

**STATE OF LOUISIANA
DIVISION OF ADMINISTRATIVE LAW
ETHICS ADJUDICATORY BOARD**

BOARD OF ETHICS

*** DOCKET NO. 2009-0728-ETHICS-A**

IN THE MATTER OF

LOUISIANA JUSTICE FUND

*** AGENCY TRACKING NO. 2007-842**

DECISION AND ORDER

The Louisiana Justice Fund (LJF) ran a television commercial about a candidate. The Louisiana Board of Ethics issued charges against LJF for failing to register as a political committee and failing to file campaign finance disclosure reports. The Ethics Adjudicatory Board concludes that LJF is not a political committee subject to registration requirements, but it is required to file campaign finance disclosure reports.

APPEARANCES

On April 9, 2010, a public hearing was conducted in Baton Rouge, Louisiana, before the Ethics Adjudicatory Board, Panel A, consisting of Administrative Law Judges John O. Kopynec, William H. Cooper, III, and Parris A. Taylor. Appearing at the hearing were:

James Charles Lamb and Keith L. Richardson, counsel for LJF; and

Kathleen Allen, counsel for the Board of Ethics.

STATEMENT OF THE CASE

This adjudication is conducted in accordance with the Code of Governmental Ethics, La. R.S. 42:1101, *et seq.*, the Administrative Procedure Act, La. R.S. 49:950, *et seq.* and the Division of Administrative Law Act, La. R.S. 49:991, *et seq.*

Following an investigation, the Board of Ethics issued charges against LJF alleging it violated sections 1491.1 and 1505.1 and failed to comply with 1491.6 of the Louisiana Campaign Finance Disclosure Act (CFDA) by failing to register as a political committee and failing to file campaign finance disclosure reports required of political committees. The Board of Ethics filed an alternative charge alleging LJF violated section 1501.1 of the CFDA by failing to file campaign finance disclosure reports required of any person.

LJF filed a Motion for Summary Judgment claiming that its television commercial was a form of political speech protected by the First Amendment and the CFDA's registration and disclosure requirements cannot be applied to persons engaging in such speech. The Ethics Adjudicatory Board denied the motion, finding that the commercial did not consist of issue advocacy speech that the First Amendment would protect from registration and disclosure requirements.

At the hearing, LJF and the Board of Ethics submitted into evidence ten stipulated facts, two documents, and a copy of the television commercial. Neither the Board of Ethics nor LJF called any witnesses. Counsel presented oral arguments and the Ethics Adjudicatory Board took the matter under advisement.

FINDINGS OF FACT

LJF is a legal entity identified as an organization created for the purpose of communicating with the citizens of Louisiana.

LJF has not filed a statement of organization to register with the Board of Ethics, functioning as the Supervisory Committee on Campaign Finance Disclosure.

LJF has not filed campaign financial disclosure reports with the Board of Ethics, functioning as the Supervisory Committee on Campaign Finance Disclosure.

Royal Alexander was a candidate for Louisiana Attorney General in the October 20, 2007 election.

LJF paid approximately \$18,550.00 to run a television commercial about Royal Alexander in the Shreveport area from October 10, 2007 through October 12, 2007.

LJF paid approximately \$624,000.00 to run a television commercial about Royal Alexander statewide.¹

The Commercial

The LJF commercial begins with a full screen head and shoulders picture of Royal Alexander that quickly shifts the picture to one side of the screen with the subtitle "Royal Alexander," and a picture of Royal Alexander sitting on a chair on the other side. While the subtitled head and shoulders picture remains on the screen, the other picture is replaced with a tall stack of \$100 bills overlaid by these words read by the narrator: "Royal Alexander shaking down contributors, selling favors." While continuing to display the subtitled picture of Mr. Alexander, the \$100 bills are replaced by the *Times-Picayune* newspaper banner and a background picture of two people in a dark room shaking hands. Once again the narrator's words overlay the shadowy figures as he reads: "Alexander offered lobbying help to corporate executives in exchange for campaign contributions." Towards the end of this narration, the shadowy figures are replaced by a briefcase full of \$100 bills.

While continuing to show the picture of Royal Alexander, a new subtitle states, "Alexander Email to contributors" and what appears to be an e-mail with the subject line of "fundraising." The narrator reads the e-mail: "If I become Attorney General, I will be in a

¹It is not clear whether the stipulated statewide expenditure includes the stipulated amount spent in the Shreveport area, as LJF's Federal Report of Expenditures lists total expenditures of only \$635,000, which is \$7,550 less than the sum of these two expenses.

position to help your industry; let me know when we can schedule a fundraiser.”² The head and shoulders picture of Royal Alexander disappears as another *Times-Picayune* banner appears with block letters that the narrator reads: “The *Times-Picayune* says Alexander’s fundraising warrants an investigation to determine if he violated state laws.” The LJF commercial then displays Royal Alexander with the subtitle “Royal Alexander TV Ad” as Mr. Alexander says, “Public corruption is corrosive.” The LJF commercial once again displays a head and shoulders picture of Royal Alexander over a message stating, “Ask Louisiana Ethics Board 225-763-8777 To Investigate Royal Alexander. Paid for by the Louisiana Justice Fund,” while the narrator says, “Don’t let Alexander’s ads fool you; he seems already on the take.”

CONCLUSIONS OF LAW

Regulation of LJF under the Campaign Finance Disclosure Act

We must first determine whether the airing of its commercial subjects LJF to regulation under the CFDA. LJF claims that Louisiana’s trigger for requiring disclosure, “an expenditure...made for the purpose of supporting, opposing, or otherwise influencing [an] election...”³ is unconstitutionally broad and vague. LJF points to the decision by the U.S. Fifth Circuit Court of Appeals in *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), for the proposition that the CFDA can only regulate communications that expressly advocate for the election or defeat of a candidate.

To determine whether a communication constitutes express advocacy, *Center for Individual Freedom* referred to *Buckley v. Valeo*, 424 U.S. 1, 44, 96 S. Ct. 612, 646-647 (1976) where the court held “one’s views on issues without expressly calling for a candidate’s election or defeat are...not covered [by the campaign finance provisions which] must be construed to apply

² The email message on the screen states: “If I become... Attorney General, I will certainly be in a position to help your industry... Let me know when we can schedule a fundraiser. Royal Alexander”

³ La R.S. 18:1483(9)

only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate.” *Buckley’s* test for determining whether the communication was “issue advocacy” or “express advocacy” used what has come to be known as the “magic words” test. In footnote 52 *Buckley* stated,

This construction would restrict the application of [the campaign finance provision] to communications containing express words of advocacy of election or defeat, such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” “reject.”

In *McConnell v. Federal Election Com’n*, 540 U.S. 93, 126-128, 124 S. Ct. 619, 650-651 (2003) the court held that *Buckley’s* magic-words requirement is functionally meaningless, stating:

While the distinction between “issue” and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words. Little difference existed, for example, between an ad that urged viewers to “vote against Jane Doe” and one that condemned Jane Doe’s record on a particular issue before exhorting viewers to “call Jane Doe and tell her what you think.” Indeed, campaign professionals testified that the most effective campaign ads, like the most effective commercials for products... should, and did, avoid the use of... magic words.

Although *McConnell* did not establish a test to replace the “magic words,” the court addressed this issue in *Federal Election Com’n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 469, 127 S. Ct. 2652, 2666 (2007):

...the proper standard for an as-applied challenge...must be objective, focusing on the communication’s substance rather than amorphous considerations of intent and effect. See *Buckley, supra*, at 43-44, 96 S. Ct. 612...a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

As the Ethics Adjudicatory Board stated in its order denying LJF’s motion for summary judgment, “The ad at issue in this matter expressly advocated the rejection of Royal Alexander’s

campaign ads, which is the functional equivalent of advocating the rejection of the candidate and cannot reasonably be interpreted as anything other than an appeal to vote against Royal Alexander.” No additional evidence has been introduced to alter that finding.

Further, our decision comports with the Supreme Court’s recent ruling in *Citizens United v. Federal Election Com’n*, 130 S. Ct. 876, 915 (2010) where it found even the functional equivalent test too limiting, stating, “[W]e reject...that...disclosure requirements must be limited to speech that is the functional equivalent of express advocacy...[T]he public has an interest in knowing who is speaking about a candidate shortly before an election.” *Citizens* ultimately held that, “We find no constitutional impediment to the application of...disclaimer and disclosure requirements...[as] there has been no showing that, as applied in this case, these requirements would impose a chill on speech or expression.” *Id* at 916. There was no showing that CFDA’s disclosure requirements would impose a chill on speech or expression. Accordingly, we find that LJF is subject to the CFDA disclosure requirements.

Registration and filing disclosure reports required of political committees

Sections 1491.1, 1491.6, and 1505.1 of the CFDA require any political committee that knows or anticipates it will make expenditures exceeding \$500 to “file a statement of organization with the supervisory committee” and to file periodic reports commonly referred to as campaign finance disclosure reports. We find that LJF is not subject to these registration and disclosure requirements as the evidence fails to prove that it is a political committee.

The CFDA defines a political committee as “**two or more** persons...and any corporation...”⁴ (emphasis added). A “person” is defined as “any individual, partnership, limited liability company or corporation, association, labor union, political committee, corporation, or

⁴ La. R.S. 18:1483(14)(a). Pursuant to La. R.S. 1:9, we find the word *and* substitutes for the word *or* in this statute.

other legal entity...⁵ There was no evidence as to how many, who, or what entities comprise LJF. LJF is a legal entity identified as an organization and is therefore itself a single juridical *person* pursuant to the CFDA. However, a political committee must consist of at least two persons and LJF is only one person. There was no evidence that LJF is a corporation. We find that LJF is not a political committee and is therefore not subject to Sections 1491.1, 1491.6, and 1505.1 of the CFDA.

Filing disclosure reports required of any person

Section 1501.1 of the CFDA requires any person other than a candidate or a political committee who makes any expenditure, to file reports if the expenditures exceed five hundred dollars. LJF made expenditures of at least \$624,000.00 to air its commercial just prior to the October 20, 2007 election. Therefore, LJF, a juridical person, violated Section 1501.1 of the CFDA by failing to file the campaign finance disclosure reports required for the October 20, 2007 primary election.

The Board of Ethics argued that LJF was required to file the 10-G, 40-G, and 48 hour reports. The 48 hour report was required to be filed within 48 hours of a transaction. The 10-G and 40-G reports were to be filed within ten days of the close of their respective reporting period. The urgency for filing these reports has long since passed. We find it reasonable that LJF be ordered to file these reports.

Penalties

The Board of Ethics asked the Ethics Adjudicatory Board to assess penalties according to La. R.S. 18:1505.4(A)(1) and La. R.S. 18:1505.4(A)(4). La. R.S. 18:1505.4(A)(1) has a knowledge requirement: “any...person required to file any reports...who **knowingly** fails to file or **knowingly** fails to timely file any such reports ...may be assessed a civil penalty.” (emphasis

⁵ La. R.S. 18:1483(13)

added). LJF maintains that it was not a person required to file any reports. There was no evidence presented by the Board of Ethics as to LJF's knowledge that it was required to file the reports.⁶ Accordingly, we cannot impose any penalty pursuant to La. R.S. 18:1505.4(A)(1) based on LJF's prior conduct. However, our order that LJF file the 10-G, 40-G, and 48 hour reports establishes the knowledge element for purposes of La. R.S. 18:1505.4(A)(1). Thus, in the event LJF does not file the reports as ordered, we find the penalty provision of La. R.S. 18:1505.4(A)(2)(a)(v) applies as written.

La. R.S. 18:1505.4(A)(4) imposes penalties "in addition to any penalties which may be imposed." No underlying penalty was imposed. La. R.S. 18:1505.4(A)(4)'s additional penalties cannot be imposed without an underlying penalty. Accordingly, we cannot impose any penalty pursuant to La. R.S. 18:1505.4(A)(4) based on LJF's prior conduct.

⁶ "Knowingly" is not specifically defined. However, the phrase "knowingly and willfully" is defined by La. R.S. 18:1505.5 as conduct which could have been avoided through the exercise of due diligence. La. R.S. 18:1505.5 explicitly states that this definition does not apply to La. R.S. 18:1505.4. Significantly, Acts 1989, No. 179, removed the phrase "knowingly and willfully" from La. R.S. 18:1505.4(A) and replaced it with the word "knowingly." Although Acts 1990, No. 180 enacted the phrase "knowingly and willfully" in La. R.S. 18:1505.4(B), the other subparagraphs of La. R.S. 18:1505.4 retained the "knowingly" language. Although La. R.S. 18:1505.4(A)(3) could be read to authorize the imposition of penalties without a scienter (knowledge) requirement, a review of the legislation reveals this is not the case. The basic substance of La. R.S. 18:1505.4(A), which was initially a single long unnumbered paragraph, has essentially remained unaltered as it has been amended and reenacted with numbered subparagraphs. See: Acts 1988, No. 994; Acts 1989, No. 179; Acts 1995, No. 1046; and Acts 1996, 1st Ex. Sess., No. 66. Further, as subparagraph (2)'s penalty provisions are written to apply only to candidates and political committees, section (3) makes clear that the majority of these provisions also apply to "persons" required to file reports.

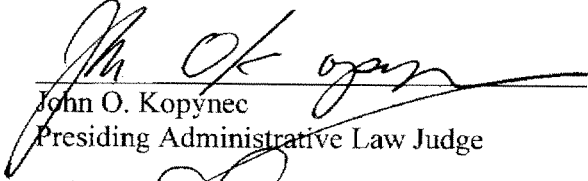
ORDER

For the foregoing reasons:

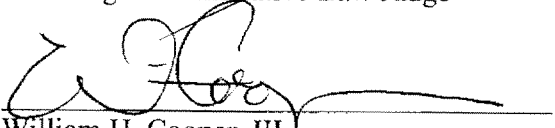
IT IS ORDERED that the Louisiana Justice Fund comply with La. R.S. 18:1501.1 and file 10-G, 40-G, and 48 hour reports on or before **May 21, 2010**.

IT IS FURTHER ORDERED that in the event that the Louisiana Justice Fund fails to file any one or more of the foregoing reports by **May 21, 2010**; it is assessed a civil penalty of two hundred dollars per day, not to exceed three thousand dollars, until such report or reports are filed.


Rendered and signed April 22, 2010, in Baton Rouge, Louisiana.



John O. Kopynec
Presiding Administrative Law Judge



William H. Cooper, III
Administrative Law Judge



Parris A. Taylor
Administrative Law Judge