STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION

FLORIDA ELECTIONS COMMISSION,[1]

Petitioner,

vs.

MARY McCARTY AND THE COMMITTEE TO TAKE BACK OUR JUDICIARY.

Respondents.

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Agency Case No.: 01-195
DOAH Case No.: 02-3613 & 02-4672
F.O. No.: DOSFEC 03-219

FINAL ORDER

On May 22 and August 13, 2003, 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 Administrative Law Judge (ALJ), Harry L. Hooper, on April 21, 2003, and addressed the Exceptions to the Recommended Order filed by the staff of the Commission and by Mary McCarty and the Committee to Take Back Our Judiciary, (McCarty and Committee) as well as the responses to the exception filed by the parties.[2]

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[1] The ALJ in his Recommended Order aligned the Commission as Respondent and Mary McCarty and the Committee to Take Back Our Judiciary as Petitioners. Since the FEC is the charging party and bears the burden of proof, it appears more appropriate to reverse this alignment.

[2] The Commission has reviewed the entire record and heard arguments of counsel.

APPEARANCES

For Petitioner:

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For Respondent:

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RULINGS ON PETITIONER'S EXCEPTIONS

Petitioner's Exception Number 1

1. The Commission agrees with Petitioner's Exception #1. The ALJ erroneously ruled (COL ¶57) that the burden of proof in Commission cases, brought under the willful standard in Chapter 106, Florida Statutes, requires clear and convincing evidence. As the Commission has ruled on numerous occasions, administrative enforcement actions involving Chapter 106, Florida Statutes, are "remedial" in nature and thus are subject to the lesser preponderance of the evidence standard. See FEC v. Hutcheson, Case No.: 01-170; FEC v. Schwartz, Case No.: 01-085; FEC v. Appleman, Case Nos.: 00-262 & 01-009; FEC v. Schreiber, Case No.: FEC 00-218; FEC v. Diaz de la Portilla, Case No.: FEC 00-006; FEC v. Proctor, Case No.: FEC 99-065; FEC v. Harris, Case No.: 98-087; FEC v. Morroni, Case No.: FEC 97-060, FEC v. Boczar, Case No.: FEC 95-053, Division of Elections v. Diaz de la Portilla, Case No.: FEC 93-045.

2. The Commission takes this position because the legislative purpose behind the regulations contained in Chapter 106, Florida Statutes, is to preserve the electoral system from corruption and the appearance of corruption, as opposed to merely punishing wrongdoers. Moreover, since the Commission is the agency with substantive jurisdiction over proceedings to enforce Chapter 106, Florida Statutes, it is clear, unless and until judicially determined otherwise, that the Division of Administrative Hearings must defer to the Commission's position on this question of law. See Purvis v. Marion County School Bd., 766 So.2d 492, 498 (Fla. 5th DCA 2000). However, it is also clear, that the evidence of Respondents' violations meets the clear and convincing standard.

Petitioner's Exception Number 2

3. The Commission agrees with Petitioner's Exception #2. The ALJ's conclusion (COL ¶68) that a political committee cannot violate Section 106.19, Florida Statutes, is belied by the text of the statute. The introduction to the statute provides that all of the following may be guilty of violating Section 106.19:

> (1) Any candidate; campaign manager, campaign treasurer, or deputy treasurer of any candidate; committee chair, vice chair, campaign treasurer, deputy treasurer, or other officer of any political committee; agent or person acting on behalf of any candidate or political committee; or other person ...: (Emphasis supplied)

4. Section 106.011(8), Florida Statutes, defines a

"person" to include "a political party, political committee, or committee of continuous existence." (Emphasis supplied) Only if the context clearly indicates otherwise are the definitions in Section 106.011, Florida Statutes, not to be utilized.[3]

5. There is no reason to deviate from the statutory definitions when construing Section 106.19, Florida Statutes. A political committee can violate all the provisions listed in Section 106.19. In fact, Section 106.19(1)(d) specifically references Section 106.11(4), Florida Statutes (2002), a provision of Chapter 106, Florida Statutes, that directly and expressly applies to political committees.[4] Therefore, it is plain that a "political committee" can violate Section 106.19 and that the ALJ's conclusion to the contrary is in error.

Petitioner's Exception Number 3

6. The Commission agrees with Petitioner's Exception #3. As discussed above under Exception #2, the ALJ's conclusion (COL

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[3] The introductory language to §106.011, Fla. Stat., reads as follows: "As used in this chapter, the following terms have the following meanings unless the context clearly indicates otherwise:"

[4] §106.11(4), Fla. Stat. (2002), reads as follows:

> No ... political committee ... shall authorize any expenses, ... unless there are sufficient funds on deposit in the primary depository account of ... political committee to pay the full amount of the authorized expense, to honor all other checks drawn on such account, which checks are outstanding, and to meet all expenses previously authorized but not yet paid.

¶64) that a political committee cannot violate Section 106.11(3), Florida Statutes (2001), is in error.[5] A political committee is covered by the express terms of the statute and can be held liable for the acts of officers committed on behalf of the committee. The parties do not dispute this fact. Thus, while the Commission accepts the ALJ's ultimate conclusion (COL ¶65) that Ms. McCarty did not violate Section 106.11(3), it finds that the Committee did.

Petitioner's Exception Number 4

7. The Commission agrees with Petitioner's Exception #4. The ALJ, on numerous occasions (COL ¶¶44, 47, 60, 65, 72, 76, 80), concluded that even when staff proved that Ms. McCarty or the Committee violated the election laws, the decision of the U.S. District Court in Florida Right to Life v. Mortham, 1999 WL 33204523 (M.D. Fla. 1999), *affirmed as* Florida Right to Life v Lamar, 238 F.3d 1288 (11th Cir. 2001), precluded him from holding either culpable. The ALJ found that because the court held that the definition of "political committee" in Section 106.011(1), Florida Statutes (1999), was unconstitutionally overbroad, neither the Committee nor Ms. McCarty, as its chair, were subject to the regulation and reporting requirements of Chapter 106, Florida Statutes, even though the Committee voluntarily

[5] In 2002, a new subsection (2) was added to §106.11, Fla. Stat., and §106.11(3) was renumbered as §106.11(4).

registered with the Division of Elections.

8. The ALJ's opinion appears to have been based upon two faulty premises. First, the ALJ may have assumed that the injunction entered by the U.S. District Court in 1999 was still in place when he entered his Recommended Order. In fact, the injunction was dissolved on March 5, 2003.[6]

9. Second, the ALJ failed to recognize that when a federal court determines that a statute is unconstitutionally overbroad, a state court, and by necessary extension a state quasi-judicial body such as the Commission, may impose a narrowing construction upon the statute in a proceeding held after the federal determination. State v. Saunders, 339 So.2d 641 (Fla. 1976). In this case, the Commission is presented with just such an opportunity.[7]

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[6] See Order dated March 5, 2003.

[7] The procedural history of the Florida Right to Life case exhibits precisely when a federal/state dichotomy can arise. In that case, the plaintiffs brought a 42 U.S.C. § 1983 claiming a fear of prosecution under the provisions of Chapter 106 using the definition of a political committee. There was no proceeding pending before a state court or the FEC in which the statute could be construed to address the constitutional concerns of the plaintiffs. Moreover, no state court or quasi-judicial body had yet rendered a decision directly addressing the type of challenge brought by the Florida Right to Life plaintiffs.

The federal courts, limited by concerns of federalism, were precluded from formulating a narrowing construction of the definition of political committee unless such a construction was "readily susceptible" from the face of the law. The federal district court found that there was no readily susceptible

10. Needless to say, neither a state court nor a quasi-judicial agency can rewrite a statute to save it. Certain rules of statutory construction must be obeyed. Fortunately, the decision of the Florida Supreme Court in Doe v. Mortham, 708 So.2d 929 (Fla. 1998), has provided timely guidance of how a statute can be saved from being found unconstitutionally overbroad.

11. In Doe, the Court was faced with a remarkably similar challenge to the one advanced in Florida Right to Life. In both cases, plaintiff's asserted that a provision of the Florida Election Code, if read broadly, would regulate "issue advocacy." Such a result would violate the First Amendment, since the U. S. Constitution has been construed to permit only regulation of "express advocacy." The Florida Supreme Court simply read the provision to encompass only matters involving express advocacy, thus saving the statute.[8]

12. Section 106.011(1), Florida Statutes (1999), lends itself to the same narrowing construction. The section provided

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narrowing construction. At the same time, the federal district court was unable to seek a state court interpretation of the statute because such a mechanism is not available to federal district courts in Florida. Unfortunately, the federal appellate court, which is authorized by law to seek such an interpretation, declined to exercise its discretion, although urged to do so by both parties.

[8] Doe, *supra*, at 932.

that a political committee existed, *inter alia*, whenever persons combined to form a group whose "primary or incidental purpose was to support or oppose any candidate, issue, or political party, which accepts contributions or makes expenditures during a calendar year in an aggregate amount in excess of $500."

13. The federal district court read the term "incidental" to include groups engaged in purely issue advocacy. Because it subjected pure issue advocacy groups to the registration and reporting requirements of Chapter 106, Florida Statues, thereby chilling their right to free speech, the court found the definition of political committee facially overbroad.[9]

14. However, the word "incidental" refers to the purpose of the group. The trigger that subjects a group's purpose to regulation is the money or anything of value raised or spent by the group to "support or oppose any candidate, issue, or political party." Only if the group raised or spent more than $500 on express advocacy activities was it subject to regulation. If the trigger was so limited, then the definition would only include groups that engage in some express advocacy.[10]

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[9] The federal district court primarily relied upon North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999) for its conclusion.

[10] The Florida Supreme Court has strongly implied that it would construe the term "incidental" in the definition of "political committee" to relate to contributions and expenditures not speech. Richman v. Shevin, 354 So. 2d 1200, 1203 (Fla. 1977),

15. Accordingly, the Commission construes Section 106.011(1), Florida Statutes (1999), to apply only to groups that raise or spend in excess of $500 for the purpose of expressly advocating the election or defeat of a candidate or issue. Given such a construction, the statute is not facially overbroad and is enforceable.[11]

16. Although the statute is enforceable, the Commission must still determine whether its provisions can actually be applied to the pending case without violating constitutional due process. Only if Ms. McCarty and the Committee had fair warning that their conduct would be subject to Chapter 106, Florida Statutes, can the law be applied to them. Osborne v. Ohio, 110 S. Ct. 1691, 1700-02, 495 U.S. 103 (1990).

17. In this case, there is no question that due process concerns have been satisfied. First, the ALJ found (FOF ¶19),

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cert. den., 99 S. Ct. 348, 439 U.S. 953, 58 L. Ed. 2d 343 (1978). A similar analysis of what activities constitute the "purpose" of a group that would subject it to regulation as a political committee has also been utilized in construing the Federal Elections Campaign Act, Akins v. Federal Election Com'n, 101 F.3d 731 (D.C. Cir. 1996), *affirmed in part and vacated on other grounds*, FEC v. Akins, 524 U.S. 11 (1998).

[11] Striking the word "incidentally" could also narrow the definition of political committee. Without the word, the definition would be virtually a mirror image of the definition upheld in Buckley v Valeo, 424 U.S. 1(1976). However, because the Commission is a quasi-judicial body, it cannot excise portions of a statute in order to save its constitutional validity. A court, however, could perform such an act, as the

that the Committee actually registered as a political committee and attempted to comply with the provisions of Chapter 106, Florida Statutes. Second, the ALJ found (FOF ¶21) that Ms. McCarty and the Committee actually engaged in raising and spending funds for express advocacy activities. Therefore, both Ms. McCarty and the Committee clearly understood that they were subject to the regulation and reporting requirements of Chapter 106, Florida Statutes, applicable to political committees.

18. Finally, the Commission rejects the argument made by Ms. McCarty and the Committee that the Commission does not have the substantive jurisdiction to review the ALJ's legal conclusion that the Florida Right to Life decision precludes finding a violation. The ALJ's conclusion goes directly to the Commission's authority to proceed in this matter. It is plainly within an agency's substantive jurisdiction to interpret a statute that the Legislature charged it with administering.

19. Therefore, to the extent that the ALJ determined that Ms. McCarty and the Committee could not be prosecuted for violating the provisions of Chapter 106, Florida Statutes, because of the Florida Right to Life decision, his conclusions are rejected.

Petitioner's Exception Number 5

Florida Supreme Court did in Doe, *supra*, 708 So.2d at 934.

20. The Commission agrees with Petitioner's Exception #5. The Commission has consistently held that violations of Section 106.19, Florida Statutes, can be proven by showing that a party acted "willfully." In FEC v. Proctor, the Commission included the following language in its Final Order:

> However, the Commission would also point out that the "knowing and willful" standard articulated in Section 106.19, Florida Statutes, is a necessary prerequisite to the finding of a criminal violation of the law. However, when the Commission exercises its jurisdiction over Section 106.19, Florida Statues, the standard is that of "willfulness" as provided in Section 106.25(3), Florida Statutes. The Commission has long held this position, see Florida Police Benev. Association Political Action Committee v. Florida Elections Com'n, 430 So.2d 483 (Fla. 1st DCA 1983), Pasquale v. Florida Elections Com'n, 759 So.2d 23(Fla. 4th DCA 2000), McGann v. Florida Elections Com'n, 803 So.2d 763, (Fla. 1st DCA 2001). Of course, as provided in Section 106.37, Florida Statutes, "willfulness" can be proven by a showing of "reckless disregard."

FEC v. Proctor, Final Order, at p. 4.

Therefore, in this case, the Commission rejects the ALJ's conclusions (COL ¶¶70-72) to the extent that they are inconsistent with the Commission's position expressed in Proctor.

Petitioner's Exception Number 6

21. The Commission accepts Petitioner's Exception #6 in part and rejects it in part. The ALJ erred in concluding that the facts did not support a violation of Section 106.19(1)(a), Florida Statutes, by the Committee or Ms. McCarty. However, the ALJ was correct in concluding that Ms. McCarty could not have violated Section 106.19(1)(a), Florida Statutes, without evidence

that she actually accepted, or was aware that another individual accepted, excessive contributions on behalf of the committee.

22. The ALJ concluded (COL ¶¶70-71) that Ms. McCarty was not aware of the excessive contributions received by the Committee between the date the fund raising letter was disseminated and the date she received the Committee's CTR-Q1 report to sign. By the time she became aware of the excessive contributions, they had already been returned.[12] The ALJ found (FOF ¶33) that Ms. McCarty did not "personally receive or have any contact with any of the contributions remitted to The Committee [as a result of the fund raising letter]."

23. The ALJ made the same finding regarding Ms. McCarty's acceptance of the $150,000, which was contributed to the Committee as an in-kind contribution (FOF ¶¶25-26) to pay for the fund raising letter. However, in this case, the ALJ erred in concluding that the facts did not support a finding that Ms. McCarty violated Section 106.19(1)(a), Florida Statutes.

24. The ALJ specifically found that Ms. McCarty helped draft the fund raising letter (FOF ¶7), approved the use of her

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[12] The Commission agrees with the Staff's argument that the return of the excessive contributions does not obviate an otherwise proven violation. Further, the Commission rejects the ALJ's analysis that the return of illegal contributions precludes finding a "willful" violation. For the reasons discussed In Re Diaz de la Portilla, Case No.: FEC 00-006, and the other cases cited in the Staff's Exception, returning the funds goes to mitigation of penalty not to the violation itself.

name on the letter (FOF ¶8), approved the language of the letter prior to mailing (FOF ¶27), and was aware that the letter was being mailed (FOF ¶27). It can be reasonably inferred from these facts that Ms. McCarty was aware that a large expenditure of funds was contributed to the Committee's in order to send the letter. Therefore, it is clear that MS. McCarty was intimately involved in the acceptance of the contribution by the Committee.

25. As the court held in Fulton v. Division of Elections, 689 So.2d 1180 (Fla. 2nd DCA 1997), Ms. McCarty's liability for acts of the Committee under Section 106.19, Florida Statutes, requires that she participate in or agree to the illegal acts. When the evidence shows such an involvement, she can be held responsible for violating Section 106.19(1)(a), Florida Statues. With regards to the $150,000 contribution, the evidence found by the ALJ meets this standard. With regards to the other eight excessive contributions, it does not.

26. The Committee, however, is responsible for accepting all nine excessive contributions; the $150,000 in-kind contribution for the fundraising letter and the eight excessive contributions received after the fund raising letter was mailed. It is self evident that the Committee accepted the excessive contributions, because the funds were either deposited in its account or were reflected as an "in-kind" contribution on its campaign report. Having accepted the excessive contributions,

the Committee violated Section 106.19(1)(a), Florida Statutes, on nine separate occasions.

Petitioner's Exception Number 7

27. The Commission rejects Petitioner's Exception #7. As the ALJ noted (COL ¶76), the $150,000.00 contribution was reported, albeit "in such an ambiguous manner, that it cannot be determined from the entry whether an in kind contribution was received, or whether a loan was extended." While this is incorrect, it was not a violation of failing to report a contribution.

RULINGS ON RESPONDENT'S EXCEPTIONS

28. The Commission accepts Respondent's Exception #1, without objection, and finds that FOF ¶2 is amended as requested.

29. The Commission accepts Respondent's Exception #2, without objection, and finds that FOF ¶6 is amended as requested.

30. The Commission rejects Respondent's Exception #3 and finds that the ALJ's findings in FOF ¶8 are supported by competent, substantial evidence.

31. The Commission accepts Respondent's Exception #4, and finds that FOF ¶9 is amended as requested.

32. The Commission rejects Respondent's Exception #5 and finds that the ALJ's findings in FOF ¶27 are supported by competent, substantial evidence.

33. The Commission rejects Respondent's Exception #6. The

format of the statement of findings and the order of probable cause used in this case are the same as were used in the Proctor case. The Commission ruled in the Proctor case that the format of these documents comport with the strictures of Section 106.265, Florida Statutes:

> As found by the ALJ (COL ¶¶45-46), the charging document specifically noted that Proctor had violated Chapter 106 on certain specific occasions. This type of pleading, while not identical to that recommended by the court in McGann [v. Florida Elections Com'n, 803 So. 2d 763, (Fla. 1st DCA 2001)], is plainly sufficient to delineate the number of "counts" charged and thus the amount of the fine to which Proctor might be subject.

FEC v. Proctor, Final Order, at p. 5.

34. The Commission rejects Respondent's Exception #7. The ALJ correctly found that Ms. McCarty willfully violated Section 106.07(5), Florida Statutes, although he erroneously determined that Florida Right to Life v. Mortham barred the finding, (see discussion as to the Petitioner's Exception #4 *infra*).[13]

35. The Commission rejects Respondent's Exception #8. The Exception addresses an evidentiary ruling by the ALJ. The FEC is not empowered to substitute its opinion on such questions of

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[13] The Commission notes that Respondent's citation to the Recommended Order in FEC v Katharine Harris, FEC 98-087, is inappropriate. In its Final Order in the Harris case, the Commission rejected the ALJ's recommended interpretation of "willfulness" cited by McCarty and the Committee.

law outside of its substantive jurisdiction, Barfield v. Department of Health, 805 So.2d 1008 (Fla. 1st DCA 2001).

CONCLUSION

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

A. Respondent violated Section 106.07(5), Florida Statutes, on one occasions. Respondent is fined $1,000.

B. Respondent violated Section 106.19(1)(a), Florida Statutes, on one occasions. Respondent is fined $1,000.

The Commission also finds that Respondent the Committee to Take Back the Judiciary violated the following provisions of Chapter 106, Florida Statutes, and imposes the following fines:

A. Respondent violated Section 106.07(5), Florida Statutes, on one occasions. Respondent is fined $1,000.

B. Respondent violated Section 106.11(3), Florida Statutes, on one occasions. Respondent is fined $1,000.

C. Respondent violated Section 106.19(1)(a), Florida Statutes, on nine occasions. Respondent is fined $9,000.

Therefore, it is

ORDERED that Respondent Mary McCarty shall remit a civil

penalty in the amount of $2,000 and the Respondent the Committee to Take Back Our Judiciary shall remit a civil penalty in the amount of $11,000. 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 22nd day of August 2002.

Chance Irvine

Chance Irvine, Chairman
Florida Elections Commission

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Mark Herron, Esquire, Messer, Caparello & Self, P.A., Post Office Box 1876, Tallahassee, Florida 32302-1876 and to Eric Lipman, Assistant General Counsel, 107 W. Gaines Street, Collins Building, Suite 224, Tallahassee, Florida 32399-0250 by hand delivery this 22nd day of August 2003.

Patsy Rushing

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

Copies also furnished to:

Barbara M. Linthicum, Executive Director
Eric Lipman, Assistant General Counsel
John Rimes, Attorney for Commission
Mark Herron, Attorney for Respondents
Supervisor of Elections, Palm Beach County, Filing Officer

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.