

JUN 07 2018

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: KASHAMBA L. MILLER-
ANDERSON,

Case No. 18-0017EC

17-080

Respondent.

_____ /

RECOMMENDED ORDER

On March 22, 2018, Administrative Law Judge Lisa Shearer Nelson conducted a hearing pursuant to section 120.57(1), Florida Statutes (2017), in Tallahassee, Florida.

APPEARANCES

For Advocate: Melody A. Hadley, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

For Respondent: Ronald G. Meyer, Esquire
Meyer, Brooks, Demma and Blohm, P.A.
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STATEMENT OF THE ISSUES

The issues for determination in this proceeding are whether Respondent, KaShamba Miller-Anderson, violated section 112.3145(8)(c), Florida Statutes (2016), by willfully failing to file a 2015 CE Form 1, "Statement of Financial Interests"; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On October 25, 2017, Petitioner, the Florida Commission on Ethics (Petitioner or the Commission), filed an Order Finding Probable Cause against Respondent, alleging that she willfully failed or refused to file an annual CE Form 1, Statement of Financial Interests for the year 2015, in violation of section 112.3145(8)(c). At Respondent's request, the matter was referred to the Division of Administrative Hearings (Division) on January 3, 2018, for assignment of an administrative law judge. The case was docketed as Case No. 18-0017EC and originally assigned to Judge Robert S. Cohen.

By notice issued January 11, 2018, the case was scheduled for hearing on March 22, 2018. On March 12, 2018, the parties filed a Joint Prehearing Stipulation that contained stipulated facts for which no evidence would be required at hearing. Those facts have been incorporated into the Findings of Fact below. On March 15, 2018, the case was transferred to the undersigned.

At hearing, the Advocate presented the testimony of Kimberly Holmes and A. Keith Powell. Joint Exhibits 1 through 3 and Advocate's Exhibits 1 through 11 were admitted into evidence. Respondent testified on her own behalf, but did not submit any additional exhibits.

The Transcript of the hearing was filed with the Division on April 16, 2018. At the parties' request, the deadline for the

submission of proposed recommended orders was extended to May 10, 2018. Both submissions were timely filed and have been considered in the preparation of this Recommended Order. All references to the Florida Statutes are to the 2016 codification, unless otherwise specified.

FINDINGS OF FACT

1. Respondent is currently a member of the Riviera Beach City Council.

2. As a member of the Riviera Beach City Council, Respondent served as a "local officer" as defined in section 112.3145(1)(a), throughout the year 2015.

3. Respondent was aware that she was required to file a CE Form 1 every year, including for the year 2015.

4. Financial disclosures are filed in order to allow the public to monitor public officials and employees for any conflicts of interest that may arise. The requirement that financial disclosures be filed is intended to deter corruption and increase the public's confidence in government.

5. In 2016, Respondent received e-mails at the address kmiller@rivierabch.com. She received regular mail at the address 430 West 28th Street, Riviera Beach, Florida 33404.

6. The CE Form 1, "Statement of Financial Interests," for calendar year 2015 was required to be filed on or before July 1, 2016. There is a grace period for filing the form that expired

on September 1, 2016. After the expiration of the grace period, an automatic fine of \$25 per day was imposed for each day the form is late, up to a maximum fine of \$1,500. The maximum fine accrued on October 31, 2016.

7. The Palm Beach County Supervisor of Elections (Palm Beach SOE) office sent Respondent the original blank 2015 financial disclosure form, along with the requirements for filing the form, before June 1, 2016. She was instructed to file her completed form no later than July 1, 2016.

8. Respondent failed to file her 2015 CE Form 1 by either July 1, 2016, or September 1, 2016.

9. Respondent received notice from the Commission regarding her failure to file her 2015 CE Form 1.

10. On July 31, 2016, the Palm Beach SOE sent a delinquency memorandum to Respondent at 430 West 28th Street, Riviera Beach, Florida 33404 by certified mail. The mail was unclaimed.

11. The July 31, 2016, memorandum included the following statement:

Pursuant to State law, please be advised that although you are delinquent in filing Form 1, a grace period is in effect until September 1, 2016. If your form is not received by September 1, 2016, we will be required by law to notify the Commission on Ethics of the delinquency. A fine of \$25 for each day late will be imposed, up to the maximum penalty of \$1500. In addition, pursuant to enacted legislation, the Commission on Ethics must initiate

investigations of delinquent filers in certain circumstances. This can result in you being removed from your public office or employment.

12. Respondent took no action to file her form by September 1, 2016. If she had done so, it would have been considered timely.

13. Commission staff sent Respondent a courtesy letter on September 7, 2016, and advised her that she was accruing a fine of \$25 per day for failure to file her 2015 CE Form 1. The Commission also e-mailed Respondent on September 20, 2016, using the e-mail address kmiller@rivierabch.com.

14. Respondent accrued the maximum fine of \$1,500 as of October 31, 2016, as authorized by section 112.3145(7)(f), for failing to file her CE Form 1 for the year 2015. On November 4, 2016, the Commission again e-mailed Respondent at the same e-mail address, advising her that the maximum fine had accrued and she still needed to file her 2015 CE Form 1.

15. The November 4, 2016, e-mail attached a blank 2015 CE Form 1 and a form to appeal her fine. Respondent did not avail herself of the opportunity to appeal the fine that had accrued.

16. On February 21, 2017, the Commission sent Respondent a Notice of Assessment of Automatic Fine by certified mail, using the 430 West 28th Street address. Respondent acknowledged

receipt of the February 2017 notice. This e-mail also provided the appeal process for contesting the maximum fine.

17. Respondent did not pay the fine at that time because she did not have the funds to do so. She believed, in error, that she now could not file the 2015 CE Form 1 until she paid the fine. Her belief, however misplaced, was sincere.

18. On June 16, 2017, the Commission mailed Respondent a Notification of Issuance of Default Final Order at the 430 West 28th Street address. The Notice was not returned to the Commission as undeliverable.

19. On June 22, 2017, Respondent paid the \$1,500 fine.

20. On June 28, 2017, Respondent filed her CE Form 1 for calendar year 2015.

21. Respondent did not have a particularly compelling reason for not timely filing her 2015 CE Form 1. Her position on the city council is a part-time position, for which she is not assigned an assistant. She admitted at hearing that the notice and the form simply got lost on her desk, and she did not make it a priority. However, Respondent claims that while filing her 2015 CE Form 1 was not the priority it should have been, she never intended not to file the form, and she never indicated to anyone that she would not do so.

22. Respondent filed her 2015 CE Form 1 and paid the fine prior to the finding of probable cause in this case.

23. There are some differences between the financial disclosure Respondent filed when she initially ran for office and the one filed for 2015. Those differences however, are not so great as to support an inference or finding that she was attempting to hide something by not filing timely.

24. The term for which Respondent was elected expired on March 21, 2018. She was re-elected for another term which began March 21, 2018.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to section 120.569 and 120.57(1).

26. The Commission is authorized to conduct investigations and to make public reports on complaints concerning violations of chapter 112, part III, Florida Statutes, which is referred to as the Code of Ethics for Florida Public Officers and Employees.

27. The Advocate has the burden to establish the allegations in the Order Finding Probable Cause by clear and convincing evidence. Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997); see also Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

28. Clear and convincing evidence requires more than a preponderance of the evidence and less than the criminal standard

of beyond a reasonable doubt. In re: Graziano, 696 So. 2d 744, 753 (Fla. 1997).

29. As stated by the Supreme Court of Florida:

Clear 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 testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a 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: Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

30. The Order Finding Probable Cause finds that:

[T]here is probable cause to believe the Respondent, as a local officer required to file financial disclosure, violated Section 112.3145(8)(c), Florida Statutes, by willfully failing or refusing to file an annual CE Form 1, Statement of Financial Interests for the year 2015, required to be filed by her due to her service as a member of the City Council of the City of Riviera Beach.

31. Section 112.3145(8)(c) provides:

If a person holding public office or public employment fails or refuses to file an annual statement of financial interests for any year in which the person received notice from the commission regarding the failure to file and has accrued the maximum automatic fine authorized under this section, regardless of whether the fine imposed was paid or collected, the commission shall initiate an investigation and conduct a public hearing without receipt of a complaint to determine

whether the person's failure to file is willful. . . . Except as provided in s. 112.324(4), if the commission determines that the person willfully failed to file a statement of financial interests, the commission shall enter an order recommending that the officer or employee be removed from his or her public office or public employment.

32. Both parties agree that in order to find a violation of section 112.3145(8)(c), the following elements must be proven: that 1) Respondent is a public officer or employee holding office; 2) Respondent either failed or refused to file an annual statement of financial interests; 3) Respondent received notice from the Commission regarding the failure to file for the corresponding year; 4) the maximum fine authorized for failing to file has accrued; and 5) Respondent's failure to file is willful.

33. In this case, there is no real dispute as to the first, third, and fourth elements. Respondent is a member of the Riviera Beach City Council; she received multiple notices regarding the need to file; and the maximum fine accrued for failing to file.

34. The Commission did not prove, however, that she failed or refused to file her 2015 CE Form 1. Instead, the evidence demonstrated that she filed the form, woefully late, but filed it nonetheless.

35. In TR & SNF, Inc. v. Agency for Health Care Administration, 238 So. 3d 934 (Fla. 1st DCA 2018), the First District considered whether the agency had the authority to revoke

a nursing home's license for violating section 410.810(8), Florida Statutes (2014), by not "timely providing" requested proof of financial ability to operate. The court noted that section 410.810(8) requires the submission of proof of financial ability to operate, but does not specify a time requirement. The court determined that while failure to provide the information would be a basis for revocation, the failure to "timely" provide it would not.

36. To be sure, there are differences between TR & SNF and the situation here: there is a timeframe for filing one's statement of financial interests form specified in statute, and a penalty that accrues on a daily basis when the deadline for filing and the grace period both pass. However, section 112.3145(8)(c), the section charged here, provides for a recommendation of removal from office where the officer or employee willfully fails to file a statement at all, as opposed to willfully failing to timely file.

37. Given the penal nature of this proceeding, section 112.3145(8)(c) must be strictly construed, with any ambiguity interpreted in favor of Respondent. Ocampo v. Dep't of Health, 806 So. 2d 633, 634-35 (Fla. 1st DCA 2002); Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164, 165 (Fla. 1st DCA 1990). Here, the language is not ambiguous: it penalizes the willful failure to file, as opposed to filing after the maximum fine is due.

38. The conclusion that the Advocate failed to prove that Respondent failed or refused to file her 2015 CE Form 1 requires dismissal of the charge against her. The evidence also did not demonstrate that the late filing was willful.


39. Willfulness is a question of fact. It is generally defined as "one that is voluntarily and intentionally performed with specific intent and bad purpose to violate or disregard the requirements of the law." Fugate v. Fla. Elec. Comm'n, 924 So. 2d 74, 75 (Fla. 1st DCA 2006).

40. The question of willfulness in this case is a close call. Given the high burden of proof however, the evidence does not support that Respondent's admittedly late filing of her 2015 CE Form 1 was willful as opposed to negligent.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Ethics enter a final order and public report finding that no violation of section 112.3145(8)(c) has been demonstrated.

DONE AND ENTERED this 7th day of June, 2018, in Tallahassee,
Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of June, 2018.

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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.