

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

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AUG 10 2010
Department of State
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Commonwealth of Pennsylvania
Bureau of Charitable Organizations

v.

David Kessock,
Angela Kessock and
Spring Ford Girls Softball Association,
Respondents

Docket No. 0035-98-10
File No. 10-98-04529
File No. 10-98-04530
File No. 10-98-04531

FINAL ADJUDICATION AND ORDER

Basil L. Merenda
Acting Secretary of the Commonwealth

302 North Office Building
Harrisburg, PA 17120
(717)787-7630

DATE DISTRIBUTED 8-10-10
PROSECUTION _____
COUNSEL _____
HEARING EXAMINER _____
OTHER _____

HISTORY

This matter comes before the Secretary of the Commonwealth (“Secretary”) on an order to show cause filed June 10, 2010, alleging that David Kessock and Angela Kessock, “primary owner or signer for business” and “agent” for Spring Ford Girls Softball Association (“SFGSA”) respectively (together “Respondents”), are subject to administrative sanctions under the Solicitation of Funds for Charitable Purposes Act (“Act”).¹ The order to show cause alleges that Respondents violated the Act at 10 P.S. § 162.15(a)(1), on two occasions by and through 10 P.S. § 162.12, by failing to provide SFGSA’s fiscal records for inspection when requested both by letter and by subpoena from the Bureau. The order to show cause also alleges that Respondents violated the Act at 10 P.S. § 162.15(a)(1), on two occasions by and through 10 P.S. § 162.21, by breaching a fiduciary duty owed to SFGSA when Respondents failed to provide the Bureau with the information requested by letter and subpoena. Finally, the order to show cause alleges that Respondents violated the Act at 10 P.S. § 162.15(a)(1), on two occasions by and through 10 P.S. § 162.17(a)(2), by failing to provide SFGSA’s fiscal records when requested by letter and subpoena.

On July 13, 2010, 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.

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

¹ Act of December 19, 1990, P.L. 1200, No. 202, *as amended*, 10 P.S. § 162.1 *et seq.*

FINDINGS OF FACT

1. This matter is 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.* (Order to show cause ¶ 1).
2. Respondent David Kessock's (hereinafter "D. Kessock") last known home address is 1096 Fox Run, Reading, PA 19606. (Order to show cause ¶ 2).
3. Respondent Angela Kessock's (hereinafter "A. Kessock") last known home address is 1096 Fox Run, Reading, PA 19606. (Order to show cause ¶ 3).
4. Respondent D. Kessock and Respondent A. Kessock are husband and wife. (Order to show cause ¶ 4).
5. Respondent Spring Ford Girls Softball Association's (hereinafter "SFGSA") last known address is 1096 Fox Run, Reading, PA 19606. (Order to show cause ¶ 5).
6. SFGSA operates as a non-profit organization that benefits a fast pitch girls softball team. (Order to show cause ¶ 6)
7. SFGSA conducts business as a charitable organization as defined by the Act. (Order to show cause ¶ 7).
8. SFGSA is not currently registered as a charitable organization with the Bureau and has never been registered as a charitable organization with the Bureau. (Bureau records)
9. At all relevant and material times, Respondent D. Kessock opened and maintained two non-profit checking accounts at Commerce Bank and Berkshire Bank in the name of SFGSA. (Order to show cause ¶ 8).

10. Respondent D. Kessock is listed as the “primary owner or signer for business” and “secretary” on the signature cards for the SFGSA accounts maintained at Commerce Bank and Berkshire Bank. (Order to show cause ¶ 9).
11. Respondent A. Kessock is listed as an “agent” and was listed as an authorized signor on the signature cards for the SFGSA accounts maintained at Commerce Bank and Berkshire Bank. (Order to show cause ¶ 10).
12. Respondents D. Kessock and A. Kessock are fiduciaries of SFGSA and were acting in a fiduciary capacity for SFGSA. (Order to show cause ¶ 12).
13. From on or about late 2008 until on or about the fall of 2009, Respondent D. Kessock and Respondent A. Kessock were the only authorized signers on SFGSA’s bank accounts at Commerce Bank and Berkshire Bank. (Order to show cause ¶ 13).
14. Respondents D. Kessock and A. Kessock and their children also maintained personal checking accounts at both Commerce Bank and Berkshire Bank. (Order to show cause ¶ 14).
15. From on or about late 2008 until on or about the fall of 2009, funds from SFGSA’s account at Commerce Bank were transferred on multiple occasions between the SFGSA Commerce Bank account and Respondents D. Kessock and A. Kessock’s personal account with Commerce Bank. (Order to show cause ¶ 15).
16. On or about January 12, 2010, the Bureau sent Respondents a letter requesting among other things, a complete list of all officers, directors, board members and employees of SFGSA, copies of financial statements or similar financial documents showing SFGSA’s annual income, expenditures, assets and liabilities, and a complete list of all accounts maintained by SFGSA. (Order to show cause ¶ 16).

17. Respondents did not respond to the Bureau's January 12, 2010 request. (Order to show cause ¶ 17).

18. On or about April 22, 2010, the Bureau sent an investigative subpoena to Respondents requesting among other things, a complete list of all officers, directors, board members and employees of SFGSA, copies of financial statements or similar financial documents showing SFGSA's annual income, expenditures, assets and liabilities, and a complete list of all accounts maintained by SFGSA. (Order to show cause ¶ 19).

19. Respondents have not provided the Bureau with the information subpoenaed in the Bureau's April 22, 2010 investigative subpoena. (Order to show cause ¶ 21).

20. On or about June 10, 2010, the Commonwealth filed an order to show cause setting forth allegations that Respondents violated the Act. (Motion to enter default and deem facts admitted ¶ 1).

21. Pursuant to the Certificate of Service attached to the order to show cause, the Commonwealth served the order to show cause upon Respondents by mailing one copy via certified mail, return receipt requested and another copy via first class mail, postage prepaid, to Respondents at the following address: 1096 Fox Run, Reading, PA 19606. (Motion to enter default and deem facts admitted ¶ 2).

22. Respondents received the order to show cause on June 15, 2010 as evidenced by Postal Form 3811, Article # 7001 0320 0004 9451 2453. (Motion to enter default and deem facts admitted ¶ 3, Exhibit A).

23. The order to show cause sent via first class mail, postage prepaid, was not returned to the Commonwealth. (Motion to enter default and deem facts admitted ¶ 4).

24. The order to show cause directed Respondents to file an answer thereto within thirty (30) days of its date. (Motion to enter default and deem facts admitted ¶ 5, Order to show cause).

25. Thirty (30) days from the date of the order show cause expired on July 10, 2010. (Motion to enter default and deem facts admitted ¶ 6; Order to show cause).

26. The Commonwealth filed a motion to enter default and deem facts admitted on or about July 13, 2010. (Docket No. 0035-98-10).

27. Respondents were served with a copy of the motion to enter default and deem facts admitted. (Motion to enter default, Certificate of service).

28. As of the date of the motion to enter default and deem facts admitted, Respondent has filed no answer to the order to show cause. (Motion to enter default and deem facts admitted ¶ 7).

29. Respondent did not file a response to the order to show cause or the motion to enter default and deem facts admitted. (Docket No. 0035-98-10; Motion to enter Default).

30. Respondent was served with all pleadings, orders and notices filed of record in this matter. (Docket No. 0035-98-10).

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter. (Findings of Fact 1, 6, 7, 9, 10).
2. Respondents have been afforded reasonable notice of the charges against them and an opportunity to be heard in this proceeding in accordance with the Administrative Agency Law, 2 Pa.C.S. § 504. (Findings of Fact 2-3, 5, 16-30).
3. There is good cause to grant the Commonwealth's motion to deem facts admitted because Respondents failed to file a written answer to the order to show cause. (Finding of Fact 28).
4. Respondents are subject to disciplinary action under section 15(a)(1) of the Act, 10 P.S. § 162.15(a)(1), by and through section 12, for failing to provide SFGSA's fiscal records when requested for inspection in the Bureau's January 12, 2010 letter. (Finding of Fact 16-17).
5. Respondents are subject to disciplinary action under section 15(a)(1) of the Act, 10 P.S. § 162.15(a)(1), by and through section 21, for breaching a fiduciary duty owed to SFGSA when Respondents failed to provide the Bureau with the information requested in the Bureau's January 12, 2010 letter. (Findings of Fact 10-13, 16-17).
6. Respondents are subject to disciplinary action under section 15(a)(1) of the Act, 10 P.S. § 162.15(a)(1), by and through section 12, for failing to provide SFGSA's fiscal records when requested for inspection in the Bureau's April 22, 2010 investigative subpoena. (Finding of Fact 18-19).
7. Respondents are subject to disciplinary action under section 15(a)(1) of the Act, 10 P.S. § 162.15(a)(1), by and through section 21, for breaching a fiduciary duty owed to SFGSA when Respondents failed to provide the Bureau with the information requested in the Bureau's April 22, 2010 investigative subpoena. (Findings of Fact 10-13, 18-19).

8. Respondents are subject to disciplinary action under section 17(a)(2) of the Act, 10 P.S. § 162.17(a)(2), for failing to provide SFGSA's fiscal records when requested for inspection in the Bureau's January 12, 2010 letter. (Finding of Fact 16-17).

9. Respondents are subject to disciplinary action under section 17(a)(2) of the Act, 10 P.S. § 162.17(a)(2), for failing to provide SFGSA's fiscal records when requested for inspection in the Bureau's April 22, 2010 investigative subpoena. (Finding of Fact 18-19).

DISCUSSION

I. STATUTORY AND REGULATORY PROVISIONS

This matter is 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 order to show cause issued in this matter comprises of six counts, alleging that Respondents violated the Act at 10 P.S. § 162.15 (a)(1), by and through 10 P.S. §§ 162.12, 162.17(a)(2), and 162.21, which provide in pertinent part as follows:

§ 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.

* * *

§ 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.

§ 162.17. 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.

(2) Has refused or failed or any of its principal officers has refused or failed, after notice, to produce any records of such organization or to disclose any information required to be disclosed under this act or the regulations of the department.

(3) Has made a material false statement in an application, statement or report required to be filed under this act.

(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.

§ 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. THE CHARGES

In each count of the order to show cause, the Commonwealth charges that Respondents violated the Act at 10 P.S. § 162.15(a)(1). In count one, the Commonwealth specifically charges that Respondents violated the Act at section 12, “by failing to provide SFGSA’s fiscal records when requested for inspection by the Bureau on January 12, 2010.” In count two, the Commonwealth charges that Respondents violated the Act at section 12, “by failing to provide SFGSA’s fiscal records when subpoenaed by the Bureau on April 22, 2010.” In count three, the Commonwealth charges that Respondents violated the Act at section 17(a)(2), “by failing to provide SFGSA’s fiscal records when requested for inspection by the Bureau on January 12, 2010.” In count four, the Commonwealth charges that Respondents violated the Act at section 17(a)(2), “by failing to provide SFGSA’s fiscal records when subpoenaed by the Bureau on April 22, 2010.” In count five, the Commonwealth charges that Respondents violated the Act at section 21, “by breaching a fiduciary duty owed to SFGSA when Respondents failed to provide the Bureau the information requested in the Bureau’s April 22, 2010 investigative subpoena.” In count six, the Commonwealth charges that Respondents violated the Act at section 21, “by breaching a fiduciary duty owed to SFGSA when Respondents failed to provide the Bureau the information requested in the Bureau’s January 12, 2010 letter.”

III. 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, 533 Pa. 663, 625 A.2d 1196 (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).

A copy of the order to show cause was mailed to Respondents at their last known address by certified mail, return receipt requested and by first class mail, postage prepaid. The order to show cause was delivered to Respondents’ address on June 15, 2010, and was signed for by Respondent, David Kessock, as evidenced by the United States Postal Service Form 3811, attached as Exhibit A in the motion to enter default and deem facts admitted. Additionally, the order to show cause mailed by first class mail has not been returned to the Commonwealth. Therefore, the Secretary finds that Respondents received actual notice of the action and allegations against them. The order to show cause clearly and specifically stated the charges against Respondents. The order to show cause directed Respondents 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 Respondents that if they failed to request a hearing they would be deemed to have waived their 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 Respondents were 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 Respondents.

III. ANALYSIS AND SANCTION

In each of the six counts charged against Respondents, the Commonwealth alleges a violation of the Act at 10 P.S. § 162.15(a)(1), which generally prohibits charitable organizations from operating in violation of, or failing to comply with, any of the requirements of the Act. In count one, the Commonwealth alleges that Respondents violated the Act by and through section 12, for “failing to provide SFGSA’s fiscal records when requested for inspection by the bureau” in the January 12, 2010, letter. Section 12 requires all charitable organizations to keep financial and other records for three years, and to make such records available to the Bureau upon request. The record clearly establishes that Respondents not only failed to provide the requested information, but also failed to respond at all to the January letter in which the Bureau’s request was contained. This failure to respond is a clear violation of section 15(a)(1) of the Act, by and through section 12 of the Act.

In count two, the Commonwealth alleges that Respondents violated the Act by and through section 12, for “failing to provide SFGSA’s fiscal records when subpoenaed by the Bureau on April 22, 2010.” As established above, section 12 requires that Respondents provide the requested fiscal information to the Bureau upon request. Again, the record clearly establishes

that Respondents failed to provide the subpoenaed information. This failure to comply with the subpoena is a violation of section 15(a)(1) of the Act, by and through section 12 of the Act.

In count six, the Commonwealth alleges that Respondents violated the Act by and through section 21, "by breaching a fiduciary duty owed to SFGSA when Respondents failed to provide the Bureau the information requested in the Bureau's January 12, 2010 letter." Section 21 of the Act establishes that "every person ... collecting or expending contributions for charitable purposes," as well as the officers, directors, and trustees of the charitable organization are "deemed to be a fiduciary and acting in a fiduciary duty."

Respondents David and Angela Kessock were authorized individuals on SFGSA accounts at two banks. Additionally, David Kessock was listed as secretary of the organization on one of the accounts. In these roles, both were deemed to be fiduciaries under the Act. As fiduciaries, Respondents must exercise all of the skill, care and diligence at their disposal when acting on behalf of SFGSA. A person acting in a fiduciary capacity is held to a high standard of honesty and full disclosure in regard to the charitable organization. By ignoring lawful requests for documentation from charities regulators, Respondents clearly acted in a manner adverse or contrary to the interests of SFGSA. Furthermore, Respondents did not provide any mitigating evidence in this matter as to their actions. Therefore, Respondents' failure to respond was a breach of their fiduciary duties, and thus a violation of the Act act section 15(a)(1), by and through section 21.

In count five, the Commonwealth alleges that Respondents violated the Act by and through section 21, "by breaching a fiduciary duty owed to SFGSA when Respondents failed to provide the Bureau the information requested in the Bureau's April, 22 2010 investigative subpoena." Just as the failure of Respondents to respond to the January letter was a breach of

their fiduciary duty to SFGSA, so too their failure to respond to the April subpoena was a breach of their fiduciary duties and thus a violation of section 15(a)(1) of the Act, by and through section 21.

In counts three and four, the Commonwealth alleges that Respondents violated the Act at 10 P.S. § 162.15(a)(1), by through section 17(a)(2), “by failing to provide SFGSA’s fiscal records when requested by the Bureau in the January letter, as well as in the April subpoena. Section 17 (relating to Administrative enforcement and penalties) provides for a panoply of remedies where the Secretary finds a violation of the Act, the refusal to produce documentation or a material false statement. Respondents have clearly “refused or failed, after notice, to produce any records of such organization or to disclose any information required to be disclosed under this act.” 10 P.S. § 162.17(a)(2). Therefore, the Secretary may “refuse to register or revoke or suspend the registration” of Respondents or take any of the additional actions in 10 P.S. § 162.17(b). Since SFGSA is not currently a registered charity, nor has it ever been, the remedies offered in section 17(a) are not applicable unless or until the SFGSA would seek registration with the Bureau. The Secretary will instead turn to section 17(b), which provides for alternative remedies such as administrative fines and an order directing that the person cease and desist specified fundraising activities.

Based on the foregoing findings of fact, 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,
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v.

David Kessock,
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ORDER

AND NOW, this 10th day of August, 2010, upon consideration of the foregoing findings of fact, conclusions of law and discussion, it is hereby **ORDERED** that:

(1) David Kessock, Angela Kessock, and Spring Ford Girls Softball Association shall immediately **CEASE and DESIST** from fundraising activities in this Commonwealth unless and until such time as all information requested by the Bureau has been provided and all penalties imposed below are paid.

(2) An **administrative fine** in the amount of **\$4,000.00** shall be imposed upon David Kessock, Angela Kessock, and Spring Ford Girls Softball Association. 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 may be taken pursuant to 2 Pa.C.S. §702 within thirty days of the date of mailing of this adjudication and order shown below.

BY ORDER:



Basil L. Merenda
Acting Secretary of the Commonwealth

Respondent:

David Kessock, Angela Kessock
and Spring Ford Girls Softball Association
1096 Fox Run
Reading, PA 19606

For the Commonwealth

Jacquelyn E. Pfursich, Prosecuting Attorney
Commonwealth of Pennsylvania
Department of State
212 North Office Building
Harrisburg, PA 17120

Date of Mailing: August 10, 2010