

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 Rules Subcommittee on Ethics and Elections

BILL: SB 1618

INTRODUCER: Senator Diaz de la Portilla

SUBJECT: Elections

DATE: March 14, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox/Carlton	Roberts	EE	Pre-meeting
2.	_____	_____	RC	_____
3.	_____	_____	JU	_____
4.	_____	_____	BC	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Senate Bill 1618 corrects an oversight in an omnibus 2007 election law that shifted final order authority, in many cases, from the Florida Elections 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 power 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 whereby 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.

SB 1618 also specifically adds electioneering communication organizations (ECOs) to the list of entities embraced by the election law penalty provisions, to conform to 2010 changes to the ECO laws.

The bill takes effect upon becoming a law.

This bill substantially amends Section 106.25, F.S., and Section 106.265, F.S.

II. Present Situation:

Penalties for Election Violations

The Florida Elections Commission has jurisdiction to investigate and determine violations of Chapters 104 and 106 of the Florida Statutes,¹ and to impose a civil penalty of up to \$1,000 per violation, in most cases.²

Until 2007, where 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 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: 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 where the ALJ found a violation.

This omission has been the subject of litigation.⁵ 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 Chapter 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.⁶

Electioneering Communications Organizations

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

¹ Section 106.25(1), F.S.

² Section 106.265(1), F.S. In addition, Sections 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, Section 48, LAWS OF FLORIDA.

⁵ *Florida Elections Commission v. Davis*, 44 So.3d 1211 (Fla. 1st DCA 2010).

⁶ 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 they practically would accomplish it.

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.⁷ Finally, the section permits a respondent, under certain circumstances, to seek reimbursement for attorneys fees.

Nothing in Section 106.265, F.S., specifically addresses *electioneering communications organizations*, 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.⁸

III. Effect of Proposed Changes:

Senate Bill 1618 establishes a new default procedure for violations alleged by the 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 ALJ at DOAH. Further, it authorizes the ALJ to impose the same civil penalties as the Commission pursuant to ss. 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 ECOs into the 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.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

⁷ 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.

⁸ See generally, Ch. 2010-167, LAWS OF FLA. (detailing requirements for ECOs in sections such as 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).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill could result in very modest increases to the General Revenue fund depending on the number and extent of administrative fines collected, which is indeterminate.

VI. Technical Deficiencies:

Section 104.271, F.S., authorizes the Commission to assess an additional civil penalty of up to \$5,000 for candidate violations involving political defamation of opposing candidates. It might be wise to specifically authorize the DOAH ALJ to assess this additional penalty, as the bill does with respect to enhanced penalties in s. 106.19, F.S.

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.)

None.

B. Amendments:

None.