

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ELECTIONS COMMISSION,

Petitioner,

vs.

Case No. 19-3376FEC

RANDY SCOTT,

Respondent.

_____ /

FINAL ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (Division), heard this case on December 10, 2019, by video teleconference at sites in Tallahassee and Fort Myers, Florida.

APPEARANCES

For Petitioner: Eric M. Lipman, General Counsel
Florida Elections Commission
107 West Gaines Street, Suite 224
Tallahassee, Florida 32399-6528

For Respondent: Randy Scott, pro se
343 Hazelwood Avenue South
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STATEMENT OF THE ISSUE

Did Respondent, Randy Scott, willfully violate section 106.07(2)(b)1., Florida Statutes (2018)¹, by filing an incomplete campaign financial report

¹ All citations to Florida Statutes are to the 2018 codification unless otherwise indicated.

and failing to file an addendum completing the report within seven days after receiving notice that the report was incomplete?

PRELIMINARY STATEMENT

On May 31, 2019, Petitioner, Florida Elections Commission (Commission), entered an Order of Probable Cause charging Mr. Scott with violating section 106.07(2)(b)1. Mr. Scott filed a request for a formal administrative hearing to contest the Order. The Commission denied it without prejudice. Mr. Scott filed an Amended Petition for Formal Hearing. On June 20, 2019, the Commission referred the matter to the Division to conduct the requested formal hearing.

The undersigned set the final hearing for August 29, 2019, a date requested by the parties. After granting two continuances for good cause on motions of the Commission, which were not opposed, the undersigned scheduled the final hearing for December 10, 2019. The hearing was conducted as noticed.

At the hearing, the Commission presented testimony from Cheryl Futch, Tammy Lipa, Mr. Scott, and Keith Smith. Commission Exhibits A through X were admitted into evidence. Mr. Scott testified on his own behalf. He did not offer exhibits.

The Commission moved to extend the deadline for filing a proposed final order until 30 days after the transcript was filed. Without objection, the motion was granted. The transcript of the hearing was filed January 9, 2020. The parties timely filed proposed orders. They have been considered in the preparation of this Order.

FINDINGS OF FACT

1. Mr. Scott ran for election to Seat 4 of the governing board for the Lee Memorial Health System. The election for the seat was to be held during the November 6, 2018, general election, not during the August 28, 2018, primary election.

2. The Lee County Supervisor of Elections (Supervisor) oversees and conducts elections. Candidates running for election in Lee County submit their initial paperwork, qualifying paperwork, and electronic financial reports to the Supervisor's filing officer. Cheryl Futch has been the Supervisor's filing officer for six years. Tammy Lipa assists Ms. Futch.

3. On June 20, 2018, Mr. Scott filed to run for Seat 4. On June 28, 2018, Mr. Scott filed an Active Candidate Acknowledgement designating himself as the campaign treasurer. After that filing, Mr. Scott could accept campaign contributions and make campaign expenditures. He was also required by section 106.07(1) to file regular reports of contributions and expenditures.

4. Mr. Scott opened a campaign bank account with SunTrust Bank with a \$160.00 cash contribution. He reported the contribution on his Campaign Treasurer's Report Summary for the period June 23 to July 6, 2018, as a loan from himself.

5. For the period August 4 through August 10, 2018, Mr. Scott filed a Waiver of Report with a notification of no activity during the reporting period. On August 10, 2018, he made a withdrawal from his campaign account at an ATM. The records do not show what time of day he made the withdrawal. This case does not involve a charge related to the August 10, 2018, report.

6. Mr. Scott subsequently filed his campaign treasurer's report for August 11 to August 23, 2018. On that report, Mr. Scott reported an expenditure as a payment to himself of \$140.00 on August 11, 2018. He identified the purpose of the expenditure as "website." The \$140.00 expenditure appears in Block 7 of the form titled "Expenditures This Report"

and on an attached itemized expenditure form. Block 8 of the summary form, titled "Other Distributions" does not contain any amounts. In Block 9, titled "Expenditure Type," the letters "RM" appear. (Comm. Ex. F) The evidence does not prove what those letters represent or who placed them there.

7. Ms. Futch accepted the report conditionally. At the hearing, Commission counsel asked Ms. Futch, "Why was Mr. Scott's original 2018 P7 report incorrect or incomplete?" She replied, "He indicated a reimbursement without a distribution in his expenditures." (Tr. P. 118) The record does not reveal why Ms. Futch concluded that Mr. Scott had indicated a reimbursement. The record is clear that Ms. Futch disagreed with Mr. Scott's characterization of the expenditure and thought that it was incorrect.

8. On August 27, 2018, at 8:04 a.m., Ms. Futch sent Mr. Scott an email stating: "Good morning. Your report has the following errors therefore you will be required to amend this report." An image of a campaign treasurer's report, in a different form than the report filed by Mr. Scott was beneath the text. The words "reimbursements must have a distribution recorded" are enclosed in a text box and an arrow points toward the word "Reimbursements" in another box appearing directly below the words "Exp. Type." The email does not state that Mr. Scott's report is incomplete.

9. Mr. Scott called and spoke to Ms. Futch on August 27, 2018. He advised her that he did not agree with her and did not want to identify the \$140.00 expenditure as a reimbursement.

10. At 2:20 p.m., Ms. Futch sent Mr. Scott another email. It stated, "Your amended report has the following errors and therefore will be rejected." It does not state that the report is incomplete.

11. An August 27, 2018, email from Ms. Futch stated, "Mr. Scott your report is still incorrect, please make the proper corrections and resubmit." It does not state that the report is incomplete.

12. On August 28, 2018, Ms. Futch emailed Mr. Scott telling him she noticed he was having difficulty filing an amended report using the

Supervisor's online filing system. She noted he had attempted to file five amended reports. She adds, "In addition, the amendment you are attempting is still incorrect. If you would like to make an appointment after the election, I would be glad to walk you through deleting the extra reports and show you how to correct your P7." The email does not state that Mr. Scott's report is incomplete.

13. The disagreement between Mr. Scott and Ms. Futch about how to categorize the \$140.00 continued. During their communications, Mr. Scott provided Ms. Futch differing theories about how the expenditure should be classified and why.

14. Eventually the Supervisor issued a "Notification of Incomplete Report Filing," received by Mr. Scott on September 17, 2018. The notification states:

The Lee County Supervisor of Elections office has determined that one or more campaign reports are incomplete for the following reasons.

The P7 report needs to be amended: expenditure type should be Monetary (not reimbursement).

15. Eventually, Ms. Futch executed and filed a Complaint against Mr. Scott with the Commission.

16. More emails between Mr. Scott, Ms. Futch, and Ms. Lipa followed. On October 9, 2018, Ms. Futch sent an email to Mr. Scott stating:

Good Afternoon Mr. Scott,
Your P7 and previously filed amendments to that report are incorrect and the explanations why have been relayed to you through multiple emails. Our office can not force you to file your report properly we are just under the obligation to report it when you don't.

17. The email does not state that Mr. Scott's report is incomplete.

18. Mr. Scott's response on October 9, 2018, ended:

Since you are asking me to fill out a state form contrary to the facts I can not and will not honor

your request. Further your rejection is outside the ministerial duties of your job and find that action unbecoming a public official. [sic]

At any time Tommy Doyle [the Supervisor] has the ability to pull back the complaint and based on these facts and the law that is exactly what he should order you to do.

For now no further communication is needed on the P7 filing.

19. Mr. Scott disagreed repeatedly, vigorously, and contentiously with Ms. Futch about how to characterize the \$140.00. In Ms. Futch's view, Mr. Scott repeatedly characterized the expenditure incorrectly on his report and amended reports.

20. The reports were not incomplete.

CONCLUSIONS OF LAW

21. Sections 106.25(5), 120.569, and 120.57(1), Florida Statutes (2019), grant the Division jurisdiction over this matter.

22. The Commission charges Mr. Scott with violating section 106.07(2)(b)1. It seeks to impose the statutory maximum penalty of \$1,000 for the alleged violation.² Because it seeks to impose a penalty, the Commission must prove its charge by clear and convincing evidence. *Diaz de la Portilla v. Fla. Elections Comm'n*, 857 So. 2d 913 (Fla. 3d DCA 2003).

23. Clear and convincing evidence must be credible. The memories of witnesses must be clear and not confused. The evidence must produce a firm belief that the truth of allegations has been established. *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). Evidence that conflicts with other evidence may be clear and convincing. The trier of fact must resolve conflicts in the evidence. *G.W.B. v. J.S.W. (in Re Baby E.A.W.)*, 658 So. 2d 961, 967

² The Commission may impose a civil penalty not to exceed \$1,000 per count. §106.25(1), Fla. Stat.

(Fla. 1995). Here Ms. Futch's repeated description of Mr. Scott's reports as incorrect and the fact that there was no information missing from the report eliminate the possibility of a firm belief that they were incomplete.

24. Section 106.07 requires each campaign treasurer for a candidate to "file regular reports of all contributions received, and all expenditures made, by or on behalf of such candidate" The section that the Commission accuses Mr. Scott of violating, section 106.07(2)(b)1., reads:

Any report that is deemed to be incomplete by the officer with whom the candidate qualifies must be accepted on a conditional basis. The campaign treasurer shall be notified by certified mail or by another method using a common carrier that provides a proof of delivery of the notice as to why the report is incomplete and within 7 days after receipt of such notice must file an addendum to the report providing all information necessary to complete the report in compliance with this section. Failure to file a complete report after such notice constitutes a violation of this chapter.

25. The statute is clear and unambiguous. It says "incomplete" reports. It does not say "incorrect" reports. Consequently, it should be interpreted and applied as the Legislature enacted it. *Wheaton v. Wheaton*, 261 So. 3d 1236, 1242 (Fla. 2019); *Dep't of Rev. v. Graczyk*, 206 So. 3d 157, 159 (Fla. 1st DCA 2016). This means that in order to prove Mr. Scott violated the statute the Commission must prove by clear and convincing evidence that Mr. Scott filed an incomplete report. It did not do so. This conclusion conforms with the Supervisor's demands of Mr. Scott. Ms. Futch repeatedly directed Mr. Scott to "amend" his report. "Amend" means to change or modify.

<https://www.merriam-webster.com/dictionary/amend> (last visited Feb. 29, 2020). This is consistent with correcting an incorrect report; it is not consistent with adding missing information to an incomplete report.

26. "Addendum," the word the statute uses to describe what must be done to remedy an incomplete report, means addition. <https://www.merriam->

webster.com/dictionary/addendum (last visited Feb. 29, 2020). This is consistent with adding to something that is incomplete. So, the Supervisor's requests themselves demonstrate that the office did not view Mr. Scott's report as missing information (incomplete) but as having incorrect information.

27. The fact that the Legislature differentiated between incorrect and incomplete in section 106.07(5) reinforces this conclusion. Section 106.07(5), which does impose sanctions for filing an incorrect report, makes it a misdemeanor to willfully certify "the correctness of any report while knowing that such report is incorrect, false, or incomplete" It differentiates between "incomplete" and "incorrect." When the Legislature uses a term in one section of a statute but does not in another, courts view the difference as intentional and assign significance to the distinction. *Smith v. Smith*, 224 So. 3d 740, 747 (Fla. 2017). Application of that principle also mandates a conclusion that section 106.07(2)(b)1. applies to incomplete reports, not incorrect reports. The principle that statutes which impose penalties must be strictly construed, further buttresses this conclusion. *City of Miami Beach v. Galbut*, 626 So. 2d 192, 194 (Fla. 1993); *Turbeville v. Dep't of Fin. Servs.*, 248 So. 3d 194, 197 (Fla. 1st DCA 2018); *Roche Sur. & Cas. Co. v. Dep't of Fin. Servs., Office of Ins. Reg.*, 895 So. 2d 1139, 1141 (Fla. 2d DCA 2005).

28. In summary, the Commission did not prove by clear and convincing evidence that Mr. Scott filed an incomplete report. Therefore, he did not violate section 106.07(2)(b)1.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that The Order of Probable Cause entered against Randy Scott in Case No. FEC 18-304 is DISMISSED.

DONE AND ORDERED this 4th day of March, 2020, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
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Filed with the Clerk of the
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this 4th day of March, 2020.

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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 the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.