

HISTORY

This matter comes before the Secretary of the Commonwealth (Secretary) on a Cease and Desist Order ("C & D") issued July 27, 2006, against Colmar Volunteer Fire Company (Respondent) finding that Respondent: (1) was not registered with the Bureau of Charitable Organizations ("BCO"); (2) was soliciting charitable contributions in Pennsylvania; and (3) failed to respond to the BCO's request for information in order for BCO to determine if registration was required under the Solicitation of Funds for Charitable Purposes Act (Solicitation Act), the Act of December 19, 1990, P.L. 1200, No. 202, *as amended*, 10 P.S. § 162.1 *et seq.* (Exhibit C-3) By letter dated August 10, 2006, and filed with the Prothonotary's Office on August 15, 2006, Respondent requested a hearing to appeal the C & D. A hearing was originally scheduled for October 4, 2006, but was continued at the request of Respondent. The hearing was rescheduled for November 3, 2006, but was continued at the request of the Commonwealth. The hearing was rescheduled for January 5, 2007 and then for January 8, 2007, but was again continued at the request of Respondent.

The hearing in this matter was held on January 29, 2007, in Harrisburg. Tracy L. McCurdy, Esquire, represented the Commonwealth. William P. Marshall, Esquire, represented Respondent. At the conclusion of the hearing, the Commonwealth asserted that the evidence indicated that the C & D was properly issued and should remain in effect, because Respondent was not exempt from registration and should continue to be prohibited from fundraising absent registration. Respondent contended that the C& D should be lifted in that Respondent is exempt from registration and that it did not forfeit that exemption through contracting with a professional fundraising counsel. The record was kept open until March 2, 2007, in order for Respondent to

submit detailed financial information for review and analysis by BCO, in support of Respondent's contention that it received contributions of \$25,000 or less annually.

In the interim, the hearing transcript was filed on February 7, 2007. The financial information was not forthcoming from Respondent and so, on March 8, 2007, the Commonwealth filed a Motion for the record to be closed and for the entering of a Final Order. Respondent did not respond to the Commonwealth's motion. On March 19, 2007, the Hearing Examiner issued an Order closing the record and establishing a briefing schedule.¹ The Commonwealth's brief was filed on April 23, 2007 and Respondent's brief was filed on May 21, 2007. The Commonwealth's reply brief was filed on June 11, 2007.

¹ In its post hearing brief, Respondent asserts that financial information was supplied, however there is no record of any information having been filed with the Department of State Prothonotary's Office.

FINDINGS OF FACT

1. Respondent is a charitable organization constituted as a volunteer fire department located in the Commonwealth of Pennsylvania. (N.T. 44-45)
2. Respondent is not registered with the BCO to solicit charitable contributions in Pennsylvania. (N.T. 18)
3. Respondent solicited charitable contributions in Pennsylvania during fiscal years ending ("FYE") December 31, 2003 through December 31, 2006. (N.T. 10-13 and 19-21; Exhibits C-1, C-5, C-6, R-1 and R-2)
4. By letter dated May 3, 2006, the BCO requested that Respondent either become registered with the BCO or provide evidence that it is exempt from registration. (N.T. 14-16; Exhibit C-2)
5. Respondent did not respond to the BCO's request. (N.T. 16)
6. On July 27, 2006, a C&D Order was issued against Respondent directing Respondent to cease and desist from soliciting charitable contributions in Pennsylvania. (N.T. 17; Exhibit C-3)
7. The Cease and Desist Order was issued because: (1) Respondent was not registered with the BCO; (2) Respondent was soliciting charitable contributions in Pennsylvania; and (3) Respondent failed to respond to the BCO's request for information. (N.T. 18; Exhibit C-3)
8. For fiscal years 2003 through 2006, fundraising activities for Respondent, consisting of direct mailing campaigns, were carried on by Municipal Marketing (from 2003 through 2005) and Choice Marketing (from 2006 to the present). (N.T. 10-13, 19-21, 58-64 and 68-69; Exhibits C-1 and C-5)

9. Municipal Marketing and Choice Marketing are registered as professional fundraising counsels with BCO. (N.T. 9, 19)

10. Municipal Marketing (from 2003 through 2005) and Choice Marketing (from 2006 to the present) were compensated for fundraising services provided to Respondent due to the fundraising costs incurred by Respondent in conducting the direct mail solicitation campaign. (N.T. 10-13, 19-21, 60-61 and 63; Exhibits C-1 and C-5)

11. Respondent designed the direct mailing campaigns, selecting the format and layout of the direct mail solicitations and also composed the solicitation letter requesting the donations. (N.T. 46-63)

12. The professional fundraising counsels provided various services, including printing the solicitations, stuffing the envelopes with the solicitations for mailing, and maintaining for Respondent a database of addresses through information supplied to them by Respondent in the form of address additions, corrections, and updates obtained by Respondent. (N.T. 12-13, 21, 46-63; Exhibits C-1, C-5)

13. The professional fundraising counsels also provided to Respondent various alternatives and choices in the form of suggested layout and design based upon solicitations conducted by other emergency organizations. (N.T. 12-13, 21, 46-63)

14. The professional fundraising counsels are paid per piece of mailing for the printing and stuffing of Respondent's direct mail solicitation. (N.T. 12-13, 21, 46-63, 68; Exhibits C-1, C-5)

15. Respondent receives, handles and processes all contributions resulting from its direct mail solicitations, in that all contributions made as a result of the direct mail solicitation are mailed directly to Respondent. (N.T. 46-63)

16. The fundraising counsels retained by Respondent did not receive, handle, or otherwise possess the contributions Respondent received as a result of the direct mail solicitations. (N.T. 46-63)

17. Respondent received contributions in excess of \$25,000 for fiscal years ending December 31, 2004 and December 31, 2005. (Exhibit C-6)

18. Respondent did not comply with the order to provide to the BCO additional information regarding Respondent's financial reports. (N.T. 86-90; Docket No. 0009-98-06, Motion for Final Order)

19. Respondent was served with all pleadings, orders and notices filed of record in this matter and attended the hearing held on January 29, 2007, represented by counsel. (Docket No. 0009-98-06)

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter. (Findings of Fact, Nos. 3-10)
2. Respondent has received notice of the charges against it and has been given an opportunity to be heard in this proceeding in accordance with Administrative Agency Law, 2 Pa.C.S. §504. (Findings of fact nos. 6-7 and 19)
3. Respondent is subject to the issuance of an order directing Respondent to Cease and Desist fundraising activities, in accordance with section 17(b)(2) of the Solicitation Act, 10 P.S. § 162.17(b)(2), by reason of its violation of section 5(a) of the Solicitation Act, 10 P.S. § 162.5(a), by failing to file a registration statement with the Department of State when not exempted under 10 P.S. §162.6. (Findings of fact nos. 1-3 and 8-17)
4. Respondent is subject to the issuance of an order directing Respondent to Cease and Desist fundraising activities, in accordance with section 17(b)(2) of the Solicitation Act, 10 P.S. § 162.17(b)(2), by reason of its violation of sections 6(b) and 16(a) the Solicitation Act, 10 P.S. §§ 162.6(b) and 162.16(a), by failing to respond to the Bureau's request for information. (Findings of fact nos. 4-5, 18)
5. Respondent is subject to the issuance of an order directing Respondent to Cease and Desist fundraising activities, in accordance with section 17(b)(2) of the Solicitation Act, 10 P.S. § 162.17(b)(2), by reason of its violation of section 15(a)(1) of the Solicitation Act, 10 P.S. § 162.15(a)(1), by soliciting contributions without being registered as a charitable organization with the Bureau of Charitable Organizations. (Findings of fact nos. 1-3 and 8-17)

DISCUSSION

This matter comes before the Secretary of the Commonwealth (Secretary) on a Cease and Desist Order ("C & D") issued July 27, 2006, against Colmar Volunteer Fire Company (Respondent) because Respondent: (1) was not registered with the Bureau of Charitable Organizations ("BCO"); (2) was soliciting charitable contributions in Pennsylvania; and (3) failed to respond to the BCO's request for information in order for BCO to determine if registration was required under the Solicitation of Funds for Charitable Purposes Act (Solicitation Act), the Act of December 19, 1990, P.L. 1200, No. 202, *as amended*, 10 P.S. § 162.1 *et seq.* (Exhibit C-3)

At the hearing and in the post hearing briefs, the parties demonstrated that there was no disagreement that Respondent: 1) is a charitable organization constituted as a volunteer fire department located in the Commonwealth of Pennsylvania; 2) is not registered with the BCO to solicit charitable contributions in Pennsylvania; and 3) solicited charitable contributions in Pennsylvania during fiscal years ending ("FYE") December 31, 2003 through December 31, 2006. (N.T. 10-13 and 19-21; Exhibits C-1, C-5, C-6, R-1 and R-2) Given the provisions of the Solicitation Act, which require registration of all charitable organizations, Respondent is required to register unless it can demonstrate that it is exempt from registration. Once the fact of solicitation is demonstrated (which again is not at issue here), the burden shifts to the putative registrant to demonstrate that it is exempt from registration. Respondent has failed to demonstrate that it is entitled to any exemption under the Solicitation Act.

The Solicitation Act defines "charitable organization" at 10 P.S. § 162.3 as follows:

"Charitable organization." Any person granted tax exempt status under section 501(c)(3) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 501 (c)(3) or any person who is or holds himself out to be established for any charitable purpose or any person who in any manner employs a charitable appeal

as the basis of any solicitation or an appeal which has a tendency to suggest there is a charitable purpose to any solicitation. An affiliate of a charitable organization which has its principal place of business outside this Commonwealth shall be a charitable organization for the purposes of this act. . . .

“Charitable Purpose” is defined in the same section of the Solicitation Act as follows:

“Charitable purpose.” Any benevolent, educational, philanthropic, humane, scientific, patriotic, social welfare or advocacy, public health, environmental conservation, civic or other eleemosynary objective, including an objective of a bona fide duly constituted organization of law enforcement personnel, firefighters or other persons who protect the public safety if a stated purpose of the solicitation includes any benefit to any person outside the actual active membership of the organization.

Clearly, Respondent is a charitable organization. Additionally, there is no controversy that Respondent solicited contributions in the Commonwealth. The evidence indicates that its solicitation activities for FYE 2003 through 2006 consisted of direct mailing campaigns, which were carried on by Municipal Marketing (from 2003 through 2005) and Choice Marketing (from 2006 to the present). (N.T. 10-13, 19-21, 58-64 and 68-69; Exhibits C-1 and C-5)

The Commonwealth alleges that Respondent solicited charitable contributions in Pennsylvania without being registered with the Bureau. Section 5(a) of the Solicitation Act, 10 P.S. § 162.5(a), provides as follows:

§ 162.5(a) Registration of charitable organizations; financial reports; fees; failure to file

(a) Registration and approval required.- A charitable organization, unless exempted from registration requirements pursuant to section 6, shall file a registration statement with the department. . . .

Respondent claims that it is exempt from registration under two subsections of section 6 of the Solicitation Act, 10 P.S. § 162.6. These subsections, 6(a)(3)(ii) and 6(a)(8), are set forth below:

§ 162.6 Exemptions from registration

(a) **General rule.** The following charitable organizations shall be exempt from the registration requirements of this act:

(3) A local post, camp, chapter or similarly designated element or a county unit of such elements of:

(ii) a bona fide organization of volunteer firemen;

provided that all fundraising activities of an organization or association under subparagraph...(ii)...are carried on by volunteers, members of an auxiliary or affiliate thereof, and those volunteers, members or affiliates receive no compensation directly or indirectly for the fundraising activities.

(8) Any charitable organization, which receives contributions of \$25,000 or less annually, provided that such organization does not compensate any person who conducts solicitations.

Local Chapter of Volunteer Firemen – 10 P.S. § 162.6(a)(3)(ii)

As indicated earlier, Respondent's solicitation activities for FYE 2003 through 2006 consisted of direct mailing campaigns, which were carried on by Municipal Marketing (from 2003 through 2005) and Choice Marketing (from 2006 to the present). (N.T. 10-13, 19-21, 58-64 and 68-69; Exhibits C-1 and C-5) Municipal Marketing and Choice Marketing are registered as professional fundraising counsels with BCO.² (N.T. 9, 19) Municipal Marketing (from 2003 through 2005) and Choice Marketing (from 2006 to the present) were compensated for fundraising services provided to Respondent due to the fundraising costs incurred by Respondent

² Section 3 of the Solicitation Law, 10 P.S. § 162.3, defines "Professional fundraising counsel" as "[a]ny person who is retained by a charitable organization for a fixed fee or rate under a written agreement to plan, manage, advise, consult or prepare material for or with respect to the solicitation in this Commonwealth of contributions for a charitable organization, but who does not solicit contributions or employ, procure or engage any compensated person to solicit contributions and who does not have custody or control of contributions. A bona fide salaried officer or regular, nontemporary employee of a charitable organization shall not be deemed to be a professional fundraising counsel provided that the individual is not employed or engaged as professional fundraising counsel or as a professional solicitor by any other person."

in conducting the direct mail solicitation campaign. (N.T. 10-13, 19-21, 60-61 and 63; Exhibits C-1 and C-5) The professional fundraising counsels provided various services, including printing the solicitations, stuffing the envelopes with the solicitations for mailing, and maintaining for Respondent a database of addresses through information supplied to them by Respondent in the form of address additions, corrections, and updates obtained by Respondent. (N.T. 12-13, 21, 46-63) The professional fundraising counsels also provided to Respondent various alternatives and choices in the form of suggested layout and design based upon solicitations conducted by other emergency organizations. (N.T. 12-13, 46-63) The professional fundraising counsels are paid per piece of mailing for the printing and stuffing of Respondent's direct mail solicitation. (N.T. 12-13, 46-63, 68)

It is clear from the above that the professional fundraising counsels retained by Respondent were conducting fundraising activities for Respondent and were compensated by Respondent. Whereas the Solicitation Act does not define fundraising activities, the Solicitation Act does define "fundraising costs" to include printing, mailing, and all direct and indirect costs of soliciting.³ It is important to note that the exemption set forth above which Respondent seeks to claim does not provide that the *solicitation* be carried on only by volunteers, etc., who are not compensated directly or indirectly, but that *all fundraising activities* are carried on by volunteers. The term solicitation, as defined in the Solicitation Act, is more narrowly defined and is obviously more limited in scope than the term fundraising activities. The two terms are not

³ Section 3 of the Solicitation Law, 10 P.S. § 162.3, defines "Fundraising costs" as "[t]hose costs incurred in inducing others to make contributions to a charitable organization for which the contributors will receive no direct economic benefit. Fundraising costs normally include, but are not limited to, salaries, rent, acquiring and maintaining mailing lists, printing, mailing and all direct and indirect costs of soliciting, as well as the cost of unsolicited merchandise sent to encourage contributions. Fundraising costs do not include the direct cost of merchandise or goods sold or the direct cost of fundraising dinners, bazaars, shows, circuses, banquets, dinners, theater parties or any other form of benefit performances."

synonymous and cannot be used interchangeably as Respondent would suggest. The fact that Respondent designed the direct mailing campaigns, selecting the format and layout of the direct mail solicitations and also composed the solicitation letter requesting the donations; received, handled and processed all contributions resulting from its direct mail solicitations, in that all contributions made as a result of the direct mail solicitation were mailed directly to Respondent; and that the fundraising counsels retained by Respondent did not receive, handle, or otherwise possess the contributions Respondent received as a result of the direct mail solicitations does not alter the fact that not all of the fundraising activities of Respondent were carried on by volunteers or members who did not receive any compensation directly or indirectly for the fundraising activities. Therefore, Respondent may not avail itself of the exemption set forth in 10 P.S. §162.6(a)(3)(ii).

Contributions of \$25,000 or less – 10 P.S. § 162.6(a)(8)

Respondent argues in the alternative that, should it not be granted the exemption set forth above, than it can still qualify for the exemption set forth in 10 P.S. §162.6(a)(8). This subsection provides that any charitable organization, which receives contributions of \$25,000 or less annually, shall be exempt from the registration requirements of the Solicitation Act, provided that such organization does not compensate any person who conducts solicitations.

Because professional fundraising counsels, such as those retained by Respondent, do not, by definition, solicit contributions, the fact that Respondent utilized professional fundraising counsels for the period in question does not disqualify Respondent from trying to avail itself of this exemption. (This fact also illustrates, yet again, the Solicitation Act differentiating between fundraising activities and solicitation) There is nothing in the record to indicate that Respondent

compensated any person to conduct solicitations. Therefore, in order to qualify for this exemption, it is incumbent upon Respondent to demonstrate that it received contributions of \$25,000 or less annually for each of the FYs in question. Respondent has failed to do this.

The rudimentary financial information supplied by Respondent to the BCO, by letter dated October 28, 2006, and marked as Exhibit C-6 indicates that Respondent received \$20,801.77 in miscellaneous income in FYE 2003; \$49,886.82 in miscellaneous income in FYE 2004; and \$199,859.90 in miscellaneous income in FYE 2005. Respondent's attempted explanations of this income are not satisfactory and absent credible information and the requested financial information, it must be assumed that this amount includes solicited contributions in excess of the \$25,000 amount. Additionally, it is unclear whether other items of income, without definitive information, should also be included in calculating the amount of charitable contributions received. (N.T. 33-38, 64-67) To do otherwise would reward Respondent for its failure to respond in a timely and complete manner to the BCO's requests for detailed financial information. Therefore, the Secretary finds that Respondent received contributions in excess of \$25,000 for fiscal years ending December 31, 2004 and December 31, 2005. (Exhibit C-6)⁴

In light of this conclusion and Respondent's failure to comply with the order to provide to the BCO additional information regarding Respondent's financial reports, Respondent shall provide the BCO with audited financial statements for FYE 2004 through 2006, inclusive, in accordance with section 5(j) of the Solicitation Act, 10 P.S. § 162.5(j). (N.T. 86-90; Motion for

⁴ Respondent prepared Exhibit C-6, but did not provide the requested additional information; however, even giving the benefit of the doubt to Respondent, any reading of those income statements plainly suggests that the amount to be included in the calculation of contributions is in excess of \$25,000.

Final Order) These audited financial statements shall be provided within one year of the date of this order.⁵

Accordingly, the following order shall issue:

⁵ In its post-hearing brief, the Commonwealth also recommended that an administrative fine totaling \$12,000 be imposed on Respondent "in an amount commensurate with its violations." It is clear that the Secretary may impose an administrative fine for each act or omission which constitutes a violation of the Act and additional penalties for each day during which such violation continues. 10 P.S. §162.17(b). However, all actions of the Secretary must be taken subject to the right of notice, hearing and adjudication and the right of appeal therefrom in accordance with Title 2 of the Pennsylvania Consolidated Statutes (relating to administrative law and procedure). 10 P.S. §162.17(c). The prospect of civil penalties of up to \$1,000 per violation under section 17 of the Act, 10 P.S. §162.17, was first and only raised in the Commonwealth's post-hearing brief. The Secretary concludes that no reasonable notice was provided to Respondent that civil penalties could be imposed for the violations at issue in the Cease and Desist order. Therefore, the Secretary declines to impose such civil penalties as part of this adjudication. This finding is without prejudice for the Commonwealth to institute charges against Respondent seeking civil penalties, providing adequate notice of the possible penalties for violation of the Act, and to amend subsequent Cease and Desist orders to include such notice.

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

Commonwealth of Pennsylvania,	:	
Bureau of Charitable Organizations	:	
	:	Docket No. 0009-98-06
v.	:	
	:	File No. 06-98-07239
Colmar Volunteer Fire Company,	:	
Respondent	:	

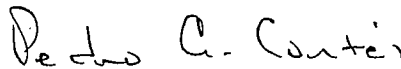
ORDER

NOW, this 25th day of **September 2007**, upon consideration of the foregoing findings of fact, conclusions of law and discussion, the Secretary of the Commonwealth hereby **ORDERS** that, within one year of the date of this Order, Respondent shall provide the Department's Bureau of Charitable Organizations with audited financial statements for Fiscal Years Ending 2004, 2005 and 2006.

It is further **ORDERED** that the Cease and Desist Order issued on July 27, 2006, prohibiting Respondent **Colmar Volunteer Fire Company** from soliciting charitable contributions in this Commonwealth, is to remain in effect until such time as Respondent is properly registered with the Department's Bureau of Charitable Organizations, unless the audited financial statements indicate charitable contributions of less than \$25,000.

Appeal of this order may be taken pursuant to 2 Pa.C.S. § 702 and 10 P.S. § 162.17(c).

BY ORDER



Pedro A. Cortés
Secretary of the Commonwealth

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