

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

CAROLYN COSBY

Petitioner,

v.

MARY PAIGE ADAMS, Commission Chair,
GEORGIA GOVERNMENT TRANSPARENCY
AND CAMPAIGN FINANCE COMMISSION,

Respondent.

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Case No:
2017CV291862

**GEORGIA GOVERNMENT TRANSPARENCY AND CAMPAIGN FINANCE
COMMISSION'S RESPONSE TO PETITION FOR JUDICIAL REVIEW**

INTRODUCTION

The Government Transparency and Campaign Finance Commission¹, by and through counsel, Christopher M. Carr, Attorney General for the State of Georgia, files this response to Carolyn Cosby's "Petition for Review of Final Agency Action of Georgia Government Transparency and Campaign Finance Commission."²

This Court should affirm the Commission's May 26, 2017 Final Decision for three reasons: (1) under the any evidence standard, there is a sufficient factual basis showing Cosby's violation of the Georgia Government Transparency and Campaign Finance Act ("Act"); (2) the application of the Act to Cosby's conduct does not violate the Constitution, nor any other substantive due process rights under O.C.G.A. § 50-13-19(h); and (3) the Commission's actions declining final agency review are squarely within the scope of OCGA § 50-13-41(e).

¹ Because Cosby seeks judicial review under O.C.G.A. § 50-13-19(a), Respondent submits that a response particular to Commission Chair Mary Paige Adams in her individual capacity is improper as the Commission as a whole made a final agency decision, which is the subject of the petition for review.

² The Commission asserts that service was not proper in this case and without waiving any defenses, responds to the Petition for Judicial Review. See O.C.G.A. § 50-13-19(e); see also *Joyner v. Schiess*, 236 Ga. App. 316, 317-318 (1999).

BACKGROUND OF COMMISSION PROCESS AND PROCEDURE

The Commission has the express authority to adopt rules and regulations necessary and appropriate for enforcing the Act in accordance with the Administrative Procedures Act (APA). After either receiving and initially investigating a third party complaint or initiating an investigation on its own, the Commission determines whether "reasonable grounds to believe a violation [of the Act] has occurred," a complaint becomes a "contested case"³ and is scheduled for a full due process hearing at the Office of State Administrative Hearings (OSAH) pursuant to the APA.⁴ See O.C.G.A. § 21-5-6(b)(10)(A); *Ga. Comp. R. & Regs. r. 189-2-.05*. See generally O.C.G.A. §§ 21-5-6(b)(9), 21-5-7 (receipt of complaints by Commission and authority of Commission to conduct its own investigations); *Ga. Comp. R. Regs. r. 189-2-.03 to .07* (Commission rules regarding receipt of complaints and conduction and initiating its own investigations). However, even after the Commission proceeds with a contested case, nothing in Georgia's statutes or the Commissions rules precludes the matter from being subject to continued investigation by the Commission and additional violations submitted for a determination of whether "reasonable grounds" exist. *Ga. Comp. R. & Regs. r. 189-2-.03(7)*; cf. O.C.G.A. §21-5-6(b)(10)(A) (matters "subject to being reopened upon the discovery of additional evidence or relevant material").

After an initial decision is issued by an Administrative Law Judge (ALJ), the Commission has thirty days to reject or modify that decision, issuing its own final decision, or, if

³ See O.C.G.A. § 50-13-13.

⁴ After giving the accused violator a copy of the complaint and notice of the hearing where the accused has an opportunity to respond to the complaint, the Commission holds a preliminary hearing, where they evaluate whether there are reasonable grounds to believe a violation of the Act has occurred. After this preliminary hearing, a case becomes "contested" and is referred to the Office of State Administrative Hearings for an initial decision from an administrative law judge. See O.C.G.A. §§ 50-13-13, 50-13-41; *Ga. Comp. R. & Regs. r. 189-2-.05*.

the Commission takes no action, the initial decision becomes the final decision of the Commission by operation of law. O.C.G.A. §§ 50-13-17(c), 50-13-41(e)(1). After the decision becomes final, an aggrieved party can seek judicial review in a superior court. O.C.G.A. § 50-13-19(a).

STANDARD OF REVIEW

Judicial review by a superior court of an administrative decision requires the court to determine that the findings of fact are supported by any evidence and to examine the soundness of the conclusion of law that are based on the findings of fact. *See Ga. Prof'l Stds. Comm'n v. James*, 327 Ga. App. 810, 811 (2014) (citing *Davane v. Thurmond*, 300 Ga. App. 474, 475 (2009)). In evaluating of the findings of fact, O.C.G.A. § 50-13-19(h) provides that the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. *Fruitt Corp. v. Ga. Dep't of Cmty. Health*, 284 Ga 158, 160 (2008) (citing *Hall v. Ault*, 240 Ga. 585, 586 (1978)). In evaluating the conclusions of law, while the court accepts the findings of fact if there is any evidence to support the findings, the court may reverse or modify the agency decision if substantial rights of the appellant have been prejudiced because the administrative decision is: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *See id.* at 160; *see also* O.C.G.A. § 50-13-19(h)(1)-(6).

FACTS AND PROCEDURAL HISTORY

Between 2011 and 2014, Carolyn Cosby formed several special interests groups based out of Cherokee County, Georgia in order to advocate for candidates and policies without first registering those groups as independent committees with the Commission prior to accepting donations and making expenditures. Commission Record (hereinafter "R.")⁵. During the 2011 and 2012 elections years, Cosby formed the Canton Tea Party (a.k.a. Canton Tea Party Patriots), and the Citizens Review and Recommendation Committee. (R.). Those groups participated in various political activities: held meetings and gatherings, attended county commission meetings, and distributed literature on particular issues. (R.). Subsequently, between 2013 and 2014, Cosby formed the Canton T.F.A. Party, Expose Bobo Boondoggle Now, Citizens Opposed to Spiraling Taxation, and Georgians for Healthcare Freedom, at various points, all for similar purposes or political advocacy. (R.). The claims against Cosby with regard to Georgians for Healthcare Freedom were that she failed to register as a lobbyist in violation of O.C.G.A. §§ 21-5-71(a)(1) and 21-5-73(a) and (b).

For all six special interest groups, the Commission accepted various third party complaints alleging violations of the Act, namely Cosby failing to register the groups prior to accepting contributions or making expenditures for purposes of political advocacy as independent committees, and failing to register prior to engaging in lobbying activities. (R.).

⁵ The Commission Record was not available at the time of writing this response; however, the Commission has not been properly served at the time of writing this response. See O.C.G.A. § 50-13-19(e). Once the record is completed the Commission will file an amended petition with proper citations for the Court's reference.

On April 24, 2013, December 10, 2014, and June 25, 2015, the Commission held preliminary hearings on all the matters and made a finding of reasonable grounds to believe violation of the Act occurred by each of the six groups. (R.).⁶

On October 5, 2016, the Department of Law on behalf of the Commission filed six separate statements of matters asserted with OSAH, requesting an evidentiary hearing before an ALJ on the alleged violations of the Act. (R.). On October 21, 2016, the ALJ granted the Commission's motion to consolidate the six cases, "as they involved common issues of law and fact and a joint hearing would serve to expedite or simplify consideration of the common issues." (R.). Prior to the hearing, on February 21, 2017, Cosby filed a motion to dismiss the statements of matters asserted. (R.). The Commission filed an objection to the motion to dismiss on March 8, 2017. (R.). The ALJ denied the motion on March 15, 2017. (R.). The case proceeded to a hearing at the Cherokee County Courthouse in Cherokee County, Georgia, on March 17, 2017. (R.).

The ALJ issued an initial decision on April 29, 2017. (R.).⁷ After consideration of the testimony and evidence, and on stipulation by Cosby to all of the Commission's exhibits entered into the record, the ALJ held that "the Commission established that Citizens Review and Recommendation Committee, the Canton Tea Party Patriots, the Canton T.E.A. Party, and the

⁶ The Commission accepted third party complaints and held preliminary hearings as follows: *Canton Tea Party/Patriots*, complaint accepted on June 15, 2012, preliminary hearing on April 24, 2013; *Citizens Recommendation and Review Committee*, complaint accepted June 18, 2012, preliminary hearing on April 24, 2013 and December 10, 2014; *Canton T.E.A. Party*, complaint accepted on July 1, 2014, preliminary hearing on December 10, 2014; *Citizens Against Spiraling Taxation*, complaint accepted on August 4, 2014, preliminary hearing on December 10, 2014; *Expose Bobo Boondoggle Now*, complaint accepted on August 4, 2014, preliminary hearing on December 10, 2014; *Georgians for Healthcare Freedom*, complaint accepted on June 30, 2014, preliminary hearing on June 25, 2015.

⁷ The ALJ initially issued a "final decision" on April 17, 2017; however, the Commission filed a motion for reconsideration to correct the decision to "initial decision" and the appeal instructions. The ALJ issued a corrected initial decision on April 26, 2017.

Citizens Opposed to Spiraling Taxation violated the Act because they failed to register and file the required disclosure reports. (R.).⁸ The ALJ found that Cosby was either the founder of, and/or current chairman of each of the six independent committees, and held that Cosby “as the owner, leader, and chairman of these independent committees is required to pay civil penalties . . . in the amount of \$30,000 for the violations of the four independent committees found to have violated the Act.” (R.).⁹

After the initial decision, the Department of Law filed a motion for final agency review and request for extension, before the Commission, on May 17, 2017. (R.). Cosby filed a motion for final agency review on May 26, 2017. (R.). The Commission took no further action and by operation of law, the initial decision became final on May 26, 2017. (R.). Cosby filed a motion to void the Commission’s final decision on June 19, 2017; subsequently, Cosby filed a petition for judicial review with the Fulton County Superior Court on June 26, 2017. This response follows.

ARGUMENT AND CITATIONS OF AUTHORITY

Cosby argues that the Commission’s May 26, 2017 Final Decision finding her in violation of the Act; (1) was in violation of the Constitution and clearly erroneous in view of the whole record; (2) the civil penalties in the amount of \$30,000 were arbitrary, capricious, an abuse of discretion, and otherwise, a clearly unwarranted exercise of discretion; (3) the Act as

⁸ The ALJ held that there was insufficient evidence to establish a violation with regard to Expose Bobo Boondoggle Now, since Cosby did in fact register this independent committee with the Commission, and filed multiple disclosures. Also the ALJ held that there was insufficient evidence to establish a violation with regard to Georgians for Healthcare Freedom,

⁹ The ALJ found that although the Commission established that Cosby promoted the passage of certain legislation, it failed to establish that Cosby received or anticipated receiving more than \$250 in compensation, reimbursement, or payment of expenses.

applied to Cosby, via the independent committees, is a violation of the First Amendment; and (4) the Commission failed to follow proper procedure and violated Cosby's due process rights.

As the Commission shows below, this Court should affirm the Commission's final agency decision¹⁰ and deny Cosby's petition for judicial review because there is a sufficient factual basis showing Cosby violated the Act, the Act, and as applied to Cosby, is Constitutional, and the actions of the Commission followed proper procedure under the APA.

1. There is a sufficient factual basis showing Cosby's violation of the Georgia Government Transparency and Campaign Finance Act.

O.C.G.A. § 50-13-19(h)(5) provides that "a court may reverse an agency's decision if the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Thebaut v. Ga. Bd. of Dentistry*, 235 Ga. App. 194, 199 (1998) (citing *Hall v. Ault*, 240 Ga. 585, 585-586 (1978)). "Judicial review of an administration decision shall be conducted by the court without a jury and shall be confined to the record." *Sawyer v. Reheis*, 213 Ga. App. 727, 728 (1994). The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. *Id.*

In reviewing the findings of fact in the final decision, specifically looking to the findings of the ALJ, the judge held that all six special interest groups were independent committees, and each of the groups engaged in some form of political advocacy. Ex. 2-8. The ALJ also held that Cosby was either the founder of, and/or current chairman of each of the six independent committees. *Id.* Four of the six independent committees failed to register with the Commission prior to accepting contributions or making expenditures for the purpose of advocating defeat of certain county level candidates. *Id.* The ALJ based its findings on the testimony of witnesses and various flyers and advertisements admitted into evidence, which were stipulated to by Cosby. *Id.*

¹⁰ The Commission's Final Decision is attached to this response as Exhibit (hereinafter "Ex.").

For the conclusions of law, based on the testimony and evidence provided, the ALJ held that the Commission proved, by a preponderance of the evidence, four of the six independent committees violated the Act when they (1) advocated for the defeat of certain candidates through various literature and advertisements; (2) failed to register with the Commission prior to making expenditures on said literature and advertisements; and (3) failed to file mandatory disclosure reports that tracked the expenditures on the various literature and advertisements. Ex. 2-8. Additionally, the ALJ held that Cosby, "as the owner, leader, and chairman of these independent committees is required to pay civil penalties [for violating the Act]." Ex. 13-14. The ALJ based the civil penalties on O.C.G.A. § 21-5-6(b)(14)(C)(i) for each of the four independent committee's three violations of the Act for a total of \$30,000. Ex. 13.

The ALJ properly based the conclusions of fact and law on the evidence of testimony, documents and stipulations. This there is sufficient support to satisfy the any evidence standard that Cosby violated the Act and this court should affirm the final decision on this basis.

2. Application of the Act to the findings against Cosby was not arbitrary or capricious.

The superior court must affirm the final decision unless the administrative factfinder acted arbitrary, capriciously, and unreasonable. *Sawyer v. Rehets*, 213 Ga. App. 727, 729 (1994). "If arbitrary and capricious action is alleged, the superior court must determine whether a rational basis exists for the decision made." *Id.* "In construing administrative rules, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the rule." *Id.* at 729-730 (citing *Atlanta Journal & C. v. Babush*, 257 Ga. 790, 791(1988).

In the *Sawyer* case, the Court held that when an ALJ "follows a reasonable thought process through [. . .] interpretation of the [rules]; logically applied the goals of the rules to the

facts adduced on the record, and that [application] was guided by expert opinion on the technical matters presented" that is appropriate. *Sawyer*, 213 Ga. App. at 729 (citing *Greyhound Lines v. Ga. Public Svc. Comm.*, 236 Ga. 76, 77 (1976)). Furthermore, "by way of contrast to rational basis standard of review, the term arbitrary, as defined in the Standard Dictionary, means 'fixed or done so capriciously or at pleasure; without adequate determining principle; not founded in the nature of things . . . not done or acting according to reason or judgment; depending on the will along; absolutely in power; capriciously; tyrannical; despotic.'" *Id.* at 730 (citing *Central of Ga. R. Co. v. Mote*, 131 Ga. 166, 176 (1908)).

Here the record demonstrates that the ALJ reasonably applied the applicable code sections of the Act contained in O.C.G.A. §§ 21-5-1 through 21-5-76, respectively. Ex. 9. The ALJ also applied the applicable code sections of the APA contained in O.C.G.A. § 50-13-13 through 50-13-17. *See generally* Ex1-15. (where the ALJ held a hearing in compliance with the APA, made a findings of fact and conclusions of law about the case, and advised parties on how to proceed forward with any applicable appeal rights). The ALJ thoroughly went through each of the alleged independent committees and cited to the record, testimony, or a stipulation, as authority for each of the conclusions.

With regard specifically to the fine:

If a violation of the Act is proven after completion of an Administrative Procedure Act hearing, the Georgia Government Transparency and Campaign Finance Commission has the authority to require the violator to "cease and desist from committing further violations," correct public statements, and pay a civil penalty. O.C.G.A. § 21-5-6 (b)(14). Under O.C.G.A. § 21-5-6 (b)(14)(C)(i) a violator may be required "to pay a civil penalty not to exceed \$1,000 for each violation . . . provided, however, that a civil penalty not to exceed \$10,000.00 may be imposed for a second occurrence of a violation of the same provision, and a civil penalty not to exceed \$25,000.00 may be

imposed for each third or subsequent occurrence of a violation of the same provision.”

O.C.G.A. § 21-5-6(b)(14)(A)-(C).

Here again, the ALJ properly followed the considerations of the fine structure to the number of violations of the act. Ex. 14. The ALJ reasonably graduated the fine as the number of violations increased. *Id.* Thus the Commission submits that the Final Decision against Cosby was neither arbitrary nor capricious and the Commission’s Final Decision should be affirmed.

3. The Act does not violate First Amendment rights and is Constitutional as applied to Cosby.

Cosby, through here independent committees, distributed various flyers, newspaper advertisements, mailers, and website links, that named specific candidates for office. (R.).

O.C.G.A. § 21-5-3(15) defines an independent committee, which is required to register per the Act, as “any committee, club, association, partnership, corporation, labor union, or other group of persons, other than a campaign committee, political party or political action committee, which receives donations during a calendar year from persons who are members or supporters of the committee and which expends such funds either for the purpose of affecting the outcome of an election for any elected office or *to advocate the election or defeat of any particular candidate.*”

O.C.G.A. § 21-5-3(15) (emphasis added). The ALJ made a specific finding that each of the independent committees that violated the Act, “failed to register with the Commission prior to accepting contributions or making expenditures for the purpose of advocating for defeat of certain candidates . . .” Ex.3-7. Here the ALJ found that because the four independent committees disseminated various literature and advertisements considered to be express advocacy and did so without registering with the Commission, they were in violation of the Act.

Ex. 11. Cosby argues that this analysis is in violation of due process and thus violates O.C.G.A. § 50-13-19(h)(1) and (3). Petition, 4.

However, it is well settled that requiring registration and disclosure of expenditures on express political advocacy does not violate the First Amendment. The U.S. Supreme Court held in *Buckley v. Valeo* that requiring a person to register with the Commission does not run afoul of First Amendment protections. *Buckley*, 424 U.S. at 68, 75-76. First, the Act does not place any “ceilings” on what independent committees can spend on independent expenditures. *See Citizens United v. FEC*, 558 U.S. 310, 366-367 (2010). Secondly, the Act does not prohibit independent committees from associating with whomever they wish to associate with, nor does the Act prohibit any types of messages from independent committees. *Id.*

“Disclosure requirements, as a general matter, directly serve substantial government interests.” *Buckley*, 424 U.S. at 68, 75-76. Disclosure is a least restrictive alternative to more comprehensive regulations of speech. *Citizens United*, 558 U.S. at 369. “The First Amendment protects political speech, and disclosure permits citizens and shareholders to react to the speech of [independent committees] in a proper way.” *Id.* at 371. “This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” *Id.*

“Disclaimer and disclosure requirements may burden the ability to speak, but they ‘impose no ceiling on campaign-related activities,’ and ‘do not prevent anyone from speaking.’” *Id.* at 366, citing *Buckley*, 424 U.S. at 46, 66. Furthermore, disclosure requirements are justified based on a governmental interest in providing the electorate with information about the sources of election-related spending. *Id.* at 367. The United State Supreme Court upheld disclosure requirement in *Citizens United* because they would “help citizens ‘make more informed choices

in the marketplace.” *Id.* (quoting *McCormell v. FEC*, 251 F. Supp. 2d 176, 237 (2003)). Thus, requiring an independent committee to register under the Act does not violate First Amendment rights.

The ALJ properly applied the Act to the actions of Cosby in her capacity as founder and/or chairman of each of the unlawful actions of the Committees as the person ultimately responsible for paying the fines for the violations. Because it’s not a violation of the First Amendment for an independent committee to have to register, the ALJ finding Cosby failed to register in violation of the Act, is not in violation of O.C.G.A. § 50-13-19(h)(1).

4. The Commission properly followed the APA.

As outlined above, the Commission gave Cosby proper notice of the pending complaints filed against her. *Supra* 4. The Commission made formal findings of a reasonable probability that Cosby violated the Act and the case proceeded forward to an OSAH hearing. *Id.* The ALJ made a proper initial decision, in writing and including findings of fact and conclusions of law. *See* Ex. 1-15. After the initial decision, Cosby and the Department of Law both requested final agency review by the Commission;¹¹ however, the Commission took no further action on either party’s motion and the initial decision became final by operation of law.

Pursuant to O.C.G.A. § 50-13-41(e)(1), “a reviewing agency shall have a period of 30 days following the entry of the decision of the administrative law judge in which to reject or modify such decision. If a reviewing agency fails to reject or modify the [initial] decision of the administrative law judge within such 30 day period, then the decision of the administrative law judge shall stand affirmed by the reviewing agency by operation of law.”

¹¹ *See generally* O.C.G.A. § 50-13-17(a) (“when [OSAH] makes the initial decision, and in absence of an application to the agency within 30 days from the date of the notice of the initial decision for review, or an order by the agency within such time for review on its own motion, the initial decision shall, without further proceedings, become the decision of the agency.”).

O.C.G.A. § 50-13-41(e)(1). Despite both sides requesting a final agency hearing, the Commission ultimately decides how to regard the initial decision. And in this instance, they took no affirmative actions.

Cosby argues that the Commission's failure to act is detrimental to the integrity of the final decision. However, while the failure to act may not be ideal, it is not in violation of O.C.G.A. § 50-13-41(e). Because the Commission's inaction does not violate the APA, the final decision by operation of law is valid and Cosby's petition should be denied on this ground.

CONCLUSION

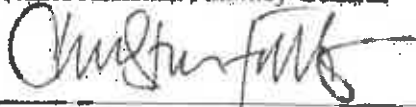
WHEREFORE the Commission request that this Court deny the petition for judicial review for the aforementioned reasons and affirm the Commission's final decision that finds Cosby in violation of the Georgia Government Transparency and Campaign Finance Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing *Response to Petition for Judicial Review*, prior to filing the same, by emailing it to athenslaw@gmail.com and bruce@fsinpoints.com and by depositing a copy of the same to be delivered via United States Mail, addressed as follows:

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This 26th day of July, 2017


CHRISTIAN A. FULLER
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