

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ELECTIONS COMMISSION,)
)
 Petitioner,)
)
vs.) Case No. 05-4399
)
MIKEL LEE PERRY,)
)
 Respondent.)

)

RECOMMENDED ORDER

A formal hearing was held in this case on April 24, 2006, in Defuniak Springs, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Albert T. Gimbel, Esquire
Gary Early, Esquire
Messer, Caparello & Self, P.A.
Post Office Box 1876
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue is whether Respondent willfully violated Section 106.07(5), Florida Statutes (2004), by certifying to the correctness of five campaign treasurer's reports (CTRs), which

did not disclose payments that Respondent's media consultant made to two television stations on Respondent's behalf.

PRELIMINARY STATEMENT

On August 23, 2005, Petitioner Florida Elections Commission (Petitioner) received a sworn complaint alleging that Respondent Mikel Lee Perry (Respondent) had violated Section 106.07, Florida Statutes (2004). Specifically, the complaint alleged that Respondent purchased television campaign advertising time, requiring cash in advance, without reporting the expenditures until after the air dates.

On August 26, 2005, Petitioner found probable cause to believe that, on six occasions, Respondent violated Section 106.07(5), Florida Statutes (2004). Prior to hearing, Petitioner withdrew the sixth count in the Order of Probable Cause. The remaining five counts allege that Respondent willfully failed to properly report payments made to two television stations by Respondent's media consultant.

On September 26, 2005, Respondent filed a Petition for Informal Administrative Hearing. At an informal hearing on November 18, 2005, Respondent denied that he willfully filed inaccurate or incomplete CTRs. On December 2, 2005, Petitioner referred the case to the Division of Administrative Hearings.

On December 27, 2005, the undersigned issued a Notice of Hearing, scheduling the hearing for February 27, 2006.

On February 14, 2006, Respondent filed an unopposed Motion for Continuance. On February 16, 2006, the undersigned issued an Order Granting Continuance and Re-scheduling Hearing for April 24, 2006.

Prior to the hearing, Respondent filed a Motion in Limine. The motion sought to exclude evidence regarding certain actions by Respondent that may have constituted a violation of Chapter 106, Florida Statutes (2004), but which were not specifically charged in Petitioner's Order of Probable Cause. The undersigned reserved ruling on the motion, which is hereby granted in part and denied in part.^{1/}

During the hearing, the parties offered two joint exhibits, J1 and J2. Exhibit No. J1 was accepted as a deposition in lieu of the trial testimony of Robert Beasley, Supervisor of Elections, Walton County, Florida. Exhibit No. J2 was accepted as the 2004 Candidate and Campaign Treasurer Handbook as published in November 2003.

Petitioner presented the testimony of five witnesses. Petitioner offered 42 exhibits, Exhibit Nos. A through PP, which were accepted as evidence.

Respondent testified on his own behalf and presented the testimony of two additional witnesses. Respondent offered 39 exhibits, Exhibit Nos. 1-39, which were accepted as evidence.

FINDINGS OF FACT

1. Petitioner has jurisdiction to investigate and enforce Chapter 106, Florida Statutes.

2. Respondent was an unsuccessful candidate for the Walton County Commission in 2004. Respondent was defeated in the August 31, 2004, primary election.

3. Respondent is not an experienced politician. The 2004 campaign was his first and only attempt to run for public office. Respondent's campaign was entirely self-funded.

4. Guy Davidson was the political consultant for Respondent's opponent. On or about August 22, 2004, Mr. Davidson filed a sworn complaint with Petitioner against Respondent. The complaint alleged that Respondent was running television ads (requiring cash in advance) although no expenditures to stations for airtime appeared on Respondent's CTRs.

5. On March 10, 2004, Respondent signed a Statement of Candidate form as required by Section 106.023, Florida Statutes (2003). The statement indicates that Respondent had received, read, and understood the requirements of Chapter 106, Florida Statute (2003).

6. On March 10, 2004, Respondent filed his Appointment of Campaign Treasurer and Designation of Campaign Depository for Candidates. Respondent appointed his personal and business

bookkeeper, Iris Schipper, to serve as his campaign treasurer. Respondent had confidence in Ms. Schipper, who had accounting experience, but no experience with political campaigns. On July 15, 2004, Respondent appointed himself as his deputy campaign treasurer.

7. In the spring of 2004, Respondent hired Steven Petermann, the owner of Petermann Corporation, as his campaign media consultant for the purpose of creating, producing, distributing and disseminating political advertisements for Respondent's campaign. Mr. Petermann was in charge of all media aspects concerning Respondent's campaign.

8. Respondent had known Mr. Petermann for years. Prior to the 2004 campaign, Respondent employed Mr. Petermann for advertising services concerning business ventures unrelated to Respondent's campaign.

9. Mr. Petermann was experienced in providing campaign advertising for local political races. He had done so for approximately 30 campaigns. Mr. Petermann provided Respondent with advertising services which were similar to the services that Mr. Petermann provided to other political candidates.

10. Respondent never specified to Mr. Petermann what advertising to buy or how much to spend. Respondent and Mr. Petermann had no specific payment or billing terms in mind

when Mr. Petermann agreed to act as Respondent's media consultant or at anytime during the campaign.

11. Generally, Mr. Petermann did not expect his political clients to pay him until the end of their campaigns. However, Respondent attempted to pay Mr. Petermann in full in accordance with the balance due on Petermann Corporation statements or in advance on those occasions when Respondent knew about projected campaign costs. In other words, Respondent tried to make sure that Mr. Petermann was paid in advance or promptly reimbursed for campaign expenses. In this regard, Respondent acted consistently with his prior private business relationship with Mr. Petermann.

12. With regard to Respondent's campaign advertising budget, Respondent told Mr. Petermann to do "whatever it took to run a successful campaign." Respondent trusted Mr. Petermann's professional judgment as to how much advertising was needed and in which mediums the advertising was to run.

13. Respondent knew Mr. Petermann was making expenditures on behalf of the campaign. Respondent was aware of each and every expenditure his campaign made to Mr. Petermann because he was very involved in his campaign finances.

14. Mr. Petermann wrote the following checks on his business account directly to WJHG-TV and WBBM-TV for advertising time on behalf of Respondent's campaign:

Date of Check	Check Number	Payee Television Station	Amount of Petermann Expenditure for Perry
06-11-04	025246	WMBB-TV	\$442.00
06-14-04	025247	WJHG-TV	\$450.50
06-29-04	025294	WJHG-TV	\$450.50
06-29-04	025297	WMBB-TV	\$446.25
07-26-04	025405	WJHG-TV	\$743.75
07-26-04	025406	WMBB-TV	\$956.25
08-12-04	025491	WJHG-TV	\$743.75
08-12-04	025492	WMBB-TV	\$956.25
08-30-04	025548	WJHG-TV	\$331.50

15. Respondent made no expenditures from his campaign account directly to a television station. Additionally, no expenditures to television stations were listed on Respondent's CTRs. Mr. Petermann purchased all of the television airtime on behalf of Respondent's campaign.

16. Mr. Petermann periodically sent Respondent statements for campaign services and expenses. The statements did not itemize each expenditure for television airtime. The statements did list television advertising and various other advertising purchases in general.

17. Respondent did not list the checks that Mr. Petermann paid directly to WJHG-TV and WMBB-TV for Respondent's television airtime on any CTR during his 2004 campaign. A member of the public could not look at Respondent's CTRs and determine the following: (a) which television stations Respondent paid for campaign advertising; (b) how much Respondent paid for

television advertising; and (c) how much Respondent paid for Mr. Petermann's professional services.

18. During the course of the campaign, Respondent reported making several payments to Petermann Advertising or Petermann Corporation. Respondent listed each payment made to Mr. Petermann on his CTRs. Respondent did not break down the expenditures and itemize the components of the expenditures on his CRTs, including how much was paid to Mr. Petermann for his professional services.

19. In a letter dated June 24, 2004, Mr. Beasley, Walton County Supervisor of Elections, advised all candidates, including Respondent, to read an enclosed memorandum from Phyllis Hampton, Chief of the Bureau of Election Records for the Department of State, Division of Elections. Mr. Beasley requested all candidates to sign an enclosed statement and return the statement to his office in the enclosed stamped and addressed envelope.

20. Ms. Hampton's memorandum was dated June 17, 2004. It specifically referred to "2004 Campaign Finance Legislative Changes." The memorandum discussed the disclaimer that candidates were required to use on campaign advertising effective July 1, 2004. The last two paragraphs of Ms. Hampton's memorandum stated as follows:

Enclosed is a copy of Chapter Law 2004-252 (CS/SB 2346 & 516). Section 5 of this law amends Section 106.143, Florida Statutes. We are also enclosing a handout that contains Section 106.143, Florida Statutes, as amended, as well as examples of political disclaimers under the new law. There are other changes in this law that affect campaign financing for candidates and a summary of those changes is enclosed.

The Division of Elections of the Department of State has posted all enacted legislation that affect The Florida Election Code, Chapters 97-106, Florida Statutes, on its web site. That web site is <http://election.dos.state.fl.us>. If you have any questions, please feel free to call us at 850-245-6240.

21. When Mr. Beasley received Ms. Hampton's memorandum, it included a copy of Public Law 2004-252. Mr. Beasley did not duplicate the law when he sent Ms. Hampton's memorandum to candidates in Walton County. If any candidate had requested a copy of the new law, Mr. Beasley would have obtained a copy for the candidate or referred the candidate to the Internet.

22. Respondent received Ms. Hampton's memorandum regarding the changes in the law, but he did not read it over in detail. Instead, Respondent continued to direct his attention to campaign issues.

23. There is no evidence that Respondent took any affirmative steps to inquire which sections of the law were amended in addition to the requirements for political disclaimers. Respondent did not go to the Department of State,

Division of Elections' website to review the law or a copy of the updated candidate's handbook. All Respondent did was to send a copy of the letter to Mr. Petermann.

24. Respondent did not give Ms. Schipper a copy of Ms. Hampton's June 17, 2004, memorandum during the campaign. Ms. Schipper received the memorandum and filed it in one of Respondent's campaign files after the campaign ended.

25. Respondent wrote a personal check dated June 30, 2004, made payable to Peterman Corp. in the amount of \$7,500. The check does not state its purpose. Mr. Petermann deposited this check in his business account on July 1, 2004.

26. Respondent wrote the June 30, 2004, personal check to Petermann Corp. because he was in Mr. Petermann's office and wanted to make sure Mr. Petermann was paid promptly for his services and expenses on Respondent's behalf. On June 30, 2004, Respondent had not yet appointed himself as his deputy campaign treasurer and did not have a campaign check signed by Ms. Schipper.

27. Respondent's Q2 CTR, which covered the period from April 1, 2004, to June 30, 2004, was due to be filed on July 12, 2004. The report listed no expenditure to Mr. Petermann. The report did not disclose that Mr. Petermann had spent \$1,789.25 on behalf of Respondent's campaign to pay for advertisements on two television stations during the reporting period.

28. On July 24, 2004, Respondent, as deputy campaign treasurer, wrote a check on his campaign account. The check was payable to Petermann Advertising in the amount of \$10,000. The check did not state its purpose.

29. On August 5, 2004, Ms. Schipper wrote a check on Respondent's campaign account. The check was payable to Respondent in the amount of \$7,500. The purpose of the check was to reimburse Respondent for the amount Respondent paid to Mr. Petermann out of Respondent's personal account on June 30, 2004.

30. On August 6, 2004, Ms. Schipper wrote a check on Respondent's campaign account. The check was payable to Petermann Advertising in the amount of \$10,000. The check states that its purpose was advertising.

31. Respondent's F2 CRT, which covered the period from July 24, 2004, through August 6, 2004, was due to be filed on August 13, 2004. The F2 CRT listed the following payments as expenditures: (a) a check dated July 24, 2004, to Petermann Advertising for campaign advertising in the amount of \$10,000; (b) a check dated August 5, 2004, to Petermann Advertising/mlp (Respondent's initials) for campaign advertising in the amount of \$7,500; and (c) a check dated August 6, 2004, to Petermann Advertising for campaign advertising in the amount of \$10,000. The August 5, 2004, check, listed as payable to Petermann

Advertising/mlp, was a reimbursement to Respondent for the personal check he wrote on June 30, 2004. Respondent's F2 CTR did not disclose that Mr. Petermann spent \$1,700 on behalf of Respondent's campaign to pay for advertisements on two television stations during the reporting period.

32. Ms. Schipper contacted someone in Mr. Beasley's office in Santa Rosa Beach, Florida, by telephone on August 13, 2004, before she filed Respondent's F2 CRT. Ms. Schipper inquired about the proper method of reporting the August 5, 2004, payment of campaign funds to reimburse Respondent for his personal check dated June 30, 2004, to Mr. Petermann. During the hearing, Ms. Schipper testified as follows:

Okay. I called the -- there was a question about this particular expense because the nature of the check that I just explained because I wasn't sure. I knew I had to report it, but I wasn't sure how I should report it. So I called the supervisor of elections office and I told them what had happened, including the fact that Lee Perry was totally self-funding his campaign and that he had a paid check personally that we need to record as an expenditure on the campaign account and I told her that I had to -- to fund the campaign account and then pay it back to Lee and it was just like an in and out transaction, but I had to report it, but it was to Petermann Advertising. We had other checks to Petermann Advertising. It was all the campaign advertising. How did I need to do that.

33. After speaking with an unidentified female in Mr. Beasley's office, Ms. Schipper was not comfortable with the answer to her inquiry. Ms. Schipper decided to list the check as payable to Petermann Advertising/mlp. Ms. Schipper did not call anyone else regarding the proper method of reporting the June 30, 2004, check, which reimbursed Respondent for reimbursing Mr. Petermann for advertising services and advertising expenses paid to television stations.

34. On August 20, 2004, Ms. Schipper wrote a campaign check payable to Petermann Advertising for campaign advertising in the amount of \$15,000.

35. Respondent's F3 CTR, covering the period from August 7, 2004, through August 26, 2004, was due to be filed on August 27, 2004. Respondent's F3 CTR listed one expenditure to Petermann Advertising for campaign advertising in the amount of \$15,000. Respondent's F3 CTR did not disclose that Mr. Petermann had spent \$1,700 on behalf of Respondent's campaign to pay for advertisements on two television stations during the reporting period.

36. On September 10, 2004, Ms. Schipper wrote a campaign check payable to Petermann Advertising for campaign advertising in the amount of \$11,422.23.

37. Respondent's G1 CTR, covering the period from August 27, 2004, through September 10, 2004, was due to be filed

on September 17, 2004. Respondent's G1 CTR listed a check payable to Petermann Advertising as an expenditure. The check, dated September 10, 2004, was for campaign advertising in the amount of \$11,422.23. Respondent's G1 CTR did not disclose that Mr. Petermann spent \$331.50 on behalf of Respondent's campaign to pay for advertisements on one television station during the reporting period.

38. On October 19, 2004, Ms. Schipper wrote a campaign check payable to Petermann Advertising for the "Perry Campaign" in the amount of \$9,100.

39. After filing Respondent's F3 CTR, Ms. Schipper realized that Mr. Petermann never received the August 20, 2004, campaign check in the amount of \$15,000. Therefore, Ms. Schipper cancelled the check and filed an Amended F3 CTR on October 22, 2004.

40. Respondent's Amended F3 CTR indicated that \$15,000 was subtracted from Respondent's expenditures. The Amended F3 CTR listed the October 19, 2004, check as an expenditure. The check was payable to Petermann Advertising for campaign advertising in the amount of \$9,100.

41. Mr. Beasley has two offices. The main office is located in Defuniak Springs, Florida. The satellite office is located in Santa Rosa Beach, Florida. Neither office has a written record of inquiries concerning the reporting of

expenditures for Respondent's campaign. As a general office practice, Mr. Beasley's staff does not make notes or records of telephone conversation with candidates or other individuals who call regarding campaign issues.

42. Ms. Schipper called Mr. Beasley's office in Santa Rose Beach, Florida, when she had a question about her duties as campaign treasurer. If she could not get an answer to her question, Ms. Schipper called Mr. Beasley's office in Defuniak Springs, Florida.

43. Ms. Schipper's office during the 2004 campaign was in Respondent's residence, which had two telephone lines. During the hearing, Respondent presented telephone records showing seven telephone calls from the residence to Mr. Beasley's main office in Defuniak Springs, Florida, on the following dates: July 1, 2004; July 7, 2004; July 16, 2004; July 17, 2004; August 27, 2004; August 30, 2004; and September 9, 2004. The telephone records do not show any calls made to Mr. Beasley's office in Santa Rosa Beach, Florida.

44. Ms. Schipper called Mr. Beasley's Santa Rosa Beach office to inquire about reimbursing Respondent for the June 30, 2004, personal payment to Mr. Petermann. However, there is no evidence that Ms. Schipper called either of Mr. Beasley's offices to inquire specifically about the proper method of reporting campaign expenditures, paid directly to Mr. Petermann,

part of which included indirect payments or reimbursements for advertising on television stations.

45. Mr. Beasley has no independent recollection of speaking with Ms. Schipper during the campaign. There is no evidence that anyone on Mr. Beasley's staff remembers speaking with Respondent or Ms. Schipper about campaign finance reports during the 2004 campaign.

46. Mr. Beasley's office provided Respondent with a copy of the 2004 Candidate and Campaign Treasurer Handbook (published November 2003)(handbook) and Chapter 106, Florida Statutes (2003). Respondent and Ms. Schipper referred to these resources from time to time during the campaign on an as needed basis.

47. The handbook did not specifically require a candidate to "itemize" expenditures to media consultants.

48. The handbook contains the following statement on the first page:

Important Notice

The information contained in this publication is intended as a quick reference guide only and is current upon publication. Chapter 97-106, Florida Statutes, the Constitution of the State of Florida, Division of Elections' opinions and rules, Attorney General opinions, county charters, city charters and ordinances, and other sources should be reviewed in their entirety for complete information regarding campaign financing and qualifying.

In addition, the following publication produced by the Florida Department of State, Division of Elections should be reviewed for further information regarding candidates and committees:

2004 Federal Qualifying Handbook
2004 Committee and Campaign Treasurer Handbook
2004 Handbook on Filing Campaign Reports
2004 Election Cycle Calendar of Reporting Dates for Candidates, Political Committees and Committees of Continuous Existence
2004 Election Cycle Calendar of Reporting Dates for Political Party Executive Committees.

All forms and publications provided by the Division of Elections are available on our web site at <http://election.dos.state.fl.us>.

Please direct any questions to either your county supervisor or elections or the Florida Department of State, Division of Elections at (850) 245-6240. (Emphasis included)

49. Chapter 7 of the handbook states as follows regarding the duties and responsibilities of campaign treasurers:

IMPORTANT: No contribution or expenditure, including contributions or expenditures of a candidate or of the candidate's family, shall be directly or indirectly made or received in furtherance of the candidacy of any person for nomination or election to political office in the state except through the duly appointed campaign treasurer of the candidate. (Emphasis included)

50. Chapter 10 of the handbook states as follows regarding campaign expenditures:

An expenditure is a purchase, payment, distribution, loan, advance, transfer of

funds by a campaign treasurer or deputy campaign treasurer between a primary depository and a separate interest-bearing account or certificate of deposit, or gift of money or anything of value made for the purpose of influencing the results of an election.

* * *

A candidate shall:

1. **Pay all campaign expenditures by a check drawn on the campaign account** (except petty cash); (emphasis included)

51. Chapter 14 of the handbook states as follows regarding the filling of campaign reports:

Reporting Expenditures

Form DS-DE 14, Itemized Expenditures is used to report all expenditures made, regardless of the amount and must contain:

1. Full name and address of each person to whom expenditures have been made along with the amount, date and clear purpose of the expenditure. Name, address and office sought by each candidate on whose behalf such expenditure was made.

2. Full name and address of each person to whom an expenditure for personal services, salary or reimbursed expenses was made along with the amount, date and clear purpose of the expenditure. A candidate or any other individual may be reimbursed for expenses incurred for travel, food and beverage, office supplies, and mementoes expressing gratitude to campaign supporters as provided for in section 106.021(3), F.S.

* * *

5. Amount and nature of debts and obligations owed by or to the candidate,

which relate to the conduct of any political campaign. (Emphasis included)

52. On July 1, 2004, amendments to Chapter 106, Florida Statutes (2004), became effective, including the addition of Section 106.07(4)(a)13., Florida Statutes (2004), which states as follows:

(4)(a) Each report required by this section shall contain:

* * *

13. The primary purpose of an expenditure made indirectly through a campaign treasurer for goods and services such as communications media placement or procurement services, campaign signs, insurance, and other expenditures that include multiple components as part of the expenditure. The primary purpose of an expenditure shall be that purpose, including integral and directly related components that comprises 80 percent of such expenditure.

53. After July 1, 2004, the Department of State, Division of Elections, revised and published the 2004 Candidate and Campaign Treasurer Handbook (effective July 2004)(amended handbook). The preface to the amended handbook states as follows: "This publication has been amended in July of 2004 to reflect changes as provided by Chapter Law 2004-252. New language is displayed in red."

54. The notice on the first page of the amended handbook was not revised.

55. Chapter 7 of the amended handbook states as follows regarding the duties and responsibilities of campaign treasurers:

IMPORTANT: No contribution or expenditure, including contributions or expenditures of a candidate or of the candidate's family, shall be directly or indirectly made or received in furtherance of the candidacy of any person for nomination or election to political office in the state except through the duly appointed campaign treasurer of the candidate, subject to the following exceptions:

* * *

2. **Reimbursements to** a candidate or any other individual for expenses incurred in connection with the campaign by a check drawn upon the campaign account and reported pursuant to Section 106.07(4), F.S. **After July 1, 2004, the full name and address of each person to whom the candidate or other individual made payment for which reimbursement was made by check drawn upon the campaign account shall be reported pursuant to Section 106.07(4), F.S., together with the purpose of such payment;**

3. **Expenditures made indirectly through a treasurer for goods or services, such as communications media placement or procurement services, campaign signs, insurance or other expenditures that include multiple integral components as part of the expenditure and reported pursuant to Section 106.07(4)(a)13**

(Emphasis included)

56. Chapter 10 of the amended handbook states as follows regarding campaign expenditures:

An expenditure is a purchase, payment, distribution, loan, advance, transfer of funds by a campaign treasurer or deputy campaign treasurer between a primary depository and a separate interest-bearing account or certificate of deposit, or gift of money or anything of value made for the purpose of influencing the results of an election **or making an electioneering communication.**

An expenditure for an electioneering communication is made when the earliest of the following occurs:

- 1. A person executes a contract for applicable goods or services;**
- 2. A person makes payment, in whole or in part, for applicable goods or services ; or**
- 3. The electioneering communication is publicly disseminated.**

* * *

A candidate or other individual may be reimbursed for expenses incurred **in connection with the campaign** by a check drawn on the campaign account and reported pursuant to section 106.07(4), F.S. **After July 1, 2004, the full name and address of each person to whom the candidate or other individual made payment for which reimbursement was made by check drawn upon the campaign account shall be reported pursuant to Section 106.07(4), F.S., together with the purpose of such payment.**

* * *

A candidate shall:

- 1. Pay all campaign expenditures by a check drawn on the campaign account** (except petty cash); (Emphasis included)

57. Chapter 14 of the amended handbook states as follows regarding the filling of campaign reports:

Reporting Expenditures

Form DS-DE 14, Itemized Expenditures is used to report all expenditures made, regardless of the amount and must contain:

1. Full name and address of each person to whom expenditures have been made along with the amount, date and clear purpose of the expenditure. Name, address and office sought by each candidate on whose behalf such expenditure was made.

2. Full name and address of each person to whom an expenditure for personal services, salary or reimbursed expenses was made along with the amount, date and clear purpose of the expenditure. A candidate or any other individual may be reimbursed for expenses incurred for travel, food and beverage, office supplies, and mementoes expressing gratitude to campaign supporters as provided for in section 106.021(3), F.S. (Emphasis included)

* * *

5. Amount and nature of debts and obligations owed by or to the candidate, which relate to the conduct of any political campaign.

* * *

7. **The primary purposes of an expenditure made indirectly through a campaign treasurer for goods and services such as communications media placement or procurement services, campaign signs, insurance, and other expenditures that include multiple components as part of the expenditure. The primary purpose of an expenditure shall be that purpose, including integral and directly related components, that comprises 80 percent of such expenditure.** (Emphasis included)

58. For the 2004 campaign, reporting forms applicable to candidates did not provide for "itemization" of payments made by media consultants to various component providers of goods and services. In contrast, forms applicable to political parties and committees required and provided a reporting mechanism for itemizing payments made by third party consultants to the providers of the component services. Those forms did not specifically apply to individual candidates.

59. At the time of the hearing, the Department of State, Division of Elections, was in the rulemaking process to develop standards and reporting forms for candidates to use when itemizing component parts of an expenditure made to a campaign consultant or vendor.

60. Respondent and Ms. Schipper never called the Florida Department of State, Division of Elections, to make campaign finance report inquiries. After reviewing the handbook as published in November 2003, Ms. Schipper believed she had a fair understanding of campaign reporting requirements. Ms. Schipper did not review Chapter 106.07(4), Florida Statutes (2004), or the amended handbook.

61. Respondent also reviewed Chapter 106, Florida Statutes (2003), and the handbook as published in November 2003. He did not review Section 106.07(4)(a), Florida Statutes (2004), but

primarily relied on Ms. Schipper to properly report campaign expenditures.

62. All checks written on Respondent's campaign account were reported on Respondent's CTRs. Respondent's CTRs reflect that Respondent's total campaign account receipts equaled his total expenditures.

63. During the hearing, the parties stipulated that Respondent had the ability to pay the maximum fine possible if it was determined that he committed the violations charged.

CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Sections 106.25, 120.569, and 120.57(1), Florida Statutes (2005).

65. Petitioner has the burden of proving by clear and convincing evidence that Respondent violated Section 106.07(5), Florida Statutes (2004), by certifying that his 2004 Q2, F2, F3, Amended F3, and G1 CTRs were true, correct and complete when they were not. See Diaz de la Portilla v. Florida Elections Commission, 857 So. 2d 913 (Fla. 3rd DCA 2003), rev. denied, 872 So. 2d 899 (Fla. 2004).

66. There are several statutory sections that apply to this case, beginning with Section 106.011(4), Florida Statutes (2004), which states as follows in pertinent part:

(4)(a) "Expenditure" means a purchase, payment, distribution, loan, advance, transfer of funds by a campaign treasurer or deputy campaign treasurer between a primary depository and a separate interest-bearing account of certificate of deposit, or gift of money or any thing of value made for the purpose of influencing the results of an election or making an electioneering communication

* * *

(b) As used in this chapter, an "expenditure" for an electioneering communication is made when the earliest of the following occurs:

1. A person executes a contract for applicable goods or services;
2. A person makes payment, in whole or in part, for applicable goods and services; or
3. The electioneering communication is publicly disseminated.

67. Regarding the duties of campaign treasurers, Section 106.021(3), Florida Statutes (2004), states as follows in relevant part:

(3) No contribution or expenditure, including contributions or expenditures of a candidate or of the candidate's family, shall be directly or indirectly made or received in furtherance of the candidacy of any person for nomination or election to political office in the state or on behalf of any political committee except through the duly appointed campaign treasurer of the candidate or political committee, subject to the following exceptions:

* * *

(b) Reimbursements to a candidate or any other individual for expenses incurred

in connection with the campaign or activities of the political committee by a check drawn upon the campaign account and reported pursuant to s. 106.07(4). After July 1, 2004, the full name and address of each person to whom the candidate or other individual made payment for which reimbursement was made by check drawn upon the campaign account shall be reported pursuant to s. 106.07(4), together with the purpose of such payment;

(c) Expenditures made indirectly through a treasurer for goods or services, such as communications media placement or procurement services, campaign signs, insurance, or other expenditures that include multiple integral components as part of the expenditure and reported pursuant to s. 106.07(4)(a)13

68. Candidates must sign statements that they have read, and understand Chapter 106, Florida Statutes (2004). See § 106.023(1), Fla. Stat. (2004). The execution and filing of the statement does not create a presumption that any violation of Florida's election laws is willful. See § 106.023(2), Fla. Stat. (2004).

69. Section 106.07(4)(a), Florida Statutes (2004), states as follows in relevant part:

(4)(a) Each report required by this section shall contain:

* * *

6. The full name and address of each person to whom expenditures have been made by or on behalf of the committee or candidate within the reporting period; the amount, date, and purpose of each such expenditure; and the name and address of, and

office sought by, each candidate on whose behalf such expenditure was made. However, expenditures made from the petty cash fund provided for in s. 106.12 need not be reported individually.

7. The full name and address of each person to whom an expenditure for personal services, salary, or reimbursement for authorized expenses as provided in s. 106.021(3) has been made and which is not otherwise reported, including the amount, date, and purpose of such expenditure. However, expenditures made from the petty cash fund provided for in s. 106.12 need not be reported individually.

* * *

10. The amount and nature of debts and obligation owed by or to the committee or candidate, which relate to the conduct of any political campaign.

* * *

13. The primary purpose of an expenditure made indirectly through a campaign treasurer for goods and services such as communications media placement or procurement services, campaign signs, insurance, and other expenditures that include multiple components as part of the expenditure. The primary purpose of an expenditure shall be that purpose, including integral and directly related components that comprises 80 percent of such expenditure.

70. As to certification and filing CTRs, Section 106.07(5), Florida Statutes (2004), states as follows in relevant part:

(5) The candidate and his or her campaign treasurer . . . 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.

71. The Department of State, Division of Elections, has authority to issue advisory opinions when any supervisor of elections or any candidate makes such a request. See § 106.23(2), Florida Statutes (2004).

72. Section 106.25(3), Florida Statutes (2004), states 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.

73. Regarding civil penalties, Section 106.265(1), Florida Statutes (2004), states 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.

74. A "willful violation" is defined in Section 106.37, Florida Statutes (2004), which states as follows:

106.37 Willful violations.--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.

75. Petitioner met its burden of proving that Respondent violated Chapter 106.07(5), Florida Statutes (2004). On five occasions, Respondent certified that his CTRs were correct and complete even though he failed to itemize expenditures for advertising on two television stations.

76. Before July 1, 2004, all campaign expenses had to be paid directly using a check on the campaign account. The law did not provide for making indirect payments through a third party like a media consultant. After July 1, 2004, candidates

could pay campaign expenses indirectly through a media consultant provided such payments were itemized.

77. Respondent received a copy of Ms. Hampton's letter dated June 17, 2004. That letter clearly gave Respondent notice that there were legislative changes in the law relating to campaign financing. Respondent never took the time to review the new law or the amended handbook. Moreover, Respondent failed to show the letter to Ms. Schipper, who did not learn about the legislative changes until after the campaign.

78. It is clear that Respondent made no effort after July 1, 2004, to determine whether his payments to Mr. Petermann needed to be itemized on the CTR for the period in which Respondent's campaign indirectly incurred the obligation to pay the underlying expenses. At the very least, the addition of Section 106.07(4)(a)13., Florida Statutes (2004), should have alerted Respondent that there were changes in the method of reporting the reimbursement of campaign expenses to media consultants. Respondent cannot now claim that he did not wholly disregard the law, making no reasonable effort to determine whether he was violating Chapter 106, Florida Statutes (2004).

79. Applying the statutory factors set forth in Section 106.265, Florida Statutes (2004), it is concluded as follows:
(a) The gravity of Respondent's omissions were significant, leaving the public no way to determine how much and at what

television stations Respondent spent money for advertising; (b) Respondent has no prior history of similar acts or omissions; (c) Respondent has the ability to pay the maximum fine; and (d) Respondent failed to show good faith in his attempts to comply with his statutory obligations because he was more concerned with keeping Mr. Petermann paid and with campaigning than with the legal requirements of the law.

RECOMMENDATION

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

RECOMMENDED:

That Petitioner enter a final order finding that Respondent violated Section 106.07(5), Florida Statutes (2004), as charged in Counts 1-5 of the Order of Probable Cause, dismiss Count 6 of the Order of Probable Cause, and impose a civil penalty in the amount of \$5,000.

DONE AND ENTERED this 30th day of June, 2006, in
Tallahassee, Leon County, Florida.

Suzanne F. Hood

SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of June, 2006.

ENDNOTE

^{1/} Respondent's Motion in Limine seeks to exclude testimony about "other events/acts" that occurred during the campaign, but which were not charged in the Order of Probable Cause. Most important, Respondent's motion relates to the following: (a) Respondent's June 30, 2004, personal check payable to Mr. Petermann; (b) the August 5, 2004, campaign check payable to Respondent as a reimbursement; and (c) the listing on Respondent's F2 CRT of the August 5, 2004 campaign check as payable to Petermann Advertising/mlp.

As a general rule, any fine or penalty imposed by Petitioner may be based only upon those violations specifically alleged in the Order of Probable Cause. See Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996).

Petitioner agrees that "other events" are not admissible to form a basis for violations of law not alleged in the Order of Probable Cause. However, Petitioner asserts that evidence of the "other events" is relevant to show Respondent's "willfulness," i.e. that Respondent knew, or had reckless disregard for whether, the "other events/acts" were prohibited by Chapter 106, Florida Statutes (2004).

"Willfulness" is an issue of fact. See McGann v. Florida Elections Commission, 803 So. 2d 763,766 (Fla. 1st DCA 2001).

Regarding "similar fact" evidence, Section 120.57(1)(d), Florida Statutes (2004), states as follows in pertinent part:

(d) Notwithstanding s. 120.569(2)(g), similar fact evidence of other violations, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

In this case, the evidence that Respondent seeks to exclude is only relevant, and therefore admissible, to show the underlying facts of Counts I and II of the Order of Probable Cause. Those counts involve allegations relating to expenditures by Mr. Petermann on Respondent's behalf, the reimbursement of those expenditures, and the failure to properly disclose or itemize the expenditures on Respondent's Q2 CTR and F2 CTR. Otherwise, the "other event/acts" are not probative to show Respondent's "willfulness." Just because Respondent wrote a personal check to Mr. Petermann, later reported as an expenditure to Petermann Advertising/mlp, does not mean Respondent knew he was violating the law, or that he was acting with reckless disregard for the law, when he signed CTRs that did not itemize payments made directly to Mr. Petermann. Accordingly, the Motion in Limine is granted in part and denied in part.

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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.