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STATE OF FLORIDA  
FLORIDA ELECTIONS COMMISSION

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ELECTIONS COMMISSION

FLORIDA ELECTIONS COMMISSION,<sup>1</sup>  
Petitioner,  
vs.

AP  
Agency Case No.: 03-001  
DOAH Case No.: 03-2443  
F.O. No.: DOSFEC 04-152 W

KAY MCGINN  
Respondent.

JBC-clw

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FINAL ORDER

On May 20, 2004, this cause came on to be heard before the Florida Elections Commission (FEC or Commission) at its meeting in Tallahassee, Florida. At the meeting, the Commission reviewed the Recommended Order entered by Administrative Law Judge (ALJ) Jeff B. Clark on January 13, 2004, and addressed the Exceptions to that Order filed by the Petitioner.<sup>2</sup>

APPEARANCES

For Petitioner: Eric Lipman, Esquire  
Assistant General Counsel  
Florida Elections Commission  
Room 224, The Collins Building  
107 West Gaines Street  
Tallahassee, FL 32399-1050

For Respondent: Stuart R. Michelson, Esquire, and  
James Burch, Esquire  
200 S.E. 13<sup>th</sup> Street  
Ft. Lauderdale, FL 33316

<sup>1</sup>The ALJ in his Recommended Order aligned the Commission as Respondent and Kay McGinn as Petitioner. Since the Commission is the charging party and bears the burden of proof, it appears more appropriate to reverse this alignment.

<sup>2</sup>The FEC has reviewed the entire record and heard arguments of the parties.

PRELIMINARY MATTERS

The Respondent filed a Motion for Leave to File Response Pursuant to 28-106.207, F. A. C., Out of Time and, at the same time, a Response to Petitioner's Exceptions to the Recommended Order. Petitioner answered Respondent's Motion by filing a Motion to Strike the late-filed Response. Respondent has filed a Response to Petitioner's Motion to Strike.

As Petitioner correctly pointed out, responses to exceptions must be filed within 10 days of service of the exceptions. See Rule 28-106.217, Fla. Admin. Code. Respondent admits that she failed to timely file her response to Petitioner's exceptions and has forthrightly stated that she has no excuse for failure to submit a motion for an extension of time in which to file her response other than simple oversight.

Under such circumstances, the Commission must follow Rule 28-106.204(5), Florida Administrative Code, which provides, "Motions for extension of time shall be filed prior to the expiration of the deadline sought to be extended and shall state good cause for the request." Since Respondent did not timely file a request for extension of time and has not proffered any "good cause" as to why she did not do so, the Motion for Leave to File Response Pursuant to 28-106.207, F. A. C., Out of Time, is hereby **DENIED** and the Response to Petitioner's Exceptions will

not be considered by the Commission. In light of the foregoing, Petitioner's Motion to Strike is moot.

#### RULINGS ON THE EXCEPTIONS

1. The Commission rejects Petitioner's First Exception that the ALJ erred by substituting his legal interpretation of "fair market value" in contradiction of the Commission's interpretation of the law. The evidence adduced at the hearing was conflicting as to whether the telephones of Frank Furman that were used by Respondent's campaign had "an attributable monetary value" to her campaign. Because the evidence was conflicting, the Commission must defer to the factual findings of the ALJ, if the facts are supported by competent, substantial evidence. Since such evidence supports these findings, the Commission accepts them.

2. That being said, however, the Commission believes that it is important to discuss what steps to follow when determining whether a donation of goods or services to a candidate's campaign constitutes a reportable contribution.

3. The term "contribution" is defined in Section 106.011(3), Florida Statutes. The portion of the definition relevant to the instant proceedings is contained in paragraph (a), which states that a "contribution" includes "anything of value, including contributions in-kind having an attributable monetary value in any form, made for the purpose of influencing

the results of an election." Further, Section 106.07(4)(a)5., Florida Statutes, requires that the candidate must report "all loans, in-kind contributions, and other receipts ... during the reporting period."

4. Therefore, when a candidate is offered something of value other than money or its equivalent, the initial question the candidate must ask is whether the in kind donation has an "attributable monetary value in any form." If so, the candidate must then determine whether the donation is offered for the "purpose of influencing the results of an election." If both questions are answered in the affirmative, then the donation is a reportable in-kind contribution under the provisions of Section 106.07, Florida Statutes, and is subject to the contribution limits found in Section 106.08, Florida Statutes.

5. Before making an in-kind contribution, an additional statutory obligation is placed upon the contributor. Section 106.055, Florida Statutes, requires that "[a]ny person who makes an in-kind contribution shall, at the time of making such contribution, place a value on such contribution, which valuation shall be the fair market value of such contribution." The clear implication of this requirement is that until the contributor places a fair market value upon an in-kind contribution, the acceptance of such "contribution" would place the candidate, at a minimum, in violation of Section 106.07(4)(a)5., Florida

Statutes. Without a fair market valuation, the candidate would be unable to report the value of the in-kind contribution as required.

6. Although the evidence in this case is conflicting, the ALJ concluded that the proffered use of the telephones to members of Respondent's campaign had no "attributable monetary value." (See FOF ¶ 8)<sup>3</sup> As such, when Mr. Furman provided limited access to his office telephones, it did not constitute a contribution that Respondent was required to report. Therefore, the ALJ's determination that Respondent did not err in failing to report the use of the telephones in her campaign reports is appropriate.<sup>4</sup>

7. The Commission concurs with Petitioner's Second Exception that the ALJ erred in concluding that Petitioner did not have an affirmative duty to inquire about and ascertain the fair market value of the in-kind contribution. Although in light of his other rulings (COL ¶ 23), the ALJ did not discuss a candidate's duty to investigate the fair market value placed upon an in-kind contribution, the Commission takes this opportunity to

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<sup>3</sup>The ALJ also found that there was no "fair market value" that could be placed upon the Respondent's access to 6-8 telephones for "one hour, one night per week." This finding is also supported by competent substantial evidence.

<sup>4</sup>While not explicitly stated in the Recommended Order it does appear that the ALJ found (FOF ¶ 9) that Mr. Furman's donation of the use of his office telephones was for the purpose of helping the Respondent's campaign and thus was "made for the purpose of influencing the results of an election."

address this recurring question. See FEC v. Dickson, FEC Case # 98-120, FEC v. Williams, FEC Case # 98-188, FEC v. Myers, FEC Case # 99-185.

8. As discussed above, in order for a candidate to lawfully accept an in-kind contribution, it must be reported under Section 106.07, Florida Statutes. In order to be reported, the contributor must place a fair market value on the in-kind contribution at the time it is given to the candidate.

9. As the ALJ noted (FOF ¶ 6), there are various accepted methodologies that may be utilized to determine fair market value. Since the Legislature has not selected any particular method of determining fair market value, it would appear that any reasonable method would be acceptable.

10. That being said, however, it is apparent that a candidate has the responsibility to determine at the time that an in-kind contribution is proffered whether the value placed upon it by the contributor is based upon a reasonable theory of fair market value. To permit any other result would allow a contributor to violate the contribution limits provided in Section 106.08, Florida Statute, by placing an unreasonably low value upon the contribution. At the same time, a candidate who is, or should have been, aware that the value of the contribution is unreasonably low would violate the provisions of 106.19(1)(a), Florida Statutes, by accepting the contribution and then

reporting the contribution at an unreasonable value so as to fall within the contribution limits.

11. Thus, the election law involving in-kind contributions requires that the candidate and contributor must meet certain standards. First, a candidate cannot accept an in-kind contribution unless and until the contributor places a value on the contribution. Second, the value must be based upon some reasonable theory of fair market value.<sup>5</sup> Third, a candidate cannot turn a blind eye to an unreasonably erroneous valuation placed upon a contribution by the contributor. No candidate may

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<sup>5</sup> *Black's Legal Dictionary*, 414, (6<sup>th</sup> edition 1991) defines "fair market value" as follows:

The amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. By fair market value is meant the price in cash, or its equivalent, that the property would have brought at the time of taking, considering its highest and most profitable use, if then offered for sale in the open market, in competition with other similar properties at or near the location of the property taken, with a reasonable time allowed to find a purchaser. The price that the asset would bring by bona fide bargaining between well-informed buyers and sellers at the date of acquisition. Usually the fair market price will be the price at which bona fide sales have been consummated for assets of like type, quality, and quantity in a particular market at the time of acquisition.

knowingly or recklessly participate in any scheme that would violate the provisions of Chapter 106. See § 104.091, Fla. Stat.

12. A candidate does not have a duty to independently investigate or second-guess an apparently reasonable value placed upon an in-kind contribution by a contributor. Nonetheless, a candidate does have the duty to decline to participate in any scheme that would result in the misreporting of the value of a contribution by accepting the contributor's unreasonable value of the in-kind contribution and then reporting such a value on his campaign report.

13. The Commission rejects Petitioner's Third Exception that the ALJ erred in concluding Respondent did not violate Section 106.07(5), Florida Statutes, because she did not know that she certified to an incorrect report. It is true that the ALJ in his Recommended Order (COL ¶ 24) explicitly analyzed whether Respondent's acts were "willful" under the "knowing" prong of Section 106.37, Florida Statutes.<sup>6</sup> However, it is also

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<sup>6</sup>Section 106.37, Fla. Stat., provides:

A person willfully violates a provision of this chapter if the person commits an act while knowing that, or showing reckless disregard for whether, the act is prohibited under this chapter, or does not commit an act while knowing that, or showing reckless disregard for whether, the act is required under this chapter. A person knows that an act is prohibited or required if the person is aware of the provision of this chapter which prohibits or requires the act,



appears in his Conclusion section that the ALJ was aware of the alternative reckless disregard basis for finding willfulness contained in Section 106.37 and implicitly determined that Respondent's acts were not willful under that basis as well.<sup>7</sup>

#### CONCLUSION

The Commission accepts the ALJ's Proposed Findings of Fact, his Recommended Conclusions of Law, except as modified herein, and his Recommendation on the disposition of the case.

Therefore, it is

**ORDERED and ADJUDGED** that Respondent did not violate Section 106.07(5), Florida Statutes, and that charge against her is **DISMISSED**.

**DONE and ORDERED** this 18<sup>th</sup> day of August 2004.

*Chance Irvine*

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CHANCE IRVINE, Chairman  
Florida Elections Commission

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understands the meaning of that provision, and performs the act that is prohibited or fails to perform the act that is required. A person shows reckless disregard for whether an act is prohibited or required under this chapter if the person wholly disregards the law without making any reasonable effort to determine whether the act would constitute a violation of this chapter.

<sup>7</sup>The ALJ's discussion of Respondent's "good faith effort to ascertain the attributable monetary value" of access to the telephones can only be explained in the context of a "reckless disregard" analysis.

NOTICE OF RIGHT TO APPEAL

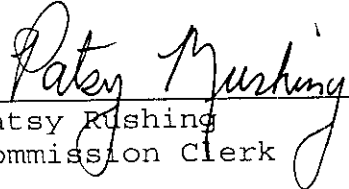
Pursuant to Section 120.68, Florida Statutes, the Respondent may appeal the Commission's Final Order to the appropriate district court of appeal by filing a notice of appeal both with the Clerk of the Florida Elections Commission and the Clerk of the district court of appeals. The notice must be filed within 30 days of the date this Final Order was filed and must be accompanied by the appropriate filing fee.

Copies furnished to:

Eric Lipman, Assistant General Counsel  
Kay McGinn, Respondent  
Stuart R. Michelson, Attorney for Respondent  
Edward Stanton, Complainant  
Supervisor of Elections, Broward County, Filing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to counsel for Respondent, Stuart R. Michelson and James Burch, 200 S.E. 13<sup>th</sup> Street, Ft. Lauderdale, FL 33316, and Eric Lipman, Assistant General Counsel, 107 W. Gaines Street, Collins Building, Suite 224, Tallahassee, Florida 32399-0250 this 27 day of August 2004

  
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Patsy Rushing  
Commission Clerk