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**State of Arizona**
**Citizens Clean Elections Commission**

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# PROBABLE CAUSE RECOMMENDATION

**To:** Commissioners

**From:** Todd F. Lang, Executive Director

**Date:** May 19, 2006

**Subject:** MUR # 04-0079 -Rick Murphy 2004

This shall reaffirm that I intend to proceed with my March 1, 2006 (copy attached) probable cause recommendation pursuant to A.A.C. R2-20-214D. The Rick Murphy 2004 campaign committee responded to the March 1 brief by letter dated May 8, 2006 (copy attached). I find no merit in the response and hereby give notice that I will proceed with my recommendation that the Commission find probable cause to believe that violations of the Citizens Clean Elections Act and Commission rules has occurred.

## Background and Clarification

MUR # 04-0079 addresses one of the primary issues raised in the previous enforcement action against Representative Murphy in MUR # 04-0029. That matter was dismissed without prejudice, after advice from counsel. This new enforcement matter arose after the complainant, Phil Hanson, submitted a new complaint in which he re-alleged parts of his original complaint. In the interest of efficiency, the information contained in MUR # 04-0029 was incorporated by reference into MUR # 04-0079.

The primary matter at issue in this current enforcement matter is Representative Murphy's use of a consultant who used sub-vendors to provide various services including: signs, mailings, and automated calls. By failing to either directly pay these sub-vendors or adequately identify the sub-vendors and the amounts paid to each in his campaign finance reports, Representative Murphy violated ARS Section 16-948(C).

Although this matter is quite simple, the lengthy response by Representative Murphy raises a number of assertions that merit clarification. For clarity I will separate his procedural concerns from his discussion of the merits.

## I. Respondent's Procedural Arguments

- Respondent's Argument No. 1 – *"The Complaint And Its Supplement Are Invalid."*

- Respondent's Argument No. 6 – *"The Commission Has Repeatedly Ignored Proper Procedure."*

- Respondent's Argument No. 7 – *"Method Of Reopening The Case Was Either Improper Or Illegal."*

Respondent argues that there are multiple technical violations related to the form of the original complaint (the "Original Complaint") filed on October 18, 2004 by Phil Hanson ("Complainant") and to the supplement to the Original Complaint (the "Supplement") filed on October 28, 2004. The Original Complaint and Supplement were the basis for MUR # 04-0029, which matter was dismissed without prejudice by the Commission prior to the filing of the present matter.

Respondent contends that neither the Original Complaint nor the Supplement were properly notarized, as required by AAC R2-20-203. He goes into great length regarding his concerns over this clerical error. Regardless, the present matter, MUR # 04-0079 was initiated in response not to the Original Complaint, but to Complainant's letter (the "New Complaint") dated October 7, 2005. The New Complaint substantially complies with the applicable filing provisions.

The New Complaint provides the full name and address of the Complainant, as required by AAC R2-20-203(B)(1). It also contains a notarized signature and appropriate jurat, as required by AAC R2-20-203(B)(2). Further, the New Complaint clearly identifies the Respondent, as required by AAC R2-20-203(D)(1). It identifies the source of the information as Lemon's written statement to the Commission dated February 7, 2005, as required by AAC R2-20-203(D)(2). It provides a clear and concise recitation of the facts that describe a violation of the Act, as required by AAC R2-20-203(D)(3). And it cites supporting documentation more readily available to the Commission than to the Complainant, as required by AAC R2-20-203(D)(4). Moreover, the complete investigative file and information gathered in MUR # 04-0029 is available to the Commission in order to make an informed decision. By dismissing the original complaint in MUR 04-0029 expressly "without prejudice," Mr. Hanson (and others) were free to file a new complaint regarding the allegations at issue. The remedies at ARS Section 16-957(C) are certainly available to Mr. Hanson, but they do not preclude the commission's consideration of a new complaint when the prior matter was not resolved on the merits.

- Respondent's Argument No. 3 – *"I Had No Constructive Notice Of The New Requirement."*

- Respondent's Argument No. 4 – *"Commission Illegally Changed The Rules In The Middle Of The 2004 Campaign."*

Respondent mischaracterizes the Commission's interpretation of ARS § 16-948(C) as creating a new reporting requirement, of which he claims he did not receive sufficient notice. In fact, the

Commission did not issue a new rule, but merely applied a longstanding statutory provision to a fact pattern it had not previously considered.

Whether ARS § 16-948(C) is violated by the reporting of payments to a consultant who in turn pays sub-vendors was a question first brought before the Commission during the 2004 election cycle. Staff sent out letters to candidates clarifying the application of ARS § 16-948(C) beginning in June, 2004.

The Commission's letters were provided as a courtesy to candidates, but the Commission was under no obligation to provide such additional notice relating to a provision of the Act that had been in effect since 1998. Respondent's claim that he did not receive the letter sent to all candidates in July 2004 does not exempt him from the Act's reporting requirements. His claim that the letter was not in the file when his attorneys requested his file in May, 2005 is inaccurate. The letter was not in the *enforcement* file they requested. As with all candidates, the letter was placed in his *candidate* file –which was not requested. Candidate files are made and kept for all participating candidates. Moreover, we are unaware of any other candidates who claim they did not receive the letter.

## II. Respondent's Arguments on the Merits

- Respondent's Argument No. 2 – *"I Fully Complied With ARS § 16-948(C)."*

ARS § 16-948(C) provides that a candidate "shall pay monies from a participating candidate's account directly to the person providing goods or services to the campaign and shall identify, on a report filed pursuant to article 1 of this chapter, the full name and address of the person and the nature of the goods and services and compensation for which payment has been made." Failure to comply with this provision is the primary violation with which Respondent is charged.

Respondent contends that he complied with ARS § 16-948(C) insofar as he identified on his campaign finance reports Constantin Querard as the vendor of direct mail and automated telephone call services. The Commission, however, has rejected this reasoning, noting that Querard in turn contracted with sub-vendors to supply goods and services for the benefit of Respondent's campaign. Where sub-vendors are the ultimate providers of goods and services to a participating candidate's campaign, the Commission interprets the Act to require that the sub-vendors be identified on the participating candidate's campaign finance reports. The Administrative Law Judge in the David Burnell Smith case (CCEC MUR No. 04-0023) found that the Commission's interpretation of ARS § 16-948(C) is correct and upheld the imposition of sanctions arising from Smith's violation of the Act.

Respondent mischaracterizes the issue as arising because of some perceived personal grievance that the Commission supposedly harbors against Querard. Rather, the issue was considered by the Commission in several other cases involving candidates in the 2004 election cycle, including the Smith, Gorman, Dial, Rosati, Udall, Manoil and Trasoff matters. Querard was indeed involved as a consultant to candidates in some (although not all) of those cases, but it was the candidates' reporting practices that triggered complaints which led to enforcement actions. In most of the cases involving a lack of detail regarding sub-vendors, the candidates agreed to amend their reports to provide the required detail, and the enforcement matters were closed.

(Smith and Rosati included additional allegations that were not dismissed.) Staff made the same offer to Representative Murphy. He declined to amend his reports.

- Respondent's Argument No. 5 – *"An Independent Audit Concluded Compliance Was Met."*

The portion of the *Report on Agreed-Upon Procedures* (the "Audit") prepared by Miller, Allen & Co., P.C. (the "Auditor") and presented to the Commission in April 2005 dealing with Respondent's expenditures did not directly address the payments made to Querard rather than to sub-vendors. The Auditor was neither asked nor qualified to determine the question of law before the Commission in this matter – whether only reporting payments to a consultant who in turn paid sub-vendors violates ARS § 16-948(C). Thus, the audit is inapposite to this matter.

## Conclusion

Based on the failure of the Rick Murphy 2004 campaign to either directly pay the sub-vendors or to provide the required detail in regard to the payment of sub-vendors, I recommend that the Commission find that his campaign failed to meet the reporting requirements of ARS Section 16-948(C). Pursuant to ARS § 16-942(B), the civil penalty for a violation by on behalf of any candidate of any reporting requirement imposed by Chapter 6 of Title 16 shall be $110.00 per day for candidates for the legislature. As these reports are now well over a year old, the penalties at issue easily exceed the cap of $10,000.00 set by Commission Rule R2-20-222. Although there are several expenditures at issue here, I recommend that the Commission issue just one penalty of $10,000.00.

Sincerely,

Todd F. Lang
Executive Director
Citizens Clean Elections Commission