

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

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Department of State
Prothonotary

Commonwealth of Pennsylvania,
Bureau of Charitable Organizations

v.

DELTA Rescue,
Respondent

Docket No. 0017-98-06

File No. 06-98-07364

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DEPARTMENT OF STATE-SIU

FINAL ADJUDICATION AND ORDER

Pedro A. Cortés
Secretary of the Commonwealth

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

DATE DISTRIBUTED 7-2-08
PROSECUTION _____
COUNSEL _____
HEARING EXAMINER _____
OTHER _____

HISTORY

This matter comes before the Secretary of the Commonwealth (Secretary) on an order to show cause filed September 1, 2006, alleging that DELTA Rescue (Respondent), a charitable organization registered in the Commonwealth of Pennsylvania from December 7, 2000, to November 11, 2001, is subject to administrative sanctions under the Solicitation of Funds for Charitable Purposes Act (Solicitation Act).¹ Respondent filed an answer to the order to show cause on October 2, 2006, and a formal administrative hearing was held in Harrisburg November 15, 2006, before Frank C. Kahoe, Jr., Esquire, hearing examiner for the Department of State. Karen L. Cummings, Esquire, represented the Commonwealth as prosecuting attorney. Respondent was represented at the hearing by William Hess, Esquire.² The hearing transcript was filed on January 17, 2007. The record was closed upon the submission of briefs by the parties, the last of which was filed March 15, 2007.

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

² Attorney Hess, a member of the bar of the State of California, appeared *pro hac vice*.

FINDINGS OF FACT

1. Respondent is a corporate entity with a mailing address of P.O. Box 9, Glendale, California 91209. (Department of State, Bureau of Charitable Organizations records; Exhibits C-1, C-2; N.T. 5)
2. On or about June 20, 1997, the Secretary issued a cease and desist order to Respondent upon receipt by the Department of State, Bureau of Charitable Organizations (Bureau) of information that Respondent had solicited charitable contributions in the Commonwealth of Pennsylvania without being registered as a charitable organization. (Bureau records; Exhibit R-33)
3. The cease and desist order was issued after Respondent failed to respond to two letters from the Bureau directing Respondent to register as a charitable organization in Pennsylvania. (Bureau records; Exhibit R-33)
4. The Bureau received information that Respondent continued to solicit charitable contributions in the Commonwealth in June 1998, December 1998, and February 1999. (Bureau records; Exhibit R-33)
5. On June 7, 2000, the Secretary issued an order adopting a consent agreement between the Bureau and Respondent in which Respondent agreed to pay an administrative fine in the amount of \$5,000.00 and to submit a completed registration statement to the Bureau within 30 days. (Bureau records; Exhibit R-33)
6. Approximately July 7, 2000, Respondent submitted to the Bureau a registration statement, Form BCO-10, for the year ending December 31, 1999, which listed Respondent's address as P.O. Box 9, Glendale, CA 91209. (Bureau records; Exhibits C-1, C-2, R-7)

7. Respondent was registered by the Bureau as a charitable organization from December 7, 2000 through November 11, 2001. (Bureau records; N.T. 27; Exhibits C-1, C-2, R-7)

8. Approximately January 4, 2001, Respondent solicited charitable contributions in the Commonwealth via a direct mailing which did not include the disclosure statement required under 10 P.S. § 162.13(c) and which included as an address for Respondent of "P.O. Box 9, Glendale, CA 91209." (Exhibit C-3; N.T. 11)

9. On July 3, 2001, the Bureau sent Respondent a letter informing Respondent of the solicitation deficiencies set forth in finding of fact number 8, and directing Respondent to provide a written explanation. (Exhibit R-19; N.T. 12, 31)

10. On July 26, 2001, Respondent, through its general counsel, sent the Bureau a letter in response to the Bureau's July 3, 2001 correspondence challenging the constitutionality of the Bureau's interpretation and application of the disclosure requirements under 10 P.S. § 162.13. (Exhibit R-21; N.T. 34)

11. On August 14, 2002, the Secretary issued a cease and desist order to Respondent on the basis that Respondent had solicited charitable contributions in the Commonwealth which did not include the disclosure statement required under 10 P.S. § 162.13(c) or Respondent's "location" as required under 10 P.S. § 162.13(b). (Exhibit R-29)

12. The cease and desist order directed Respondent to cease and desist from soliciting contributions in the Commonwealth, "until such time as DELTA Rescue includes the required disclosure statement and its address as registered with the Department on its solicitation materials." (Exhibit R-29)

13. Approximately June 18, 2004, the Bureau received copies of solicitations to Pennsylvania residents, made between August 22, 2003 and June 18, 2004, which did not include

the disclosure statement required under 10 P.S. § 162.13(c), or Respondent's location as required under 10 P.S. § 162.13(b). (Exhibit C-4)

14. Respondent was served with the Order to Show Cause issued in this matter and all orders, pleadings and notices subsequently filed in this matter. (Docket no. 0017-98-06; N.T. 3-5)

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter. (Findings of Fact nos. 1-12)
2. Respondent 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. (Finding of Fact no. 13)
3. Respondent is subject to sanctions under section 17(a)(1) and 15(a)(1) of the Solicitation Act, 10 P.S. § 162.17(a)(1) and § 162.15(a)(1), for soliciting charitable contributions in Pennsylvania in violation of a cease and desist order issued by the Secretary August 14, 2002. (Findings of Fact nos. 10-12)
4. Respondent is subject to sanctions under section 17(a)(1) of the Solicitation Act, 10 P.S. § 162.17(a)(1), for soliciting charitable contributions in Pennsylvania without including the disclosure notice required under section 13(c) of the Solicitation Act, 10 P.S. § 162.13(c). (Findings of Fact nos. 6-7, 12)
5. Respondent is subject to sanctions under section 17(a)(1) of the Solicitation Act, 10 P.S. § 162.17(a)(1), for soliciting charitable contributions in Pennsylvania without including its location in violation of section 13(b)(1) of the Solicitation Act, 10 P.S. § 162.13(b)(1). (Findings of Fact nos. 6-7, 12)
6. Respondent is subject to sanctions under section 17(a)(1) of the Solicitation Act, 10 P.S. § 162.17(a)(1), for soliciting charitable contributions in Pennsylvania without a current registration in violation of section 5(a) of the Solicitation Act, 10 P.S. § 162.5(a). (Findings of Fact nos. 6, 12)

DISCUSSION

I. STATUTORY PROVISIONS

The order to show cause issued in this matter comprises four counts, alleging that Respondent violated the Solicitation Act at 10 P.S. §§ 162.5(a), 162.13(b) and (c), 162.15(a)(1), and 162.17(a)(1), which provide in pertinent part as follows:

§ 162.5. 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. This statement must be refiled annually within 135 days after the close of its fiscal year in which the charitable organization was engaged in solicitation activities. The department shall review the statement pursuant to subsection (r). No charitable organization shall solicit contributions or have contributions solicited in its behalf before approval of its registration statement by the department.

* * *

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

* * *

(b) Solicitation disclosures.—A charitable organization soliciting in this Commonwealth shall include all of the following disclosures at the point of solicitation:

(1) Its legal name as registered with the department and location and, if different, the legal name and address of the charitable organization as registered with the department on whose behalf the solicitation is being conducted. Any use of a project or program name in a solicitation must be immediately followed by a disclosure of the legal name of the charitable organization as registered.

* * *

(c) Notice on printed solicitation.—On every printed solicitation or written confirmation, receipt and reminder of a contribution, the following statement must be conspicuously printed verbatim:

The official registration and financial information of (insert the legal name of the charity as registered with the department) may be obtained from the Pennsylvania Department of State by calling toll free, within Pennsylvania, 1 (800) 000-0000. Registration does not imply endorsement.

* * *

§ 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.

* * *

§ 162.17. 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.

II. THE CHARGES

In each count of the order to show cause, the Commonwealth charges that Respondent violated the Solicitation Act at 10 P.S. § 162.15(a)(1). In Count One, the Commonwealth specifically charges that Respondent violated the Solicitation Act at 10 P.S. § 162.17(a)(1), "by soliciting in Pennsylvania while under a Cease and Desist Order." Counts One through Three center on the averment that Respondent solicited charitable contributions in the Commonwealth which did not include a notice required under 10 P.S. § 162.13(c), or Respondent's location as required under 10 P.S. § 162.13(b). In Count Four, the Commonwealth charges that Respondent solicited contributions in Pennsylvania without being properly registered in violation of the Solicitation Act at 10 P.S. § 162.5(a).

III. THE HEARING

At the hearing, the Commonwealth presented copies of three mail solicitations which had been received by the Bureau. Exhibit C-3 comprised two such solicitations: one sent to an address in Enola, PA 17025-1802, purportedly received by the Bureau January 4, 2001;³ and a second, sent to an address in Furlong, PA 18925-1385, purportedly received by the Bureau September 5, 2001. Exhibit C-4 is a third mail solicitation, sent to an address in Furlong, PA 18925-1385, which was purportedly received by the Bureau June 18, 2004.⁴ None of the three mail solicitations includes the notice statement mandated at section 13 (c) of the Solicitation Act. Each of the mail solicitations list as an address for Respondent of "P.O. Box 9, Glendale, CA 91201," where the solicitations direct that donations are to be sent.

³ The solicitation received by the Bureau January 4, 2001, was a request for a donation for a "2000 Christmas Love Stocking," presumably sent sometime before December 25, 2000.

⁴ Exhibit C-4 has a handwritten notation, "8/23/03 - 6/18/04," but the solicitation for a "2003 Christmas Love Stocking," presumably sent sometime before December 25, 2003.

The record presented at hearing established that Respondent was registered as a charitable organization from December 7, 2000 through November 11, 2001. In January 2001, the Bureau received copies of solicitations made to Pennsylvania residents which did not include the disclosure language mandated by section 13(c) of the Solicitation Act, and in which the only address listed for Respondent is a post office box in Glendale, California. On August 14, 2002, the Secretary issued a cease and desist order to Respondent stating that he had found that Respondent had solicited charitable contributions in the Commonwealth which did not include the disclosure statement required under 10 P.S. § 162.13(c), or Respondent's location as required under 10 P.S. § 162.13(b). The letter ordered Respondent to cease and desist from soliciting contributions in the Commonwealth, "until such time as DELTA Rescue includes the required disclosure statement and its address as registered with the Department on its solicitation materials." Approximately June 18, 2004, the Bureau received a third mail solicitation, sent to an address in Furlong, PA 18925-1385 in late 2003, which also did not include the required disclosure language or Respondent's location.

In its brief presented at the hearing and its posthearing brief, Respondent argues that section 13(c) of the Solicitation Act is unconstitutional, "in that it constitutes an unreasonable restraint and unfair burden under the First Amendment and the Commerce Clause of the United States Constitution."⁵ While initially noting that it is outside the authority of the state agency to declare its enabling statute facially unconstitutional (*see Myers v. Dept. of Revenue*, 423 A.2d 1101 (Pa. Cmwlth. 1980); *Smolow v. Dept of Revenue*, 547 A.2d 478 (Pa. Cmwlth. 1988)),⁶

⁵ Reply to Commonwealth's Post-Hearing Brief, p. 3.

⁶ The constitutionality argument raised by Respondent is properly addressed in another forum, as acknowledged by Respondent, who filed a complaint for declarative and injunctive relief on August 20, 2002, in the U.S. District Court, Central District, State of California (case no. cv-6483). The trial court's dismissal of case on the basis of improper venue was affirmed by the U.S. Court of Appeals for the Ninth Circuit (case no. 03-55046) on June 15, 2004. (Exhibit R-33 and N.T. 60)

Section 13(c) of the Solicitation Act requires that registered charities include in all written solicitations a notice that "official registration and financial information" is available to consumers from the Department of State and that registration of the charity "does not imply endorsement." The requirements of Section 13(c) are consistent with the legislative purpose of the Solicitation Act, "to protect the citizens of this Commonwealth . . . by promoting consumer education about charitable concerns..."⁷ The requirement that written solicitations in Pennsylvania include such a statement imposes no substantial burden on charitable organizations.

With respect to the requirement under section 13(b)(1) that charities disclose their "legal name as registered with the department and location," Respondent argues that the listing of its mailing address, a post office box, in its solicitations complies with the section 13(b)(1) requirement. Respondent points out that section 5(b)(2) requires that a charitable organization must provide its "principal address" when filing its registration statement, and section 13(b)(1) also specifies that organizations soliciting contributions must provide "the legal name and address of the charitable organization as registered with the department on whose behalf the solicitation is being conducted." The Commonwealth argues that section 13(b)(1)'s requirements that charities provide both a "location" and an "address" in solicitations are distinct:

. . . If the legislature only intended to require disclosure of a mailing address for a charitable organization soliciting for itself, it would not have made the subtle distinction between "location" in the first part of the sentence and "address" in the second part of the sentence.

The requirement to disclose the location of a charitable organization is much broader than the requirement to merely provide an address. When a charitable organization is located or has its operations in a certain geographic

⁷ 10 P.S. § 162.2.

location but only reveals a post office box to potential donors, it has not satisfied the requirement of disclosing its location. Furthermore, including a geographic location, rather than a post office box, is necessary to carry out the fraud prevention purposes of the Act. If charitable organizations were permitted to conceal their location, verification of activities is made infinitely more difficult and donors are not able to make fully informed giving decisions.⁸

The record supports a finding that Respondent's providing only its post office box address in its solicitations did not comply with the requirement that it disclose its location in solicitations.⁹

III. ANALYSIS AND SANCTION

In each of the four counts of the order to show cause, the Commonwealth alleges that Respondent violated section 15(a)(1) of the Solicitation Act, 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, regulations of the Department or an order of the Secretary, or soliciting contributions after registration with the Department has expired. In count one, the Commonwealth specifically charges that Respondent violated the Solicitation Act at 10 P.S. § 162.17(a)(1), "by soliciting in Pennsylvania while under a Cease and Desist Order." The record supports a finding that Respondent violated the August 14, 2002 cease and desist order by mailing a solicitation to a Pennsylvania address in 2003, such solicitation which also did not include the required section 13(c) notice or Respondent's location. Likewise, the record supports findings under Counts Two and Three that Respondent's 2000 and 2003 solicitations were in violation of the disclosure and notice requirements of section 13(c) and 13(b)(1) of the Solicitation Act. Finally, the record supports a finding that Respondent solicited charitable

⁸ Commonwealth's Post-Hearing Brief (unpaginated).

⁹ Respondent also argues that the Bureau should be estopped from imposing sanctions for a violation of section 13(b)(1) because it had accepted Respondent's registration statement which included only Respondent's principle address of "P.O. Box 9, Glendale, CA 91201." As discussed above, the requirement of section 5(b)(2) that a charity provide its "principal address" in its registration statement is separate and distinct from the consumer disclosure requirement under section 13(b)(1).

contributions in Pennsylvania after its registration expired November 11, 2001, in violation of section 5(a) of the Solicitation Act, as alleged in Count Four. The Commonwealth requests that the Secretary impose an administrative fine of \$1,000.00 under section 17(b)(3) of the Solicitation Act "per violation." While the record presented supports findings that Respondent violated the Solicitation Act as alleged in each of the four counts of the OSC, these findings are based upon three solicitations made between 2000 and 2003. Therefore, an administrative fine in the amount of \$3,000.00 is an appropriate sanction, combined with a directive that Respondent cease and desist from soliciting charitable contributions in this Commonwealth unless and until it is once more properly registered to do so under the Solicitation Act, and that all future solicitations comply with the disclosure and notice requirements of section 13(b)(1) and (c) of the Solicitation Act, 10 P.S. § 162.13(b)(1) and (c). 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.

DELTA Rescue,
Respondent

Docket No. 0017-98-06
File No. 06-98-07364

ORDER

AND NOW, this 2nd day of July, 2008, upon consideration of the foregoing findings of fact, conclusions of law and discussion, it is hereby ordered as follows:

1. An administrative fine in the amount of \$3,000.00 shall be imposed upon DELTA Rescue in accordance with 10 P.S. § 162.17(b)(3). This amount shall be remitted by money order or certified check made payable to "Commonwealth of Pennsylvania" and forwarded to:


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

within 30 days of the date of this order; and

2. Respondent shall immediately **CEASE** and **DESIST** from fundraising and solicitation activities in this Commonwealth unless and until such time as all penalties are paid and Respondent comes into full compliance with all provisions of the Act, including proper registration under the Solicitation Act and all compliance with the disclosure and notice requirements of section 13(b)(1) and (c) of the Solicitation Act, 10 P.S. § 162.13(b)(1) and (c), for all solicitations.

Appeal of this decision to the Commonwealth Court may be taken pursuant to 2 Pa.C.S. § 702 within 30 days of the date of mailing shown below.

BY ORDER:


Pedro A. Cortés
Secretary of the Commonwealth

For the Commonwealth:
Karen L. Cummings, Esquire
OFFICE OF GENERAL COUNSEL
Pennsylvania Department of State
301 North Office Building
Harrisburg, PA 17120

For Respondent:
William R. Hess, Esquire
5455 Wilshire Boulevard, Suite 2100
Los Angeles, CA 90036

Date of mailing: 7 - 2 - 08