UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CONWAY FOR SENATE, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 3:12-244 (CRS-JDM) REPLY

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM OF LAW IN REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

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April 12, 2013

The Federal Election Commission acted reasonably when it assessed the Conway for Senate campaign with an administrative fine for its failure to file a mandatory campaign-finance disclosure report in January 2011. Plaintiff Conway for Senate ("Conway") challenges the fine on the grounds that one of its staff members sent the report by FedEx before the statutory deadline. But Conway's Opposition ("Conway Opp'n," Docket No. 18) to the Commission's summary judgment motion (Docket No. 16) fails to refute the Commission's determination, based on the administrative record, that the required report was *not* included in a FedEx package containing a number of other reports sent by Conway's agents, and thus not timely filed.

Rather, Conway's Opposition eschews the proper legal standard for judicial review of the Commission's administrative decision and substitutes sharp rhetoric and groundless speculation about possible errors by others for legal analysis of the actual administrative record in this case. Conway's concession that the alternative conclusion it urges is merely "just as plausible as the FEC's conclusion that the Conway campaign failed to file" its report (Conway Opp'n at 6) means that its challenge fails under the applicable legal standard.

To be upheld under the Administrative Procedure Act, an agency's administrative action need only be supported by a reasonable basis, and Conway has not refuted the Commission's demonstration that its administrative action was reasonable and supported by the administrative record. Nor has Conway identified any clear error in the Commission's judgment. Its attempt to belatedly rely on an inapplicable defense, which it never invoked during the administrative process, is equally unavailing.

The administrative record in this case plainly supports the Commission's decision, and the Court should therefore deny Conway's motion for summary judgment and enter summary judgment on behalf of the Commission.

A. The Commission's Administrative Action Was Not Arbitrary or Capricious

Conway acknowledges that "agency decisions are given deference by reviewing courts" and may only be reversed if they are "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." (Conway Opp'n at 5.) This "highly deferential" standard of review requires that courts "presume[] the validity of agency action," *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007), but the ruling Conway advocates here would neither defer to the Commission's decision nor presume that the Commission's action was reasonable.

Conway's Opposition, however, inadvertently confirms the reasonability of the Commission's action here. Conway's central argument for challenging the Commission's determination that Conway failed to file its year-end report is its alternative theory that it is "*possib*[*le*] that agents of the U.S. Senate *may have* erroneously processed the contents of the envelope received from Conway for Senate." (Conway Opp'n at 6 (emphases added).) Although Conway describes this "possibility" as "the very crux of this dispute" (*id.*), it does not cite anything in the administrative record to support its hypothesis. Instead, Conway declares that the Senate is "not infallible" (Conway Opp'n at 6), and asks, "Is it not possible in that two-day period, as the envelope traveled from the Senate Sergeant at Arms to the Senate Office of Public Records, a portion of contents may have been removed from the envelope in error and never replaced?" (*Id.* at 7.) Conway argues that its unsupported theory that the Senate

misplaced its report is "just as plausible" as the Commission's determination that Conway failed to file it. (Conway Opp'n at 6.) Conway's argument fails to refute the reasonability of the Commission's action for at least two reasons.

First, Conway's argument fails as a matter of law. Even if it were true that the administrative record supported two equally plausible conclusions — which, as discussed below, it is not — Conway's preference for its own "alternative explanation does not negate the reasonableness of" the Commission's administrative determination. *Bangura v. Hansen*, 434 F.3d 487, 503 (6th Cir. 2006).

Indeed, Conway's assertion that "the FEC's conclusion that the Conway campaign failed to file" its year-end report is "*just as plausible*" as Conway's alternative supposition about the "possibility" that the U.S. Senate "may have" lost the report undermines Conway's claim that the Commission's determination was *un*reasonable. Conway's argument about two equally plausible conclusions amounts to a concession by Conway that the Commission's action must have been reasonable and certainly not arbitrary or capricious.

Second, Conway's argument is factually groundless; in fact, its alternative explanation is *not* equally plausible. The Commission's determination that Conway failed to timely file its 2010 year-end report was amply supported by the administrative record. That record reflects the Secretary of the Senate's contemporaneous, meticulously documented receipt of a FedEx envelope from Conway containing *five* different documents, not including Conway's year-end report. (AR086-103.)[1] The record further

[1] The administrative record contains actual copies of the five reports included in the FedEx package Conway sent to the Senate in January 2011. (AR086-103.) The FEC's Reviewing Officer communicated with the Superintendent of the Senate Office of Public Records to ascertain what the Senate had received, (AR050-AR103), and called a staff

reflects shifting and inconsistent post hoc explanations by Conway personnel about the supposed mailing of that report, including a March 10, 2011, statement by a Conway employee that she had a "certified-mail receipt confirming delivery" of the report (AR081); an April 20 statement by Conway's treasurer that the year-end report had been "sent separately" by FedEx from the other documents received by the Senate on the same day (*id.*); and finally a statement in the May 5 affidavit of Conway's receptionist that she "was given" the year-end report and three other documents, and those *four* documents "were packaged in a Federal Express envelope" for shipping to the Senate (AR064).[2]

In contrast, Conway's alternative explanation for its missing campaign-finance report — "the *possibility* that agents of the U.S. Senate *may have* erroneously processed the contents of the envelope received from Conway for Senate," (Conway Opp'n at 6 (emphases added)) — is entirely hypothetical and lacks any factual basis. Indeed, Conway identifies no evidence from the administrative record (or anywhere else) to answer its own question about whether it is "possible" that when its FedEx package was

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member of that office to confirm that, "as is their process, all of the documents included in the [Conway for Senate's] envelope were forwarded to the Senate Office of Public Records." (AR 124.)

[2] Conway criticizes the Commission for "plac[ing] great weight on" these inconsistent statements regarding the mailing of its year-end report, but it neither disputes nor explains the discrepancies. (Conway Opp'n at 4 (describing factual record as "contradictory and muddled").) Conway's subjective disagreement with the Commission's analysis of the administrative record (Conway Opp'n at 8-9), is an insufficient basis for the Court to reverse the Commission's determination. Conway does not assert that the Commission "fail[ed] to examine relevant evidence or articulate a satisfactory explanation," and its alternative characterization of that evidence "does not negate the reasonableness of" the Commission's administrative determination. *Bangura*, 434 F.3d at 502-03.

received by the Senate "a portion of contents may have been removed from the envelope in error and never replaced." (*Id.* at 7.)[3]

Conway's characterization of the administrative record as "split right down the middle in a proverbial he-said, he-said" (Conway Opp'n at 5) is thus not only a legally insufficient assertion, it is also factually wrong. Conway's contradictory accounts of mailing its year-end report to the Commission and hypothetical theories about possible "erroneous[] process[ing]" of its FedEx envelope by the Senate (*id.* at 6) are not "just as plausible" as the Commission's conclusion that the report simply was never sent by Conway.

Conway's unfounded accusations of negligence by officials at the U.S. Senate (Conway Opp'n at 6) call into question the reliability of public officers. But it is especially clear that the Commission's analysis of the record was supported by evidence here, where the Senate's careful docketing of Conway's FedEx package is entitled to the presumption of regularity accorded to official acts of public officers. *Dept. of State v. Ray*, 502 U.S. 164, 179 (1991). Under that presumption, "in the absence of clear evidence to the contrary, the court will presume that public officers have properly

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[3] Conway cites *Greenwood for Congress, Inc. v. FEC*, Civ. No. 03-307, 2003 WL 22096125 (E.D. Pa. Aug. 15, 2003), as purported support for its assertion that "the Senate . . . is not infallible." (Conway Opp'n at 6.) But *Greenwood* concerned the filing of a report by the principal campaign committee of *a candidate for the U.S. House of Representatives*, which the committee filed *directly with the Commission*. *Greenwood*, 2003 WL 22096125, at *1. The case thus has nothing to do with the *Senate* or its alleged propensity to make mistakes. Moreover, as the Commission has explained (Docket No. 16-1 at 12-13), in *Greenwood*, unlike here, the reporting committee provided *actual evidence*, based on the registered weight of the package it mailed, that the package must have contained more material than the Commission had acknowledged receiving. *Id.* at *2. In this case, however, Conway's theory that because the Senate "is not infallible" it "may have" lost Conway's year-end report is premised entirely on baseless speculation. (Conway Opp'n at 6.)

discharged their official duties. The doctrine allows courts to presume that what appears regular is regular, the burden shifting to the attacker to show the contrary." *Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011) (internal quotation marks omitted); *see Latif v. Obama*, 677 F.3d 1175, 1178 (D.C. Cir. 2012), *cert. denied*, 132 S. Ct. 2741 (2012) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." (internal quotation marks omitted); *NLRB v Ohio New and Rebuilt Parts, Inc.* 760 F.2d 1443, 1451 (6th Cir. 1985) ("There is a strong and firm presumption that governmental officials . . . perform their functions without bias."); *Goldberg v. Truck Drivers Local Union No. 299*, 293 F.2d 807, 812 (6th Cir. 1961) ("In the absence of proof to the contrary, there is a presumption of regularity in the proceedings of a public officer. The burden is upon the party complaining to show otherwise."). Conway's assertion that the Senate is "not infallible" (Conway Opp'n at 6), and its bald speculation that "agents of the U.S. Senate *may have* erroneously processed the contents of the envelope received from Conway for Senate" (*id.* (emphasis added)), fail to rebut the presumption of regularity here.

In sum, the Commission's conclusion that Conway failed to file its year-end report not only was reasonable, it was the *most* reasonable conclusion to be drawn from the administrative record here.[4]

[4] Conway is thus incorrect in claiming (Conway Opp'n at 5) that the Commission's administrative determination was "not supported by substantial evidence." As detailed *supra* p. 3 and in the Commission's summary judgment brief (Docket No. 16-1 at 6-8), the administrative record clearly and substantially supports the Commission's conclusion that Conway failed to file its year-end report.

B. The Commission's Administrative Process Complied with the Law

Conway's criticisms of the Commission's administrative process are misplaced and appear to be premised on a fundamental misunderstanding of the statutorily mandated procedures applicable here. Conway objects to the fact that the Commission made its reason-to-believe finding about Conway's failure to file its report "before undertaking *any* administrative inquiry or investigation with the Secretary of the Senate." (Conway Opp'n at 2.) But the law requires no such investigation. Under the Act's streamlined provisions for the administrative fines program, the Commission is only required to give persons "written notice and an opportunity to be heard" after finding "reason to believe" a report has not been timely filed. 2 U.S.C. § 437g(a)(4)(C)(i)-(ii); *see also* 11 C.F.R. § 111.36.[5] No exhaustive investigation is required before or after the Commission finds "reason to believe" a violation has occurred. As the Commission explained (Docket No. 16-1 at 3-8), the Commission and its staff followed the prescribed administrative fine procedures at each stage of the proceedings below.

C. Conway's Belated "Best Efforts" Arguments Lack Merit

Conway does not dispute that it failed to *actually* assert a "best efforts" defense to the Commission during the administrative process under review. *See Wilson Air Ctr., LLC v. FAA*, 372 F.3d 807, 813 (6th Cir. 2004) ("[I]t is inappropriate for courts reviewing agency decisions to consider arguments not raised before the administrative agency involved"); *LeBlanc v. EPA*, 310 Fed. App'x 770, 776 (6th Cir. 2009) ("A reviewing court may not consider arguments that were not previously raised before an administrative agency . . . .").

[5] Even under the Act's procedures for other violations, no investigation is required until after the Commission has made a "reason to believe" finding. 2 U.S.C. § 437g(a)(2); 11 C.F.R. § 111.10(a).

Instead, Conway advances, with no legal support, its novel argument that it "constructively" asserted a best efforts defense simply by protesting the Commission's finding that Conway had failed to file its year-end report. (Conway Opp'n at 10.) Indeed, Conway's invocation of the best efforts defense is at odds with its contention that its report was delivered to the Senate. An element of the defense is that the person at issue "was *prevented* from filing in a timely manner." 11 C.F.R. § 111.35(b)(3)(i) (emphasis added). Conway thus could not have both timely filed and fit within the best efforts defense. Its only argument at the time to the Commission was that the former was true.

Moreover, Conway's speculation about possible "Senate negligence" also does not remotely present enough evidence to demonstrate that the best efforts safe harbor would have applied had it not been waived. (Conway Opp'n at 5.) To successfully rely on that safe harbor, Conway would have had to show that it "used best efforts to file in a timely manner" but was prevented from doing so "by reasonably unforeseen circumstances" beyond the respondent's control. 11 C.F.R. § 111.35(b)(3). Conway points to nothing in the administrative record supporting its speculation; thus, Conway cannot establish here that the Commission "fail[ed] to examine relevant evidence" regarding the Senate losing Conway's report. *Bangura*, 434 F.3d at 502 (citation omitted).

CONCLUSION

For the foregoing reasons, the Commission's administrative fine was reasonable and fully supported by the administrative record. The Commission's motion for summary judgment should be granted, and plaintiffs' motion for summary judgment should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Benjamin A. Streeter III hereby certifies that on April 12, 2013, he caused Defendant Federal Election Commission's Memorandum of Law in Reply to Plaintiff's Opposition to Motion for Summary Judgment to be filed with the Clerk of the United States District Court for the Western District of Kentucky via the Clerk's electronic filing system and that a copy of this filing was delivered by the electronic filing system on that date to the following counsel of record:

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