

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ELECTIONS COMMISSION,)
)
 Petitioner,)
)
vs.) Case No. 08-2766
)
KENNETH S. LUNKINS,)
)
 Respondent.)

)

SUMMARY FINAL ORDER

This cause is before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings, on the Florida Elections Commission's Second Motion for Summary Final Order.

APPEARANCES

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

For Respondent: Kenneth S. Lunkins, pro se
No. 530800339
Joseph V. Conte Facility
1351 Northwest 27th Avenue
Pompano Beach, Florida 33069

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed the offenses set forth in the Order of Probable Cause issued June 1, 2007, and, if so, what action should be taken.

PRELIMINARY STATEMENT

On June 1, 2007, the Florida Elections Commission (Commission) issued an Order of Probable Cause against Kenneth S. Lunkins. The Commission charged Mr. Lunkins with one count of violating Section 106.07(1), Florida Statutes, in the year 2006. Mr. Lunkins failed to request a formal or informal hearing or elect to resolve the matter by a consent order. As a result, pursuant to Section 106.25(5), Florida Statutes, Mr. Lunkins was entitled to an administrative hearing conducted by an administrative law judge. On June 11, 2008, the Commission referred this matter to the Division of Administrative Hearings.

When the instant matter was referred to the Division of Administrative Hearings, the referral documents reflected a Coral Springs, Florida address for Mr. Lunkins. Initial documents sent from the Division of Administrative Hearings to Mr. Lunkins at the Coral Springs' address were returned by the U.S. Postal Service as undeliverable—"return to sender," "unknown reason," and "unable to forward." On July 11, 2008, the Commission filed a Motion for Summary Final Order (Motion), which reflected that Mr. Lunkins was incarcerated in a correctional facility and that the Motion was served upon him by U.S. Mail. This Administrative Law Judge wanted to be assured that Mr. Lunkins had received a copy of the Motion before making

a ruling. As a result, the ruling on the Commission's Motion was reserved to provide the Commission with an opportunity to show that Mr. Lunkins had received the Motion.

Instead of showing that Mr. Lunkins had received the Motion, the Commission filed an Amended Motion for Summary Final Order (Amended Motion), reflecting that Mr. Lunkins had been served with a copy of the Amended Motion by certified mail. After filing the Amended Motion, the Commission failed to show that Mr. Lunkins had received the Amended Motion. The ruling on the Commission's Amended Motion was reserved to provide the Commission an opportunity to show that Mr. Lunkins had received the Amended Motion. Later, the Commission filed a copy of a return receipt showing that Mr. Lunkins had received the Amended Motion. A ruling was made denying the Amended Motion.

Later, the Commission filed a Second Motion for Summary Final Order (Second Motion), which reflected that the Second Motion was served on Mr. Lunkins by certified mail. A copy of the return receipt was not filed. Subsequently, the Commission served Mr. Lunkins with another copy of the Second Motion by certified mail. The Commission filed a copy of a return receipt showing that Mr. Lunkins received the second copy of the Second Motion. By Order issued January 13, 2009, the undersigned ruled that all matters in the Commission's First Request for Admissions, which included documents, were deemed admitted. The

admissions constitute material facts. No genuine issue as to any material fact exists.

Section 120.57(1), Florida Statutes (2009), provides in pertinent part:

(h) Any party to a proceeding in which an administrative law judge of the Division of Administrative Hearings has final order authority may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if applicable, and any other information required by law to be contained in the final order.

Florida Administrative Code Rule 28-106.204 provides in pertinent part:

(4) In cases in which the Division of Administrative Hearings has final order authority, any party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits.

The requirements for a summary final order have been met.

FINDINGS OF FACT¹

1. In the 2006 election, Mr. Lunkins was a candidate for the Florida Senate, District 32.

2. On or about April 20, 2005, Mr. Lunkins filed a State of Florida Appointment of Campaign Treasurer and Designation of Campaign Depository for Candidates form (DS-DE-9), designating himself as his campaign treasurer.

3. By letter dated April 26, 2005, and sent on the same date, to Mr. Lunkins from Kristi Reid Bronson, Chief, Bureau of Election Records, Division of Elections, Ms. Bronson provided Mr. Lunkins with a user identification number and initial password, which allowed him to access the Division of Elections' electronic filing system. The letter from Ms. Bronson was sent to the address provided to the Division of Elections.

4. Further, Ms. Bronson's letter contained information about filing campaign treasurer reports. She advised Mr. Lunkins that all candidates filing their campaign treasurer's reports with the Division of Elections were required to file the reports using the electronic filing system. Also, she advised him that Chapter 106, Florida Statutes, the 2005 Calendar of Reporting Dates, and the 2004 Candidate and Campaign Treasurer Handbook were available for printing on the Division of Elections' website.

5. By letter dated July 12, 2006, and sent on the same date, from Ms. Bronson to Mr. Lunkins, she notified him, among other things, that he had failed to file his 2006 Q2 Campaign Treasurer's Report, which was due on July 10, 2006.

6. By a second letter dated August 30, 2006, and sent the same date by certified mail, from Ms. Bronson to Mr. Lunkins, she notified him, among other things, that he had failed to file his 2006 Q2 Campaign Treasurer's Report, which was due on July 10, 2006.

7. On September 1, 2006, Mr. Lunkins claimed and received Ms. Bronson's certified letter dated August 30, 2006.

8. Mr. Lunkins failed to file his 2006 Q2 Campaign Treasurer's Report, which was due on July 10, 2006.

9. Mr. Lunkins' failure to file his 2006 Q2 Campaign Treasurer's Report was willful.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto, pursuant to Section 120.569, Florida Statutes (2009), and Subsection 120.57(1), Florida Statutes (2009).

11. Section 106.25, Florida Statutes (2009), provides in pertinent part:

(5) Unless a person alleged by the Elections Commission to have committed a violation of this chapter or chapter 104

elects, within 30 days after the date of the filing of the commission's allegations, to have a formal or informal hearing conducted before the commission, or elects to resolve the complaint by consent order, such person shall be entitled to a formal administrative hearing conducted by an administrative law judge in the Division of Administrative Hearings. The administrative law judge in such proceedings shall enter a final order subject to appeal as provided in s. 120.68.

12. The ultimate burden of proof is on the Commission to establish by clear and convincing evidence that Mr. Lunkins violated Section 106.07(1), Florida Statutes (2006), as alleged in the Order of Probable Cause. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); § 120.57(1)(j), Fla. Stat. (2009).

13. These proceedings are de novo. § 120.57(1)(k), Fla. Stat. (2009).

14. Section 106.07, Florida Statutes (2006), provides in pertinent part:

(1) Each campaign treasurer designated by a candidate or political committee pursuant to s. 106.021 shall file regular reports of all contributions received, and all expenditures made, by or on behalf of such candidate or political committee. . . .

* * *

(2)(a) All reports required of a candidate by this section shall be filed with the officer before whom the candidate is required by law to qualify. All candidates

who file with the Department of State shall file their reports pursuant to s. 106.0705.

. . .

* * *

(7) Notwithstanding any other provisions of this chapter, in any reporting period during which a candidate . . . has not received funds, made any contributions, or expended any reportable funds, the filing of the required report for that period is waived. However, the next report filed must specify that the report covers the entire period between the last submitted report and the report being filed, and any candidate . . . not reporting by virtue of this subsection on dates prescribed elsewhere in this chapter shall notify the filing officer in writing on the prescribed reporting date that no report is being filed on that date.

(8)

* * *

(c) Any candidate or chair of a political committee may appeal or dispute the fine, based upon, but not limited to, unusual circumstances surrounding the failure to file on the designated due date, and may request and shall be entitled to a hearing before the Florida Elections Commission, which shall have the authority to waive the fine in whole or in part. The Florida Elections Commission must consider the mitigating and aggravating circumstances contained in s. 106.265(1) when determining the amount of a fine, if any, to be waived. . . .

* * *

(9) The Department of State may prescribe by rule the requirements for filing campaign treasurers' reports as set forth in this chapter.

15. Section 106.265, Florida Statutes (2006), provides in pertinent part:

(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 . . . ;
and

(d) Whether the person . . . has shown good faith in attempting to comply with the provisions of this chapter or chapter 104.

(2) If any person . . . fails or refuses to pay to the commission any civil penalties assessed pursuant to the provisions of this section, the commission shall be responsible for collecting the civil penalties resulting from such action.

(3) Any civil penalty collected pursuant to the provisions of this section shall be deposited into the Election Campaign Financing Trust Fund.

(4) Notwithstanding any other provisions of this chapter, any fine assessed pursuant to the provisions of this chapter, which fine is designated to be deposited or which would otherwise be deposited into the General Revenue Fund of the state, shall be deposited into the Election Campaign Financing Trust Fund.

16. Florida Administrative Code Rule 2B-1.002 provides in pertinent part:

For purposes of imposing a civil penalty for violating Chapter 104 or 106, F.S, the following definitions shall apply:

(1) A person acts "willful" or "willfully" when he or she knew that, or showed reckless disregard for whether his or her conduct was prohibited or required by Chapter 104 or 106, F.S.

(2) "Knew" means that the person was aware of a provision of Chapter 104 or 106, F.S., understood the meaning of the provision, and then performed an act prohibited by the provision or failed to perform an act required by the provision.

(3) "Reckless disregard" means that the person disregarded the requirements of Chapter 104 or 106, F.S., or was plainly indifferent to its requirements, by failing to make any reasonable effort to determine whether his or her acts were prohibited by Chapter 104 or 106, F.S., or whether he or she failed to perform an act required by Chapter 104 or 106, F.S.

17. The Commission demonstrated by clear and convincing evidence that Mr. Lunkins knew that he was required to file his Campaign Treasurer's Report for the 2006 campaign year.

18. The Commission demonstrated by clear and convincing evidence that Mr. Lunkins failed to file his 2006 Q2 Campaign Treasurer's Report, which was due on July 10, 2006.

19. Hence, the Commission demonstrated by clear and convincing evidence that Mr. Lunkins violated Section 106.07(1),

Florida Statutes (2006), by his failure to file his 2006 Q2 Campaign Treasurer's Report, which was due on July 10, 2006.

20. The civil penalty authorized to be imposed upon Mr. Lunkins is \$1,000.00 per violation. § 106.265(1), Fla. Stat. (2006). The Commission demonstrated by clear and convincing evidence that Mr. Lunkins committed one violation of Section 106.07(1), Florida Statutes (2006).

21. Several mitigating and aggravating circumstances shall be considered in the imposition of the civil penalty. § 106.265(1), Fla. Stat. (2006). No mitigating or aggravating circumstances were raised or presented by the parties and the evidence fails to demonstrate any such circumstances. Hence, the civil penalty of \$1,000.00 is reasonable and appropriate.

CONCLUSION

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

ORDERED that:

1. Kenneth S. Lunkins committed one count of violating Section 106.07(1), Florida Statutes (2006), by failing to file his 2006 Q2 Campaign Treasurer's Report, which was due on July 10, 2006.

2. A civil penalty of \$1,000.00 is imposed. The civil penalty shall be paid to the Florida Elections Commission within 30 days of the date of this Summary Final Order.

DONE AND ORDERED this 14th day of January, 2010, in
Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of January, 2010.

ENDNOTE

^{1/} The Findings of Facts are based upon the admissions deemed admitted.

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.