

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Budget Committee

BILL: CS/CS/SB 1618

INTRODUCER: Judiciary Committee, Rules Subcommittee on Ethics and Elections, and Senator Diaz de la Portilla

SUBJECT: Elections

DATE: April 13, 2011

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Fox/Carlton	Roberts	EE	Fav/CS
2. Fox/Carlton	Phelps	RC	Favorable
3. O'Connor	Maclure	JU	Fav/CS
4. Pigott	Meyer, C.	BC	Pre-meeting
5. _____	_____	_____	_____
6. _____	_____	_____	_____

Please see Section VIII. for Additional Information:

- A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes
B. AMENDMENTS..... Technical amendments were recommended
 Amendments were recommended
 Significant amendments were recommended

I. Summary:

This bill corrects an oversight in an omnibus 2007 election law that shifted final order authority, in many cases, from the Florida Elections Commission (Commission) to an administrative law judge (ALJ) at the Division of Administrative Hearings (DOAH), but neglected to statutorily authorize the ALJ to institute any civil penalties for election law violations. This bill grants the ALJ the same penalty powers as the Commission, and provides that the ALJ must consider the same aggravating and mitigating circumstances in determining the amount of penalties.

The bill also reverses the current default procedure under which alleged election law violations are transferred to DOAH *unless* the party charged with the offense elects to have a hearing before the Commission. The bill mandates that 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.

The bill also specifically adds electioneering communications organizations (ECOs) to the list of entities embraced by the election law penalty provisions, to conform to 2010 changes to the ECO laws.

This bill substantially amends sections 106.25 and 106.265, Florida Statutes.

II. Present Situation:

Penalties for Election Violations

The Florida Elections Commission (Commission) has jurisdiction to investigate and determine violations of chs. 104 and 106, F.S.,¹ and to impose a civil penalty of up to \$1,000 per violation, in most cases.²

Until 2007, when there were disputed issues of material fact, an alleged violator could elect to have a formal hearing at the Division of Administrative Hearings (DOAH), with the matter returning to the Commission for final disposition and a determination of penalties, if applicable. Otherwise, the Commission would conduct the hearing.

In 2007, the Legislature amended the procedure to have *all* cases default to an administrative law judge (ALJ) at DOAH after the Commission makes a probable cause determination, *unless* the alleged violator elects³ to have a formal or informal hearing before the Commission or resolves the matter by consent order.⁴ The 2007 changes also gave the ALJ the authority to enter a *final order* on the matter, appealable directly to Florida's appellate courts.⁵ Cases forwarded to DOAH never return to the Commission for final disposition. The 2007 law, however, neglected to give the ALJ the power to impose a civil penalty in cases in which the ALJ found a violation.

This omission has been the subject of litigation.⁶ In April 2006, the Commission received a sworn complaint alleging that James Davis, a candidate, had violated certain elections laws. The Commission conducted an investigation and found probable cause, charging Mr. Davis with five violations of ch. 106, F.S. Because he did not request a hearing before the Commission, or elect to resolve the matter by a consent order, the matter was referred to DOAH for a formal administrative hearing. Ultimately, the ALJ found that Mr. Davis violated the Election Code, as alleged. The ALJ declined to impose civil penalties, however, because he determined that he lacked the express authority to do so. The Commission appealed the case to the First District Court of Appeal, which affirmed the order. As a result, complaints heard by an ALJ can result in a violation without recourse to the imposition of a civil penalty for the violation.⁷

Electioneering Communications Organizations

Section 106.265, F.S., contains the specific authority for the Commission to impose a civil penalty for a violation of chs. 104 or 106, F.S. That section authorizes the Commission to impose

¹ Section 106.25(1), F.S.

² Section 106.265(1), F.S. In addition, ss. 104.271 and 106.19, F.S., provide for expanded and enhanced penalties for certain election law violations.

³ Within 30 days after the probable cause determination.

⁴ Chapter 2007-30, s. 48, Laws of Fla.

⁵ Section 106.25(5), F.S.

⁶ *Florida Elections Commission v. Davis*, 44 So. 3d 1211 (Fla. 1st DCA 2010).

⁷ Because of the nature of such proceedings, it is unclear whether the Commission would have jurisdiction to impose a civil penalty based upon a final order from DOAH – or even how the Commission practically would accomplish it.

a civil penalty not to exceed \$1,000 per count, with the precise amount dependent upon consideration of certain aggravating and mitigating factors. The section further provides that the Commission is responsible for collecting civil penalties when any person, political committee, committee of continuous existence, or political party fails or refuses to pay any civil penalties, and requires such penalties to be deposited into the now-defunct Election Campaign Financing Trust Fund.⁸ Finally, the section permits a respondent, under certain circumstances, to seek reimbursement for attorneys' fees.

Nothing in s. 106.265, F.S., specifically addresses *electioneering communications organizations* (ECOs), which can also commit elections violations. Until last year, when they were more explicitly detailed in statute, ECOs were generally treated like political committees for most purposes under the campaign finance laws.⁹ An ECO is defined as:

any group, other than a political party, political committee, or committee of continuous existence, whose election-related activities are limited to making expenditures for electioneering communications or accepting contributions for the purpose of making electioneering communications and whose activities would not otherwise require the group to register as a political party, political committee, or committee of continuous existence under [ch. 106, F.S.]¹⁰

III. Effect of Proposed Changes:

This bill establishes a new default procedure for violations alleged by the Florida Elections Commission, providing that a hearing will be conducted by the Commission *unless* an alleged violator elects, as a matter of right, to have a formal hearing before an administrative law judge (ALJ) at the Division of Administrative Hearings (DOAH). Further, it authorizes the ALJ to impose the same civil penalties as the Commission pursuant to ss. 104.271, 106.19, and 106.265, F.S., and requires the ALJ to take into account the same mitigating and aggravating factors that the Commission must consider. As under current law, the ALJ's final order, which may now include civil penalties, is appealable directly to the district courts of appeal and does not return to the Commission for disposition.

The bill also integrates electioneering communications organizations (ECOs) into a statutory list of entities for the purpose of assessing election law civil penalties, and clarifies that all civil penalties collected are deposited to the General Revenue Fund of the state instead of the defunct Election Campaign Financing Trust Fund.

The bill takes effect upon becoming a law.

⁸ The Elections Campaign Financing Trust Fund expired effective November 4, 1996, by operation of law. Funding for public campaign financing in statewide races has since been handled through the General Revenue Fund.

⁹ See generally ch. 2010-167, Laws of Fla. (detailing requirements for ECOs in sections such as s. 106.0703, F.S.); see also s. 106.011(1)(b)3., F.S. (2009) (for purposes of registering and reporting contributions and expenditures, ECOs are treated like political committees).

¹⁰ Section 106.011(19), F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill could result in a modest increase to the General Revenue Fund depending on the number and extent of administrative fines collected, which are indeterminate at this time.

The bill does not have a fiscal impact to the Division of Administrative Hearings.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS/CS by Judiciary on April 12, 2011:**

The committee substitute clarifies that if a person alleged to have committed a violation does not elect to have an administrative hearing conducted by an administrative law judge, then he or she is still entitled to a hearing before the Florida Elections Commission.

CS by Ethics and Elections on March 21, 2011:

The committee substitute differs from the original bill in that it adds a cross-reference to allow a DOAH administrative law judge to impose an additional penalty for candidates who violate the political defamation provision in s. 104.271, F.S.

B. Amendments:

None.