

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

Department of State

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PROTHONOTARY

Commonwealth of Pennsylvania,
Bureau of Charitable Organizations

v.

Fortress America
Respondent

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Docket no. 0006-98-00

Department File no. 99-98-00692

ADJUDICATION AND ORDER

Kim Pizzingrilli
Secretary of the Commonwealth

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

HISTORY

This matter comes before the Secretary of the Commonwealth (Secretary) on an order to show cause (OSC) filed June 16, 2000, alleging that Fortress America (Respondent), an unregistered charitable organization, is subject to administrative sanctions 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.* The OSC was served upon Respondent via certified mail July 25, 2000, as evidenced by United States Postal Service Domestic Return Receipts filed of record. On August 29, 2000, the Commonwealth filed a motion to enter default and deem facts admitted (MDFA) which was served upon Respondent at the address where the OSC was served. Respondent did not file an answer to either pleading and is therefore in default.

FINDINGS OF FACT

1. The OSC issued in this matter was served upon Respondent via certified mail, return receipt requested and first class mail, postage prepaid addressed to Jamey Wheeler, Fortress America, 5200 West 73rd Street, Edina, MN 55435, and Respondent's counsel via certified mail, return receipt requested, addressed to David Goch, Esquire, 1747 Pennsylvania Avenue N.W., Washington, DC 20006, as evidenced by United States Postal Service Domestic Return Receipts filed of record. (Docket no. 0006-98-00)

2. On August 29, 2000, the Commonwealth filed a MDFA in this matter which was served upon Respondent via first class mail, postage prepaid sent to the Edina, Minnesota address. (Docket no. 0006-98-00)

3. Respondent has not filed an answer to either the OSC or the MDFA. (Docket no. 0006-98-00)

4. Approximately January 22, 1998, the Department of State, Bureau of Charitable Organizations (Bureau) received 13 separate solicitation materials from a Pennsylvania resident which indicated that Respondent had been soliciting charitable contributions. (OSC ¶ 5, Exhibits 1-13)

5. Approximately February 12, 1998, the Bureau sent Respondent a letter informing it of its registration obligations.¹ (OSC ¶ 6, Exhibit 14)

¹ The February 12, 1998 letter was addressed to Jamey Wheeler, Fortress America, One America's Way, Washington, DC 20069.

6. Respondent received the February 12, 1998 letter February 19, 1998, as evidenced by U.S. Postal Service Return Receipt. (OSC ¶ 7, Exhibit 15)

7. Approximately March 16, 1998, the Bureau obtained eight separate solicitation materials mailed to a Pennsylvania resident which indicated that Respondent had been soliciting charitable contributions. (OSC ¶ 8, Exhibits 16-23)

8. Approximately July 15, 1998, the Bureau obtained five separate solicitation materials mailed to a Pennsylvania resident which indicate that Respondent continued to solicit contributions. (OSC ¶ 9, Exhibits 24-28)

9. Approximately August 14, 1998, the Secretary issued a Cease and Desist Order against Respondent which was sent via certified mail Article # P 482 103 303. (OSC ¶ 12, Exhibit 29)

10. Approximately August 24, 1998, Respondent received the Cease and Desist Order as indicated by a U.S. Postal Service Return Receipt.² (OSC ¶ 13, Exhibit 30)

11. Approximately June 1, 1999, the Bureau issued a subpoena against Respondent via certified mail Article # Z 233 141 568. (OSC ¶ 19, Exhibit 32)

12. Approximately June 8, 1999, Respondent received the subpoena as indicated by a U.S. Postal Service Return Receipt.³ (OSC ¶ 20, Exhibit 32)

13. As of the date of the OSC, Respondent had not submitted the documents requested in the subpoena. (OSC ¶ 21)

² The August 14, 1998 Cease and Desist Order was addressed to Fortress America, James Wheeler, 7455 Brandt Avenue 5, Edina, MN 55435.

³ The June 1, 1999 subpoena was addressed to James Wheeler, Fortress America, 5200 West 73rd Street, Suite 21, Edina, MN 55435.

14. Approximately March 6, 2000, the Bureau obtained solicitation material mailed to a Pennsylvania resident which indicates that Respondent continued to solicit contributions. (OSC ¶ 14, Exhibit 31)

15. Respondent solicited charitable contributions from Pennsylvania residents. (OSC ¶ 2)

16. At all times pertinent to the factual allegations of the OSC, Respondent was not registered as a charitable organization in the Commonwealth of Pennsylvania. (OSC ¶ 1)

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter. (Finding of Fact no. 15)
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. 1, 2)
3. Respondent is in default in this action and the factual allegations contained in the OSC are deemed admitted in accordance with 1 Pa Code § 35.37. (Findings of Fact nos. 1, 2, 3)
4. Respondent is subject to the imposition of administrative fines in accordance with section 17 of the Solicitation Act, 10 P.S. § 162.17, by reason of its violation of section 15(a)(1) of the Solicitation Act, 10 P.S. § 162.15(a)(1), by failing to comply with the requirement of the Solicitation Act that it file a registration statement with the Department of State and, on 27 occasions, soliciting contributions without being registered. (Findings of Fact nos. 4, 7, 8, 14, 15, 16)
5. Respondent has violated section 15(a)(1) of the Solicitation Act, 10 P.S. § 162.15(a)(1), by soliciting contributions in violation of a "Cease and Desist" order after the "Cease and Desist" order was issued by the Secretary, and is therefore subject to the imposition of an administrative fine in accordance with section 17 of the Solicitation Act, 10 P.S. § 162.17. (Findings of Fact nos. 9, 10, 14)
6. Respondent is subject to the imposition of an administrative fine in accordance with section 17 of the Solicitation Act, 10 P.S. § 162.17 by failing to produce records after the Bureau had requested those records through a subpoena. (Findings of Fact nos. 11, 12, 13)

DISCUSSION

Motion for Default

The OSC was served on Respondent and its counsel by certified mail June 16, 2000, as evidenced by U.S. Postal Service return receipts filed of record in this action. In a notice attached to the OSC, Respondent was informed that a formal administrative disciplinary action had been instituted against Respondent and that "administrative fines of up to \$1,000 per violation and \$100 for each day the violation continues" may be levied upon Respondent.⁴ The OSC directed Respondent to file an answer to the allegations in the OSC, and advised that if Respondent did not file an answer to those allegations, disciplinary action may be taken against Respondent without a hearing. Under a section captioned "PROCEDURES" in the OSC, Respondent was ordered to file a written answer to the OSC within 30 days and advised that "[i]f Respondent fails to file an Answer within the time allowed herein, the Factual Allegations may be deemed admitted, and the Secretary will issue an Order which may impose penalties as set forth above."⁵ On August 29, 2000, the Commonwealth filed the MDFA, which was sent via first class mail to the Edina, Minnesota address at which the OSC was served. Respondent did not file an answer to either pleading. Respondent is therefore in default in accordance with 1 Pa.

⁴ OSC, "NOTICE."

⁵ OSC, "PROCEDURES."

Code § 35.37.⁶ Accordingly, the Commonwealth's motion for default is granted and the allegations in the OSC are deemed admitted.

Basis for the imposition of administrative fines.

The OSC filed in this matter is brought under the Solicitation Act, 10 P.S. § 162.1 *et seq.*, which provides grants the Secretary authority over charitable organizations as follows:

§ 162.4. Powers and duties of secretary

The secretary shall have the following powers and duties to:

(1) Provide for and regulate the registration of charitable organizations, professional fundraising counselors and professional solicitors.

(2) Decide matters relating to the issuance, renewal, suspension or revocation of registrations.

(3) Promulgate, adopt and enforce the rules and regulations necessary to carry out this act.

(4) Promulgate regulations altering fees and fines established in this act sufficient to meet expenditures of the bureau.

(5) Take appropriate action to initiate any civil or criminal proceedings necessary to enforce this act, in accordance with the act of October 15, 1980 (P.L. 950, No. 164), known as the Commonwealth Attorneys Act.

(6) Conduct hearings and make adjudications.

⁶ Section 35.37 of the General Rules of Administrative Practice and Procedure provides in pertinent part as follows:

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 said order an answer in writing Any respondent failing to file an answer within the time allowed shall be deemed in default, and all relevant facts stated in the order to show cause may be deemed admitted.

(7) Keep a record showing the names and addresses of all registered charitable organizations, professional fundraising counsel and professional solicitors.

(8) Submit annually, on or before September 30, to the Governor, to the State Government Committees of the House of Representatives and Senate, as well as to interested parties, a report on the number of registered charities, the number of charities ordered to cease and desist solicitation, the number of charities contracting with professional solicitors and the compensation of professional solicitors for each solicitation campaign in relation to the funds raised and administrative costs.

(9) Delegate to a division director of his office such powers and duties under this act as he may deem appropriate.

(10) Exercise all other authority accorded to him by this 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.

Among the facts alleged in the OSC and deemed admitted is that Respondent solicited contributions from Pennsylvania residents using a charitable appeal as the basis of its solicitations. Respondent's appeal is charitable in nature because it seeks contributions for a charitable purpose. Specifically, the solicitation is a patriotic appeal to "Stop the New World Order" which it claimed has placed "America's very future . . . in real jeopardy."⁷ By employing a charitable appeal as the basis for the solicitation, Respondent falls within the Solicitation Act's definition of "charitable organization" and therefore is subject to the Secretary's oversight under the Solicitation Act.

The Commonwealth alleges specifically that "Respondent solicited charitable contributions in Pennsylvania without being registered with the Bureau."⁸ 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. . . .

The facts alleged in the Commonwealth's OSC and deemed admitted can be summarized as follows:

⁷ OSC, Exhibits 2, 3.

⁸ OSC, ¶¶ 10, 15.

- Respondent has solicited charitable contributions from Pennsylvania residents without having been registered as a charitable organization; (OSC ¶¶1, 2; Findings of Fact nos. 15, 16)
- The Bureau received 13 such solicitations from a Pennsylvania resident in January 1998 and advised Respondent of the registration requirement of the Solicitation Act in February 1998; (OSC ¶¶5, 6; Findings of Fact nos. 2, 3)
- The Bureau received 13 additional solicitations sent by Respondent in March and July 1998 which resulted in the Secretary issuing a Cease and Desist Order to Respondent August 14, 1998; (OSC ¶¶ 8, 9, 12; Findings of Fact nos. 7, 8, 9)
- In June 1999, the Bureau issued a subpoena to Respondent requesting information including lists of Pennsylvania residents who Respondent had solicited and those who had contributed to Respondent; (OSC ¶¶ 19-20, Exhibit 32; Findings of fact nos. 12, 13)
- As of the date of the OSC, Respondent had not submitted the documents requested in the subpoena; (OSC ¶ 21; Finding of Fact no. 14)
- In March 2000, the Bureau obtained solicitation material mailed to a Pennsylvania resident indicating the Respondent continued to solicit contributions after the Cease and Desist Order had been issued. (OSC ¶ 14; Finding of Fact no. 11)

The OSC filed in this matter, comprises 29 counts. Counts One through Twenty-seven of the OSC are based on Respondent soliciting contributions without being registered with the Bureau, in violation of section 15(a)(1) of the Solicitation Act. Count Twenty-eight of the OSC is based on a solicitation made after the Secretary's August 14, 1998 "Cease and Desist" order in

violation of that order, also in violation of section 15(a)(1) of the Solicitation Act. Section 15(a)(1) of the Solicitation Act, 10 P.S. § 162.15(a)(1), provides as follows:

§ 162.15. Prohibited acts

(a) **General rule.-** Regardless of a person's intent or 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.

The deemed-admitted facts, outlined above, support a finding that Respondent violated the Solicitation Act in each of these 28 counts. The Secretary is authorized to impose administrative fines under section 17 of the Solicitation Act, 10 P.S. § 162.17, which provides as follows:

§ 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:

* * *

(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.

Respondent is therefore subject to administrative fines of up to \$28,000 by reason of its repeated violation of section 15(a)(1) of the Solicitation Act as set forth in Counts One through Twenty-eight. In Count Twenty-nine, the Commonwealth charged Respondent specifically with violating section 17 of the Solicitation Act, 10 P.S. § 162.17, by failing to produce records subpoenaed by the Bureau June 1, 1999. This charge is also supported by the facts which are deemed admitted and forms the basis of an additional \$1,000 administrative fine.

In the instant action, the Bureau's director sent Respondent a letter in response to the first thirteen deceptive solicitations, requesting that Respondent "register with the Bureau unless [Respondent] is either excluded or exempted from the [Solicitation] Act's requirements."⁹ Respondent did not register with the Bureau and as a consequence, the "Cease and Desist" order was issued August 14, 1998, and served upon Respondent August 24, 1998.¹⁰ Respondent nevertheless continued to solicit charitable contributions. Respondent similarly did not respond to either the OSC or the MDFA issued in the instant administrative action. Under these circumstances and in the absence of any mitigation, the Secretary determines that the maximum administrative fine should be imposed. Accordingly, the following order shall issue.

⁹ OSC, Exhibit 14.

¹⁰ OSC, Exhibits 29,30.

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

Commonwealth of Pennsylvania,
Bureau of Charitable Organizations

v.

Fortress America,
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Docket no. 0006-98-00

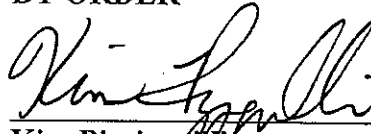
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ORDER

NOW, this 7TH day of November, 2000, upon consideration of the foregoing findings of fact, conclusions of law and discussion, the Secretary of the Commonwealth hereby **finds** that Respondent **Fortress America** has violated the Solicitation of Funds for Charitable Purposes Act at 10 P.S. §§ 162.15(a)(1) and .17, it is hereby **ordered** that an **administrative fine** in the amount of **\$29,000.00** be and hereby is imposed upon Respondent in accordance with 10 P.S. § 162.17.

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

BY ORDER



Kim Pizzingrilli
Secretary of the Commonwealth

Date of Mailing:

11-8-00

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