

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ELECTIONS COMMISSION,)
)
 Petitioner,)
)
vs.) Case No. 04-1178
)
JOHN J. FUGATE,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing in the above-styled case was held on June 21, 2004, in Arcadia, Florida, and on July 26, 2004, in Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Keith C. Tischler, Esquire
Jolly & Peterson, P.A.
Post Office Box 37400
Tallahassee Florida 32315

STATEMENT OF THE ISSUE

Whether Respondent, John J. Fugate, Sheriff of DeSoto County, willfully violated Subsection 104.31(1)(a), Florida

Statutes (2003), 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 October 8, 2003, Petitioner, Florida Elections Commission (the "Commission"), received a sworn complaint alleging that Respondent, Sheriff John J. Fugate, violated various provisions of Florida's election laws. On January 5, 2004, after an investigation, the Commission staff recommended finding probable cause that Respondent violated Subsection 104.31(1)(a), Florida Statutes (2003). On February 27, 2004, the Commission issued an Order of Probable Cause finding probable cause to believe Respondent violated Subsection 104.31(1)(a), Florida Statutes (2003).

On March 31, 2004, Respondent, through counsel, timely filed a Petition for Initiation of Proceedings to contest the Order of Probable Cause. On April 8, 2004, the case was forwarded to the Division of Administrative Hearings ("DOAH") for assignment of an Administrative Law Judge to conduct a formal hearing. The case was set for final hearing on June 21 and 22, 2004, in Arcadia. By agreement of the parties, the

first day of the hearing was held as scheduled in Arcadia, but the second day was rescheduled for July 26, 2004, in Tallahassee.

At the final hearing, the Commission presented the testimony of Sheriff Fugate and of Katherine Willcutts, finance director of the DeSoto County Sheriff's Office. The Commission's Exhibits 1 through 8 and 10 through 14 were admitted into evidence.

Respondent presented the testimony of nine witnesses: Sheriff Fugate; David Scheid, candidate for DeSoto County Sheriff and the complainant in this case; Deborah Ane Clifton, a former employee of the DeSoto County Sheriff's Office; James M. Stutler and Mark Lawrence, deputies for the DeSoto County Sheriff's Office; Carol Williamson, a lieutenant in the DeSoto County Sheriff's Office; William P. Wise, a major in the DeSoto County Sheriff's Office; David K. Smith, investigator for the Commission; and Barbara Linthicum, the Commission's executive director. Respondent's Exhibits 5, 6, 8 through 12, 18 through 21, 32A, 32C, 32E, and 33 were admitted into evidence. Respondent's Exhibit 32B was proffered, but not admitted.

The final Transcript was filed at DOAH on August 24, 2004. By Order dated September 3, 2004, Respondent's unopposed motion for enlargement of time was granted, and the parties were directed to file their proposed recommended orders no later than

September 10, 2004. Both parties timely filed Proposed Recommended Orders.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, the following findings of fact are made:

1. At the time of hearing, Respondent, John J. Fugate, was the incumbent Sheriff of DeSoto County, Florida. He was first elected in November 2000 and took office in January 2001. At the times pertinent to this case, Sheriff Fugate was a candidate for re-election, having filed the initial paperwork appointing a campaign treasurer and naming a depository for campaign contributions on May 20, 2003.

2. Also on May 20, 2003, Sheriff Fugate submitted his signed "Statement of Candidate," pursuant to Section 106.023, Florida Statutes (2003). This document attested that Sheriff Fugate had received, read, and understood "the requirements of Chapter 106, Florida Statutes (2003)." These statutory provisions were included in the "2000 Candidate Handbook On Campaign Financing," published by the state Division of Elections and given to Sheriff Fugate by the local Supervisor of Elections, when Sheriff Fugate filed his paperwork for the 2000 election. The "2004 Candidate and Campaign Treasurer Handbook" was given to Sheriff Fugate when he filed his re-election

paperwork with the local Supervisor of Elections and also included the provisions of Chapter 106, Florida Statutes (2003). During the Commission's investigation, Sheriff Fugate admitted that he had also read Chapter 104, Florida Statutes (2003), and believed he understood its provisions.

3. Though Sheriff Fugate had filed the papers establishing his candidacy for re-election, some Sheriff's Office employees openly questioned whether he really intended to stand for re-election. These questions stemmed from the fact that Sheriff Fugate's teenage son had been killed in an automobile accident in 2002. Sheriff Fugate was aware of these questions and was concerned that loyal employees were unsure of his intentions.

4. For some time, Sheriff's Office employees had also been discussing the status of Major William Wise, the second-in-command to Sheriff Fugate. Major Wise had been the chief deputy under Sheriff's Fugate's predecessor, was kept in that position by Sheriff Fugate, and was very popular among the Sheriff's Office employees. Major Wise was a participant in the State of Florida's Deferred Retirement Option Program ("DROP"), which he believed would require him to separate from the Sheriff's Office for one year upon his official retirement in October 2004. However, in October 2003, Major Wise learned that there was a way for him to reduce his separation to 30 days and still retain his full retirement benefit.

5. Sheriff Fugate decided to prepare a letter to all Sheriff's Office employees that would convey both his re-election intentions and the good news concerning the fact that Major Wise would not have to vacate his position. The letter was written on stationery with a header reading, "Re-Elect Fugate for Sheriff," along with Sheriff Fugate's mailing address and phone number. The text of the letter read as follows:

It hardly seems possible that the second half of the third year of this term of office is upon us and I can only concur with the saying that "time stands still for no one."

For those that have been here for a while, we have made giant strides for the DeSoto County Sheriff's Office in the past two and a half years and for the newer employees, with your help and our combined efforts, I look forward to more success in the future. Thank you for your help and I truly appreciate the service given to the citizens of DeSoto County.

In anticipation of running for a second term of office and as legally required, I have opened my official campaign account. This is the first step in any campaign and this announcement is not to be construed as a request for a contribution to my campaign. I, like you, have been in an employment position when the incumbent was seeking another term of office and can personally relate to pressure applied to assist with the campaign. Please understand that I will, and do value your support in any way that you may be inclined to offer. I also encourage anyone that feels that I have not earned your support in any way in the

performance of my duty to feel free to talk to me and you can be assured that it will remain professional and will not be made personal.

On another note, I know that there has been some question as to what was going to happen to the position of Major due to Major Wise being in the Drop program and it coming to an end. It is with great pleasure that I announce that a way has been found for Major Wise to continue in his position and he has made the decision to do so. Major Wise has contributed a great deal to this office and I am very pleased that he will be staying with us.

If anyone has any questions about this letter, I remind you of our "open door" policy and invite you to feel free to stop by and visit with me. Again, thank you and I look forward to our working together to build a better office for the employees and the community.

Beneath Sheriff Fugate's signature was the following: "Pd. Pol. Adv. Paid For In-Kind By John J. Fugate. Approved by John J. Fugate (D)."

6. Sheriff Fugate's review of the Candidate Handbooks led him to conclude that he should not use the Sheriff's Office or DeSoto County resources in preparing or distributing his letter and that none of the costs involved in preparing or distributing the letter should be borne by the Sheriff's Office or the County. Thus, Sheriff Fugate drafted the letter on his home computer. He printed approximately 120 copies of the letter on his home printer, using paper and ink that he purchased at Wal-

Mart. On his campaign treasurer's report for the third quarter of 2003, Sheriff Fugate reported the cost of ink and paper associated with this letter as an in-kind contribution from himself to his campaign.

7. Sheriff Fugate brought the copies of the letter to the Sheriff's Office and placed one copy in the pay envelope of each Sheriff's Office employee. At the DeSoto County Sheriff's Office, it was common practice for items other than pay checks to be included in the pay envelopes. Such items had included advertising circulars and public service memoranda, but not political advertisements. The Sheriff's Office had no specific policy setting forth what may or may not be placed in the pay envelopes, nor was there any particular procedure for obtaining approval of what was to be placed in the pay envelopes. Neither Sheriff Fugate, Major Wise, nor payroll supervisor Kathy Willcutts could recall a request to place an item in the pay envelopes ever having been denied.

8. The pay envelopes, including Sheriff Fugate's letter, were distributed to the Sheriff's Office employees in the usual manner, either at the front desk in the Records Division for pickup or in the employee's mail slot. The employees received Sheriff Fugate's letter upon retrieving their paychecks on or about October 2, 2003.

9. Several Sheriff's Office employees testified at the hearing. None of these employees felt that Sheriff Fugate was attempting to influence their vote or pressuring them to make a monetary contribution to his campaign. Lieutenant Carol Williamson is a 28-year Sheriff's Office employee and has worked for five different sheriffs. Lt. Williamson testified that in the past, she has been essentially ordered to campaign for her bosses, but that she did not consider Sheriff Fugate's letter to be anything other than informational. Deputy Mark Lawrence testified that "I read it, said 'okay,' and threw it away."

10. Sheriff Fugate disclaimed any intent to influence his employees' votes or pressure them for campaign contributions. During his career, he had been forced to campaign for his elected superiors. Because of this experience, Sheriff Fugate did not wish to place his own employees in the position of feeling coerced to support him.

11. Sheriff Fugate testified that he used campaign letterhead and included the "paid political advertisement" disclaimer because his reading of the statutes led him to conclude that those items were legally required on any correspondence referencing his campaign. Nevertheless, Sheriff Fugate maintained that his letter was intended solely to convey information, not to coerce or influence anyone's vote.

12. Sheriff Fugate's testimony is supported by the letter itself, which expressly stated that he was not seeking contributions to his campaign and that employees should feel no pressure to support his candidacy. Nonetheless, Sheriff Fugate's letter was clearly an attempt to favorably influence his employees, albeit a low-key one that did not demand support in the apparent manner of previous sheriffs. The letter solicited the support of Sheriff's Office employees, "in any way that you may be inclined to offer." The letter may not have been coercive, but it was disingenuous for Sheriff Fugate to suggest that the letter was not designed to influence his employees in the upcoming election.

13. Sheriff Fugate was cognizant of Section 104.31, Florida Statutes (2003), and its prohibition on the use of "official authority or influence for the purpose of . . . coercing or influencing another person's vote" However, Sheriff Fugate believed, mistakenly but in all good faith, that his placement of the letters was allowed under another provision of Section 104.31, Florida Statutes (2003):

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.

For reasons expressed in the Conclusions of Law below, Sheriff Fugate's good faith belief that his actions were within the ambit of the statute negates any suggestion that he "willfully" violated Subsection 104.31(1)(a), Florida Statutes (2003).

14. Sheriff Fugate did not seek advice from the local Supervisor of Elections or an advisory opinion from the state Division of Elections pursuant to Subsection 106.23(2), Florida Statutes (2003), because he believed that he understood the application of the relevant statutes to his situation, including Section 104.31, Florida Statutes (2003).

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. §§ 106.25(5), 120.57(1), and 120.569, Fla. Stat. (2004).

16. The Commission has the burden to prove its case by clear and convincing evidence. Diaz de la Portilla v. Florida Elections Commission, 857 So. 2d 913, 917 (Fla. 3d DCA 2003), review denied, 872 So. 2d 899 (Fla. 2004). See also Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Latham v. Florida Commission on Ethics, 694 So. 2d 83, 84-86 (Fla. 1st DCA 1997).

17. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA

1989), the Court defined clear and convincing evidence as follows:

[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 evidence 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 the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

18. Judge Sharp, in her dissenting opinion in Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998) (Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative [sic] elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L.Ed.2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the fact finder a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994).

19. The Order of Probable Cause states:

On or about October 2, 2003, Respondent violated Section 104.31(1)(a), Florida Statutes, using his official authority or influence for the purpose of influencing another person's vote, when he included in the pay envelopes of the employees of the DeSoto County Sheriff's Office a political advertisement advocating Respondent's re-election to the office of Sheriff of DeSoto County that was created by the Respondent and was an in-kind contribution to his campaign.

20. Section 104.31, Florida Statutes (2003), reads as follows, in relevant part:

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;

21. Subsection 106.265(1), Florida Statutes (2003), 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.

22. Subsection 106.25(3), Florida Statutes (2003), 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.

23. The Commission contends that Section 106.37, Florida Statutes (2003), provides the correct standard for the

determination of "willfulness." Section 106.37, Florida Statutes (2003), 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.

24. By its terms, Section 106.37, Florida Statutes (2003), limits its application to "provision[s] of this chapter," in contrast to Subsections 106.265(1) and 106.25(3), Florida Statutes (2003), quoted above, both of which expressly apply to provisions "of this chapter or chapter 104." Counsel for Sheriff Fugate emphasizes this contrast to contend that Section 106.37, Florida Statutes (2003), cannot be applied to alleged violations of provisions of Chapter 104, Florida Statutes (2003). The plain wording of the statute leads to the conclusion that Section 106.37, Florida Statutes (2003), does

not apply in this case because the only alleged violation is of Subsection 104.31(1)(a), Florida Statutes (2003).^{1/}

25. The determination of "willfulness" is a question of fact. McGann v. Florida Elections Commission, 803 So. 2d 763, 764 (Fla. 2001). For purposes of this case, the term "willful," as used in Subsection 106.25(3), Florida Statutes (2003), is essentially an undefined term. In Metropolitan Dade County v. Department of Environmental Protection, 714 So. 2d 512, 516 (Fla. 3d DCA 1998), the court faced the question of interpreting the undefined statutory term "willful violation" and reasoned as follows:

In construing an undefined term, we must look to the common or usual meaning of the term. State Dept. of Administration v. Moore, 524 So. 2d 704 (Fla. 1st DCA 1988) . . . The court in [Thunderbird Drive-In Theatre, Inc. v. Reed, 571 So. 2d 1341, 1344 (Fla. 4th DCA 1990)] relied on W. Page Keeton, et al., Prosser & Keeton Handbook of the Law of Torts § 34, at 213 (5th ed. 1984), in concluding that the usual meaning assigned to "willful" "[i]s that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow . . ." Thus, the Thunderbird Drive-In court concluded that when the legislature uses the word "willful" in a statute it demonstrates the legislature's intention that the actor possess "more than mere knowledge or awareness" for the statute to be applicable.

. . . The Thunderbird Drive-In definition is not an unusual or extraordinary

interpretation of the term "willful."
Black's Law Dictionary defines "willful" as:

An act or omission is 'willfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

Black's Law Dictionary 1434 (5th ed. 1979)(same definition at 1599 (6th ed. 1990)). This definition mirrors the Thunderbird Drive-In definition.

Other courts have ascribed to a similar definition of "willful violation." In Hazen Paper Co. v. Biggins, 507 U.S. 604, 617, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), the Supreme Court determined that a "willful" violation, as the term is used in federal statutes, requires a showing that the actor "either knew or showed reckless disregard for the matter of whether its conduct was prohibited...." This definition conveys the same idea that the act be intentional and accompanied by the "actor's intent and purpose that the prohibited conduct take place." (Some citations omitted)

26. In State v Stuler, 122 So. 2d 1, 2-3 (Fla. 1960), the Florida Supreme Court provided the controlling interpretation of Section 104.31, Florida Statutes (2003):

The privilege of working for the public is not an absolute right. It can be made subject to such reasonable restrictions and regulations as the Legislature under the Constitution may prescribe. . . .

The obvious objective to be accomplished by statutes of the type under consideration

is to preserve the political purity of public employment and to protect public employees against harassment and political annoyances as conditions to holding their jobs. Likewise public employees are thereby shielded against pressures or annoying solicitations for political contributions in order to curry favor with some elected official charged with the supervision of the particular employees. . . .

[Section 104.31, Florida Statutes], like most of the statutes on this subject does not preclude public employees from exercising complete freedom of choice at the ballot box. It specifically authorizes them "to express their opinions on all political subjects and candidates." The public employees are merely prohibited while in the public employ from doing certain specific things which the Legislature has properly concluded are opposed to the best interests of the public service. (Citations omitted)

27. There is little question that Sheriff Fugate's distribution of his campaign letter via the Sheriff's Office paycheck envelopes violated the terms of Subsection 104.31(1)(a), Florida Statutes (2003), in that he was attempting, however mildly, to influence the vote of his subordinate employees. The only real issue is whether Sheriff Fugate's violation was "willful."

28. Based on the facts found above, it cannot be said that the Commission has demonstrated, clearly and convincingly, that Sheriff Fugate acted "with bad purpose either to disobey or to disregard the law," or that it was his "intent and purpose that the prohibited conduct take place." Sheriff Fugate credibly

testified that he believed his actions were in accord with the portion of Section 104.31, Florida Statutes (2003), providing that nothing therein shall be construed to limit the right of a candidate to actively campaign for office. The Commission offered no direct evidence to refute Sheriff Fugate's good faith belief that his actions were within the 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, John J. Fugate, did not violate Subsection 104.31(1)(a), Florida Statutes (2003), as alleged, and dismissing the Order of Probable Cause.

DONE AND ENTERED this 22nd day of December, 2004, in Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of December, 2004.

ENDNOTE

^{1/} This conclusion finds support in the legislative histories of the provisions at issue. Section 106.37, Florida Statutes (2003), was enacted by Section 1, Chapter 97-13, Laws of Florida, and has not been amended since its enactment. As of 1997, the applications of Subsections 106.25(3) and 106.265(1), Florida Statutes (2003), were likewise limited to violations of Chapter 106, Florida Statutes (2003). Sections 34 and 36 of Chapter 98-129, Laws of Florida, amended Subsections 106.25(3) and 106.265(1), Florida Statutes (2003), respectively, to apply also to violations of Chapter 104, Florida Statutes (2003). The Legislature did not expand the scope of Section 106.37, Florida Statutes (2003).

COPIES FURNISHED:

Eric M. Lipman, General Counsel
Florida Elections Commission
Collins Building, Suite 224
107 West Gaines Street
Tallahassee, Florida 32399-1050

Keith C. Tischler, Esquire
Jolly & Peterson, P.A.
Post Office Box 27400
Tallahassee, Florida 32315

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

Barbara M. Linthicum, Executive Director
Florida Elections Commission
Collins Building, Suite 224
107 West Gaines Street
Tallahassee, Florida 32399-1050

Charles Finkel, General Counsel
Florida Elections Commission
Collins Building, Suite 224
107 West Gaines Street
Tallahassee, Florida 32399-1050

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.