

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AN UNNAMED POLITICAL ENTITY,            )  
  )  
          Petitioner,                            )  
  )  
vs.    )     Case No. 06-0141RX  
  )  
FLORIDA ELECTIONS COMMISSION,            )  
  )  
          Respondent.                         )  
\_\_\_\_\_  
  )

FINAL ORDER

A formal administrative hearing was waived in this case, and the parties stipulated to the submission of cross motions for summary final order before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings in Tallahassee, Florida.

APPEARANCES

For Petitioner: Edward A. Tellechea, Esquire  
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For Respondent: John H. French, Jr., Esquire  
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STATEMENT OF THE ISSUES

Whether Florida Administrative Code Rules 2B-1.0025(3), (5), and (7) and 2B-1.0027(3) are valid exercises of delegated legislative authority.

PRELIMINARY STATEMENT

On January 11, 2006, Petitioner filed a Petition to Determine the Invalidity of Existing Rules. On January 13, 2006, Respondent's counsel filed his Notice of Appearance. On January 19, 2006, a telephonic pre-hearing conference was held, and, pursuant to the agreement of the parties, an Order on Confidentiality was entered the following day, which held that Petitioner in this proceeding is a political entity regulated by Chapter 106, Florida Statutes (2005),<sup>1</sup> and was presently under investigation by Respondent, and, inter alia, could proceed to resolution on the merits under the pseudonym listed in the style of this case.

This matter was then set for hearing. On February 14, 2006, the parties filed a Joint Motion wherein the parties represented that they did not need a formal hearing in this matter, but would submit stipulated facts, and sought to submit cross motions for summary final orders and responses to each side's respective motions. The motion was granted, the hearing was cancelled, and a briefing schedule was established. Following the granting of several motions for extension of time, the parties each filed motions for summary final order and responses to said motions.

Following the filing of the parties' final submittals on May 10 and 11, 2006, each parties' motions and responses have been given careful consideration in the preparation of this Final Order.

FINDINGS OF FACT

1. Petitioner is a political entity subject to the regulations set forth in Chapter 106, Florida Statutes.

2. Petitioner is the subject of certain complaints and several investigatory proceedings initiated by Respondent.

3. The aforementioned complaints were determined to be legally sufficient, pursuant to the Florida Administrative Code, and as a result thereof, investigatory subpoenas were issued in accordance with Florida Administrative Code Rule 2B-1.0027(2).

4. The rules subject to Petitioner's challenge, Florida Administrative Code Rules 2B-1.0025(3),(5), and (7), and 2B-1.0027(2), were all subject to and reviewed by legal counsel to the Joint Administrative Procedure Committee of the Florida Legislature pursuant to Subsection 120.54(3)(a)4., Florida Statutes, and were promulgated without Committee objection prior to 1999.

5. The aforementioned investigatory subpoenas served upon Petitioner were challenged by Petitioner, pursuant to Florida Administrative Code Rule 2B-1.0027(2).

The challenge was heard by Respondent's Chair via telephone conference call on January 9, 2006, and the subpoenas were upheld by the Chair.

6. Petitioner has been, and continues to be, subject to the provisions and operations of the rules that are the subject of this proceeding and is, thus, substantially affected by said rules. Accordingly, Petitioner has standing to maintain this proceeding.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings (DOAH) has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Subsection 120.56(1), Florida Statutes.

8. Petitioner is a substantially affected party by the challenged rules and has standing to maintain this proceeding. Subsection 120.56(1)(a), Florida Statutes.

9. The ultimate issue in this matter is whether the challenged rules constitute an invalid exercise of delegated legislative authority as defined by Subsection 120.52(8), Florida Statutes. The portions of that statute that are relevant to this proceeding read, as follows:

120.52 Definitions.--As used in this act:

\* \* \*

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and

duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

\* \* \*

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.

\* \* \*

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

10. Petitioner contends that Florida Administrative Code Rule 2B-1.0025(3) is invalid in that it delegates determinations of the legal sufficiency of complaints to the Respondent's

executive director in contravention of the underlying statutory authority.

11. The relevant portion of the rule reads, as follows:

2B-1.0025 Complaints

\* \* \*

(3) Upon receipt of a complaint, the executive director shall determine whether the complaint is legally sufficient, unless the executive director determines that the identity of the parties or witnesses or other factual or legal basis would prevent his or her determination due to an appearance of impropriety or a conflict as defined by Section 112.312(8), Florida Statutes. Upon the executive director's determination that he or she has a conflict or that action on the complaint would present an appearance of impropriety, the executive director shall refer the complaint to the Commission for a determination of legal sufficiency.

12. The specific authority cited for the authority to adopt the rule is contained in Subsection 106.26(1), Florida Statutes, the relevant portion of which reads:

106.26 Powers of commission; rights and responsibilities of parties; findings by commission--

(1) The commission shall, pursuant to rules adopted and published in accordance with Chapter 120, consider all sworn complaints filed with it and all matters reported to it by the Division of Elections. In order to carry out the responsibilities prescribed by this chapter, the commission is empowered to subpoena and bring before it, or its duly authorized representatives, any person in the state, or any person doing business in

the state, or any person who has filed or is required to file any application, document, papers, or other information with an office or agency of this state or a political subdivision thereof and to require the production of any papers, books or other records relevant to any investigation, including the records and accounts of any bank or trust company doing business in this state. Duly authorized representatives of the commission are empowered to administer all oaths and affirmations in the manner prescribed by law to witnesses who shall appear before them concerning any relevant matter.

13. Petitioner points to the above-quoted statute to make its claim that Florida Administrative Code Rule 2B-1.0027(2) contravenes Subsection 106.26(1), Florida Statutes, because the statute specifically provides that the "Commission is empowered to subpoena" and fails to mention anything about delegating such responsibility to any other entity. Petitioner also cites to Subsection 106.26(1), Florida Statutes, to support its claim that Florida Administrative Code Rule 2B-1.0025(3) contravenes the legislative mandate that the "Commission . . . consider all sworn complaints filed with it and all matters reported to it by the Division of Elections" because it calls for Respondent's executive director to make findings of legal sufficiency.

14. Petitioner, however, has failed to consider Subsection 106.24(4), Florida Statutes, which addresses the functions of Respondent's executive director.

Section 106.24, Florida Statutes, creates the "Florida Elections Commission" and provides in part as follows:

(4) The commission shall appoint an executive director, who shall serve under the direction, supervision, and control of the commission. The executive director, with the consent of the commission, shall employ such staff as are necessary to adequately perform the functions of the commission, within budgetary limitations. (Emphasis added)

15. Respondent's position is that Subsection 106.24(4), Florida Statutes, allows, to delegate to the executive director the authority to perform necessary "functions of the Commission" and those such functions include the issuance of subpoenas and the determination of legal sufficiency of a complaint.

Respondent relies on Florida Commission on Human Relations v. Parrish Management, Inc., 682 So. 2d 159 (Fla. 1st DCA 1996), a case arising out of the First District Court of Appeal that is based on underlying facts that are remarkably similar to the matter at hand. Parrish involved a challenge to the Florida Commission on Human Relations (FCHR) rules that allowed its executive director to make "an investigatory determination of reasonable cause to believe that an unlawful employment practice had occurred." Parrish at 159. The rule in question was challenged in part on the basis that Subsection 760.11(3), Florida Statutes (1995), specifically provided that "the Commission shall determine if there is reasonable cause to



believe that a discriminatory practice has occurred, in violation of the Florida Civil Rights Act of 1992," and that such explicit statutory language gave the FCHR, and not its executive director, the authority to find reasonable cause.

16. In overruling the DOAH Administrative Law Judge's Final Order finding the rules in question to be invalid exercises of delegated legislative authority, the court in Parrish cited to Subsection 760.03(7), Florida Statutes (1995), which reads in part as follows:

(7) The commission shall appoint, and may remove, an executive director who, with the consent of the commission, may employ a deputy, attorneys, investigators, clerks, and such other personnel as may be necessary adequately to perform the functions of the commission, within budgetary limitations. (Emphasis added).

17. The court found that the above-quoted language, which is practically identical to that found in Subsection 106.24(4), Florida Statutes, clearly allows "the Commission to delegate to the executive director the authority necessary to adequately 'perform the functions of the commission'" such as making findings of reasonable cause. Parrish at 160. In making its finding, the court recognized that the term "commission" as used in Sections 760.03 and 760.11, Florida Statutes, could not be reasonably defined to only include the panel of commissioners.

18. In support of its view, the court noted that along with giving the "commission" the authority to find reasonable cause, Section 760.11, Florida Statutes, also provides that upon a finding of reasonable cause it shall,

[C]learly stamp on the face of the complaint the date the complaint was filed with the commission; shall within 5 days of the complaint being filed, send a copy of the complaint to the person who allegedly committed the violation; shall investigate the allegations in the complaint; and shall promptly notify the aggrieved person and the respondent of the reasonable cause determination, the date of such determination, and the options available under this section.

Parrish at 160. The court noted that the FCHR, a collegial body that meets on a periodic basis, could not reasonably be expected to perform all the functions outlined in Section 760.11, Florida Statutes. Therefore, it was surely the intention of the legislature to allow the commission through Subsection 760.03(7), Florida Statutes, to delegate the authority to perform some of its functions to its executive director.

19. Subsection 106.24(4), Florida Statutes, and other relevant provisions of Chapter 106, Florida Statutes, are very similar to the provisions in Chapter 760, Florida Statutes, addressed by the First District Court of Appeal in Parrish. Subsection 106.24(4), Florida Statutes, is almost identical to Subsection 760.03(7), Florida Statutes, and like Section 760.11,

Florida Statutes, there are provisions in Section 106.25, Florida Statutes, that employ the term "commission" in such a manner that cannot be reasonably defined to only include the panel of commissioners. For example, under Subsection 106.25(2), Florida Statutes, the "commission" is required to, within five days after the receipt of a sworn complaint, send a copy of the complaint to the alleged violator and is required to investigate all sworn complaints containing violations of Chapters 104 and 106, Florida Statutes, or complaints arising from information provided to Respondent by the Division of Elections. As in the case of the FCHR in Parrish, Respondent too is a collegial body that must meet in the "sunshine" and on a quarterly basis, and can not reasonably be expected to perform all the "commission" functions outlined in Chapter 106, Florida Statutes, itself.

20. Furthermore, under Subsection 106.24(1)(a), Florida Statutes, the legislature explicitly deems Respondent's executive director as "the agency head for all purposes." The delegation of authority to its executive director is not explicitly precluded and, thus, is allowed under Subsection 20.05(1)(b), Florida Statutes, which provides, in pertinent part, as follows:

(1) Each head of a department, except as otherwise provided by law, must:

\* \* \*

(b) Have authority, without being relieved of responsibility, to execute any of the powers, duties, and functions vested in the department or in any administrative unit thereof through administrative units and through assistants and deputies designated by the head of the department from time to time, unless the head of the department is explicitly required by law to perform the same without delegation. (Emphasis added).

21. Since there is no language in any of the provisions of Chapters 104 or 106, Florida Statutes, that explicitly prohibit the delegation of the authority to issue subpoenas and the finding of legal sufficiency of complaints, Florida Administrative Code Rules 2B-1.0025(3) and 2B-1.0027(2) do not contravene any specific statutory authority. Accord, Sheffield v. Department of Highway Safety and Motor Vehicles, 356 So. 2d 353 (Fla. 1st DCA 1978).

22. Given the statutory framework of Chapter 106, Florida Statutes, the Parrish ruling, Subsection 20.05(1)(b), Florida Statutes, and the clear and plain language of Subsection 106.24(4), Florida Statutes, it is held that it was the intention of the legislature to allow the commission to delegate to the executive director the authority to issue investigatory subpoenas, to make findings of legal sufficiency, and to perform other such functions that it can not reasonably perform due to

its collegial nature. Accordingly, Respondent, pursuant to its rulemaking authority set forth in Subsection 106.26(1), Florida Statutes, has explicitly consented to having its executive director perform the ministerial task of making findings of legal sufficiency and issuing subpoenas, subject to the review of Respondent's Chair, or his/her designee, pursuant to Florida Administrative Code Rule 2B-1.0027(2).

23. Petitioner also challenges Florida Administrative Code Rules 2B-1.0025(5) and (7) as enlarging, modifying, or contravening Subsection 106.25(2), Florida Statutes, which reads as follows:

(2) The commission shall investigate all violations of this chapter and chapter 104, but only after having received either a sworn complaint or information reported to it under this subsection by the Division of Elections. Any person, other than the division, having information of any violation of this chapter or chapter 104 shall file a sworn complaint with the commission. The commission shall investigate only those alleged violations specifically contained within the sworn complaint. (Emphasis added).

24. Petitioner alleges that Florida Administrative Code Rules 2B-1.0025(5) and (7) are contrary to the above-quoted, emphasized statutory language.

25. Florida Administrative Code Rule 2B-1.0025 implements Section 106.25, Florida Statutes, and, in doing so, it defines

legal sufficiency and outlines the process by which a complaint is determined to be legally sufficient. Florida Administrative Code Rules 2B-1.0025(5) and (7), the two specific rule provisions in question, reads as follows:

(5) A complaint is not required to list every section of the Election Code that a Respondent could have violated or to specify facts that support every element of the violations alleged. (Emphasis added).

\* \* \*

(7) In determining the legal sufficiency of a complaint, the executive director shall consider any document referred to in the complaint and any material Commission staff has obtained in prior Commission investigations. In determining the legal sufficiency of a complaint alleging a violation of the campaign finance laws, the executive director shall also consider documents on file with the filing officer. (Emphasis added).

26. Petitioner characterizes the emphasized portions of the above-quoted rules as authorizing, "the Executive Director to 'fill in the blanks' in a complaint as to the facts necessary to constitute a violation as well as to consider documents and other materials that are extraneous to the complaint or otherwise made part thereof by the complaint."

27. Respondent opposes Petitioner's characterization. The first sentence within Subsection 106.25(2), Florida Statutes, which Petitioner noticeably excludes from its Petition, requires the Respondent to investigate "all violations" of Chapters 104

and 106, Florida Statutes, that are contained either within a sworn complaint or information reported to it by the Division of Elections. The last sentence of Subsection 106.25(2), Florida Statutes, merely states that Respondent may only investigate the violation contained within the complaint. The clear and unambiguous language of both sentences, when read together, make it clear that Respondent is required by law to investigate all violations contained within a sworn complaint received by Respondent. No reasonable reading of Subsection 106.25(2), Florida Statutes, could lead any reasonable person to conclude that all complaints or allegations of wrongdoing received by Respondent must specify all the facts necessary to support a violation before Respondent can decide to investigate the matter.

28. In filing this challenge, Petitioner is attempting to improperly restrict Respondent's ability to investigate violations of Chapters 104 and 106, Florida Statutes, by encouraging this tribunal to read Subsection 106.25(2), Florida Statutes, in such a manner as to require all complaints to be more akin to a formal charging document. Rather, what is required is just a simple allegation that sets forth that an entity, subject to Chapters 104 or 106, Florida Statutes, has violated one of its provisions. If the stricter standard were the case, only those members of the public that have the legal

knowledge necessary to determine all the factual elements necessary to support a violation of Chapter 104 or 106, Florida Statutes, or have the financial ability to hire an attorney to do so, on their behalf, would be able to have their complaints heard.

29. Petitioner also asserts that Subsection 106.25(2), Florida Statutes, precludes Respondent from promulgating a rule that allows it to refer to extraneous documents to determine whether a complaint is legally sufficient. There is no language within Subsection 106.25(2), Florida Statutes, or any provision of Chapter 104 or 106, Florida Statutes, that precludes Respondent from referring to documents outside of the complaint itself for purposes of verifying or discounting facts alleged within a complaint. The primary purpose of Florida Administrative Code Rule 2B-1.0025(7) is to provide a mechanism that allows Respondent, through its staff, to review documents extraneous to the complaint that contradict the allegations in the complaint, which support a finding of no legal sufficiency. In other words, it helps eliminate unsupported complaints early during the legal sufficiency phase of an investigation.

30. If Petitioner's position was upheld, Respondent would be unable to simply review a document already in its possession, or easily accessible through another agency, to verify or deny an allegation contained in a complaint. In other words, it



would eliminate a mechanism that facilitates the early elimination of complaints that lack merit and would require Respondent to take all complaints to the full commission for full review and prolong the life span of meritless complaints.

31. Florida Administrative Code Rules 2B-1.0025(5) and (7) do not enlarge, modify, and/or contravene the specific provisions of Subsection 106.25(2), Florida Statutes. As required by law, it simply sets forth, "pursuant to rules adopted and published in accordance with Chapter 120," how Respondent will "consider all sworn complaints filed with it and all matters reported to it by the Division of Elections." § 106.26(1), Fla. Stat.

32. In 1999, the legislature amended Subsection 120.52(8), Florida Statutes, to read in pertinent part:

. . . an agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute.

33. The amendment to the statute does not repeal or amend the powers and duties provisions in Sections 106.24 or 106.25, Florida Statutes, and the rules, previously adopted by Respondent, implement the specific powers and duties granted to Respondent in the enabling statute. Therefore, the 1999 amendment to Subsection 120.52(8), Florida Statutes, does not overrule or preclude the result in Parrish, which is the binding precedent in this case.

FINAL ORDER

Based on the foregoing,

It is ORDERED, as follows:

- 1) Petitioner's motion for summary final order is denied;
- 2) Respondent's motion for summary final order is granted;
- 3) The petition seeking declaration of invalidity of Florida Administrative Code Rules 2-B-1.0025(3), (5), and (7) and 2B-1.0027(2) is dismissed; and
- 4) The above-cited rules do not constitute an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 6th day of July, 2006, in Tallahassee, Leon County, Florida.



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DANIEL M. KILBRIDE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 6th day of July, 2006.

ENDNOTE

1/ Unless otherwise indicated, all references to the Florida Statutes shall be to the 2005 version.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.