

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND)
CONSUMER SERVICES,)
)
Petitioner,)
)
vs.) CASE NO. 92-5344
)
UNITED RAINBOW FOUNDATION, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Mary Clark, held a formal hearing, in the above-styled case on March 1, 1993, by telephone conference as stipulated by the parties.

APPEARANCES

For Petitioner: Robert G. Worley, Esquire
Room 515, Mayo Building
Tallahassee, Florida 32399-0800

For Respondent: John P. Holsonback, Esquire
Melendi, Gibbons & Holsonback, P.A.
408 East Madison
Tampa, Florida 33602

STATEMENT OF THE ISSUES

An administrative complaint and first amended administrative complaint allege that Respondent violated Section 496.405, F.S. (1991) by soliciting contributions as a charitable organization on several occasions prior to approval of its registration statement by the Division of Consumer Services.

The parties have stipulated that the violations occurred and further stipulated that the remaining issue for resolution is an appropriate penalty.

PRELIMINARY STATEMENT

The initial administrative complaint is dated July 30, 1992, and was issued at the same time as a separate notice of denial of Respondent's request for registration approval. Timely petitions for hearing were filed and the proceeding on registration denial was conducted under the expedited schedule provided in Section 496.405(7), F.S.

The outcome of the registration denial proceeding was a recommended order entered August 17, 1992, recommending that registration be approved, by default. The agency's final order provided for registration approval retroactive to July 17, 1992.

In this instant action under the administrative complaint the agency is seeking administrative fines against the Respondent, United Rainbow Foundation, Inc. (URF).

A stipulation of facts was filed by the parties on February 12, 1993, and in a prehearing stipulation filed on February 24, 1993, the parties requested that the hearing officer determine an appropriate fine, if any, on the basis of the record already established in DOAH case #92-4817 (the registration denial proceeding) and on the parties' stipulations.

Oral argument was conducted by telephone on March 1, 1993. Petitioner's motion for leave to file an amended administrative complaint was granted. The amended complaint conforms the dates of solicitations to the parties' stipulation and deletes reference to alleged violations after the July 17, 1992 retroactive registration approval.

The transcript of proceeding in DOAH case #92-4817 was filed on March 8, 1993 and the parties' proposed recommended orders were filed on March 8 and March 15, 1993.

The proposed findings of fact by each party are substantially adopted here as they are derived from the stipulated facts filed on February 12, 1993, and on facts found in DOAH case #92-4817.

FINDINGS OF FACT

1. Petitioner, United Rainbow Foundation, Inc. (URF) is a Florida not-for-profit corporation with its principal office in Tarpon Springs, Pinellas County, Florida.

2. The following facts, comprising the parties' stipulation filed on February 12, 1993, are adopted:

1. Prior to being registered on July 17, 1992, under Chapter 496, Florida Statutes, United Rainbow solicited contributions in the State of Florida for a total of thirty-two (32) days;
2. Solicitations for charitable contributions were made by United Rainbow in the calendar year 1992 on or about the following dates:

April 10, 13

May 12, 13, 15, 22, 26, 28, 29

June 1, 2, 3, 8, 9, 10, 11, 12, 16, 18, 22,
23, 25, 26, 29

July 1, 2, 3, 6, 7, 9, 10, 14

3. These solicitations were made in several locations in Florida as follows:

Bradenton
New Port Richey
Orlando
Gainesville
Lecanto
Venice

4. As a result of the aforementioned activities, United Rainbow received charitable contributions between April 10, 1992 and July 14, 1992 totalling approximately \$15,446.74; and

5. United Rainbow incurred attorney's fees and costs totalling \$12,876.87 (as of December 31, 1992) in connection with administrative proceedings in both this action and in a related action wherein United Rainbow successfully challenged the denial of its registration under Chapter 496 (DOAH Case No. 92-4817). However, the Department objects to the relevancy of attorney's fees incurred by United Rainbow and does not waive its objection by execution of this Stipulation.

3. The findings of fact reflected in the recommended order dated August 17, 1992 in DOAH case #92-4817, as adopted in the agency's final order entered August 19, 1992 are adopted herein. The recommended and final orders are appended hereto.

CONCLUSIONS OF LAW

4. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to Section 120.57(1), F.S. and Section 496.419(6), F.S.

5. Section 496.405(1), F.S. provides, in pertinent part:

496.405 Registration statements by charitable organizations and sponsors.-

(1)(a) A charitable organization or sponsor, unless exempted pursuant to s. 496.406, which intends to solicit contributions in this state by any means or have funds solicited on its behalf by any other person, charitable organization, sponsor, commercial co-venturer, or professional solicitor, or that participates in a charitable sales promotion or sponsor sales promotion, must, prior to engaging in any of these activities, and annually thereafter, file a registration statement with the division.

. . .

(c) No charitable organization or sponsor that is required to file a registration statement shall, prior to approval of its registration statement by the division in accordance with subsection (7) solicit contributions or have

contributions solicited on its behalf by any other person, charitable organization, sponsor, commercial co-venturer, or professional solicitor, or participate in a charitable sales promotion or sponsor sales promotion.

. . .

6. It is uncontroverted that URF is a "charitable organization" as defined in Section 496.404(1), F.S. and is required to file a registration statement with the Division of Consumer Services of the Florida Department of Agriculture and Consumer Services.

7. It is uncontroverted that URF violated subsection 496.405(1)(c), F.S. on thirty-two separate occasions.

8. As stipulated, the only issue is the amount of administrative fine to be imposed, if any.

Section 496.419, F.S., provides, in pertinent part:

. . .

(4) The division may enter an order imposing one or more of the penalties set forth in subsection (5) if the division finds that a charitable organization, sponsor, professional fundraising consultant, or professional solicitor, or an agent, servant, or employee thereof has:

(a) Violated or is operating in violation of any of the provisions of ss. 496.401-496.424 or of the rules adopted or orders issued thereunder:

. . .

(5) Upon a finding as set forth in subsection (4), the division may enter an order doing one or more of the following:

(a) Imposing an administrative fine not to exceed \$1,000 for each act or omission which constitutes a violation of ss. 496.401-496.424 or a rule or order.

(b) Issuing a cease and desist order that directs that the person cease and desist specified fundraising activities;

(c) Refusing to register on probation for a period of time, subject to such conditions as the division may specify;

(d) Placing the registrant on probation for a period of time, subject to such conditions as the division may specify;

(e) Issuing of a letter of concern, and

(f) Cancelling an exemption granted under s. 496.406.

9. This is the first case arising under Sections 496.401-496.424, F.S., the "Solicitation of Contributions Act", which act was created in 1991 by Chapter 91-208, Laws of Florida.

There are no adopted guidelines for imposing a penalty, and no policy created by prior agency action.

10. Counsel for the agency argues that a fine of \$1,000.00 a day for each of the thirty-two days is reasonable, since each day of solicitation could effectively be broken down into multiple separate violations when the number of solicitors working each day is considered. See findings of fact #7, recommended order, DOAH #92-4817: "At various times, and in various cities in Florida typical crews of four to twenty people worked traffic intersections with plastic jugs."

11. Counsel for URF argues that the \$32,000.00 fine is excessive, and would be a "death penalty"; that the organization did everything necessary within its knowledge to meet regulatory requirements before commencing operation; that it lost money during the four to six weeks that it could not operate while awaiting a decision on the registration denial; and that it incurred costs and attorney's fees in contesting the denial decision in a proceeding in which it ultimately prevailed.

12. The assessment of a penalty, so long as it is within the range permitted by law, is a policy matter essentially within the agency's prerogative. *Criminal Justice Standards and Training Commission v. Bradley*, 596 So. 2d 661, 663 (Fla. 1992).

The following observations, based on the facts and circumstances in this case, are therefore offered as guidance.

13. Section 496.422, F.S. requires the Department of State to include notice of registration requirements with its packets sent to persons or organizations seeking to incorporate as nonprofit corporations. This was not done in this case. (Finding of Fact #3, Recommended Order in DOAH #92-4817.)

Nonetheless, URF was given notice of the requirements on several other occasions as it continued its solicitation activities:

An April 6, 1992 letter from the Pinellas County Department of Consumer Affairs included explicit instructions to contact the Division of Consumer Services. (Findings of Fact #6, Recommended Order in DOAH 92-4817);

The organization's own accountant informed it on June 11, 1992 that requirements of the Solicitation of Contributions Act had not been satisfied. (Finding of Fact #18, Recommended Order, DOAH #92-4817); and

On or about June 26, 1992, a URF representative was informed by telephone by Division Staffperson Mary Helen Shelton, of the registration requirements. (Finding of Fact #8, Recommended Order, DOAH #92-4817.)

The organization's protestations of ignorance are simply unpersuasive.

14. The organization has spent considerable funds in this and the prior registration proceeding. It prevailed in the prior proceeding largely because the agency was inexperienced in administering a function that it had been

assigned for barely six months (see Chapter 91-208, Laws of Florida, effective 1/1/92). It is impossible to distinguish the costs and fees expended in that case from those in this case in which the organization has not prevailed, and it would be improper to offset the penalty by deducting the fees and costs.

15. From the evidence and argument it is impossible to determine that a \$32,000.00 penalty would be a "death penalty". The budget submitted with its registration application by URF in July 1992 reflected gifts, grants and contributions totalling \$1,125,000.00 and expenses totalling \$828,896.00. (Finding of Fact 17, Recommended Order, DOAH #92-4817.)

The parties have stipulated that the contributions collected during the relevant periods prior to registration amounted to \$15,446.74.

The budgeted amounts may have been overly optimistic, but at the time that the budget was submitted, surely the organization had some notion of the amount it had collected (the \$15,446.74), and some anticipation that collections would substantially pick up over the 1992 calendar year. Compared to the organization's budget, the \$32,000.00 penalty would be "a drop in the bucket".

16. That the organization lost money during the time that it was awaiting a decision on the registration is effectively countered with the fact that for at least the same amount of time the organization illegally gained money prior to its approval.

17. It is possible that the illegally gained money is the most appropriate and concrete measure of a penalty. That is, the organization should at least relinquish the \$15,446.74 in contributions solicited prior to registration.

However, as discussed above, there are more aggravating than mitigating factors found in the record and the reasonableness of the agency counsel's recommendation has not been refuted.

RECOMMENDATION

Based on the foregoing, it is hereby

RECOMMENDED:

That the agency enter its final order finding that the Respondent, United Rainbow Foundation, Inc. violated Section 496.405(1)(c), F.S. and assessing a penalty of \$32,000.00.

DONE AND ENTERED this 26th day of April, 1993, in Tallahassee, Florida.

MARY CLARK
Hearing Officer
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
day of April, 1993.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.