

**STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION**

Division of Elections,
Petitioner,

v.

Case No.: FEC 94-123
F.O. No.: DOSFEC 96-030

Merle Albertyn Kappelmann,
Respondent.

FINAL ORDER

THIS CAUSE came on to be heard at a formal hearing held before the Florida Elections Commission on August 2, 1996 in Orlando, Florida.

APPEARANCES

For Division: David R. Westcott
Assistant General Counsel
Department of State
Division of Elections
Room 2002, The Capitol
Tallahassee, FL 32399-0250

For Respondent: Merle Albertyn Kappelmann
2011 South Atlantic Avenue
Daytona Beach Shores, FL 32118

STATEMENT OF THE ISSUE

Whether the Respondent violated Section 106.071(1), Florida Statutes, when she mailed a professionally printed post card containing a false and misleading disclaimer to 1,300 voters in Daytona Beach Shores opposing the candidacy of Harold Needham.

PRELIMINARY STATEMENT

On November 21, 1994, the Division of Elections received a sworn complaint alleging violations of Florida's election laws. The Division conducted an investigation to determine whether the facts alleged in the complaint constituted probable cause to believe that the Respondent violated the following section(s) of Chapter 106, Florida Statutes:

Section 106.071(1), Florida Statutes, failure of a person who makes independent expenditures of \$100 or more to file periodic reports of the expenditures; and

Section 106.071(1), Florida Statutes, failure of a person to include the proper disclaimer in a political advertisement paid for by an independent expenditure.

On November 27, 1995, David A. Rancourt, Director of the Division of Elections, signed a Statement of Findings determining that there was probable cause to believe that Respondent violated the disclaimer provision of Section 106.071(1), Florida Statutes. On December 8, 1995, the Florida Elections Commission entered an Order of Probable Cause finding that there was probable cause to believe that the Respondent willfully violated the disclaimer provision of Section 106.071(1), Florida Statutes. The Respondent timely requested a formal hearing and was noticed to appear before the Commission on June 7, 1996. At Respondent's request, the Commission continued the formal hearing until August 2, 1995. At the formal hearing, the Division presented the oral testimony of two witnesses, Charles Leonard Ivey, its investigator, and Harold Needham, the Complainant. The Division offered four exhibits which were admitted into evidence. The Respondent did not testify nor did she present any witnesses. Respondent offered six exhibits, two of which were admitted in to evidence. The parties waived their right to submit written,

proposed final orders to the Commission.

FINDINGS OF FACT

1. The Commission is charged with enforcing Section 104.271 and Chapter 106, Florida Statutes, the campaign financing law.

2. The Respondent is a resident of Daytona Beach Shores. The Complainant was an unsuccessful candidate for re-election to the Daytona Beach Shores City Council during the 1994 elections.

3. On November 3, 1994, Respondent paid \$84.27 to Copy Cat Printing for the production of 1,300 two-sided post cards that opposed the candidacy of Harold Needham and supported two other candidates. The post cards were political advertisements which advocated the defeat of a clearly identified candidate.

4. On November 4, 1994, Respondent paid \$237.50 in postage to mail the 1,300 post cards to Daytona Beach Shores voters. The post cards were delivered on November 5th and 7th. The general election was held on November 8, 1994.

5. Respondent placed the disclaimer, "Pd. Pol. Ad by Concerned Citizens" on the front of the post cards. However, the evidence shows that Respondent acted alone in the payment and distribution of the post cards. The Commission finds that Respondent's use of the phrase "Concerned Citizens" was more than just an attempt to publish the post cards anonymously. Rather, it was a calculated effort to deceive the voters of Daytona Beach Shores by implying that the allegations in the post cards came from an organized group of people, possibly even a political committee, who called themselves "Concerned

Citizens."

6. Respondent's use of the false and misleading disclaimer shows her knowledge that the law requires political advertisements to contain disclaimers. Respondent further evidenced her knowledge of Florida's elections laws when she filed an independent expenditure report for the post cards, as well as other independent expenditures, with the Volusia County Supervisor of Elections on November 15, 1994. Even with this knowledge of the law, Respondent intentionally chose not to place the proper disclaimer on the post cards.

7. The post cards read, "SAY NO TO NEEDHAM" on the front, and on the back alleged that Mr. Needham "violated the law" when he was involved in a "HIT AND RUN" accident with a child on a bicycle.

8. The undisputed testimony of Mr. Needham showed that on September 1, 1993, more than a year before Respondent mailed her post cards, a child ran in to Mr. Needham's car, then got back on his bicycle and rode away. Although the child's mother later filed a police report, Mr. Needham was cleared in the ensuing investigation and the state attorney declined to file any charges against Mr. Needham.

9. The Commission finds that Respondent's allegations against Mr. Needham in the post card are false. Mr. Needham was never even charged with a crime much less convicted of hit and run by a jury of his peers.

10. Respondent mailed the post cards so that they would arrive at the homes of Daytona Beach Shores voters just days before the general election. The Commission

finds that Respondent did this purposefully in order to leave Mr. Needham no time to effectively respond to her false allegations. In an attempt to show that the allegations in the post cards were false, Mr. Needham ran from precinct to precinct on election day and passed out copies of the Port Orange police report to as many voters as he could find. Mr. Needham lost the election by a mere 40 votes, and it is likely that Respondent's post card was the difference in the election.

11. On March 20, 1996, the General Counsel's Report of the Federal Elections Commission (FEC) found reason to believe that Respondent violated 2 U.S.C. s. 441e for producing these same post cards. The FEC found that Respondent is not a citizen or permanent resident of the United States of America and, therefore, is prohibited from making contributions or expenditures relating to any national, state, county or local election held in this country. The FEC issued a letter of admonishment and referred the case to the Immigration and Naturalization Service.

12. Respondent did not testify on her own behalf nor did she call any witnesses to testify for her. Respondent offered no defense other than she felt that Section 106.071(1), Florida Statutes, was unconstitutional¹.

CONCLUSIONS OF LAW

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

¹ Respondent filed a Motion to Dismiss this complaint based on McIntyre v. Ohio Elections Commission, 115 S.Ct. 1511 (1995). The Commission fully considered Respondent's arguments and denied the motion in a separate order dated March 14, 1996.

2. Section 106.071(1), Florida Statutes, reads in pertinent part: "Any political advertisement paid for by an independent expenditure shall prominently state 'Paid political advertisement paid for by (Name of person or committee paying for advertisement) independently of any (candidate or committee),' and shall contain the name and address of the person paying for the political advertisement."

3. In order to show a violation of Section 106.071(1), Florida Statutes, the Division must prove that Respondent willfully made an independent expenditure on a political advertisement which failed to contain the following disclaimer: "Paid political advertisement paid for by Merle Albertyn Kappelmann independently of any candidate or committee. Merle Albertyn Kappelmann, 2011 South Atlantic Avenue, Daytona Beach Shores, Florida 32118."

4. The Division's un rebutted testimony clearly shows that Respondent spent a total of \$321.77 on the production and distribution of the post cards. The post cards advocated the defeat of candidate Harold Needham, and contained the false and misleading disclaimer, "Pd. Pol. Ad by Concerned Citizens."

5. Under Section 106.25(3), Florida Statutes, and Rule 1D-1.0025(10), F.A.C., a Respondent acts willfully when she "knew or showed reckless disregard for whether the Respondent's conduct was prohibited or required by Chapter 106, Florida Statutes.

6. Section 106.071(1), Florida Statutes, is clearly written. Respondent knew


and understood that the law required her to list who was responsible for the political advertisement. She made no argument that she misunderstood the law or that the violation was inadvertent. When Respondent chose to use the false and misleading disclaimer, she willfully violated Section 106.071(1), Florida Statutes.

ORDER

Based upon the foregoing facts and conclusions of law, the Florida Elections Commission finds that the Respondent willfully violated Section 106.071(1), Florida Statutes. Therefore, it is

ORDERED that the Respondent shall remit a civil penalty in the amount of \$1,000. The civil penalty shall be paid to the Florida Elections Commission, Room 2002, The Capitol, 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 on August 9, 1996 in Tallahassee, Florida.



Carlos Alvarez, Chairman
Florida Elections Commission
Room 2002, The Capitol
Tallahassee, FL 32399-0250

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.

Copies furnished to:

✓David R. Westcott, Assistant General Counsel
Merle Albertyn Kappelmann, Respondent (certified mail)
Harold W. Needham, Complainant
Joyce Holmquist, Filing Officer