STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION

FLORIDA ELECTIONS COMMISSION,

Petitioner,

vs.

Agency Case No.: 03-160
DOAH Case No.: 04-006
F.O. No.: DOSFEC 05-080 W

JAMES JENNINGS,

Respondent.
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FINAL ORDER

On November 17, 2004, and February 16, 2005, this cause came on to be heard before the Florida Elections Commission (FEC or Commission). At those meetings, the Commission reviewed the Recommended Order entered by Division of Administrative Hearings (DOAH) Administrative Law Judge (ALJ) Jeff B. Clark, on September 24, 2004. The Commission also considered the Exceptions to the Recommended Orders filed by the Petitioner and by the Respondent, as well as the Responses filed by the parties.[1]

APPEARANCES

For Petitioner: Eric Lipman, Esquire
Assistant General Counsel
Florida Elections Commission
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107 West Gaines Street
Tallahassee, FL 32399-1050

[1] The petitioner in FEC cases is the staff of the Commission acting as advocate for the FEC. In this case, the FEC has reviewed the entire record and heard arguments of counsel.

For Respondent: Mark Herron, Esquire
Messer, Caparello and Self, P. A.
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RULINGS ON THE PETITIONER'S EXCEPTIONS

A. Petitioner's Exception Number 1.

1. The Commission agrees with Petitioner's Exception #1.[2] The ALJ erred when he granted Respondent's Motion to Dismiss Counts 27-56 charged in the Order of Probable Cause. (Rec. Order at pp. 5-9) These counts charged Respondent with violating Section 106.021(3), Florida Statutes, for signing checks on his campaign account when he was not the campaign treasurer or deputy treasurer.

2. The Commission agrees with the parties and with the ALJ that the dispositive issue in determining whether to dismiss these counts is the effect of the amendment to Section 106.25, Florida Statutes, (hereinafter the "Amendment") contained in Section 21, Chapter 2004-252, Laws of Florida. The Amendment limits the Commission's investigative power to "those alleged

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[2] The Exception addresses a conclusion of law of the ALJ and implicates a provision of law over which the Commission has substantive jurisdiction. As such, the FEC possesses the authority to reject the ALJ's conclusion so long as the FEC states with particularity its reasons for determining that its interpretation of the law is "as or more reasonable" than t he ALJ's interpretation of the law. See § 120.57(1)(l), Fla. Stat.

violations specifically contained within the sworn complaint." The issue is whether the Amendment applies to pending cases.[3]

3. The Commission also agrees with the parties and with the ALJ that the resolution of this issue turns upon whether the Amendment is procedural or remedial or, alternatively, whether it is substantive. If the Amendment is procedural or remedial, then, in the absence of legislative intent to the contrary, it would apply to pending cases, and the ALJ's decision to dismiss Counts #27-56 was correct. If the Amendment changes substantive law, it would only apply to cases filed after July 1, 2004, and the ALJ's decision was incorrect.

4. Initially, nothing in the text of Chapter 2004-252 provides that the Amendment was intended to operate retrospectively. Moreover, as the Commission staff's Exception comprehensively makes clear, there is no legislative history which evidences any intent on the part of the Legislature that the provisions of Section 21, Chapter 2004-252, were intended to apply to pending cases.[4]

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[3] In this order the Commission does not address the impact of the portion of the 2004 amendment to § 106.25(2), Fla. Stat, that limits the filing of successive complaints by a single complainant against the same respondent.

[4] It is true that there is clear evidence, as is also discussed in the FEC staff's Exception, that the 2004 Legislature considered adopting an explicit provision which would have applied § 21 to pending cases and that the Legislature determined not to enact the provision. The FEC, however, bearing

5. There is also no evidence that the Legislature intended the provisions of Section 21, Chapter 2004-252, to be merely a clarification of the previously existing statute. In order for such a finding to be made there must be some evidence of legislative reaction to recent judicial or administrative pronouncements and a concomitant controversy over legislative intent, Lowry v. Parole & Probation Comm'n, 473 So.2d 1248, 1250 (Fla.1985). No evidence of such a legislative reaction has been brought to the Commission's attention. Furthermore, the Commission takes notice of the fact that it has consistently asserted its duty under the previous provisions of Section 106.25(2), Florida Statutes, to investigate any violation involving the same Respondent which came to the Commission's attention after a legally sufficient complaint was filed. See Final Judgment in Maloy v Florida Elections Commission, Case No. 03-CA-1689, (2^{d} Jud. Cir. 2004).

6. Therefore, no expression of legislative intent can be gleaned either from the text of Section 21, Chapter 2004-252 or relevant legislative history. As a result of the foregoing, the Commission's determination on this issue must be made utilizing

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in mind the general abjuration against basing a decision as to legislative intent upon legislative inaction, does not rely upon this fact. Fleeman v. Case, 342 So.2d 815, 817 (Fla. 1976), but see Bradley v. Tourist Attractions, Inc., 365 So.2d 436 (Fla. 3rd DCA 1978).

standard tools of statutory construction as announced by the courts.

7. It is apparent that the Amendment is not procedural in nature. Contrary to Respondent's assertions, the Amendment does not simply affect how the Commission staff is to go about proving its case against a Respondent. Instead the Amendment acts to limit the Commission's previously existing authority and duty to investigate a respondent for violations alleged in the sworn complaint. As such, the Amendment plainly affects substantive Commission authority, not just the manner by which the Commission resolves cases that are before it. See Zimmerman v. Florida Elections Commission 373 So.2d 58 (Fla. 1st DCA 1979)(amendment conferring authority upon Commission to adjudicate final determinations of violation of Chapter 106 was substantive and inapplicable to pending case),and McGann v. Florida Elections Com'n, 803 So.2d 763 (Fla. 1st DCA 2001)(amendment defining "willful" was substantive change to element of offense and would not be applied to pending case).[5]

8. The effect of the Amendment is also not remedial. Far from "conferring or changing" the remedies available to the Commission in its enforcement of the provisions of Chapter 106,

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[5] For an example of a clear procedural statute one need only look to § 15, Ch. 2004-252, L.O.F., which amended § 106.023, Fla. Stat., to provide that merely signing a candidate statement does not create a presumption that a violation is "willful."

Florida Statutes, the Amendment limits Commission jurisdiction and reduces its existing duty to utilize the remedies now present in Chapter 106, Florida Statutes.

9. To be sure, applying the provisions of the Amendment to pending cases would expand the scope of the new legislative direction. However, to do so by giving retroactive effect to a law that limits existing Commission duties and responsibilities is not appropriate in the absence of specific legislative intent. Arrow Air, Inc., v Walsh, 645 So.2d 422(Fla. 1994).[6]

10. Therefore, the Commission concludes that the Amendment is a substantive change to Florida's Election Code and may not be applied to pending cases.[7]

11. In the instant case, the effect of the Amendment to Section 106.25, Florida Statutes, is to limit the Commission's authority to investigate violations of The Florida Elections

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[6] Such a result is even less appropriate when the effect of the decision would, as here, result in a literal "windfall" to a Respondent whose case had already proceeded to hearing and was ready for disposition when the law was amended. Whatever the reason for the legislative decision to amend Chapter 106 to limit the FEC's investigative authority, there appears no policy reason to apply such a limitation to cases wherein which the investigation has already been completed, a charging document has issued, and the hearing has been held before the amendment's effective date.

[7] In making this decision the FEC rejects any argument that simply because it is a governmental agency that statutes addressing its substantive duties and jurisdiction are to be construed in any different manner than those applicable to other

Code that are not "specifically contained within the sworn complaint." As a result, the Amendment operates to limit the previously existing responsibility of the Commission to investigate "all violations of [Chapter 106] and chapter 104" without limitation once a sworn complaint has been received.

12. Given the foregoing, the ALJ erred in recommending dismissal of Counts 27-56 and these charges are hereby reinstated.

B. Petitioner's Exception Number 2.

13. The Commission agrees with Petitioner's Exception #2.[8] The ALJ erred when he found that Commission staff presented no evidence "as to the amount of the [24] unreported contributions."

14. While it is true that there was no testimony on the amount of the contributions, it is clear, as found by the ALJ (FOF ¶ 13, COL ¶¶ 32-33), that Respondent did not report 24 contributions on his original 2003 G3 report. (Jt. Ex. #6). It is also clear that each of these unreported contributions

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non-governmental entities, Metropolitan Dade County v. Chase Federal Housing Corp, 737 So.2d 494, 499(Fla. 1999).

[8] The Exception addresses a factual finding of the ALJ. As such, the FEC possess the authority to reject the ALJ's finding so long as it determines that the fact is supported by competent substantial evidence or that the proceedings upon which the finding was based did not comply with the essential requirements of law See § 120.57(1)(l). Fla. Stat.

were eventually reported on the two amended reports that Respondent filed after the election. (Jt. Exs. #7 & #8).[9]

15. While it may have been helpful if the Commission staff had elicited direct testimony from Respondent on the amount of each contribution, it is not difficult to ascertain the same facts by examining the amended reports and comparing them to the original report. As noted by the Commission staff, the Order of Probable Cause delineated the amount of each unreported contribution (Counts 3-26). Each contribution could then be compared to the contributions listed in the amended reports, (Jt. Exs. #7 & #8), which were not included in the original 2003 G3 report (Jt. Ex. #6).

16. Respondent's first amended report (Jt. Ex. #7) listed 17 of the 24 unreported contributions by continuing the numbering scheme from the original report (Jt. Ex. #6), as contributions numbered 26-42. The second amended report (Jt. Ex. #8) segregated the remaining 7 unreported contributions by placing the term "added" next to each of the newly reported contributions.[10] Thus, it is quite simple to identify the

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[9] All three of these exhibits were admitted into evidence without objection (Hearing Transcript 10, 14).

[10] It is true that the second amended report was confusing because it reordered the first amended report and listed all of the contributions in order by date contributed whereas the first amended report had simply appended the previously unreported contributions regardless of the date that the

contributions that were unreported on the original 2003 G3 report.

17. Finally, it is difficult to reconcile the ALJ's finding of fact that staff failed to meet its burden to present evidence on the amount of the 24 unreported contributions with his conclusion of law in ¶36 where he held the Commission staff had "proved [Counts 3-26] clearly and convincingly." Since each of those Counts contained the specific amount of each unreported contribution, it is apparent that ALJ's Conclusion of Law in ¶36 is inconsistent with his Finding of Fact in ¶13.

18. Given the foregoing, the ALJ's determination that the Commission staff did not prove the amounts of the unreported contributions is not supported by competent substantial evidence in the record.

C. Petitioner's Exception Number 3

19. The Commission agrees with Petitioner's Exception #3. The Commission agrees that the evidence does not support Finding of Fact in ¶16. Indeed, the ALJ's "finding" that it is unlikely that any voter was waiting to examine Respondent's

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contribution was received. Given the small number of contributions at issue, however, it is relatively simple to correlate the contributions on the second amended report with those that were initially reported on the first amended report.

CTRs on the day before the election is mere speculation, since neither party submitted any such evidence.

20. Whether any particular person is likely to have been misled by incorrect, false, or incomplete reports is simply not an element of whether a violation of the reporting requirements of Chapter 106, Florida Statutes, has occurred. The Legislature has determined that the timely filing of correct, accurate, and complete reports is necessary to advance the compelling state interest of preserving the integrity of Florida's electoral process and the public's confidence in elections.

21. Whether, in any particular campaign, a person is actually misled by inaccurate reports is unimportant in light of the overriding necessity to assure the public of the integrity of the campaign finance reporting system. Accordingly, if a CTR is incorrect, false, or incomplete, the Legislature does not require evidence of intent to deceive or other bad motive on the part of the candidate or committee required to file the report.

D. Petitioner's Exception Number 4

22. The Commission agrees with Petitioner's Exception #4. As set forth above, the ALJ erred in dismissing Counts 27-56. Moreover, since the evidence found by the ALJ (FOF ¶¶ 3-6, 17) shows that Respondent willfully violated the

provisions of Section 106.021(3), Florida Statutes, it is apparent that Counts 27-56 have also been proven.

23. The ALJ's finding (FOF ¶ 19) that Respondent did not understand the Florida's election law, even though he had signed the candidate statement required by Section 106.023(1), Florida Statutes, (FOF ¶ 4) does not obviate this result. Although the Legislature has made it clear that signing the candidate statement does not create a presumption that a violation of Chapter 106, Florida Statutes, is willful,[11] it is apparent that Respondent's conduct in signing the campaign checks was not only "inexplicable," according to the ALJ, but evidenced a reckless disregard for what the ALJ determined to be a "clear" requirement of Chapter 106, Florida Statutes. As such, the violations meet the standard of willfulness defined in Section 106.37, Florida Statutes.

E. Petitioner's Exception Number 5

24. The Commission accepts Petitioner's Exception #5. The Commission agrees with staff that the proposed penalties are in part too light in view of the violations charged and proven.

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[11] Effective July 1, 2004, § 106.023 was amended by adding subsection (2) that reads: "The execution and filing of the statement of candidate does not in and of itself create a presumption that any violation of the chapter or chapter 104 is a willful violation as defined in s. 106.37."

25. The Commission imposes fines that are within the range of penalties authorized by the statute after taking into consideration the factors set forth in Section 106.265(1), Florida Statutes. Because, the penalty in each case is based upon the facts of that particular case, the fines may vary.[12]

26. In determining the amount of the fines in the instant case the Commission has looked at the factors set forth in Section 106.265(1)(a)-(d), Florida Statutes, as required by the Legislature and the courts, see Diaz de la Portilla v Florida Elections Commission, 857 So. 2d 913(Fla. 3rd DCA 2003). After a review of these factors and comparing the proposed fine with those applied in similar cases, the Commission agrees that the ALJ's recommended fine of $100 per count for Counts 3-26 is not sufficient in light of the circumstances delineated by the staff in its Exception. The Commission determines that a fine of $200.00 per count is more

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[12] See FEC v McGann, FEC Case No. 96-225, DOAH Case No. 98-2845 ($1000 per count for 6 violations of § 106.19(1)(b)), FEC v Proctor, FEC Case No. 99-065, DOAH Case No. 00-4994 ($100 per count for 53 violations of § 106.19(1)(b)), FEC v Appleman, FEC Case Nos. 00-262 & 01-009, DOAH Case Nos. 01-3541 & 01-3542 ($1000 fine for one count of violating § 106.19(1)(c)), FEC v Hutcheson, FEC Case No. 01-170, DOAH Case No. 01-4936 ($1000 per count for 5 violations of § 106.19(1)(d), plus 3 times amount involved in the illegal act), and FEC v. McCarty and Committee to Take Back Our Judiciary, FEC Case No. 01-195, DOAH Case No. 02-3613 & 02-4672 ($1000 per count for 9 violations of § 106.19(1)(a)).

appropriate and comports more closely with previous Commission actions.

27. Moreover, since the ALJ erroneously dismissed Counts 27-56 as discussed above, obviously, he made no recommendation on the penalty for these violations. Because the Commission has determined, as did the ALJ, that the facts support a finding that Respondent violated the provisions of Section 106.021(3), Florida Statutes, on 30 occasions, it is appropriate to fine Respondent for these violations as well. A fine of $100.00 per count adequately addresses the violations.

28. The Commission concurs with the remaining penalty recommendations of the ALJ.

RULINGS ON THE Respondent's EXCEPTIONS

A. Respondent's Exception Number 1.

29. The Commission rejects Respondent's Exception #1. Respondent has filed an exception to Finding of Fact in ¶ 22, in which the ALJ found Respondent's current annual income to be $51,279. Respondent does not argue that this finding is unsupported by competent substantial evidence, but rather that the information is now out of date. Respondent argues that his financial condition has materially worsened since the DOAH hearing was held because of the 2004 hurricanes that hit Florida. As a result, Respondent requests that the Commission remanded the case to DOAH for the purpose of updating

Respondent's financial status and reconsidering the fine under the provisions of Section 106.265(1)(c), Florida Statutes.

30. The Commission declines to adopt Respondent's invitation. While agencies have some limited authority to remand a recommended order to an ALJ for clarification or modification, the courts have held that this authority is limited and should be used sparingly and only in unusual circumstances in order to remove possible inequities and prevent mistakes that might otherwise require judicial intervention, Grier v. State, Agency for Health Care Admin., Bd. of Psychology, 704 So.2d 1072(Fla. 1st DCA 1997), Department of Professional Regulation v. Wise, 575 So.2d 713(Fla. 1st DCA 1991) (Ervin, J. concurring opinion). The circumstances surrounding the instant case do not rise to this level.

31. If the Exception is viewed as a request that the Commission consider evidence that was not presented at the DOAH hearing, the Commission is also constrained to deny that request. Generally, it is improper for the Commission or any administrative agency to consider matters outside the record of the hearing when it enters its final order and imposes a penalty, Hodge v Department of Professional Regulation, 432 So.2d 117(Fla. 5th DCA 1983), Ong v Department of Professional Regulation, 565 So.2d 1384(Fla. 5th DCA 1990).

32. Only when a party proffers specific, "newly discovered" evidence under oath that would avoid a palpable injustice could the Commission even consider accepting supplementary material during its penalty deliberations that was not a part of the DOAH record. Mazurek v. Department of Professional Regulation, Board of Real Estate, 711 So. 2d 199(Fla. 5th DCA 1998). Here Respondent's Exception makes a general allegation that damages from Hurricane Charley during the 2004 hurricane season, which occurred after the DOAH hearing, "impacted Respondent's financial resources." There was no factual information, sworn or unsworn, appended to the Exception that shows the scope, extent, or materiality of the effect of Hurricane Charley on Respondent's financial resources. As a result, the Commission has no basis for permitting Respondent to supplement the record.

CONCLUSION AND PENALTY

WHEREFORE the Commission accepts the ALJ's Recommended Findings of Fact and Recommended Conclusions of Law, as modified by the rulings on the parties' exceptions set out above. The Commission finds that Respondent James Jennings has violated the following provisions of Chapter 106, Florida Statutes, and imposes the following fines:

A. Respondent violated Section 106.07(5), Florida Statutes, on two occasions (Counts 1 & 2). Respondent is

fined $1000 for violating Count 1 and $500.00 for violating Count 2 for a total of $1500.

B. Respondent violated Section 106.19(1)(b), Florida Statutes, on 24 occasions (Counts 3-26). Respondent is fined $200 per count for a total of $4800.

C. Respondent violated Section 106.021(3), Florida Statutes, Florida Statutes, on 30 occasions (Counts 27-56). Respondent is fined $100 per count for a total of $ 3000. Therefore it is

ORDERED that the Respondent shall remit a civil penalty in the amount of $9300. The civil penalty shall be paid to the Florida Elections Commission, the Collins Building, Suite 224, 107 W. Gaines Street, Tallahassee, Florida 32399-0250, within 30 days of the date this Final Order is received by the Respondent.

DONE AND ENTERED by the Florida Elections Commission and filed with the Clerk of the Commission in Tallahassee, Florida, this 7th day of March, 2005.

Chance Irvine

Chance Irvine, Chair
Florida Elections Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to counsel for Respondent, Mark Herron, Messer, Caparello and Self, P.A., Post Office Box 1876, Tallahassee, Florida 32302-1876 and Eric Lipman, Assistant General Counsel, 107 W. Gaines Street, Collins Building, Suite 224, Tallahassee, Florida 32399-0250 this 7th day of March, 2005.

Patsy Rushing
Commission Clerk
107 W. Gaines Street,
Collins Building, Suite 224,
Tallahassee, Florida, 32399-1050.

Copies also furnished to:

Theresa Marie Gargano, Complainant
Supervisor of Elections, Lee County

NOTICE OF RIGHT TO APPEAL

Pursuant to Section 120.68, Florida Statutes, the Respondent may appeal the Commission's Final Order to the appropriate district court of appeal by filing a notice of appeal both with the Clerk of the Florida Elections Commission and the Clerk of the district court of appeal. The notice must be filed within 30 days of the date this Final Order was filed and must be accompanied by the appropriate filing fee.