

FILED

STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION

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STATE OF FLORIDA
ELECTIONS COMMISSION

FLORIDA ELECTIONS COMMISSION,

Petitioner,

vs.

FEC Case No. 01-170

DOAH Case No. 01-4936

F.O. No.: DOSFEC 02-227

DOUGLAS A. HUTCHESON,

Respondent.

FINAL ORDER

On August 15, 2002, this cause came on to be heard before the Florida Elections Commission (Commission). At the meeting, the Commission reviewed the Recommended Order entered by Administrative Law Judge (ALJ) Harry L. Hooper on July 12, 2002, and addressed the Exceptions to that Recommended Order filed by both the Petitioner and the Respondent.¹

APPEARANCES

For Petitioner: Eric Lipman, Esquire
Assistant General Counsel
Florida Elections Commission
Collins Building, Suite 224
Tallahassee, FL 32399-1050

For Respondent: Ernest L. Cotton, Esquire.²
Cotton & Gates, P. A.
3 Plew Avenue
Shalimar, FL 32579

¹ The Commission has reviewed the entire record, except for the transcript, which neither party ordered, and heard arguments of the parties.

² Mr. Cotton was not present at the Commission meeting. Mr. Hutcheson made an oral motion for a continuance that was denied by the Commission.

RULINGS ON THE EXCEPTIONS

Petitioner's Exception

1. The Commission agrees with Petitioner's Exception. The ALJ erroneously ruled (COL ¶57) that the burden of proof in Commission cases, brought under the willful standard in Chapter 106, Florida Statutes, requires clear and convincing evidence. As the Commission has ruled on numerous occasions, administrative enforcement actions involving Chapter 106, Florida Statutes, are "remedial" in nature and thus are subject to the lesser preponderance of the evidence standard. See FEC v. Schreiber, Case No.: FEC 00-218; FEC v. Diaz de la Portilla, Case No.: FEC 00-006; FEC v. Proctor, Case No.: FEC 99-065; FEC v. Harris, Case No.: 98-087; FEC v. Morrone, Case No.: FEC 97-060; FEC v. Boczar, Case No.: FEC 95-053; Division of Elections v. Diaz de la Portilla, Case No.: FEC 93-045.

2. The Commission takes this position because the legislative purpose behind the regulations contained in Chapter 106, Florida Statutes, is to preserve the electoral system from corruption and the appearance of corruption, as opposed to merely punishing wrongdoers. Moreover, since the Commission is the agency with substantive jurisdiction over proceedings to enforce Chapter 106, Florida Statutes, it is clear, unless and until judicially determined otherwise, that the Division of Administrative Hearings (DOAH) must defer to the Commission's position on this question of law. See Purvis v. Marion County

School Bd., 766 So.2d 492, 498 (Fla. 5th DCA 2000). That being said, however, the Commission finds that the ALJ's conclusions in his Recommended Order meet the "clear and convincing" standard.

Respondent's Exceptions

3. The Commission rejects each of Respondent's Exceptions to the ALJ's proposed Findings of Fact (Respondent's Exceptions ¶¶1-13).³ The Respondent did not provide the Commission with a transcript of the formal hearing. The Commission is precluded from even considering these Exceptions, because it cannot change or reject a proposed finding of fact unless it reviews the complete record, which includes the transcript. Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987); Edwards v. Department of Health & Rehabilitative Services, 592 So.2d 1249,1250 (Fla. 4th DCA 1992). See §120.57(1)(1), Fla. Stat.

4. Respondent's Exceptions in ¶¶15 & 16 asserts that the ALJ erred in determining (COL ¶¶61 & 62) that Respondent violated Section 104.011, Florida Statutes, when he falsely swore an oath indicating the location of his "legal residence." The Commission rejects this Exception.

5. The ALJ's decision on the Respondent's "legal residence" involves an application of general principles of law and does not involve the construction or application of a statute or rule over which the Commission has "substantive jurisdiction."

³ All or portions of Respondent's Exceptions in ¶¶18, 22 & 24 to the "Conclusions of Law" are also in reality exceptions to the findings of fact and are likewise rejected.

See §120.57(1)(1), Fla. Stat. Therefore, the Commission is precluded from modifying the ALJ's conclusion even if it were warranted. Barfield v. Department of Health, 805 So.2d 1008, (Fla. 1st DCA 2001). However, modification is not warranted because the Commission agrees with the ALJ's interpretation of the term "legal residence" and his resolution of the issue.

6. The Commission rejects Respondent's Exception in ¶20.⁴ The ALJ correctly found that Respondent's actions were "willful."⁵ 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. The section provides that a person's conduct is willful if he "knows" that he has not complied with Chapter 106. A person "knows" if he "is aware of the provision of [Chapter 106] which prohibits or requires the act, understands the meaning of that provision, and performs the act that is prohibited or fails to perform the act that is required."

7. A person's conduct is also willful if it evidences "reckless disregard" of the provisions of Chapter 106. "Reckless disregard" is shown if "the person wholly disregards the law without making any reasonable effort to determine whether the act would constitute a violation of [Chapter 106]."

⁴ The Commission also rejects those portions of Exceptions in ¶¶22 & 24 that mimic the reasoning set out in Exception in ¶20.

⁵ §106.25(3), Fla. Stat., provides that the "willfulness" standard set out in §106.37 applies to violations of both Ch. 104

8. As the ALJ found in his Conclusions of Law, Appellant's conduct was "willful." The Commission must sustain the ALJ's decision on "willfulness" if the ALJ applied the right rule of law and his findings are supported by competent substantial evidence. In re M.F., 770 So.2d 1189, 1192 (Fla. 2000); Banks v. State, 732 So.2d 1065, 1067 (Fla. 1999); Willacy v. State, 696 So.2d 693, 695 (Fla. 1997)⁶ Here it is clear that the ALJ's conclusions are proper and must be sustained.

9. Finally, the Commission rejects Respondent's Exceptions in ¶25. Having provided no transcript, Respondent cannot now challenge the factual findings of the ALJ regarding the factors set out in Section 106.265(1)(a)-(d), Florida Statutes.

CONCLUSION AND PENALTY

WHEREFORE, the Commission hereby accepts the ALJ's Recommended Findings of Fact and his Conclusions of Law, as modified by the rulings on the parties' exceptions set out above. The Commission, therefore, finds that Respondent has violated the following provisions of Chapters 104 and 106, Florida Statutes, and imposes the following fines:

A. Respondent violated Section 104.011(1) and (2), Florida

and Ch. 106.

⁶ Of course, the determination of whether an ALJ has properly interpreted and applied the definition of willfulness involves the interpretation and application of a statute over which the Commission has substantive jurisdiction. Thus, an ALJ's conclusions on this issue are not subject to the same deference that are due an ALJ's decisions on matters of fact and those questions of law that are outside the Commission's substantive jurisdiction.

Statutes, on one occasion. Respondent is fined \$1000.

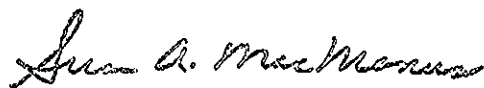
B. Respondent violated Section 106.09(1), Florida Statutes, on six occasions. Respondent is fined \$6000.

C. Respondent violated Section 106.07(5), Florida Statutes, on four occasions. Respondent is fined \$4000.

D. Respondent violated Section 106.11(1) and 106.19(1)(d), Florida Statutes, on five occasions. Respondent is fined \$5000, plus the multiple provided for in Section 106.19(2), Florida Statutes, \$5301 for a total of \$10,301. Therefore, it is

ORDERED that the Respondent shall remit a civil penalty in the amount of \$21,201. 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.

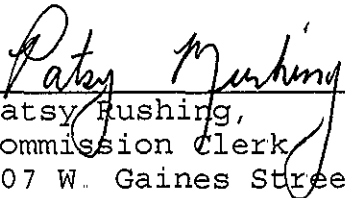
DONE AND ENTERED by the Florida Elections Commission and filed with the Clerk of the Commission in Tallahassee, Florida, this 25 day of November 2002.



Susan MacManus, Chairman
Florida Elections Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to counsel for Respondent, Ernest Corron, Esquire, Cotton & Gates, P.A., The Plew Avenue, Shalimar, FL 32579, and Barbara M. Linthicum, Executive Director 107 W. Gaines Street, Collins Building, Suite 224, Tallahassee, Florida 32399-0250 this 25th day of November, 2002.



Patsy Rushing,
Commission Clerk,
107 W. Gaines Street,
Collins Building, Suite 224,
Tallahassee, Florida, 32399-1050.

Copies also furnished to:

Eric Lipman, Assistant General Counsel
Douglas A. Hutcheson, Respondent
Ernest L. Cotton, Attorney for Respondent
Patricia Hollarn, Supervisor of Elections, Walton County, Filing
Officer

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.