

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

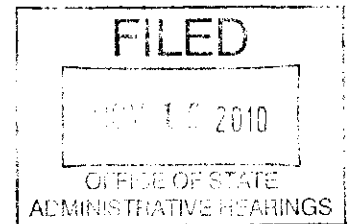
STATE ELECTION BOARD,
Petitioner,

v.

MARION RHODES,
Respondent.

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Docket No.:
OSAH-ELE-LV-1104233-66-Miller



INITIAL DECISION

I. Summary of Proceedings

The State Election Board ("Board"), Petitioner herein, filed this matter seeking sanctions against the Respondent, Marion Rhodes. As set forth in the Statement of Matters Asserted, the Board alleges that the Respondent violated state election laws during the early voting period for the 2008 election. The hearing¹ was held on October 20, 2010, pursuant to O.C.G.A. §§ 21-2-33.1, 50-13-13, and 50-13-41, before the undersigned administrative law judge of the Office of State Administrative Hearings. The Board was represented by Assistant Attorney General Ann S. Brumbaugh. John M. Clark, Esq., represented the Respondent.

After consideration of the evidence and the arguments of the parties, the Board's proposed sanctioning of the Respondent is **DENIED** for the reasons stated below.

II. Findings of Fact

1.

The Respondent is the District 1 representative to the Board of Commissioners for Greene County, Georgia, where he has served more than four terms. During elections, he frequently obtains absentee ballots for members of the community and provides voters with

¹ This case was consolidated with State Election Board v. Dorothy Wright, Docket No. OSAH-ELE-LV-1104232, prior to the hearing. Although the cases were heard together, the factual circumstances of each are unrelated. Therefore, the Court elects to issue a separate decision in each case.

transportation to the polls. As a result, he interacts regularly with employees of the Greene County Board of Elections and Registration ("County Elections Board"), including the elections supervisor, Mike Malone, and the deputy elections supervisor, Louise Nesbit. (T. 45-46, 132, 193-194.)

2.

In October 2008, the Respondent attempted to help a disabled voter obtain an absentee ballot for the 2008 election. However, the County Elections Board, at Mr. Malone's direction, rejected the voter's application because it had not been signed by the person who assisted her in filling it out.² (T. 83-86, 195-197.)

3.

On the afternoon of October 24, 2008, early voting for the 2008 election was taking place at the County Elections Board office. Turnout for early voting had been larger than anticipated, and Mr. Malone was standing outside the building to greet voters, open the door for them, and help control the line if the registration area became crowded. (T. 49-51.)

4.

The Respondent approached Mr. Malone at the door, and Mr. Malone greeted him. The Respondent replied, "Who is the handwriting expert in your office?" The Respondent stood approximately one foot from Mr. Malone, in a manner that Mr. Malone found intimidating.³ The Respondent held the County Elections Board's letter rejecting the disabled voter's absentee ballot application directly in front of Mr. Malone's face and stated, "You're discriminating

² Mr. Malone instructed his employees to reject such applications based on his interpretation of the governing statute. Later, after he was contacted by a representative of the Secretary of State's Office, he discontinued this practice. There was no evidence at the hearing that Mr. Malone had rejected absentee ballot applications in bad faith. (T. 83-86, 195-197.)

³ Mr. Rhodes is approximately six feet tall, while Mr. Malone is of smaller stature. (T. 53, 194.)

against the handicapped.” The Respondent’s body language was animated during the conversation. He spoke in a loud voice and appeared to be angry. (T. 51-52, 106, 123, 133-134; Exhibit R-2.)

5.

Ms. Nesbit was distracted from her work by the Respondent’s loud voice. After observing the two men for several minutes, she walked outside. Ms. Nesbit asked the Respondent if he would keep his voice down and come inside the office to discuss his concerns. The Respondent refused. (T. 52-53, 133-135; Exhibit R-2.)

6.

At that point, a sheriff’s deputy walked up to the door and greeted the group, and the conversation quieted. However, after the deputy entered the building, the Respondent asked Ms. Nesbit, “Why are you discriminating against the disabled?” Ms. Nesbit responded by reminding him that her husband was disabled and inquiring why the Respondent was showing her disrespect. Mr. Malone then ended the conversation and informed the Respondent that he intended to call the sheriff. The Respondent left the premises. (T. 53-54, 135; Exhibit R-2.)

7.

When he returned to his office, Mr. Malone contacted the chief deputy sheriff and informed him of the events that had just occurred. A deputy took Mr. Malone’s statement the next day. (T. 55-56, 136; Exhibit R-2.)

8.

The Respondent’s behavior during the incident was boorish and distracting to the employees of the County Elections Board. However, it was undisputed that the Respondent did

not threaten Mr. Malone or Ms. Nesbit or interfere with their performance of their duties.⁴ There was also no evidence that the Respondent's behavior disrupted the voting process. (T. 104-109, 115-116, 118-119, 122-131, 143-44; Exhibit R-2.)

9.

The Court finds the testimony of all of the witnesses to be essentially credible. This determination is based on the witnesses' demeanor and manner of testifying, as well as the corroboration of each witness' testimony by others. To the extent there were minor differences in their individual recollections, the Court finds that these differences are attributed to the fast pace at which the events unfolded, the different vantage points of the witnesses, and the length of time that has elapsed since the incidents. Additionally, because the Respondent exhibited a tendency to minimize his conduct, the Court finds the testimony of the other witnesses to be more credible regarding his demeanor during his exchange with Mr. Malone. (T. 196-198.)

10.

On February 24, 2010, the Board found probable cause that the Respondent had violated O.C.G.A. § 21-2-566(2). The Board further recommended the imposition of a cease and desist order, a civil penalty of up to \$5,000.00, and a public reprimand. (Statement of Matters Asserted, ¶¶ 3, 5; T. 222; Exhibits P-1, P-2.)

⁴ Mr. Malone testified that while he felt intimidated during their conversation, the Respondent made no threats and did not interfere with or prevent him from performing his duties as a poll officer. (T. 89-91.) Similarly, the only disruption of Ms. Nesbit's duties occurred when she was distracted by the activity outside her office. (T. 133.)

III. Conclusions of Law

1.

Because this matter involves the proposed sanctioning of the Respondent, the Board bears the burden of proof. Ga. Comp. R. & Regs. r. 616-1-2-.07(1). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21(4). For the reasons that follow, the Court concludes that the Board did not meet its burden.

2.

Pursuant to O.C.G.A. § 21-2-566(2), “Any person who . . . [u]ses or threatens violence in a manner that would prevent a reasonable poll officer or actually prevents a poll officer from the execution of his or her duties or materially interrupts or improperly and materially interferes with the execution of a poll officer’s duties . . . shall be guilty of a felony”

3.

Because O.C.G.A. § 21-2-566(2) contains no punctuation to separate the many clauses, it can be interpreted in two ways. Under the first interpretation, the statute may be read as follows:

Any person who . . . [u]ses or threatens violence in a manner that

- (a) would prevent a reasonable poll officer or actually prevents a poll officer from the execution of his or her duties or
- (b) materially interrupts or improperly and materially interferes with the execution of a poll officer’s duties . . .

shall be guilty of a felony

Under this interpretation, “uses or threatens violence” is an essential element that must be proven in any case alleging a violation of O.C.G.A. § 21-2-566(2). However, the statute may also be construed to mean:

Any person who . . .

- (a) [u]ses or threatens violence in a manner that would prevent a reasonable poll officer or actually prevents a poll officer from the execution of his or her duties or
- (b) materially interrupts or improperly and materially interferes with the execution of a poll officer's duties . . .

shall be guilty of a felony

Under this second interpretation, a person may violate the statute by materially interrupting or interfering with the execution of a poll officer's duties, without the use or threat of violence.

4.

Because the meaning of O.C.G.A. § 21-2-566(2) is unclear, the Court looks to the prior version of the statute for guidance as to the legislature's intent. See O.C.G.A. § 1-3-1. Prior to July 1, 2008, the statute provided, "Any person who . . . [u]ses or threatens violence to any poll officer or interrupts or improperly interferes with the execution of his or her duty" has committed a felony. O.C.G.A. § 21-2-566(2). Clearly, under the prior statute, it would be a violation to interrupt or interfere with the execution of a poll officer's duties, whether or not violence was used or threatened.⁵

5.

A comparison of the current and prior versions of O.C.G.A. § 21-2-566(2) reveals that the 2008 amendments added language to the statute, but did not delete or substantially revise the prior language. Therefore, because it appears that the legislature intended to maintain the

⁵ The phrase "uses or threatens violence" cannot modify the second clause. Such an interpretation would be neither reasonable nor grammatically correct, as follows:

Any person who . . . [u]ses or threatens violence
(a) to any poll officer or
(b) interrupts or improperly interferes with the execution of his or her duty . . .
shall be guilty of a felony

O.C.G.A. § 21-2-566(2) (amended July 1, 2008).

essential elements of the statute as they existed previously, the Court adopts the second interpretation of the statute.

6.

The Board failed to prove, by a preponderance of the evidence, that the Respondent violated O.C.G.A. § 21-2-566(2) by “us[ing] or threaten[ing] violence in a manner that would prevent a reasonable poll officer or actually prevent[ed] a poll officer from the execution of his or her duties.” As set forth in detail in the Findings of Fact, above, the Respondent did not use or threaten violence against either Mr. Malone or Ms. Nesbit. While the Respondent was loud and confrontational during their interaction, he did not threaten or use violence at any time. Further, he did not prevent them from executing their duties as poll officers, nor would his actions have prevented a reasonable poll officer from performing his or her duties.


7.

The Board failed to prove, by a preponderance of the evidence, that the Respondent violated O.C.G.A. § 21-2-566(2) by “materially interrupt[ing] or improperly and materially interfer[ing] with the execution of a poll officer’s duties.” Mr. Malone’s testimony established unequivocally that the Respondent did not interfere with his performance of his duties. In addition, although the Board presented evidence that Ms. Nesbit and other poll workers were distracted from their duties by the Respondent’s confrontation with Mr. Malone, the statute cannot reasonably be construed to prohibit minor distractions. To the extent the Respondent’s actions could be interpreted as an interruption or interference of any poll worker’s duties, such interruption or interference was *de minimis* and not material.

IV. Decision

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Board's proposed sanctioning of the Respondent is hereby **DENIED**.

SO ORDERED, this 16th day of November, 2010.

A handwritten signature in cursive script, appearing to read "Kristin L. Miller", written over a horizontal line.

KRISTIN L. MILLER
Administrative Law Judge