

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

KAY MCGINN, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 03-2443  
 )  
 FLORIDA ELECTIONS COMMISSION, )  
 )  
 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 September 5, 2003, in Pompano Beach, Florida.

APPEARANCES

For Petitioner: Stuart R. Michelson, Esquire  
Law Office of Stuart R. Michelson  
200 Southeast 13th Street  
Fort Lauderdale, Florida 33316

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

STATEMENT OF THE ISSUE

Whether Petitioner, Kay McGinn, willfully violated Subsection 106.07(5), Florida Statutes (2001), when she certified the correctness of a campaign treasurer's report that

was incorrect, false, or incomplete because it failed to disclose an in-kind contribution by Frank Furman for the use of telephones used by Petitioner and her campaign volunteers in offices that Mr. Furman owned.

PRELIMINARY STATEMENT

On May 30, 2003, Respondent, Florida Elections Commission, entered an Order of Probable Cause finding "that there is probable cause to charge the Respondent [Petitioner herein] with: One count of violating Section 106.07(5), Florida Statutes, prohibiting a candidate from certifying the correctness of a campaign treasurer's report that is incorrect, false, or incomplete."

In the Statement of Findings, which is incorporated by reference in the Order of Probable Cause, it is alleged:

4. Complainant alleged Respondent failed to report the in-kind value of telephones used in a campaign phone bank. Complainant stated Respondent failed to list the name of the person who made the in-kind contribution and the value of the contribution.

5. Specifically, Complainant alleged Frank H. Furman contributed the use of his office phones for approximately four weeks prior to the election day of March 12, 2002. Respondent and her campaign workers utilized Mr. Furman's telephones to promote Respondent's re-election.

\* \* \*

12. Commission staff obtained Mr. Furman's actual telephone bills for the months of

January, February and March of 2002. The cost for basic service for Mr. Furman averaged \$1,482.18 for those months. The average daily rate was \$49.41. The average hourly rate (with the assumption that a day consists of eight business hours) is \$6.18. Respondent utilized Mr. Furman's phones on eight occasions for two hours on each occasion for a total of 16 hours. Sixteen hours at the hourly rate of \$6.18 comes to a total of \$98.88 as a value of the in-kind contribution given by Furman to Respondent's campaign.

On June 25, 2003, Petitioner, Kay McGinn, responded to the Order of Probable Cause, by a Request for Formal Hearing Before the Division of Administrative Hearings, denying that her actions were willful, or reckless, asserting that the use of Mr. Furman's telephones had no value, that she had relied on Mr. Furman's assessment that the use of his phones had no value, and that Respondent's finding was inconsistent with common practice and common sense.

On July 1, 2003, the case was forwarded to the Division of Administrative Hearings. On July 2, 2003, an Initial Order was sent to both parties. On July 15, 2003, the case was scheduled for final hearing on September 5, 2003, in Pompano Beach, Florida.

The case was presented as scheduled on September 5, 2003. Petitioner testified on her own behalf and presented two witnesses: Lonnie Maier, who was qualified as an expert witness on phone services and marketing and sales of call centers and

phone banks, and Russell Klenet, who was qualified as an expert witness on the use of telecommunications in political campaigns. Petitioner offered two exhibits which were received into evidence and marked Petitioner's Exhibits 1 and 2. Respondent called Petitioner in its case and presented four additional witnesses: Daniel Faust, Mary Chambers, Frank Furman, and Norman Ostrau, who was qualified as an expert witness in Florida election law. Respondent offered four exhibits which were received into evidence and marked Respondent's Exhibits 1 through 4.

The parties jointly stipulated to extend the time for filing proposed recommended orders until December 15, 2003. The two-volume Transcript of Proceedings was filed with the Division of Administrative Hearings on October 1, 2003. Both parties timely filed Proposed Recommended Orders.

#### FINDINGS OF FACT

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

1. Petitioner is the Mayor of Pompano Beach, Florida. She ran unsuccessfully for Pompano Beach City Commission in 1996. Her campaigns for the same office in 1998, 2000, and 2002 were successful. The alleged offense took place during the 2002 election campaign.

2. Petitioner is an intelligent, conscientious public servant. She is familiar with the Florida election law and is

sensitive to her obligation to follow the law and diligent in her attempt to do so.

3. During the 2002 campaign, Frank Furman, a long-time Pompano Beach business man who enjoys an excellent reputation, offered the use of his business offices to Petitioner for campaign activities. Petitioner chose to use Furman's office on six to eight occasions to make campaign-related local telephone calls. Typically, Petitioner and five or six volunteers would spend about one hour in the early evening calling Pompano Beach voters encouraging them to vote for Petitioner.

4. Mindful of the election law requiring the reporting of "in-kind" contributions, Petitioner asked Mr. Furman the value of the use of his telephones for reporting purposes. Furman advised Petitioner that the use of his telephones had "no value."

5. In reporting "in-kind" contributions, Petitioner's practice was to ask the contributor to provide an invoice reflecting the "fair market value" of the "in-kind" contribution. Armed with the invoice, she would then report the "in-kind" contribution.

6. "Fair market value" is an economic concept used most frequently in reported Florida cases when referring to the value of real property taken in condemnation actions or in determining restitution in criminal cases. Numerous definitions are found.

Typically, the definitions involve "a willing buyer and a willing seller, fully informed as to the value of the object of the transaction, neither being under any compulsion to buy or sell."

7. Respondent's Statement of Findings, which was analyzed by Petitioner's expert witness, offers an amortized cost to Mr. Furman for use by Petitioner and her volunteers of the telephones. This amortized cost is apparently advanced as evidence of "fair market value" or "attributable monetary value." Mr. Furman pays a fixed-rate of slightly less than \$1,500.00 per month for the use of 32 to 33 telephone lines. This means that each line costs approximately \$46.87 per month. Assuming 30 days per month, the daily cost per line is \$1.56. Assuming 24-hour days, the hourly cost per line is \$0.065. Further assuming that six volunteers used one telephone for one hour on eight different days, the result is 48 hours of line use. The resulting amortized use cost, given the known use by Petitioner and her campaign volunteers, is \$3.12. Amortized use cost is not fair market value.

8. Neither an "attributable monetary value" nor a "fair market value" of Petitioner's use of Mr. Furman's telephones was established. To the contrary, it was established that there was no "market" for access to six to eight telephones for one hour, one night per week. While it is assumed that Petitioner would

benefit from telephone calls made by her supporters, whether made from their individual homes or from some group setting, the evidence failed to established that Petitioner's use of Mr. Furman's telephones had any "attributable monetary value" or "fair market value."

9. Given that the use of the telephones by Petitioner was during non-working hours when the telephones would normally be idle, it is not surprising that Mr. Furman advised Petitioner that there was no cost associated with the use of his telephones. His monthly telephone bill would be the same whether Petitioner used his telephones or not. Nor is Petitioner to be faulted for relying on the contributor's assessment of the value of the "in-kind" contribution of the use of the telephones.

10. The real value to Petitioner's campaign was the use of Mr. Furman's office as a meeting place. As a practical matter, each volunteer could have taken a list of the telephone numbers of Pompano Beach voters to their respective homes and made the telephone calls from their homes.

11. This was not a professional "phone bank," sometimes used in political campaigns where trained callers use scripted messages designed to elicit voter preferences and where the candidates receives "feed-back" on salient issues. A "fair

market value" can be easily established for such services as they are common in the market place.

12. The evidence suggests that campaign volunteers making telephone calls to registered voters from their homes or from someone's office is a common practice in political campaigns in Florida. It is also suggested that this common practice is not reported as a campaign contribution.

#### CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. §§ 106.25(5), 120.57(1), and 120.569, Fla. Stat. (2003).

11. Respondent in its Order of Probable Cause asserts "that there is probable cause to charge the Respondent [Petitioner herein] with: One count of violating Section 106.07(5), Florida Statutes, prohibiting a candidate from certifying the correctness of a campaign treasurer's report that is incorrect, false, or incomplete."

12. Subsection 106.07(5), Florida Statutes (2001), reads as follows:

(5) The candidate and his or her campaign treasurer, in the case of a candidate, or the political committee chair and campaign treasurer of the committee, in the case of a political committee, shall certify as to the correctness of each report; and each person so certifying shall bear the responsibility for the accuracy and veracity of each report. Any campaign treasurer, candidate,



or political committee chair who willfully certifies the correctness of any report while knowing that such report is incorrect, false, or incomplete commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

13. Subsection 106.011(3)(a), Florida Statutes (2001), reads as follows:

(3) "Contribution" means:

(a) A gift, subscription, conveyance, deposit, loan, payment, or distribution of money or 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.

14. Section 106.055, Florida Statutes (2001), reads as follows:

Valuation of in-kind contributions.--Any 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.

15. Subsection 106.25(3), Florida Statutes (2001), reads as follows:

(3) 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.

16. Section 106.37, Florida Statutes (2001), reads as follows:

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, 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.

17. Subsection 106.265(1), Florida Statutes (2001), reads as follows:

(1) The commission is authorized upon the finding of a violation of this chapter or chapter 104 to impose civil penalties in the form of fines not to exceed \$1,000 per count. In determining the amount of such civil penalties, the commission shall consider, among other mitigating and aggravating circumstances:

(a) The gravity of the act or omission;

(b) Any previous history of similar acts or omissions;

(c) The appropriateness of such penalty to the financial resources of the person,

political committee, committee of continuous existence, or political party; and

(d) Whether the person, political committee, committee of continuous existence, or political party has shown good faith in attempting to comply with the provisions of this chapter or chapter 104.

18. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue in the proceeding. Respondent has the burden of proof. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996); Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

19. The standard of proof imposed on Respondent is to establish the essential elements of a violation by clear and convincing evidence. Diaz de la Portilla v. Florida Elections Commission, 857 So. 2d 913 (Fla. 3rd DCA 2003). Respondent must establish by clear and convincing evidence that Petitioner willfully violated the particular statute alleged.

20. As noted by the Florida Supreme Court:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in mind

of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

21. Respondent has failed to demonstrate that Petitioner's use of Mr. Furman's telephone had any "attributable monetary value" or "fair market value." To the contrary, the evidence clearly showed that there was no "market" for such use.

22. Respondent failed to demonstrate that Petitioner's reliance on Mr. Furman's assessment that the use of his telephones had no value constituted a willful violation or reckless disregard of her reporting responsibilities under the election law. Section 106.055, Florida Statutes, is the only statutory reference to the valuation of in-kind contributions. This provision clearly indicates that the contributor making the in-kind contribution shall place a value on the contribution, which valuation shall be at the fair market value of the contribution.

23. Whether Petitioner has an affirmative duty to investigate the fair market value of an "in-kind" contribution, rather than rely on the valuation provided by the contributor as suggested by Section 106.055, Florida Statutes, need not be addressed in this case, as the evidence is persuasive that

valuation provided by the contributor was appropriate under the circumstances presented.

24. Respondent failed to demonstrate that Petitioner's failure to include the use of Mr. Furman's telephones on her campaign treasurer's report was done with the knowledge that in so doing she was creating an incorrect, false or incomplete report. To the contrary, the evidence indicates that Petitioner made a good faith effort to ascertain the attributable monetary value of the use of Mr. Furman's telephones, relied on his valuation, and concluded that the use of the telephones under the circumstances did not require reporting.

#### RECOMMENDATION

Based upon the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the Florida Elections Commission enter a final order finding that Petitioner, Kay McGinn, did not violate Subsection 106.07(5), Florida Statutes, as alleged, and dismissing the Order of Probable Cause.

DONE AND ENTERED this 13th day of January, 2004, in  
Tallahassee, Leon County, Florida.



---

JEFF B. CLARK  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 13th day of January, 2004.

COPIES FURNISHED:

Eric M. Lipman, Esquire  
Florida Elections Commission  
Collins Building, Suite 224  
107 West Gaines Street  
Tallahassee, Florida 32399-1050

Stuart R. Michelson, Esquire  
Law Office of Stuart R. Michelson  
200 Southeast 13th Street  
Fort Lauderdale, Florida 33316

Barbara M. Linthicum, Executive Director  
Florida Elections Commission  
The Collins Building, Suite 224  
Tallahassee, Florida 32399-1050

Patsy Rushing, Clerk  
Florida Elections Commission  
The Collins Building, Suite 224  
Tallahassee, Florida 32399-1050

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.