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

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Department of State

Commonwealth of Pennsylvania :
Bureau of Charitable Organizations :

v. :

Docket no. 0045-98-11

File no. 11-98-00851

Birkholm Direct :
Respondent :

FINAL ADJUDICATION AND ORDER

Carol Aichele
Secretary of the Commonwealth

401 North Street, Room 302
Harrisburg, PA 17120

HISTORY

This case comes before the Secretary of the Commonwealth (Secretary) on an order to show cause filed November 17, 2011, alleging that Birkholm Direct (Respondent) violated the Solicitation of Funds for Charitable Purposes Act, Act of December 19, 1990, P.L. 1200, No. 202 (Act), *as amended*, 10 P.S. §§ 162.1 *et seq.* The order to show cause charged that Respondent violated the Act by failing to file Respondent's contract with the Bucks County Counsel #777, Boy Scouts of America with the Bureau of Charitable Organizations ("Bureau") prior to rendering professional fundraising counsel services and that Respondent violated the Act by providing professional fundraising counsel services to the charity without being properly registered as a professional fundraising counsel with the Bureau.

Respondent filed an answer to the order to show cause on January 4, 2012. On January 5, 2012, a notice of hearing was issued, scheduling the matter for a hearing on February 23, 2012. Respondent requested to participate in the hearing by telephone. On January 6, 2012, the Hearing Examiner issued an order granting participation by Respondent via telephone and directed that all exhibits would be exchanged by the parties in advance. The formal administrative hearing was held before Department of State (Department) Hearing Examiner C. Michael Weaver in Harrisburg on February 23, 2012. Jacquelyn E. Pfursich, Esquire, represented the Commonwealth as prosecuting attorney. Respondent was represented by Michael Peter Birkholm, President and Chief Executive officer. At the hearing, the Commonwealth presented testimonial and documentary evidence in support of the allegations in the order to show cause. Respondent's testimony was provided by Michael Peter Birkholm and documentary evidence was admitted in support of the case. The parties declined to file post-hearing briefs. The record was closed with the filing of the hearing transcript on March 8, 2012.

FINDINGS OF FACT

1. Respondent Birkholm Direct is a professional fundraising counsel as defined by the Act. (Exhibit C-1, C-2)
2. Respondent's last known business address is 150 N. Santa Anita Avenue, #460, Arcadia, CA 91006. (Bureau Records; Exhibit C-1)
3. Respondent's registration with the Bureau, registration number 16423, expired on February 4, 2010 and had not been renewed at the time of the hearing on February 23, 2012. (Bureau records; Exhibits C-1, C-2; NT 48, 49, 75, 77)
4. Respondent is presently registered with the Bureau as a professional fundraising counsel from March 5, 2012 through March 5, 2013. (Bureau records; NT 49)
5. The Bucks County Counsel #777, Boy Scouts of America is a charitable organization that is registered with the Bureau, Certificate number 01061. (Bureau Records; Exhibit C-1)
6. The Bucks County Counsel #777, Boy Scouts of America is located in the Commonwealth of Pennsylvania. (Bureau Records; Exhibit C-1, C-2)
7. On November 30, 2010, Respondent entered into a contract with the Bucks County Counsel #777, Boy Scouts of America, in which Respondent was to provide the Boy Scouts with professional fundraising counsel services in the Commonwealth from January 1, 2011 through December 31, 2011. (Exhibit C-2, C-3; NT 43-45)
8. Respondent did not file its contract with the Bucks County Counsel #777, Boy Scouts of America with the Bureau for the year 2011. (Exhibit C-1, C-2; NT 45)
9. A professional fundraising counsel must be registered with the Bureau prior to being retained and sign a contract with a charitable organization in Pennsylvania. (NT 46)
10. A contract for professional fundraising counsel must be filed with the Bureau ten

working days prior to the start of professional fundraising counsel services. While Respondent began fundraising counsel services for the Bucks County Counsel #777, Boy Scouts of America on January 1, 2011, Respondent's contract with this charity was filed with the Bureau of Charitable Organizations at some date after February 2011. (NT 47)

11. Respondent has signed a professional fundraising counsel contract with Bucks County Counsel #777, Boy Scouts of America for services beginning January 1, 2012 – while it applied for registration, it was not registered with the Bureau until March 5, 2012. (Bureau records; NT 50, 51)

12. Respondent provided professional fundraising counsel services to the Bucks County Counsel #777, Boy Scouts of America in the Commonwealth since February 2011. (Exhibit C-1, C-2; NT 43-45)

13. Respondent failed to register as professional fund raising counsel for the years 2010 and 2011, because of financial distress of the firm, which caused turmoil and distress in its ability to manage administrative obligations because all staff had to be laid off. (NT 75, 79)

14. Respondent was not aware that the registration had expired and there was no intent to deceive. (NT 76)

15. Respondent had been registered in Pennsylvania from 1999 through early 2010, which was accomplished through a contracted law firm from New York City. (NT 76, 77, 81)

16. Respondent attempted to register with the Bureau in December 2011 for the years 2011 and 2012, by submitting registrations in January 2012, which were initially rejected for several deficiencies. (Exhibits R-3, R-4; NT 49, 77)

17. Respondent was served with all pleadings, orders and notices filed of record in this matter, was represented by counsel, and presented evidence at the hearing. Docket No. 0045-98-11; NT 5 and *passim*.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter. (10 P.S. §162.4; Finding of Fact 1)
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. (Finding of Fact 17)
3. Respondent is subject to disciplinary action under section 15(a) of the Act, 10 P.S. §162.5(a)(1), by and through 10 P.S. §162.8(d), by failing to file Respondent's contract with the Bucks County Counsel #777, Boy Scouts of America with the Bureau prior to rendering professional fundraising counsel services. (Findings of Fact 1-16)
4. Respondent is subject to disciplinary action under section 15(a) of the Act, 10 P.S. §162.5(a)(1), by and through 10 P.S. §162.8(a), by providing professional fundraising counsel services to the Bucks County Counsel #777, Boy Scouts of America without being properly registered as a professional fundraising counsel with the Bureau. (Findings of Fact 1-16)

DISCUSSION

The Commonwealth charged Respondent with two violations of the Solicitation of Funds for Charitable Purposes Act (Act), which encompassed failing to file a contract with a client and providing professional fundraising counsel services to a client without being properly registered with the Bureau. The provisions under the Act under which these charges fall are 10 P.S. §162.15(a)(1), 10 P.S. §162.8(d) and 10 P.S. §162.8(a). These portions of the Act provide, in pertinent part, as follows:

* * *

Section 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.

* * *

Section 162.8. Registration of professional fundraising counsel and contracts

(a) Registration and approval required. —No person shall act as a professional fundraising counsel before obtaining department approval of a registration statement pursuant to subsection (c) or after the expiration, suspension or revocation of such registration. A registration application shall be signed and be made by the principal officer of the professional fundraising counsel subject to 18 PA.C.S. § 4904 (relating to unsworn falsification to authorities) and shall contain all of the following information:

- (1) The address of the principal place of business of the applicant and any Pennsylvania addresses, if the principal place of business is located outside this Commonwealth.
- (2) The form of the applicant's business.
- (3) The names and residence addresses of all principals of the applicant, including all officers, directors and owners.
- (4) Whether any of the owners, directors, officers or employees of the applicant are related by blood, marriage or adoption to any other directors, officers, owners or employees of the applicant, any officer, director, trustee or employee of any charitable organization under contract to the applicant or

any supplier or vendor providing goods or services to any charitable organization under contract to the applicant.

- (5) The name of any person who is in charge of any solicitation activity.
- (6) Any other information required by the regulations of the department.

* * *

(d) Written contract. —There shall be a written contract between a charitable organization and a professional fundraising counsel which shall be filed by the professional fundraising counsel with the department at least ten working days prior to the performance by the professional fundraising counsel of any service. No solicitation or services pursuant to the contract shall begin before the department has approved the contract pursuant to subsection (e). The contract must be signed by two authorized officials of the charitable organization, one of whom must be a member of the organization's governing body, and the authorized contracting officer for the professional fundraising counsel. The contract shall contain all of the following provisions:

- (1) The legal name and address of the charitable organization as registered with the department unless that charitable organization is exempt from registration.
- (2) A statement of the charitable purpose for which the solicitation campaign is being conducted.
- (3) A statement of the respective obligations of the professional fundraising counsel and the charitable organization.
- (4) A clear statement of the fees which will be paid to the professional fundraising counsel.
- (5) The effective and termination dates of the contract or if the contract does not have a set termination date, the contract shall contain a clause allowing either party a reasonable period to terminate the contract or notify the other party if either party chooses not to renew. The contract shall also contain the date services will commence with respect to solicitation in this Commonwealth of contributions for a charitable organization.
- (6) A statement that the professional fundraising counsel will not at any time have custody or control of contributions.
- (7) A statement that the charitable organization exercises control and approval over the content and volume of any solicitation.
- (8) Any other information required by the regulations of the department.

The evidence in the record consisted of admissions in Respondent's answer, testimony from R. Brian Aumiller, Administrative Assistant for registration with the Bureau of Charitable Organizations, and a number of documents submitted both by the Commonwealth and Respondent. There is no real dispute over any issue by Respondent as to the facts as alleged in the order to show

cause.

Respondent admitted in its answer to the charges that it is a professional fundraising counsel, and had been registered in the Commonwealth from 1999 through 2009. The President and Chief Executive Officer Michael Peter Birkholm testified on behalf of Respondent. He admitted that Respondent has two clients in Pennsylvania, one of which is Bucks County #777, Boy Scouts of America. This client is a charitable organization that is registered with the Bureau (Certificate number 01061) and is located in the Commonwealth of Pennsylvania. Services were provided to this client in the Commonwealth for the year 2011. On November 30, 2010, Respondent entered into a contract with the Bucks County Counsel #777, Boy Scouts of America to provide professional fundraising counsel services in the Commonwealth from January 1, 2011 through December 31, 2011. Respondent did not timely file its contract with the Bucks County Counsel #777, Boy Scouts of America with the Bureau for the year 2011.

A professional fundraising counsel must be registered with the Bureau prior to being retained and signing a contract with a charitable organization in Pennsylvania. A contract for professional fundraising counsel should have been filed with the Bureau ten working days prior to the January 1, 2011, the date the services began to Bucks County Counsel #777, Boy Scouts of America. Respondent only filed its contract with its client some time after February 2011, even though it was not registered. Respondent did provide professional fundraising counsel services to the Bucks County Counsel #777, Boy Scouts of America for the year 2011.

Mr. Birkholm testified that Respondent's failure to register was not intentional, but an oversight based on financial distress of the firm, which caused turmoil and distress in its ability to manage administrative obligations because all staff had to be laid off. Previous to Respondent's extreme financial nadir, it employed a law firm out of New York City to handle registration matters

for its operation in Pennsylvania from 1999 through 2009. Respondent attempted to register with the Bureau on its own in December 2011 for the years 2011 and 2012, but failed to perfect the application process and become registered until March 5, 2012. Mr. Birkholm explained that Respondent did try to comply with other requirements of the Act, such as disclosure language on the materials posted on behalf of its client. Unfortunately, this effort fell short and did not meet the technical aspects of the rules. Respondent submitted documentary evidence verifying its financial distress with the submission of the expense budget for Bucks County Counsel #777, Boy Scouts of America and copies of Form 940 for 2011 demonstrating that it paid no salaries for the year. Also, Respondent submitted additional evidence to elucidate that the firm has had major economic problems as represented in an operational loss of just under \$82,000 for the year 2011.

Based upon the evidence presented, Respondent has committed the two violations alleged in the order to show cause, by entering into a contract with a client before being registered with the Bureau and providing professional fundraising counsel services without being actively registered with the Bureau. When the Secretary finds that a professional fundraising counsel has violated any of the provisions of the Act, the Secretary is authorized to enforce the Act against Respondent pursuant to 10 P.S. § 162.17, which provide, in relevant part, as follows:

Section 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:

- (1) Revoke a grant of exemption to any of the provisions of this act.
- (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.
- (4) Place the registrant on probation for such period of time and subject to such conditions as he may decide.

* * *

The Commonwealth recommended at the hearing that an administrative fine of \$1,000.00 be imposed upon Respondent for each violation, totaling a fine of \$2,000.00. The Commonwealth did not request anything more severe despite Respondent's continued conduct, not charged, but testified to and accepted as aggravating evidence, in that it continued functioning in Pennsylvania in the year 2012 without perfecting proper registration with the Bureau. However, Respondent did place mitigating evidence into the record to persuade the tribunal that a lesser penalty might be appropriate. Aside from pointing out that it has already attempted to adhere to the Act as it operated as a professional fundraising counsel, the bottom line is that Respondent was not registered during a time where it operated as a professional fundraising counsel. Respondent emphasized as mitigation its financial dilemma and dire prospects of survival as an entity. The economic climate has been dismal for many since the year 2007; however, few are excused from the consequences of the law because of monetary stress. Minimal weight is given to Respondent's mitigation. Accordingly, the following order shall issue:

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

Commonwealth of Pennsylvania	:	
Bureau of Charitable Organizations	:	
	:	
v.	:	Docket no. 0045-98-11
	:	File no. 11-98-00851
Birkholm Direct	:	
Respondent	:	

ORDER

AND NOW, this 5th day of September, 2012, upon consideration of the foregoing findings of fact, conclusions of law and discussion, the Secretary **ORDERS** that an **administrative fine** in the amount of **\$2,000.00** be and hereby is imposed upon Respondent **Birkholm Direct**.

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

Pursuant to section 17(b)(3) of the Act, 10 P.S. §162.17(b)(3), failure to pay the administrative fine in full within 30 days of the effective date of this order will result in the automatic suspension of the registration of **Birkholm Direct** until the fine is paid in full. No registration shall be renewed until the fine is paid.

Appeal may be taken pursuant to section 17(c) of the Act, 10 P.S. §162.17(c), and 2 Pa.C.S. §702, within 30 days of the date of mailing of this Adjudication and Order as indicated below.

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

BY ORDER



Carol Aichele

For the Commonwealth:

Jacquelyn Pfursich, Esquire
GOVERNOR'S OFFICE OF GENERAL COUNSEL
DEPARTMENT OF STATE OFFICE OF CHIEF COUNSEL
PROSECUTION DIVISION
P.O. Box 2649
Harrisburg, PA 17105-2649

For Respondent:

Birkholm Direct
150 N. Santa Anita Avenue #460
Arcadia, CA 91006

Date of mailing:

September 5, 2012

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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 Charitable Organizations
401 North Street
Room 301
Harrisburg, PA 17120