

# THE ARIZONA REPUBLIC

## Clean Elections law faces big test

*Legislator may be tossed out*

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The state Clean Elections Commission faces its latest and potentially most crucial test in a case involving a newly elected lawmaker accused of overspending his public campaign limits by more than \$7,500.

At issue is whether the legislator should be removed from office under the terms of the Arizona's Clean Elections Law, or whether the state Constitution forbids such a harsh punishment.

With a handful of other lawmakers facing campaign finance accusations, the case could determine the future of public campaign financing in Arizona, a system that has been under attack almost since voters approved it in 1998. Backers say the system has increased voter turnout and the number of candidates running for office in Arizona.

But clearly, this is the law's biggest challenge so far.

"I think that Clean Elections' neck is on the line," said Sen. Carolyn Allen, R-Scottsdale. "They (publicly financed candidates) are taking taxpayer money, and you have to play by the rules whether you like them or not."

The latest controversy revolves around Rep. David Burnell Smith, a Republican from Scottsdale who was elected in November. An outside audit released Friday concluded that he broke the state's Clean Elections Law when he overspent his publicly funded campaign war chest by more than \$7,500 during his victorious Republican primary in September. The audit was conducted by Sarvas, King & Coleman, a Phoenix-based firm.

In the past, critics have complained that Clean Elections officials accused candidates, particularly Republicans, of breaking the law over minor infractions or inadvertent errors in campaign finance reporting. This time, however, the accusation is more serious.

Under state law, the penalty for a candidate who overshoots his spending limit by more than 10 percent is to be removed from office. Smith is accused of overspending his limit by as much as 22 percent.

His spending limit under Clean Elections rules was \$34,600 for the primary and general election. The audit showed that, according to his campaign bank account, he spent nearly \$39,000. In addition, the audit found more than \$3,300 in expenditures beyond his campaign bank account.

Campaign limits for legislative candidates vary according to whether their opponents use public funds and how much their opponents spend.

It will be up to the five-member Clean Elections Commission to determine whether Smith did commit a violation and whether the law requires that he lose his seat.

Smith and his attorney, Lee Miller, believe such a drastic punishment would be unconstitutional and that the appointed commission doesn't have the authority to overturn an election.

Miller chalks up Smith's troubles to an accounting snafu caused by some campaign mailers that cost more than estimated. Miller says nothing in the Arizona Constitution gives the commission the authority to remove an elected official.

### **'Constitution trumps'**

"The (Arizona) Constitution establishes requirements for becoming a member of the Legislature, it doesn't say anything in there about fully complying with campaign finance laws," Miller said. "The Constitution trumps state law, period."

Miller said the information contained in the audit is nothing new and that Smith remains willing to repay the overspending and pay a fine.

"It is what Mr. Smith admitted what it would be a number of weeks ago," Miller said. "It was credit. It was the first time in five (attempts to win a legislative seat) that he was smelling victory. When it all added up, it was too much. To his credit, he went down to the commission and told them he overspent and tried to resolve this."

### **A different view**

Smith's primary opponent, Thom Von Hapsburg, who filed the original Clean Elections complaint, sees things differently.

"When Mr. Smith took that money, he knew what the rules were," Von Hapsburg said. "If he didn't want to abide by those rules, he shouldn't have taken taxpayer money from the state. He's a lawyer. This is not an average Joe citizen. He's used to reading the law. He can't play naïve."

No candidate has been removed from office since the Clean Elections Law was approved by voters.

Backers of the Clean Elections Law think this case is especially important, saying that if candidates are allowed to break spending limits and just face a fine, it could shake the foundation of Arizona's popular but controversial system of public campaign financing.

An investigation and audit into Smith's campaign has been continuing for months, and the commission is not likely to take action on the matter this month. Some legislators, Republicans and Democrats alike, say that if the commission doesn't act to remove Smith, the validity and credibility of the voter-approved system of public campaign

financing is in danger of collapsing.

## **A broad investigation**

Smith is at the center of a broad investigation being conducted by the Clean Elections Commission and the Arizona Attorney General's Office involving a slate of at least five victorious socially conservative candidates. The investigations of the other candidates are in their preliminary stages.

The Attorney General's Office declined to comment on the probe. It was launched over the summer to look into an Ahwatukee political consultant. In September, a Maricopa County Superior Court judge found that Constantin Querard violated state law by producing an early-ballot mailing disguised to look as if it came from the Republican Party and that he held on to more than 14,000 early-ballot requests in hotly contested races while he perused them for information to sell for a profit.

The ruling prevented Querard from using his sophisticated mailing lists to help candidates during the final days before the 2004 primary election.

Investigators grilled Querard for more than four hours in December about the early-ballot mailer and work he did on the campaigns of Smith and another candidate. Querard declined to answer questions about the mailer, invoking the right to avoid self-incrimination.

Colleen Connor, executive director of the commission and its top lawyer and investigator, told a reporter last month that removing a lawmaker from office may be unconstitutional. Courts in other states voided state statutes that raise additional barriers to public office that aren't found in that state's constitution. But Connor recused herself on Thursday from the Smith case and those involving five other legislators that employed Querard and/or political consultant Chris Baker, a friend and sometimes associate of Querard. Connor cited a potential conflict because of "family members having an interest in the Right to Life advocacy groups that are involved in the proceedings."

Connor did not elaborate, but legislators who worked with Querard share strong anti-abortion stances, and Querard is a full-time fund-raiser for Arizona Right to Life.

Querard said he expects nothing to come of the attorney general's investigation and that the office has not contacted him since he gave his deposition in the case. He also agrees that Smith should not be driven from office.

"He will end up paying a large fine," Querard said. "But the power to seat the Legislature is up to the people at the ballot box and the people in the Legislature."

## **Constitutional questions**

Legal experts said the Clean Elections "death penalty" has never been argued in an Arizona court of law. Chuck Blanchard, a former state senator who has successfully

defended Clean Elections, said that the constitutionality of the election law should be decided by the courts.

"I know some people question its constitutionality, but this hasn't been argued in court," Blanchard said. "The general rule is that if a Legislature adopts a statute or the people adopt an initiative, the presumption is that the executive branch will enforce it, and they'll let the courts decide. The best forum to test that is in court."

"If the executive branch doesn't follow this through, it could undo what the people decide without any review."

## **Upholding the law**

Attorneys and advocates close to the Clean Elections movement say the appointed commission and its staff is supposed to uphold and follow the law as its written. Guessing at what a court will do is not their role.

"A state agency cannot act as a court," said Barbara Lubin, executive director of the Clean Elections Institute, a non-profit watchdog group. "In other words, an agency cannot interpret a law as it presumes a court would. They do not have that authority."

Commission Chairwoman Marsha Busching said she expects to follow the law as written when the time comes, but there is value in looking at case law in other states.

"By looking at other states' rulings, the commission may observe a history of similar circumstances," Busching said. "However, it is the Commission's role to follow Arizona law and make the proper decisions as they relate to the Clean Elections