STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ELECTIONS COMMISSION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-1587
	)	
ROBERT H. SHARKEY,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on June 23, 2011, by video teleconferencing with sites in Fort Myers and Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Eric M. Lipman, Esquire
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For Respondent: Stephen Hunter Johnson, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Robert H. Sharkey ("Sharkey"), violated section 104.271(2), Florida

Statutes (2010),[1/] as alleged in Petitioner, Florida Elections Commission's ("Commission"), Order of Probable Cause dated February 21, 2011, and, if so, the amount of any fine that should be imposed against Sharkey. Specifically, did Sharkey act with actual malice in publishing a defamatory statement against an opponent during a political campaign?

PRELIMINARY STATEMENT

On February 15, 2011, an Order of Probable Cause was entered by the Commission holding that Sharkey violated chapter 106, Florida Statutes, by maliciously making or causing to be made a false statement about his opponent in a political race.

Sharkey filed a request for formal hearing pursuant to section 106.25(5). The matter was assigned to the undersigned for purposes of conducting the final hearing.

At the final hearing, the Commission called four witnesses: Bernie Feliciano, qualifying officer for the Lee County Supervisor of Elections; Sharkey; Alex Grantt; and Edward Fitzgerald, fire commissioner in Bonita Springs. The Commission's Exhibits 1 through 13 were received and admitted into evidence. Sharkey did not call any other witnesses. Sharkey's Exhibits A and B were received and admitted into evidence. Sharkey's Exhibit B is the Transcript of a deposition taken of Wayne Edsall, including numerous attachments. To the

extent the attachments are hearsay and were not verified, corroborated or subject to a hearsay exception, they will not be used to make a Finding of Fact in this Final Order.

The parties advised that a transcript of the final hearing would be ordered. The parties were given ten days from the date the transcript was filed at the Division of Administrative Hearings ("Division") to submit proposed final orders. The Transcript was filed at the Division on July 11, 2011. Each party timely submitted a proposed final order, and each was duly considered in the preparation of this Final Order.

FINDINGS OF FACT

Based upon the evidence presented, the following Findings of Fact are made in this matter:

1. During the 2010 Florida general election period, Sharkey was a candidate for fire commissioner of the Bonita Springs Fire Control and Rescue District, Seat 1. His opponent in the political campaign was Edward Fitzgerald, the incumbent fire commissioner.

2. Sharkey is not a career politician and had never run for public office prior to the 2010 general election. He had run for private offices, but had no experience in a general or primary public election process.

3. Sharkey had properly applied to be a candidate in the election and had received all requisite materials from the

supervisor of elections. The materials he received included a Candidate and Campaign Treasurer Handbook, a step-by-step guide to running a political campaign. The handbook included the following provision:

> A candidate may not, with actual malice, make any false statement about an opposing candidate.

4. During the course of the campaign, Sharkey issued two emails to approximately 200 people he considered friends and supporters. The entire texts of the emails were as follows[2/]:

> Sunday, August 22, 2010 at 8:11 p.m.
>
> FISCAL RESPONSIBILITY; lets get you informed regarding this issue. 2008 without BSFCRD permission, Fitzgerald attends a three week class at Harvard University pertaining to Fire Education, you the "Citizen Tax Payer of Bonita Springs paid for Fitz's trip, including Air fare, Hotel, Meals, and Harvard's fee for schooling a 75 year old commissioner. Folks this is a flagrant Abuse, and the other Fire Commissioners did not know or approve of this, however they all caved in after the fact to fund Fitz. this opportunity. I wonder what this cost the Residents of Bonita. Better yet, Fitz. thought this was so good and easy he helped the Fire Chief Kinsey to also attend and cost the "CITIZEN TAX PAYERS TWICE". a few months later. Next Ed Fitz goes to Paris France with the Chief Kinsey and Asst Chief Kraft.
>
> Sunday, August 22, 2010 at 8:41 p.m.
>
> The "CITIZEN TAX PAYERS OF BONITA SPRINGS", WERE DUPED AGAIN!!! The three Amigos Ed Fitzgerald, Chief Kinsey, and Asst. Chief Kraft flew to Paris France to

> attend an International Fire Prevention Seminar. Can you imagine the gall, and the irresponsible decision of these three. Two of them are staff, the other is your fire commissioner, chairman. What a model for others! I could understand if Chicago, Miami, Atlanta, New York, Boston, Cleveland, Los Angeles was in attendance, but Fitz and company, this is outrageous, and complete Abuse of the "CITIZEN TAX PAYERS OF BONITA SPRINGS". Please Mr. Mayor, City Councilmen, pay attention to this. Lets address this abuse of our citizens. this is embarrassing.!! Airfare, Hotel, Meals, for Three days. for a seminar that should include major cities, not Fitz and company, but the "CITIZEN TAX PAYERS OF BONITA", get hosed again. That's enough!! Vote this clown out of office, Put Responsible People on the Fire Commission, people who will always represent the "CITIZEN TAX PAYERS OF BONITA SPRINGS". There is no other name for this ABUSE!! Why did the Current Fire Commissioners endorse this?? Fitz'z co commissioners, They need to leave as well!! Vote them all out, and maybe we can fix the future of the Bonita Springs Fire Control and Rescue District.!!!!!!

5. Sharkey sent out these two emails in an effort to garner support from his voter base and to express his understanding of at least one of the issues in the campaign, i.e., financial responsibility by the fire commissioners. The emails went to over 200 people, but Sharkey does not know at this time exactly who received the emails.

6. Sharkey reportedly got the information contained in his emails from a person he had known from church, Alex Grantt. Sharkey also knew Grantt because Sharkey was a customer of

Grantt's pest control service. Sharkey described himself and Grantt as social friends, who had known each other for over 20 years. Grantt described Sharkey as someone he knew a little, but that they were not social friends. Sharkey believed Grantt was an exemplary person who would not intentionally tell a lie.

7. Grantt often attended fire commission meetings, because he was interested in what the commission was doing. He would not always listen attentively when he was at a meeting. Grantt remembers discussing Fitzgerald's trip to Harvard with Sharkey at some point, perhaps in late July or early August. As to whether he talked to Sharkey before the emails were sent on August 22, 2010, Grantt said, "I think I did; I may have." Upon further questioning by Sharkey's attorney at final hearing, Grantt said, "Yes" [I did tell Sharkey that Fitzgerald had been reimbursed for the trip to Harvard before Sharkey sent his email]. Grantt had been in attendance at a fire commission board meeting at some point in time and remembered Fitzgerald asking for reimbursement for the Harvard class. He mistakenly remembered that Fitzgerald had been reimbursed for the class when, in fact, he had not.

8. Grantt also remembered mentioning something about the Paris trip to Sharkey. Grantt had heard discussion about the trip during another board meeting and is certain that the trip was discussed. He mentioned to Sharkey at some point in time

that the matter had come up during a commission meeting. There is no persuasive evidence that Grantt told Sharkey, prior to the two emails being sent, that Fitzgerald had, in fact, gone to Paris. Grantt could only say that there had been mention of the trip during a meeting.

9. Grantt was, as of the date of final hearing, very sure that Fitzgerald and the fire chief made the trip to Paris. His belief is based on a review, after the emails had been sent, of some past minutes from commission meetings. There is absolutely no competent evidence to support his contention, but Grantt is still sure Fitzgerald made the trip at taxpayer's expense.[3/] Fitzgerald testified that he had never been to France at taxpayer expense or otherwise. His testimony in that regard is credible. Grantt, on the other hand, seems very confused as to the facts.

10. There was also another alleged source relied upon by Sharkey concerning the statements in his emails. At around the time he sent out the emails, Sharkey spoke with Wayne Edsall, another fire commissioner. Neither Sharkey, nor Edsall, can pin down the exact dates and times they talked, but it was on or near the date of the emails. Sharkey remembers it being after the emails were sent; Edsall thinks it might have been before, but that it could have been after.

11. Edsall remembers meeting Sharkey only once for a moment, just long enough for introductions. Edsall remembers talking to Sharkey on the telephone other times and exchanging at least one email. Sharkey does not remember any telephone conversations with Edsall. Edsall apparently provided Sharkey with some hints or advice about running a political campaign.

12. As for the subject matter of the emails, Edsall was aware of the Harvard class that Fitzgerald had taken, but remembers telling Sharkey that Fitzgerald paid for the class out of his own pocket. Edsall has a vague memory of the Paris trip, but cannot affirm that he had ever heard more than rumors about such a trip. He would have been very surprised if any commissioner had been allowed to take such a trip.

13. It is impossible to ascertain from the evidence whether Edsall and Sharkey had any meaningful or substantive conversations concerning the alleged Fitzgerald trips, and, if so, when such conversations may have occurred.

14. After posting his emails on August 22, 2010, Sharkey asked Grantt to do some further investigation so as to verify the statements that had been made. Sharkey also purportedly had a later conversation with Edsall concerning the veracity of the allegations he had levied against Fitzgerald.

15. Upon further consideration and investigation, Sharkey came to the conclusion that the statements he had made about

Fitzgerald were false. Sharkey was contacted by an attorney representing Fitzgerald who demanded a retraction of the statements. The demand was set forth in a letter dated August 30, 2010. On September 3, 2010, Sharkey issued a retraction, acknowledging that the statements he had made in his emails were not true. The retraction was sent to local newspapers for distribution. The retraction was not addressed to anyone in particular and did not mention Fitzgerald or the fire chief by name.

16. Later, Sharkey coincidentally encountered Fitzgerald at a restaurant and apologized in person for the erroneous statements he had made. Nonetheless, Fitzgerald was hurt and embarrassed by the emails and was not willing to accept Sharkey's apology.

17. It is clear that Sharkey did not independently attempt to verify the information he received from Grantt prior to publishing his emails. Sharkey relied entirely on Grantt's statements, nothing more. Sharkey knew, or should have known, that the allegations were serious and would potentially inflict egregious harm on Fitzgerald's reputation if published.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this

proceeding pursuant to sections 120.57(1) and 106.25(5), Florida Statutes.

19. The burden of proof is on the party asserting the affirmative of the issue in a proceeding, unless there is a statutory directive to the contrary. The Commission has the burden of proof in this proceeding. Dep't of Banking & Fin. v. Osborne Stern and Co., 670 So. 2d 932, 934 (Fla. 1996); Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977).

20. In this case, the Commission must prove by clear and convincing evidence that Sharkey is in violation of the provisions of section 104.271(2), which prohibit a candidate in an election from making or causing to be made false statements about another candidate. Section 104.271(2) states:

> Any candidate who, in a primary election or other election, with actual malice makes or causes to be made any statement about an opposing candidate which is false is guilty of a violation of this code . . . [T]he commission shall assess a civil penalty of up to $5,000 against any candidate found in violation of this subsection[.]

21. Clear and convincing evidence is an intermediate standard of proof which is more than the "preponderance of the evidence" standard used in most civil cases, but less than the "beyond a reasonable doubt" standard used in criminal cases.

See State v. Graham, 240 So. 2d 486 (Fla. 2d DCA 1970). Clear and convincing evidence has been defined as evidence which:

> [R]equires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in 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), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983) (citations omitted).

22. The Commission must prove not only that Sharkey violated a provision of the election laws, but also that the act or omission was "willful." See § 106.25(3), Fla. Stat.; Diaz de la Portilla v. Fla. Elections Comm'n, 857 So. 2d 913, 916-917 (Fla. 3rd DCA 2003).

23. In the present case, defamation is being alleged by a public official. The commission must, therefore, prove that the statement was made with actual malice, i.e., it was made "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). Sharkey cites to Grad v. Copeland, 280 So. 2d 461 (Fla. 4th DCA 1973), which states in the dissenting opinion by Judge Salfi: "Actual malice is defined as

the publishing party knowing the falsity or a showing that he acted in such a way as to demonstrate his reckless disregard for whether it was true or not. In other words, simply being negligent or grossly negligent in failing to ascertain the falsity of something will not meet the test of actual malice." Id. at 468. That opinion by Judge Salfi does not alter the New York Times definition of actual malice.

24. Reckless disregard in defamation cases is not measured by whether a reasonably prudent man would have investigated before publishing the document. The measure is whether a respondent "entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). Dissemination of a statement, even in the face of serious doubts, equates to reckless disregard. If a person publishes information received from a source and "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports," then reckless disregard exists. Id. at 732.

25. Sharkey acted with reckless disregard when relying solely upon casual conversations with a person with whom he did not have a close relationship--he published an email to over 200 people excoriating his opponent. The allegations are of such a nature that any prudent person would have verified the facts prior to publication, especially if that person was a candidate in the midst of a political campaign.

26. The fact that Sharkey later retracted his defamatory statement does not change the fact that he acted improperly. As stated in Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 n.9 (1974), "an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie." Or, as it has been said, "You cannot un-ring a bell once it has been rung." Anonymous.

27. The Commission has, by clear and convincing evidence, proven that Sharkey acted with reckless disregard when he issued two emails to the public and made false statements about Fitzgerald.

28. Section 106.265 was amended by the Florida Legislature and now provides in pertinent part:

> (1) The commission or, in cases referred to the Division of Administrative Hearings pursuant to s. 106.25(5), the administrative law judge 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, or, if applicable, to impose a civil penalty as provided in s. 104.271 or s. 106.19.
>
> (2) In determining the amount of such civil penalties, the commission or administrative law judge 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 or chapter 104.

29. The publication of a false statement is serious and is deserving of a substantial fine. Section 104.271(2) provides that, "notwithstanding any other provision of law, the commission shall assess a civil penalty of up to $5,000 against any candidate found in violation of this subsection." Thus, a fine up to $5,000 could be imposed in this case.

30. However, there are mitigating factors to be considered. First, Sharkey has no prior history of similar acts or omissions. Second, there was no evidence presented that Sharkey has the financial resources available to pay a substantial fine. Third, Sharkey's retraction and apology to Fitzgerald show at least some good faith effort to comply with the provisions of the election laws.

ORDER

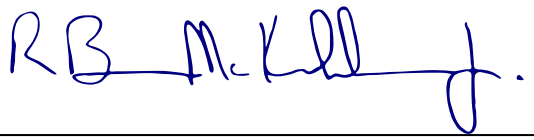
Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED that:

1. Petitioner, Robert H. Sharkey, violated the provisions of section 104.271(2).

2. A civil penalty in the sum of $1,000 is assessed, payable to Respondent, Florida Elections Commission, within 30 days of the entry of this Final Order.

DONE AND ORDERED this 28th day of July, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of July, 2011.

ENDNOTES

[1/] Unless stated specifically otherwise herein, all references to the Florida Statutes shall be to the 2010 version.

[2/] The texts of the emails are set forth exactly as they appeared, with all spelling, grammar and syntax errors in place.

[3/] There was a discussion at a board meeting concerning an upcoming international fire conference, but the meeting was held in Palm Beach County, Florida, not Europe.

COPIES FURNISHED:

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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 Administrative 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 Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.