



FLORIDA ELECTIONS COMMISSION
107 W. Gaines Street
Collins Building, Suite 224
Tallahassee, Florida 32399-1050
(850) 922-4539

FILED
06 JUN 27 AM 8:38
DIVISION OF
ADMINISTRATIVE
HEARINGS

June 26, 2006

G. Hal Johnson, Esq.
Florida Police Benevolent Association, Inc.
300 East Brevard Street
Tallahassee, FL 32301-1218

RE: Case No.: FEC 04-256

Dear Mr. Johnson:

The Florida Elections Commission at its last regularly scheduled meeting considered the above referenced case and issued the final order that is enclosed.

Please let me know if you have any questions.

Sincerely,

Barbara M. Linthicum

Barbara M. Linthicum
Executive Director

Enclosure: Final Order

cc: Thomas L. Wills, Respondent w/out enclosure
Calvin Bryant, Complainant
Palm Beach County Supervisor of Elections, Filing Officer

✓DOAH

FILED

05 JUN 26 AM 11:17

STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION

STATE OF FLORIDA
ELECTIONS COMMISSION

FLORIDA ELECTIONS COMMISSION,
Petitioner,

vs.

THOMAS L. WILLS, JR.,
Respondent.

FEC Case No. 04-256

DOAH CASE No. 05-1356

F.O. No.: 06-058

FILED
06 JUN 27 AM 8:38
DIVISION OF
ADMINISTRATIVE
HEARINGS

FINAL ORDER

This matter was initially heard before the Florida Elections Commission (FEC or Commission) on February 16, 2006. At the meeting, the FEC reviewed the Recommended Order entered by Administrative Law Judge (ALJ) Patricia M. Hart of the Division of Administrative Hearings that was entered on December 2, 2005, and addressed the Exceptions to that Order filed by the Petitioner.

On May 18, 2006, before issuance and entry of a final order in this matter, the Commission reconsidered its February 16, 2006, ruling in light of the First District Court of Appeal's opinion in the matter of John J. Fugate v. Florida Elections Commission, 924 So. 2d 74 (Fla. 1st DCA 2006).

APPEARANCES

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

For Respondent: G. Hal Johnson, Esq.
Florida Police Benevolent
Association, Inc.
Post Office Box 11239
Tallahassee, Florida 32301

RULING ON EXCEPTIONS

Petitioner's Exception Number 1

1. The Commission agrees with and accepts Petitioner's first exception wherein Petitioner excepts to paragraph 8 of the Recommended Order. The Commission found there was no substantial competent evidence to support the ALJ's factual finding that an off-duty law enforcement officer was not required to obey anything but a direct order from a superior officer. It also found that the record did however contain competent substantial evidence supporting the finding that an inferior officer who is on police department premises is required to obey any request made by a superior officer, whether a direct order or not.

Petitioner's Exception Number 2

2. The Commission agrees with and accepts Petitioner's second exception wherein Petitioner excepts to the first portion of paragraph 25 of the Recommended Order stating that neither Officer Wills nor any member of the West Palm Beach Police Department is expected to enforce Florida's election laws as part of their duties as law enforcement officers. The

Commission found that the competent substantial evidence supports a contrary finding. Specifically, three Captains of the West Palm Beach Police Department testified that their officers are required to enforce all Florida's laws. The testimony of Captain Olson made it clear that while officers may have arrest discretion, they do not have any discretion as to whether an officer will enforce and uphold all of Florida's Statutes.

Petitioner's Exception Number 3

3. The Commission agrees with and accepts Petitioner's third exception wherein Petitioner excepts to that portion of the finding of fact in paragraph 30 providing that none of the officers present in the briefing room clearly remembered Respondent's specific statements and that Respondent's purpose in reading the PBA e-mail or making statements to the officers was not to coerce or influence anyone present in the briefing room to attend the Bradshaw rally. Despite witnesses not being able to recall the exact words that Respondent used at the briefings, the Commission believes that the competent and substantial evidence reflects that several of the officers had a clear memory of the nature of Respondent's comments and that Respondent was upset at the response to his Bradshaw rally announcement.

4. Respondent's statement to Officer Ronald Robbins

approximately one week before Robbins' June 1, 2005, deposition illustrates that Respondent had a very clear memory of what he said at the May 10, 2004, briefing. A week before Officer Robbins' deposition, Respondent called Officer Robbins who was on disability leave and instructed Robbins to come to the station to pick up a subpoena for his deposition. Officer Robbins testified to the following events:

[A]bout a week ago I was in there signing for subpoenas because Lieutenant Wills ordered me to come in. As you know, I'm out with this broken thenal. And as I was leaving, he asked me why I didn't attend, I guess, the first deposition you guys had down here maybe a few weeks ago. And I told him I couldn't, obviously. And he said, Okay. He said, Just remember, it was Sergeant Kelly who said all that and not me about Bradshaw...That was in his office as I was walking out of his office.

5. Officer Robbins also testified that he was 100% sure that Respondent made that statement to him approximately one week prior to Robbins' deposition.

6. Despite having the opportunity to refute or challenge Officer Robbins' allegations, Respondent never questioned or denied Robbins' testimony about what happened just prior to Robbins' deposition. Respondent's failure to deny, challenge, or otherwise contradict Officer Robbins' testimony is Respondent's tacit or adopted admission of the truth of Robbins' testimony. Nelson v. State, 748 So. 2d 237, 242-43 (Fla. 1999),

cert denied 528 U.S. 1123, 120 S. Ct. 950, 145 L.Ed.2d 825 (2000) (Testimony of witness that Nelson and non-testifying accomplice discussed the facts of a murder in the presence of a witness was admissible against Nelson as an admission by silence because statements were such that if untrue, they would call for a denial.)

7. Additionally, Officer Robbins' other testimony indicated that he was clear about what happened in the briefing room the evening Respondent spoke to his officers about the Bradshaw rally. Although Officer Robbins did not remember Respondent's exact words, Robbins was unequivocal that the rally "was a big deal throughout the department" and that Respondent stated that the officers "better . . . show up at the rally because Chief Bradshaw was the one that hired us." Robbins further testified that he thought to himself, "[t]hat's not who I want to vote for; why do I have to show up?"

8. Sergeant Luciano also remembered clearly what Respondent told his inferior officers. The only fact that Sergeant Luciano was unsure about was whether the events in question happened on May 10, 2004. Sergeant Luciano testified that Respondent told the officers about an upcoming Bradshaw rally and said:

Bradshaw has done a lot for the West Palm Beach Police Department and a lot for officers in general, and we should show our

support if we could attend [the rally] at the courthouse, I believe in the a.m. [H]e just reminded us that Bradshaw was loyal to our department.

9. Sergeant Luciano also testified with clarity that the reason Respondent ordered Officer Creelman into his office after a line-up the following week and stated that:

I sat with Creelman in front of the lieutenant's desk, and Lieutenant Wills voiced his displeasure about Creelman's behavior in line-up and not wanting to - not so much not wanting to support Bradshaw, but making it a point that [Creelman] spoke that he didn't want to support Bradshaw ... in front of the other officers....I just know that Lieutenant Wills was very unhappy with the way that Officer Creelman spoke in front of other officers, confronting Wills in his announcement that it would be nice for officers to show up at the rally."

10. Based upon the foregoing, the Commission finds that the ALJ's findings of fact in paragraph 30 are not supported by substantial competent evidence.

Petitioner's Exception Number 4

11. The Commission rejects Petitioner's fourth exception because it lacks substantive jurisdiction of evidentiary issues under Chapter 90, Florida Statutes.

Petitioner's Exception Number 5

12. The Commission agrees with and accepts Petitioner's fifth exception wherein Petitioner asserts that there is no substantial competent evidence to support the ALJ's factual

finding in paragraph 33 providing that it is "uncontroverted that Lieutenant Wills' purpose in calling Officer Creelman and Sergeant Luciano into his office on May 17, 2004, was to talk to Officer Creelman about his making disrespectful comments during the briefings of Lieutenant Wills's squad." The ALJ then stated that "it cannot reasonably be inferred from the evidence presented that Lieutenant Wills's purpose in reminding Officer Creelman of his remark was other than to illustrate Lieutenant Wills's point that Officer Creelman had been disrespectful during briefings on more than one occasion."

13. The ALJ's finding that these facts were uncontroverted is refuted by Sergeant Luciano's testimony. Sergeant Luciano testified that he was sitting with Officer Creelman in front of Lieutenant Wills' desk when Wills voiced his displeasure about Creelman's behavior at the line-up. Lieutenant Wills was displeased because Creelman make a point of stating that he did not want to support Bradshaw.

Petitioner's Exception Number 6

14. The Commission agrees with and accepts Petitioner's sixth exception wherein the Petitioner establishes that the ALJ mislabeled the legal conclusions set forth in paragraphs 30 and 33 as findings of fact. Respondent was charged with violating Section 104.31(1)(a), Florida Statutes, which precludes a person from using his official authority 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.

15. When the ALJ concluded that Respondent's "purpose" in telling his officers about the rally was not to coerce or influence anyone present in the briefing room, and when the ALJ concluded that Respondent told Officer Creelman that he would not forget the earlier anti-Bradshaw comment for the purpose of illustrating another occasion in which Officer Creelman was disrespectful at a line-up, the ALJ was making the ultimate conclusion about whether Respondent had committed the violations charged. The Commission is of the opinion that such findings are legal conclusions and, therefore, finds that the ALJ mislabeled them as findings of fact.

Petitioner's Exceptions Numbers 7, 8, and 9

16. The Commission rejects Petitioner's seventh, eighth, and ninth exceptions. When this matter originally came before the Commission for probable cause, when it went to hearing pursuant to Section 120.57(1), Florida Statutes, and at all times prior to February 23, 2006, the Commission applied the definition of "willful violations" as appears in Section 106.37, Florida Statutes, to the term "willful" as it appears in Section 106.25(3), Florida Statutes, which requires all violations of Chapters 104 and 106 to be "willful" for purposes of Commission

jurisdiction.¹

17. On February 23, 2006, prior to the 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). In Fugate, the Court found that the Commission was precluded from applying the Section 106.37 definition of "willful violations" to Chapter 104 violations because the language of Section 106.37 itself made it applicable only to violations of Chapter 106.

18. This case proceeded through probable cause and through the hearing process based on the predicate that Respondent's "willful" violations of provisions of Chapter 104 were willful as defined in Section 106.37. However, since the issuance of the Fugate opinion, the Commission is precluded from making such a finding. Although the Commission believes that Section 104.31(1)(a) was designed to prevent the very conduct in which

¹Section 106.37, Florida Statutes, defines a "willful violation" as committing "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

Lieutenant Wills engaged, it is compelled to reject Petitioner's seventh, eight, and ninth exception.

CONCLUSIONS

The Commission accepts the ALJ's Findings of Fact and Conclusions of Law, except as modified by the rulings on Petitioner's exceptions set forth above. The Commission, therefore, based on the foregoing, DISMISSES both counts of Section 104.31(1)(a), Florida Statutes, as 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 26th day of June 2006, in Tallahassee, Florida.

Chance Irving

Chance Irving, Chair
Florida Elections Commission

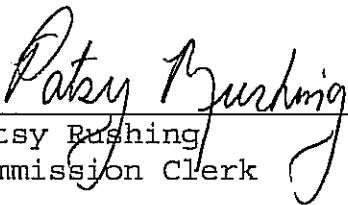
NOTICE OF RIGHT TO APPEAL

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.

constitute a violation of this chapter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: counsel for Respondent, G. Hal Johnson, Esq., Florida Police Benevolent Association, Inc., Post Office Box 11239, Tallahassee, Florida 32301; and Eric Lipman, Assistant General Counsel, 107 W. Gaines Street, Collins Building, Suite 224, Tallahassee, Florida 32399-0250 this 26th day of June, 2006.



Patsy Bushing
Commission Clerk