155859 **ELECTRONICALLY FILED**

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

CONWAY FOR SENATE PLAINTIFF

VS. **MOTION FOR SUMMARY JUDGMENT**

FEDERAL ELECTION COMMISSION DEFENDANT

Plaintiff, Conway for Senate, files its Motion for Summary Judgment pursuant to Fed.R.C.P. 56. Plaintiff asserts that the FEC's decision that Plaintiff violated the Federal Election Campaign Act by not filing its report in a timely manner was arbitrary and capricious, contrary to law and fact. In support of its Motion, Plaintiff relies upon the accompanying Memorandum of Law and administrative record. A proposed Order accompanies this Motion.

Respectfully submitted,

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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 January, 2013, which will send a notice of electronic filing of the above to all counsel of record as follows:

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CONWAY FOR SENATE PLAINTIFF

VS. **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

FEDERAL ELECTION COMMISSION DEFENDANT

Comes the plaintiff, Conway for Senate, by and through counsel, and for its Memorandum of Law in Support of its Motion for Summary Judgment states as follows:

JUDGMENT

I. Introduction.

In 2010, Kentucky Attorney General Jack Conway unsuccessfully ran for the United States Senate seat vacated by Senator Jim Bunning. After his loss, the Federal Election Commission ("FEC") informed his campaign, Conway for Senate, that they were required to submit various required reports. At issue in this case is a year-end report that the campaign alleges it placed in an envelope received by the FEC. The FEC admitted it received the envelope, but claimed there was no such report in the envelope. As a result, the FEC deemed the campaign to have violated the reporting statute by failing to file, and assessed a civil monetary penalty against the campaign.

The decision to rule the report as "not filed" was arbitrary, capricious, and an abuse of the FEC's discretion. The administrative record contains myriad pieces of evidence provided by Conway for Senate indicating that the report was filed timely, including the Federal Express tracking data for the envelope it was in (which the FEC does not dispute receiving), an e-mail showing that the document was prepared timely and sent to the relevant parties, and affidavits from all parties involved in the mailing asserting that the report was in the envelope when it was mailed. In sharp contrast to this, the FEC reviewing officer's case was built entirely on an unsubstantiated letter claiming that the report was not in the envelope, a secondhand discussion in which the Sergeant-at-Arms denied misplacing it, and two phone conversations

in which the reviewing officer was not present. Neither the FEC nor the reviewing officer made any attempt to independently verify this information, relying instead solely on the assumption of infallibility of all government actors involved. Even taking the FEC's claim at face value that the report was not in the envelope, its actions were still improper as it ignored its own stated policy by failing to give plaintiff the benefit of the doubt under the best efforts defense, a safe harbor provision located in the Federal Election Campaign Act.

The decision to assess a penalty despite the paucity of evidence in its favor and the substantial evidence against it represents a clear error in judgment. While certainly the FEC is entitled to wide deference in its decision-making process, the disregard shown to the facts of the case, the desultory nature of the investigation, and the failure to evaluate a defense statutorily guaranteed to the plaintiff, demonstrate that the FEC exceeded even this broad standard. The FEC decision was arbitrary and capricious. Conway for Senate asks the court to enter summary judgment on its behalf and vacate the FEC's final determination and the civil monetary penalty.

II. Statement of Facts.

Conway for Senate ("campaign") received notice from the Federal Election Commission ("FEC") on December 27, 2010, of forms it was required to file, including the year-end report. AR 071-075. After receiving the notice, campaign employee Nick Braden prepared the relevant forms, including the year-end report. He e-mailed them to R. Wayne Stratton, the campaign's treasurer, on January 24, 2011. AR 117. The reports were printed and given to Mr. Stratton's secretary, Lynn-Marie Johnson, who placed them in an envelope and mailed them via Federal Express overnight mail on January 25. AR 029. The envelope was assigned a tracking number and was timely received and signed for on January 26, 2011. AR 030-033. The envelope was first delivered to the Senate Sergeant-at-Arms, who opened it, and then forwarded it to the Senate Office of Public Records. That office then reported the contents to the Federal Election Commission. AR 070, 124.

On February 17, the FEC mailed a notice to Mr. Stratton informing him that the Commission did not receive a copy of the year-end report. AR 001. Due to the fact that the notice was mailed to the P.O.

box of a campaign that was now shut down, Mr. Stratton did not receive the notice in his office until March 10. AR 113. He immediately responded by mailing a letter saying that the year-end report had been mailed on January 25 and included the original shipment label and tracking data for the envelope in which it had been shipped. AR 104. He also included another copy of the original report; however, because he had filed his original report on January 25, he insisted that he had filed timely. *Id.* Nevertheless, on April 1, the FEC found reason to believe that the campaign had violated 2 U.S.C. §434(a), and fined them $4,950.00 for not filing the report.[1] AR 017. This was the first time the campaign had been penalized during its entire existence. AR 077. The campaign was notified of the penalty on April 4 and given a chance either to pay the fine or challenge the penalty. AR 024. The letter informed Stratton that if he wished to challenge the decision he could do so on three grounds: a factual error in the "reason to believe" finding; a miscalculation of the civil money penalty; or a demonstrated use of his best efforts to file when prevented from doing so by reasonably unforeseen circumstances beyond his control. AR 025.

Stratton challenged the penalty in a letter on May 4, insisting that the campaign had "consistently filed on time reports" and reiterating that they did so this time as well. AR 028. Also included with this letter was the May 5 affidavit of Lynn-Marie Johnson, in which she confirmed that she had placed the year-end report with three other amended reports in an envelope and had mailed them in the January 25 package. AR 029. In response, the FEC checked with the Senate Office of Public Records; that office claimed that five documents had indeed been received in that office on January 28 in the envelope in question, but none of them was the year-end report. AR 051.

On June 29, FEC reviewing officer Dayna Brown submitted her recommendation to the Commission that a violation had occurred and the Commission should make a final determination to assess the civil penalty. AR 060-62. In addition to the letter from the Office of Public Records, Brown based her decision largely on two communication logs written by other FEC analysts allegedly

[1] Despite the fact that Stratton re-filed the report on March 10 (and the FEC concedes it received that document), FEC regulations treat filings later than thirty days past the due date as not filed. AR 024; 11 C.F.R. §111.43(e)(1).

documenting communication with committee members. AR 062. First, an FEC analyst claimed that campaign representative Paula Paisley said in a phone conversation on March 10 that the year end-report had been sent through certified mail. AR 081. Second, a different analyst claimed that Mr. Stratton said in a phone conversation on April 20 that the year-end report had been filed separately from the other amended reports. *Id.* Despite her heavy emphasis on these conversations, Brown did not participate in either of them. *Id.* Brown concluded by saying that the campaign's challenge failed to address any of the provided valid grounds, including failing to allege that "the RTB finding is based on factual errors." *Id.*

Wayne Stratton replied by letter on July 8, indicating that he never stated in any conversation that the year-end report was mailed separately. AR 113. He also reiterated his belief that the report was timely filed, and pointed out that of the six (6) federal and statewide PACs and campaigns for which he was treasurer, none of them ever failed to file in a timely fashion. *Id.* Included with his response was the affidavit of office manager, Paula Paisley, in which she confirmed the fact that the year-end report was placed in the envelope and mailed as Stratton and Johnson had verified earlier. AR 115. She also mentioned that in speaking with the Office of Public Records, a staffer had mentioned that the Senate Sergeant-at-Arms opened all incoming mail, and that it could be possible that the report was lost before being sent to Public Records. *Id.* Also included was the original affidavit from Johnson, the secretary who mailed the documents, and a copy of the January 24 e-mail from Braden confirming he had completed the year-end report and was sending it to Stratton and Paisley. AR 116-17.

On March 27, 2012, Dayna Brown filed her final determination recommendation, in which she again insisted that the campaign be penalized. AR 123-25. Her only evidence was that the Office of Public Records told her that they did not receive the report and that she had heard secondhand that the Sergeant-at-Arms also claimed he did not lose the report. *Id.* There is no evidence in the record that Brown attempted to independently verify either the Office of Public Record's claim or the hearsay information received regarding the Sergeant-at-Arms. *Id.* The FEC deferred to her recommendation and made a final determination of the civil penalty on April 5. AR 135.

III. Argument.

A. Statement of Jurisdiction.

This court has proper jurisdiction in this matter subject to section 437g(a)(4)(c)(iii) of the Federal Election Campaign Act, which provides: "[a]ny person against whom an adverse determination is made . . . may obtain a review of such determination in the district court of the United States for the district in which the person resides . . ." 2 U.S.C. §437g.

B. Summary Judgment Standard.

Summary judgment is proper where there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of material fact exists only if a reasonable jury could return a favorable verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The burden is on the moving party to demonstrate the absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). When the court is considering a summary judgment motion regarding agency action, its role is "to determine whether or not as a matter of law, evidence in the administrative record permitted the agency to make the decision it did." *Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 689 F. Supp. 2d 891, 895 (W.D. Ky. 2010) (internal quotations and citations omitted).

C. The decision to penalize Plaintiff based on the scant evidence against them and the powerful evidence in their favor in the administrative record was arbitrary and capricious.

While agency decisions are to be given wide deference by the courts, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 844 (1984), they may be overturned if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). When analyzing whether an agency decision was arbitrary and capricious, the court may not substitute its own judgment for that of the agency, but should look at the underlying facts to determine if there has been a clear error in judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The court may not create a reasonable explanation for the agency action that was not first proffered by the agency. *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196 (1947). "Deferential review is not

no review, and deference need not be abject." *McDonald v. W.-S. Life Ins. Co.*, 347 F.3d 161, 172 (6th Cir. 2003) (internal quotations and citations omitted). When evaluating an agency adjudicatory action, the court evaluates if the decision is supported by "substantial evidence." 5 U.S.C. §706(2)(E); *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 798 (6th Cir. 2012).

In evaluating the FEC's actions under the arbitrary and capricious standard, *Greenwood for Congress, Inc. v. Federal Election Commission* is especially apposite. CIV.A. 03-0307, 2003 WL 22096125 (E.D. Pa. Aug. 15, 2003) (unpublished). In that case, the circumstances were virtually identical to those currently before the court – a committee claimed it filed a year-end report, but the FEC said it did not receive the report in the envelope and summarily fined the campaign.[2] *Id.* at *2-3. The court noted 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 disregarded the evidence presented by the campaign. *Id.* at *3. As the FEC's action was based "apparently on nothing more than a belief in the infallibility of their procedures and employees," the court overturned the FEC's decision as arbitrary and capricious.

This case is identical to the *Greenwood* case, and while the latter case is not controlling, the identical facts make it highly persuasive. Here too the FEC is adopting a stance of agency infallibility, summarily concluding that if the report does not show up in its system, then the fault must lie with the campaign. In doing so it is disregarding substantial evidence to the contrary. The administrative record shows the investigation to be perfunctory at best. The reviewing officer did not look at the relevant database herself, nor did she evaluate the procedures of the Office of Public Records or interview the employees personally. She cites conversation logs as evidence of the non-filing of the report, but the record contains no affidavits from the analysts who had the conversations (or affidavits of any kind). Brown did not even bother to speak with the analysts who had the phone conversations. At no point does she entertain the idea that as the envelope wended its way among three separate bureaucratic offices (the Sergeant-at-Arms, Office of Public Record, and FEC), and as numerous employees handled the

[2] Interestingly, even the officer mentioned in the *Greenwood* case, Dayna Brown, is the same reviewing officer who made the recommendations in this case.

documents contained therein, someone could have overlooked or lost the report. In response to the allegation that perhaps the initial recipient of the envelope, the Senate Sergeant-at-Arms, may have lost it, the reviewing officer apparently believed that a secondhand blanket denial relayed by someone in a completely different office was sufficient evidence.

In contrast to the paucity of evidence produced by the FEC, Plaintiff provided ample documentation to prove it had filed the report in a timely fashion. Stratton mailed three separate letters and had one logged phone conversation in which he insisted he sent the report in the envelope. Both the secretary and the office manager produced affidavits confirming that they had printed out and mailed the year-end report in the envelope. The office manager also confirmed this in a logged phone conversation. The campaign produced an e-mail showing that the year-end report was e-mailed both to affiants and to Stratton the day before it was shipped. Finally, the campaign produced no fewer than four tracking documents from Federal Express showing that the envelope arrived timely at the FEC.

The evidence above, combined with the lack of any previous violations during dozens of filing deadlines, and the fact that an envelope was received with the other relevant documents, show that the evidence in the administrative record does not support a finding that the report was not filed. While the FEC's decision is entitled to deference, to allow this decision to stand would constitute nothing less than blind and unwarranted obeisance. The FEC's complete unwillingness to consider the possibility of fault on the part of any of the government actors involved after the delivery of the envelope constitutes an abuse of discretion, and the decision should be overturned.

D. Even assuming the report was in fact not received by the Office of Public Record, Defendant was arbitrary and capricious in failing to follow its own regulatory guidelines regarding the "best efforts" defense.

Section 432(i) of the Federal Election Campaign Act provides:

> "When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act." 2 U.S.C. 432(i). *See also* 11 C.F.R. §104.7(a).

While this best efforts defense was initially interpreted as applying only to contributor information, the FEC expanded its own interpretation of the statute in 2007 to include a campaign treasurer's failure to file required reports. "Statement of Policy Regarding Treasurers Best Efforts To Obtain, Maintain, and Submit Information as Required by the Federal Election Campaign Act," 72 FR 31438-01. In order to show that the campaign made best efforts, the campaign must demonstrate it took relevant precautions (like double checking recordkeeping), that the campaign had trained employees who knew how to submit information in accordance with the Act, that the failure to file 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. *Id.* Issues such as inexperience or negligence of the campaign staff, failure of campaign computers, or lack of knowledge of filing deadlines do not qualify under the best efforts standard. *Id.*

Plaintiff acknowledges that the policy statement is only an announcement of a "general course of action" and is not binding on the FEC. *Id.* However, while an agency's decision to exercise discretion in ignoring or changing policy is not subject to heightened review, the agency must at least acknowledge it is doing so. As the U.S. Supreme Court has noted, "an agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

In a very similar case, a campaign treasurer failed to file a year-end report with the FEC after making multiple attempts to do so. *Lovely v. F.E.C.*, 307 F. Supp. 2d 294, 297 (D. Mass. 2004). Despite the weight of evidence demonstrating the fault was with the FEC, the FEC summarily ruled that the report was not filed and assessed a penalty. *Id.* The court reversed this decision, noting the lack of fact-finding on key issues by the reviewing officer, and a profound lack of clarity as to "how the Commission evaluated Plaintiffs' 'best efforts' arguments, or whether it applied the correct legal standard." *Id.* at 301.

Assuming *arguendo* that the report was in fact not filed, the FEC should have undertaken a "best efforts" analysis based on the evidence. There is no evidence in the "reason to believe" recommendation, the final determination recommendation, or in any of the FEC investigation contained in the

administrative record to indicate that the reviewing officer or the Commission even considered the "best efforts" defense as required by the Commission's own interpretation of 2 U.S.C. 432(i). The evidence put forward by Stratton – the copy of the e-mail from Braden, the affidavits from those involved in printing and mailing it, the Federal Express tracking numbers, and Stratton's own personal recollections – are plainly the kind to be considered under the "best efforts" analysis. Stratton laid out the procedures and safeguards used by the campaign, indicating that the alleged failure to file was due to unforeseen circumstances, and he responded by filing a new copy the same day he became aware of the unforeseen circumstances. His evidence and explanation fall firmly within the guidelines laid out in the statute and relevant FEC regulations and policy statement. It is true that as the policy interpretation is nonbinding, the reviewing officer had discretion not to apply the best efforts analysis. However, administrative law requires that she at least acknowledge her departure from stated policy before doing so. Due to the lack of any mention in the record of the best efforts defense beyond the initial form letter, the FEC disregarded its own interpretation of its statutory authority and thus behaved in an arbitrary and capricious manner.

IV. Conclusion.

For the above reasons Plaintiff Conway for Senate respectfully requests that this court enter an order granting Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

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