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STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION

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DIVISION OF
ADMINISTRATIVE
HEARINGS

AP

FLORIDA ELECTIONS COMMISSION,

Petitioner,

v.

ARLENE SCHWARTZ,

Respondent.

DOAH Case No.: 01-3652
Case No.: FEC 01-085
F.O. No.: DOSFEC 02-100 W

JBC-CWS

FINAL ORDER

THIS CAUSE came on to be heard before the Florida Elections Commission at its meeting held on May 9 and 10, 2002, in Miami, Florida. At the meeting, the Commission reviewed the Recommended Order entered by Administrative Law Judge (ALJ) Jeff B. Clark on January 31, 2002, and Exceptions to the order filed by the Petitioner.

APPEARANCES

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

For Respondent J. David Bogenschutz, Esquire
Bogenschutz & Dutko
600 South Andrews Avenue, Suite 500
Fort Lauderdale, Florida 33301-2802

RULINGS ON THE EXCEPTIONS

1. The Commission agrees with Petitioner's first exception. The ALJ erroneously ruled that the standard of proof

in Commission cases, brought under the "willful" standard in Chapter 106, Florida Statutes, requires "clear and convincing" evidence. (COL ¶19) The Commission has consistently held that administrative enforcement actions involving Chapter 106, are "remedial" in nature and thus are subject to the lesser "preponderance of the evidence" standard. See, FEC v. Schreiber, FEC Case No.: 00-218; FEC v. Diaz de la Portilla, FEC Case No.: 00-006; FEC v. Harris, FEC Case No.: 98-087; FEC v. Morroni, FEC Case No.: 97-060; FEC v. Boczar, FEC Case No.: 95-053; Division of Elections v. Diaz de la Portilla, FEC Case No.: 93-045.

The Commission has not yet ruled on the standard of proof required to prove a violation of Chapter 104, Florida Statutes, except a violation of Section 104.271, Florida Statutes. Because Section 104.271 involves the restriction of free speech, the courts have extended greater protection to candidates accused of making a false and malicious statement against his or her opposing candidate. In such cases, the courts have required that a violation must be proven by "clear and convincing" evidence. See Division of Elections v. Fischer, Case No. FEC 94-122, *aff'd per curiam*, Fischer v. Division of Elections, 706 So.2d 289 (Fla. 1st DCA 1998), *cert. den.*, 119 S.Ct. 375, 525 U.S. 949 (1998). The courts, however, have not determined what standard of proof should be used for the remaining violations in Chapter 104 and the Commission, which has only had jurisdiction over the

remainder of Chapter 104 since 1998, has not yet had the opportunity to rule on the issue of the standard of proof.¹

Obviously, the question of the standard of proof required to find a violation is a material issue in enforcement actions. However, because both parties accepted the facts of this case and the Commission disposed of the case on a legal rather than a factual issue making, it is unnecessary to resolve the issue here.

2. The Commission rejects the Petitioner's second exception. As set out in the Recommended Order (COL ¶14), 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.

3. The Commission also rejects the Petitioner's third exception. The Commission recognizes that it is unclear what standard the ALJ used to determine "willfulness" in his Recommended Order. In addition, the ALJ never actually decided whether Respondent's willful use of city stationery to endorse a candidate when she was mayor of the city was an act that could have violated Section 104.31(1)(a), Florida Statutes.

¹ In Chapter 98-129, Laws of Florida, the Commission was first given jurisdiction to investigate and determine violation of

Regardless of the ALJ's lack of clarity on these issues, the Elections Commission believes that Respondent's actions would have been a violation of Section 104.31(1)(a), if willfulness had been proven. The Commission's position is shared by other agencies responsible for enforcing similar provisions.

The Commission on Ethics enforces Section 112.313(6), Florida Statutes, which is the companion statute to Section 104.31(1)(a), Florida Statutes. Section 112.313(6) prohibits a public official or employee from using his or her official position to influence an election. The Commission on Ethics has repeatedly held in its enforcement of Section 112.313(6) that the acts committed by the Respondent are punishable by that Commission. See In re Patty Lynch, Complaint No. 92-147 (fined employee of tax collectors office who handed out palm cards of favored candidate during working hours) In re Robert D. Moore, Complaint No. 96-241 (fined tax collector for using office letterhead stationary to endorse a candidate).

The Division of Elections has also intimated that its position is the same. In Division of Elections Opinion 90-10, the Division answered a candidate who asked whether an elected official could host a fundraiser for her. The Division opined that Section 104.31 did not prohibit the public official from hosting a fund raiser for a candidate, but cautioned that the

other provision of Chapter 104, F. S.

public official could not use her position to influence another person's vote.

The Office of the Attorney General has also construed Section 104.31(1)(a) to reach precisely the same type of conduct as Respondent's conduct. See AGO 72-62. In short, as the Attorney General stated in AGO 72-62, "[t]he essence of s. 104.31(1)(a) is the legislature's intent to prevent the misuse of official authority or influence in elections...." Plainly, the use of public property, such as publicly purchased official stationary, to advocate the election of a candidate is such a prohibited act.

Turning to the question of "willfulness," the ALJ appears to have used the "reckless disregard" analysis to determine whether Respondent's conduct was willful.² As discussed in Section 106.37, Florida Statutes, the "reckless disregard" prong of "willfulness" is shown if "[a] person shows reckless disregard for whether an act is prohibited or required under [the applicable statute] if the person wholly disregards the law without making any reasonable effort to determine whether the act would constitute a violation...." In this case, the ALJ concluded that Schwartz had made a "reasonable effort."

² There was no evidence adduced that Schwartz "knew" that her acts were in violation-the other manner by which "willfulness" can be shown under s. 106.37. The Commission would note that in contradistinction to Chapter 106's requirement for candidates there is no requirement that elected officials sign a statement acknowledging receipt, reading and comprehension of Chapter 104.

The ALJ found that the Respondent made an effort to ascertain whether her actions were acceptable and that the Respondent acted in "good faith" based upon information that she received from others, such as the city attorney. Although the Commission could have come to another conclusion, the findings of the ALJ are deserving of due deference by the Commission. Therefore, the "willfulness" element has not been proven.

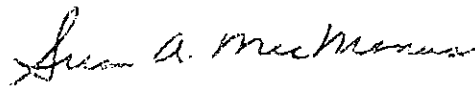
CONCLUSION AND DISPOSITION

The Commission accepts the ALJ's Proposed Findings of Fact, his Recommended Conclusions of Law, except as modified herein, and his Recommendation on the disposition of the case.

Therefore, it is

ORDERED that the charge against Respondent is hereby **DISMISSED**.

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

See s. 106.023, Fla. Stat.

NOTICE OF RIGHT TO APPEAL

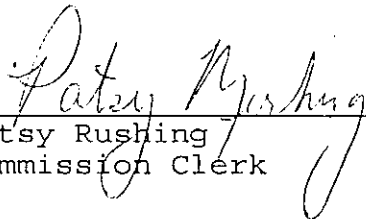
Pursuant to Section 120.68, Florida Statutes, the Respondent may appeal the Commission's Final Order to the appropriate district court of appeal by filing a notice of appeal both with the Clerk of the Florida Elections Commission and the Clerk of the district court of appeal. The notice must be filed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

Copies furnished to:

Eric Lipman, Assistant General Counsel
Arlene Schwartz, Respondent
David Boganschutz, Attorney for Respondent
Peter Dennison, Complainant
Supervisor of Elections, Broward 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, David Boganschutz, Colonial Bank Building, 600 S. Andres Avenue, Suite 500, Ft. Lauderdale, FL 33301 and Eric Lipman, Assistant General Counsel, 107 W. Gaines Street, Collins Building, Suite 224, Tallahassee, Florida 32399-0250 this 23rd day of August, 2002.



Patsy Rushing
Commission Clerk