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STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION

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ELECTIONS COMMISSION

FLORIDA ELECTIONS COMMISSION,
Petitioner,

vs.

Agency Case No.: FEC 03-242
DOAH Case No.: 04-1178
F.O. No.: DOSFEC 05-142

JOHN J. FUGATE,
Respondent.

_____ /

FINAL ORDER

THIS CAUSE came on to be heard before the Florida Elections Commission at its meetings held on February 10 and May 19, 2005, in Tallahassee, Florida. At the February 10, 2005 meeting, the Commission reviewed the Recommended Order entered by Administrative Law Judge (ALJ) Lawrence P. Stevenson on December 22, 2004, and Exceptions to the order filed by the Petitioner. At the February 19, 2005, meeting the Commission approved this Final Order.

APPEARANCES

For Petitioner: Eric M. Lipman, Esquire
Florida Elections Commission
Collins Building, Suite 224
107 West Gaines Street
Tallahassee, Florida 32399-1050

For Respondent: Keith C. Tischler, Esquire
Jolly & Peterson, P.A.
Post Office Box 37400
Tallahassee, Florida 32315

RULINGS ON THE EXCEPTIONS

A. Petitioner's Exception Number 1.

1. The Commission agrees with Petitioner's first

exception. The ALJ erroneously ruled that Section 106.37, Florida Statutes, does not apply to alleged violations of Chapter 104, Florida Statutes. The Commission has consistently construed the statutory language in Section 106.25(3), Florida Statutes, to mean that the definition of willfulness in Section 106.37, Florida Statutes, applies to alleged violations of Chapter 104, Florida Statutes. In *FEC v. Schwartz*, Case Number FEC 01-086, (August 23, 2002), the Commission ruled that:

The Commission's jurisdiction over Chapter 104 is subject to a "willfulness" component. See s. 106.25(3), Fla. Stat. In light of this legislative directive, the Commission finds that "willfulness," as defined in Section 106.37, Florida Statutes, must be proven before the person charged can be found to have violated a provision of Chapter 104. (*Schwartz* Final Order at ¶2)

2. Ruling on an exception involving this same issue in *FEC v. Hutcheson*, Case Number FEC 01-170, (November 24, 2002), the Commission affirmed the ALJ's application of Section 106.37, Florida Statutes, to cases involving alleged violations of Chapter 104, Florida Statutes, and stated:

The ALJ correctly found that Respondent's actions were "willful."¹ As the Commission has repeatedly explained, for the purposes of the Commission's jurisdiction, the term "willfulness" has a specific meaning that is set out in Section 106.37, Florida Statutes. (*Hutcheson* Final Order at ¶6).

¹ §106.25(3), Fla. Stat., provides that the "willfulness" standard set out in §106.37 applies to violations of both Ch. 104 and Ch. 106.

3. The Commission has applied the legal standard of willfulness found in Section 106.37, *Florida Statutes*, when making determinations of probable cause. (See *FEC v. Stein*, Case Numbers FEC 04-042 and 04-046; *FEC v. Floyd*, FEC Case Number FEC 04-043; *FEC v. Weed*, Case Numbers FEC 04-047, FEC 04-048 and FEC 04-048; *FEC v. Oliphant*, Case Number FEC 02-356.)

4. In Endnote 1 of the Recommended Order, the ALJ states that his conclusion is supported by the legislative history of Sections 106.25(3) and 106.37, *Florida Statutes*. The Commission disagrees with both the ALJ's conclusion of law and his understanding of the legislative history.

5. Section 106.37, *Florida Statutes*, was enacted by Section 1, Chapter 97-13, *Laws of Florida*. Section 106.37, *Florida Statutes*, codified most of the case law definition of willfulness that had developed in previous Commission cases.²

6. In 1998, the Legislature enlarged the Commission's jurisdiction by providing that the Commission also investigate and determine violations of Chapter 104, *Florida Statutes*. In the same section of Chapter 98-129, *Laws of Florida*, that vested the Commission with jurisdiction to investigate violations of Chapter 104, *Florida Statutes*, the Legislature also amended Section 106.25(3), *Florida Statutes*, so that the Section 106.37,

² The ALJ's decision in this case directly contradicts other ALJ's conclusions of law on the same issue. (See *Hutcheson*- DOAH Case Number 01-4936; *Schwartz*-DOAH Case Number 01-3652.)

Florida Statutes, definition of willfulness would apply to alleged violations of Chapter 104, *Florida Statutes*.

7. Thus, the Commission, consistent with its past holdings, again holds that Section 106.37, *Florida Statutes*, applies to alleged violations of Chapter 104, *Florida Statutes*.

A. Petitioner's Exception Number 2.

8. The Commission agrees with Petitioner's second exception. In reaching his conclusion of law in ¶28, the ALJ applied his findings of fact in this case to an incorrect legal standard of willfulness as discussed above.

9. Respondent submitted his signed Statement of Candidate form on May 20, 2003, at the same time he submitted the required documents to open a campaign account and accept contributions. Respondent's Statement of Candidate form attested that had received, read, and understood the requirements of Chapter 106, *Florida Statutes*. These statutory provisions were included in the *2000 Candidate Handbook on Campaign Financing*, published by the state Division of Elections and given to Respondent by the local Supervisor of Elections, when Respondent filed his paperwork for the 2000 election. (FOF ¶2)

10. Respondent received a copy of the *2004 Candidate and Campaign Treasurer Handbook* when he filed his re-election paperwork with the local Supervisor of Elections. (FOF ¶2)

11. Respondent prepared a letter to all Sheriff's Office employees regarding his intention to seek re-election that also informed the employees that Major Wise would be able to remain with the office after his retirement. Respondent printed his letter on stationery with a header reading, "Re-Elect Fugate for Sheriff," along with Sheriff Fugate's mailing address and phone number. The words "Pd. Pol. Adv. Paid For In-Kind By John J. Fugate. Approved by John J. Fugate (D)," appeared underneath Respondent's signature at the bottom of the page. (FOF ¶5)

12. Respondent knew that he was prohibited from using Sheriff's Office or DeSoto County resources to prepare or distribute his letter and that none of the costs involved in preparing or distributing the letter should be borne by the Sheriff's Office or the County. Therefore, Respondent drafted the letter on his home computer, printed approximately 120 copies of the letter on his home printer, and used paper and ink that he purchased at Wal-Mart. ((FOF ¶6)

13. Respondent then brought the copies of the letter to the Sheriff's Office and placed one copy in the pay envelope of each his employees. ((FOF ¶7)

14. Pay envelopes, including Sheriff Fugate's letter, were distributed to the Respondent's employees in the usual manner, either at the front desk in the Records Division for pickup or in the employee's mail slot. The employees received

Respondent's letter upon retrieving their paychecks on or about October 2, 2003 (FOF ¶8)

15. Respondent did not seek advice from the local Supervisor of Elections or an advisory opinion from the state Division of Elections because he believed he could distribute the flyers that included information about his campaign in his employee's envelopes. (FOF ¶14).

16. Application of the facts to the proper legal definition of willfulness in Commission cases reveals that Respondent acted willfully in this matter. Respondent knew he could not use the county or sheriff's office resources for anything in connection with his campaign. Accordingly, he developed and printed his flyer at home on his own computer. However, Respondent made no efforts to determine if distributing the flyers in employee's pay envelopes was permissible. Respondent merely reviewed the statute in question, decided he could proceed with his plan, and proceeded to distribute his flyer without further inquiry or thought.

17. Because Respondent knew he was prohibited from using the resources of his elected office to create and copy his campaign flyer, at a minimum, Respondent should have made some inquiry (either of the Supervisor of Elections or the Division of Elections) to attempt to determine if it was permissible to distribute his campaign flyer at the Sheriff's office.

18. Based upon the foregoing, applying the facts of this case to the proper legal standard of willfulness in Commission proceedings, the Commission finds the Respondent committed one count of violating 104.31(1)(a), *Florida Statutes*.

CONCLUSION AND PENALTY

The Commission accepts the ALJ's Recommended Findings of Fact and his Conclusions of Law, except as modified by the rulings on Petitioner's exceptions set out above. The Commission finds that Respondent has violated Section 104.31(1)(a), *Florida Statutes*. Therefore, it is

ORDERED that the Respondent shall remit a civil penalty in the amount of \$500. The civil penalty shall be paid to the Florida Elections Commission, the Collins Building, Suite 224, 107 W. Gaines Street, Tallahassee, Florida 32399-0250, within 30 days of the date this Final Order is received by the Respondent.

DONE AND ENTERED by the Florida Elections Commission and filed with the Clerk of the Commission on this 3rd day of June, 2005, in Tallahassee, Florida.

Chance Irvine

Chance Irvine, Chairman
Florida Elections Commission
107 W. Gaines Street,
Collins Building, Suite 224,
Tallahassee, Florida, 32399-1050

NOTICE OF RIGHT TO APPEAL

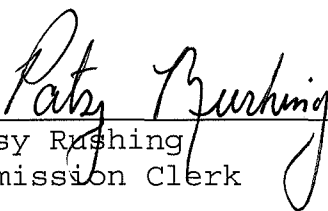
Pursuant to Section 120.68, Florida Statutes, the Respondent may appeal the Commission's Final Order to the appropriate district court of appeal by filing a notice of appeal both with the Clerk of the Florida Elections Commission and the Clerk of the district court of appeal. The notice must be filed within 30 days of the date this Final Order was filed and must be accompanied by the appropriate filing fee.

Copies furnished to:

Eric M. Lipman, Assistant General Counsel
Mary Ellen Clark, Assistant Attorney General
John J. Fugate, Respondent
Keith C. Tischler, Attorney for Respondent
Willa G. Rothrock, Complainant
Supervisor of Elections, DeSoto County, Filing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by certified Mail to counsel for Respondent, Keith C. Tischler, Jolly & Peterson, P.A., P.O. Box 37400, Tallahassee, Florida 32315 and Eric Lipman, Assistant General Counsel, 107 W. Gaines Street, Collins Building, Suite 224, Tallahassee, Florida 32399-0250 this 3rd day of June, 2005.



Patsy Rushing
Commission Clerk