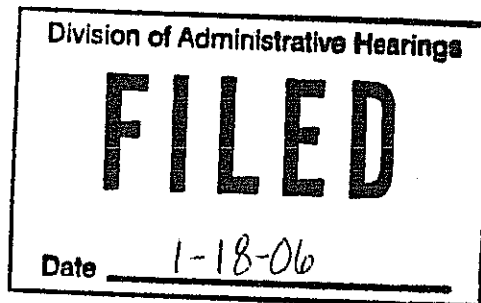


STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION



FLORIDA ELECTIONS COMMISSION,

Petitioner,

vs.

WILLIAM PROCTOR, JR.,

Respondent.

FEC Case No. 99-065

DOAH Case No. 00-4994

F.O. No.: DOSFEC 02-148 W

FINAL ORDER

On May 9 and August 15, 2002, this cause came on to be heard before the Florida Elections Commission (Commission). At those meetings, the Commission reviewed the Recommended Order entered by Administrative Law Judge (ALJ) Jeff B. Clark on January 25, 2002, and the Order of Clarification dated July 8, 2002. The Commission has addressed the Exceptions to those Orders filed by the Petitioner and by the Respondent, William Proctor, Jr., (Proctor), as well as the Responses filed by the parties.¹

APPEARANCES

For Petitioner: David F. Chester, Esquire
Florida Elections Commission
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Collins Building, Suite 224
Tallahassee, FL 32399-1050

For Respondent: Mark Herron, Esquire
Mark Herron, P.A.
215 S. Monroe St., Suite 3550
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¹ The Commission has reviewed the entire record and heard arguments of counsel.

RULINGS ON THE EXCEPTIONS

A. PETITIONER'S EXCEPTIONS.

1. The Commission agrees with Petitioner's Exception #1. The ALJ erroneously ruled 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. Alan Schreiber, Case No.: 00-218; FEC v. Diaz de la Portilla, Case No.: FEC 00-006; FEC v. Harris, Case No.: 98-087; FEC v. Morroni, 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).

3. That being said, however, the Commission finds that the ALJ's conclusions set out in his Recommended Order that Proctor either violated or did not violate the various provisions of Chapter 106 are correct under either burden.

4. The Commission accepts Petitioner's Exception #2. Both parties agree that two scrivener's errors crept into the Recommended Order. Therefore, the second paragraph of the ALJ's Preliminary Statement is amended to reflect that only the Statement of Findings was incorporated by reference in the Commission's Order of Probable Cause. In addition, Paragraph #32 of the Recommended Order is amended to read that Proctor's conviction in court was for violating Section 106.19(1)(c), Florida Statutes, and not Section 106.19(1)(a).

5. The Commission rejects Petitioner's Exception #3. While it respects the scholarly nature of the substance of the Exception and its discussion of the various "states of mind" applicable to certain violations of Chapter 106, which largely involve criminal violations of the Chapter, the Commission sees no reason to modify the ALJ's resolution of this issue.

6. Finally, the Commission agreed with the gravamen of Petitioner's Exception #4 at its May 9, 2002 meeting. To clarify whether a fine should be imposed as a result of Proctor's five violations of Section 106.19(1)(d), Florida Statutes, the Commission remanded this case to the ALJ. The ALJ's Order on

Remand having resolved the issue, Exception #4 is now moot.

B. RESPONDENT PROCTOR'S EXCEPTIONS

7. The Commission rejects Proctor's Exception #1. The ALJ found (FOF ¶15) that Proctor "personally handled essentially all campaign banking activities." (*Emphasis Supplied*) This finding is supported by competent substantial evidence and thus is accepted by the Commission. See Section 120.57(1)(1), Fla. Stat.

8. The Commission also rejects Proctor's Exception #2. The ALJ correctly found that a person could violate Section 106.19(1)(b), Florida Statutes, by acting with "reckless disregard." Petitioner's Response to this Exception adequately addresses this issue.

9. However, the Commission would also point out that the "knowing and willful" standard articulated in Section 106.19, Florida Statutes, is a necessary prerequisite to the finding of a criminal violation of the law. However, when the Commission exercises its jurisdiction over Section 106.19, Florida Statutes, the standard is that of "willfulness" as defined in Section 106.25(3), Florida Statutes. The Commission has long held this position, see Florida Police Benev. Association Political Action Committee v. Florida Elections Com'n, 430 So.2d 483 (Fla. 1st DCA 1983), Pasquale v. Florida Elections Com'n, 759 So.2d 23 (Fla. 4th DCA 2000), McGann v. Florida Elections Com'n, 803 So.2d 763, (Fla. 1st DCA 2001). Of course, as provided in Section 106.37, Florida Statutes, "willfulness" can be proven by a showing of

"reckless disregard."

10. The Commission rejects Proctor's Exceptions #3 and #4. The ALJ correctly analyzed the First District Court of Appeals recent decision in McGann v. Florida Elections Comm'n, supra, wherein the Court discussed the pleading requirements necessary to determine the number of potential "counts" in a charging document.

11. As found by the ALJ (COL ¶¶45-46), the charging document specifically noted that Proctor had violated Chapter 106 on certain specific occasions. This type of pleading, while not identical to that recommended by the court in McGann, is plainly sufficient to delineate the number of "counts" charged and thus the amount of the fine to which Proctor might be subject.

12. As the ALJ noted in his conclusions, the pleading found deficient in McGann only used the term "multiple occasions" and did not explicitly set out the number of violations. As the ALJ also found, the Order of Probable Cause in this case did not reflect this deficiency, especially when coupled with the incorporated Statement of Findings. The Commission fully concurs with the ALJ.

13. The Commission rejects Proctor's Exception #5. This exception goes to the actual conduct of the hearing and asserts that the ALJ prejudiced Proctor by the scheduling of the hearing and by improperly involving himself in the prosecution of the case. The Commission staff has adequately and fully refuted these

allegations (Response to Exceptions at ¶¶ 2-21). The Commission hereby adopts these statements as its own.

THE ORDER OF CLARIFICATION

16. At the meeting on May 9, 2002, the Commission was unclear whether ALJ intended to recommend a fine on Proctor under the provisions of Section 106.265(1), Florida Statutes, for willfully violating Section 106.19(1)(d), Florida Statutes, on five occasions (Recommendation ¶E). An Order Remanding Case to DOAH for Clarification of Recommended Order was therefore entered on June 20, 2002.

17. On July 8, 2002, the ALJ entered an Order of Clarification explaining that he intended to impose no additional fines under any theory for Proctor's five violations of Section 106.19(1)(d), Florida Statutes. Although the ALJ found that Proctor's conduct in violating Section 106.19(1)(d), Florida Statutes, was "knowing and willful" (COL ¶51), he apparently determined that the \$2500 fine recommended for the five violations of Section 106.11(3) was sufficient and that no additional fines for the violations of Section 106.19(1)(d), Florida Statutes, were recommended. The Commission accepts the ALJ's recommendation under the facts of this case.

CONCLUSION AND DISPOSITION

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 also accepts the ALJ's recommendation that Proctor violated Section 106.07(5), Florida Statutes, on 13 occasions, Section 106.011(3), Florida Statutes, on five occasions, Section 106.19(1)(b), Florida Statutes, on 53 occasions, Section 106.19(1)(c), Florida Statutes, on 130 occasions, and Section 106.19(1)(d), Florida Statutes, on five occasions, and that Respondent did not violate Section 106.19(1)(a), Florida Statutes. Therefore, it is

ORDERED that the Respondent shall remit a civil penalty in the amount of \$79,800. 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 August 23, 2002, in Tallahassee, Florida.

Susan A. MacManus, 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 also furnished to:
Eric Lipman, Assistant General Counsel
David Chester, Assistant General Counsel
William Proctor, Jr., Respondent
Mark Herron, Attorney for Respondent
Carol Kio-Green, Complainant
Supervisor of Elections, Leon County, Filing Officer

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, Mark Herron, P.A., Post Office Box 1701, Tallahassee, FL 32302-1701, Barbara M. Linthicum, Executive Director 107 W. Gaines Street, Collins Building, Suite 224, Tallahassee, Florida 32399-0250 this _____ day of August, 2002.

Patsy Rushing
Commission Clerk