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STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION

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STATE OF FLORIDA
ELECTIONS COMMISSION

FLORIDA ELECTIONS COMMISSION,

Petitioner,

vs.

DOUGLAS M. GUETZLOE AND THE
GUETZLOE COMMUNICATIONS
GROUP, INC.

DOAH Case No. 06-3643
FEC CASE Nos. 03-260 and
04-040
F.O. No.: 07-188

Respondent.

FINAL ORDER

On August 16, 2007 this matter was heard before the Florida Elections Commission (FEC or Commission) in Tallahassee, Florida. At the meeting, the FEC reviewed the Recommended Order entered by Administrative Law Judge (ALJ) Daniel M. Kilbride of the Division of Administrative Hearings which was entered on June 11, 2007 and addressed the Exceptions to that Order filed by the Petitioner and Staff's Response to Respondent's Exceptions.

APPEARANCES

For Petitioner: Eric M. Lippman, Esquire
Florida Elections Commission
Collins Building, Suite 224
107 West Gaines Street
Tallahassee, FL 32399-1050

For Respondent: None

RULING ON EXCEPTIONS

1. The Commission rejects Respondent's exceptions to paragraphs 18, 23, and 33 (contained in paragraphs a. through d. of Respondent's Exceptions to Recommended Order) of the Recommended Order. Respondent asserts that the factual findings in paragraphs 18, 23, and 33 are not supported by competent substantial evidence. Attaching two pages printed from the Division of Elections' website on June 23, 2007, Respondent asserts that in 2003 there was no "proper form" on which independent expenditures should be reported.

The legal doctrine known as "law of the case" requires that issues decided by a district court of appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings. *Engall v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla.2006) citing, *Florida Department of Transportation v. Juliano*, 801 So.2d 101 (Fla.2001). A decision of a district court of appeal on a settled issue becomes the "law of the case." *State v. McBride*, 848 So.2d 287 (Fla.2003). *Wells Fargo Armored Services Corporation v. Sunshine Security and Detective Agency, Inc.*, 575 So.2d 179 (Fla.1991). The doctrine of law of the case applies only to prior appellate decisions in the same case. *State v. McBride*, 848 So.2d 287 (Fla.2003). The lower tribunal is bound to follow prior rulings of the appellate court in the same case as long as the facts on which such

decision are based continue to be the facts of the case.

Juliano, 801 So.2d at 106. The law of the case applies in subsequent proceedings as long as there has been no change in the facts on which the mandate was based. *Engall*, 945 So.2d at 105.

The allegations regarding the Respondent's non-compliance with the reporting requirements of Section 106.071(1), Florida Statutes, as set forth in counts 5-7 of the Commission's Order of Probable Cause, was decided by the district court's opinion in *Guetzloe v. Florida Elections Commission*, 927 So. 2d 942 (Fla. 5th DCA 2006), *rev. den.*, *Florida Elections Commission v. Guetzloe*, 939 So.2d 1058 (Fla. 2006) In its opinion, the district court held that:

Guetzloe did not file an expenditure report with the Daytona Beach City Clerk, but did file a memorandum with the Clerk that listed expenditures of \$ 4,476.80 for radio advertisements, printing, postage, and telephone calls. However, the actual expenditures totaled \$ 9,790.84.

Guetzloe, 972 So.2d at 943; FOF ¶6.

Additionally, at the beginning of the Final Hearing, the parties agreed that the only issue left to be decided was "willfulness," as illustrated by the following discussion:

MR. LIPMAN: . . .Earlier we had the hearing -- the telephone hearing prior to when we set this date. You had indicated it...I think we agreed -the trial today is on the issue of willfulness because all the other matters have either been upheld by the District Court or weren't challenged, so they stand as it was.

ALJ KILBRIDE: Okay. MR. O'Neal?

MR. O'NEAL: Your Honor, I agree. I think if you read the District Court's opinion, the remand was for trial [of] the question of willfulness, and all my questions and testimony today will go to the question of willfulness.

ALJ KILBRIDE: All right. That was my understanding of reading the opinion . . .

* * * * *

ALJ KILBRIDE If the parties want to argue something different, then that's what the prehearing stipulation was about or if we need a motion. So yes, it appears from the general statement of [P]etitioner's position is the only issue before the tribunal is whether the [R]espondent's actions were willful in relation to the violation of 106 and this - subparagraphs of 106.

The district court determined that Respondent failed to comply with the requirements of Section 106.071(1), Florida Statutes. There have been no changes in the facts since the appeal and therefore, the district court's determination that Respondent failed to comply with the reporting requirements of Section 106.071(1), Florida Statutes, is the law of this case. Accordingly, the ALJ and the Commission are bound to accept those matters established and decided on appeal, as true.

The Commission rejects Respondent's exception to paragraph 18 of the Recommended Order specifically because it is not relevant and the issue raised is moot because his non-compliance with Section 106.071(1), Florida Statutes, is the law of the case. The finding set forth in paragraph 18 is relevant only to Respondent's compliance with Section 106.071(1), which is not an

issue on remand.

Nonetheless, even if paragraph 18 was pertinent to a pending issue, Respondent's claim that there is no substantial competent evidence to support the factual finding in paragraph 18 were not supported by the record. During her deposition, Jennifer Thompson, the Daytona Beach City Clerk, testified that the fax memo Respondent sent to her on October 24, 1993 was not a report. (D39). Ms. Thompson's testimony is substantial and provides competent evidence that Respondent did not use a "proper form." Respondent submitted only a "Fax Memo," that was not a "report" because it failed to list all the information required by Section 106.071(1), Florida Statutes. (Ex.18). §106.071(1), Fla. Stat., provides that:

The [independent expenditure] report shall contain the full name and address of the person making the expenditure; the full name and address of each person to whom and for whom each such expenditure has been made; the amount, date, and purpose of each such expenditure; a description of the services or goods obtained by each such expenditure; the issue to which the expenditure relates; and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made.

Even if the ALJ erred by finding that Respondent's failed to file his report on the "proper form," Respondent's exceptions should be denied because the ALJ did not use the term "proper form" in those factual findings. The factual findings in paragraph 33 conclude that Respondent failed to make any

reasonable efforts to comply with the election laws by submitting a "proper report" disclosing his expenditures.

2. The Commission rejects Respondent exceptions to paragraph 34 (contained in paragraphs e. through h. of Respondent's Exceptions to Recommended Order) of the Recommended Order. Specifically, Respondent excepts to the finding of fact that his actions were willful. Willfulness is an issue of fact to be decided by the trier of fact. *Guetzloe*, 927 So.2d at 945 (Fla. 5th DCA 2006); *Fugate v. Florida Elections Commission*, 924 So.2d 74 (Fla. 1st DCA 2006). In order for the Commission to grant Respondent's second exception, the Commission must conclude that the ALJ's finding of willfulness was not based upon competent substantial evidence.

Respondent specifically excepted to the factual finding in paragraph 34 and asserted that to the extent the ALJ relied upon Respondent's willful failure to file reports on the "proper form," there is no substantial evidence to support a finding that Respondent failed to file his independent expenditure reports on the "proper form." Respondent's non-compliance with Sections 106.071(1), Florida Statutes, was conclusively decided when the district court found that Respondent did not file the required reports at issue in this matter. Therefore, the issue presented to the ALJ for determination was whether Respondent's non-compliance was willful, not whether Respondent's failure to

use a given form was willful.

Respondent's assertion that there is no substantial competent evidence to support the ALJ's findings that Respondent's actions in this case as to Counts 5, 6, 7, and 12 in the order of probable cause were willful is not supported by the record. The following Findings of Fact support the ALJ's finding of willfulness in relation to Sections 106.071(1) and 106.19(1)(c), Florida Statutes:

a. Guetzloe is a very experienced political consultant. He has run for public office three times. In 1986, Guetzloe was a candidate for the Florida House of Representatives. In 1990, Guetzloe was a candidate for the Florida Senate from District 14. When Guetzloe qualified as a candidate for the Florida Senate in 1986 and 1990, he received a copy of Chapter 106, Florida Statutes. (FOF ¶9)

b. Guetzloe is also chairman and treasurer of Ax the Tax, a Florida-registered political committee. Ax the Tax first registered as a local political committee in 1982. It registered again in 1986 and it has been, more or less, active ever since. Guetzloe is the only officer of Ax the Tax, and Guetzloe makes 100 percent of the decisions for Ax the Tax. (FOF ¶12).

c. Guetzloe received the Department of State Handbook for Committees (Handbook) through the years in connection with Ax the Tax. The Handbook contained information concerning independent expenditures. Guetzloe testified that when he received updates to the handbooks, from time to time, he possibly reviewed them. (FOF ¶13).

d. Guetzloe has never read through the statutes to familiarize himself with the requirements imposed upon candidates for public office or on committees. (FOF ¶14).

e. Guetzloe is aware that the election laws have changed dramatically through the years. Guetzloe has generally kept up with changes in the law relating to political disclaimers through notices sent by the Division of Elections. However, unless there was a notice specifically outlining changes, Guetzloe generally assumed that the law that had been in effect is still in effect. Guetzloe relies on receiving notice in the mail from the Division of Elections to determine if there were any changes to the election laws. Unless he receives such a notice, Guetzloe presumes that there are no changes. Guetzloe does not take affirmative steps on his own to determine if and

how Florida's election laws may change from year to year. Over the years, Guetzloe did not contact any of the County Supervisors of Elections, or local filing officers, to ask if there had been changes in the law, nor did he review the statutes for changes. However, if a question arose that he wanted answered, the Supervisor or the local filing officers would be Guetzloe's point of reference. He availed himself of those resources many times over the years. (FOF ¶15).

f. In his October 24, 2003, memo to the Daytona Beach City Clerk, Guetzloe acknowledged that he needed to file an additional independent expenditure report for expenditures made after October 3, 2003. (Ex. 18). There is no evidence to support that Respondent filed any document with the Daytona Beach City Clerk's (DBCC) office except his October 24, 2003, report. Respondent could not satisfactorily explain why he failed to file any additional independent expenditure reports. (FOF ¶23)

g. Respondent testified that he believed the reason he included the language, "Please be advised that in accordance with Section 106.071(1), Florida Statutes, that The Guetzloe Communications Group, Inc., d/b/a Advantage Consultants . . .has made an

independent expenditure on behalf of various candidates for Daytona Beach Mayor and City commission," in the Fax Memorandum was because he was instructed to do so by the DBCC office. (FOF ¶21).

h. Guetzloe made no efforts to read or study the Florida Election Code, specifically related to independent expenditures, campaign financing reporting or disclosure statements, at any time during the 2003 election cycle. (FOF ¶29).

i. It is a candidate or committee's responsibility to educate themselves about the requirements of the law. (FOF ¶30).

j. Guetzloe failed to make any reasonable effort to comply with the election laws by submitting a proper report disclosing the expenditures or a follow up report, as required by law. (FOF ¶33).

Furthermore, Respondent's assertion in paragraphs g. and h. that staff must prove that Respondent's actions were knowing and willful is contrary to existing law. Section 106.25(3), Florida Statutes, provides:

For the purposes of commission jurisdiction, a violation shall mean the willful performance of an act prohibited by this chapter or chapter 104 or the willful failure to perform an act required by this chapter or chapter 104.

In *Diaz de la Portilla*, the district court ruled that,

A willful violation is a knowing violation of the statute. *Id.* § 106.37. A willful violation also includes a reckless violation, that is, an act showing a reckless disregard for whether the action is required or permitted under chapter 106.

Diaz de la Portilla at 857 So.2d 916.

Applying this standard, the district court affirmed the Commission's determination that Diaz de la Portilla committed four violations of Section 106.19(1)(b), Florida Statutes. *Id.* at 922.

In *Florida Elections Commission v. Proctor*, Case No. FEC 99-065, DOAH Case Number 00-4994, August 23, 2002, *aff'd per curium*, *Proctor v. Florida Elections Commission*, 855 So.2d 62 (Fla. 1st DCA 2003), the Commission specifically held that:

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 Statutes, the standard is that of "willfulness" as defined 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."

Proctor Final Order at ¶9.

3. The Commission rejects Respondent's exceptions to paragraph 30 (contained in paragraphs i. through m. of

Respondent's Exceptions to Recommended Order) of the Recommended Order. Respondent asserts that his exception to paragraph 30 is grounded in his first amendment rights. Respondent asserts that the ALJ erred when by imposing the same burden on Mr. Guetzloe, a private citizen, to educate himself about the laws and requirements of Chapter 106, as is imposed upon candidates and committees.

With these exceptions, Respondent raises this issue for the first time. Respondent never raised that issue before the finder of fact until filing his Exceptions to Recommended Order, and therefore, it is improper to raise the issue for the first time in his exceptions.

In addition, Respondent's exception also mischaracterized his participation in the 2003 City of Daytona Beach elections as that of a private citizen exercising his first amendment rights to free speech. Respondent's characterization is not supported by the record. Respondent Guetzloe's actions were far from those of a private citizen. Guetzloe's unrebutted trial testimony was that the independent expenditures were paid for by withdrawing funds from GCC's bank account. (T110; FOF ¶16). Respondent is also the Chairman, Treasurer, only officer and sole decision maker of Ax the Tax, a Florida political committee. (FOF ¶10). Ax the Tax has been active at either the county or the state level since 1987 or 1988. (T54). The Ax the Tax logo was

included on the advertisements paid for by the independent expenditure so that people would know that the person making the independent expenditures was the Chairman and Treasurer of Ax the Tax. (T77).

Guetzloe's actions in this case are more accurately characterized as those of a long time political operative who has made his living in the political arena by providing political advice to candidates for over 20 years, and who, through the years, has received several copies of Florida's election laws as well as handbooks published and distributed by the Florida Division of Elections. Accordingly, contrary to Respondent's characterization that Guetzloe was acting as a private citizen when making the independent expenditures, the overwhelming evidence in this case indicates that Guetzloe was acting as anything but a private citizen in this case.

FINDINGS OF FACT

4. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

5. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

6. The Commission has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 106, Florida Statutes.

7. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

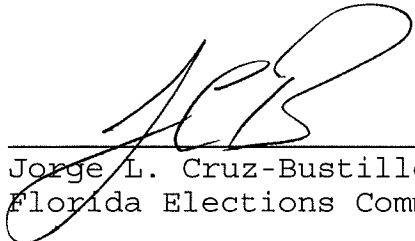
DISPOSITION

Upon a complete review of the record in this matter, the Commission accepts the disposition recommended by the Administrative Law Judge.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that in the matter of *Florida Elections Commission v. Douglas M. Gueztloe and The Gueztloe Communications Group, Inc.*, Agency Case Nos. FEC 03-260 and 04-040, Respondents violated Section 106.071(1), Florida Statutes, on three occasions, and therefore, a fine of \$1,000.00 is imposed for each count for a total \$3,000.00 and Respondents violated Section 106.19(1)(c), Florida Statutes, and \$1,000.00 is imposed for that single count.

This Final Order shall take effect upon being filed with the Clerk for the Florida Elections Commission. The fine shall be due and owing within 30 days of entry of this order.

DONE AND ORDERED this 12 day of December,
2007.




Jorge L. Cruz-Bustillo, Chair
Florida Elections Commission

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: Counsel for Respondent, Fred O'Neal, Post Office Box 842, Windermere, Florida 34786; and Eric Lipman, Assistant General Counsel, 107 W. Gaines Street, Collins Building, Suite 224, Tallahassee, Florida 32399-0250 this 12 day of December, 2007.



Patsy Rushing
Commission Clerk