STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ELECTIONS COMMISSION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-0417
	)	
JOSUE LAROSE,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER OF DISMISSAL

In an Order to Show Cause issued July 23, 2012, the undersigned directed the parties to show cause, no later than July 27, 2012, why the Division of Administrative Hearings ("DOAH") should not dismiss this case for lack of jurisdiction. Thereafter, on July 25, 2012, the parties submitted responses to the Order to Show Cause, which the undersigned has considered.

For the reasons detailed below, jurisdiction to hold a formal hearing in this cause resides exclusively with Florida Elections Commission ("FEC") pursuant to section 106.25(5), Florida Statutes (2011). In brief, because Respondent did not submit a timely request for a hearing before DOAH, the FEC is the only quasi-judicial tribunal authorized to adjudicate the pending charges. This case, having been filed improvidently with DOAH, must therefore be dismissed to enable the FEC to fulfill its statutory obligations.

I. Background

On December 6, 2011, the FEC filed an Order of Probable Cause ("OPC")——the equivalent of an administrative complaint——against Respondent, which alleged more than 2,000 violations of various provisions of chapter 106, Florida Statutes. Both the OPC and a Notice of Rights ("Notice") were forwarded promptly to Respondent. Among other things, the Notice indicated clearly that if Respondent desired a formal hearing before an administrative law judge, a request would need to be made within 30 days from the date the OPC was filed——i.e., Thursday, January 5, 2012——not served. The Notice provided further that if Respondent did not request a hearing before DOAH (or settle the matter by a consent order) within 30 days of the filing date,[1/] the case would be "sent to the Commission and [Respondent] will be entitled to a formal or informal hearing."

Subsequently, on Friday, January 6, 2012, at approximately 9:00 p.m., Respondent faxed a correspondence (dated January 6) to the FEC that requested a formal hearing. Notwithstanding the fact that the request was made two business days late[2/] and contained no indication that Respondent desired a formal hearing before DOAH——the relevant portion of Respondent's request reads, "I send you this letter to request a Formal Hearing"——the FEC forwarded the matter to DOAH for the assignment of an administrative law judge.

Thereafter, on July 23, 2012, the undersigned issued an Order to Show Cause,[3/] which provided, in relevant part:

> As reflected by the [language of section 106.25(5)], in the absence of a timely request for a hearing to be conducted by an ALJ, it is the sole responsibility of the FEC to hold a hearing——either formal or informal, depending upon the existence of disputed issues of material fact——and issue a final order. In other words, jurisdiction rests exclusively with the FEC unless a respondent makes a timely, affirmative election for an ALJ hearing.
>
> It appears . . . that Respondent submitted an untimely (by at least one day) request for a formal hearing to be conducted by an ALJ. Accordingly, . . . the parties shall show cause in writing why the undersigned should not dismiss this cause for lack of jurisdiction and return the matter to the FEC to conduct a final hearing.

(emphasis in original).

In his response to the Order to Show Cause, Respondent concedes that DOAH lacks jurisdiction to adjudicate this matter and requests that his case be returned to the FEC:

> Declaration of Non Jurisdiction: I want to declare that you don't have the jurisdiction to litigate this case and I need to ask you to dismiss this case and close it immediately. You can send this case back to [the FEC] for non jurisdiction . . . . I wait for your order to dismiss this case and close it immediately.

In contrast, the FEC argues in its response that this matter is properly before DOAH because: (1) the 2010 version of section 106.25(5) is applicable, despite the fact that the

amended 2011 version took effect more than six months before the OPC was filed; and (2) assuming the 2011 version of section 106.25 controls, DOAH may exercise jurisdiction in this cause even in the absence of a timely request.

Contrary to Petitioner's assertion, the 2011 codification of section 106.25(5) governs Respondent's untimely request for formal hearing. Further, the current version of section 106.25(5) provides that the FEC alone possesses jurisdiction to hold formal hearings in situations where a respondent makes a belated request for a formal hearing. Each of these issues is discussed below.

II. Analysis

As alluded to previously, section 106.25(5) underwent revision during the 2011 legislative session. Prior to 2011, that section read:

> 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.

§ 106.25(5), Fla. Stat. (2010).

The foregoing language demonstrates that under the 2010 version of section 106.25(5), a respondent who submitted a late request for a formal hearing to be held by the FEC (or made no request at all) was entitled to a hearing at DOAH before an administrative law judge. In other words, the default procedure was that DOAH would hear elections cases unless a respondent requested, timely and affirmatively, that the FEC itself conduct the hearing. The subsequent revision to section 106.25(5), which took effect on May 19, 2011——well before Petitioner filed its OPC against Respondent——reversed the default procedure completely. Specifically, the amended version of section 106.25(5) provides:

> A person alleged by the Elections Commission to have committed a violation of this chapter or chapter 104 may elect, as a matter of right, within 30 days after the date of the filing of the commission's allegations, to have 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, which may include the imposition of civil penalties, subject to appeal as provided in s. 120.68. If the person does not elect to have a hearing by an administrative law judge and does not elect to resolve the case by a consent order, the person is entitled to a formal or informal hearing conducted before the commission.

§ 106.25(5), Fla. Stat. (2011)(emphasis added).

As the plain and unambiguous statutory language reveals, the current version of section 106.25(5) designates the FEC——and only the FEC——as the quasi-judicial tribunal charged with the duty of conducting a formal hearing unless a respondent makes a timely request for a hearing before DOAH. Stated differently, DOAH's jurisdiction in these matters is conditioned on an affirmative, timely-submitted request for a DOAH proceeding, without which DOAH is not authorized to conduct a final hearing. This interpretation is supported by the Staff Analysis of the 2011 amendment, which reads:

> The bill reverses the current default procedure whereby alleged election law violations are transferred to the Division of Administrative Hearings (DOAH) unless the party charged with the offense elects to have a hearing before the Commission. It mandates that the the alleged violator affirmatively request a hearing at DOAH within 30 days after the Commission's probable cause determination, or the Commission will hear the case.

Fla. H. Gov't Op. Subcomm., CS/HB 1355 (2011) Staff Analysis at 9. (Apr. 11, 2011); see also Fla. H. State Affairs Comm., CS/CS/HB 1355 (2011) Final Bill Analysis at 14-15 (June 29, 2011).

Significantly, the circumstances under which DOAH is permitted to hear allegations of election law violations——i.e., where a respondent makes a timely, specific request for a hearing before DOAH——cannot be expanded by the consent of the

parties or by a delegation of the FEC's responsibility. See Procacci v. Dep't of Health & Rehabilitative Servs., 603 So. 2d 1299, 1300-01 (Fla. 1st DCA 1992). In Procacci, a hearing officer determined that the Department of Health and Rehabilitative Services ("HRS") had failed to follow its own procedures concerning the evaluation of competitive bids. Thereafter, by stipulation of the bidding parties and HRS, the hearing officer conducted a de novo review of the bids and made a recommendation regarding which party should receive the award. Id. at 1300. HRS entered a final order adopting the hearing officer's recommendations, which one of the losing bidders appealed. In reversing the final order, the court observed that because the legislature had placed upon HRS "the primary responsibility for evaluating bids and selecting the bidder to whom the contract or lease at issue should be awarded," id. at 1300, HRS was precluded from delegating its responsibility to the hearing officer:

> An agency may not delegate to a hearing officer its legislatively prescribed responsibilities.
>
> * * *
>
> Thus, HRS had no authority to enter into the stipulation by which it purported to agree that the hearing officer could determine which of the bidders should be awarded the lease. Moreover, because it was the responsibility of HRS to evaluate the bids, and then to select the bidder to whom the

> lease should be awarded, the hearing officer lacked jurisdiction to make such a decision. In such a case, jurisdiction cannot be conferred by agreement or consent of the parties; nor can it be based upon waiver or estoppel.

Id. at 1300-01 (emphasis added).

The First District's decision in Swebilius v. Florida Construction Industry Licensing Board, 365 So. 2d 1069 (Fla. 1st DCA 1979), which the court relied upon in Procacci, illustrates further the principle that an agency may neither enlarge its jurisdiction nor delegate such jurisdiction away. In Swebilius, a contractor was alleged to have performed substandard work in a county in which a local contracting board existed. Id. at 1069. Pursuant to section 468.112, Florida Statutes, the state licensing board was required to forward the allegations to the local board for further proceedings; only in situations where no local board existed was the state board authorized to take jurisdiction. Id. at 1070. Notwithstanding the requirements of section 468.112, the state licensing board filed an administrative complaint against the builder, which was subsequently forwarded to a hearing officer to conduct a formal hearing. On appeal, the court reversed the final order entered against the contractor on the grounds that state licensing board lacked jurisdiction:

> The act is clear in its terms that only in the event a local board does not exist is

> FCI conferred jurisdiction to investigate, hold hearings, and if need be, suspend or revoke a license . . . . [A]n agency may not enlarge its jurisdiction; nor can jurisdiction be conferred upon the agency by agreement or consent of the parties . . . . Since there was a local board, the Licensing Board had no jurisdiction, and Swebilius is not estopped from now raising the point.

Id. at 1070-71; see also Booker Creek Pres., Inc., v. Southwest Fla. Water Mgmt. Dist., 534 So. 2d 419, 424 (Fla. 5th DCA 1988) ("The District cannot delegate its statutory duty to other state agencies.").

Analogous to the statute in Swebilius, which authorized the state board to exercise jurisdiction only when no local board existed, the current version of section 106.25(5) provides that DOAH is authorized to hear election law cases only where a respondent makes an affirmative election for a DOAH hearing within 30 days. In all other situations——such as the instant case, where, indisputably, Respondent made an untimely[4/] (and ambiguous) election——it is the FEC's statutory charge to conduct a formal hearing. To find otherwise would require the undersigned to ignore the obvious legislative intent behind 2011 revision to section 106.25(5): to make the FEC the default tribunal. Accordingly, it is concluded that jurisdiction to hold a formal hearing in this cause is vested exclusively with the FEC.[5/]

Finally, the undersigned will address FEC's contention that the current version of 106.25(5) does not apply. In particular, the FEC asserts that the 2011 amendment to section 106.25(5) was substantive in nature (as opposed to procedural) and cannot be applied retroactively[6/] in the absence of clear evidence of legislative intent.

Contrary to FEC's argument, and as demonstrated by Florida Birth-Related Neurological Injury Compensation Association v. DeMarko, 640. So. 2d 181 (Fla. 1st DCA 1994), the 2011 amendment to section 106.25(5) that modified the circumstances under which DOAH and the FEC will hear alleged election law violations was a procedural change. In DeMarko, the parent of an injured child brought a claim under the Florida Birth-Related Neurological Injury Compensation Act ("the Act"). Pursuant to the law in effect at the time of the injury, cases brought under the Act were heard by the Office of the Judges of Compensation Claims ("JCC"). Id. at 182. After the completion of the final hearing, but before the JCC entered a final order in the matter, the Act was modified such that jurisdiction to hear birth-related injury cases was transferred to DOAH. Id. at 182. A petition for writ of prohibition that challenged the JCC's authority to enter a final order was subsequently filed, which the First District granted:

> While we agree that judicial resources would be conserved if the judge of compensation claims could enter the final order, he lacks jurisdiction to do so. It is well-settled that remedial or procedural statutes do not fall within the constitutional prohibition against retroactive legislation and they may be held immediately applicable to pending cases. A statute transferring jurisdiction from one quasi-judicial tribunal to another is procedural in nature . . . . Because section 766.304 contains no explicit savings clause, the judge of compensation claims has lost jurisdiction over the cause and jurisdiction now lies with the Division of Administrative Hearings.

Id. at 182 (emphasis added)(internal citations and quotations omitted); Russell Corp. v. Jacobs, 782 So. 2d 404, 405-06 (Fla. 1st DCA 2001)(holding that amendment to section 440.09(4), Florida Statutes, which conferred jurisdiction to the JCC to determine whether fraud occurred in workers' compensation cases, was a procedural change); Kerr Constr. v. Peters Contracting, Inc., 767 So. 2d 610, 611-12 (Fla. 5th DCA 2000)(holding that statutory amendment that voided forum selection clauses in contracts for improvements to real property was procedural in nature; "[T]he statute does not affect the substantive rights of the parties. It merely requires that those substantive rights be adjudicated by a Florida Court.").

Applying the foregoing authority to the instant matter, the 2011 amendment to section 106.25(5)——which took effect more than six months before Respondent was charged——was procedural in

nature because it modified the circumstances under which DOAH and the FEC hear election law cases; it did not effect a substantive change by, for example, redefining the elements of an offense. For these reasons, the current version of section 106.25(5) controls.

III. Conclusion

For the reasons detailed above, jurisdiction to hold a formal hearing in this matter resides solely with the FEC due to the absence of a timely request for a hearing to be conducted before DOAH. It is, therefore,

ORDERED that:

1. The file of the Division of Administrative Hearings in the above-captioned matter is closed.

2. This dismissal is without prejudice to Respondent's right to a formal hearing before the FEC.

DONE AND ORDERED this 30th day of July, 2012, in Tallahassee, Leon County, Florida.

Edward T. Bauer
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of July, 2012.

ENDNOTES

[1/] Although neither party has raised the issue, it should be noted that the FEC's service of the Order of Probable Cause and Notice of Rights by U.S. Mail did not result in an extension of the 30-day deadline to make a request for hearing. See Fla. Admin. Code R. 28-106.103 ("No additional time shall be added . . . when the period of time begins pursuant to a type of notice described in Rule 28-106.111, F.A.C."); Cann v. Dep't of Child. & Fam. Servs., 813 So. 2d 237, 238-39 (Fla. 2d DCA 2002) ("Although Florida Administrative Code Rule 28-106.103 allows an additional five days for mailing in some circumstances, that rule expressly excepts requests for hearing under rule 28-106.111.").

[2/] See Fla. Admin. Code. R. 28-106.104(3)("Any document received by the office of agency clerk after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day").

[3/] A tribunal may raise the issue of jurisdiction sue sponte. See DNA Ctr. for Neurology & Rehab. v. Progressive Am. Ins. Co., 13 So. 3d 74, 75 (Fla. 5th DCA 2009).

[4/] Significantly, Respondent's pleading in response to the Order to Show Cause contains no assertion that the hearing request dated January 6, 2012, was filed timely, nor does it include any allegation that he was misled into inaction or prevented from asserting his rights. Further, the record demonstrates that the substance of the FEC's Notice of Rights was consistent with the terms of 106.25(5), Florida Statutes (2011).

[5/] During a July 23, 2012, telephone conference with the parties, counsel for the FEC conceded the Respondent is entitled to a formal hearing (as opposed to informal) due to the existence of disputed issues of fact.

[6/] The undersigned is skeptical that the facts of the instant case implicate any issue of retroactivity, as it is undisputed that the operative event in this context——i.e., the FEC's filing of the OPC against Respondent——occurred more than six months after section 106.25(5) was amended. In any event, the statutory amendment was merely procedural in nature and must therefore be applied retroactively.

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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 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.