

**BEFORE THE  
FAIR POLITICAL PRACTICES COMMISSION  
STATE OF CALIFORNIA**

**In the Matter of:**

**SUSAN G. SHELLEY and the SUSAN SHELLEY FOR ASSEMBLY  
2013 and SUSAN SHELLEY FOR ASSEMBLY 2014 CANDIDATE-  
CONTROLLED COMMITTEES, Respondents**

**Agency Case No. 15/003**

**OAH No. 2019030096**

**PROPOSED DECISION**

Deena R. Ghaly, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on June 19, 2019, in Los Angeles, California.

Theresa Gilbertson, Staff Counsel, represented Complainant Fair Political Practices Commission (Complainant or FPPC). Susan Shelley (Shelley) represented herself and her two committees, Susan Shelley for Assembly 2013 (2013 Committee) and Susan Shelley for Assembly 2014 (2014 Committee) (collectively, Respondents).

**PRETRIAL MOTION**

On the hearing day, Respondents submitted a Motion to Dismiss, which Complainant opposed. In their motion, Respondents argued that the Accusation

should be dismissed based on: (i) the United States Constitution's prohibition against double jeopardy; (ii) collateral estoppel; and (iii) California Code of Regulation, title 2 (Regulation) section 18361.4, which prohibits the FPPC from commencing an enforcement action if the violator consulted with FPPC staff "in good faith, disclosed truthfully all the material facts, and committed the acts complained of either in reliance on the advice of the staff or because the staff's failure to provide advice."

This proceeding is governed by the Administrative Procedure Act (Gov. Code §§ 11500 et seq.), which does not expressly provide for dispositive pretrial motions such as motions to dismiss. Courts have held there is implied authority for dispositive motions in the course of administrative hearings if the underlying facts are not in dispute and the claim or allegations is subject to dismissal as a matter of law. (See *Duarte & Witting, Inc. v. New Motor Vehicle Bd.* (2002)104 Cal.App.4th 626, 642.)

Respondents' double jeopardy argument is based on the undisputed fact that another state agency, the Secretary of State, imposed monetary penalties on Respondents for the same misconduct at issue here, failure to timely file pre-election campaign finance statements. There is clear precedent, however, that the constitutional prohibition against double jeopardy is applicable only to successive criminal actions, and therefore does not apply to administrative penalties, which, in the absence of extraordinary circumstances not alleged or apparent here, are considered civil. (See, *Hudson v. United States* (1997) 52 U.S. 93 [118 S.Ct. 488].)

Respondents also argue that the Accusation should be dismissed based on collateral estoppel. As Respondents explain the doctrine in this context, collateral estoppel is a remedy to hold government entities to the same standards of morality and justice expected from its citizens. Among the cases cited by Respondents regarding collateral estoppel is *U.S. v. Georgia-Pacific Co.* (9th Cir. 1970) 421 F.2d 92, a

convoluted case involving an owner of timberlands who in 1934 agreed to donate certain lands to the federal government. Over a period of three decades, the government failed to meet the conditions of transfer and the court, invoking collateral estoppel, prevented it from seeking additional compliance with the agreement. Another case Respondents cites, *Gestuvo v. Immigration and Naturalization Service* (1971), involves an individual who was granted a visa based on the government agency's classification of him as a professional, a classification it attempted to repudiate as a mistake when it refused to revalidate his visa status a short period later. The court held that the individual could not be refused the visa because the government was estopped from reversing its mistake where he had relied on its original determination and there was no significant disruption of national policy in granting the visa.

In the motion, Respondents are not clear about how the FPPC actions here are analogous to those in the cases. The general upshot seems to be that the FPPC has acted in such a reprehensible manner that collateral estoppel precludes it from going forward with this enforcement action. The reprehensible conduct is the enforcement action itself.

Respondents' representations about the FPPC are obviously not undisputed facts and, as factual matters, cannot be established through argument in a motion. Under these circumstances, collateral estoppel as it is set out in Respondents' motion does not establish a basis to dismiss the Accusation.

Finally, Respondents argue that Regulation 18361.4 precludes the FPPC from bringing an enforcement action. This regulation provides immunity from enforcement actions if a candidate or other individual subject to the Political Reform Act (PRA) requests advice from FPPC staff, gives all material information about the subject for

which the advice is sought, and then follows the advice. Here, as set out with more specificity at Factual Findings 14 through 16 below, Shelley asked FPPC staff specific questions about reporting requirements and received specific advice, some of which she failed to follow. Shelley also made general statements to FPPC staff about wanting to be in compliance and asking, again very generally, for help. These circumstances do not fulfill the requirement for establishing immunity under Regulation 18361.4 and therefore, there is no basis to dismiss the Accusation under this theory.

### **POST-HEARING SUBMISSIONS**

During the hearing, oral and documentary evidence was received. The record was held open for closing statements and responses. Complainant's statement and response were marked Exhibits 40 and 41, respectively. Respondents' statement and a reply to Complainant's reply were marked Exhibits MM and NN, respectively. All post-hearing submissions were lodged with the record and considered. The matter was submitted for decision on July 10, 2019.

### **SUMMARY**

Shelley was a first-time candidate when she ran for the California State Assembly's 45th District seat in the 2013 special and 2014 regular elections. Shelley formed a committee for each election. These committees were required to file pre-election campaign statements by certain dates.

In the Accusation, the FPPC alleged that collectively, Respondents failed to timely file pre-election statements in five instances. The evidence established these violations.

Each violation of the PRA carries a penalty of up to \$5,000. In the course of the hearing, Shelley demonstrated important mitigating factors supporting a reduced penalty. The mitigating factors, balanced against equally important public interests in protecting the democratic process, warrant a penalty amount at the mid-point of the range, \$2,500 per violation.

## **FACTUAL FINDINGS**

### **Parties and Jurisdiction**

1. The FPPC is the state agency charged with the duty to administer the PRA.<sup>1</sup> Among its provisions are campaign finance reporting requirements. The FPPC's Enforcement Division is assigned to enforce the PRA.

2. Shelley was a candidate for the California State Assembly, 45th District in the primary and general special elections in 2013 and the primary and general elections in 2014. Once she reached the applicable campaign contribution or

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<sup>1</sup> The PRA is contained in Government Code sections 81000 through 91014. Regulations interpreting the PRA are at Regulation sections 18110 through 18997. All references to the PRA and its regulations are to the versions applicable at the times relevant to this matter.

expenditure thresholds, Shelley formed committees to manage those contributions and expenditures, the 2013 Committee and 2014 Committee.<sup>2</sup>

3. The PRA requires that committees file statements and reports pursuant to a prescribed schedule, and with a prescribed "filing officer." State office candidates' filing officer is the Secretary of State (SOS). (Gov. Code, § 84215, subd. (a).) As part of its duties as filing officer, the SOS is also mandated to impose penalties for late or non-filings.

4. On August 7, 2017, the FPPC issued an Order Finding Probable Cause and to Prepare and Serve an Accusation (Order) in this matter. The FPPC's Enforcement Division prepared and served the Accusation pursuant to the terms of the Order. Shelley filed a Notice of Defense on behalf of herself and her committees and this hearing followed.

### **Shelley's Political Campaigns**

5. In 2013, Assemblymember Robert Blumenfield (Blumenfield) held the 45th District Assembly seat. Term limits would have prevented him from running in the next regular election, scheduled for 2014. On January 14, 2013, Shelley declared her candidacy for the seat to be vacated by Blumenfield. The following month, Shelley

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<sup>2</sup> A "committee" is defined under the PRA as any person or combination of persons who directly or indirectly receive contributions totaling \$1,000 or more in a calendar year. (Gov. Code § 82013, subd. (a).)

formed the 2014 Committee. The SOS assigned an identification number for the 2014 Committee, 1355796.

6. In March 2013, Blumenfield won a Los Angeles City Council seat for the term beginning July 2013. Blumenfield resigned from the Assembly, thus necessitating a special election to fill his seat. The Governor issued a proclamation scheduling a special primary election on September 17, 2013. In case no candidate received more than 51% of the vote in the special primary election, a special general election was scheduled for November 19, 2013.

7. On July 10, 2013, Shelley filed a statement of intent to run in the 2013 special election. On July 11, 2013, Shelley formed the 2013 Committee. The SOS assigned to the 2013 Committee identification number 1358945.

### **Filing Requirements**

8. Filing requirements designate certain reporting periods for which candidates must file pre-election statements, one ending 45 days before the date of the election, and one ending 17 days before the date of the election. The pre-election statements reflecting campaign finance activity for each reporting period are due 40 and 12 days before the elections respectively. (Gov. Code §§ 8400.5, subd. (c) (amended in 2016) and 84200.8, subd. (a) and (b).) Candidates controlling more than one committee must file a pre-election statement for each committee. (Reg. § 18405.) Pre-election statements must be filed in paper format and, for candidates and committees reaching certain monetary thresholds, as did Respondents, in electronic format as well. (Gov. Code § 84605, subd. (a)(1).)

9. The first reporting period for the special primary election held on September 17, 2013 (special primary election), was January 1 through August 3, 2013, and pre-election statements were due on August 8, 2013. Shelley filed the paper format of the first reporting period pre-election statements for the 2013 Committee and the 2014 Committee on October 2, 2013, 55 days late, and their electronic format statements on August 19, 2013, 11 days late. The late filings for the 2013 Committee correspond to Counts 1 of the Accusation. The FPPC has not charged Respondents for the untimely filing of the 2014 Committee pre-election statements for this reporting period.

10. The second reporting period for the special primary election was August 4 through August 31, 2013 and pre-election statements for that period were due on September 5, 2013. Shelley filed the paper format of the second reporting period pre-election statements for the 2013 Committee and the 2014 Committee on October 2, 2013, 27 days late, and their electronic format statements on September 6, 2013, one day late. The FPPC has not charged Respondents for the untimely filing of either the 2013 Committee or 2014 Committee statements for the second reporting period.

11. Because no candidate in the special primary election won more than 51% of the vote, a special general election was held on November 19, 2013 (special general election). The first reporting period for the special general election was from September 1 through October 5, 2013, and pre-election statements for that period were due on October 10, 2013. The second reporting period was from October 6, 2013 to November 2, 2013, and pre-election statements for that period were due on November 7, 2013.

12. Shelley did not submit the paper format of the pre-election statements for either the first or second reporting periods of the special general election. Rather, she reported the campaign finance expenditures for the two reporting periods on behalf of



both the 2013 Committee and the 2014 Committee in post-election statements filed on February 6, 2014. Shelley filed the electronic version of the pre-election statements for the first reporting period on October 21, 2013, 11 days late, and the second reporting period on January 31, 2014, 85 days late. The non-filings of the 2013 Committee paper format pre-election statement and late filing of the 2013 Committee electronic format pre-election statement for the first reporting period correspond to Count 2 of the Accusation. The non-filings of the 2013 Committee paper format and electronic format of the pre-election statements covering the second reporting period correspond to Count 3 of the Accusation. The non-filings of the 2014 Committee paper format pre-election statements and the late filing of the 2014 Committee electronic format pre-election statement for the first reporting period correspond to Count 4 of the Accusation. The non-filings of the 2014 Committee paper format and electronic format of the pre-election statements for the second reporting period correspond to Count 5 of the Accusation.

### **Shelley's Communications with the FPPC during the Campaigns**

13. The FPPC provides technical assistance to candidates through its advice staff. On the evening of Friday, August 16, 2013, Shelley sent an e-mail communication stating:

I'm a candidate in the AD45 special election on September 17 and serving as my own Treasurer. I just checked online to find the pre-primary filing deadline and discovered that it was August 8. Sorry about that, I'm on it now.

Here's my question: I have two committees, one established back in January before this special election was officially

called. That one is for 2014, but until the 2013 account was established in July, I was raising and spending money using the 2014 committee account. Should I file form 460 for each committee for the period ending 8/3/13, or is there a different schedule for the 2014 committee? There were two transfers of funds from the 2014 committee to the 2013 committee, which I will reattribute in the 2013 committee's report.

Thank you for your assistance. I'm making every effort to comply with everything, and it's a daunting task.

(Exh. B.)

14. FPPC advice staff answered at 6:44 am on Monday, August 19, 2013, quoting its campaign manual which stated that candidates must file statements for each committee "each time any committee statement is due." (Exh. C.) As set forth in Factual Findings 9 through 13, subsequent to the FPPC's response, Respondents filed pre-election statements for both committees but not when they were due.

15. On Monday, August 19, 2013, at 11:27 p.m., Shelley sent an e-mail correspondence to FPPC staff asking how to report a loan she made to the 2014 Committee and transferred to the 2013 Committee. FPPC staff responded on August 20, 2013 at 12:40 p.m., advising Shelley that the transfer should be reported as a contribution from the 2014 Committee to the 2013 Committee.

16. On Friday, December 20, 2013, at 10:48 p.m., Shelley sent an e-mail regarding how to retire debt from her campaign for the general special election. At the end of the communication, she wrote:

In a related matter, I acted as my own treasurer and would like to make sure the campaign's reporting is in full compliance. I made every effort during the campaign to file all required reports as completely and accurately as possible. Please let me know if anything is missing or incorrect.

(Exh. D, p. 2.)<sup>3</sup>

## **Enforcement Actions by Other Agencies**

### **SECRETARY OF STATE**

17. Shelley was subject to fines for late and non-filings under the SOS's authority. These penalties are either \$10 per day or an amount equivalent to the cumulative amount of contributions and expenditures in the late filing. For the special primary election, the SOS assessed fines totaling \$1,590 against Respondents. For the special general election, the SOS assessed fines totaling \$5,012. Citing her status as a first-time candidate, the burdens of the dual filings, and the relatively small amount of money she had raised and spent, Shelley applied to the SOS for a liability waiver, which the SOS granted in part and denied in part.

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<sup>3</sup> Shelley also offered evidence of communications she made to the FPPC during the 2014 elections seeking its assistance with that year's elections. As Respondents' compliance with the PRA during that election is not at issue in this matter, the 2014 are considered only for the general proposition, that as a candidate, Shelley maintained contact with, and utilized the FPPC's advice services.

## **FRANCHISE TAX BOARD AUDIT**

18. Per applicable law, Respondent's committees were audited by the state Franchise Tax Board (FTB). Its auditors found that Respondents had substantially complied with the PRA's disclosure and record-keeping requirements but also noted findings of non-filings, late filings, and failure to attribute certain contributions to their contributors by the 2013 Committee, and of non-filings and late filings by the 2014 Committee. (See, Exh. 16.)

19. FTP audit findings were forwarded to the FPPC, the SOS, and the Department of Justice.

### **Respondent's Evidence**

20. Amber Maltbie, an attorney and partner with the law firm Nossaman LLP and a professor at Pacific McGeorge School of Law, where she teaches election law, testified on respondent's behalf. Attorney Maltbie has been in practice for ten years, predominantly representing candidates at the state and local level in California, as well as federal candidates. She also serves on the board of directors of Emerge California, which assists women running for political office. Attorney Maltbie has been approved as an expert witness in proceedings before the Los Angeles Superior Court.

21. Attorney Maltbie's advice, particularly to first time candidates, is to hire a professional treasurer:

I always say that when you're starting a campaign, if you're a first-time candidate, you absolutely should hire a professional treasurer . . . And conversely, I know a number of political treasurers [and] their job is professional political

reporting but they're not attorneys and so they will as a policy not work with a candidate unless they have a political attorney because of the liability on the treasurer imposed on the Political Reform Act, and my view is a – I mean, this is the Political Reform Act. It's almost 200 pages long.

(Transcript, pp. 144-145.)

22. Attorney Maltbie reviewed Respondents' filings. She determined that, while not in complete compliance with the PRA and its regulations, Shelley's mistakes were not serious. According to Attorney Maltbie, most of Respondents' electronic filings, if not those in paper format, were available sometime during the election and, in her experience, the electronic filings, uploaded onto the SOS's website, are the main source of information for most stakeholders such as the press, other candidates, and members of the public. Attorney Maltbie also noted that other filings by Respondents disclosed the majority of the contributions received by the committees.

## **LEGAL CONCLUSIONS**

### **Burden and Standard of Proof**

1. As the moving party, complainant has the burden of proving the allegations. The standard of proof is preponderance of evidence. (Evid. Code § 115.) The term preponderance of evidence means "more likely than not." (*Sandoval v. Bank of America* (2002) 94 Cal.App.4th 1378, 1388.)

## **Applicable Statutes and Regulations**

2. When enacting the PRA, the people of California determined that previous laws regulating political practices were not adequately enforced, that therefore, the PRA must be construed liberally to achieve its purposes, and that it be vigorously enforced. (See Gov. Code §§ 81001, subd. (h), 81003, and 81002, subd. (f).) Among its purposes, the PRA seeks to ensure that receipts and expenditures in election campaigns are fully and truthfully disclosed to the benefit of the voters. (Gov. Code § 81002, subd. (a).)

3. The FPPC Enforcement Division is mandated to enforce the PRA's provisions. (Gov. Code §§ 83111, 83116, and 91000.5; Regulation §§ 18361, 18361.4, subd. (c).)

4. A candidate or committee controlled by the candidate may be held liable for any violation of the Act. (Gov. Code, § 83116.5.)

5. Each violation of the Act is punishable by a monetary penalty of up to \$5,000. (Gov. Code, § 83116, subd. (c).) Regulation section 18361.5, subdivision (d), provides that in framing a proposed order following a finding of a violation pursuant to Government Code section 83116, the FPPC and the administrative law judge shall consider all the circumstances including but not limited to:

- (1) The seriousness of the violation;
- (2) The presence or absence of any intention to conceal, deceive or mislead;
- (3) Whether the violation was deliberate, negligent or inadvertent;

(4) Whether the violator demonstrated good faith by consulting the Commission staff or any other government agency in a manner not constituting a complete defense under Government Code section 83114(b);

(5) Whether the violation was isolated or part of a pattern and whether the violator has a prior record of violations of the Political Reform Act or similar laws; and

(6) Whether the violator, upon learning of a reporting violation, voluntarily filed amendments to provide full disclosure.

### **Causes for Finding Liability Pursuant to the PRA**

7. Cause exists to find Shelley and the 2013 Committee in violation of the PRA for failing to timely file paper and electronic pre-election campaign statements pursuant to Government Code sections 84200.5, subdivision (c) and 84200.8, subdivision (a) for the first reporting period of the 2013 special primary election. (Factual Finding 9 and Legal Conclusions 1-4)

8. Cause exists to find Shelley and the 2013 Committee in violation of the PRA for failing to file the paper pre-election campaign statement and failing to timely file the electronic pre-election statement pursuant to Government Code sections 84200.5, subdivision (c) and 84200.8, subdivision (a) for the first reporting period of the 2013 special general election. (Factual Finding 11 & 12 and Legal Conclusions 1-4.)

9. Cause exists to find Shelley and the 2013 Committee in violation of the PRA for failing to file the paper and the electronic pre-election campaign statement

pursuant to Government Code sections 84200.5, subdivision (c) and 84200.8, subdivision (a) for the second reporting period of the 2013 special general election. (Factual Findings 11 & 12 and Legal Conclusions 1-4.)

10. Cause exists to find Shelley and the 2014 Committee in violation of the PRA for failing to file the paper pre-election campaign statement and failing to timely file the electronic pre-election campaign statement pursuant to Government Code sections 84200.5, subdivision (c) and 84200.8, subdivision (a) for the first reporting period of the 2013 special general election. (Factual Findings 11 & 12 and Legal Conclusions 1-4.)

11. Cause exists to find Shelley and the 2014 Committee in violation of the PRA for failing to file the paper pre-election campaign the electronic pre-election campaign statement pursuant to Government Code sections 84200.5, subdivision (c) and 84200.8, subdivision (a) for the second reporting period of the 2013 special general election. (Factual Findings 11 & 12 and Legal Conclusions 1-4.)

## **Discussion**

12. Applying the criteria for determining penalties set out at Legal Conclusion 6 above, the evidence established as follows:

Seriousness of violations: Respondents' violations are serious. Compliance with campaign finance laws is essential to fair elections. Alternate forms of reporting cannot provide full redress for lost opportunities to receive timely statements and compare them with filings of the same type by other candidates. Especially troubling are Respondents' filings made after the election date.



Presence or absence of intention to conceal, deceive or mislead: There was no committed the violations with an intent to conceal, deceive or mislead.

Whether the violations were deliberate, negligent or inadvertent. Shelley's initial communication to the FPPC (Factual Finding 13) demonstrates that, even before receiving advice, she was aware of the filing schedule and that she had already missed one deadline. Her continued late filings constitute negligence.

Whether the violator demonstrated good faith by consulting the Commission staff or any other government agency in a manner not constituting a complete defense under Government Code section 83114, subdivision (b): Shelley demonstrated good faith by consulting FPPC about her reporting question. Because Shelley sought advice about her filing commitments, the FPPC declined to charge all possible violations.

Whether the violations were part of a pattern. Shelley repeatedly made the same filing mistake and thus the violations can be deemed to constitute a pattern.

Whether the violator voluntarily filed amendments to provide full disclosure: As the violations at issue involve campaign activity that was eventually disclosed in late filings and post-election filings, this criterion is not applicable.

9. Considering the relevant factors in total, Shelley's mitigating factors, balanced against equally important public interests in protecting the democratic process, warrant a penalty amount at the mid-point of the range, \$2,500 per violation, or for the five violations, a total of \$12,500, in accordance with the Order below.

## **ORDER**

1. Accusation Counts 1 through 5 are sustained.

2. Per the Legal Conclusions, total liability for the violations in the Accusation is assessed at \$12,500. Respondent Shelley shall pay \$12,500 to the FPPC on term and conditions it determines.

DATE: August 9, 2019

DocuSigned by:  
*Deena R. Ghaly*  
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DEENA R. GHALY

Administrative Law Judge

Office of Administrative Hearings