

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BEFORE THE SECRETARY OF THE COMMONWEALTH

Commonwealth of Pennsylvania,
Bureau of Charitable Organizations

v.

Gary James Cummings, Sr.,
Respondent

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:
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:
:

Docket No. 0001-98-14

File No. 13-98-09955

FINAL ADJUDICATION AND ORDER

Pedro A. Cortés
Secretary of the Commonwealth

302 North Office Building
401 North Street
Harrisburg, PA 17120

PHOTOCOPIARY
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Department of State

HISTORY

This case comes before the Secretary of the Commonwealth (Secretary) pursuant to the Solicitation of Funds for Charitable Purposes Act, Act of December 19, 1990 (P.L. 1200, No. 202), as amended (Act), 10 P.S. §§162.1 *et seq.* On January 17, 2014, the Department of State (Department), Bureau of Charitable Organizations (Bureau) filed an order to show cause charging Respondent with several violations of the Act, 10 P.S. §§ 162.1 *et seq.*

The order to show cause filed on January 17, 2014, alleged that Respondent had violated 10 P.S. § 162.15(a)(1), by and through § 162.13(a), by using contributions to the organization in an manner inconsistent with the organization's charitable purpose. Further, the Commonwealth alleged that Respondent had violated 10 P.S. § 162.15(a)(2), by and through § 162.21, by conspiring in a fiduciary capacity to utilize unfair and deceptive acts to deprive and defraud the organization of funds meant to promote the organization's charitable purpose. Lastly, the Commonwealth alleged that Respondent had violated 10 P.S. § 162.15(a)(1), by and through § 162.12, by failing to maintain true and accurate records of expenditures made with funds meant to promote the organization's charitable purpose. The order to show cause directed Respondent to file a written answer to the charges within thirty days of the date the order to show cause was issued and notified Respondent that failure to file an answer within the time allowed may result in the factual allegations deemed admitted.

On February 17, 2015, the Commonwealth filed a motion to enter default and deem facts admitted in accordance with the General Rules of Administrative Practice and Procedure at 1 Pa. Code §35.37.

Respondent did not submit a reply to either pleading. The Secretary now issues this adjudication and order in final disposition of this matter

FINDINGS OF FACT

1. This matter is before the Secretary of the Commonwealth (Secretary) pursuant to the Solicitation of Funds for Charitable Purposes Act, Act of December 19, 1990, P.L. 1200, No. 202, *as amended* ("Act"), 10 P.S. §§ 162.1, *et seq.*
2. At all relevant and material times, Respondent was the President of the Firemen's Ambulance Service Team (here and after referred to as 'F.A.S.T.'), a charitable organization located in Renovo, PA, registered with the Commonwealth under registration number 37995. (Order to show cause ¶ 2; Docket no. 0001-98-14)
3. The last known mailing address for the Respondent is: 229 Champlain Avenue, Renovo, PA 17764. (Order to show cause ¶ 3)
4. It is believed and therefore averred that Respondent may be receiving mail at: PIN 13-1555, Clinton County Prison, 58 Pine Mountain Road, McElhatten, PA 17748. . (Order to show cause ¶ 4)
5. Respondent served as the President of F.A.S.T., 800 Huron Avenue, Renovo, PA 17764, from approximately 2006 through on or about April 2012. (Order to show cause ¶ 6)
6. During the period when Respondent served as its President, F.A.S.T. operated as a nonprofit organization registered with the Commonwealth under registration number 37995. (Order to show cause ¶ 7)
7. During the period when Respondent served as its President, F.A.S.T. conducted business as a charitable organization as defined by the Act. (Order to show cause ¶ 8)
8. Respondent, as President of F.A.S.T., was required to act in a fiduciary capacity for F.A.S.T. (Order to show cause ¶ 9)
9. During the period when Respondent served as its President, F.A.S.T. received contributions intended to be used for its charitable purpose of providing management of

emergency services and transportation from hospitals in Western Clinton County Pennsylvania and nearby areas. (Order to show cause ¶ 10)

10. During the period when Respondent served as its President, F.A.S.T. had bank accounts at the Jersey Shore State Bank and at M & T Bank, into which contributions received by the organization were deposited. (Order to show cause ¶ 11)

11. At all relevant and material times, Respondent had access to checks issued by the Jersey Shore State Bank and the M & T Bank for the accounts held by F.A.S.T. at those institutions. (Order to show cause ¶ 12)

12. On or about July 15, 2008, M & T Bank issued an M & T Check Card (a.k.a. debit card) providing access to the account held by F.A.S.T. at the bank; which card was activated on September 8, 2008. (Order to show cause ¶ 13)

13. The debit card issued July 15, 2008, expired July 31, 2011; however, a new card was issued and was activated on July 6, 2011, prior to the expiration date of the originally issued card. (Order to show cause ¶ 14)

14. At all relevant and material times, Respondent had access to the debit card issued by M & T Bank. (Order to show cause ¶ 15)

15. Over the period from approximately 2006 until approximately April 2012, Respondent misappropriated in excess of \$14,000 in funds from F.A.S.T. accounts through checks written for purchases of goods and services used for Respondent's personal use, needs and benefit. (Order to show cause ¶ 16)

16. Over the period from approximately mid-2008 until approximately April 2012, Respondent misappropriated in excess of \$40,000 in funds from F.A.S.T. accounts through the use of the debit card for purchases and withdrawals used for Respondent's personal use, needs and benefit. (Order to show cause ¶ 17)

17. The misappropriated funds were not applied in a manner consistent with F.A.S.T.'s charitable purposes. (Order to show cause ¶ 18)

18. Pennie Lynn Bodley (here and after referred to as "Bodley"), 229 Champlain Avenue, Renovo, PA 17764, served as the Secretary of F.A.S.T from approximately mid-2008 through approximately April 2012. (Order to show cause ¶ 21)

19. During the period Bodley served as Secretary, she resided with Respondent at 229 Champlain Avenue, Renovo, PA 17764. (Order to show cause ¶ 22)

20. During her time as Secretary of F.A.S.T., Bodley was deemed to be a fiduciary and was acting in a fiduciary capacity. (Order to show cause ¶ 21, 23)¹

21. Respondent and Bodley conspired to misappropriate funds from F.A.S.T. accounts for their own personal use, needs and benefit. (Order to show cause ¶ 24)

22. Respondent is unable to truly and accurately account for the funds misappropriated from F.A.S.T. accounts through checks written for purchases of goods and services used for Respondent's personal use, needs and benefit, from approximately 2006 until approximately April 2012. (Order to show cause ¶ 27)

23. Respondent is unable to truly and accurately account for the funds misappropriated from F.A.S.T. accounts through the use of the debit card for purchases and withdrawals used for Respondent's personal use, needs and benefit, from approximately mid-2008 until approximately April 2012. (Order to show cause ¶ 28)

24. The Commonwealth served the Order to Show Cause upon Respondent by mailing one copy via Certified Mail, Return Receipt Requested and another copy via First Class Mail, Postage Prepaid, to the Respondent at the following addresses: Gary James Cummings, Sr.,

¹ Paragraph 23 of the Order to Show Cause incorrectly identifies Respondent as Secretary of F.A.S.T., when alleging that Pennie Lynn Bodley was deemed to be a fiduciary and was acting in a fiduciary capacity. The Secretary finds this to be harmless error, as paragraphs 21 and 22 correctly identify Bodley as Secretary of F.A.S.T., and paragraphs 6-11 correctly identify Respondent as President of F.A.S.T.

229 Champlain Avenue, Renovo, PA 17764; Gary James Cummings, Sr.; PIN 13-1555, Clinton County Prison, 58 Pine Mountain Road, McElhatten, PA 17748. (MDFA at ¶ 3)

25. The copies of the Order to Show Cause sent to the Respondent by Certified Mail, Return Receipt Requested, at the Renovo, PA address, which was marked as item number 9171 9690 0935 0027 7808 21, was returned to the Commonwealth on February 11, 2014, with the envelope marked by the U.S. Postal Service to reflect that it was "Unclaimed." (MDFA at ¶ 5)

26. Respondent received the Order to Show Cause sent to the Respondent by Certified Mail, Return Receipt Requested, at the McElhatten, PA address, which was marked as item number 9171 9690 0935 0027 7808 38, as confirmed by a proof of delivery issued by the U.S. Postal Service on February 5, 2014, in response to a request for delivery information. (MDFA at ¶ 6)

27. The copies of the Order to Show Cause sent via First Class Mail, Postage Prepaid, to both addresses were not returned to the Commonwealth. (MDFA at ¶ 8)

28. The order to show cause directed Respondent to file an answer thereto within thirty days of its date. (MDFA at ¶ 9)

29. Thirty days from the date of the order to show cause expired on February 17, 2014. (MDFA at ¶ 6)

30. Respondent did not file a response to the order to show cause or the motion to enter default and deem facts admitted. (Docket number 0001-98-14)

31. Respondent was served with all pleadings, orders and notices filed of record in this matter. (Docket number 0001-98-14)

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter. (Section 4 of the Act, 10 P.S. § 162.4). (Findings of Fact 1-2)
2. Respondent has received notice of the charges and an opportunity to be heard in this proceeding in accordance with Administrative Agency Law, 2 Pa.C.S. § 504. (Findings of Fact 3-4, 24-31)
3. Respondent violated 10 P.S. § 162.15(a)(1), by and through 10 P.S. § 162.13(a), in that Respondent used contributions to F.A.S.T. in a manner inconsistent with the organization's charitable purpose,. (Findings of Fact 5-17)
4. Respondent violated 10 P.S. § 162.15(a)(2), by and through 10 P.S. § 162.21, in that the facts deemed admitted establish that Respondent conspired with another in a fiduciary capacity to utilize unfair and deceptive acts to deprive and defraud F.A.S.T. of funds meant to promote the organization's charitable purpose. (Findings of Fact 15-21)
5. Respondent violated the Act at 10 P.S. § 162.15(a)(1) through a violation of 10 P.S. § 162.12, in that Respondent failed to maintain true and accurate records of expenditures made with funds meant to promote the F.A.S.T.'s charitable purpose. (Findings of Fact 22-23)

DISCUSSION

I. STATUTORY AND REGULATORY PROVISIONS

This case comes before the Secretary pursuant to the Solicitation of Funds for Charitable Purposes Act, Act of December 19, 1990 (P.L. 1200, No. 202), as amended (Act), 10 P.S. §§162.1, *et seq.* The pertinent provisions are as follows:

§162.12. Records to be kept by charitable organizations, professional fundraising counsels and professional solicitors; inspection; retention

Every charitable organization, professional fundraising counsel and professional solicitor subject to the provisions of this act shall, in accordance with the rules and regulations prescribed by the department, keep true fiscal records as to its activities in this Commonwealth as may be covered under this act, in such form as will enable them accurately to provide the information required under this act. Such records shall be made available for inspection upon demand by the department or the Office of Attorney General. However, names, addresses and identities of contributors and amounts contributed by them shall not be considered a matter of public record and, therefore, shall not generally be made available for public inspection, shall not be used for a purpose inconsistent with this act and shall be removed from the records in the custody of the department at such time that such information is no longer necessary for the enforcement of this act. Such records shall be maintained for a period of at least three years after the end of the period of registration to which they relate.

§162.13. Limitation on activities of charitable organizations; disclosure requirements

(a) Solicitation limitation.--A charitable organization may only solicit contributions for the charitable purpose expressed in solicitation for contributions or the registration statement of the charitable organization and may only apply contributions in a manner substantially consistent with that purpose.

* * *

§162.15. Prohibited acts

(a) General rule.—Regardless of a person's intent or the lack of injury, the following acts and practices are prohibited in the planning, conduct or execution of any solicitation or charitable sales promotion:

(1) Operating in violation of, or failing to comply with, any of the requirements of this act, regulations of the department or an order of the secretary, or soliciting contributions after registration with the department has expired or has been suspended or revoked or soliciting contributions prior to

the solicitation notice and contract having been approved by the department.

(2) Utilizing any unfair or deceptive acts or practices or engaging in any fraudulent conduct which creates a likelihood of confusion or of misunderstanding.

* * *

§162.17. Administrative enforcement and penalties

(a) General rule.--The secretary may refuse to register or revoke or suspend the registration of any charitable organization, professional fundraising counsel or professional solicitor whenever he finds that a charitable organization, professional fundraising counsel or professional solicitor, or an agent, servant or employee thereof:

(1) Has violated or is operating in violation of any of the provisions of this act, the regulations of the department, or an order issued by the secretary.

* * *

(b) Additional actions.--When the secretary finds that the registration of any person may be refused, suspended or revoked under the terms of subsection (a), the secretary may:

* * *

(2) Issue an order directing that the person cease and desist specified fundraising activities

(3) Impose an administrative fine not to exceed \$1,000 for each act or omission which constitutes a violation of this act and an additional penalty, not to exceed \$100 for each day during which such violation continues. Registration will be automatically suspended upon final affirmation of an administrative fine until the fine is paid or until the normal expiration date of the registration. No registration shall be renewed until the fine is paid.

* * *

§162.21. Charitable organizations deemed fiduciary

Every person soliciting, collecting or expending contributions for charitable purposes and every officer, director, trustee and employee of any such person concerned with the solicitation, collection or expenditure of such contribution shall be deemed to be a fiduciary and acting in a fiduciary capacity.

The motion to enter default and deem facts admitted is in accordance with the General Rules of Administrative Practice and Procedure. The relevant provision of the General Rules of Administrative Practice and Procedure states as follows:

§35.37 Answers to order to show cause

Any person upon whom an order to show cause has been served . . . shall, if directed to do so, respond to the same by filing within the time specified in the order

an answer in writing. The answer shall be drawn so as specifically to admit or deny the allegations or charges which may be in order, set forth the facts upon which respondent relies, and state concisely the matters of law relied upon. . . . A respondent failing to file an answer within the time allowed shall be deemed in default, and relevant facts stated in the Order to show cause may be deemed admitted.

1 Pa. Code § 35.37.

II. DUE PROCESS

“It is well established that the requirements of due process of law apply to administrative proceedings.” First National Bank of Pike County v. Department of Banking and Bank of Matamoras, Intervening, 300 A.2d 823, 824 (Pa. Cmwlth. 1973) (citation omitted). “Due process requires that a person be provided notice and an opportunity to be heard prior to an adjudication, affecting that person’s rights.” Goetz v. Department of Environmental Resources, 613 A.2d 65, 67 (Pa. Cmwlth. 1992) (citation omitted), appeal denied, 625 A.2d 1196 (Pa. 1993). “Notice of administrative action which is mailed to the interested party’s last known address has been found to be reasonable notice.” Kobylski v. Commonwealth of Pennsylvania, Milk Marketing Board, 516 A.2d 75, 77 (Pa. Cmwlth. 1986), citing Yarbrough v. Department of Public Welfare, 478 A.2d 956 (Pa. Cmwlth. 1984).

Copies of of the order to show cause were mailed to Respondent at his two last known addresses in Renovo, Pennsylvania and McElhatten, Pennsylvania by certified mail, return receipt requested and by first class mail, postage prepaid. The order to show cause sent via certified mail to the Renovo address, which was marked as item 9171 9690 0935 0027 7808 21, was returned to the Commonwealth on February 11, 2014, with the envelope marked by the U.S. Postal Service that it was “Unclaimed.” The order to show cause was also sent to Respondent via certified mail, return receipt requested, at the McElhatten, PA address, which was marked as item 9171 9690 0935 0027 7808 38, and was confirmed as delivered by a proof of delivery issued by the U.S. Postal Service on February 5, 2014, attached as Exhibit B in the motion to

enter default and deem facts admitted. Additionally, the copies of the order to show cause mailed by first class mail to both the Renovo, PA and McElhatten, PA addresses, have not been returned to the Commonwealth. Therefore, the Secretary finds that Respondent received reasonable notice of the action and allegations against him. The order to show cause clearly and specifically stated the charges against Respondent. The order to show cause directed Respondent to file an answer or risk disciplinary action without a hearing. The order to show cause explained the procedures to request a hearing. Further, the order to show cause warned Respondent that if he failed to request a hearing he would be deemed to have waived his right to a hearing and final judgment might be entered without a hearing. Due process does not confer an absolute right to be heard, but only that a party be provided with an opportunity to be heard. Goetz, 613 A.2d at 67. The Secretary finds that Respondent was given an opportunity to be heard and failed to take advantage of that opportunity. Therefore, the Secretary of the Commonwealth deems the factual allegations contained in the order to show cause admitted, and grants the motion to enter default and deem facts admitted against Respondent.

III. ANALYSIS AND SANCTION

In count one, Respondent is charged with violating 10 P.S. §162.15(a)(1), by and through 10 P.S. §162.13(a), by misappropriating at least \$54,000 from F.A.S.T. for his personal use and benefit. In doing so, it is alleged that he caused the charity to apply contributions in a manner inconsistent with F.A.S.T.'s charitable purpose. The facts deemed admitted establish that, from approximately mid-2008 until approximately April 2012 Respondent made purchases via checks and debit cards drawn on F.A.S.T. accounts at M & T Bank and the Jersey Shore State Bank for purchases of goods and services used for Respondent's personal use needs and benefit. This clearly indicates that the misappropriated contributions were applied in a manner that was

inconsistent with the charitable purpose of F.A.S.T. Therefore, count one of the order to show cause is sustained.

In count two, Respondent is charged with violating 10 P.S. § 162.15(a)(2), by and through 10 P.S. § 162.21, in that, as President of F.A.S.T., he conspired with another in a fiduciary capacity to utilize unfair and deceptive acts to deprive and defraud the organization of funds meant to promote the organization's charitable purpose. A fiduciary has a duty and obligation to act for a beneficiary in situations that require trust, integrity and honesty. As Secretary of F.A.S.T., Bodley was an officer and thus a fiduciary of F.A.S.T. This established a fiduciary relationship between Bodley and F.A.S.T. Because Respondent conspired with another in a fiduciary capacity to utilize unfair and deceptive acts to deprive and defraud F.A.S.T. of funds meant to promote F.A.S.T.'s charitable purpose, count two of the order to show cause is sustained.

In count three, Respondent is charged with violating 10 P.S. § 162.15(a)(1) through a violation of 10 P.S. § 162.12, in that Respondent failed to comply with the requirement to keep true fiscal records of expenditures made with funds meant to promote the F.A.S.T.'s charitable purpose. The facts deemed admitted establish that Respondent cannot truly and accurately account for the funds misappropriated from F.A.S.T. accounts through the use of checks and a debit cards for purchases of goods and services used for Respondent's personal use, needs and benefits. This clearly indicates that the Respondent cannot accurately provide the information required under the Act, nor is he able to make available for inspection such records upon demand by the Department of State or the Office of Attorney General. Therefore, count three of the order to show cause is sustained.

When the Secretary finds that a person has violated any of the provisions of the Act, the Secretary is authorized to enforce the Act against such person pursuant to section 17(a)(1) of the

Act, 10 P.S. § 162.17(a)(1), and to levy administrative fines according to section 17(b)(3) of the Act, 10 P.S. § 162.17(b)(3). Under section 17(b)(3), the Secretary may impose an administrative fine not to exceed \$1,000 for each act or omission which constitutes a violation of the Act.

Based on the foregoing, it is clear that the Respondent has taken advantage of the generosity of the good people of the Commonwealth of Pennsylvania, and has defrauded them of hard-earned dollars donated in good faith to the worthwhile charitable cause of supporting the Commonwealth's first responders. Reflecting on the troubling facts of this case, one is reminded of the words of the English writer, poet and critic Samuel Johnson: "Whoever commits a fraud is guilty not only of the particular injury to him who he deceives, but of the diminution of that confidence which constitutes not only the ease but the existence of society." Through his deceit, Respondent has measurably subtracted from that confidence. Thus, it is left to the people of the Commonwealth, acting through those they have charged with enforcing the law, to restore that confidence which sits as a cornerstone of civil society.

The appropriate penalty will be for Respondent not to engage in all manner of fundraising and solicitation activities in this Commonwealth for a period of three years. Additionally, a civil penalty of \$1,000 is imposed for each of Respondent's acts or omissions which constituted a violation of the Act.

Therefore, based on the foregoing findings of facts, conclusions of law and discussion, and in the absence of mitigation, the following order shall issue:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BEFORE THE SECRETARY OF THE COMMONWEALTH

Commonwealth of Pennsylvania, :
Bureau of Charitable Organizations :
 : Docket No. 0001-98-14
v. :
 : File No. 13-98-09955
Gary James Cummings, Sr., :
Respondent :

ORDER

AND NOW, this 23rd day of July, 2015, upon consideration of the foregoing findings of fact, conclusions of law and discussion, it is hereby **ORDERED** that:

(1) Gary James Cummings, Sr. shall **CEASE and DESIST** from all manner of fundraising and solicitation activities in this Commonwealth, until such time as all penalties imposed below are paid in full, and in no case shall he engage in fundraising or solicitation activities for a period of three (3) years from the effective date of this Order.

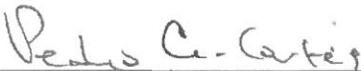
(2) An **administrative fine** in the amount of **\$3,000.00** shall be imposed upon Gary James Cummings, Sr. This amount shall be remitted by certified check or U.S. Postal Service money order made payable to "Commonwealth of Pennsylvania" within thirty days of the effective date of this order and mailed to:

Martha H. Brown, Assistant Counsel
Pennsylvania Department of State
Office of Chief Counsel
301 North Office Building
Harrisburg, PA 17120

Appeal of this decision to the Commonwealth Court may be taken pursuant to 10 P.S. §162.17(c) and 2 Pa.C.S. §702 within 30 days of the date of mailing shown below.

This order shall take effect thirty days from the date it is deposited in the mail.

BY ORDER



Pedro A. Cortés
Secretary of the Commonwealth

For the Commonwealth:

Robert B. Armour
Commonwealth of Pennsylvania
Department of State
P.O. Box 2649
Harrisburg, PA 17105-2649

Respondent:

Gary James Cummings, Jr.
229 Champlain Avenue
Renovo, PA 17764

Date of mailing:

July 23, 2015

NOTICE

The attached Adjudication and Order represents the final agency decision in this matter. It may be appealed to the Commonwealth Court of Pennsylvania by the filing of a Petition for Review with that Court within 30 days after the entry of the order in accordance with the Pennsylvania Rules of Appellate Procedure. See Chapter 15 of the Pennsylvania Rules of Appellate Procedure entitled "Judicial Review of Governmental Determinations," Pa. R.A.P 1501 – 1561. Please note: An order is entered on the date it is mailed. If you take an appeal to the Commonwealth Court, you must serve the Secretary of the Commonwealth with a copy of your Petition for Review. The agency contact for receiving service of such an appeal is:

Pennsylvania Department of State
Office of Chief Counsel
Legal Counsel, Bureau of Corporations and Charitable Organizations
401 North Street
Room 301
Harrisburg, PA 17120