

FILED

AUG 29 2022

BEFORE THE ARKANSAS ETHICS COMMISSION

ARKANSAS ETHICS
COMMISSION

BY

[Signature]

**In Re: Mark D. Lowery
Respondent**

Case No. 2022-CO-046

FINAL ORDER

Came for a final adjudication hearing on August 19, 2022, the complaint filed in this case against the Respondent, Mark D. Lowery, and based upon due consideration of the evidence presented at that hearing and the applicable law, the Arkansas Ethics Commission (hereinafter the “Commission”) hereby makes the following findings of fact and conclusions of law:

1. The Commission has jurisdiction over this matter pursuant to Ark. Code Ann. § 7-6-218.

2. The Respondent is a citizen of the State of Arkansas who, at all times relevant to this case, was a candidate for Arkansas Secretary of State and State Treasurer during the 2022 election cycle.

3. The Commission is charged with enforcing Ark. Code Ann. § 7-6-207 which provides, in pertinent part, as follows:

(a) Reports Required.

(1) Except as provided in subsections (c) and (e) of this section, each candidate for state or district office, including a district judge, or a person acting in the candidate’s behalf, shall file with the Secretary of State:

(A) For each quarter during a calendar year in which a candidate is not listed on any ballot for election, a quarterly report of all contributions received and expenditures made during that quarter. The quarterly report shall be filed no later than fifteen (15) days after the end of each quarter;

(B) Beginning with the month of January of a calendar year in which a candidate may be listed on any ballot for election, a monthly report of all contributions received and expenditures made during that month. However, for any month in which certain days of that month are included in a preelection report required under subdivision (a)(1)(C) of this section or a final report required under subdivision (a)(1)(D) of this section, no monthly report for that month shall be due. In the case of a primary or runoff election, those days of the month occurring after the date of the election shall be carried forward and included in the next monthly report. The monthly report shall be filed no later than fifteen (15) days after the end of each month, except that the final report, covering the month during which an election is held, shall be filed within thirty (30) days after the end of the month in which the last election is held at which the candidate seeks nomination and after the end of the month in which the general election is held. With respect to a special election, the candidate shall file monthly reports under this section beginning with the month in which the special election candidate's total campaign contributions or expenditures exceed five hundred dollars (\$500);

(C) No later than seven (7) days prior to any preferential primary election, runoff election, general election, or special election in which the candidate's name appears on the ballot, a preelection report of all contributions received and expenditures made between the period covered by the previous report and the period ten (10) days before the election. In case of a runoff election, the report shall cover all contributions received and expenditures made during that period of time that begins after the date of the election from which the runoff arose and ends ten (10) days before the runoff election;

(D) No later than thirty (30) days after the end of the month in which the candidate's name has appeared on the ballot in any primary election, runoff election, general election, or special election, or when only one (1) candidate qualifies for a particular office or position and no position or name of an unopposed candidate shall appear on a ballot, a final report of all contributions received and expenditures made which have not been disclosed on reports previously required to be filed. A final report is required regardless of whether a candidate has received contributions or made expenditures in excess of five hundred dollars (\$500);

4. On April 13, 2022, the Commission received a complaint against the Respondent in his capacity as a candidate for State Representative - District 39 in 2018 and 2020, a candidate for Secretary of State in 2021, and a candidate for State Treasurer in 2022. Briefly restated, the essential allegations of the complaint are as follows:

- (1) The Respondent was elected to the State House - District 39 in 2018 and 2020. The Respondent was a Republican primary candidate for Secretary of State in 2021 and is currently a candidate for Arkansas State Treasurer.

- (2) A review of the Respondent's Secretary of State campaign reports indicates he failed to file all required campaign reports for 2019, 2020 and 2021. The majority of contribution and expenditure reports he did file "appear" to contain materially misleading or incomplete beginning and reporting period ending dollar amounts. He has also consistently failed to meet filing deadlines.
- (3) The Respondent filed final general election reports for 2020 and one carryover report. However, ending report dollar amounts do not always correlate with the next report-beginning amount. One example is the first report for Secretary of State then Treasurer of State. These are not small dollar amounts involved.
- (4) None of the Respondent's Statements of Financial Interest reports lists any debts to creditors or the government. This appears to be a recurring omission (as opposed to a one time oversight) because of the number of reports involved. Yet public records show the Respondent filed Chapter 7 Bankruptcy in 1998 and filed a Chapter 13 Bankruptcy in February 2017 (Case No. 4:17-bk-18025T/M). It would seem 33 monthly beginning June 2019 warranted reporting for years 2019 - 2022.

5. On April 21, 2022, the Commission sent the Respondent a letter, via certified mail with a return receipt requested, to notify him that an investigation was being commenced concerning the allegations set forth in the complaint. The letter went on to state that the focus of the investigation with regard to allegation numbers 1 - 3 of the complaint would be whether or not the Respondent violated Ark. Code Ann. § 7-6-207 in his capacity as a candidate for State Representative - District 39 in 2018 and 2020, a candidate for Secretary of State in 2021, and a candidate for State Treasurer in 2022 by failing to file required reports and/or failing to properly complete reports. With respect to allegation number 4 of the complaint, the April 21st letter noted that the focus of the investigation would be whether or not the Respondent violated Ark. Code Ann. § 21-8-701 in his capacity as a public official by failing to list creditors and governmental entities owed past due amounts.

6. The April 21st letter further noted that the complaint alleges that the Respondent failed to file all required reports for 2019 and 2020; and advised that the following reports were included in the scope of a previous case, i.e., Case No. 2020-CM-007:

- (a) Carryover Fund Report for the first quarter of 2019
- (b) Carryover Fund Report for the second quarter of 2019
- (c) Campaign Contribution and Expenditure (“C&E”) Report for the third quarter of 2019
- (d) October 2019 monthly C&E Report
- (e) November 2019 monthly C&E Report
- (f) December 2019 monthly C&E Report
- (g) January 2020 monthly C&E Report
- (h) February 2020 monthly C&E Report
- (i) Final C&E Report for the 2020 primary election
- (j) April 2020 monthly C&E Report
- (k) May 2020 monthly C&E Report
- (l) June 2020 monthly C&E Report
- (m) July 2020 monthly C&E Report

Likewise, the April 21st letter advised that the failure to timely file the C&E reports listed above had already been addressed by the Commission. Accordingly, the investigation in the instant case did not include the timeliness of those reports.

7. On April 28, 2022, the Commission sent the Respondent a letter, via first-class mail, stating that, upon further review, it appeared the affirmative defense provisions of Ark. Code Ann. § 7-6-229 was potentially applicable to allegation numbers 2 and 3 of the complaint, and Ark. Code Ann. § 21-8-701(f) was potentially applicable to allegation number 4 of the complaint.

8. On June 10, 2022, staff presented the preliminary results of its investigation to the Commission at its regular monthly meeting and was instructed to complete the investigation. The Respondent was notified of the Commission's decision by letter dated June 15, 2022.

9. The Respondent appeared at the June 10th meeting and presented evidence with respect to whether or not the alleged errors in the C&E reports were unintentional and whether or not the filing of any amendments occurred within the required 30-day time period. Specifically, he asserted the affirmative defense with respect to his beginning and ending balances in his Carryover Fund reporting form, C&E reports for his campaign for Secretary of State, and his C&E reports for his campaign for State Treasurer through the date of this complaint. He further asserted that he came to the Commission and met with staff to discuss his case on or about May 10, 2022, and that he did not understand the complete nature of the complaints against him sufficient to file amendments until that meeting. Furthermore, evidence was presented that he filed amended reports on June 9, 2022, (specifically, a Carryover Fund reporting form, two (2) C&E reports from his campaign for Secretary of State, and two (2) C&E reports for his campaign for State Treasurer.)

10. At the June 10th meeting, the Commission decided, by a vote of 4-0, with one seat on the Commission vacant, that the affirmative defense provision provided in Ark. Code Ann. § 7-6-229 was applicable in this case with respect to allegation numbers 2 and 3 and had been successfully met based upon a finding that there had been unintentional errors in the Respondent's reports that had been amended within thirty (30) days of discovering these unintentional errors in the filed reports. Accordingly, there was no further investigation with respect to those particular allegations regarding beginning and ending balances and the Respondent shall not be considered to have committed a violation in connection therewith. The Respondent was notified of such in the June 15th letter.

11. At the June 10th meeting, the Respondent did not assert the affirmative defense with respect to allegation number 4, citing a defense on the merits to this allegation. It was noted that evidence seeking to establish a defense on the merits to a particular allegation or to demonstrate mitigating circumstances was not considered at that stage of the proceedings. The June 15th letter noted that the appropriate time to consider such evidence would be after the investigation has been completed and when the case comes before the Commission for a probable cause determination.

12. On July 5, 2022, the Commission sent the Respondent a letter, via first-class mail, to notify him that the results of the investigation would be presented to the Commission at its regular monthly meeting on July 15, 2022, for purposes of determining whether or not probable cause existed for the finding of a violation.

13. On July 15, 2022, the Commission considered the results of staff's investigation and found, by a vote of 3-0, with Commissioner Klein not present and one seat on the Commission vacant, that probable cause existed for finding that the Respondent violated Ark. Code Ann. § 7-6-207 by failing to timely file required C&E reports with respect to the Third Quarter of 2021, Fourth Quarter of 2021, and month of February of 2022 in his campaign for Secretary of State, and the month of March of 2022 in his campaign for State Treasurer, all in connection with the 2022 Primary election.

14. With regard to Ark. Code Ann. § 21-8-701 and the allegation that, in his capacity as a public official he failed to list creditors and governmental entities owed past due amounts, the Commission found that while the Respondent did have creditors to whom more than five thousand dollars (\$5,000.00) was owed, those loans were made in the ordinary course of business by either

a lending institution or a person who regularly and customarily extends credit and, therefore, those creditors were not required to be disclosed pursuant to Ark. Code Ann. § 21-8-701(d)(6)(B)(i).

15. On July 18, 2022, the Commission sent the Respondent a letter, via first-class mail, which notified him of the Commission's finding of probable cause. In accordance with the Commission's Rules of Practice and Procedure, said letter contained a written Offer of Settlement proposing the issuance of a Public Letter of Caution and the imposition of a one thousand dollar (\$1,000.00) fine for failing to timely file four (4) C&E reports.

16. Pursuant to the terms of the written Offer of Settlement, the Respondent had ten (10) days to either sign and return the offer or request a public hearing. The written Offer of Settlement went on to state in the event that he did neither of those things, this matter would proceed to a final adjudication hearing.

17. On Friday, July 29, 2022, the Respondent notified the Commission via telephone that he did not wish to accept the written Offer of Settlement and, on August 9, 2022, the Commission sent the Respondent a letter, via first-class mail, notifying him that a final adjudication hearing would be held on August 19, 2022. Said letter contained a separate written notice of final adjudication hearing providing the information required in Ark. Code Ann. § 25-15-208(a)(2).

18. The Respondent appeared at the final adjudication hearing which was held during the Commission's confidential session on August 19, 2022. Said hearing was conducted in accordance with Ark. Code Ann. § 25-15-213.

19. At the hearing, the following exhibits were introduced into evidence:

- Exhibit "1" - Probable Cause Report
- Exhibit "2" - Written Offer of Settlement

- Exhibit “3” - Letter to Respondent accompanying Notice of Final Adjudication Hearing
- Exhibit “4” - Letter to complainant accompanying Notice of Final Adjudication Hearing
- Exhibit “5” - Notice of Final Adjudication Hearing
- Exhibit “6” - Complainant’s request to withdraw complaint
- Exhibit “7” - Certified copy of 2022 Reporting Calendar for State and District Candidates
- Exhibit “8” - Certified Copy of Third Quarter C&E Report for Mark Lowery for Secretary of State
- Exhibit “9” - Certified Copy of Fourth Quarter C&E Report for Mark Lowery for Secretary of State
- Exhibit “10” - Certified Copy of February Monthly C&E Report for Mark Lowery for Secretary of State
- Exhibit “11” - Certified Copy of March Monthly C&E Report for Mark Lowery for State Treasurer
- Respondent’s Exhibit “1” - Email from Secretary of State

20. At the Final Adjudication Hearing, the Respondent admitted that he failed to timely file four (4) C&E reports, but stated that he had no intent to defraud. He went on to state that he made the mistake of waiting until the deadline to file the reports.

21. The Respondent stated that because he was working on the reports after hours, he would have to wait until the next day to get help from the Secretary of State’s office when a problem was encountered.

22. With the exception of one (1) report which was thirty-one (31) days late, most of the reports were filed early the next business day.

23. The Respondent expressed concern that the Commission was being “weaponized” and pointed out that other states imposed a fee of ten dollars (\$10.00) per day for the late filing of reports or had a grace period during which late reports were simply accepted for filing.

24. The Respondent called a witness (Shantell McGraw) from the Secretary of State’s office who recounted the following problems in the electronic filing system:

- (a) Filers have encountered problems with particular reports not being available as an option to be filed.
- (b) Filers have problems with balances on their reports not being accurate.
- (c) Sometimes, reports do not show information which has been input into the system.
- (d) The Secretary of State’s office has experienced problems getting prompt service from the electronic filing system vendor.
- (e) The Secretary of State’s office cannot be reached for help after the close of business.

25. At the conclusion of the final adjudication hearing, the Commission conducted its deliberations and then returned to public session. When it returned to public session, the Commission voted on the following matter:

A motion was made by Commissioner Johnson and seconded by Commissioner Lopez to find the Respondent violated Ark. Code Ann. § 7-6-207 by failing to timely file required C&E reports with respect to the Third Quarter of 2021, Fourth Quarter of 2021, and month of February of 2022 in his campaign for Secretary of State, and the month of March of 2022 in his campaign for State Treasurer, all in connection with the 2022 Primary election, and shall be issued a Public Letter of Caution and fined eight hundred dollars (\$800.00). The motion passed by a vote of 3-0, with Commissioners Irby and Pitts not voting since they attended the hearing electronically and were not physically present.

26. The Respondent committed a violation of Ark. Code Ann. § 7-6-207 by failing to timely file required C&E reports with respect to the Third Quarter of 2021, Fourth Quarter of 2021,

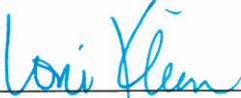
and month of February of 2022 in his campaign for Secretary of State, in connection with the 2022 Primary election.

27. The Respondent committed a violation of Ark. Code Ann. § 7-6-207 by failing to timely file his monthly C&E report for March of 2022 in his campaign for State Treasurer, in connection with the 2022 Primary election.

28. With respect to the Respondent's violation of Ark. Code Ann. § 7-6-207, the Commission found that a Public Letter of Caution shall be issued and that a fine of eight hundred dollars (\$800.00) shall be imposed and be due and payable within thirty (30) days from the entry of this Order.

IT IS, THEREFORE, CONSIDERED, DECIDED and ORDERED by the Commission that the Respondent, Mark D. Lowery, shall be found to have violated Ark. Code Ann. § 7-6-207 by failing to timely file required C&E reports with respect to the Third Quarter of 2021, Fourth Quarter of 2021, and month of February of 2022 in his campaign for Secretary of State, and monthly C&E report for March of 2022 in his campaign for State Treasurer, all in connection with the 2022 Primary election; that the Respondent shall be issued a Public Letter of Caution; and that the Respondent shall be fined eight hundred dollars (\$800.00), with that amount due and payable within thirty (30) days from the entry of this Order.

IT IS SO ORDERED this 29th day of August, 2022.



LORI KLEIN, Chairman
Arkansas Ethics Commission