

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ELECTIONS COMMISSION,)
)
 Petitioner,)
)
vs.) Case No. 05-1352
)
THOMAS L. WILLS, JR.,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on August 10 and 11, 2005, with the parties appearing by video teleconference in West Palm Beach, Florida, before Patricia M. Hart, the duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

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For Respondent: G. Hal Johnson, Esquire
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STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the Order of Probable Cause entered March 4, 2005, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In an Order of Probable Cause entered March 4, 2005, the Florida Elections Commission ("FEC") notified Thomas L. Wills, Jr., a lieutenant with the City of West Palm Beach Police Department, that it had found probable cause to charge him with two violations of Florida's election laws. In Count 1, the FEC alleged that Lieutenant Wills asked employees under his supervision to attend a political rally for Ric Bradshaw, a candidate for Palm Beach County Sheriff; in Count 2, the FEC alleged that Lieutenant Wills threatened a police officer because the officer had, a week earlier, made a comment about joining a group of Bradshaw's opponents at the rally. In both Counts 1 and 2 of the Order of Probable Cause, the FEC charged that Lieutenant Wills had used "his official authority or influence for the purpose of attempting to coerce or influence another persons' vote or affecting the results of an election," in violation of Section 104.31(1)(a), Florida Statutes (2003).¹ Lieutenant Wills timely filed an Amended Petition for Formal Administrative Hearing Involving Disputed Issues of Fact, and the FEC transmitted the petition to the Division of

Administrative Hearings for assignment of an administrative law judge.

The final hearing was held on August 10 and 11, 2005. The FEC presented the testimony of Officer Paul Creelman, Lieutenant Wills, Captain Maria Olsen, and Captain Allen Wesley Ortman; Petitioner's Exhibits 9 through 11 were offered and received into evidence. Lieutenant Wills testified in his own behalf, and Respondent's Exhibits 12 through 15 were offered and received into evidence. In addition, Joint Exhibits 1 through 7 and 16 through 24 were offered and received into evidence.² Joint Exhibits 16 through 24 consist of the transcripts of the depositions of Sergeant Joseph Luciano, Sergeant John Kelly, Sergeant Louis Peneque, Officer Bryan Williams, Officer Ronald Robbins, Lieutenant Daniel Sargent, Captain Brett Patterson, Sergeant John Riddle, and Officer Kevin Harrell. The deposition transcripts were offered and received in lieu of the live testimony of these witnesses. Finally, official recognition was given to the Order of No Probable Cause entered by the FEC in a case involving William McCray, FEC 04-214; the Order of No Probable Cause entered by the FEC in a case involving Calvin Bryant; and the Final Order of the FEC in Florida Elections Commission v. John J. Fugate, DOAH Case No. 04-1178 (February 19, 2005).

The two-volume transcript of the proceedings was filed with the Division of Administrative Hearings on September 7, 2005. The parties timely filed proposed findings of fact and conclusions of law, and these proposals have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the stipulation of the parties, and on the entire record of these proceedings, the following findings of fact are made:

1. The FEC is the statutory entity that is responsible for investigating complaints and enforcing Florida's election laws, Chapters 104 and 106, Florida Statutes. See § 106.25, Fla. Stat.

2. Lieutenant Wills has been employed by the West Palm Beach Police Department for approximately 23 years and has served as a lieutenant for approximately three years.

3. At the time he was promoted to lieutenant, Lieutenant Wills was serving as the president of the West Palm Beach Police Benevolent Association, Inc. ("PBA"), which is a police union for officers, sergeants, and lieutenants employed by the West Palm Beach Police Department. Lieutenant Wills resigned this position when he was promoted. In May 2004, the

time material to this proceeding, Lieutenant Wills served as a representative to the PBA.

4. In May 2004, Lieutenant Wills worked the night shift, from 5:00 p.m. to 6:30 a.m. He supervised a uniformed patrol squad of 10-to-12 police officers and two sergeants. The squad was divided into two units; the first night-shift unit began work at 5:00 p.m., and the second night-shift unit began work at 7:00 p.m. Sergeant Riddle supervised the first night-shift unit, and Sergeant Kapper supervised the second night-shift unit, under Lieutenant Wills's command.

5. The police officers in Lieutenant Wills's squad were required to attend a briefing or "line-up" before they began their patrol or other duties. During the line-up, the officers were briefed on arrest information, bulletins, training, work assignments, and other employment-related matters. The briefings were conducted by Sergeant Kelly, an administrative sergeant who was not under the direct supervision of Lieutenant Wills. Lieutenant Wills often participated with Sergeant Kelly in conducting the briefings for his squad.

6. Officers in the first night-shift unit went on duty at 5:00 p.m., and the briefing for this shift began promptly at 5:00 p.m.; an officer was considered late for work if he or she arrived in the briefing room after 5:00 p.m.

7. The officers in Lieutenant Wills's first night-shift unit routinely began congregating in the briefing room 15 or 20 minutes before the 5:00 p.m. briefing began. They watched television; talked about many different topics, including politics; and generally interacted informally until briefings began at 5:00 p.m.

8. When a police officer was on the police department premises, the officer was expected to obey a direct order from a superior officer, even if he or she was not on duty. If an officer was given an order by a superior officer to carry out work-related duties prior to the beginning of his or her shift, the officer was eligible for overtime pay for the time spent performing these work-related duties. An off-duty officer was not, however, expected to obey anything but a direct order from a superior officer.

9. In an e-mail dated May 4, 2004, Sergeant Peneque, who was the president of the PBA, advised that the PBA planned to endorse Ric Bradshaw, a former chief of the West Palm Beach Police Department, as a candidate for Palm Beach County Sheriff and that the endorsement would be announced at a press conference to be held on May 25, 2004. Sergeant Peneque related in the e-mail that the "chief" was asking that the members of the police department support him by coming to the press conference. Sergeant Peneque sent this e-mail out on the West

Palm Beach Police Department "Lotus notes" e-mail system, and it appeared on all of the police department computers.

10. The PBA routinely sent e-mails regarding union business through the police department e-mail system, and the information was generally disseminated to the assembled police officers prior to the start of shift briefings.

11. On May 10, 2004, about 10 or 15 minutes before the beginning of the briefing for the 5:00 p.m. shift, Sergeant Kelly read Sergeant Peneque's e-mail to the officers who had congregated in the briefing room. There were about five or six officers present at that time, and few of them indicated to Sergeant Kelly that they would attend the Bradshaw rally. Sergeant Kelly was upset by this lackluster response and made several remarks to the officers in the briefing room to the effect that they should support "Chief" Bradshaw, that Bradshaw had hired most of them, and that they should show their loyalty by supporting his candidacy for sheriff.

12. Lieutenant Wills came into the briefing room in time to hear Sergeant Kelly's remarks about the lack of support for the Bradshaw candidacy, between 5 and 10 minutes before 5:00 p.m. By that time, more officers had assembled in the briefing room. Before the 5:00 p.m. briefing began, Lieutenant Wills read the PBA e-mail to the officers in the briefing room. Lieutenant Wills asked how many officers planned to attend the

Bradshaw rally. Lieutenant Wills was disappointed when only a few officers indicated that they were going to attend the rally, and he said something to the effect that "Chief" Bradshaw had done a lot for the West Palm Beach Police Department.³

13. A police officer named Paul Creelman spoke up when Lieutenant Wills told the assembled officers about the Bradshaw rally, after one of the officers in the briefing room made a remark that a group of anti-Bradshaw officers were planning to show up for the rally. Officer Creelman remarked, "What time do they get there."⁴ Officer Creelman meant his remark as a joke.

14. At the time he made the remark, Officer Creelman was sitting in the back of the briefing room; he was eavesdropping on the discussion between Lieutenant Wills and the officers at the front of the briefing room but was not one of the officers engaged in the discussion with Lieutenant Wills.

15. Lieutenant Wills heard Officer Creelman's remark, but he did not respond to the remark. He went on to discuss other matters.

16. In May 2004, Officer Creelman was assigned to the Neighborhood Enhancement Team ("NET"). Officer Creelman and the other NET officers were not members of Lieutenant Wills's squad and attended the 5:00 p.m. briefing as guests, primarily to gather officer safety information. Sergeant Luciano was the sergeant in charge of the night-shift NET officers, and

Lieutenant Sargent supervised Sergeant Luciano and the NET officers. Lieutenant Wills had no direct supervisory authority over Officer Creelman.

17. Officer Creelman was present at the 5:00 p.m. briefing for Lieutenant Wills's squad on May 17, 2004. During the briefing, Sergeant Kelly discussed problems that the squad was having with officers abusing sick leave by calling in sick when they wanted a few days off. Lieutenant Wills joined the discussion, and he was emphatic that he would not tolerate the abuse of sick leave by the officers in his squad because it left the squad short-handed and caused safety concerns. Lieutenant Wills discussed the police department's policies regarding sick leave, and, at one point, Lieutenant Wills stated that he had been the president of the PBA; that he knew how things worked; and that he would "fuck over" anyone who "fucked" with him about sick leave.

18. Officer Creelman interjected a comment under his breath, saying "That's sad."⁵ Lieutenant Wills asked Officer Creelman to repeat his comment, and Officer Creelman did so. Lieutenant Wills demanded to know what Officer Creelman meant by the remark, and Officer Creelman told Lieutenant Wills that he considered his comment about using what he had learned as PBA president against his subordinate officers to be inappropriate.

19. Lieutenant Wills was angry about Officer Creelman's remark and told Sergeant Luciano that he wanted to see him and Officer Creelman in his office after the briefing. When Officer Creelman and Sergeant Luciano came into his office, Lieutenant Wills expressed his anger about what he considered Officer Creelman's derogatory and disrespectful conduct towards him during the briefing. Lieutenant Wills told Officer Creelman that he did not want him "mouthing off" during his squad's briefing and that he thought Officer Creelman was a "smart aleck." To make the point that the incident on May 17, 2004, was not the first time Officer Creelman had "smarted off" to him, Lieutenant Wills told Officer Creelman that he had not forgotten his remark about the anti-Bradshaw rally. Lieutenant Wills then told Officer Creelman and Sergeant Luciano to leave his office.

20. According to Officer Creelman, the reason Lieutenant Wills called him into his office was to address Officer Creelman's conduct in making inappropriate comments during the briefing of Lieutenant Wills's squad.⁶ Officer Creelman described Lieutenant Wills's manner during the time he was in Lieutenant Wills's office as "normal" and stated that Lieutenant Wills spoke in a low tone of voice.⁷

21. In a memorandum dated May 18, 2004, to Assistant Chief Van Reeth, Officer Creelman set out his version of the events

that took place on May 10, 2004, regarding Lieutenant Wills's discussion of the Bradshaw rally; his version of Lieutenant Wills's conduct during the May 17, 2004, briefing; and his version of the meeting in Lieutenant Wills's office on May 17, 2004.⁸ In the May 18, 2004, memorandum, Officer Creelman requested permission to speak with Assistant Chief Van Reeth and the Chief of Police "so that we can all resolve this matter."

22. On May 21, 2004, Officer Creelman filed a complaint against Lieutenant Wills regarding "the manner in which the Lieutenant spoke to officers in briefing." Officer Creelman's complaint was that Lieutenant Wills used "inappropriate language." A copy of Officer Creelman's May 18, 2004, memorandum was attached to the complaint form.

23. Captain Olsen conducted the investigation of Officer Creelman's complaint against Lieutenant Wills, and she concluded that Lieutenant Wills used inappropriate language during the May 17, 2004, briefing when discussing the abuse of sick leave by members of his squad. Lieutenant Wills was disciplined for this misconduct with a verbal reprimand documented in his personnel file.

24. Captain Olsen concluded after her investigation that Lieutenant Wills read the PBA e-mail before the May 10, 2004, briefing began, when Lieutenant Wills and the police officers he supervised were off duty. Because of this, Captain Olsen

concluded that Lieutenant Wills did not violate any of the rules or policies of the West Palm Beach Police Department with respect to his remarks about the Bradshaw rally.

25. Neither Lieutenant Wills nor any other member of the West Palm Beach Police Department is expected to enforce Florida's election laws as part of their duties as police officers, and no training with respect to the provisions of Florida's election laws is provided for police officers by the West Palm Beach Police Department or the Florida Department of Law Enforcement. Lieutenant Wills is not familiar with the provisions of Florida's election laws in his professional capacity as a law enforcement officer.

26. Lieutenant Wills has never run for public office or served as a committee chair, a committee treasurer, or a campaign treasurer for a candidate in a municipal, county, or state political campaign. Lieutenant Wills is not familiar with the provisions of Florida's election laws in his personal, individual capacity.

27. Lieutenant Wills was provided with a copy of the rules and regulations of the West Palm Beach Police Department, and he was aware in May 2004 that it was against the police department's rules and regulations for an officer to engage in or discuss political activities during work hours.

28. Notwithstanding this policy, Bradshaw's candidacy for Palm Beach County Sheriff generated a lot of interest among the police officers and was a topic of general discussion at the police department, even when officers were on duty, because Bradshaw had been the Chief of the West Palm Beach Police Department until he retired in early 2004.

Summary

29. The evidence presented by the FEC is not sufficient to establish with the requisite degree of certainty that Lieutenant Wills willfully used his supervisory position, authority, or influence for the purpose of coercing or influencing the vote of any of the officers present during the discussion of Bradshaw's candidacy before the May 10, 2004, briefing or of affecting the result of the election for Palm Beach County Sheriff.

30. The evidence presented reflects that none of the officers present in the briefing room prior to the May 10, 2004, briefing had a clear memory of the specific statements made by Lieutenant Wills, and the evidence is not sufficiently persuasive to support a finding of fact that Lieutenant Wills told the police officers assembled in the briefing room that they should support Bradshaw's candidacy for sheriff or that they should attend the Bradshaw rally. It cannot reasonably be inferred from the evidence presented that Lieutenant Wills's

purpose in reading the PBA e-mail or in making the statement to the officers that Bradshaw had done a lot for the West Palm Beach Police Department was to coerce or influence anyone present in the briefing room to attend the Bradshaw rally, to vote for Bradshaw, or to effect the results of the election for sheriff.⁹

31. Even if the evidence were sufficient to support a finding that Lieutenant Wills's purpose was to coerce or influence the officers to attend the Bradshaw rally or to support or vote for Bradshaw for sheriff, the evidence presented by the FEC is not sufficient to support a finding that Lieutenant Wills was aware that his actions violated Florida's elections laws or that he acted in disregard of the law. Evidence that Lieutenant Wills knew that the West Palm Beach Police Department rules and regulations prohibited him from engaging in political activities while on duty is not sufficient to support an inference that Lieutenant Wills should have been on notice that he should consult Florida's election laws prior to reading the PBA e-mail or making any remarks about Bradshaw's candidacy for sheriff.

32. Finally, the evidence presented by the FEC is not sufficient to support a finding that Lieutenant Wills's purpose in telling Officer Creelman on May 17, 2004, that he remembered his remark about the anti-Bradshaw rally was to coerce or

influence Officer Creelman's vote for sheriff or the affect the result of the election for sheriff. It is uncontroverted that Lieutenant Wills's 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, and 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.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the subject matter of these proceedings and of the parties pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2005).

34. Section 104.31, Florida Statutes, provides in pertinent part:

(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.

35. On its face, Section 104.31(1)(a), Florida Statutes, requires proof that a public employee (1) "use his or her official authority or influence"; (2) "for the purpose of"; (3) "interfering with an election" or "coercing or influencing another person's vote" or "affecting the result" of an election. Section 106.25(3), Florida Statutes, adds an additional element to the proof required to establish a violation of Section 104.31(1)(a), Florida Statutes. Section 106.25(3), Florida Statutes, provides: "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."

36. "Willful performance of an act" is defined in Section 106.37, Florida Statutes, which provides:

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.

The definition of "willful" found in Section 106.37, Florida Statutes, applies to violations of Section 104.31, Florida Statutes.

37. The FEC has the burden of proving by clear and convincing evidence that Lieutenant Wills violated Section 104.31(1)(a), Florida Statutes. See Diaz de la Portilla v. Florida Elections Commission, 857 So. 2d 913 (Fla. 3d DCA 2003).

38. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court explained:

[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).

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

various pronouncements on clear and convincing evidence and observed:

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 trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davie, 645 So. 2d 398, 404 (Fla. 1994).

39. Based on findings of fact herein, the FEC has failed to prove by clear and convincing evidence that Lieutenant Wills willfully used his authority as a police lieutenant for the purpose of influencing another person's vote in the election for Palm Beach County Sheriff or for the purpose of affecting that election either in his remarks before the briefing on May 10, 2004, or in his remark to Officer Creelman during the meeting in Lieutenant Wills's office on May 17, 2004.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Elections Commission

enter a final order dismissing in its entirety the Order of Probable Cause entered against Thomas L. Wills on March 4, 2005.

DONE AND ENTERED this 2nd day of December, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of December, 2005.

ENDNOTES

^{1/} All references to the Florida Statutes herein are to the 2003 edition unless otherwise indicated.

^{2/} It is noted that all of the exhibits received into evidence in this case, except for the deposition transcripts, were consecutively numbered by the parties and included in a single notebook. For ease in handling the record, the exhibits have been separated into Joint Exhibits, Petitioner's Exhibits, and Respondent's Exhibits.

^{3/} Lieutenant Wills's testimony regarding his remarks about the Bradshaw rally is credited. A careful review of the evidence reveals that none of the witnesses precisely and distinctly remembered the sequence of events that occurred before the May 10, 2004, briefing or the statements Lieutenant Wills made during the discussion relating to Bradshaw's candidacy. Sergeant Kelly read the PBA e-mail before Lieutenant Wills entered the briefing room. By his own admission, Sergeant Kelly

made several strongly worded comments about the loyalty that the police officers owed to Bradshaw, but his testimony indicated that he did not distinctly remember Lieutenant Wills's specific comments. In addition, the persuasiveness of the testimony of other officers who attributed to Lieutenant Wills the comments that Bradshaw hired them and that they should support Bradshaw's candidacy is significantly diminished because these officers did not appear to distinguish between the comments made by Sergeant Kelly and the comments made by Lieutenant Wills.

⁴/ Transcript at page 94.

⁵/ Transcript at page 89.

⁶/ Transcript at page 107.

⁷/ Transcript at page 91.

⁸/ The FEC offered Officer Creelman's May 18, 2004, memorandum into evidence as Petitioner's Exhibit 10. Lieutenant Wills objected on the grounds that the memorandum was hearsay and that the contents of the memorandum were irrelevant to the issues presented in the Order of Probable Cause. After hearing argument from counsel and requesting a written memorandum on the issue of whether the memorandum would be admissible over objection in a civil proceeding, the undersigned received the memorandum into evidence subject to the limitations on the use of hearsay in Section 120.57(1)(c), Florida Statutes, which provides: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

The FEC argued in its Proposed Recommended Order that the memorandum was admissible over a hearsay objection in a civil action because the statements attributed to Lieutenant Wills by Officer Creelman in the memorandum fell within exceptions to the general rule that hearsay is inadmissible. See § 90.802, Fla. Stat. The FEC argued that the statements were admissions by Lieutenant Wills; that the statements were excited utterances on the part of Lieutenant Wills; and that the statements were statements by Lieutenant Wills relating to his mental, emotional, or physical condition. The FEC's arguments that the statements attributed by Officer Creelman to Lieutenant Wills in the memorandum are admissible as exceptions to the hearsay rule are, however, rejected.

It is apparent from the discussion of counsel regarding the admissibility of Petitioner's Exhibit 10 (see transcript at pages 79-83), the arguments made by the FEC in its Proposed Recommended Order, and the testimony elicited from Officer Creelman that the FEC's intent in introducing the memorandum into evidence was to prove that Lieutenant Wills uttered the statements attributed to him, not that the statements were true. The statements attributed to Lieutenant Wills in the memorandum do not, therefore, constitute hearsay because hearsay is defined in Section 90.801, Florida Statutes, as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Emphasis added.)

There is, however, an additional consideration with respect to the admissibility of Petitioner's Exhibit 10 over a hearsay objection. The memorandum itself is an out-of-court statement made by Officer Creelman that the FEC offered to prove that the matters asserted in the memorandum are true, that is, that Lieutenant Wills made the statements and conducted himself in the manner attributed to him in the memorandum. To be considered in this proceeding as independent evidence of the matters asserted in the memorandum, the memorandum must fall within an exception to the hearsay rule. This issue has not been addressed by the FEC, but it would appear that the only exception to the hearsay rule that could possibly apply is the exception relating to recorded recollections.

Section 90.803, Florida Statutes, provides that the following is one type of out-of-court statement that is not inadmissible as hearsay:

(5) RECORDED RECOLLECTION.--A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted, but no such memorandum or record is admissible as an exhibit unless offered by an adverse party.

In this case, the FEC failed to prove the predicate to the admissibility of the memorandum because it did not establish that Officer Creelman had insufficient recollection of the events in May 2004 to testify "fully and accurately" to the incidents recorded in the memorandum. Furthermore, the memorandum itself is not admissible into evidence pursuant to Section 90.803(5), Fla. Stat., because it was not offered by Lieutenant Wills, the adverse party.

Even though the memorandum would not be admissible over objection in a civil action, Section 120.57(1)(c), Florida Statutes, only prohibits the use of the memorandum as independent support for a finding of fact. The contents of the memorandum can, however, be considered if the matters asserted in the memorandum supplement or explain other, non-hearsay evidence in the record of this proceeding. In this respect, the material acts and statements attributed to Lieutenant Wills in the memorandum are not supported by other evidence in the record.

Even if the May 18, 2004, memorandum were admissible over objection in a civil action and could itself form the basis for a finding of fact, the memorandum has virtually no evidentiary value in this proceeding because the memorandum lacks credibility in all material respects: Officer Creelman's testimony at the hearing was inconsistent in a number of particulars with the assertions he made in the memorandum; Officer Creelman's testimony regarding Lieutenant Wills's comments about Bradshaw and the rally was equivocal and prefaced by "I believe" and "he said something to the effect of," despite having been asked several times during his testimony to read and re-read portions of the May 18, 2004, memorandum; and Officer Creelman wrote the memorandum because he believed that Lieutenant Wills had reported "the incident" to Assistant Chief Van Reeth.

⁹/ None of the police officers who were present in the briefing room before the May 10, 2004, briefing and whose testimony was presented as evidence in this proceeding felt that his or her decision to support or not support Bradshaw was affected by Lieutenant Wills's comments.

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.