BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

GEORGIA GOVERNMENT TRANSPARENCY AND CAMPAIGN FINANCE COMMISSION, **Petitioner,** **v.** **JOHN OXENDINE,** **Respondent.**	**Docket No.: 2125875** **2125875-OSAH-GGTACFC-CAN-60-Walker** **Agency Reference No.: 2017-0169PC**

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS AND DENYING PETITIONER'S MOTION FOR SUMMARY DETERMINATION

On May 21, 2021, Petitioner, Georgia Government Transparency and Campaign Finance Commission ("Commission"), filed a Statement of Matters Asserted[1] alleging that Respondent had violated the Ethics in Government Act, O.C.G.A. § 21-5-1 et. seq., by converting campaign contributions into personal assets.[2] On August 3, 2021, Respondent filed a Motion to Dismiss the Statement of Matters Asserted, and on August 10, 2021, the Commission filed a Motion for Summary Determination. Following additional briefing by the parties, oral argument was held on August 31, 2021; subsequently the parties filed post-hearing briefing.

[1] Petitioner also filed a second Statement of Matters Asserted against Respondent that has been docketed as 2125871-OSAH-GGTACFC-CAN-60-Walker.

[2] The Statement of Matters Asserted alleges violations of the Ethics in Government Act; additionally, attached to the Statement of Matters Asserted as Exhibit B are copies of the 2011 and 2014 versions of the Georgia Government Transparency and Campaign Finance Act in place at the time of the alleged violations.

BACKGROUND

Respondent, John W. Oxendine, was a candidate for Governor of the State of Georgia during the 2010 primary election. On or about April 23, 2008, he filed his Declaration of Intention to Accept Campaign Contributions. He registered his campaign as "Oxendine Working for Georgia, Inc." and listed himself as the treasurer. Exhibits 1, 2, 3 attached to Statement of Matters Asserted (hereinafter "SMA").

Georgia law requires that candidates file periodic campaign contribution disclosure reports (hereinafter "CCDRs") so long as the candidate continues to accept, expend, or maintain campaign funds. See generally O.C.G.A. § 21-5-34. After Respondent lost the election, he maintained funds in his campaign account and continued to file CCDR statements with the Commission. SMA ¶ 19.

Respondent is an attorney and maintains a private law practice. The law practice operated under the name "John Oxendine, P.C." from January 4, 2011, until November 6, 2017. SMA ¶ 11. On January 18, 2013, Respondent transferred $97,000.00 from his campaign account to John Oxendine, P.C. Exhibit 4-A attached to Petitioner's Motion for Summary Determination ("MSD").[3] On January 31, 2013, Respondent transferred $50,000.00 from his campaign account to John Oxendine P.C. Exhibit 4-B attached to MSD.[4] On April 9, 2013, Respondent transferred $40,000.000 from his campaign account to John Oxendine P.C. Exhibit 4-C attached to MSD.[5] When Respondent filed his CCDR for 2013, he did not disclose these transfers as expenses, nor did he list them as loans or investments. Exhibit 3-C attached to MSD.

On May 30, 2014, Respondent made another transfer from his campaign account to his law firm account in the amount of $50,000.00. Exhibit 4-D attached to MSD.[6] When Respondent

[3] The document itself is marked as Exhibit 9; however, a cover page indicates it has been filed as Exhibit 4A.
[4] The document itself is marked as Exhibit 10; however, a cover page indicates it has been filed as Exhibit 4B.
[5] The document itself is marked as Exhibit 11; however, a cover page indicates it has been filed as Exhibit 4C.
[6] The document itself is marked as Exhibit 15; however, a cover page indicates it has been filed as Exhibit 4D.

filed his CCDR for 2014, he did not report any loans or investments. Exhibit 3-F attached to MSD. Instead, he reported that the campaign had made $300.00 in itemized expenditures during 2014 and had a remaining net balance on hand of - $300.00. Id.

On August 13, 2015, Oxendine filed a first set of amendments to his 2013 and 2014 CCDRs. On October 30, 2015, Respondent filed a second set of amendments to his 2012, 2013, and 2014 CCDRs. Exhibits 3-B, 3-D, 3-E, 3-H attached to MSD.

On the second amended 2013 CCDR, Respondent disclosed for the first time the $187,000.00 in transfers that he had made from his campaign account to his law firm bank accounts. Exhibit 3-E attached to MSD. He listed these transfers on his itemized expenditures report as having the purpose of "Investment for return of interest." Id.

On his second amended 2014 CCDR, Respondent disclosed for the first time the additional $50,000.00 that he had transferred from his campaign account to his law firm bank account. Exhibit 3-H attached to MSD. Again, he listed this transfer on his itemized expenditures report as having the purpose of an "Investment for return of interest." Id.

On January 7, 2016, Respondent filed another CCDR. The CCDR's Addendum Statement included information that on October 27, 2015, Respondent's law firm issued a check for $213,570.60 to the campaign as a "return of invested principal and interest." Exhibit 3-I attached to MSD.

PROCEDURAL HISTORY

On June 20, 2017, the Commission sent Respondent a letter notifying him that it had opened an investigation and submitted a Complaint to determine whether he had violated the Georgia Government and Transparency and Campaign Finance Act. See Ga. Comp. R. & Regs. 189-2-.04 (Commission must notify a party in writing of the basis of the investigation and the basis for probable cause to open an investigation); Exhibit A attached to SMA. The letter stated that if the Commission determined that there was a basis to proceed with further prosecution the Complaint would be presented to the Commission at a preliminary hearing "where the Commission will determine whether there are reasonable grounds to believe that you have violated the Act." Id.

On June 19, 2019, the Commission sent Respondent a second letter notifying him that it had set a time for a preliminary hearing. Ga. Comp. R. & Regs. r. 189-2-.01(3)(6); Exhibit 6 attached to MSD. The June 19, 2019, letter stated that at the preliminary hearing, "the Commission will determine whether there are reasonable grounds to believe that a violation of the Campaign Finance Act has occurred." Id.

On February 20, 2020, the Commission issued a document styled "Order After Preliminary Hearing." Exhibit 7 attached to MSD. The Order After Preliminary Hearing indicated that the Commission had found reasonable grounds to believe that Respondent had violated O.C.G.A. §§ 21-5-33(a) and (c),[7] and referred the case "for further prosecution under the Administrative

[7] O.C.G.A. § 21-5-33 provides in relevant part:

(a) Contributions to a candidate, a campaign committee, or a public officer holding elective office and any proceeds from investing such contributions shall be utilized only to defray ordinary and necessary expenses, which may include any loan of money from a candidate or public officer holding elective office to the campaign committee of such candidate or such public officer, incurred in connection with such candidate's campaign for elective office or such public officer's fulfillment or retention of such office.

[….]

Procedure Act in accordance with O.C.G.A. §§ 21-5-6(b)(10)(A) and 21-5-6-(b)(10)(B); and Ga. Comp. R. & Regs. R. 189-2-0.3(6)." Id. The Commission served Respondent with the Order After Preliminary Hearing on February 21, 2021.[8] Id.

On May 21, 2021, the Commission filed a Statement of Matters Asserted with the Office of State Administrative Hearings. The Statement of Matters Asserted includes the relevant statutes that form the framework of the alleged violations of the Ethics in Government Act, a factual and procedural overview of the matter, and the following four violations: VIOLATION I: John Oxendine utilized and/or converted $187,000.00 in calendar year 2013 to pay personal and business expenses in violation of O.C.G.A. §§ 21-5- 3(16.1); 21-5-3(18); 21-5-33(a) and (c); VIOLATION II: John Oxendine failed to disclose the 2013 "investment" expenditures on the original December 31, 2013 campaign contribution disclosure reports in violations [sic] of O.C.G.A. § 21-5-34; VIOLATION III: John Oxendine utilized and/or converted $50,000.00 in calendar year 2014 to pay personal and business expenses in violation of O.C.G.A. §§ 21-5-3(16.1); 21-5-3(18); 21-5-33(a) and (c); and VIOLATION IV: John Oxendine failed to disclose the 2014 "investment" expenditures on the original December 31, 2014 campaign contribution disclosure reports in violation of O.C.G.A. § 21-5-34. SMA ¶¶ 47-50. If the Commission proves that Respondent violated the Ethics in Government Act, it may seek an order requiring him to cease and desist from committing further violations, make reimbursement to his campaign for any improper expenditure of campaign funds, dispose of his excess campaign contributions within a date certain by making contributions to appropriate charitable organizations as permitted by

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(c) Contributions and interest thereon, if any, shall not constitute personal assets of such candidate or such public officer.

[8] The Order is dated "this the 20th day of February [] 2020, *nunc pro tunc*, 21st day of August 2019." Exhibit 7 attached to MSD.

O.C.G.A. § 21-5-33(c), amend his campaign contribution disclosure reports so as to accurately reflect the amount and disposition of his campaign's contributions and expenditures; and pay civil penalties as provided by O.C.G.A. § 21-5-6(b)(14).

MOTION TO DISMISS

Pursuant to O.C.G.A. § 50-13-13(a)(6), an Administrative Law Judge may "dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground." To grant a motion to dismiss, a court must find that "the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof." Harrell v. City of Griffin, 346 Ga. App. 635, 636 (2018). Pleadings must be construed in "the light most favorable to the plaintiff with any doubts resolved in the plaintiff's favor." Id.

ANALYSIS

A. Statute of Limitations

1. Preliminary Order

Respondent contends that this action should be dismissed because the Commission has failed to comply with the statute of limitations imposed by O.C.G.A. § 21-5-13. Under O.C.G.A. § 21-5-13, any action alleging a violation of the Ethics in Government Act involving a candidate for office with a term of four or more years must "be commenced" within five years after the date of filing of the first report containing the alleged violation. The statute specifies that an action "shall be deemed to have commenced" when:

> (1) A complaint has been accepted by the commission in compliance with Code Section 21-5-7; or
>
> (2) The commission or Attorney General serves on such person a notice of summons or hearing, in accordance with Chapter 13 of Title 50, the

> "Georgia Administrative Procedure Act," that alleges that such person has violated this chapter.

O.C.G.A. § 21-5-13. Respondent maintains that the Commission did not commence the instant action within the five years of October 30, 2015, the date he filed the second set of amendments to his 2013 and 2014 CCDRs.

In opposition, the Commission asserts that it commenced an action within the five-year statute of limitations. The Commission maintains that the June 19, 2019, letter ("June 2019 Notice"), notifying Respondent of the preliminary hearing scheduled for August 21, 2019, constitutes a notice of summons or hearing in accordance with O.C.G.A. § 21-5-13(2).[9] See Petitioner's Response to Motion to Dismiss at 15.

The Commission may accept a written complaint alleging a violation of the Ethics in Government Act or "initiate on probable cause an investigation on its own cognizance as it deems necessary to fulfill its obligations under this chapter." O.C.G.A. § 21-5-6(b)(9), (10)(A); Ga. Comp. R. & Regs. 189-2-.04. If the Commission does not find cause to dismiss the complaint, it shall schedule a preliminary hearing and "shall determine whether there are reasonable grounds to believe that a violation [of the Ethics in Government Act] has occurred." Ga. Comp. R. & Regs. 189-2-.03(6). If the Commission finds reasonable grounds, Rules 189-2-.01(5) and 189-2-.03(6) specify that the matter be deemed a contested case and "proceed to an administrative hearing in accordance with the Georgia Administrative Procedure Act."

The Georgia Administrative Procedure Act "is meant to provide a procedure for administrative determination and regulation where expressly authorized by law or otherwise required by the Constitution or a statute of this state." O.C.G.A § 50-13-1. Relying on a recent decision by the Georgia Court of Appeals, Georgia Government Transparency & Campaign

[9] The Commission does not argue that O.C.G.A. § 21-5-13(1) is applicable in the instant case.

Finance Commission v. New Georgia Project Action Fund, 359 Ga. App. 32 (2021), the Commission argues that the provisions of the Administrative Procedure Act govern not only contested cases but all prehearing proceedings. It reasons that if the Administrative Procedure Act applies to all prehearing proceedings, the June 2019 Notice would qualify as a summons or hearing in accordance with the Georgia Administrative Procedure Act. See O.C.G.A. § 21-5-13(2).

The holding in New Georgia Project is much narrower than the Commission suggests. In that case, the Court examined a specific subsection of a statute, O.C.G.A § 50-13-13(b), that provides remedial measures available if "an agent or employee of a party disobeys or resists any lawful order of process; or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document; or refuses to appear after having been subpoenaed; or, upon appearing, refuses to take the oath or affirmation as a witness; or after taking the oath or affirmation, refuses to testify . . . ." The Court held that because O.C.G.A § 50-13-13(b) applied in "proceedings before the agency," rather than just "contested cases," it authorized judicial enforcement of administrative subpoenas issued prior to the commencement of an administrative hearing.

However, the Court did not hold that the Administrative Procedure Act applied broadly to all prehearing proceedings. To the contrary, the Court distinguished O.C.G.A § 50-13-13(b) from O.C.G.A § 50-13-13(a), the subsection that addresses administrative hearing procedures in extensive detail, noting "the General Assembly utilized the phrase 'contested case' in both subsections (a) and (c), but not in subsection (b)." 359 Ga. App. at 35; see O.C.G.A. § 50-13-2(2) (defining contested case as "a proceeding … in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing"). Accordingly, the Court concluded that the term "proceedings before the agency" is "not merely a substitute for the term 'contested case.'" 359 Ga. App. at 35. Moreover, New Georgia Project

specifically states that the Commission's preliminary investigation need not comply with the notice and hearing provisions of the Administrative Procedure Act. 359 Ga. App. at 33 n.1.

Additionally, O.C.G.A. § 21-5-13(2) explicitly requires that the notice "alleges that such person has violated [the Ethics in Government Act]." As the statutes and the Commission's rules and regulations mandate, it is only *after* the conclusion of a preliminary hearing that the Commission determines "*if there are reasonable grounds* to believe that the Georgia Government Transparency and Campaign Finance Act or other statute under the jurisdiction of the Commission has been violated." Ga. Comp. R. & Regs. 189-2-.01(20) (emphasis added); O.C.G.A. § 21-5-6(b)(10)(B) ("until such time as the commission determines that there are reasonable grounds to believe that a violation has occurred, it shall not be necessary to give the notice by summons nor to conduct a hearing in accordance with Chapter 13 of Title 50, the 'Georgia Administrative Procedure Act[.]'"); see also Ga. Comp. R. & Regs. 189-2-.01(19) (defining Notice of Hearing as "a written statement of the substance of a specific charge alleging violation of the statute, rule, or regulation to be considered at a hearing to the person or party affected thereby [. . . .] Notice shall be given in accordance with the Georgia Administrative Procedure Act."). Given that the June 19 Notice was sent before the preliminary hearing took place, the Commission could not yet have determined - much less notified Respondent - that there were reasonable grounds to believe that he had violated the Ethics in Government Act.[10]

[10] The Commission suggests that the APA's general grant of authority allowing state agencies to adopt rules of practice supports its claim that it served a notice of hearing in accordance with the Administrative Procedure Act "when it sent Respondent its notice of the preliminary hearing, advising Respondent that it intended to hold a hearing as to whether Oxendine had violated the Act as alleged in the Commission's Complaint." Petitioner's Response to Motion to Dismiss at 13; see O.C.G.A. § 50-13-3(A)(2). For the reasons stated above, the undersigned does not find the Commission's argument persuasive.

2. Order After Preliminary Hearing

To grant a motion to dismiss, a court must find that "the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof." Harrell, 346 Ga. App. at 636. Although the Commission does not argue that the Order After Preliminary Hearing dated February 20, 2020 "("February 2020 Order") "commenced" the case as required under O.C.G.A. § 21-5-13(2), because the facts must be construed in the light most favorable to the Commission with doubts resolved in the Commission's favor, the undersigned will consider whether the February 2020 Order could trigger the application of O.C.G.A. § 21-5-13(2). Id.

Unlike the June 19 Notice, and as required by O.C.G.A. § 21-5-13(2) (action commences when Commission serves notice alleging violation), the February 2020 Order specifies that the Commission had found reasonable grounds that Respondent violated O.C.G.A. § 21-5-33(a) and (c). Thereupon, the Commission's regulations provide that "if reasonable grounds to believe a violation of the Campaign Finance Act has occurred have been found, a matter becomes a contested case and shall be scheduled for hearing pursuant to the Administrative Procedure Act." Ga. Comp. R. & Regs. 189-2-.05. A hearing is "a proceeding . . . for an adjudication of issues presented in a contested case, at which all parties at interest are afforded an opportunity to present testimony, documentary evidence and arguments, as to the matter under consideration." Ga. Comp. R. & Regs. 189-2-.01(11). As the Commission acknowledges in its pleadings, the Commission's own rules deem the action against Respondent following the preliminary hearing to be a "contested case," and mandate that a Notice of Hearing "be given in accordance with the Georgia Administrative Procedure Act." Ga. Comp. R. & Regs. 189-2-.01(19); Petitioner's

Response to Motion to Dismiss at 13 (concurring that in such a case "the APA's notice provisions applicable to contested cases found in O.C.G.A. § 51-13-13 (a) [would] apply.").

In contested cases, the Administrative Procedure Act, O.C.G.A. § 50-13-13(a)(1), requires that "[i]n addition to any other requirements imposed by common law, constitution, statutes, or regulations," reasonable notice served personally or by mail shall include:

> (A) A statement of the time, place, and nature of the hearing;
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> (B) A statement of the legal authority and jurisdiction under which the hearing is to be held;
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> (C) A reference to the particular section of the statutes and rules involved;
>
> (D) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time, the notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished; and
>
> (E) A statement as to the right of any party to subpoena witnesses and documentary evidence through the agency [.]

O.C.G.A. § 50-13-13(a)(2).

In four one-sentence paragraphs, the February 2020 Order indicated that the Commission had found reasonable grounds to believe that Respondent had violated O.C.G.A. §§ 21-5-33(a) and (c), in connection with transactions disclosed as "investment for return of interest." The February 2020 Order identified each transaction alleged to have violated the statutes by date and amount. On its face, the February 2020 Order appears to meet the requirements of O.C.G.A. § 50-13-13(a)(2)(B)(C) and (D). See Quigg v. Ga. Prof'l Standards Comm'n, 344 Ga. App. 142, 156

(2017) ("notice must be sufficiently specific and detailed to convey . . . the substantial nature of the charge without requiring speculation") (citation omitted).[11]

To "commence" an action, O.C.G.A. § 21-5-13(2) requires the Commission or Attorney General to serve a notice of summons or hearing. Although in many respects the February 2020 Order is closer to satisfying the requirements of O.C.G.A. § 21-5-13(2) than the June 2019 Notice, the February 2020 Order did not meet the APA's hearing notice requirements under O.C.G.A. § 50-13-13(a)(2)(A) and (E). It did not include the time or place for hearing, or state that a party may subpoena witnesses and evidence through the agency. The term "summons" is undefined either in the Ethics in Government Act or the APA; however, Black's Law Dictionary (11th ed. 2019) defines summons as "[a] writ or process commencing the plaintiff's action and requiring the defendant to appear and answer." Considered in light of this definition, none of the documents at issue would qualify as a "summons" requiring Respondent to appear and answer as described by O.C.G.A. § 21-5-6(b)(10)(A).[12] Instead of serving a notice of summons or hearing, the Commission's February 2020 Order sent the case on "for further prosecution under the Administrative Procedure Act in accordance with O.C.G.A. §[] 21-5-6(b)(10)(A)," which provides that the Commission shall give notice by summoning persons believed to have committed violation to a hearing conducted in accordance with Administrative Procedure Act.

3. Calculation of Time

Under O.C.G.A. § 21-5-13, any action alleging a violation of the Ethics in Government Act involving a candidate for an office with a term of four years or more must "be commenced"

[11] Respondent notes that the Statement of Matters Asserted also asserts that these loans violated O.C.G.A. §§ 21-5-3(16.1) and 21-5-3(18) and includes two allegations that were not contained in the order. See ¶¶ 47-50.

[12] Pursuant to O.C.G.A. § 21-5-6(b)(10)(A), "[i]f the commission determines that there are such reasonable grounds to believe that a violation has occurred, it shall give notice by summoning the persons believed to have committed the violation to a hearing. The hearing shall be conducted in all respects in accordance with Chapter 13 of Title 50, the 'Georgia Administrative Procedure Act.'"

within five years after the date of filing of the first report containing the alleged violation. On October 30, 2015, Respondent filed the second set of amendments to his 2012, 2013, and 2014 CCDRs. The two amended disclosure reports filed on October 30, 2015, were the first reports containing alleged Violations I and III, and the Commission was required to commence the instant case within five years of this date with respect to these alleged violations.

As O.C.G.A. § 21-5-13 instructs, the Commission had five years from October 30, 2015, plus 122 days of additional time stemming from the Georgia Supreme Court's tolling of statutes of limitation during the COVID pandemic bringing the deadline to March 1, 2021, to commence an action as to Violations I and III.[13] Even though the June 2019 Notice and the February 2020 Order were issued before this date, neither fully complied with O.C.G.A. § 21-5-13(2).

While the Commission does not contend that the Statement of Matters Asserted is the triggering document under O.C.G.A. § 21-5-13(2), Respondent argues that Statement of Matters Asserted filed by the Commission would not commence this action because it still does not satisfy the APA's notice requirements under O.C.G.A. § 50-13-13(a)(2)(A) and (E). Even if the Statement of Matters sufficed as a notice of summons or hearing under O.C.G.A. § 21-5-13(2), it was filed with the Office of State Administrative Hearings on May 21, 2021, and Respondent asserts he was not served until June 9, 2021, well outside the five-year statute of limitation.[14] Transcript of Oral Argument held on August 31, 2021, at 10.

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[13] See July 10, 2020, Fourth Order Extending Declaration of Statewide Judicial Emergency (https://www.gasupreme.us/wp-content/uploads/2020/07/4th-SJEO-FINAL.pdf) at 5.

[14] The Commission further maintains that a Notice of Hearing sent by the Office of State Administrative Hearings could not be the "notice of summons or hearing" contemplated by O.C.G.A. § 21-5-13(2) because neither the Commission nor the Attorney General is authorized to send Respondent a notice of hearing in an OSAH case. See Ga. Comp. R. & Regs. 616-1-2-.09 ("As soon as practicable after a case is commenced, the Court shall issue a Notice of Hearing to the parties for the purpose of setting forth the date, time, and location of the hearing."); but see O.C.G.A. § 50-13-41(b) ("administrative law judge shall have all the powers of the ultimate decision maker in the agency with respect to a contested case").

4. Violations II and IV

a. Disclosure Reports

In Violations II and IV of the Statement of Matters Asserted, the Commission contends that Respondent violated the reporting provisions in O.C.G.A. § 21-5-34 because the original disclosure reports filed for calendar years 2013 and 2014 did not disclose the transactions related to Violations I and III. See SMA ¶¶ 48 & 50. Even if the statute of limitations does not mandate dismissal of the entire Statement of Matters Asserted, Respondent argues that Violations II and IV of the Statement of Matters Asserted must be dismissed. The Commission did not respond to his argument.[15]

Respondent contends that the statute of limitations applicable to Violations II and IV, which allege Respondent failed to disclose the transfers from his campaign account on the 2013 and 2014 CCDRs, should begin running from the date that the reports were filed with the Commission. Per Respondent, he filed the 2013 CCDR on January 8, 2014, and the deadline for the Commission to commence an action as to Violation II was therefore January 8, 2019. See Exhibit 8 attached to SMA. The disclosure report for 2014 was filed on January 7, 2015, and Respondent argues that the deadline for the Commission to commence an action as to Violation IV was January 7, 2020. Id. Respondent concludes that because the reports relating to Violations II and IV were filed before the reports relating to Violations I and III, the five-year statute of limitations also expired on an earlier date.

The undersigned declines to address Respondent's argument. Whether or not the earlier date would trigger the statute of limitations, even under the later date the Commission may not

[15] During oral argument, the Commission noted that "[t]he meat of the allegations against the candidate are for the use of the funds and not so much the disclosure." Transcript of Oral Argument held on August 31, 2021, at 16.

pursue these two allegations. Further, to grant a motion to dismiss a court must find that "the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof." Harrell, 46 Ga. App. at 636. Given the allegations in the Statement of Matters Asserted concerning the filing of the CCDRs, granting a motion to dismiss based on this specific argument would be premature. See Sandy Springs Toyota v. Classic Cadillac Atlanta Corp., 269 Ga. App. 470, 470, (2004) (fraud may toll statute of limitations).

b. Preliminary Proceedings

Respondent makes a second argument in regard to Violations II and IV. Neither the June 2019 Notice of Preliminary Hearing or the February 2020 Order After Preliminary Hearing alleged violations of O.C.G.A. § 21-5-34. He maintains that the first time the Commission referenced a violation of O.C.G.A. § 21-5-34 was in the Statement of Matters Asserted filed on May 21, 2021, and argues that the Commission's action including these allegations is in violation of the Commission's rules and regulations.

Although the undersigned has determined that all the violations must be dismissed because the Commission has not complied with the applicable statute of limitations, the undersigned agrees with Respondent as to the latter argument as well. The statutes and rules mandate that, before a hearing in accordance with the Administrative Procedure Act may be held on these allegations, Respondent is entitled to a preliminary hearing before the Commission to determine whether there are reasonable grounds to believe the Act was violated. See, e.g., O.C.G.A. § 21-5-6(b)(10); Ga. Comp. R. & Regs. 189-2-.04 (Commission staff may initiate investigation into alleged violations

of Ethics in Government Act; "[i]n such case, the applicable procedures found in Rules 189-2-.03, 189-2-.05, and 189-2-.06 shall be followed in the investigation").[16]

SUMMARY DETERMINATION

The Commission has moved for summary determination. Summary determination in this proceeding is governed by Office of State Administrative Hearings ("OSAH") Rule 15, which provides, in relevant part:

> A party may move, based on supporting affidavits or other probative evidence, for summary determination in its favor on any of the issues being adjudicated, on the basis that there is no genuine issue of material fact for determination[.]

Ga. Comp. R. & Regs 616-1-2-.15(1). On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party "is entitled to a judgment as a matter of law on the facts established." Pirkle v. Envtl. Prot. Div., Dep't of Natural Res., OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at *6-7 (OSAH 2004) (citing Porter v. Felker, 261 Ga. 421 (1991)); see generally Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-305 (2006) (observing that a summary determination is "similar to a summary judgment" and elaborating that an administrative law judge "is not required to hold a hearing" on issues properly resolved by summary adjudication).

[16] Respondent makes additional arguments as to why the transactions at issue were permissible as a matter of law and challenges O.C.G.A. § 21-5-33(c) as unconstitutional. Because the undersigned finds that the statute of limitations is applicable to the allegations in the Statement of Matters Asserted, it is unnecessary to address Respondent's arguments; however, they are preserved for the record.

ANALYSIS

The Georgia Government Transparency and Campaign Finance Act of 2010, in effect at the time of the alleged violations, like the current Ethics in Government Act, permits a candidate to invest money or capital to gain interest or income. See O.C.G.A. § 21-5-33(a); 21-5-3(16.1) (defining investment as "the investment of money or capital to gain interest or income"). However, campaign contributions, including any proceeds from investing such contributions, are not considered a candidate's personal assets, and may only be spent to pay for the campaign's "ordinary and necessary expenses." O.C.G.A. § 21-5-33(a), (c). If there are funds remaining after payment of the campaign's ordinary and necessary expenses, O.C.G.A. § 21-5-33(b) allows a candidate to contribute to a charitable organization, transfer funds to a political party, candidate or persons making the contributions, repay prior campaign obligations, and in some instances retain for use in future campaigns.

The Commission argues that Respondent's transfer of campaign funds to his law firm violated O.C.G.A. § 21-5-33 because the transfers cannot be reasonably construed as "investments" within the meaning of the Ethics in Government Act, and would, as a matter of law, not be a permitted use of excess campaign funds under O.C.G.A § 21-5-3. Citing Sawnee Elec. Membership Corp. v. Georgia PSC, 273 Ga. 702, 705-706 (2001), it maintains that an administrative law judge must defer to the Commission regarding the interpretation of the statutes which it is empowered to enforce, unless the agency's action is contrary to the plain language of the statute. See MSD at 10. In opposition, Respondent argues that because the campaign was paid nearly $9,000 in interest on these transactions, there is an issue of material fact as to whether they would qualify as investments under the Ethics in Government Act.

In the event the statute of limitations does not bar the Commission from pursuing its allegations, the undersigned does not find that the case is appropriate for summary determination. Summary determination may only be granted if a party provides "supporting affidavits or other probative evidence" demonstrating "that there is no genuine issue of material fact for determination." Ga. Comp. R. & Regs 616-1-2-.15(1). Although the Commission has provided documentation regarding the transfers of campaign funds and CCDRs, the Statement of Matters Asserted alleges "on information and belief" that the funds transferred were not used for ordinary or necessary campaign expenses. SMA ¶ 45. Similarly, it alleges "[o]n information and belief the 'investment' funds were converted to personal assets and used for Respondent's own personal gain and/or personal use." SMA ¶ 46. Cf. Fletcher v. Hatcher, 278 Ga. App. 91, 93 (2006) ("We do not consider the allegations in plaintiffs' verified complaint to be evidence, because the verification therein was based on 'the best of plaintiffs' knowledge and belief").

Given the Commission's reliance on "information and belief," there is insufficient probative evidence to prevail in a motion for summary determination. Ga. Comp. R. & Regs 616-1-2-.15(1); cf. Dupree v. Houston Cty. Bd. of Educ., 357 Ga. App. 38, 39 (2020) (party moving for summary judgment may prevail "by showing the court that the documents, affidavits, depositions and other evidence in the record reveal" that there are no issues of material fact "on at least one essential element of [the party's] case") (citation omitted). Moreover, the undersigned does not find that the statutes and regulations relied upon by the Commission are ambiguous. In such a case, an administrative law judge is not required to defer to the Commission's statutory or regulatory interpretation of relevant authority. See City of Guyton v. Barrow, 305 Ga. 799, 802-03 (2019) (only after applying all the canons of statutory construction may a court find a regulation ambiguous and holding deference unwarranted because regulation was not ambiguous).

DECISION

The Commission has an imperative role to play in protecting "the integrity of the democratic process and to ensure fair elections . . . [and] to institute and to establish a requirement of public disclosure of campaign contributions and expenditures [. . . .]" O.C.G.A. § 21-5-2. It is essential that the Commission work diligently to investigate alleged violations of the Ethics in Government Acts. The undersigned makes no substantive findings regarding the Commission's allegations in the Statement of Matters Asserted, but rules only as to the applicability of the statute of limitations in O.C.G.A. § 21-5-13, and as to whether Summary Determination is appropriate. For the aforementioned reasons, Respondent's Motion to Dismiss is **GRANTED**, and the Petitioner's Motion for Summary Determination is **DENIED**.

SO ORDERED, this 18th day of October, 2021.

Ronit Walker
Administrative Law Judge