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STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION

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ELECTIONS COMMISSION

FLORIDA ELECTIONS COMMISSION,

Petitioner,

vs.

MIRIAM OLIPHANT,

Respondent.

FEC Case No. 02-356

DOAH CASE No. 04-1999

F.O. No. : 07-038

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FINAL ORDER

On November 18, 2005 this matter was heard before the Florida Elections Commission (FEC or Commission) at its regularly scheduled quarterly meeting. At such meeting, the FEC reviewed the Recommended Order entered by Administrative Law Judge (ALJ) Claude B. Arrington of the Division of Administrative Hearings (DOAH) entered on August 29, 2005 and addressed the exceptions to that order filed by both the Petitioner and Respondent.

Petitioner was represented by Charles Finkel, General Counsel, and Eric M. Lipman, Assistant General Counsel. Respondent appeared personally and was represented by Mark Herron, Esquire, and Henry Hunter, Esquire.

Upon consideration of the Recommended Order, the exceptions, and otherwise being duly advised on the premises, the Commission found the Respondent guilty of willfully violating Section 104.051(2), Florida Statutes, 55 times and imposed an appropriate

fine. The Commission's determination and the ALJ's recommendation was based in part on the Commission's application of the Section 106.37, Florida Statutes, definition of the term "willful violations" to the 55 alleged violations of Chapter 104 set forth in the order of probable cause.

On February 23, 2006, however, prior to the issuance and entry of the final order in this cause, the First District Court of Appeal issued its opinion in the matter of *John J. Fugate v. Florida Elections Commission*, 924 So. 2d 74 (Fla. 1st DCA 2006) wherein it found that the Commission was precluded from applying Section 106.37 to violations of Chapter 104 because the language of Section 106.37 itself made it only applicable to violations of Chapter 106. The Court also found that in the absence of a rule or statute defining the term "willful" the ALJ's definition of "willful" was reasonable, and thus, reversed Commission's final order with instructions to the Commission to adopt the ALJ's finding that the Appellant's violation was not "willful."

Given the *Fugate* Court's finding as to the term "willful" as applied to violations of Chapter 104, the Commission reconsidered its November 18, 2005 decision in *Florida Elections Commission v. Miriam Oliphant*, FEC Case No. 02-356, DOAH CASE No. 04-1999, on May 18, 2006 because its final determination was based on the application of the term "willful violations" as defined in Chapter 106 to alleged violations of Chapter 104. Upon

considering the findings of the First District Court of Appeal in *Fugate*, the Commission voted to vacate its ruling on the *Oliphant* matter and remanded the case to DOAH for amended findings consistent with the First District Court of Appeal's *Fugate* opinion.

On August 30, 2006, ALJ Arrington issued his Amended Recommended Order Following Remand and it was considered by the Commission on November 15, 2006, at its regularly scheduled quarterly meeting. Petitioner was represented by Charles Finkel, General Counsel, and Eric M. Lipman, Assistant General Counsel. Respondent did not appear personally but was represented by Mark Herron, Esquire, and Henry Hunter, Esquire. At such meeting, after a review of the complete record, the Commission considered the Amended Recommended Order, Petitioner's exceptions, the argument of the parties both in support and in opposition and made the following findings:

RULINGS ON EXCEPTIONS

1. In the Amended Recommended Order, ALJ Arrington adopted the definition of "willful act" set forth by ALJ Stevenson in *Florida Elections Commission v. Fugate*, DOAH Case No. 04-1178 (December 22, 2004) and in doing so concurred with the First District Court of Appeal's opinion in *John J. Fugate v. Florida Elections Commission*, 924 So. 2d 74 (Fla. 1st DCA 2006) wherein it found ALJ Stevenson's definition of "willful" as being

reasonable in the absence of a rule or statute defining the term.¹ As a result thereof, ALJ Arrington found that the Respondent did not intentionally violate any provision of Chapter 104 and recommended the dismissal of all charges.

Petitioner filed exceptions to paragraphs 15 and 18 of the Amended Recommended Order wherein Commission staff urged the Commission to reject ALJ Arrington's definition of "willful" and encouraged the Board to adopt a "reckless disregard" definition similar to that found in Section 106.37, Florida Statutes, which had previously been used by the Commission in cases such as *Division of Elections v. Tanner*, Case No. FEC 93-003 (August 29, 1995). Commission staff has correctly asserted that the *Fugate* Court did not require ALJs or the Commission to utilize Arrington's definition of "willful" in future cases but given the fact that another ALJ's definition of "willful" had previously been found to be reasonable by the First District Court of Appeal and that the Commission did not have a rule defining the term that could be applied to this matter, the Board chose to reject Petitioner's exception to paragraphs 15 and 18 of the Recommended Order.

2. The Commission also rejected the Petitioner's exception

¹ ALJ Stevenson defined a "willful act" as "one that is voluntarily and intentionally performed with specific intent and bad purpose to violate or disregard the requirements of the law." *Florida Elections Commission v. Fugate*, DOAH Case No. 04-1178 (December 22, 2004).

to paragraph 17 of the Amended Recommended Order because it did not believe that ALJ Arrington rendered an opinion as to the validity of Rule 2B-1.002, Florida Administrative Code, therein. While at first glance ALJ Arrington does seem to offer commentary as to the validity of the rule, upon careful reading it becomes apparent that he is merely ruling that Rule 2B-1.002 could not be applied retroactively to the Respondent's particular set of circumstances.

3. In Petitioner's third exception, Commission staff objected to the ALJ's procedural history of this matter as reflected in paragraphs 6, 9, and 13 of the Amended Recommended Order. Respondent concurred with Commission staff, and therefore, the following substitute paragraphs were approved by the Commission without objection:

Paragraph 6. - On November 18, 2005, the Commission held a hearing to consider the ALJ's Recommended Order and vote on the parties's exceptions. The Commission did not enter a Final Order on that date. On May 18, 2006, the Commission held a hearing to reconsider its final decision in this matter. The Commission vacated its vote approving a final draft of the Final Order for entry and instead entered an Order on Remand.

Paragraph 9. - The Commission relied on the *Fugate* opinion when it decided to vacate its previous vote approving the content of its Final Order.

Paragraph 13. - The Commission relied upon the Fugate opinion in reaching its decision to remand this matter back to DOAH. A Final Order was not entered in this case.

CONCLUSIONS

The Commission accepts and adopts the ALJ's Findings of Fact as set forth in the Recommended Order and the Conclusions of Law that appear in the Amended Recommended Order, except as modified by the rulings on Petitioner's exceptions set forth above.

Based on the foregoing, the Commission hereby DISMISSES all charges against Respondent set forth in the order of probable cause.

DONE and ENTERED by the Florida Elections Commission and filed with the Clerk of the Commission on this 23rd day of February, 2007, in Tallahassee, Florida.



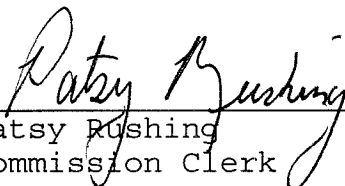
Chance Irvine, Chair
Florida Elections Commission

NOTICE OF RIGHT TO APPEAL

Pursuant to Section 120.68, Florida Statutes, the parties 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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: counsel for Respondent, Mark Herron, Esquire, Messer, Caparello and Self, P. A., 2618 Centennial Place, Tallahassee, Florida 32308; Henry Hunter, Esquire, Henry Hunter & Associates, Inc., 219 East Virginia Street, Tallahassee, Florida 32301; and Eric Lipman, Assistant General Counsel, 107 W. Gaines Street, Collins Building, Suite 224, Tallahassee, Florida 32399-0250 this 23rd day of February, 2007.



Patsy Rushing
Commission Clerk