STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION

RECEIVED 1995 FEB -1 PM 1:44 DIVISION OF ADMINISTRATIVE HEARINGS

DIVISION OF ELECTIONS,

Petitioner,

v.

PAT HORNE,

Respondent.
_____/

Rem Closed

CASE NO. FEC 92-~~006~~ 006
F.O # DOSFEC-95-186
94-803

FINAL ORDER

THIS CAUSE came on to be heard before the Florida Elections Commission at a regularly scheduled meeting held in Orlando, Florida on December 14, 1994, pursuant to a Recommended Order entered on September 27, 1994 by Hearing Officer Robert E. Meale of the Division of Administrative Hearings. Exceptions were filed to the recommendation of the Hearing Officer by the Petitioner acting through its staff, the Department of State, Division of Elections on October 21, 1994. Respondent had previously filed a memorandum in support of the Recommended Order dated October 13, 1994.

The Commission, having reviewed the exhibits and the transcript of the proceedings below as well as the Recommended Order, hereby makes the following rulings on the exceptions filed by Petitioner:

1. As to Exception No. 1, it is the opinion of the Commission that this exception is well taken. For purposes of Section 106.011(17), F.S., a political advertisement in general

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H.O. INITIALS_____

is considered to be a statement which "expressly advocates" the success or defeat of a candidate or an issue. The facts as found by the Hearing Officer clearly show that the "complimentary election edition" distributed to the public by Grass Roots of Southwest Florida, Inc. did in fact, advocate the defeat of certain sitting commissioners (see for example findings of fact 11-14).

The statements set forth above, as found by the Hearing Officer, meet the standard of "express advocacy" necessary, as a general matter, to constitute a political advertisement for purposes of Chapter 106 (see Federal Elections Commission v. Furgatch, 807 F.2d 857,864 (9th Cir. 1987) cert. den. 484 U.S. 850, (1987). In Furgatch, the Court, in addressing types of "advertisements" which would be considered as political advertisements for purposes of appropriate regulation in light of the First Amendment constraints stated:

> First, even if [the advertisement] is not presented in the clearest, most explicit language, the speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one possible meaning.
>
> Secondly, speech may only be termed "advocacy" if it presents a clear plea for action, and thus, speech that is merely informative is not covered by the [Federal Elections Campaign Act]. Finally, it must be clear what action is advocated. Speech can not be "express advocacy of the election, or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it advocates a vote for or against a candidate, or encourages the reader to take some other type of action.
>
> We emphasize that if any reasonable alternative reading of speech can be suggested, it can not be express advocacy subject to the acts disclosure requirements. This is necessary and sufficient to prevent a chill on certain forms of speech other

> than campaign advertising regulated by the act. At the same time, however, the court is not forced under this standard to ignore the plain meaning of campaign related speech in a search for certain fixed indicators of "express advocacy".

As noted above, and as found by the Hearing Officer, the matters contained in the "complimentary election edition" produced by Grass Roots did constitute express advocacy and thus, were and are campaign advertising regulated by Chapter 106 (The Florida equivalent of the Federal Elections Campaign Act).

The next issue which must be determined is whether the "complimentary election edition falls within one of the two exemptions to the definition of political advertisement as set forth in Section 106.011(17)(a) or (b), F.S.

First, it is clear that this is not a "newsletter" within the definition of such a term found in the exemption contained in Section 106.011(17)(a), F.S. It is beyond dispute that the materials distributed in the "complimentary election edition" went not only to the members of the Grass Roots organization and its subscribers, but to any and all individuals who wished to receive it. Thus, as a matter of law, it can not be a "newsletter" exempted from the provisions of Section 106.011(17), F.S.

The next issue is whether or not the "complimentary election edition" constituted "editorial endorsements by any newspaper, radio, television station or other recognized new medium" as defined in Section 106.011(17)(b), F.S.

Here, it is apparent that the complimentary edition can

not be considered as simply a newspaper endorsement. In fact, in a striking similarity to the facts underlying a decision of the United States Court of Appeals, First Circuit in Federal Elections Commission v. Massachusetts Citizens for Life, Inc., 769 F.2d 13 (1st Cir. 1985) at 769 F.2d 21-22. It is apparent that this "special edition" is virtually identical in its reason for existence as that discussed in the Massachusetts Citizens for Life case mentioned above. The Florida Elections Commission, as did the First Circuit Court of Appeals hereby holds that this "special edition" can not be considered as a normal function of a press entity, or a newspaper or other recognized news medium. It is apparent that the sole purpose of the complimentary edition was not to convey information regarding county politics, but was rather to defeat certain incumbent county officials. Thus, it does not fall within the exemption set forth in Section 106.011 (17)(b), F.S.

2. The Commission further finds that Exception No. 2 is well taken. While it respects the concerns mentioned by the Hearing Officer as regards the requirement of notice to be given to a respondent by a charging document, the Commission disagrees profoundly with the Hearing Officer's conclusions found at paragraphs 31-35 of the Recommended Order. There is no question that the parties at the hearing were well aware of the issues and that they were adequately tried before the Hearing Officer. It is further apparent that the Respondent was in no way embarrassed or impeded in her defense of the alleged violations. As was noted by the Petitioner in its exceptions Seminole County Board

of County Commissioners v. Long, 422 So.2d 938,940 (Fla. 5th DCA 1982) and numerous Florida decisions simply require that an administrative complaint or charging document be specific enough to inform the accused with reasonable certainty of the nature of the charge. Here, that was done and the case was tried and resolved on its merits.

The Commission therefore respectfully disagrees with the characterization of the charging document made by the Hearing Officer in paragraphs 31-35 of the Recommended Order, determines to treat those recommendations as dicta, which is not relevant or dispositive as to the matters presented during the hearing.

3. As to Exception No. 3, however, the Commission finds that this exception is not well taken. It is apparent, as was found by the Hearing Officer, that the documents formatted into the complimentary campaign edition, were in fact, prepared by an entity entitled "Grass Roots of Southwest Florida, Inc.", which is a corporation incorporated in the State of Florida. No evidence or material was submitted to the Hearing Officer or to the Commission, which would allow the Commission to disregard the corporate form of the entity which in fact prepared the documents at issue. As such, therefore, the charging document, which was filed against an individual, Patrica Ann Horne, (who is the owner, director and officer of Grass Roots) should have been more properly submitted either against the corporation or the corporation and the owner. Since this was not done, and no argument was made before the Hearing Officer as to any theory

to pierce the corporate veil, it is hereby found that the Respondent, Patrica Horne, was not personally responsible for the production of the complimentary campaign edition, thus can not be found to be in violation of Chapter 106. It is further noted, that, since the acts at issue here occurred in the summer of 1992, any charge against the corporation would now be time barred as provided in Section 106.28, F.S.

Wherefore, based upon the foregoing and with the aforementioned modifications, made as a result of the exceptions filed by Petitioner, it is the judgement of the Florida Elections Commission that, as amended, the Findings of Fact and Conclusions of Law and Recommendation of the Hearing Officer are accepted by the Florida Elections Commission and are adopted as the Final Order of the Commission.

DONE AND ORDERED this 27th day of January, 1995.

C. Alvarez

CARLOS ALVAREZ, CHAIRMAN
FLORIDA ELECTIONS COMMISSION