

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ELECTIONS COMMISSION,)
)
 Petitioner,)
)
vs.) Case No. 00-2582
)
ALEX DIAZ DE LA PORTILLA,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a final administrative hearing in this case on August 8, 2005, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Eric M. Lipman, Esquire
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For Respondent: Mark Herron, Esquire
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STATEMENT OF THE ISSUE

What is the appropriate fine for Respondent's 17 violations of Chapter 106, Florida Statutes (1999)?

PRELIMINARY STATEMENT

This case was remanded by the Third District Court of Appeal on September 10, 2003, directing that "there must be a new hearing on the issue of penalty in light of the reduction number of violations" The Third District Court of Appeal further directed: "Regarding setting fines, section 106.265, Florida Statutes, lists several factors to be considered. Among the things to be taken into account is "[t]he appropriateness of such penalty to the financial resources of the person"

On June 10, 2004, the Florida Elections Commission returned the case to Division of Administrative Hearings to "conduct a formal hearing for the sole issue of penalty amount." On June 11, 2004, the case was reopened, and counsel were directed to submit dates of mutual availability for a hearing. The case was scheduled for hearing on November 22 and 23, 2004.

On November 18, 2004, Respondent's motion for continuance was granted, and the case was rescheduled for January 3, 2005. The hearing began as scheduled on January 3, 2005, but was continued to a future date to be determined based on the availability of the litigants.

On April 18, 2005, the case was rescheduled to August 8, 2005. Further testimony was taken on August 8, 2005, concluding the presentation of evidence. The Respondent was the only witness. The Florida Election Commission entered 27 exhibits into evidence, and Respondent entered 3 exhibits into evidence.

No transcript of proceedings was prepared. On November 14, 2005, Respondent requested an extension of time to file proposed recommended orders. The request was granted, and the time for filing the proposed recommended orders was extended until November 28, 2005. Petitioner filed a Proposed Recommended Order Following New Penalty Hearing.

On December 30, 2004, one working day before the hearing, Petitioner filed a Motion To Compel seeking the production of certain documents and seeking attorney's fees. On July 21, 2005, Petitioner filed an additional motion to compel seeking the production of documents and attorney's fees. While it is apparent that the great volume of personal financial information provided by Respondent was produced grudgingly and only after protective orders were in place, the delay in production does not warrant the penalty of attorney's fees.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following findings of facts are made:

1. Respondent is an elected public official, a State of Florida State Senator; violations of the Florida Elections Law during his election to that high office triggered this case. He has been a state legislator for more than a decade.

2. The Third District Court of Appeal remanded the original case for reconsideration of the penalty after affirming Respondent's 17 violations of Chapter 106, Florida Statutes (1999).

3. The 17 violations affirmed by the Third District Court of Appeal are:

a. two violations of Subsection 106.07(5), Florida Statutes (1999), for certifying as correct, an incorrect campaign treasurer's report;

b. four violations of Subsection 106.19(1)(b), Florida Statutes, for failing to report four personal loans (contributions) to his campaign;

c. five violations of Subsection 106.143(1), Florida Statutes, for advertisements without disclaimers;

d. five violations of Subsection 106.132(2), Florida Statutes, for advertisements that did not contain a party affiliation;

e. one violation of Subsection 106.143(4)(a), Florida Statutes, for failure to state that the candidate approved the campaign advertisement.

4. Respondent's current employment is that of a Florida state senator. His direct income from that employment is \$29,916. He receives additional payments from the State of Florida in the form of reimbursements for travel, per diem, and other approved expenses related to his official position.

5. Respondent enjoys a remarkable lifestyle. He owns two homes, one in Miami and the other in Tallahassee. Recently married, the Tallahassee home is jointly-owned with his wife and was purchased for \$795,000. While the Miami home was owned by Respondent, individually, prior to the marriage, it is now jointly-owned. The change in title to the Miami home may be the result of refinancing subsequent to his marriage.

6. Respondent leases a Lexus automobile; the monthly lease cost is \$755.

7. Respondent maintains a Schwab investment account to which he contributes \$150 monthly. In August 2005, the account had a value of approximately \$7,200.

8. Respondent maintains an American Express credit card account, jointly with his wife, that had a balance due of \$61,000 during the time of the hearings.

9. In September 2004, Respondent loaned his legislative aide \$15,000, which at the time of the hearings remained unrepaid.

10. In May 2005, Respondent refinanced his Miami home, which he valued at \$210,000 on his 2004 Form 6, for \$384,300.

11. At the time of the hearings, Respondent had funds on deposit in Sunshine State Credit Union and Washington Mutual Bank of approximately \$3,800.

12. Respondent's personal living expenses exceed his stated income. No reasonable explanation has been offered for his ability to maintain his lifestyle.

13. Respondent's net worth will allow him to pay any fine appropriate for the 17 violations of law affirmed by the Third District Court of Appeal.

14. Respondent had previously violated Subsection 106.57(5), Florida Statutes (1999).

CONCLUSIONS OF LAW

15. DOAH has jurisdiction of the parties and subject matter of this proceeding. §§ 106.25(5) and 120.57(1), Fla. Stat. (1999).

16. The Third District Court of Appeal affirmed 17 violations of Florida law by Respondent and remanded the case for reconsideration of the penalty. Diaz de la Portilla v. Florida Elections Commission, 857 So. 2d 913 (Fla. 3rd DCA 2003).

17. The standard of proof in a case seeking fines for violations of election laws is clear and convincing evidence. Diaz de la Portilla v. Florida Elections Commission, supra.

18. Regarding the setting of fines, Subsection 106.265, Florida Statutes (1999), lists several factors to be considered. Among the things to be taken into account is the appropriateness of such penalty to the financial resources of the person. § 106.265(1)(c), Fla. Stat. (1999). A party asserting the affirmative of a proposition has the burden of producing evidence on that proposition. Thus, if a defending party wishes his financial position to be taken into account as a matter in mitigation, that party should produce evidence of his financial resources. Where the defending party was the candidate for election, it may be most efficient to admit into evidence the most recent financial disclosure statement of the candidate. Diaz de la Portilla v. Florida Elections Commission, supra.

19. The totality of the evidence submitted revealed that Respondent has the financial resources to respond to an appropriate penalty for his 17 violations of Florida law.

20. Two violations of Subsection 106.07(5), Florida Statutes (1999), and four violations of Subsection 106.19(1)(b), Florida Statutes, involve Respondent's failure to report four contributions totaling \$87,000. As noted by the Third District Court of Appeal, the violations are an apparent result of

Respondent's not reading the first page of his campaign treasurer's report and not disclosing his four personal loans to his campaign. Based on all the evidence received in this case, including the fact that Respondent had previously violated Subsection 106.07(5), Florida Statutes (1999), these six violations warrant the imposition of the maximum penalty of \$1,000.

21. The remaining 11 violations: five violations of Subsection 106.143(1), Florida Statutes (1999), for advertisements without disclaimers; five violations of Subsection 106.132(2), Florida Statutes, for advertisements that did not contain a party affiliation; and one violation of Subsection 106.143(4)(a), Florida Statutes, for failure to state that the candidate approved the campaign advertisement, are technical in nature and warrant a \$250 penalty per violation.

RECOMMENDATION

Based on the forgoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Election Commission impose a penalty of \$8,750 on Respondent, Senator Alex Diaz de la Portilla.

DONE AND ENTERED this 6th day of January, 2006, in
Tallahassee, Leon County, Florida.



JEFF B. CLARK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of January, 2006.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.