

VT SUPERIOR COURT
WASHINGTON UNIT
STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
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JA

STATE OF VERMONT

FILED

v.

GREEN MOUNTAIN FUTURE

DECISION ON CIVIL PENALTY

The court previously granted the State's motion for summary judgment and ruled that Green Mountain Future ("GMF") violated the Vermont campaign finance law when it failed to register and disclose its expenditure of \$429,186 on two political ads shortly before the 2010 gubernatorial election.

The remaining issue is the State's request for a civil penalty. The State seeks \$100,000 and argues that a sharp rebuke is required to deter future violations. See 17 V.S.A. § 2806(b) (allowing a civil penalty of up to \$10,000 per violation). GMF argues that no monetary penalty is required because it believed in good faith that its advertisements were exempt from the Vermont disclaimer and disclosure requirements because they were "issue ads" not subject to regulation.

The imposition of a civil penalty under 17 V.S.A. § 2806(b) is equitable in nature. Its primary purpose is remedial—to increase the cost of noncompliance, not to punish the violator. Cf. *State v. Irving Oil Corp.*, 2008 VT 42, ¶ 17, 183 Vt. 386 (so concluding in the environmental enforcement context). In determining the appropriate penalty, the court will consider harm to the public, the good or bad faith reasons for GMF's failure to register, GMF's ability to pay, and the need for deterrence. Cf. *Federal Election Commission v. Furgatch*, 869 F.2d 1256, 1258 (9th Cir. 1989) ("[I]n determining the amount of the penalty [for an election law violation], a district court should consider (1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; and (4) the necessity of vindicating the authority of the [regulator].").

Harm to the public

There was little or no harm to the public in this case because virtually the same information was filed by GMF with the Internal Revenue Service and posted on the federal website. The minimum donation level which requires disclosure is \$100 for the Vermont system and \$200 for the federal. According to counsel, there was one person who donated between \$100 and \$200 and was not disclosed on the federal website. Some people may have visited the Vermont Secretary of State's website and failed to find the information they sought. Others may have preferred to use a disclosure process which covers only expenditures and candidates running in

Vermont. Since the overlap between the federal and state disclosure requirements is virtually complete, there was little or no actual harm caused in this case.

This factor supports a moderate civil penalty since harm to the public was not great.

Reasons for GMF's failure to register

GMF argues that it had a good faith basis for not registering because it believed that it was engaged in protected "issue advocacy" and was not taking a position with respect to the election. It seems obvious to the court that these advertisements ran when they did and with their particular content for the exclusive purpose of influencing the outcome of the election. Lt. Governor Dubie's position on Vermont Yankee was of interest to GMF because of his candidacy. No other prominent Vermonter's opinions on the topic of nuclear energy—pro or con—were featured in a GMF ad campaign costing almost half a million dollars.

Before running the ads, GMF received fair warning from the Secretary of State:

The answer to your questions will depend on the exact content of the particular communication. However, 17 V.S.A. § 2801(4) uses broad language. An organization is a PAC in Vermont if it spends in excess of \$500 "in a calendar year for the purpose of supporting or opposing one or more candidates, influencing an election, or advocating a position on a public question or affecting the outcome of an election." There is nothing in the plain meaning of the statute that suggests that it only applies when certain words of express advocacy are used. Consequently, our conservative advice is that any organization that is engaged in an activity described in § 2801(4) should comply with all Vermont laws relating to PACs. The office of the attorney general concurs in this advice.

Email dated 8/6/10.

GMF chose to give a construction to this advice which was the exact opposite of what was meant:

GMF's counsel agreed in the analysis that the statute does not only apply when "certain words of express advocacy are used." It would apply when *any* words of express advocacy are used.

GMF Memo. at 8. GMF was warned that in the opinion of the regulator, the Vermont law would receive a more expansive interpretation. It chose not to hear the warning.

A more plausible explanation for GMF's failure to register comes from its memo in which it notes with concern the likelihood that the \$2,000 cap on donations, including donations from the Democratic Governors Association which paid for almost the entire Vermont effort, would apply. This limitation on the activities of the PAC is a far more credible explanation for why it did not register and disclose expenditures under the Vermont law.

The court does not believe that GMF misunderstood the purpose and meaning of the Vermont statute as written. It is more plausible that GMF has a sincere belief in the unconstitutionality of the law as applied in this case. This is a closer question than whether the Vermont legislature intended to regulate the activities of the GMF. Purposefully violating the law because you believe it is illegal is very different from violating it because you believe it does not apply by its terms to your activities. The first is a form of civil disobedience; the latter is a defense of good faith. The person challenging the law on grounds of unconstitutionality is in general required to pay the consequences if he or she is wrong. See *U.S. v. Burton*, 737 F.2d 439, 442 (5th Cir. 1984) (“One who believes a statute to be unconstitutional is entitled to challenge it in court . . . but disobeys it only at the risk of . . . penalties should the constitutionality of the statute be upheld.”).

This is a factor which supports the imposition of a civil penalty.

Ability to pay

Judging from the amounts spent in 2010, the GMF has an ability to pay almost any reasonable penalty. The current low ebb in its account has occurred because 2011 is not an election year. GMF has one primary source of contributions which is the Democratic Governors Association. During the month of September 2010, the DGA contributed \$513,855 to the GMF. One individual contributed \$20,000 and another \$100. No other contributions appear in the IRS reports provided to the court. The court understands that the GMF has the ability to raise funds to meet its needs and can pay any reasonable civil penalty.

This is a factor which supports the imposition of a civil penalty.

Deterrence

At oral argument, counsel for GMF stated that GMF would abide by any order of this court which is upheld on appeal. The court agrees. In a society which follows the rule of law, no other position is possible. The conduct in this case occurred openly and was already subject to disclosure to the IRS whose penalties, one assumes, are far worse than Vermont’s. This is not a case in which deterrence is needed to prevent surreptitious acts or criminal conduct. Both sides require a final ruling. Once that is in place, compliance is unlikely to pose a problem.

This is a factor which does not support the imposition of a civil penalty.

Specific violation

The potential number of individual violations is astronomical since the television advertisements were aired thousands of times. The court identifies the failure of the GMF to register as a political committee in violation of 17 V.S.A. § 2831 in September 2010 as the most critical violation. For this violation, the court imposes a civil penalty of \$10,000. In the court’s judgment, this penalty is sufficient to meet the needs of the state to respond to GMF’s failure to comply with the law.

CONCLUSION

Considered together, these factors lead the court to conclude that a civil penalty of \$10,000 is sufficient to meet the needs of the State to enforce the campaign finance laws. The amount is not trivial nor is it crushing. It is within the current ability of the GMF to pay even without seeking additional funds from the DGA. To the extent other campaigns look to this case for guidance, a \$10,000 penalty is a sufficient deterrent to achieve compliance.

The court further orders that the GMF bring itself into full compliance with the Vermont election law within 30 days by registering and filing the required reports for the months September – December 2010.

Dated:

11/29/11



Geoffrey Crawford,
Superior Court Judge