings as to MCAO's conflicts of interest and unilaterally remove matters from MCAO's consideration. This is neither the rule of law nor good public policy.

IT IS ORDERED the relief requested in the petitions is granted.

IT IS FURTHER ORDERED the Court declares that MCAO and County Attorney Montgomery are without authority to institute the pending civil enforcement action against the petitioners.

IT IS FURTHER ORDERED the defendants are enjoined from proceeding in any way with the Order Requiring Compliance and associated administrative proceeding, except to dismiss the administrative proceeding.

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IT IS FURTHER ORDERED awarding petitioners attorneys' fee pursuant to § 12-348 and their taxable costs pursuant to § 12-341.

/S/ JOHN C. REA

HONORABLE JOHN C. REA
JUDGE OF THE SUPERIOR COURT

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.