

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ELECTIONS COMMISSION,)
)
 Petitioner,)
)
vs.) Case Nos. 08-2765
) 08-3375
CHARLES J. GRAPSKI,)
)
 Respondent.)

)

FINAL ORDER

A duly-noticed final hearing was held in these cases by Administrative Law Judge T. Kent Wetherell, II, on March 30, 2009, in Tallahassee, Florida.

APPEARANCES

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

For Respondent: No appearance

STATEMENT OF THE ISSUE

The issue is whether Respondent committed the violations alleged in the Orders of Probable Cause, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

The Florida Elections Commission (Commission) determined in an Order of Probable Cause dated June 1, 2007, that there was

probable cause to believe that Respondent violated Section 106.07, Florida Statutes (2006), by failing to timely file a quarterly campaign treasurer's report for the 2006 election in which he was a candidate for state office. On June 11, 2008,^{1/} this matter was referred to the Division of Administrative Hearings (DOAH) and designated DOAH Case No. 08-2765.

The Commission determined in an Order of Probable Cause dated May 30, 2008, that there was probable cause to believe that Respondent violated Section 106.07, Florida Statutes (2007), by failing to file two campaign treasurer's reports and by filing an incomplete report for the 2007 election in which he was a candidate for local office. On July 14, 2008, this matter was referred to DOAH and designated DOAH Case No. 08-3375.

The final hearing in DOAH Case No. 08-2765 was initially scheduled for August 28, 2008. The hearing was subsequently rescheduled for September 29, 2008, based upon the Commission's motion.

The final hearing in DOAH Case No. 08-3375 was initially scheduled for October 7, 2008. The hearing was subsequently rescheduled for October 13, 2008.

On September 11, 2008, the cases were consolidated "for all further proceedings, including the final hearing scheduled for September 29, 2008." The hearing was subsequently rescheduled

for October 28 and 29, 2008, based upon Respondent's unopposed motion.

Respondent's motion to strike two counts of the Order of Probable Cause in DOAH Case No. 08-3375 was denied in an Order dated October 6, 2008. Reconsideration of that Order was denied in an Order dated October 16, 2008.

On October 24, 2008, the final hearing was cancelled because the Commission informed the undersigned in writing that Respondent was being held in jail without bond on several criminal charges. On December 1, 2008, the cases were placed into abeyance pending Respondent's release from jail. The cases remained in abeyance until March 2, 2009, when the Commission advised the undersigned in a status report that Respondent had been released from jail.

On March 3, 2009, a Notice of Hearing was issued scheduling the final hearing for March 30, 2009. The Notice of Hearing was mailed to Respondent at his address of record, Post Office Box 190, Alachua, Florida 32616.

The final hearing was held as scheduled. Respondent did not appear at the hearing. The Commission presented the testimony of Erin Nesmith, Malcolm Chellman, Diane Morgan, Alan Henderson, and Donna Maphurs. The Commission's Exhibits 1 through 5 were received into evidence.

No transcript of the final hearing was filed. The Commission presented an oral closing argument in lieu of filing a proposed final order.

FINDINGS OF FACT

1. Respondent was a candidate for election to the Florida House of Representatives in 2006.

2. The Division of Elections (Division) was the filing office for that election.

3. On March 27, 2006, the Division sent a letter to Respondent acknowledging his candidacy and informing him of the filing deadline for the first campaign treasurer's report. The letter also informed Respondent that all of the Division's publications, including the "2006 Calendar of Reporting Dates," were available on the Division's website.

4. The filing deadline for the campaign treasurer's report covering the second quarter of 2006 (hereafter "Q2 report") was July 10, 2006.

5. Respondent did not file his Q2 report by that deadline.

6. On July 12, 2006, the Division sent Respondent a letter informing him that his Q2 report had not been received. The Division sent a second letter (by certified mail) on October 17, 2006, and the Commission sent several additional follow-up certified letters in November and December 2006.

7. Respondent filed his Q2 report on February 9, 2007, which is 214 days after the deadline.

8. Respondent was a candidate for election to the Alachua City Council in 2007.

9. The City Clerk was the filing officer for that election.

10. Respondent submitted his campaign paperwork to the City Clerk on February 23, 2007.^{2/} The paperwork included a "Statement of Candidate" form signed by Respondent stating that he "received, read, and understand[s] the requirements of Chapter 106, Florida Statutes."

11. On February 23, 2007, the City Clerk's office provided Respondent a copy of Chapters 104 and 106, Florida Statutes, a copy of the "2006 Candidate and Campaign Treasurer's Handbook," and a calendar of the election dates. The handbook contained the applicable filing deadlines for the campaign treasurer's reports that Respondent was required to file.

12. The first report was due on March 14, 2007, and covered the period between the candidate's filing date and March 14.

13. The second report was due on March 23, 2007, and covered the period of March 15 to March 23.

14. The third report was due on April 6, 2007, and covered the period of March 24 to April 6.

15. Respondent did not file the first report even though he had contributions and expenditures during the period covered by the report.

16. On March 15, 2007, the City Manager sent a certified letter to Respondent informing him that his first campaign treasurer's report had not been received. The letter advised Respondent that fines had started to accrue.

17. Respondent did not file the second report, nor did he file a "waiver report" reflecting that he did not have any contributions or expenditures during the period covered by the report.

18. On March 27, 2007, the City Manager sent a certified letter to Respondent informing him that his second campaign treasurer's report had not been received. The letter advised Respondent that fines were accruing.

19. On April 9, 2007, Respondent filed an untimely and incomplete report for the third reporting period. The report included only the itemized contribution page and the itemized expenditure page; it did not include the required summary page that contains the candidate's certification of the report's truth, correctness, and completeness.

20. On April 9, 2007, the City Manager sent a certified letter to Respondent informing him that his third campaign

treasurer's report was incomplete. The letter gave Respondent three days to submit a complete report.

21. To date, Respondent has not filed the first or second reports or a complete third report.

22. In each of the circumstances described above, Respondent was aware of the requirement to file a complete campaign treasurer's report as well as the deadline for doing so by virtue of having been provided copies of the applicable laws and the candidate's handbook.

23. Respondent's failure to file complete and timely reports was clearly more than an oversight. Indeed, even though Respondent was sent certified letters by the filing officer on each occasion advising him that the reports had not been received, he did not make any subsequent filings with the City Clerk and it took him over six months to file his Q2 report with the Division.

24. Respondent was provided notice of the date, time, and location of the final hearing, through a Notice of Hearing mailed to his address of record.

25. Respondent failed to appear at the final hearing despite having been provided proper notice of the hearing.

CONCLUSIONS OF LAW

26. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Section 106.25(5), Florida Statutes (2008).

27. The Commission has the burden to prove the violations alleged in the Orders of Probable Cause by clear and convincing evidence. See Diaz de la Portilla v. Fla. Elections Comm'n, 857 So. 2d 913, 917 (Fla. 3d DCA 2003).

28. The clear and convincing standard of proof is greater than the preponderance of the evidence standard that applies in most civil cases, but it is less than the beyond a reasonable doubt standard that applies in criminal cases; it 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 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 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).

29. The Commission must not only prove that Respondent violated a provision of the campaign finance laws, but also that the act or omission that resulted in the violation was "willful." See § 106.25(3), Fla. Stat. (2008); Diaz de la Portilla, 857 So. 2d at 916-17.

30. Willfulness is a question of fact. See § 106.25(3), Fla. Stat. (2008); McGann v. Fla. Elections Comm'n, 803 So. 2d 763, 764 (Fla. 1st DCA 2001).

31. The determination of willfulness in this case is governed by the definition in Section 106.37, Florida Statutes (2006), which was in effect at the time of the acts and omissions that gave rise to the Orders of Probable Cause.^{3/} See Diaz de la Portilla, 857 So. 2d at 917 n.2; McGann, 803 So. 2d at 764.

32. Section 106.37, Florida Statutes (2006), provided:

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.

33. The Commission alleged that Respondent violated Subsections (1), (5), and (7), of Section 106.07, Florida Statutes (2006 and 2007), which provide:

(1) Each campaign treasurer designated by a candidate . . . shall file regular reports of all contributions received, and all expenditures made, by or on behalf of such candidate Reports shall be filed on the 10th day following the end of each calendar quarter from the time the campaign treasurer is appointed, except that, if the 10th day following the end of a calendar quarter occurs on a Saturday, Sunday, or legal holiday, the report shall be filed on the next following day which is not a Saturday, Sunday, or legal holiday. Quarterly reports shall include all contributions received and expenditures made during the calendar quarter which have not otherwise been reported pursuant to this section.

* * *

(5) The candidate and his or her campaign treasurer, in the case of a candidate, or the political committee chair and campaign treasurer of the committee, in the case of a political committee, shall certify as to the correctness of each report; and each person so certifying shall bear the responsibility for the accuracy and veracity of each report. . . .

* * *

(7) Notwithstanding any other provisions of this chapter, in any reporting period during which a candidate, political committee, or committee of continuous existence has not received funds, made any contributions, or expended any reportable funds, the filing of the required report for that period is waived. However, the next report filed must specify that the report covers the entire period between the last submitted report and the report being filed, and any candidate, political committee, or committee of continuous existence not reporting by virtue of this subsection on

dates prescribed elsewhere in this chapter shall notify the filing officer in writing on the prescribed reporting date that no report is being filed on that date.

34. The Commission met its burden to prove that Respondent violated these statutory provisions.

35. The evidence clearly and convincingly establishes that (1) Respondent failed to timely file the Q2 report due on July 10, 2006, for the 2006 House of Representatives election; (2) Respondent failed to file the campaign treasurer's report due on March 14, 2007, for the 2007 City Council election; (3) Respondent failed to file the campaign treasurer's report due on March 23, 2007, for the 2007 City Council election, or a "waiver report" for that period; (4) Respondent filed an incomplete campaign treasurer's report for the third reporting period for the 2007 City Council election; and (5) Respondent's failure to file these reports was willful, as defined in Section 106.37, Florida Statutes (2006).

36. Each violation that was proven was contained in a separate count of the Orders of Probable Cause, and, therefore, a separate fine may be imposed for each violation. See Diaz de la Portilla, 857 So. 2d at 924; McGann, 803 So. 2d at 765-66.

37. Section 106.265(1), Florida Statutes (2006, 2007, and 2008), provides:

(1) The commission is authorized upon the finding of a violation of this chapter . . .

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 . . . ; and

(d) Whether the person . . . has shown good faith in attempting to comply with the provisions of this chapter

38. Properly reporting campaign contributions and filing campaign treasurer's reports go to the heart of the campaign finance laws, and, as a result, a candidate's willful failure to comply with the statutory reporting requirements justifies the imposition of the maximum fine of \$1,000 per count. See, e.g., Beardslee v. Fla. Elections Comm'n, 962 So. 2d 390 (Fla. 5th DCA 2007) (affirming \$1,000 fine for candidate's willful failure to report a \$143 contribution).

39. Respondent has the burden to prove the existence of any mitigating circumstances that would justify imposition of a lesser fine. See Diaz de la Portilla, 857 So. 2d at 925.

40. No mitigating evidence was presented at the final hearing.

ORDER

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

ORDERED that:

1. Respondent is guilty of:

(a) willfully violating Section 106.07(1), Florida Statutes (2006), as alleged in Count 1 of the Order of Probable Cause dated June 1, 2007;

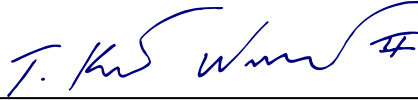
(b) willfully violating Section 106.07(1), Florida Statutes (2007), as alleged in Count 1 of the Order of Probable Cause dated May 30, 2008;

(c) willfully violating Section 106.07(7), Florida Statutes (2007), as alleged in Count 2 of the Order of Probable Cause dated May 30, 2008; and

(d) willfully violating Section 106.07(5), Florida Statutes (2007), as alleged in Count 3 of the Order of Probable Cause dated May 30, 2008.

2. Respondent is assessed an administrative fine of \$4,000 (\$1,000 for each count), which must be paid to the Florida Elections Commission within 30 days of the date of this Final Order.

DONE AND ORDERED this 31st day of March, 2009, in
Tallahassee, Leon County, Florida.



T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of March, 2009.

ENDNOTES

^{1/} An explanation of the more than one-year delay between the first Order of Probable Cause and the referral of the case to DOAH is contained in the Motion for Summary Final Order filed by the Commission on July 11, 2008.

^{2/} The record also includes campaign paperwork submitted by Respondent on March 7, 2007. The February 23 paperwork identifies the office that Respondent was seeking as "Commissioner Group 2," whereas the March 7 paperwork identifies the office that Respondent was seeking as "Commissioner Group 1." An explanation of these different sets of paperwork is contained in Exhibit 2, at page P39.

^{3/} Section 106.37, Florida Statutes, was repealed effective January 1, 2008. See Ch. 2007-30, Laws of Fla., at §§ 51, 57. Because the statute was still in effect at the time of the acts and omissions that gave rise to the Orders of Probable Cause, it is unnecessary to consider whether, in light of the repeal of Section 106.37, Florida Statutes, it is appropriate to resort to case law or other sources to define "willful" for purposes of Chapter 106, Florida Statutes. Cf. Fugate v. Fla. Elections Comm'n, 924 So. 2d 74, 75 (Fla. 1st DCA 2006) ("In the absence of a statute or properly promulgated rule defining the term

['willful' for purposes of Chapter 104, Florida Statutes], the case-law derived definition used by the ALJ was reasonable.").

COPIES FURNISHED:

Charles J. Grapski
Post Office Box 190
Alachua, Florida 32616

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

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

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

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.