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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CASE NO. 3:12-CV-244-CRS

CONWAY FOR SENATE

PLAINTIFF

**PLAINTIFF, CONWAY FOR SENATE’S, MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND
VS. IN REPLY TO DEFENDANT’S OPPOSITION TO
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

FEDERAL ELECTION COMMISSION

DEFENDANT

Plaintiff Conway for Senate hereby submits this Memorandum of Law in opposition to the Defendant Federal Election Commission’s (hereinafter, “FEC”) Motion for Summary Judgment, and in Reply to the FEC’s opposition to Plaintiff’s own Motion for Summary Judgment. The Defendant’s memorandum to this Court all but confirms Conway for Senate’s position that the FEC’s assessment of a \$4,950 fine for alleged failure to file a campaign finance report was arbitrary and capricious as the record before the FEC contains directly contradictory information rendering any conclusion against Plaintiff *de facto* arbitrary and capricious. The FEC states in the first paragraph of its brief, “The administrative record on which the [FEC] based its decision, however, shows that the report at issue was not included in the FedEx envelope—an envelope whose contents were extensively and contemporaneously documented upon receipt.” (Record Entry No. 16, p. 1). The FEC’s argument essentially boils down to this: the Secretary of the Senate’s Office could not possibly have committed any error when it contemporaneously documented the contents of the FedEx package it “received” from Conway for Senate on January 28, 2011—a full two days after Federal Express actually delivered the package. Continuing: because of this infallibility, it is not arbitrary and capricious for the FEC to fine Conway for Senate even though the Conway campaign submitted multiple sworn affidavits indicating that the report in question was in fact sent to the Secretary of the Senate on January 25, 2011. This conclusion is untenable, and it should not stand as the basis of a civil fine of this magnitude in light of the entire administrative record. The FEC’s

Motion for Summary Judgment should be denied, and Plaintiff Conway for Senate's Motion for Summary Judgment should be granted.

BRIEF COUNTERSTATEMENT OF FACTS

On February 17, 2011, the FEC sent a non-filer notice to Conway for Senate. AR001. The FEC's Communication Log indicates that on March 10, 2011, at 10:28 a.m., Ms. Paula Paisley, an employee of the accounting firm employed by Conway for Senate for FEC reporting and compliance, contacted the FEC. AR037. The FEC's notation states as follows:

Ms. Paisley called regarding an RQ7 sent to the Committee for the 2010 YE Report. She said she filed the report and has a certified-mail receipt confirming delivery. I told her the report is not showing up and requested she re-send a copy of it. I also advised her to include a copy of the mail receipt she has from the first filing with a notice indicating this is the second filing of the 2010 YE report. She said that she will do as I requested.

Id.

The FEC admits in Section II of its Memorandum that the Conway for Senate campaign, after receiving the FEC's non-filer notice and after Ms. Paisley's call with the FEC on March 10, 2011, filed its year-end report on March 10, 2011. AR001; AR004. Because the report was filed more than 30 days after the due date the report was deemed "not filed" under the Commission's regulations for non-election sensitive reports.

On March 30, before undertaking *any* administrative inquiry or investigation with the Secretary of the Senate, but after Ms. Paisley's March 10, 2011 call evidencing the Conway campaign's belief that the document was timely filed, the FEC's staff recommended that the Commission (1) find reason to believe that the Conway for Senate campaign and its treasurer had "not filed" its year-end report; and (2) assess an administrative fine of \$4,950.00. AR002-007. On April 1, 2011, the full Commission approved this recommendation, and on April 4, 2011, the FEC notified the Conway for Senate campaign of its reason-to-believe finding via letter. AR017; AR024-027.

On April 20, 2011, Mr. Stratton called the FEC in response to the April 4 letter. The notation in the FEC's Communication Log is as follows:

Mr. Stratton called regarding the RTB letter for AF 2414. He stated that they did not believe their 2010 YE report was late and they had provided tracking information from

FedEx that it had been delivered timely. I stated that the Senate is the office who actually receives the reports and they notify us as to whether or not the report has been filed. He stated that they sent in a copy of the 2010 YE report and a copy of the tracking info when they received the notice. I advised him that as of this date, the 2010 YE report they stated was originally sent was not received. I noted that the other reports were received on that day with the same tracking info as they referenced but there was no YE report. He stated they were sent separately. I gave him the contact number for the Secretary of the Senate and advised him that we are notified by them before we send notices of failure to file. I gave him my contact info.

AR037.

On May 4, 2011, R. Wayne Stratton, treasurer to the Conway for Senate campaign, submitted a written protest of the FEC's reason to believe determination. AR028-033. Included within this protest submission were the FedEx receipts evidencing shipment from Marie Johnson of the accounting firm of Jones, Nale & Mattingly to the Senate Office of Public Records. AR031-034. In addition, Ms. Johnson submitted a sworn affidavit, dated May 5, 2011, in which she stated as follows:

On January 25, 2011, I was given a set of reports on the campaign of Conway for Senate to be shipped to the Senate Office of Public Records. This included three responses to inquiries and amended report as well as one original year-end report of receipts and disbursements covering the period from November 23, 2010 through December 31, 2010. The reports and letters were packaged in a Federal Express envelope and shipped priority overnight to the Senate Office of Public Records on January 25, 2011. Tracking confirmation shows the package was delivered and signed for on January 26, 2011. Copies of the documents in question, Fed Ex shipping label, and delivery confirmation report and recipient signature are included with this statement.

AR 029.

Thus, as of May 5, 2011, all that had occurred in the administrative inquiry into the alleged non-filing on the Conway for Senate year-end report was that (1) the FEC realized it did not have a timely copy filed, but had yet to make any inquiry of the Secretary of the Senate; and (2) the Conway for Senate campaign submitted a sworn affidavit stating that it did in fact include said report in a January 25, 2011 Fed Ex shipment to the Senate Office of Public Records. *Id.* As of May 5, 2011, the administrative record stood in the proverbial he-said, he-said posture: the FEC contended that the year-end report had not been filed and the Conway for Senate campaign submitted sworn statements and FedEx receipts in support of its position that the report had been filed.

It wasn't until June 20, 2011, approximately two and a half months after transmitting the notice of non-filer letter to the Conway for Senate Campaign on April 4, 2011, that the FEC's Reviewing Officer, Ms. Dayna Brown, sent a letter to the Office of the Secretary of the Senate. AR050. So, some 75 days after putting the Conway campaign on notice that it did not file its alleged year-end report, the FEC actually made the effort to check in with the entity actually tasked under federal law with receiving said reports. *Id.*; 2 U.S.C. 432(g)(1). It is also noteworthy that on April 20, 2011, FEC analyst Sari Pickerall represented to Mr. Stratton, treasurer for Conway for Senate, that the FEC is "notified" by the Secretary of the Senate before sending notices of failure to file. AR037. This does not seem to be the case here, as Ms. Brown did not even make formal inquiry of the Senate until June 20, 2011, well after the failure to file notice was transmitted to the Conway campaign. Ms. McCallum's June 22, 2011, response indicated that her office received the Conway campaign's Fed Ex envelope on January 28, 2011, and the envelope contained five different reports, but not the year-end report. AR051. FedEx receipts indicate that the Senate received the Conway campaign's envelope on January 26, 2011, yet the Senate's representative indicated it was received on January 28, 2011. AR031; AR051.

The FEC placed great weight on the Conway campaign's alleged inconsistent statements made during the Commission's "investigation" and the campaign's failure to file supportive documentation, despite the fact that the campaign provided sworn affidavits and Fed Ex receipts:

Given the Committee representative's indication on March 10 that the Year End report was sent via certified mail; the Treasurer's indication on April 20 that the Year end report was sent separately from the amendments filed via FedEx on January 25 and therefore separate from the tracking information provided in the challenge; and the Senate Superintendent's confirmation that the January 25 FedEx receipt shipment did not include the Year End Report, the respondents failed to provide documentation supporting the timely filing of the Year End Reports.

AR062.

ARGUMENT

The FEC's Memorandum ultimately confirms Conway for Senate's argument: the factual record is contradictory and muddled, and the FEC placed much emphasis on hearsay transcriptions of phone calls between its own staff and agents of the Conway campaign and a very strained assessment of the

Conway campaign's "inconsistent" positions. Furthermore, the best efforts safe harbor *is* applicable if one considers Senate negligence as a reasonably unforeseen circumstance. The Conway for Senate campaign contends that this argument was not waived during the administrative review as it was constructively made again and again by repeated protestations of campaign agents that the year-end report had in fact been timely sent. The FEC's finding and penalty assessment was arbitrary and capricious and based on a record containing facts in favor of both parties. The FEC chose to fine a campaign and a treasurer with no prior infractions, almost in spite of evidence indicating the Conway campaign had in fact sent in the required year-end report.

Obviously, agency decisions are given deference by reviewing courts. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). But agency decisions, like the FEC's decision in the case at bar, can be overturned if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.*; 5 U.S.C. s706(2)(A). In making an assessment of whether an agency decision was arbitrary or capricious, the reviewing court cannot substitute its own judgment for that of the agency, but it should look at the underlying facts to see if there was a clear error in judgment. *Citizens to Preserve Overton Park, Inc. v. Vople*, 401 U.S. 402, 416 (1971). The court's evaluation of the record of an agency's action should include an assessment of whether the agency decision is supported by substantial evidence. 5 U.S.C. s706(2)(E); *T-Mobile Cent., LLC v. Charter Twp. Of W. Bloomfield*, 691 F.3d 794, 798 (6th Cir. 2012).

- a. The FEC's Administrative Finding is Not Supported by Substantial Evidence and is Arbitrary and Capricious.

The FEC's determination in this case is not supported by substantial evidence. The record is split right down the middle in a proverbial he-said, he-said, and the FEC chose to side with itself to the detriment of the Conway for Senate campaign. The FEC places great weight on its own cursory notes of calls with agents for the Conway campaign—clearly unilateral descriptions of telephonic conversations in which the Conway campaign had no oversight. The fact that one FEC analysis colloquially noted that Ms. Paisley indicated the package was sent by certified-mail in the March 10, 2011 call note (AR037)

seems to have taken on a disproportionate magnitude of importance in the FEC's assessment of the Conway campaign's credibility. The empirical fact is that the campaign *sent* the reports via *Federal Express* and provided corroborating documentary evidence. The mere fact that an FEC staffer inaccurately reflected a discussion with Ms. Paisley does not negate the objective truth that Conway agents sent the documents by Fed Ex. This is but one example of the FEC arbitrarily and summarily brushing aside relevant facts.

What the FEC seems to want to avoid discussing, but is perhaps at the very crux of this dispute, is the possibility that agents of the U.S. Senate may have erroneously processed the contents of the envelope received from Conway for Senate. In fact, this conclusion is just as plausible as the FEC's conclusion that the Conway campaign failed to file. On March 30, 2011, before undertaking *any* administrative inquiry or investigation with the Secretary of the Senate, but after Ms. Paisley's March 10, 2011 call evidencing the Conway campaign's belief that the document was timely filed, the FEC's staff recommended that the Commission 1) find reason to believe that the Conway for Senate campaign and its treasurer had "not filed" its year-end report; and (2) assess an administrative fine of \$4,950. AR002-007. Accordingly to the FEC, the Senate reported that it had not received the Conway campaign's end-of-year filing on February 16, 2011. More specifically, the Senate Office of Public Records alleged: "Raymond Davis of our staff communicated with FEC employee Chris Ritchie on February 16, 2011 and indicated at that time that OPR had not received the Conway for Senate 2010 Year End Report." AR051. But no objective document corroborating this alleged communication exists in the administrative record; this fact is in only the record via the June 22, 2011, letter statement of Superintendent of the Senate Secretary's Office of Public Records Ms. Dana McCallum.

But the Senate, as Plaintiff pointed out in its original briefing on this matter, is not infallible. *See generally, Greenwood for Congress, Inc. v. Federal Election Commission*, CIV.A. 03-0307 WL 22096125 (E.D. Pa. Aug. 15, 2003). The Senate is on record indicating that it received the Conway for Senate Fed Ex delivery on January 28, 2011 when Fed Ex delivery receipts indicate it was delivered on January 26, 2011. AR051; AR032. Two full business days transpired before the envelope was

inventoried by the appropriate agency. Is it not possible in that two-day period, as the envelope traveled from the Senate Sergeant at Arms to the Senate Office of Public Records, a portion of contents may have been removed from the envelope in error and never replaced? The FEC did not seem interested enough to find out. But in lieu of a diligent investigation, the FEC prefers that the Conway for Senate campaign be tagged with a black-eye of non-compliance and a monetary fine, and the possibility that any one of three entities that handled the reports may have been it fault is simply a non-starter. In *Greenwood*, the Eastern District of Pennsylvania found it of great weight that the FEC presented no evidence, including affidavits of any kind, to *disprove* the idea that its own personnel could have lost the report, yet in turn disregarded the sworn affidavits submitted by the campaign. *Greenwood*, at 3. The court held that because the FEC's administrative finding was based on "apparently nothing more than a belief in the infallibility of their procedures and employees," the FEC's finding was arbitrary and capricious. *Id.* It's difficult to see how the *Greenwood* court's prescient analysis does not apply to the instant case. The Senate submitted no sworn affidavits addressing the custody and control of the Conway for Senate Fed Ex envelope over the course of two-day delay in inventorying the delivery. On the other hand, the Conway for Senate campaign submitted significant evidence in support of its position which the FEC arbitrarily ignored: Stratton mailed three separate letters to the FEC insisting the report had been mailed timely; both he and Ms. Paisley held phone calls with FEC staff, contemporaneous to the time of the dispute, insisting that the report had been filed; the office manager and a secretary submitted sworn affidavits confirming they had printed out and overnighted the year-end report; the office manager confirmed this in a logged phone conversation; the campaign produced an email from a campaign staffer showing that the year-end report was transmitted to Jones, Nale and Mattingly for filing with the FEC; and the campaign provided the FedEx tracking receipts.

The Commission's finding that the Conway campaign failed to timely file its 2010 year-end report is simply not a reasonable determination based on the administrative record. The Reviewing Officer's recommendations omitted certain key facts. Furthermore, she placed disproportionate emphasis

on hearsay statements of witnesses and little weight on the sworn affidavits submitted by the Conway for Senate campaign.

In its Memorandum, the FEC argues that its Reviewing Officer took reasonable steps to investigate whether the Senate received Conway's year-end report in January 2011. This assertion is laughable. The FEC Reviewing Officer admits to contacting the Senate representatives *after* a "reason to believe" letter was sent to the Conway for Senate campaign. A fine was assessed and a letter transmitted to Mr. Stratton on April 4, 2011 asking for remittance of that fine. To be clear: absolutely no investigation took place with respect to the Senate before this letter was mailed to Conway for Senate. Ms. Brown submitted her affidavit on June 29, 2011, a full three months after the FEC assessed the fine on the campaign. AR085. The FEC's representation that an investigation preceded its determination to assess a fine is flat out false, and, according to the FEC, this non-investigation is the "primary piece" of evidence on which the Reviewing Officer relied to establish that the Commission's determination was reasonable. (Record Entry #16, at 11).

The FEC argues that its second reason for affirming its finding of a non-filing was that the Conway campaign gave "shifting and inconsistent explanations about the mailing of the year-end report." (Record Entry No. 16-1, p. 11). The FEC credits its own analyst's *ad hoc* description of a phone call on March 10, 2011 in reaching its conclusion. The analyst on the call noted that Ms. Paisley represented she sent the documents via certified mail. But that is an unverifiable description of a conversation between two parties; it's not a sworn statement. This is hearsay—and the record is indisputable that the documents were sent via Federal Express. The FEC then states that Mr. Stratton claimed the year-end report was sent "separately," again citing an FEC analyst's *ad hoc* description of a phone call with Mr. Stratton on April 20, 2011—another unsworn, hearsay statement which Mr. Stratton denies ever making. AR113. Next the FEC argues that the sworn affidavit of Ms. Johnson should be discounted because she stated that the reports "were packaged," and that this verb tense does not confirm that she in fact personally packaged the reports herself into the FedEx envelope. AR064. This is just silliness: Ms. Johnson's affidavit starts out: "I was given a set of reports...to be shipped [...]," and the FedEx receipt

bears her name. *Id.* The FEC is really grasping here. This verb tense parsing and out-of-context excerpt is what it cites as the third most critical fact in assessing the credibility of the Conway campaign. The FEC hangs its hat on two hearsay statements recollected by its own employees informally summarizing phone conversations, and a verb tense “gotcha” taken out of context from the sworn affidavit of a Conway campaign agent. These “facts” serve as the basis for a \$4,950 fine against a campaign with no prior record of non-compliance and ample evidence that the year-end report was in fact sent is arbitrary and capricious.

This administrative “finding” is a sham and unreasonably ignores facts in the record supportive of the Conway for Senate campaign. The factual record in this case is mixed, with ample evidence submitted in support of Conway’s position. For the FEC to ignore this evidence is *de facto* arbitrary and capricious. The FEC is doubling down now that the Conway campaign has brought suit to clear its reputation.

b. Conway for Senate’s Best Efforts Argument is Not New and Sustains Relief from this Administrative Finding and Fine.

In Plaintiff’s initial brief in support of its Motion for Summary Judgment, it raised the argument of the “best efforts” defense housed in Section 432(i) of the Federal Election Campaign Act:

When the treasurer of a political committee shows that the best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or records of such committee shall be considered in compliance with this Act.

2 U.S.C. s 432(i); see also 11 C.F.R. s 104.7(a).

According to the FEC’s own “Statement of Policy Regarding Treasurers Best Efforts to Obtain, Maintain, and Submit Information as Required by the Federal Election Campaign Act,” in order to show that the campaign made best efforts, the campaign must demonstrate it took relevant precautions, that the campaign had trained employees who knew how to submit information in accordance with the Act and that the failure was the result of reasonably unforeseen circumstances beyond the control of the committee, and that after discovering the failure the campaign filed the relevant reports as soon as

possible. 72 FR 31438-01. Inexperience or negligence of the campaign staff, failure of computers, or a lack of knowledge of filing deadlines do not qualify under the best efforts standard. *Id.*

The FEC responds to Conway's attempt to defend on best efforts grounds that the campaign in essence waived this defense because the campaign did not make it at the time appropriate under its practice, citing the case of *Cunningham v. FEC*. Civ. No. IP-01-0897-C-B/S, 2002 WL 31431557, at p. 4 (S.D. Ind. Oct. 28, 2002). Conway for Senate replies that it constructively made a best efforts argument throughout its interaction with the FEC during the review of its assessed fine. The campaign submitted sufficient evidence that it prepared the year-end report on time, including affidavits from Ms. Paisley and Ms. Johnson, and an email from campaign employee Nick Braden. AR116-117. This evidence also confirms that the campaign took precautions to maintain compliance with federal reporting obligations. Mr. Stratton indicated in his communications with the FEC that he had significant experience as a campaign treasurer and had never been found non-compliant prior, and in fact the FEC well knows that the Conway for Senate campaign had no prior incident of non-compliance. The Conway for Senate campaign was, in all of its communications with the FEC, essentially saying that this failure occurred due to unforeseen circumstances beyond its control: it prepared and sent the year-end report timely via FedEx, and for some reasonably unforeseen reason—somewhere in the chain of custody—it was not received by the Senate or the FEC. The campaign sent the report. The FEC did not receive the report. *Res ipsa loquitur*—the thing speaks for itself: something unforeseen occurred that prevented a proper filing of the report after the campaign shipped it via Fed Ex. And as soon as the campaign learned that the report was not received, it re-sent it on March 10, 2011.

The FEC notes that reasonably unforeseen safe harbors include the systemic failures of a breakdown of its computer system or software, widespread internet outages or severe weather incidents. And indeed, 11 C.F.R. s 111.35(d) expressly excludes negligence as a reasonably unforeseen circumstance to which a safe harbor would apply. But the negligence this regulation refers to is the committee's negligence—*i.e.*, Conway for Senate's negligence. In all of the communications with the FEC, and in the administrative record as a whole, it is readily apparent that the Conway campaign was not

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing with the clerk of the court by using the CM/ECF system on this 15th day of March, 2013, which will send a notice of electronic filing of the above to all counsel of record as follows:

ANTHONY HERMAN
DAVID KOLKER
LISA STEVENSON
ADAV NOTI
BENJAMIN A STREETER III
999 E STREET NW
WASHINGTON DC 20463
Attorneys for Defendant

By: /s/ Glenn D. Denton
Glenn D. Denton