

OFFICE OF THE SECRETARY OF STATE, ELECTIONS DIVISION  
STATE OF COLORADO

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IN THE MATTER OF CHARLES HEATHERLY v. COLORADO RISING and  
PROGRESSNOW COLORADO

2019-03

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**NOTICE OF INITIAL REVIEW**

Charles Heatherly (Complainant) filed a complaint with the Elections Division on January 23, 2019, pursuant to Campaign and Political Finance (CPF) Rule 18.2,<sup>1</sup> alleging that Colorado Rising<sup>2</sup> and ProgressNow Colorado (Respondents) violated Colorado campaign finance laws.

The Elections Division notified the Respondents of the complaint by email on January 24, 2019. The Elections Division has completed its initial review in accordance with CPF Rule 18.2.4.

For the reasons below, the Elections Division finds that Complainant has identified potential violations of Colorado campaign finance law, and has alleged sufficient supporting facts regarding the alleged violations to warrant additional review under CPF Rule 18.2.8.

**Analysis**

*1. The Elections Division will review the complaint under CPF Rule 18.2.*

As an initial matter, the Elections Division notes that Complainant requests that the Secretary of State recuse herself and her office from reviewing the complaint.

The Elections Division is a nonpartisan division of the Secretary of State's office, and it reviews and prosecutes complaints under CPF Rule 18.2 independent of the Secretary of State and Deputy Secretary of State.<sup>3</sup> As a result, the Elections Division will proceed with its review of the complaint.

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<sup>1</sup> 8 CCR 1505-6, Rule 18.2.

<sup>2</sup> An issue committee registered in TRACER as Colorado Rising for Health and Safety.

<sup>3</sup> See Ethical Wall Memoranda dated January 8, 2019, and February 1, 2019.

2. *Complainant alleges potential violations of Colorado campaign finance law.*

In his first claim, Complainant alleges that Respondent Colorado Rising, after making several amendments, incorrectly reported that Respondent ProgressNow Colorado made a major contribution to its committee prior to the 2018 general election.

An issue committee that receives any contribution of \$1,000 or more within the 30 days preceding a general election must file an additional report disclosing that contribution, no later than 24 hours after receipt of the contribution.<sup>4</sup> The Secretary of State's office refers to that additional report as a "major contributor report". Major contributor reports must list the name and address of the contributor, and the amount of the contribution.<sup>5</sup>

In his second claim, Complainant alleges that Respondent ProgressNow Colorado was required, but failed, to register and report as an issue committee.

An issue committee is defined as any person, other than a natural person, or any group of two or more persons, including natural persons that: (1) has a major purpose of supporting or opposing any ballot issue or ballot question; and (2) has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.<sup>6</sup>

Factors relevant to determining whether an issue committee has "a major purpose" of supporting or opposing a ballot measure include an organization's (1) specifically identified objectives in its organizational documents at the time it is established or as such documents are later amended; or (2) demonstrated pattern of conduct based on its annual expenditures in support of or opposition to a ballot measure, or production or funding, or both, of written broadcast communications, or both, in support of or opposition to a ballot measure.<sup>7</sup>

An issue committee<sup>8</sup> must register with the appropriate officer<sup>9</sup> within ten calendar days of accepting or making contributions or expenditures in excess of two hundred dollars to support or oppose a ballot measure.<sup>10</sup> After registration, issue committees must file reports with the appropriate officer on the assigned schedule.<sup>11</sup> An organization that meets the definition of an issue committee, but fails to register and report, violates section 1-45-108, C.R.S.

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<sup>4</sup> Section 1-45-108(2.5)(a), C.R.S.

<sup>5</sup> See section 1-45-108(1)(a)(I), C.R.S.; Note: in the case of a natural person, occupation and employer is also required.

<sup>6</sup> Colo. Const. art. XXVIII, Sec. 2(10)(a); 8 CCR 1505-6, Rule 1.9.

<sup>7</sup> Section 1-45-103(12)(b), C.R.S.

<sup>8</sup> Except a small-scale issue committee as provided in section 1-45-108(1.5), C.R.S.

<sup>9</sup> Under section 1-45-109(1)(a)(I), C.R.S., the Secretary of State is the appropriate filing officer for issue committees supporting or opposing statewide ballot measures.

<sup>10</sup> Section 1-45-108(3.3), C.R.S.

<sup>11</sup> Section 1-45-108(2)(a)(I), C.R.S.

In his final claim, Complainant requests an investigation under CPF Rule 18.2.8.

Because the Complainant has identified potential violations of Colorado campaign finance law, the Elections Division must next determine whether the Complainant alleged sufficient facts to support a legal and factual basis for the complaint.

3. *Complainant alleges sufficient facts to support a legal and factual basis for the complaint.*

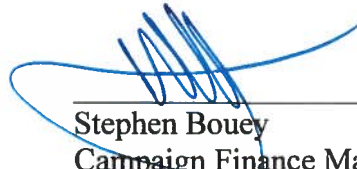
Complainant alleges that the Respondents failed to accurately report contributor information on its major contributor reports, and failed to register and report as an issue committee prior to the 2018 general election. In support, Complainant provides evidence, which, if proven, could be sufficient to support the alleged violations.

Based on the information Complainant provided, the Elections Division finds that the Complaint alleges facts that, if proven, could establish that Respondents were required to register and satisfy reporting requirements under Colorado law.

**Finding**

For the reasons set forth above, the Elections Division finds that Complainant alleged potential violations of Colorado campaign finance law and alleged sufficient facts to support a legal and factual basis for the complaint. Therefore, the Elections Division will conduct additional review of the alleged violations within 30 days, under CPF Rule 18.2.8, to determine whether to file a complaint with a hearing officer.

Dated this 6<sup>th</sup> day of February 2019.

  
\_\_\_\_\_  
Stephen Bouey  
Campaign Finance Manager  
Elections Division  
1700 Broadway, Suite 200  
Denver, CO 80290  
(303) 894-2200

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Notice of Initial Review was served by electronic transmission to:

Colorado Rising  
[olynmawr@msn.com](mailto:olynmawr@msn.com)

ProgressNow Colorado  
[Info@progressnowcolorado.org](mailto:Info@progressnowcolorado.org)  
[mtierney@tierneylawrence.com](mailto:mtierney@tierneylawrence.com)

Charles Heatherly  
[Charlesaz42@aol.com](mailto:Charlesaz42@aol.com)  
[sgessler@klendagesslerblue.com](mailto:sgessler@klendagesslerblue.com)

on this 16<sup>th</sup> day of February, 2019.

  
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Elections Division

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## MEMORANDUM

**To:** Elections Division  
**From:** Jenny Flanagan  
**Date:** January 8, 2019  
**Re:** Ethical wall between the Elections Division and the Deputy Secretary of State for campaign finance complaints

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The Secretary of State's campaign and political finance rules provide that the Department of State's Elections Division must independently review campaign finance complaints for substantive merit and forward valid complaints to a hearing officer if necessary.<sup>1</sup> Once a hearing officer has issued an initial ruling, the Deputy Secretary of State may become involved as a final agency decision maker. Prior to that point, however, the Elections Division's actions must be walled-off from the Deputy Secretary via an ethical barrier to ensure neutral analysis and review of the decision.

This arrangement was initially memorialized in a memorandum dated June 25, 2018. This memorandum replaces that policy in order to reflect the transfer of duties upon the election of Secretary of State Jena Griswold.

In order to ensure the presence of an effective ethical wall, Elections Division staff are instructed as follows:

1. Provide all office personnel with information on the ethical wall.
  - a. The Elections Division must provide guidance to relevant personnel on ethical walls regarding the campaign and political finance complaint process
    - i. This includes guidance to all elections and administrative division employees to alert them to the need to keep this information walled-off from the Deputy Secretary.
    - ii. The personnel within the Elections Division who will work directly on the complaint process must limit their email and other intra-office communications concerning any pending campaign finance complaint to that select group to ensure no information about the complaint is inadvertently sent to another Division or to the Deputy Secretary.
2. Initial review.
  - a. The Elections Division must notify the Respondent of the complaint and review the complaint for validity.
  - b. Elections Division employees may only communicate about the complaint with Elections Division staff, attorneys representing the Elections Division for the purpose of assisting with review and potential prosecution of the complaint, and

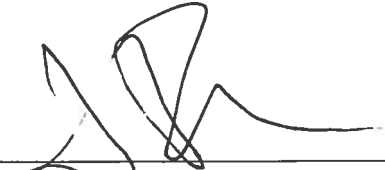
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<sup>1</sup> 8 CCR 1505-6, Rule 18.2. See also *Holland v. Williams*, 16-cv-00138 (June 12, 2018).

- with members of the Administration Division when necessary. This communication must never involve the Deputy Secretary.
- c. If at any point a Complainant or Respondent communicates with the office, they will be forwarded directly to the Elections Division.
  - d. The Information Technology Division will create segregated server space for campaign finance complaints that will be accessible only to employees of the Elections Division.
  - e. The Elections Division's dismissal of a complaint is a final agency decision, and at this point, the ethical wall is lifted.
  - f. The complaint is a public document, and available upon request under CORA.
3. Cure process.
- a. The Elections Division will notify the Respondent of the opportunity to cure, if allowed.
  - b. The Elections Division's dismissal of a cured complaint is a final agency decision, and at this point, the ethical wall is lifted.
  - c. The complaint is a public document, and available upon request under CORA.
4. Investigation and enforcement.
- a. During the investigation of a complaint, the Elections Division must investigate the claims in the complaint without involving the Deputy Secretary.
  - b. If the Elections Division files a complaint with a hearing officer, it must notify the hearing officer that the Deputy Secretary is walled-off and may not be contacted.
  - c. Once the complaint has been filed with a hearing officer, the complaint is a public document and available upon request under CORA. The ethical wall remains intact.
  - d. After a hearing officer renders a decision in the case, the ruling is sent to the Deputy Secretary for a final agency decision.
  - e. Once the Deputy Secretary renders her final agency decision, the ethical wall is lifted.

### **Conclusion**

The ethical wall between the Elections Division and the Deputy Secretary of State must remain in place during the campaign finance complaint process. The Elections Division may lift the ethical wall only after the Deputy has issued a final agency decision. As best practice, the Elections Division should restrict access to complaints and supporting documentation and communications, so that other office personnel do not inadvertently break the ethical wall.



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Jenny Flanagan  
Deputy Secretary of State

Memorandum Addendum

To: Elections Division

From: Secretary Griswold

Date: February 1, 2019

RE: Addendum to memorandum of January 8, 2019, regarding the ethical wall between the Elections Division and Deputy Secretary of State for campaign finance complaints

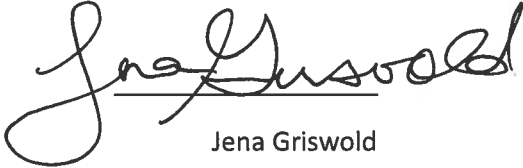
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On January 8, 2019, Deputy Secretary Flanagan issued a memo to the Elections Division, which continued the ethical wall established by our office in June 2018, to ensure independent review of campaign finance complaints.

This addendum formally extends that ethical wall to Secretary of State Jena Griswold. Elections Division staff are instructed to apply the guidelines reaffirmed in the January 8<sup>th</sup> memo to Secretary Griswold in the same manner as the Division currently applies them to Deputy Secretary Flanagan.

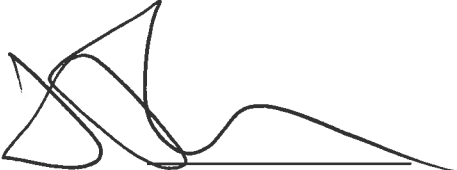
Note that the Elections Division has not involved Secretary Griswold in the Divisions independent review of complaints since the Secretary took office, in line with our practice dating back to June 2018. While the office continues to evaluate the best way to do enforcement, this formal ethical barrier is meant to provide specific guidance to the Elections Division regarding the Secretary's non-involvement in complaint review.

This addendum takes effect immediately.



Jena Griswold

Secretary of State



Jenny Flanagan

Deputy Secretary of State