

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ELECTIONS COMMISSION,     )  
  )  
      Petitioner,                     )  
  )  
vs.                                     )     Case No. 08-3373  
  )  
KENTWARD C. FORBES,                )  
  )  
      Respondent.                    )  
\_\_\_\_\_  
  )

FINAL ORDER

June C. McKinney, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing by videoconference in Tallahassee, Florida on February 18, 2009. The parties, attorneys for the parties, witnesses, and court reporter participated by videoconference in Miami, Florida.

APPEARANCES

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

For Respondent: Charles McKinnon  
Law Offices of Charles McKinnon  
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Naranja, Florida 33032

STATEMENT OF THE ISSUE

The issue is whether Respondent committed the violations alleged in the Order of Probable Cause, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

The Florida Elections Commission (Commission) determined in an Order of Probable Cause dated May 30, 2008, that there was probable cause to believe that Respondent violated Section 106.07(5), Florida Statutes on two counts. Count one alleges that on or about July 29, 2005, Respondent violated Section 106.07(5), Florida Statutes, by certifying to the correctness of South Bay Community Political Action Committee's (SBPAC) amended 2004 F1 CTR, when he incorrectly reported and failed to include items. Count two alleges that on or about July 29, 2005, Respondent violated Section 106.07(5), Florida Statutes, by certifying to the correctness of SBPAC amended 2004 Q4 CTR, when he incorrectly reported and failed to include items.

Respondent did not timely request a formal or informal hearing before the Commission or elect to resolve the complaint by a consent order. Therefore, Respondent was entitled to a formal administrative hearing conducted by an administrative law judge. On July 14, 2008, this matter was referred to the Division of Administrative Hearings (DOAH).

On November 26, 2208, a Notice of Hearing was issued scheduling the final hearing for February 18, 2009. On December 15, 2008, an Amended Notice of Hearing by Video Teleconference was issued. The final hearing was held as scheduled. Respondent did not appear but was represented by counsel. Respondent did not present any evidence. The Commission presented the testimony of Maria Acosta and Keith Smith. The Commission's Exhibits 1 through 18 were received into evidence.

A Transcript was filed on April 10, 2009. Respondent did not file a proposed final order. Petitioner filed a Proposed Final Order on April 30, 2009, which has been duly considered in this matter.

#### FINDINGS OF FACT

1. On May 20, 2004, SPCPC registered with the Miami-Dade County Supervisor of Elections Office as an issues-only political committee.

2. On or about November 11, 2004, Respondent signed an Appointment of Campaign Treasurer and Designation of Campaign Depository form, accepting the position of committee campaign treasurer. Respondent served as treasurer of SBCPC until it dissolved.

3. The SPCPC is required to file campaign treasurer's reports (CTR) detailing all contributions and expenditures.

CTRs contain a summary page on which the committee chairperson and the committee treasurer certify the report is true, correct, and complete.

4. The letter "Q" before a number indicates that a CTR is a quarterly report. The "F" series reports are filed before a primary election and the "G" series reports are filed prior to the general election. In 2004, SBCPC should have filed an F1 CTR 32 days prior to the primary election, and F2 CTR 18 days prior to the primary election, and an F3 CTR 4 days prior to the primary election.

5. The Miami-Dade Elections Department provides written resource materials for political committees. Candidates and committees have available to them election law books and the Division of Elections' Committee and Campaign Treasurer Handbook.

6. Respondent obtained a copy of Chapter 106, Florida Statutes in 2002, but no longer has it and he received the Committee and Campaign Treasurer Handbook<sup>1</sup> prior to his appointment as SBCPC's treasurer. The handbook explains the rules for properly reporting contributions and expenditures and another copy was available to Respondent upon his appointment as treasurer for SBCPC.

7. The Miami-Dade Ethics Committee also provides training seminars for candidates and committees on Florida's election

laws at least once a year. Acosta, a 20-year veteran clerk with the Miami-Dade Elections Department, teaches campaign financing as part of the training. The training seminars were offered on May 5, 2004 and August 23, 2006. Respondent attended at least one ethics training seminar.

8. Candidates or committees that have questions about filing campaign reports may contact Acosta for elections assistance or questions. Acosta and Respondent know each other and have spoken several times when Respondent has worked on previous campaigns and committees.

9. David Smith, an Investigations Specialist II with the Commission, was assigned to investigate FEC07-192, Respondent Kenneth Forbes, regarding allegations that several CTRs were incorrect, incomplete, or false.

10. During Smith's investigation, he reviewed the complaint, the attachments to the complaint, Section 106.07(5), Florida Statutes, as the applicable section of the law that was alleged to have been violated, and obtained and reviewed the bank statements, deposit items and checks issued for SBCPC for the dates covering Amended F1 report for 2004 and the Amended Q4 report for 2004. Smith then compared the bank records to the information reported on the campaign treasurer's report item-by-item, including checks written and deposits made.

11. Smith summarized his findings and sent Respondent an affidavit to complete as part of the investigation. Respondent Forbes completed, signed, and returned to Smith the affidavit with his notarized signature. Smith reviewed the responses and finalized his Report on Investigation. After Smith drafted his final findings, he called Respondent to discuss the findings and to see if Respondent had anything else to add. Respondent never returned his call.

12. Respondent's signature on the affidavit is the same signature that appears above his name on the cover page certification of SBCPC's 2004 Amended F1 and 2004 Amended Q4 CTR, and the form appointing Respondent as Treasurer of SBCPC.

13. Respondent certified that SPCPC's 2004 Amended F1 Report was true, correct, and complete when it was not. Respondent also certified that SPCPC's 2004 Q4 CTR was true, correct, and complete when it was not.

14. Smith detailed his investigatative findings of Respondent's violations of Section 106.07(5), Florida Statutes, in two tables. Table one demonstrates Respondent failed to report, or misreported, the following transactions on the 2004 Amended F1 CTR that he certified were true, correct, and complete:

<b>MISSING AND INCORRECT INFORMATION ON 2004 AMENDED F1 REPORT</b>			
<b>Date Filed</b>	<b>Reporting Period</b>	<b>Missing Information</b>	<b>Incorrect Information</b>
07/29/05	07/01 to 07/23/04 2004 F1 - Amended	<ul style="list-style-type: none"> <li>Failed to report \$500 contribution from Sandy Walker; check dated 07/07/04.</li> <li>Failed to report \$500 contribution from Canco Rentals; check dated 07/07/04.</li> </ul>	<ul style="list-style-type: none"> <li>Reported \$1000 loan in Respondent's name; bank records are void of a check from Respondent.</li> </ul>
			<ul style="list-style-type: none"> <li>Reported \$200 expenditure to "Patricia A. Forbes" for the purpose of "Stipend." Check #1008 was made payable to "Cash" and the memo line included the notation, "Focus Group."</li> </ul>

15. Table two demonstrates Respondent failed to report, or misreported, the following transactions on the 2004 Amended Q4 CTR that he certified was true, correct, and complete:

<b>MISSING AND INCORRECT INFORMATION ON 2004 AMENDED Q4 REPORT</b>			
<b>Date Filed</b>	<b>Reporting Period</b>	<b>Missing Information</b>	<b>Incorrect/Incomplete Information</b>
07/29/05	10/29 to 12/31/04 2004 Q4 - Amended		<ul style="list-style-type: none"> <li>Reported \$860 expenditure to "Fran Mar Bus Service, Inc.," rather than "Franmar Corporation."</li> </ul>
		<ul style="list-style-type: none"> <li>Failed to report \$600 expenditure to Enid Demps; check #1049 dated as 10/30/04.</li> <li>Failed to report \$4,770 expenditure to Enid Demps; check #1050 dated as 10/30/04.</li> <li>Failed to report \$120 expenditure to Enid Demps; check #1051 dated as 10/30/04.</li> </ul>	<ul style="list-style-type: none"> <li>Reported a single expenditure to Enid Demps in the amount of \$5,490 rather than three separate checks totaling \$5,490.</li> </ul>

			<ul style="list-style-type: none"> <li>• Reported \$4,386 expenditure to FL E.E.E. Holding, LLC – Ken Forbes; Check #1053 issued to Ken Forbes. Reported incorrect address.</li> </ul>
		<ul style="list-style-type: none"> <li>• Failed to report a \$150 expenditure to “Mae Matchum” on 11/03/04</li> <li>• Failed to report a \$100 expenditure to “Diana Price” on 11/03/04</li> <li>• Failed to report a \$50 expenditure to “Jamal Floyd” on 11/03/04</li> <li>• Failed to report a \$25 expenditure to “Sheri Seed” on 11/03/04</li> <li>• Failed to report a \$20 expenditure to “Effie R. Russell” on 11/03/04</li> <li>• Failed to report a \$20 expenditure to “Dorothy Clarke” on 11/03/04</li> </ul>	<ul style="list-style-type: none"> <li>• Reported a single expenditure to South Bay Community PAC in the amount of \$365. Bank records show six checks issued to various individuals totaling \$365.</li> </ul>
			<ul style="list-style-type: none"> <li>• Reported \$200 expenditure to South Bay Community PAC on 11/05/04; Check #1062 issued to Patricia A. Forbes</li> <li>• Reported \$350 expenditure to GK Enterprises on 12/12/04; Check #1066 issued to Patricia A. Forbes. Reported incorrect address.</li> </ul>

16. Respondent has been involved in several other political committees and is not new to the political process. Respondent's failure to report or misreport transactions was clearly more than an oversight. Respondent was aware of the requirement to file a complete and accurate CTR by virtue of previously having been before the Commission before for violations of Florida's election laws.



17. The Commission has entered at least 10 Final Orders against Respondent upholding fines for filing reports late and assessing fines for willfully violating the election laws.

18. Respondent even has violated the same statute that he is charged with violating in this case. The Commission found that the Respondent violated Section 106.07(5), Florida Statutes, and assessed civil penalties against him both in case number FEC 06-206 and case number FEC 06-334 and 06-403 combined.

19. When Respondent failed to report or misreport transactions on the 2004 Amended F1 CTR and 2004 Amended Q4 CTR, he knew what was required of him when filing such reports.

#### CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Section 106.25(5), Florida Statutes(2008).

21. The Commission has the burden to prove the violations alleged in the Order of Probable Cause by clear and convincing evidence. See Diaz de la Portilla v. Fla. Elections Comm'n, 857 So. 2d 913, 917 (Fla. 3d DCA 2003).

22. The clear and convincing standard of proof is greater than the preponderance of the evidence standard that applies in most civil cases, but it is less than the beyond a reasonable doubt standard that applies in criminal cases; it requires that:

[T]he 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 confusion as to the facts in issue. The evidence must be of such weight that it produces in the 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).

23. The Commission must not only prove that Respondent violated a provision of the campaign finance laws, but also that the act or omission that resulted in the violation was "willful." Willfulness is a question of fact. The determination of willfulness in this case is governed by the definition in Section 106.37, Florida Statutes (2006), which was in effect at the time of the acts and omissions that gave rise to the Order of Probable Cause. See Diaz de la Portilla, 857 So. 2d at 917 n.2; McGann v. Fla elections Comm'n, 803 So. 2d 763, 764 (Fla. 1st DCA 2004).<sup>2</sup>

24. Section 106.37, Florida Statutes (2006), provided:

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 a reasonable effort to determine whether the act would constitute a violation of this chapter. . . .

25. The Commission alleged that Respondent violated Section 106.07(5), Florida Statutes, which provides:

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. . . .

26. The Commission met its burden to prove that Respondent violated the statutory provision.

27. The evidence clearly and convincingly establishes that (1) Respondent failed to report two expenditures on SBCPC's 2004 Amended F1 CTR; (2) Respondent incorrectly reported two other transactions on SBCPC's 2004 Amended F1 CTR; (3) Respondent failed to report nine expenditures on SBPC's 2004 Amended Q4 CTR; and (4) Respondent incorrectly reported 12 expenditures on SBPC's 2004 Amended Q4 CTR.

28. Respondent had the responsibility for the accuracy and veracity of both the 2004 Amended F1 CTR and the 2004 Amended Q4

CTR. Respondent is not new to the political process and his prior 10 cases in which the Commission found Respondent violated election laws including the two cases where Respondent violated the same statute alleged in this matter demonstrates that Respondent knew or should have known that he was required to report proper expenditures and contributions on SBCPC's CTRs but he failed to do so.

29. Respondent also had the resources that he had used in the past with other campaigns and committees such as the Committee and Campaign Treasurer Handbook and personnel at Miami-Dade Elections Office that he could have called upon to assist him in correctly filling out the amended CTRs but he did not.

30. Respondent's violations in this case are willful because he knew what was required of him as campaign treasurer and yet he still failed to report or misreported numerous contributions and expenditures in the CTRs.

31. Each violation that was proven was contained in a separate count of the Order of Probable Cause, and therefore, a separate fine may be imposed for each violation. See Diaz de la Portilla, 857 So. 2d at 924; McGann, 803 So. 2d at 765-766.

32. Section 106.265(1), Florida Statutes (2006, 2007, and 2008), provides:

(1) The commission is authorized upon the finding of a violation of this chapter. . . . 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 of omissions;

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

(d) Whether the person . . . has shown good faith in attemptation to comply with the provision of this chapter . . . .

33. Properly reporting campaign contribution and filing campaign treasurer's reports go to the heart of the campaign finance laws, and as a result, a candidate's willful failure to comply with the statutory reporting requirements justifies the imposition of the maximum fine of \$1,000 per count. See, e.g., Beardslee v. Fla. Elections Comm'n, 962 So. 2d 390 (Fla. 5th DCA 2007) (affirming \$1,000 fine for candidate's willful failure to report a \$143 contribution).

34. Respondent has the burden to prove the existence of any mitigating circumstances that would justify imposition of a lesser fine. See Diaz de la Portilla, 857 So. 2d at 925.

35. No mitigating evidence was presented at the final hearing.

ORDER

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

ORDERED that:

1. Respondent is guilty of:

(a) Willfully violating Section 106.07(5), Florida Statutes (2004), as alleged in Count 1 of the Order of Probable Cause dated May 30, 2008.

(b) Willfully violating Section 106.07(5), Florida Statutes (2004), as alleged in Count 2 of the Order of Probable Cause dated May 30, 2008.

2. Respondent is assessed a civil penalty of \$2,000 (\$1,000 for each count), which must be paid to the Florida Elections Commission within 30 days of the date of this Final Order.

DONE AND ORDERED this 27th day of May, 2009, in Tallahassee, Leon County, Florida.



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JUNE C. MCKINNEY  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of May, 2009.

ENDNOTES

1/ Respondent attested to receipt of Chapter 106, Florida Statutes and reading the Committee and Campaign Treasurer Handbook in an affidavit dated October 17, 2007.

2/ Section 106.37, Florida Statutes (2006), was repealed effective January 1, 2008, after the events giving rise to this case.

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.