

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 IN THE MATTER OF:

No. 14F-001-AAG

4 TOM HORNE, individually; Tom Horne for
5 Attorney General Committee (SOS Filer
6 2010 00003);
7 KATHLEEN WINN, individually;
8 Business Leaders for Arizona (SOS Filer
9 2010 00375).

CASE MANAGEMENT ORDER NO. 16
ORDER ON CROSS-EXAMINATION
OBJECTIONS AND REQUESTS FOR
SPECIFIC RULINGS

10 Pending before this Tribunal is Appellants' Cross-Examination Objections and
11 Requests for Specific Rulings. Appellants raised a number of issues related to the
12 cross-examination of Special Agent Brian Grehoski, his invocation of a *Touhy* letter,
13 and his testimony referencing hearsay.

14 Below are the specific rulings requested together with the analysis and
15 determinations of this Tribunal.

16 **1. Were Ms. Winn and Mr. Horne denied their due process rights to effective**
17 **cross-examination because Agent Grehoski presented critical facts through**
18 **verbal hearsay?**

19 **2. Were Ms. Winn and Mr. Horne denied their due process right to effective**
20 **cross-examination because Agent Grehoski testified about hearsay documents**
21 **such as telephone records, FBI summary reports, FBI 302 investigative reports,**
22 **and notes made by other FBI agents or investigators?**

23 Appellants alleged that the Yavapai County Attorney "presented its case through
24 hearsay, conjecture, speculation, and opinion of Agent Grehoski relying on a so-called
25 *Touhy* letter." Winn Memorandum p. 2 (footnote omitted).

26 Aside from the vague assertion that the reliability of the hearsay was not
27 satisfactorily established due to a lack of metadata,¹ Appellants did not provide any

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30 ¹ At hearing, Appellants mentioned an expert witness that they had standing by to testify as to the
necessity of metadata to properly evaluate electronic records and establish their reliability; however,
Appellants did not call the expert witness during the hearing.

1 authority to support the proposition that the admission of hearsay in an administrative
2 hearing, in and of itself, violates an individual's right to effective cross-examination.

3 A.R.S. § 41-1092.07(F)(1) provides:

4 A hearing may be conducted in an informal manner and without
5 adherence to the rules of evidence required in judicial proceedings.
6 Neither the manner of conducting the hearing nor the failure to adhere to
7 the rules of evidence required in judicial proceedings is grounds for
8 reversing any administrative decision or order if the evidence supporting
9 the decision or order is substantial, reliable and probative.

10 In an administrative proceeding, otherwise inadmissible evidence such as
11 hearsay may be considered and may be given probative weight. *Brown v. Ariz. Dep't of*
12 *Real Estate*, 181 Ariz. 320, 328, 890 P.2d 615, 623 (App. 1995) (citing *Begay v. Ariz.*
13 *Dep't of Economic Security*, 128 Ariz. 407, 409, 626 P.2d 137, 139 (App. 1981)). "In
14 some circumstances, hearsay may even be the sole support of an administrative
15 decision." *Id.* at 409-10, 626 P.2d at 139-40.

16 Because hearings conducted by the Office of Administrative Hearings are not
17 required to comply with the rules of evidence required in judicial proceedings, the
18 admission of hearsay during the hearing in this matter did not deny Appellants their due
19 process rights to effective cross-examination.

20 **3. Were Ms. Winn and Mr. Horne denied their due process right to effective**
21 **cross-examination because Agent Grehoski, based on his interpretation of the**
22 ***Touhy* letter, determined that a question was not relevant and therefore refused**
23 **to answer it.**

24 The *Touhy* letter is in reference to *United States ex rel. v. Ragen*, 340 U.S. 462,
25 71 S.Ct. 416, 95 L.Ed. 417 (1951), in which the Supreme Court ruled that an FBI agent
26 could not be held in contempt for refusing to obey a subpoena duces tecum when the
27 Attorney General, acting pursuant to valid federal regulations governing the release of
28 official documents, had ordered him to refuse to comply. Agent Grehoski indicated
29 numerous times throughout his testimony that he was unwilling or unable to answer a
30 specific question based on the limitations identified in a letter authored by Diana L.
Varela, Assistant U.S. Attorney. In the letter, Agent Grehoski was authorized "to testify

1 regarding the substantive facts and circumstances within his personal knowledge
2 relevant to the investigation as an agent investigating the above-referenced matter.”
3 Agent Grehoski was specifically prohibited from testifying “concerning any other matter,
4 reveal confidential sources, or methodologies, or reveal information that might
5 jeopardize pending investigations.”

6 Appellants argued that Agent Grehoski’s initial refusal to answer certain
7 questions on the basis of his interpretation of the *Touhy* letter prevented them from fully
8 cross-examining the witness.

9 Agent Grehoski was the first witness called at the hearing on February 10, 2014.
10 At the end of the day, Mr. Debus was asking Agent Grehoski questions on cross-
11 examination. On the morning of February 11, 2014, cross-examination continued.
12 Initially, both on February 10, 2014, and February 11, 2014, Agent Grehoski refused to
13 answer questions that he believed were beyond the scope of his authorization to testify
14 outlined in the *Touhy* letter. Agent Grehoski indicated numerous times he was only
15 authorized to address those issues related to the campaign finance question and would
16 not answer questions related to the hit and run incident and surveillance conducted by
17 the FBI.

18 However, during a break on the morning of February 11, 2014, while still on
19 cross-examination, Agent Grehoski consulted his attorney, who clarified the scope of
20 the *Touhy* letter. As Agent Grehoski explained, his authorization under the *Touhy* letter
21 was broader than he initially believed. At that time, Agent Grehoski stated he was
22 willing to answer questions on any topic included in the materials disclosed to the
23 Maricopa County Attorney’s Office earlier in the investigation, including the hit and run
24 incident and the surveillance conducted by the FBI.²

25 Upon Agent Grehoski’s statement that he was willing and able to address a
26 broader scope of topics than he initially believed, Mr. Debus stated that “of course,
27 [Agent Grehoski] had overnight to plan all this, and it’s a whole new revelation about
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30 ² The reply filed by Kathleen Winn and BLA erroneously asserted that when Agent Grehoski explained he
was willing to answer questions on a wider range of topics, Agent Grehoski had “already completed his
testimony” and that “[t]he hearing had moved on to other witnesses.” Reply at p. 2.

1 what he can talk about.” TR at 286:9-11. Mr. Debus requested that he be allowed to
2 recall Agent Grehoski the following day for additional cross-examination.

3 On redirect, Mr. Kreuzberg asked a question regarding a document Agent
4 Grehoski had previously been unwilling to acknowledge on cross-examination, much
5 less comment on the contents. At that time, Mr. Debus objected because Agent
6 Grehoski had been unwilling to answer questions regarding the document on cross-
7 examination. The Administrative Law Judge noted that, while Agent Grehoski first
8 refused to answer those questions, he had offered earlier in the day to answer a wider
9 range of questions. In response, Mr. Debus stated, “That isn’t the way the game is
10 played. It isn’t meaningful cross-examination if you give them overnight, give them a
11 chance to figure it all out, and then come back, and things that they refused to talk
12 about, now he wants to talk about and say it.” TR at 335:11-15.

13 Appellants cite a number of cases for the proposition that cross-examination is a
14 fundamental right that applies in administrative hearings and there was no dispute
15 among the parties that such is the case. However, Appellants did not cite any case for
16 the proposition that a party has a fundamental right to ask cross-examination questions
17 in a particular order and the failure to have those questions answered in a particular
18 order is a violation of due process.

19 In the end, Agent Grehoski indicated he would answer most, if not all, of the
20 questions posed by Appellants. Appellants’ failure to take advantage of that
21 opportunity does not equate to a denial of their due process right to effective cross-
22 examination.

23 **4. Were Ms. Winn and Mr. Horne denied their due process right to effective**
24 **cross-examination because Agent Grehoski refused to testify to parts of the FBI**
25 **investigation that were not given to the Yavapai County Attorney’s Office?**

26 During cross-examination, Agent Grehoski refused to confirm or deny the FBI
27 was in possession of any documents aside from the approximately 3,000 pages that
28 were turned over to the Maricopa County Attorney’s Office pursuant to the limitations of
29 the *Touhy* letter. TR 278:24-279:4; 279:25-280:10; 282:15-23. While Appellants made
30 vague allegations that this prevented them from effectively cross-examining Agent

1 Grehoski, no specific arguments were presented to demonstrate how the due process
rights of Ms. Winn and Mr. Horne were denied.

2 Appellants cite the case *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d
3 774 (9th Cir. 1994), for the proposition that “*Touhy* did not empower a federal agent to
4 usurp the power of the judicial officer.” Memorandum at p. 3. The court in *Exxon*
5 *Shipping Co.* declined to hold that federal courts could not compel federal officers to
6 give factual testimony and found that there was not an independent privilege to
7 withhold government information or shield federal employees from valid subpoenas.
8 *Exxon Shipping Co.*, 34 F.3d at 778, 780. However, the court also provided that
9 employing the balancing test authorized by the rules of discovery, courts should ensure
10 that the unique interests of the government are adequately considered. *Id.* at 780.

11 Agent Grehoski did not go so far as to say that the FBI investigation in this
12 matter was ongoing, but he did acknowledge that the case file was still open. TR
13 275:12-19. Agent Grehoski indicated that all materials in the FBI’s possession that
14 were relevant to the allegation of coordination were turned over to the Maricopa County
15 Attorney’s Office in connection with their investigation. Given the status of the FBI
16 investigation, the government’s interest in refusing to discuss what documents, if any,
17 exist in relation to that investigation is valid. This is especially true in light of Agent
18 Grehoski’s assertion that all relevant documents had been turned over and he was
19 willing to answer any questions regarding those documents as previously discussed.

20 Without more, Agent Grehoski’s refusal to testify to parts of the FBI investigation
21 that were not given to the Yavapai County Attorney’s Office, if such materials existed,
22 did not deny Ms. Winn and Mr. Horne their due process right to effective cross-
23 examination.

24 **5. Were Ms. Winn and Mr. Horne denied their due process right to effective**
25 **cross-examination because the Administrative Law Judge refused to strike the**
26 **testimony of Agent Grehoski?**
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28 As addressed above and in the Tribunal’s Order on the Motion to Strike
29 Testimony, striking the testimony of Agent Grehoski is not appropriate.

30 Done this day: April 14, 2014.

/s/ Tammy L. Eigenheer
Tammy L. Eigenheer
Administrative Law Judge

Copy e-mailed this 14th day of April, 2014 to all parties and interested persons,

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