

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ELECTIONS COMMISSION,)
)
 Petitioner,)
)
vs.) Case No. 01-3652
)
ARLENE SCHWARTZ,)
)
 Respondent.)

)

RECOMMENDED ORDER

On November 13, 2001, a formal administrative hearing was held in this case in Fort Lauderdale, Florida, before Jeff B. Clark, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Eric M. Lipman, Esquire
Florida Elections Commission
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For Respondent: J. David Bogenschutz, Esquire
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Suite 500
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STATEMENT OF THE ISSUES

Whether Respondent, Arlene Schwartz, willfully violated Subsection 104.31(1)(a), Florida Statutes, which prohibits an officer or employee of the state, or of any county or

municipality, from using his or her official authority or influence for the purpose of interfering with an election or a nomination of office, or coercing or influencing another person's vote or affecting the results thereof.

PRELIMINARY STATEMENT

On March 7, 2001, Petitioner, Florida Elections Commission (Commission), received a sworn complaint alleging that Respondent, Arlene Schwartz, violated Chapter 104, Florida Statutes. On June 22, 2001, after an investigation, the Commission staff recommended finding probable cause that Respondent violated Subsection 104.31(1)(a), Florida Statutes. On August 7, 2001, the Commission issued an Order of Probable Cause finding probable cause to believe Respondent violated Subsection 104.31(1)(a), Florida Statutes.

On August 30, 2001, Respondent, through counsel, filed a Petition for Formal Hearing and on September 17, 2001, the Division of Administrative Hearings received the case for assignment of an Administrative Law Judge to conduct a formal hearing. On October 5, 2001, the case was set for final hearing in Fort Lauderdale, Florida, on November 13 through 15, 2001.

At the final hearing held on November 13, 2001, the Commission presented three witnesses: Keith Smith, a Commission investigator; Debra Thomas, City Clerk, City of Margate, Florida; and Iris Siple, Chief Administrator to the Clerk of

Court, Broward County, Florida. The Commission introduced three exhibits in evidence, numbered Exhibits 1, 2, and 3.

Respondent presented seven witnesses: Eugene Steinfeld, City Attorney, City of Margate, Florida; Lori Parrish, County Commissioner, Broward County, Florida; Howard Forman, Clerk of Court, Broward County, Florida; John Borden-Kircher; Jack Tobin; Robert Crawford; and Respondent, herself. Respondent offered five exhibits numbered exhibits 1 through 5 which were received in evidence.

The Transcript of Proceedings, which bears the Court Stenographer's Certificate dated December 9, 2001, was filed with the Division of Administrative Hearings on January 11, 2002; the parties requested and received leave to the submit proposed recommended orders on or before January 11, 2002. Both parties timely filed Proposed Recommended Orders.

FINDINGS OF FACT

Based on the testimony and demeanor of the witnesses, documentary evidence, entire Transcript of Proceedings, and the facts admitted in the Joint Pre-hearing Stipulation, the following findings of fact are made:

1. Respondent, Arlene Schwartz, as Mayor of the City of Margate, Florida, was a municipal officer on October 27, 2000, when she wrote a letter signed by her as Mayor, Margate, Florida, on official City of Margate stationery, endorsing

Howard Forman for Clerk of Court, Broward County, Florida.

Respondent has 10 years of experience as a candidate, elected official or member of municipal boards.

2. Eugene Steinfeld was City Attorney, City of Margate, for 24 years; as such he gave advice to the Mayor and Commissioners of the City of Margate about their responsibilities under the Florida Ethics Code and Elections Laws.

3. In 1994, in his capacity as City Attorney, Mr. Steinfeld authored a City of Margate Resolution which authorized the Mayor, Vice Mayor and City Commissioners "to use a facsimile of the official seal of the City of Margate in correspondence, promotion, or advertising when they are promoting the City of Margate. . . ."

4. On January 24, 2000, in his capacity as City Attorney, Mr. Steinfeld sent an inter-office memorandum to Respondent and others advising "there is no prohibition for endorsing a candidate for City Commission by another candidate for City Commission . . . ; it is only where a candidate expends money for another candidate or contributes things of value to another candidate that is prohibited, pursuant to FS. 104.071."

5. In September 2000, Mr. Steinfeld had a conversation with Respondent wherein she asked if she would be permitted to endorse a candidate for a board position in a development

district. In advising her that she could, he recalled saying, "You do not lose your freedom of speech when you become an elected official."

6. On October 23, 2000, Respondent attended a meeting of the Margate Democratic Club where Howard Forman, a candidate for Clerk of Court, Broward County, spoke. As a State Senator, Mr. Forman had assisted the City of Margate even though Margate was not in his Senate District. Respondent orally endorsed Mr. Forman at the meeting and offered her assistance.

7. On October 25, 2000, Respondent's office received a telephone call from Iris Siple who worked in Mr. Forman's campaign. Respondent returned the call on October 26, 2000, and was asked to write a letter endorsing Mr. Forman on city stationery. The letter was written on October 27, 2000, and later faxed to Mr. Forman's campaign headquarters.

8. Mr. Forman's campaign reproduced the letter and mailed approximately 700 copies to potential voters. Respondent received no remuneration or benefit for writing the endorsement letter.

9. Respondent acknowledged that she had no specific discussion with the City Attorney regarding the appropriateness of using city stationery in the endorsement letter. Nevertheless, she believed that writing the endorsement letter was something that she could do without violating the law.

Based on the evidence presented, including the resolution allowing the use of the seal in correspondence promoting the city, the memorandum and advice given by the City Attorney, and her reliance on the request made by Mr. Forman's campaign office for a letter on city stationery, the undersigned finds that Respondent's belief that she had done nothing inappropriate in writing the endorsement letter to be credible.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. Subsections 106.25(5) and 120.57(1), and Section 120.569, Florida Statutes.

11. The Commission in its Order of Probable Cause asserts that: "Respondent violated Section 104.31(1)(a), Florida Statutes, prohibiting an officer or employee of the state, a county, or a municipality from using his official authority or influence for the purpose of interfering with an election, interfering with a nomination for office, coercing or influencing another person's vote, or affecting the results of an election on one occasion."

12. Section 104.31, Florida Statutes, reads as follows:

Political activities of state, county, and municipal officers and employees.-

(1) No officer or employee of the state, or of any county or municipality thereof,

except as hereinafter exempted from provisions hereof, shall:

(a) Use his or her official authority or influence for the purpose of interfering with an election or a nomination of office or coercing or influencing another person's vote or affecting the result thereof.

* * *

The provisions of this section shall not be construed so as to prevent any person from becoming a candidate for and actively campaigning for any elective office in this state. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. The provisions of paragraph (a) shall not be construed so as to limit the political activity in a general, special, primary, bond, referendum, or other election of any kind or nature, of elected officials or candidates for public office in the state or of any county or municipality thereof; . . .

* * *

(3) Nothing contained in this section or in any county or municipal charter shall be deemed to prohibit any public employee from expressing his or her opinions on any candidate or issue or from participating in any political campaign during the employee's off-duty hours, so long as such activities are not in conflict with the provisions of subsection (1) or s. 110.233.

13. Subsection 106.265(1), Florida Statutes, reads as follows:

(1) The commission is authorized upon the finding of a violation of this chapter or chapter 104 to impose civil penalties in the form of fines not to exceed \$1,000 per count. In determining the amount of such

civil penalties, the commission shall consider, among other mitigating and aggravating circumstances:

- (a) The gravity of the act or omission;
- (b) Any previous history of similar acts or omissions;
- (c) The appropriateness of such penalty to the financial resources of the person, political committee, committee of continuous existence, or political party; and
- (d) Whether the person, political committee, committee of continuous existence, or political party has shown good faith in attempting to comply with the provisions of this chapter or chapter 104.

14. Subsection 106.25(3), Florida Statutes, reads as follows:

(3) For the purposes of commission jurisdiction, a violation shall mean the willful performance of an act prohibited by this chapter or chapter 104 or the willful failure to perform an act required by this chapter or chapter 104.

15. Section 106.37, Florida Statutes, reads as follows:

A person willfully violates a provision of this chapter if the person commits an act while knowing that, or showing reckless disregard for whether, the act is prohibited under this chapter, or does not commit an act while knowing that, or showing reckless disregard for whether, the act is required under this chapter. A person knows that an act is prohibited or required if the person is aware of the provision of this chapter 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. A person shows reckless disregard for whether an act is prohibited or required under this chapter if the person wholly disregards the law without making any

reasonable effort to determine whether the act would constitute a violation of this chapter.

16. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue in the proceeding. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996); Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

17. While Subsection 106.265(1), Florida Statutes, authorizes a \$1,000 civil penalty per "count," the Order of Probable Cause, which is the charging document in this case, does not contain "counts." Instead, it contains a single paragraph which alleges that there is probable cause to believe that Respondent violated Subsection 104.31(1)(a), Florida Statutes, on one occasion. Therefore, Respondent faces a potential civil penalty of \$1,000 if the Commission proves its case. In addition to the civil penalty, the ruinous effect of a determination that a political official has violated the Florida Elections Law has on an individual's reputation for personal integrity makes the penalty in this case punitive and penal in nature.

18. Subsection 120.57(1)(j), Florida Statutes, reads as follows:

(1) Additional Procedures Applicable to Hearings Involving Disputed Issues of Material Fact.-

* * *

(j) Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.

19. In addition, existing case law establishes that the Commission has the burden of proving by clear and convincing evidence that Petitioner willfully violated Subsection 104.31(1)(a), Florida Statutes. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Latham v. Florida Commission on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997).

20. As noted by the Florida Supreme Court:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in mind of the trier of fact a firm belief or conviction, without hesitancy, as to the

truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

21. Respondent authored an endorsement letter on City of Margate stationery using her appropriate title, Mayor. In performing this activity, she was aware of a municipal resolution allowing the use of the city seal to promote the City of Margate and she believed that the endorsed candidate would promote the City of Margate as he had done in the past; she was aware of a memorandum from the City Attorney, who was her legal advisor on Florida Elections Law, that it was appropriate for her to endorse other candidates; several weeks before this incident, she had specifically discussed endorsement of a candidate with the City Attorney and had been advised that her political rights to free expression had not been diminished because she was an elected official; and, in good faith, had relied on a request from the campaign staff of a seasoned and highly-regarded candidate for an endorsement on city stationery. There is no demonstration of knowledgeable or reckless commission of an act prohibited or required by the Florida Elections Law. Respondent clearly had a "good faith" belief that the endorsement letter was appropriate and not in violation of the Florida Elections Law.

RECOMMENDATION

Based upon the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the Florida Elections Commission enter a final order finding that Respondent, Arlene Schwartz, did not violate Subsection 104.31(1)(a), Florida Statutes, as alleged and dismissing the Order of Probable Cause.

DONE AND ENTERED this 31st day of January, 2002, in Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 31st day of January, 2002.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.