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9 ***Leaders for Arizona***

10 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

11 In the Matter Of,

Case No. 14F-001-AAG

12 TOM HORNE, Tom Horne for Attorney
13 General Committee (SOS Filer ID 2010
14 00003); KATHLEEN WINN, Business
15 Leaders for Arizona, (SOS Filer ID 2010
16 00375)

**MEMORANDUM RE WINN AND
HORNE'S CROSS-EXAMINATION
OBJECTIONS AND REQUEST FOR
SPECIFIC RULINGS**

17 Kathleen Winn, joined by Tom Horne, asks the Court to make specific rulings re due
18 process objections made during the trial. This memorandum is based upon Ms. Winn's
19 federal due process right,¹ and its state-law counterpart.² This memorandum is based upon
20 the accompanying memorandum of points and authorities.

21 **RESPECTFULLY SUBMITTED** this 24th day of February 2014.

22 **DEBUS, KAZAN & WESTERHAUSEN**

23 By /s/ Larry L. Debus
24 Larry L. Debus
25 Attorneys for Respondent Winn

26 ¹ U.S. Const., Amendments 5 and 14.

27 ² Ariz. Const., Art.2, Section 4.

1 **Memorandum of Points and Authorities**

2 **Introduction.**

3 In 2009, Ms. Winn created an independent expenditure campaign, Business Leaders of
4 Arizona. The campaign, after initial activity, remained dormant until October 2010. In
5 October 2010, Ms. Winn raised funds to publish a TV Ad advocating against the election of
6 Attorney General Candidate Felicia Rotellini.

7 On October 14 2012, the Yavapai County Attorney's Office issued a compliance order
8 alleging that Ms. Winn and Mr. Horne unlawfully coordinated in the publication of ads
9 produced by Ms. Winn's independent expenditure campaign fund, Business Leaders of
10 Arizona.³ Ms. Winn and Mr. Horne rejected the orders terms.

11 Trial on the compliance order allegations commenced on Monday, February 10, 2014
12 and concluded Wednesday, February 12, 2014. The Yavapai County Attorney's Office called
13 two witnesses. Brian Murray (Ms. Winn's campaign consultant) and FBI Agent Brian
14 Grehoski.

14 **The Trial.**

15 The Maricopa County Attorney's Office and the Federal Bureau of Investigation,
16 pursuant to a cooperation agreement, joined together in 2012 in whatever was the target of
17 their inquiry. This investigation is the basis of allegations in the compliance order. Ignoring
18 Arizona's abhorrence of federal intervention in our state affairs, the Yavapai County
19 Attorney's Office chose FBI Agent Brian Grehoski to hearsay-in the investigation facts. The
20 Yavapai County Attorney's plan was for the federal agent to employ a so-called *Touhy*⁴
21 letter, thereby thwarting cross-examination otherwise available with Agent Grehoski's
22 Maricopa County counterpart.

23 The plan worked. The Yavapai County Attorney presented its case through hearsay,
24 conjecture, speculation, and opinion⁵ of Agent Grehoski relying on a so-called *Touhy* letter.

25 _____
26 ³ Yavapai County Attorney's compliance order.

27 ⁴ *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

⁵ Notwithstanding a stipulation that he would offer no opinions; none was disclosed.

1 The Yavapai county attorney through Agent Grehoski manipulated cross-examination via the
2 *Touhy* letter. Agent Grehoski raised his own objections to defense questions, and ruled on
3 them as well, thereafter refusing to answer. Agent Grehoski refused to answer the questions
4 “outside of the information turned over to the county attorney’s office.”⁶ He also refused to
5 reveal what information was withheld from the county attorney.⁷ The Court refused Ms.
6 Winn’s request to order Agent Grehoski to answer relevant questions on cross-examination.
7 The Court either denied Ms. Winn’s due process objections or proceeded without ruling.

8 **The *Touhy* Letter.**

9 As background, “In *Touhy*, the Supreme Court ruled that an FBI agent could not be
10 held in contempt for refusing to obey a subpoena *duces tecum* when the Attorney General,
11 acting pursuant to valid federal regulations governing the release of official documents, had
12 ordered him to refuse to comply.”⁸ *Touhy* did not empower a federal agent to usurp the
13 power of the judicial officer. That would violate the separation of powers between the
14 executive branch and the judiciary.⁹ “As the Supreme Court has said, ‘judicial control over
15 the evidence in a case cannot be abdicated to the caprice of executive officers.’”¹⁰ Thus, in
16 litigation over the Exxon oil spill, the Ninth Circuit remanded the case to the district court, for
17 the district court to apply the federal rules of civil procedure to the requests for records from
18 federal agencies:

19 In summary, the district court erred in holding that § 301 authorizes federal
20 agencies to refuse to comply with proper discovery requests. Section 301 does not
21 create an independent privilege to withhold government information or shield federal
22 employees from valid subpoenas. Rather, district courts should apply the federal rules
23 of discovery when deciding on discovery requests made against government agencies,

24 ⁶ Day 3 Reporter’s Transcript (“RT”) p. 19.

25 ⁷ Day 1 RT pgs. 44, 45, 46 and Day 3 RT pgs. 19, 20, 21, 22, 23, 24.

26 ⁸ *Exxon Shipping Co. v. U.S. Dep’t of Interior*, 34 F.3d 774, 776 (9th Cir. 1994) *citing Touhy*,
340 U.S. at 469.

27 ⁹ *Exxon Shipping Co.*, 34 F.3d at 778.

¹⁰ *Exxon Shipping Co.*, 34 F.3d at 778 *quoting United States v. Reynolds*, 345 U.S. 1, 9–10
(1953). (“We decline to hold that federal courts cannot compel federal officers to give factual
testimony”).

1 whether or not the United States is a party to the underlying action.¹¹

2 This applies to the production of documents as well as to testimony.¹²

3 Agent Grehoski's stone-walling went beyond the scope of a *Touhy* letter. As discussed
4 below, it also violated the respondents' due process rights.

5 The *Touhy* letter was not provided to court and counsel until Agent Grehoski took the
6 stand. We have no doubt the court was acting in utmost good faith when it bowed to a FBI
7 agent armed with his *Touhy* letter and backed by the force of the Yavapai County Attorney.

8 **The Hearing Violated Due Process.**

9 From the beginning of the trial to the end, counsel for Ms. Winn and Mr. Horne made
10 repeated, continuing objections to Agent Grehoski's use of hearsay testimony and documents,
11 the presentation of which denied Ms. Winn and Mr. Horne their due process rights. Agent
12 Grehoski determined what questions were relevant and refused to answer when he determined
13 they were not. The defense made a timely objection on each occasion.¹³ Finally, the defense
14 made a timely motion to strike the testimony of Agent Grehoski because of the total and
15 complete denial of Ms. Winn and Mr. Horne's ability to test the truthfulness of his testimony
16 through cross-examination.¹⁴

17 The denial or restriction by an administrative law judge of a petitioner's right to cross-
18 examination is a violation of their right to due process.¹⁵

19 ¹¹ *Exxon Shipping Co.*, 34 F.3d at 780.

20 ¹² *Exxon Shipping Co.*, 34 F.3d at 777.

21 ¹³ RT Day 1 p. 51, 52, 55, 57, 63, 66, 69, 77, 78, 84, 86, 90, 91, 92, 94, 101, 102, 103, 172,
22 173, 224; Day 3 pgs. 3, 4, 5, 12, 13, 14, 22, 23, 74, 89, 90, 91, 92, 95, 96, 231 and 232.

23 ¹⁴ RT Day 1 pgs. 84, 85, 130, 154, 158; Day 3 p. 4, 78, 82, 83, 84.

24 ¹⁵ *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) (termination of public assistance requires
25 due process, including confrontation of adverse witnesses); *Webb v. State ex rel. Arizona*
26 *Board of Medical Examiners*, 202 Ariz. 555, 558 ¶ 12, 48 P.3d 505s (App. 2002) (A person
27 who faces impairment of a medical license, "in our judgment, must at a minimum be provided
a chance to confront adverse evidence and question adverse witnesses"); *Obersteiner v. Indus.*
Comm'n of Arizona, 161 Ariz. 547, 549, 779 P.2d 1286, 1288 (App. 1989) ("The right to
cross-examination is fundamental and attaches when the Industrial Commission receives any
testimonial or documentary evidence.") *Scheytt v. Indus. Comm'n of Arizona*, 134 Ariz. 25,
28, 653 P.2d 375, 378 (App. 1982) ("While the discretion of the administrative law judge is

1 **Requested rulings.**

2 The Court was asked to make specific rulings so that the record could be preserved for
3 appeal. The Court ordered counsel to brief the issue of specific rulings. Ms. Winn and Mr.
4 Horne are entitled to rulings on their objections that Agent Grehoski’s testimony was allowed
5 on a misleading factual premise and that his reliance on the *Touhy* letter was a misapplication
6 of the Arizona Administrative Code¹⁶ in violation of the Arizona Constitution, Article 2
7 section 4, Due Process, to the particular facts of this case. “(O)rderly procedure and good
8 administration require that objections to the proceedings of an administrative agency be made
9 while it has opportunity for correction in order to raise issues reviewable by the courts.”¹⁷ As
10 a corollary, the administrative officer must rule on objections in order for the reviewing
11 courts understand the issues before them.

12 The specific rulings requested by Ms. Winn and Mr. Horne follow.

- 13 1. Agent Grehoski presented critical facts through verbal hearsay. In this context, didn’t
14 this deny Ms. Winn and Mr. Horne their due process right to effective cross-
15 examination?
- 16 2. Agent Grehoski testified about hearsay documents such as, telephone records, FBI
17 summary reports, FBI 302 investigative reports, notes made by other FBI agents or
18 investigators. Didn’t this deny Ms. Winn and Mr. Horne their due process right to
19 effective cross-examination?
- 20 3. If Agent Gehoski, based on his interpretation of a *Touhy* letter, determined that a
21 question was not relevant, and then refused to answer it. Didn’t this deprive Ms. Winn
22 and Mr. Horne their due process right to effective cross-examination?

23 quite broad in that regard, it is our opinion that such discretion cannot be exercised so as to
24 deny a party's timely exercised request for an opportunity to cross-examine a witness who has
25 given material evidence in the proceeding) (internal citations omitted).

26 ¹⁶ A.R.S. § 41-1092.07 (“The administrative law judge shall exercise reasonable control over
27 the manner and order of cross-examining witnesses and presenting evidence to make the
cross-examination presentation effective for ascertaining the truth . . .”).

¹⁷ *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952).

1 4. Agent Grehoski refused to testify to parts of the investigation that were not given to
2 the Yavapai County Attorney's Office. In this context, didn't this limitation deny Ms.
3 Winn and Mr. Horne their due process right to effective cross-examination?

4 5. After Agent Grehoski testified as to hearsay verbal statements and documents, and
5 refused to answer questions on cross-examination based on his own determination of
6 relevance, the respondents moved to strike his testimony. Did the refusal to strike
7 testimony violate Ms. Winn's and Mr. Horne's due process right to effective cross-
8 examination?

9 Respectfully Submitted this 24th day of February 2014.

10 DEBUS, KAZAN & WESTERHAUSEN

11 By /s/ Larry L. Debus
12 Larry L. Debus
13 Attorneys for Respondent Winn
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1 ORIGINAL OF THE FOREGOING e-filed
2 this 24th day of February, 2014, to:

3 Honorable Tammy Eigenheer
4 Administrative Law Judge
5 ARIZONA OFFICE OF ADMINISTRATIVE HEARINGS
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9 COPIES of the foregoing emailed
10 (through OAH electronic filing)
11 this 24th day of February, 2014, to:

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