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FLORIDA ELECTIONS COMMISSION

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FLORIDA ELECTIONS COMMISSION,

Petitioner,

vs.

CASE NO. 98-1543

ARMOND PASQUALE,

Respondent,

F.O. No.: DOSFEC 99-045W

FLORIDA ELECTIONS COMMISSION,

Petitioner,

vs.

CASE NO. 98-1544

VERONICA PASQUALE,

Respondent.

FINAL ORDER

This cause came on to be heard before the Florida Elections Commission (FEC or Commission) at its meeting in Tallahassee, Florida on October 7, 1998 pursuant to a Recommended Order from Administrative Law Judge Stuart M. Lerner (the ALJ) dated August 25, 1998.

Preliminary Matters

1. Both parties (the staff of the FEC in its advocate's role and the Pasquales) have filed "Exceptions" to the Recommended Order. While the filings are labeled "Exceptions" they are actually in the nature of objections to the legal conclusions and reasoning of the ALJ-not to the

facts as found by the ALJ. As such, while the Commission has taken into consideration the arguments made by the parties in the entry of this Final Order, it is not required to make rulings on the "Exceptions" and declines to do so.

2. Except as set forth below, the FEC accepts the proposed findings of fact of the ALJ and, except to the extent discussed below, the proposed conclusions of law.

3. Finally, the Commission is concerned that the ALJ (See Recommended Order, Endnote 5) seems to rely upon a legal interpretation made in a **recommended order** in a previous FEC case as persuasive authority. It goes without saying that an ALJ's *legal* conclusions in a **recommended order** are not entitled to precedential effect unless they have been adopted by the agency in its **final order** and in the referenced case they were not.

4. An agency's interpretation of a statute over which it has been delegated regulatory authority is entitled to deference when that interpretation is found in a rule or in a final order, Secretary of State v. Milligan, 704 So.2d 152 (Fla 1st DCA 1997). An ALJ thus is bound to follow the agency's legal interpretations when rendering a recommended order so long as the courts have not rejected the agency's reasoning.¹

The Scope of the Statutory Exemptions for Editorial Endorsements

5. The ALJ has made numerous conclusions (COL 72-78) which address the scope of what may be considered as "editorial endorsements." Because the FEC disagrees with the analysis of the ALJ, it has set out its own legal analysis below.

¹Of course, this does not mean that an ALJ can not point out inconsistencies or possible errors in an agency's legal analysis. However, just as a lower court can not ignore the rulings of a higher tribunal, an ALJ should not disregard an agency's prior rulings in recommending a particular legal analysis to an agency.

6. Florida law (Section 106.011(3), F.S.) excludes from the definition of a "contribution" expressions of support which would be considered "editorial endorsements."² In addition, the definition of a "political advertisement" (Section 106.011(17), F.S.) exempts "[e]ditorial endorsements by any newspaper, radio or television station, or other recognized news medium" [hereinafter the "press"].³ The FEC staff has argued that the "editorial" exemption in the definition of a "contribution" should be read to be coextensive with the similar exemption in the definition of a "political advertisement" and be limited to editorial statements in "press" outlets. The staff argues that otherwise a candidate may collude with others to expend funds to produce public "editorial" endorsements which would not be considered as "contributions" to the candidate's campaign.

7. The ALJ, however, disagreed (COL 75-76) with the staff's argument and held that the differences in the wording of the exemptions evidenced the Legislature's intent to apply the definition of a "contribution" more narrowly than the definition of a "political advertisement" when "editorial" statements are involved. Thus virtually any statement of endorsement which represented a person's or entity's support of a candidate or issue would be an "editorial" and would not be considered a "contribution" even if accomplished in concert with the candidate and

²"This definition ["contribution"] shall not be construed to include editorial endorsements."

³What the "recognized news media" actually is may be somewhat amorphous and can not be pigeon holed. However, a fair reading of the statute would confine its terms to "those, including newspapers, television and radio, who "gather[] information" and turn it "into a distinct work, and distribute[] that work to an audience", National Sec. Archive v. Dep't of Defense, 880 F.2d 1381, 1386, 1387 (D.C. Cir. 1989) *cert. denied*, 494 U.S. 1029, 110 S.Ct. 1478, 108 L.Ed.2d 615 (1990) and, most importantly, are generally recognized by the public as so doing.

involving the expenditure of funds.⁴ Therefore the ALJ found (COL ¶78) that the “Publication’s”⁵ statements of opinion were “editorial endorsements,” were exempt from the definition of a “contribution” and thus were not required to be reported in Veronica Pasquale’s campaign reports.

8. It is true that the “editorial” exemption in the “contribution” definition is facially different than that contained in the definition of a “political advertisement.” It is clear, however, from the statutory context that the purpose of both “exceptions” is the same—to preclude the attribution of Chapter 106’s regulatory provisions to the “press.” Absent the exceptions all “press” endorsements which are paid expressions of support for a candidate would be “political advertisements” and the monies expended for them would be considered either as “independent expenditures” or “contributions.”⁶ This decision by the Legislature is logical and is

⁴It is uncertain as to what limitations, if any, the ALJ would put upon the term “editorial” endorsement for purposes of the Section 106.011(3), F. S., exemption. The Commission reads the ALJ’s analysis (COL 73) to mean that he would hold the exemption to be virtually coextensive with any public statement of opinion and that any funds spent in dissemination of the “endorsement” would not be considered “contributions” in any circumstances.

⁵In his Recommended Order the ALJ denoted the “newsletter” published by Mr. Carroll and which supported Veronica Pasquale as well as others as the “Publication.” For consistency’s sake the Commission will maintain this nomenclature.

⁶The exemption also is available to certain newsletters of certain organizations (Section 106.011(17)(a), F. S.). This provision dovetails with the exclusion of the funds spent on the printing or distribution of such newsletters from the definition of an “expenditure” (Section 106.011(4), F. S.) So long as they are not “contributions.” In addition, the exemption’s existence gives weight to the position discussed above (Note 3) that the Legislature intended the “recognized news media” exemption (Section 106.011(17)(a), F. S.) to only apply to newspapers and news magazines as well as television, radio and other electronic media outlets with a general circulation. If the “recognized news media” exemption was intended to have been read broadly to include **any** dissemination of facts or opinions then the “newsletter” exemption would be unnecessary.

constitutionally sound.

9. In most cases the “press” exception from the definition of “contribution” would not be needed to exclude the “press” from Chapter 106 strictures relating to “contributions.” An “editorial” endorsement made by the “press” is usually an “independent” statement of support which need not be reported as a “contribution” by a campaign. This is due to the fact that if its publication involved the expenditure of funds it would usually be an “independent expenditure.”

10. Without both of the exemptions, however, an “editorial” endorsement by the “press” which involved an expenditure of funds by an entity which was not “independent” of the candidate’s campaign (see Section 106.011(5), F. S.) would be considered as a reportable in-kind contribution to the campaign-and thus be limited by contribution caps-See Section 106.08, F.S.⁷ Moreover, even “independent” “press” statements of endorsement would be subject to reporting, disclaimer, and disclosure requirements.⁸ Such an application of the law would be a clear restriction upon Freedom of the Press.⁹

⁷Any such non “independent” distribution or transfer of anything of value for the purpose of “expressly advocating” the success or defeat of a candidate is a “contribution” to the candidate unless exempt from the definition thereof -See Florida Right to Life Inc. v. Crotty, Case No. 98-770CV19A, _ F. Supp. 2d _ (M. D. Fla. 1998).

⁸See Sections 106.071, 106.143, 106.144, F. S.

⁹Of course, any person or entity simply claiming to be a part of the “press” is subject to some scrutiny-at least to determine if the claim to be a part of the “press” is valid. Indeed, even a recognized part of the “press” may, within limits, be scrutinized if a legally cognizable complaint has been filed to determine if it is actually acting in its capacity as a news gathering and disseminating entity. It has been clearly recognized that, while the state must tread warily when it questions the bona fides of a purported news organization claiming this type of “press” exemption, it does have the right to inquire as to those bona fides, See Reader's Digest Ass'n, Inc. v. Federal Election Com'n, (D.C.N.Y. 1981), 509 F.Supp. 1210, Federal Election Commission v. Phillips Pub., Inc., 517 F.Supp. 1308, (D.C.D.C. 1981), and that various indices can be looked at

11. The Legislature, recognizing the difficulty of interfering with “press” freedoms, simply chose to exclude such non-”independent” expenditures from a constitutionally questionable application of legitimate contribution limitations. This type of discrimination between the “press” and “others” has been upheld as reaching a reasonable accommodation between First Amendment Speech and Press rights, Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 110 S.Ct. 1391, 1401-1402 (1990).¹⁰

12. To follow the reasoning of the ALJ could allow any paid non “independent” statement of opinion to be exempt from contribution limitations and could allow the exemption to “swallow” the statutory scheme. Thus the costs of producing the Publication would be considered to be a “contribution” to Veronica Pasquale’s campaign unless it was “independent” of the campaign or, even if not “independent,” it was actually a “editorial” endorsement by the “press.”

13. Of course, the Publication must be a part of the “press” in order to qualify for the exceptions. The FEC staff makes a compelling argument that the Publication was not a “recognized communications media” as defined in the statute and thus not entitled to the “press” exceptions at all. If the FEC staff is correct then the Pasquale campaign would have been required to report the Publication’s expenditures as “contributions” unless the expenditures would qualify as “independent expenditures” whether or not the Publication was part of the

to determine whether a statement has actually been put out by the “press,” See Federal Election Com'n v. Massachusetts Citizens for Life, Inc., 107 S.Ct. 616, 623, 479 U.S. 238 (1986).

¹⁰Such an application of the “editorial” exemptions also advances, as far as possible, the Legislature’s purpose to apply the contribution limitations broadly to all “persons.” as far as constitutionally permissible-See Sections 106.011(8), and 106.08(5), (7)-(8), F. S.

“press.” Thus an overview of the Publication and the Pasquales’ relationship to it, based upon the facts found by the ALJ, is appropriate.

Applying the Commission’s Analysis to the Findings of Fact of the ALJ

14. The Publication was created in early 1996 and was intended to provide an alternative source of news and opinion as to the goings-on at the local city government (FOF 14). The Publication was a “grass roots” creation of Mr. Carroll, with help from his wife and acquaintances. It included-as regular contributors-Veronica Pasquale and other members of the “Discussion Group”-an ad hoc political “club” that included Mr. Carroll, the Pasquales and other local politicians and interested persons (FOF 4-13, 16-17). The Publication’s positions on issues were consistent with the positions of the Discussion Group. (FOF 15). The Publication was Mr. Carroll’s creation, however, and was not controlled by the Discussion Group (FOF 18).

15. Nevertheless Mr. Carroll intentionally used the Discussion Group as “cover” for the fact that the Publication was actually his (FOF 19-24). Furthermore, the Pasquales were used as contact persons for the publication and were intimately involved in setting up a post office box to be used by those wishing to contact the Publication or the Discussion Group (FOF 25-31). Thus it is clear that, while not controlling the Publication, the Pasquales were significantly involved in its activities.

16. The Publication had 10 editions, the 5th and 6th of which were particularly concerned with the local city elections (FOF 14, 32-34, 36). The latter two issues cost some \$885 *in toto* to produce and copy-a sum that was apparently paid for by Mr. Carroll (FOF 37-38). In one of those editions (the 5th) articles by Veronica Pasquale appeared (FOF 35). In addition, Armond Pasquale was directly involved in distributing the Publication-including the editions

that endorsed and praised his wife's candidacy-copies of which the Pasquale campaign received gratis from the publisher (FOF 40). It was not until after the distribution of the 6th edition-but before the election-that Mr. Carroll admitted that he was the publisher of the Publication (FOF 42).

17. In short, the evidence that the Publication was a actual "press" organ as opposed to an adjunct to the Discussion Group is slim. While Mr. Carroll may have ultimately taken responsibility for the Publication, it is apparent that the Publication was, in all material aspects relating to candidate advocacy statements, the willingly captive voice of the Discussion Group and, therefore, that of Veronica Pasquale. Such a captive organ is not a "press" entity that can be entitled to spend funds expressly advocating the success of candidates without being required to report its expenditures and otherwise comply with Chapter 106, See Reader's Digest Ass'n, Inc. v. Federal Election Com'n, *supra*, at 509 F.Supp. 1215.

18. Thus the expenditures made by Mr. Carroll to put out the Publication were reportable and, if not "independent" were, at least in part, allocable as "in-kind" contributions to the Pasquale campaign. The ALJ found (FOF 39) that the expenditures were made "independently" of the Pasquales and any other person or group. This finding, couched as a factual finding, is however, actually a legal conclusion and, as such, is not entitled to deference by the FEC unless the evidentiary facts-set forth above-support the conclusion, Schrimsher v. School Board of Palm Beach County, 694 So. 2d 856, 860-862 (Fla. 3rd DCA 1997), Macpherson v. School Board of Monroe County, 505 So.2d 682, 683-684 (Fla. 3rd DCA 1987).

19. The definition of an "independent expenditure" is, in relevant part, as follows:

an expenditure by a person for the purpose of advocating the election or defeat of a candidate or the approval or rejection of an issue, which expenditure is not controlled by, coordinated with, or made upon consultation with, any candidate, political committee, or agent of such candidate or committee. An expenditure for such purpose by a person having a contract with the candidate, political committee, or agent of such candidate or committee in a given election period shall not be deemed an independent expenditure. (Section 106.011(5)(a), F. S.)

20. In this case it is apparent that the production and distribution of the Publication was at least coordinated with and done in consultation with the Pasquales. The evidence shows that not only did Veronica Pasquale actually write for the Publication but she and her husband provided logistical support for it. Most importantly, however, is the fact that Armond Pasquale delivered copies of the Publication to the populace which were provided gratis to the campaign- apparently for that very purpose. Under these circumstances it is hard to see how the Publication was "independent" of the Pasquale campaign.

21. Because the ALJ found no duty on the part of Armond Pasquale to report the value of the expenditures necessary to create the Publication's editions which were, as noted above, "in-kind contributions" to the Pasquale Campaign, he understandably did not address the question of "willfulness"-which is a required element of this type of violation of Chapter 106. Because the Commission has found that reporting was required, it must address this issue.

22. First, it must be noted that a determination of "willfulness" in the context of Chapter 106 is an ultimate legal conclusion, see *FEC v. Miller*, -----, *aff'd per curiam*, *Miller v. Florida Elections Com'n*, 678 So.2d 1293 (Fla. 2nd DCA 1996). The factors, now set out in statute (Section 106.37, F. S.), which are used to determine "willfulness" require the application of a special statutory standard contained in the law to the facts. The determination of "willfulness" is

thus within the realm of agency policy and therefore ultimately in the area of agency discretion and is not the subject for a factual finding by the ALJ.

23. The ALJ, however, did make factual findings and conclusions of law which lead the FEC to hold that the failure by Armond Pasquale to report the entire value (\$885) of the election issues of the Publication was "willful." The ALJ correctly found (COL 80-84) that Armond Pasquale's failure to report the value of the free copies donated to the Pasquale Campaign was a violation. The FEC also agrees with the ALJ's conclusions that Armond Pasquale was familiar with the reporting requirements of Chapter 106 and therefore knew that "in-kind contributions" must be reported.

24. In addition, based upon the ALJ's findings of fact, FEC finds that the Pasquales were intimately involved in supporting the production and distribution of the Publication and that Armond Pasquale was directly involved in distributing the issues of the Publication supporting his wife. Under the circumstances, Armond Pasquale clearly should have known that a non-independent expenditure to produce a political advertisement by persons who were not a part of the recognized news media must be reported as an "in-kind contribution." Failure to do so was "willful.

25. The Commission, however, is of the opinion that the fine already recommended to be imposed upon Armond Pasquale for failure to report the value of the free copies of the Publication is sufficient in light of the facts of this case.

Failure to Register as a Political Committee

26. The ALJ found (COL 87-89) that the Pasquales and others did not form a "political committee" when they came together in the Discussion Group. He also found that the Pasquales'

activities did not involve the Publication in the sense that the Pasquales were not involved in any “expenditures” in aid of the Publication. The ALJ found that all “expenditures” on behalf of the Publication were made by Mr. Carroll and not by the Pasquales. As such, he reasoned that the threshold standards for the creation of a political committee were not met.¹¹

27. It appears that such is not the case. Clearly the members of the Discussion Group, which included the Pasquales, were involved in supporting the Publication with more than moral fervor. First, the Publication itself reflected the positions of the Discussion Group (FOF 15-17). Next, the Pasquales (with other members of the Discussion Group) provided the funds to pay for the use of a post office box for the Publication. In fact, Veronica Pasquale actually applied for the box (FOF 26-31). Similarly, Armond Pasquale’s actions in distributing copies of the Publication (FOF 40) also had some value.

28. In short, while the Commission accepts the ALJ’s findings that the Publication was primarily the child of Mr. Carroll it cannot accept his finding (COL 88) that he was acting completely on his own. The facts show that the creation and dissemination of the Publication were, at least to the extent discussed above, part of a “combination” of two or more persons.

29. That being said, the remainder of the test for the creation of a political committee is easily met. The Publication (and those behind it) engaged in “express advocacy” in support of

¹¹The relevant standards in this case being that there must be at least two individuals, if they are natural persons, who combine to engage in “express advocacy” activities—see Florida Right to Life v. Crotty, *supra*, in support of candidates and who accept contributions or make expenditures during a calendar year in an aggregate amount in excess of \$500—although the possibility that such a limit will be reached satisfies this requirement; Falzone v. State, 500 So.2d 1337 (Fla. 1987).

candidates (FOF 36). It expended funds in excess of \$500 in support of its advocacy (FOF 37-38). Finally, the members of the Discussion Group-including the Pasquales-number more than one person. The persons (and others) discussed in COL 88 became a political committee when they acted in concert to support the creation and dissemination of the Publication. They violated Chapter 106 when they did not register their combination as required in Section 106.03, F. S.

30. Turning to the question as to whether Veronica Pasquale's actions as a part of the above discussed "political committee" make her responsible for the failure to register and whether her inaction can be deemed "willful" is a more difficult proposition. In order for Veronica Pasquale to be personally responsible for the "committee's" failure to register requires a showing that she was more than just a member of the group, Fulton v. Division of Elections, 689 So 2d 1180 (Fla. 2nd DCA 1997).

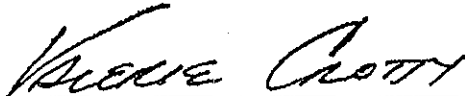
31. The evidence, as found by the ALJ, of Veronica Pasquale's activities in this regard is mixed. On the one hand, she wrote for the Publication (FOF 16, 35) and actually applied for the post office box which would be used by the Publication (FOF 30). On the other hand, the ALJ found that Mr. Carroll alone had general control over the Publication (FOF 14, 18) and the ALJ made no finding that Veronica Pasquale had any involvement in the distribution of the Publication. While a close case, the Commission determines that the evidence of her participation meets the standard necessary to hold Veronica Pasquale to be among those who were personally responsible for registering the "committee." In light of this conclusion the question of Veronica Pasquale's "willfulness" must be addressed

32. As discussed above, "willfulness" requires more than simple negligence-intentional misconduct or reckless disregard of the law must be shown. Here the evidence, as found by the

ALJ, leads the FEC to the conclusion that Veronica Pasquale's failure to assure the registration of the somewhat amorphous body that constituted the Discussion Group/Publication was more akin to negligence than intentional or reckless conduct. Under such circumstances no violation of Chapter 106 can be found.

BASED UPON THE FOREGOING, Armond Pasquale is found to be in violation of Sections 106.07(5) and 106.19(1)(b), F. S., and is FINED \$500. The remaining charges against the Respondents are hereby DISMISSED.

DONE AND ORDERED this 22nd day of February, 1999.


VALERIE M. CROTTY, CHAIR
FLORIDA ELECTIONS COMMISSION