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STATE OF FLORIDA
ELECTIONS COMMISSION

STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION

FLORIDA ELECTIONS COMMISSION,
PETITIONER,

v.

AGENCY CASE No.: FEC 05-158
F.O. No.: DOSFEC 06-111 W

ROGER PENNINGTON,
RESPONDENT.

_____ /

CONSENT FINAL ORDER

The Respondent, Roger Pennington, and the Florida Elections Commission (Commission) agree that this Consent Order resolves all of the issues between the parties in this case. The parties jointly stipulate to the following facts, conclusions of law, and order:

FINDINGS OF FACT

1. The Respondent, Roger Pennington, serves as chairman of the Committee to Restore Integrity in Politics (CRIP), an organization registered as an electioneering communication organization (ECO) with the Department of State, Division of Elections (DOE).
2. On March 31, 2006, the staff drafted a Staff Recommendation recommending to the Commission that there was probable cause to believe that The Florida Election Code was violated. On May 24, 2006, an Amended Staff Recommendation was entered nunc pro tunc to May 18, 2006.
3. On May 26, 2006, the Commission entered an Order of Probable Cause finding that there was probable cause to charge the Respondent with the following violations:

Count 1:

In October 2004, Respondent violated Section 106.03(1), Florida Statutes, by failing to file a statement of organization as a political committee within 10 days of CRIP's anticipation of receiving

contributions in excess of \$500 or making expenditures in excess of \$500, when the Respondent designed the mailers opposing Amendment 4, and CRIP received contributions from cruise lines and published mailers opposing Amendment 4.

Count 2:

On October 22, 2004, Respondent violated Section 106.143(1)(b), Florida Statutes, when the Respondent failed to mark prominently CRIP's political ad opposing Amendment 4 as a paid political advertisement.

Count 3:

On October 26, 2004, Respondent violated Section 106.143(1)(b), Florida Statutes, when the Respondent failed to mark prominently CRIP's political ad opposing Amendment 4 as a paid political advertisement.

Count 4:

In October 2004, Respondent violated Section 106.19(1)(c), Florida Statutes, by falsely reporting or deliberately failing to report information required by Chapter 106, when the Respondent failed to file a statement of organization as a political committee within 10 days of CRIP's anticipation of receiving contributions in excess of \$500 or making expenditures in excess of \$500, when the Respondent designed the mailers opposing Amendment 4, and CRIP received contributions from cruise lines and published mailers opposing Amendment 4.

Count 5:

On October 22, 2004, Respondent violated Section 106.19(1)(c), Florida Statutes, by falsely reporting or deliberately failing to include information required by Chapter 106, when the Respondent failed to mark prominently CRIP's political ad opposing Amendment 4 as a paid political advertisement.

Count 6:

On October 26, 2004, Respondent violated Section 106.19(1)(c), Florida Statutes, by falsely reporting or deliberately failing to include information required by Chapter 106, when the Respondent failed to mark prominently CRIP's political ad opposing Amendment 4 as a paid political advertisement.

Count 7:

On October 24, 2004, Respondent violated Section 106.19(1)(d), Florida Statutes, by making an expenditure prohibited by Chapter 106, when the Respondent authorized a \$154,480 check to DMS for a mailer opposing Amendment 4 when CRIP was registered as an ECO.

Count 8:

On October 24, 2004, Respondent violated Section 106.19(1)(d), Florida Statutes, by making an expenditure prohibited by Chapter 106, when the Respondent authorized a \$154,480 check to DMS for a second mailer opposing Amendment 4 when CRIP was registered as an ECO.

4. On May 26, 2006, the Respondent was served with the Order of Probable Cause by serving his attorney by hand delivery.

5. The Respondent requested within 30 days of receiving the Order of Probable Cause that the matter be resolved by a Consent Order.

6. The Respondent and the staff stipulate to the following facts:

A. Respondent, Roger Pennington, serves as chairman of the Committee to Restore Integrity in Politics (CRIP), an organization registered as an electioneering communication organization (ECO) with the Department of State, Division of Elections (DOE). Respondent also serves as director of the Committee to Restore Integrity in Politics, Inc. (CRIP-CORP), a Florida nonprofit corporation, and as president of Direct Mail Systems, Inc. (DMS), a Florida for profit corporation.

B. The Complainant is Complainant has been a registered voter in Pinellas County for approximately 25 years. Complainant stated that she has never run for public office and has never served as a campaign treasurer. Complainant said that she has worked as a paid consultant for Citizens for a Better Fort Myers, a political committee registered with the City of Fort Myers.

C. Complainant stated that she received two mailers immediately prior to the November 2, 2004 election advocating the defeat of Amendment 4 to the Florida Constitution that proposed to authorize Miami-Dade and Broward county voters to approve slot machines in pari-mutuel facilities. On the front of the mailers appear the phrase "VoteNOon4" above the name and address of CRIP. On the bottom of the back of the mailer, "VoteNOon4" is repeated. (The address listed is the

same address listed on the documents establishing the ECO filed by CRIP.)

D. CRIP was established as an ECO on September 24, 2004. The Electioneering Communication Statement of Organization reflected that Respondent was the chairperson, and that Mark Zubaly was appointed campaign treasurer. In this statement, CRIP was described as a statewide organization that supports individual responsibility and opposes higher taxes. In the portion of the form where any candidates supported by the organization would be listed, CRIP listed the response, "N/A."

E. Respondent submitted copies of two DMS-CORP invoices. The first invoice described the job as "No Casinos Postcard #1," and the second invoice listed "No Casinos Postcard #2." Both invoices were dated October 22, 2004, both listed CRIP as the entity invoiced for 500,000-piece mailer projects for \$154,480 each. Both invoices provided details that fit the description of the mailers attached to the Report of Investigation.

F. In his affidavit, Respondent stated that he helped create the content of the mailers and approved the mailers. He stated that there were no earlier versions of the mailers, and the copies supplied by the Complainant were the only version of the two mailers. When asked whether other individuals within CRIP took part in the creation and dissemination of the mailers, Respondent listed Mark Zubaly.

G. In an affidavit, Mark Zubaly stated that Respondent came up with the concept of the mailers, and various departments within DMS developed and created the mailers. Mr. Zubaly said that he served as the coordinator that supervised the completion of the mailers by DMS staff, and confirmed that all of the artwork, printing and postage tasks associated with the mailers were completed in-house, with no third party vendor involvement.

H. In his affidavit, Mr. Zubaly clarified that 500,000 copies of each mailer were created, but only 495,998 copies of each, were mailed out to the public. Mr. Zubaly stated that the mailings occurred on October 22 and 26, 2004. Mr. Zubaly said that aside from coming up with the concept of the mailers and approving the final versions prior to dissemination, Respondent had no other "hands on" duties associated with the development of the mailers.

I. The political disclaimers on the two mailers stated, "Paid electioneering communication paid for by Committee to Restore Integrity in Politics, 7068 Atascadero Dr., Tallahassee, FL 32308."

J. Correct political disclaimers would have been:

“Paid Political Advertisement paid for by Committee to Restore Integrity in Politics, 7068 Atascadero Dr., Tallahassee, FL 32308.”

K. Between October 20 and October 26, 2004, CRIP received contributions totaling \$900,000 from four different Casino Cruise Lines (Palm Beach, Titan, Oceans, and Sterling). The invoices from DMS for the mailers were dated October 22, 2004.

L. On October 24, 2004, Respondent authorized the payment by CRIP of \$154,480 to DMS for invoice #2399 and \$154,480 to DMS for invoice #2400 to pay for the two mailers advocating the defeat of Amendment 4. At that time Respondent knew that CRIP was registered as an ECO and not as a political committee. Having registered CRIP as an ECO on September 24, 2004, Respondent knew or should have known that ECOs are precluded from expressly advocating the passage or defeat of an issue.

M. In his affidavit, Respondent stated that since the 1970s, he has received copies of Chapters 104 and 106, Florida Statutes, and that he has read these chapters of the Florida Election Code. Respondent also confirmed that since the 1970s, he has received copies of the *Handbook for Committees*, and that he has read this resource material. When asked what action he has taken to determine his responsibilities under Florida's election laws, Respondent stated he reads the handbooks periodically.

N. When asked whether he had consulted Chapter 106, Florida Statutes, or any of the handbooks provided to him by the filing officer regarding the characteristics of an electioneering communication, and the need to avoid language that advocated the election or defeat of a candidate or the passage or defeat of an issue, Respondent stated that he understood the language and restrictions as they related to candidates, but he misunderstood their impact upon issue campaigns. However, Respondent did not seek advice from an attorney or the Division of Elections concerning CRIP's development and publication of these two mailers.

O. Kristi Reid Bronson, Chief, Bureau of Election Records for DOE, submitted an affidavit stating that on September 27, 2004, Respondent was provided with copies of Chapters 104 and 106, Florida Statutes, the *2004 Committee and Campaign Treasurer Handbook*, and the political ad disclaimer supplement.

CONCLUSIONS OF LAW

7. The Commission has jurisdiction over the parties to and subject matter of this cause, pursuant to Section 106.26, Florida Statutes.

8. Section 106.011(1)(a), Florida Statutes, includes in its definition of “political committee,” two or more individuals, or a person other than an individual, that, in an aggregate amount in excess of \$500 during a single calendar year, accepts contributions for the purpose of expressly advocating the election or defeat of a candidate or issue, or makes expenditures that expressly advocate the election or defeat of a candidate or issue, or contributes to a common fund from which contributions are made to political entities.

9. **Express advocacy,**” means language of the communication must, by its express terms, exhort the viewer to take a specific electoral action for or against a particular candidate; examples of express advocacy in Buckley FN52,¹ which reads as follows, are illustrative but not exhaustive: “This construction would restrict the application of s 608(e)(1) to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”

10. The two mailers stating, “Vote **No** On **4**,” constituted express advocacy. When CRIP engaged in express advocacy it was no longer defined as an ECO. CRIP then met the definition of a political committee and should have been registered as such.

11. The Commission staff and the Respondent stipulate that all elements of the offenses charged in the Order of Probable Cause can be proven by clear and convincing evidence.

¹ *Buckley v. Valeo*, 424 U.S. 1 (1976).

12. Respondent fined for Counts 4, 5, and 6 of the Order of Probable Cause because the penalties for these counts are being imposed under Counts 1, 2, and 3.

ORDER

9. The Respondent and the staff of the Commission have entered into this Consent Order voluntarily and upon advice of counsel.

10. The Respondent shall bear his own attorney fees and costs that are in any way associated with this case.

11. The Respondent understands that before the Consent Order becomes final agency action, the Commission must approve it at a public meeting. After approval, the Consent Order constitutes final agency action of the Commission on the violations listed in the Order of Probable Cause.

12. The Respondent voluntarily waives the right to any further proceedings under Chapters 104, 106, and 120, Florida Statutes, and the right to appeal the Consent Order.

13. This Consent Order is enforceable under Sections 106.265 and 120.69, Florida Statutes. The Respondent expressly waives any venue privileges and agrees that if enforcement of this Consent Order is necessary, venue shall be in Leon County, Florida, and Respondent shall be responsible for all fees and costs associated with enforcement.

14. If the Commission does not receive the signed Consent Order within 20 days of the date you received this order, the staff withdraws this offer of settlement and will proceed with the case.

15. Payment of the civil penalty is a condition precedent to the Commission's consideration of the Consent Order.

PENALTY

WHEREFORE, based upon the foregoing facts and conclusions of law, the Commission finds that the Respondent has violated the following provisions of Chapter 106, Florida Statutes, and imposes the following fines:

A. Section 106.03(1), Florida Statutes, on one occasion for failing to file a statement of organization as a political committee within 10 days of CRIP's anticipation of receiving contributions in excess of \$500 or making expenditures in excess of \$500. Respondent is fined \$500 for this violation.

B. Respondent has violated Section 106.143(1)(b), Florida Statutes, on two occasions for making expenditures for a political advertisements and failing to mark prominently CRIP's political ads opposing Amendment 4 as a paid political advertisements. Respondent is fined \$500 for each of the two counts for a total of \$1,000.

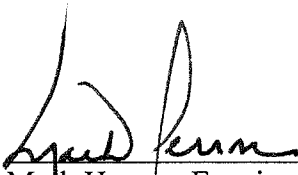
C. Respondent has violated Section 106.19(1)(d) Florida Statutes, on two occasions for making an expenditure prohibited by Chapter 106, when the Respondent authorized two \$154,480 checks to DMS for mailers opposing Amendment 4 when CRIP was registered as an ECO. Respondent is fined \$3,000 for each of the two counts for a total of \$6,000.

Therefore it is

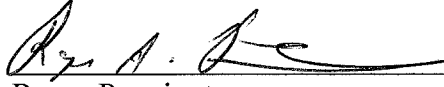
ORDERED that the Respondent shall remit to the Commission a civil penalty in the amount of \$7,500, inclusive of fees and costs. The civil penalty shall be paid to the Florida Elections Commission, 107 W. Gaines Street, Collins Building, Suite 224, Tallahassee, Florida, 32399-1050.

The **Respondent** hereby agrees and consents to the terms of this Order on

7/16/06, 2006.



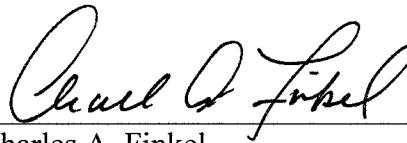
Mark Herron, Esquire
Post Office Box 1876
Tallahassee, Florida 32302-1876



Roger Pennington
7068 Arascadero Drive
Tallahassee, Florida 32308

The **Commission staff** hereby agrees and consents to the terms of this Consent Order on

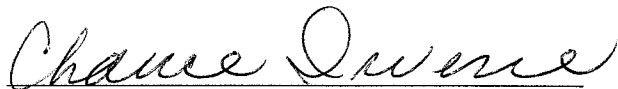
July 21, 2006.



Charles A. Finkel
General Counsel
Florida Elections Commission
107 W. Gaines Streets
Collins Building, Suite 224
Tallahassee, FL 32399-1050

Approved by the Florida Elections Commission at its regularly scheduled meeting held on August 17-18, 2006 at Tallahassee, Florida and filed with the Clerk of the Commission on

Sept. 1, 2006, in Tallahassee, Florida.



Chance Irvine, Chairman
Florida Elections Commission
107 W. Gaines Streets
Collins Building, Suite 224
Tallahassee, FL 32399-1050

Copies furnished to:

Charles A. Finkel, General Counsel
Mark Herron, Attorney for Respondent