STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION

FLORIDA ELECTIONS COMMISSION,
Petitioner,

vs.

DOAH Case No.: 98-2845
FEC Case No.: 96-225
F. O. No. DOSFEC 00-220W

ROBERT C. McGANN,
Respondent.
_____/

FINAL ORDER

On February 2, May 4, and July 27, 2000 this cause came on to be heard before the Florida Elections Commission (FEC or Commission). At those meetings the FEC reviewed the Recommended Order entered by ALJ Robert Meale on July 14, 1999 and addressed the Exceptions to that Order filed by the Petitioner and by the Respondent.[1]

APPEARANCES

For Petitioner: Michael T. McGuckin
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Florida Elections Commission
The Capitol, Room 2002
Tallahassee, Florida 32399-1050

For Respondent: Robert B. McKay
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[1]The FEC has reviewed the entire record and heard argument of counsel.

Petitioner's Exception #1

The Petitioner's first exception addresses the ALJ's Conclusions of Law (#55-59) which hold that the form of the charging document filed by the Petitioner prevents the imposition of fines for multiple "counts." The ALJ based his decision to reject Petitioner's request to have the FEC impose multiple fines on two lines of reasoning.

First, the ALJ deemed the charging document (the FEC's finding of probable cause and attached statement of findings) to be inadequate to put McGann on notice that he could be fined for each alleged failure (COL # 55-57). Second, the ALJ noted (COL # 58) that, in the absence of any evidence of intent, a pattern of carelessness or disregard must usually be shown to meet the "willfulness" threshold in the law.

The Petitioner excepts to both of the ALJ's reasons for holding that McGann could not be subjected to fines for each individual failure to comply with the applicable statute.

Adequate Notice as to the Number of "Counts.

A charging document in an administrative law case meets standards of due process if the instrument informs the respondent of the "nature and subject matter of the hearing in such a fashion as would allow him his right to present a defense." see Wood v. Department of Transportation, 325 So.2d 25,26(4th DCA

1976), Lusskin v. State Agency for Health Care Admin., Bd. of Medicine, 731 So.2d 67,68 (4th DCA 1999). If adequate notice is given, an agency's assessment of a penalty will be upheld if the penalty is within the range authorized by law, Florida Real Estate Commission v. Webb, 367 So.2d 201 (Fla.1978); Clark v. Department of Professional Regulation, 463 So.2d 328 (5th DCA 1984), *rev. denied*, 475 So.2d 693 (Fla.1985). As the ALJ noted, Section 106.265(1) grants the FEC the authority to impose fines "not to exceed $1000 **per count.**" (E. S.)

Contrary to proceedings involving licenses (See Section 120.60(5)), Chapter 120 and the Model Rules of Administrative Procedure set out no particular requirements as to the manner in which a charging document in an FEC proceeding must be pleaded. Other than referencing the fact that the FEC's order finding probable cause must appraise the respondent of the sections of law alleged to have been violated and of the right to an administrative hearing under Chapter 106 and 120 (Rule 2B-1.0027(7)-(10)), the FEC's rules are also silent as to the particular form of pleading to be followed.

In this case the Petitioner listed eight separate paragraphs in its Order of Probable Cause. The paragraphs noted that the acts complained of occurred on various occasions. Sometimes the Petitioner enumerated the number of incidents. Sometimes the

charging document simply listed that the violations were "multiple."

If the ALJ is correct as to his position regarding the pleadings then the Petitioner, if it wished to show that each failure to comply with Chapter 106 merited a fine of up to $1000, would have to assert that each "occasion" warranted a separate fine. This position is overtechnical.

The FEC rejects the ALJ's statement (COL # 57) that the references to the "occasions" when violations were alleged to have occurred did not appraise McGann of the actual facts underlying the failures to comply. Since the Order of Probable Cause specifically incorporates the Statement of Findings (in effect a statement of particulars), there can be no complaint that McGann didn't know the "names and dates" underlying the allegations or was unaware of number of times that he was alleged to have failed to comply.

What McGann didn't necessarily know from the face of the charging document was how many potential fines to which he would be subject when the Probable Cause Order simply referenced that he had violated the law on "multiple" occasions. Of course, McGann could have sought the precise limits of his potential liability through discovery, which he apparently failed to do. On the other hand, it would be better if the pleadings could have

allowed McGann to gauge his potential fine exposure from the face of the charging document. In the end, the Commission is of the opinion that, under the facts of this case, fairness demands that any violation based upon evidence of failure to comply with the law on "multiple occasions" should be limited to a single fine of up to $1000.

Cumulative Violations.

The ALJ also correctly pointed out that, especially in a failure to report or improper/incorrect certification case, the question of "willfulness" is often the only real bone of contention. In this vein, sometimes the sheer number of failures to comply with Chapter 106 can make actions "willful" that would otherwise not meet that threshold if the occurrence had been isolated (for example, "reckless disregard" might not be proven by an isolated instance). The Commission has so held, See FEC v. Miller, #94-04504, *aff'd per curiam* Miller v. Florida Elections Com'n, 678 So.2d 1293 (2nd DCA 1996).

The ALJ found that the cumulative effect of McGann's failures reaches the willfulness threshold with regard to the alleged violations of Sections 106.07(5) and 106.19(1)(b) and (c). The ALJ then recommended that the Petitioner should not now be allowed to dissect the various failures into their individual components for penalty purposes.

To do so would, the ALJ intimated (COL #58), allow the Petitioner to show a "willful" violation by proving several violations when each taken alone would not reach the "willfulness" threshold. The ALJ believed that it would then be improper to penalize McGann as though each violation standing alone evidenced a discrete "willful" act.

The ALJ's position is, in effect, an argument against "bootstrapping." The ALJ's analysis would have some merit where the evidence showed that the "willfulness" in a respondent's failure to comply was only based upon the number of violations and not their individual culpability. As set forth below, the Commission cannot agree that any of the violations at issue herein are not individually culpable.

Petitioner"s Exception #2

Petitioner's Exception #2 is based upon three separate contentions. The first is that the ALJ incorrectly made "factual findings" which resolved the issue of "willfulness" when such findings should only have been set out in the ALJ's Conclusions of Law. Second, the Petitioner argues that the ALJ failed to articulate a standard for "willfulness" and, as a result, incorrectly imposed an "intent" or "scienter" requirement in order to find "willfulness." Finally, the Petitioner asserts that, when the appropriate "willfulness" standard is applied, the

evidentiary facts found by the ALJ require that McGann be found in violation as to those allegations where the ALJ found a lack of "willfulness." The FEC will address these contentions in order.

The Ultimate Determination of "Willfulness" Is Not Appropriately to Be Made in the Findings of Fact.

Addressing the first point, it does appear that Petitioner's point is well taken. As opposed to other administrative regulatory schemes which have relied upon common law definitions of such terms as "negligence" or "willfulness" Chapter 106 includes a specific statutory definition of "willfulness"-see Section 106.37.[2] Thus the case law, see Heifetz v. Department of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985) and Goin v. Commission on Ethics, 658 So.2d 1131 (Fla. 1st DCA 1995), which permits ALJs to place ultimate factual conclusions as to

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[2]**Willful violations.-**
A person willfully violates a provision of this chapter if the person commits an act while knowing that, or showing reckless disregard for whether, the act is prohibited under this chapter, or does not commit an act while knowing that, or showing reckless disregard for whether, the act is required under this chapter. A person knows that an act is prohibited or required if the person is aware of the provision of this chapter which prohibits or requires the act, understands the meaning of that provision, and performs the act that is prohibited or fails to perform the act that is required. A person shows reckless disregard for whether an act is prohibited or required under this chapter if the person wholly disregards the law without making any reasonable effort to determine whether the act would constitute a violation of this chapter.

whether an act was "willful" or "negligent" in the findings of fact portion of a recommended order simply doesn't apply in the context of Chapter 106.

Furthermore, because Chapter 106 (a statute over which the FEC has substantive jurisdiction) has a specific definition of "willfulness" the Commission has the authority to review and, when appropriate, reject or modify any legal conclusions that the ALJ may have made as to the question of "willfulness."[3] Of course, aside from the incorrectly categorized "willfulness" findings, the remainder of the ALJ's factual findings must be accepted unless unsupported by the record, see Section 120.57(1)(l).

"Willfulness" Does Not Require a Showing of Intent or Scienter.

Second, the FEC notes that, as asserted by the Petitioner, the ALJ never stated what legal standard he was applying when he made his various conclusions relating to "willfulness." Certain of the statements made by the ALJ clearly imply that he required a showing of intent or scienter (for example, see FOF # 15, 29)

[3]The ALJ made numerous ultimate findings as to "willfulness" in his proposed findings of fact which were properly conclusions of law. The FEC has noted such findings in Attachment "A" and has redacted these findings from the Recommended Order as findings of fact and has considered them as the ALJ's proposed conclusions of law on the various charges.

to find "willfulness." To the extent that the ALJ was of the opinion that "willfulness" requires intent or scienter his analysis was incorrect.

Both the case law, see Sanders v. Florida Elections Commission, 407 So.2d 1069(4th DCA Dist. 1981), Pasquale v. Florida Elections Com'n, _ So. 2d _ (Fla. 4th DCA 2000), 2000 WL 294820, and the statute do not require that an act must be "intentional" or "corrupt" to be "willful."[4] Under Section 106.37, a person can be fined if he or she "knows" that he or she has not complied with Chapter 106. A person "knows" if "the person is aware of the provision of this chapter which prohibits or requires the act, understands the meaning of that provision, and performs the act that is prohibited or fails to perform the act that is required."

A person can also be subject to a penalty if his or her conduct evidences "reckless disregard" of the provisions of the law. "Reckless disregard" is shown if "the person wholly disregards the law without making any reasonable effort to

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[4]The application of Section 106.37 to the instant proceedings in not an improper retrospective application of a later enacted law. The statute imposes no new duties upon any person and is part of a regulatory scheme as opposed to a penalty, see Rowe v. Agency for Health Care Admin, 714 So.2d 1108 (5th DCA 1998).

determine whether the act would constitute a violation of [Chapter 106]."[5]

The ALJ did make numerous evidentiary findings relating to McGann's objective conduct that are amply supported by the record. Thus, if the ALJ's evidentiary findings support a conclusion that McGann either "knew" the requirements of the law and failed to comply or "recklessly disregarded" his duties under Chapter 106 then such violations will have been proven to be "willful" even if the ALJ did not articulate the accurate standard for "willfulness."

The FEC's Conclusions Based upon the Evidentiary Facts and the Statutory Standard of "Willfulness."[6]

1. Section 106.05, failure to timely deposit contributions on multiple occasions (FOF 13-14).

The violation of Section 106.05, failure to deposit funds to the campaign account within five business days, was proven.

McGann signed and filed numerous campaign reports that show that he was well aware that contributions needed to be deposited in the campaign depository. He also had signed the candidate

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[5] For a more complete discussion and application of the "reckless disregard" standard see Final Order in FEC v. Miller, supra.

[6]The references to the Findings of Fact below are to those set out in the Appendix hereto. Findings of Fact 1-12 apply to all alleged violations.

form acknowledging that he had read and understood the provisions of Chapter 106.

Nevertheless, as the ALJ found (FOF 14), McGann failed to timely deposit funds even though he was aware that he had received them (certain of the monies came from McGann himself). The evidence is thus clear that McGann both "knew" that contributions had to be deposited in the campaign account and "fail[ed] to perform the act that [was] required" and "recklessly disregarded" his obligations. The violation was therefore "willful."[7]

2. Section 106.143(2), failure to designate party affiliation on two occasions (FOF 16-18).

Once again McGann was aware of the law (Tr. 192) and failed to follow it. McGann authorized the ads (Tr. 196) and the placement of his party affiliation on the remainder of his advertisements make it clear that he was aware of the statutory requirement.

It is true that McGann's answers to interrogatories propounded to him reflect the possibility that the party

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[7]At best McGann might argue (as he did in his testimony, (Tr. 191) that he was unaware that deposits must be made within 5 days of receipt. But at least 2 of the deposits apparently were never placed in the account even though McGann reported them as contributions.

affiliation was left off by the printer but such evidence, while possibly exculpatory, see Sanders v. Florida Elections Commission, supra, at 407 So.2d 1070, was never produced. In short, McGann knew that the information needed to be placed on the signs and disregarded the requirement or ignored it.

3. 106.143(5), failure to indicate incumbency on advertisement on two occasions (FOF 19-22).

This violation is similar in nature to the preceding. The 2 advertisements at issue clearly failed to have the information even though the remainder apparently did. Mcgann thus knew of the requirement (Tr. 132-133) and ignored or disregarded it. Once again, no exculpatory evidence was presented.

4. 106.11(1), making campaign expenditures from other than the campaign depository on multiple occasions (FOF 23-25).

As his reporting forms indicated, the evidence is clear that McGann was aware of the requirements of the law that expenditures must come from the campaign account. McGann also knew that he personally had expended cash for campaign matters which did not come from his campaign account (Tr. 130). McGann stated (Tr. 130) that he believed that he could expend such funds because he thought that "petty cash" expenditures outside of the account were allowed. Thus McGann apparently had reviewed the law before he acted.

But the law simply doesn't allow what McGann did. Section 106.12 (the "petty cash" section) cited by McGann can not be read to allow cash expenditures of funds from other than the campaign account. The law, on its face, allows certain cash expenditures only from the campaign account. McGann again either ignored the law or recklessly disregarded his obligations under it.

5. 106.11(3), signing a check on campaign account with insufficient funds in the account "on multiple occasions" (FOF 26-29).[8]

McGann largely financed his own campaign (Tr. 125) and thus should have been aware of the campaign account's financial status. He also was apparently aware (Tr. 130-131) that the account had to be solvent when checks were written against it.

It is undisputed that McGann wrote a check (Tr. 163) which the funds in the account couldn't cover on the date when the check was uttered. It is also true that McGann apparently had sufficient credit with the bank that the check was not returned for lack of funds (Tr. 132).

However, since the very nature of campaign accounts puts vendors at significant risk if funds are not available to pay

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[8]The charging document indicates "multiple occasions" but the FEC only finds one "count" was proven for the reasons set forth above.

them, see Final Order in FEC v. Gersten *affirmed per curiam*, Gersten v. Florida Elections Com'n, 603 So.2d 1284(3rd DCA 1992), the Legislature has strictly enjoined any form of deficit spending.[9] Nevertheless, McGann still personally wrote and then uttered a check at a time when the account had insufficient funds. Further, the evidence is clear that McGann paid absolutely no attention to his campaign account.[10] His conduct thus was

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[9]**Section 106.11(3)**

No candidate, campaign manager, treasurer, deputy treasurer, or political committee or any officer or agent thereof, or any person acting on behalf of any of the foregoing, shall authorize any expenses, nor shall any campaign treasurer or deputy treasurer sign a check drawn on the primary campaign account for any purpose, unless there are sufficient funds on deposit in the primary depository account of the candidate or 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. However, an expense may be incurred for the purchase of goods or services if there are sufficient funds on deposit in the primary depository account to pay the full amount of the incurred expense, to honor all checks drawn on such account, which checks are outstanding, and to meet all other expenses previously authorized but not yet paid, provided that payment for such goods or services is made upon final delivery and acceptance of the goods or services; and an expenditure from petty cash pursuant to the provisions of s. 106.12 may be authorized, if there is a sufficient amount of money in the petty cash fund to pay for such expenditure. Payment for credit card purchases shall be made pursuant to s. 106.125. Any expense incurred or authorized in excess of such funds on deposit shall, in addition to other penalties provided by law, constitute a violation of this chapter.

[10]McGann stated (Tr. 179) that he hadn't looked at a bank statement since 1968.

"reckless" and therefore "willful."

6. Section 106.07(5), certifying to false or incorrect report on six occasions, Section 106.19(1)(b), failure to report contributions on multiple occasions, Section 106.19(1)(c), falsely reporting or failing to report information required by Chapter 106 on six occasions (FOF 30-32, 34-35, 38).[11]

The ALJ correctly found that McGann's conduct was "willful." Where the ALJ erred was in finding only a single violation. This conclusion was a result of the ALJ's belief that "willfulness" was shown as a result of the accumulation of the six occasions that nonreporting/misreporting occurred as opposed to the fact that any nonreporting/misreporting of contributions, unless some exculpatory reason is presented, is likely "willful."

This is so because, as McGann and all candidates know and the ALJ found, contributions must be reported timely, accurately and completely. Since the ALJ apparently felt that only the accumulation of several acts of nonreporting/misreporting justified a finding of "willfulness," he incorrectly limited the

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[11]The Petitioner has not excepted to the ALJ's treatment of the failure to report contributions/false or incorrect reporting or certification violations as coextensive. It has excepted to the ALJ's treatment of the violation as a single violation as opposed to 6 disparate acts.

number of violations to one.[12] The FEC, after applying the correct standard for "willfulness" set out in Section 106.37, finds that all six of the violations were proven.

Respondent's Exception

Respondent's Exception is REJECTED. The evidence clearly shows, as the ALJ found, that McGann failed to timely report contributions and certified to false/incorrect reports. Any effort on McGann's part to correct such errors after the fact does not remove his culpability for his actions during the election process.

Based upon the foregoing, the Commission **ACCEPTS** Petitioner's Exceptions #1 and #2 to the extent set forth herein and **REJECTS** Respondent's sole Exception. The ALJ's Findings of Fact, Conclusions of Law and Recommendation are modified accordingly. The remainder of the ALJ's Findings of Fact and Conclusions of Law are **ACCEPTED** by the Commission.

Wherefore, McGann is found to be in violation of Sections 106.05, 106.07(5), 106.11(1) and (3), 106.143(2)and (5), and 106.19(1)(b) and (c), Fla. Stat., and is hereby fined as follows:

1. As to the one count of violating Section 106.05-**$1000**.

2. As to the two counts of violating Section 106.143(2)-

[12]As the ALJ found and the FEC has accepted, 6 contributions were misreported.

$400.[13]

3. As to the two counts of violating Section 106.143(5)-$200.[14]

4. As to the one count of violating Section 106.11(1)-**$1000.**

5. As to the one count of violating Section 106.11(3)-**$1000.**

6. As to the six counts of violating Sections 106.07(5) and 106.19(1((b) and (c)-**$6000.**

The total fine imposed is thus **$9,600 ORDERED** that shall be paid to the Commission, Room 2002, the Capitol, Tallahassee, Florida 32399-1050, within 30 days of the date this Final Order is received by the Respondent.

DONE AND ORDERED by the Florida Elections Commission and Filed with the Clerk of the Commission on this 7th day of August 2000 in Tallahassee, Florida.

Susan A. MacManus

SUSAN A. MacMANUS, CHAIR
Florida Elections Commission
Room 2002, the Capitol
Tallahassee, Florida 32399-1050

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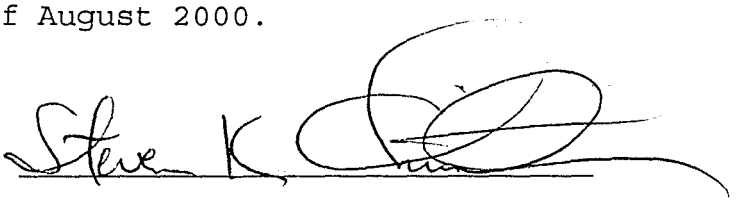
[13]This is the fine determined by the FEC to be appropriate for a minor violation of this section, Rule 2D-1.003(2)(f), F. A. C., multiplied by the two occasions where the law was violated.

[14]This is the fine determined by the FEC to be appropriate for a minor violation of this section, Rule 2D-1.003(2)(n), F. A. C., multiplied by the two occasions where the law was violated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by U.S. Mail to Robert B. McKay, Carney & McKay, 1140 Franklin Avenue, Suite 201, Garden City, New York 11530, Barbara M. Linthicum, General Counsel and Michael T. McGuckin, Assistant General Counsel, Florida Elections Commission, Room 2002, The Capitol Building, Tallahassee, Florida 32399-1050, on this 7th day of August 2000.



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.

APPENDIX "A"

FINDINGS OF FACT

1. Respondent is a licensed physician. For many years, he practiced as a heart surgeon in Springfield, Illinois. After developing a hand tremor resulting from a medical condition, Respondent relocated to Naples, where he had vacationed for several years.

2. In early 1996, after moving to Naples, Respondent opened a walk-in clinic in Naples. At all material times, Respondent has worked at the clinic about 60 hours weekly.

3. Respondent has never assumed responsibility for financial matters or record-keeping at his home or in his office. At home, these responsibilities are borne by his wife of 28 years. At the office, these responsibilities are assumed by his office manager.

4. Prior to fall 1996, Respondent had never had any significant experience in politics. However, dissatisfied with aspects of the training and qualifications of certain personnel who responded to emergency medical calls, Respondent decided to run in the fall 1996 election for Seat 3 of the North Naples Fire and Rescue Commission.

5. On July 1, 1996, Respondent obtained a "candidate

packet" from the Filing Officer of the Office of the Collier County Supervisor of Elections. The packet contained considerable information, including treasurer's report forms; a list of key dates, including filing deadlines; a Division of Elections Candidate Handbook; copies of Chapters 99, 105, and 106, Florida Statutes; itemized contribution forms; and itemized expenditure forms.

6. Without studying any of the information, Respondent signed and filed a Statement of Candidate on the same day that he picked up the candidate packet. The signed Statement of Candidate acknowledges that Respondent received, read, and understood the requirements of Chapter 106, Florida Statutes. On the same day, Respondent signed a form appointing himself as his campaign treasurer and designating The Huntington Bank as his campaign depository.

7. The campaign bank account, which was a checking account, was titled, "Dr. Robert C. McGann Campaign Account for North Naples Fire District" and bore account number 02628208279. The only authorized signatories on the account were Respondent and his wife. The same bank also handled the checking account for Respondent's medical practice.

8. On July 18, 1996, Respondent signed and filed a form titled, "Acknowledgment by Candidate." In this form, Respondent

acknowledged that he had reviewed and understood various items, which he initialed. These initialed items included two items concerning the deadlines for filing campaign treasurer reports.

9. On the same day, the Filing Officer provided Respondent with a two-sided document titled, "State of Florida 1996 Calendar and Election Dates." This document summarizes the deadlines for filing election reports and provides report-filing deadlines.

10. For the First Primary, the filing deadlines are: August 2 for the period from July 1 through July 26; August 16 for the period from July 27 through August 9; and August 30 for the period from August 10 through August 29.

11. For the Second Primary, the filing deadlines are: September 13 for the period from August 30 through September 6 and September 27 for the period from September 7 through September 26. The State of Florida 1996 Calendar and Election Dates requires that each candidate whose candidacy terminates as of the Second Primary must file his or her final report by December 30, 1996.

12. Respondent filed six campaign treasurer reports. He signed each of the reports and filed each of the reports on time.

13. The first allegation is that, "on multiple occasions," Respondent failed to timely deposit timely campaign contributions.

14. Petitioner proved that Respondent failed to timely deposit campaign contributions on several occasions.

15. ~~However, Petitioner failed to prove that any of these failures was willful. The modest amounts do not invite a finding of willfulness, nor do the identities of the contributors, none of whom appears to be someone whom Respondent would wish to hide from public scrutiny. The preponderance of the evidence suggests only that Respondent's failures to timely deposit campaign contributions were due to his carelessness, and nothing in the record suggests that this carelessness was studied, purposeful, or otherwise calculated to avoid the requirements of the law.~~

16. The second allegation is that Respondent failed to include his political party affiliation in a political advertisement.

17. Petitioner proved that Respondent published at least two political advertisements that failed to disclose his political party affiliation.

18. ~~However, Respondent failed to prove that these nondisclosures were willful.~~ The nondisclosures occurred during the Republican primary elections. Failing to alert potential voters of Respondent's political affiliation could only hurt Respondent, as potential voters who found his campaign literature

appealing might not be able to find the particular race in which Respondent was involved. In a larger sense, concealing his Republican affiliation hurt Respondent because he was running in a largely Republican area.

19. The third allegation is that Respondent failed to use, in his political advertisements, the word "for" between his name and the office for which he was running. The stated purpose of this requirement is to alert potential voters that a candidate is not an incumbent.

20. Petitioner proved that Respondent published at least two political advertisements that failed to include the word "for" between his name and the office for which he was running.

21. ~~However, Petitioner failed to prove that the failures were willful~~. The first advertisement ran during the First Primary, which included Respondent, the incumbent, and another challenger. The advertisement showed the incumbent's name followed by: "Incumbent- committed to the status quo." The advertisement showed the other challenger's name followed by: "Union Candidate." The advertisement showed Respondent's name followed by: "Candidate for Change." The whole thrust of Respondent's campaign in the First Primary was to change the policies of the North Naples Fire and Rescue Commission. Emphasizing his outsider status through the use of "for" would

have served this purpose. ~~The omission in thus due to neglect, not willfulness.~~

22. The second advertisement evidently ran during the Second Primary because it mentions only the challenger, who eventually won this primary. The advertisement again emphasizes the outsider status of Respondent as an agent for change. ~~Given this campaign theme, it is impossible to infer willfulness, rather than carelessness, in the failure of this advertisement to include "for" between Respondent's name and the position that he was seeking~~.

23. The fourth allegation is that, "on multiple occasions," Respondent made expenditures from campaign funds other than by a check drawn on his campaign depository.

24. Petitioner proved that Respondent made the following expenditures with funds not drawn from his campaign depository: $23 and $110 to Home Depot, $29 to Sam's Club, $6.15 to Mary Morgan, $25 to Office Depot, $30.60 to Office Depot, and $28 to Kinkols. Respondent reported each of these expenditures, but the campaign checking account does not reveal payments of these sums.

25. ~~However, the Petitioner failed to prove that these acts were willful~~. With the exception of $6.15 given to Mary Morgan, the recipients of these sums are commercial establishments that provide goods and services of obvious usefulness to a political

campaign. Mary Morgan is the Supervisor of Elections, whose office received $6.15, apparently in payment of some filing fee. Also, these relatively modest sums qualify as petty cash expenditures.

26. The fifth allegation is that, "on multiple occasions," Respondent signed a check drawn on the campaign depository without sufficient funds on deposit in the campaign depository to pay the full amount of the check, to honor all outstanding checks, and to pay all previously authorized but unpaid expenses.

27. Petitioner proved that Respondent's wife, who was an authorized signatory on the campaign checking account, signed a $507.15 check to Sir Speedy. The check is dated August 1, although the evidence does not establish that Sir Speedy received the check on that date. However, the evidence does establish that Sir Speedy presented the check for payment on August 6, at which time the bank honored the check and paid Sir Speedy $507.15.

28. The bank statement for the campaign checking account reveals that the bank credited the account with a $500 deposit on August 2, leaving a balance of $2.30. The next activity was August 6, when the bank debited the account for the Sir Speedy check in the amount of $507.15, leaving a negative balance of

$4.85, which increased the next day to a negative balance of $7.35 after the application of monthly checking fees.

29. ~~Although Respondent is responsible for the acts of his wife, as his agent in making this expenditure, Petitioner failed to prove that Respondent or his wife willfully delivered a campaign check without sufficient funds. If this had been their intent, their effort was stymied by the bank's honoring the check. In fact, they had no such intent though they probably did not know that this check would cause a negative balance of a few dollars, it is more likely that they delivered the check knowing that the bank would honor the check because the account had sufficient funds or, if it did not, it was short only a few dollars and the bank, consistent with its policy on their accounts, would nonetheless honor the check. Additional evidence that this was bank policy is the absence of any overdraft fee on the August or September bank statement~~

30. The sixth allegation is that, "on multiple occasions," Respondent failed to report a contribution required by law to be reported.

31. Petitioner proved that Respondent received numerous contributions that he failed to report, including $500 from himself on August 2, $1000 from himself on August 19, $100 from Barry or Diane Flagg on August 16, $50 from Gordon Radcliff in

late September, $50 from Thomas Jewell on September 26, $50 from David Grieder on September 26, and $100 from Peter or Carol Boyd on September 26.

32. The evidence in support of the allegation that Respondent failed to report a contribution consists of seven contributions over a seven-week period. These omissions totaled $1850 out of a total reported contributions of $9414.75 (including $4500 in loans from Respondent); in other words, Respondent failed to report nearly 20 percent of t he contributions. Bank records for the campaign checking account record only $6820 in deposits.

33. ~~Reporting contributions is arguably the most basic requirement of the applicable law. Respondent's reports reveal a knowledge of the requirement to report contributions. Respondent even testified that he understood that he was required to report contributions, as well as expenditures. Although he reported numerous contributions, he failed to report a considerable amount of contributions under circumstances that reveal that this failure to report was willful~~.

34. The seventh and eighth allegations are, respectively, that, "on six occasions" each, Respondent certified to the correctness of a campaign treasurer's report that was incorrect, false, or incomplete and falsely reported or failed to report

information required by law.

35. Petitioner has proved numerous inaccuracies and omissions in the campaign reports filed by Respondent.

36. ~~To the extent that the seventh and eighth allegations cover the sixth allegation, Petitioner has proved a willful violation, but the same acts and omissions cannot provide ground for double discipline under two different statutes. To the extent the seventh and eighth allegations cover other acts and omissions, besides the mere failure to report contributions, Petitioner has failed to prove willfulness.~~

~~37. To the contrary, the many inaccuracies and omissions (apart from the violations covered by the sixth allegation) again appear to be the product of Respondent's carelessness, rather than a studied attempt to avoid complying with the reporting requirements imposed by law.~~

38. ~~Petitioner infers willfulness from Respondent's failure to respond to six certified letters from the County filing officer alerting him to the deficiencies in his previously filed reports.~~ The cited deficiencies consist mostly of 22 contributions or expenditures lacking a date, six contributions or expenditures lacking an address (i.e., one contributor for which Respondent previously supplied an address, Office Depot for which Respondent supplied an address on a later report, the

County Supervisor of Elections (twice; this is the employer of the filing officer), Kinko's in Naples, and Desk Top Results in Naples).

39. ~~There are two problems in using the unanswered letters as grounds for inferring willfulness. First, the letters ignore most of the deficiencies on which Petitioner relies and the filing officer's failure to mention them do not assist Petitioner's effort in showing willfulness. . . Most of these ignored items are facially evident. Such items include the wrong reporting time frames; the failure to identify the report as quarterly, first primary, etc.; and the failure to indicate whether the report is an original or amendment.~~

~~40. Second, the letters only raise two claimed deficiencies the failure to disclose dates and addresses for contributions and expenditures. Even as to these matters the letters provide no basis for an inference of willfulness for several reasons.~~

~~41. First, the filing officer sent all of the letters on the same date, December 6. The most recurring failing cited in the letters is the absence of dates for contributions and expenditures. The record suggests that Respondent's carelessness in recordkeeping rendered impossible any accurate amendment of his reports to add the dates.~~

~~42. The situation might have been different if the filing officer had sent such a letter after Respondent had filed the first report without the required dates. As to that report, it would have been more likely that Respondent could have reconstructed the dates. As to subsequent reports, it is much re likely that the carelessness defense would have been unavailing, after Respondent would have received a specific demand for this information.~~

43. Given the outcome of the case, the Administrative Law Judge has examined the sealed exhibit containing copies of Respondent's personal income tax returns for 1996 and 1997. There is no indication in these tax returns that a fine of $1000 would be excessive.

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