STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

In Re JOSEPH G. SPICOLA,	)	
	)	
Respondent,	)	CASE NO. 91-6730EC
	)	COMPLAINT NO. 91-4
_____	)	

RECOMMENDED ORDER

Pursuant to written notice a formal hearing was held in this case before Larry J. Sartin, a duly designated Hearing Officer of the Division of Administrative Hearings, on February 12, 1992, in Tampa, Florida.

APPEARANCES

The Advocate: Virlindia Doss
Assistant Attorney General
Department of Legal Affairs
The Capitol, Suite 101
Tallahassee, Florida 32399-1050

For Respondent: John R. Lawson, Jr., Esquire
John A. Schaefer, Esquire
201 East Kennedy Boulevard
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STATEMENT OF THE ISSUES

Whether the Respondent violated Section 112.313(3), Florida Statutes, by purchasing, while an employee of the Tampa Port Authority, services from a law firm in which he was a partner, and Section 112.313(7)(a), Florida Statutes, by being a 50 percent partner in a law firm which was doing business with his agency, the Tampa Port Authority?

PRELIMINARY STATEMENT

On or about December 28, 1990, a Complaint was filed with the Florida Commission on Ethics (hereinafter referred to as the "Commission"). The Complaint was filed by Richard L. Murphy and contained allegations of misconduct by Joseph G. Spicola, Jr., the Respondent in this case. Based upon a review of the Complaint against Mr. Spicola the Commission issued a Determination of Investigative Jurisdiction and Order to Investigate on April 10, 1991, ordering the staff of the Commission to conduct a preliminary investigation into whether the Respondent violated Sections 112.313(3) and 112.313(7)(a), Florida Statutes.

Following the Commission's investigation of the allegations against Mr. Spicola a Report of Investigation was released on May 23, 1991. Based upon the Complaint and the Report of Investigation the Advocate for the Commission issued an Advocate's Recommendation on June 17, 1991. The Advocate determined that

there was probable cause to believe that Mr. Spicola had violated Sections 112.313(3) and 112.313(7)(a), Florida Statutes.

Based upon the Report of Investigation and the Advocate's Recommendation, the Commission issued an Order Finding Probable Cause on September 18, 1991, accepting the recommendation of the Advocate. The Commission ordered that a public hearing be conducted.

By letter dated October 22, 1991, the Commission referred this matter to the Division of Administrative Hearings and, in accordance with Rules 34-5.010 and 34-5.014, Florida Administrative Code, requested that the public hearing on the Complaint against Mr. Spicola be conducted by the Division of Administrative Hearings.

Prior to the formal hearing the parties filed a Prehearing Statement. The parties stipulated to certain facts in the Prehearing Statement. Those facts have been accepted in this Recommended Order and have been identified as "Stipulated Facts".

At the formal hearing the Advocate presented the testimony of Emmett C. Lee, Jr. The Advocate also offered ten exhibits which were accepted into evidence. Mr. Spicola testified in his own behalf and presented the testimony of Robert Benjamin Hinkley and Joseph Garcia. Mr. Spicola also offered eleven exhibits, marked as Respondent's exhibits A-C, F-H and N-R. These exhibits were accepted into evidence.

The parties have filed proposed recommended orders containing proposed findings of fact. A ruling on each proposed finding of fact has been made either directly or indirectly in this Recommended Order or the proposed finding of fact has been accepted or rejected in the Appendix which is attached hereto.

FINDINGS OF FACT

A. The Respondent's Professional Experience.

1. The Respondent, Joseph G. Spicola, Jr., has been an attorney since 1958.

2. Mr. Spicola has served as a public defender, an elected state attorney, city attorney and as General Counsel for former Florida Governor Bob Martinez.

3. Mr. Spicola also served as the General Counsel for the Tampa Port Authority (hereinafter referred to as the "Port Authority") as an employee from March 14, 1989, until December 31, 1990. (Stipulated Fact).

4. Mr. Spicola, since January 1, 1991, to the present, has served as general counsel to the Port Authority as an independent contractor. (Stipulated Fact).

5. Between March 14, 1989, and December 31, 1990, Mr. Spicola received a salary from the Port Authority in the amount of $58,039.00. He also received state health insurance and retirement benefits. (Stipulated Fact).

6. While Mr. Spicola was an employee of the Port Authority he was subject to the Code of Ethics for Public Officers and Employees, Part III of Chapter 112, Florida Statutes (hereinafter referred to as the "Ethics Code").

B. The Practice of Mr. Spicola's Predecessor.

7. Mr. Spicola's predecessor as general counsel of the Port Authority, Terrell Sessums, was a salaried employee and he participated in the Florida Retirement System.

8. In his capacity as general counsel of the Port Authority, Mr. Sessums referred legal work to law firms and other attorneys, including a law firm that Mr. Sessums owned an interest in, MacFarlane, Ferguson, Allison & Kelly (hereinafter referred to as "MacFarlane").

9. The practice of referring legal work of the Port Authority to Mr. Sessums' law firm began in approximately May, 1977. At that time Mr. Sessums obtained approval from the Port Authority Board of Commissioners (hereinafter referred to as the "Board"), to engage the services of an associate of MacFarlane. The minutes of the May 10, 1977, meeting of the Board reflect the following concerning the authorization to use Mr. Sessums' law firm:

> Tampa Port Authority vs. State of Florida. . . .
> Because of the volume of work involved in these various legal matters, in addition to Port Authority routine legal matters, and in view of the time element with regard to the Uiterwyk suit, Mr. Berger told the Board that he had, subject to Board confirmation, authorized Mr. Sessums to associate Mr. David Kerr of MacFarlane, Ferguson, Allison & Kelly to represent the Authority in the Uiterwyk Cold Storage suit against the Authority. The charge for Mr. Kerr's services will be at the rate of $50 per hour and $75 per hour for court time, plus necessary and reasonable costs, upon receipt of properly itemized statements. . . .
> Whereupon, it was moved by Mr. Simms, seconded by Mr. Drawdy, and unanimously carried, the Chairman stepping down to vote, to approve the appointment of Mr. David Kerr of MacFarlane, Ferguson, Allison & Kelly to represent the Port Authority in the Uiterwyk Cold Storage litigation.
> Mr. Sessums also requested the Board's approval to associate other attorneys, including partners and associates of his own law firm, when necessary and desirable, to be paid at the rate of up to $50 per hour, plus necessary and reasonable costs, subject to receipt of properly itemized statements. Mr. Sessums explained that he has from time to time found it necessary to have the assistance of some of his associates, who have been paid for their services out of Mr. Sessums' income from the Port Authority or other fees.

The Board approved Ms. Sessums' request.

10. Approval of the use of MacFarlane by Mr. Sessums for Port Authority work was also given at a September 9, 1980, meeting of the Board.

11. After 1978, when Emmett Lee became Deputy Executive Director, Mr. Sessums kept Mr. Lee informed as to the use of MacFarlane and other outside attorneys. Mr. Lee became Executive Director in 1980 and remained in that position until 1990. The evidence failed to prove the exact time when Mr. Sessums began informing Mr. Lee of his use of outside attorneys or whether Mr. Sessums was informing anyone else before he began informing Mr. Lee.

12. Mr. Lee discussed with Mr. Sessums the need for back-up attorneys for Mr. Sessums apparently after Mr. Lee became Executive Director. Mr. Sessums suggested the use of an associate at MacFarlane. Mr. Lee included fees for the use of outside attorneys, including attorney's from MacFarlane, in the Port Authority's budget each year, which the Board approved.

13. Generally, Mr. Sessums kept Mr. Lee informed of his use of MacFarlane and other law firms for Port Authority work. After the September 9, 1990, meeting of the Board, Mr. Sessums was specifically required to obtain "prior approval of the Port Director" for any attorneys, "including partners and associates of his own law firm". See Advocate's exhibit 7.

C. Mr. Spicola's Employment by the Port Authority.

14. When Mr. Spicola first took the position as general counsel of the Port Authority, he was advised by the Port Authority Executive Director that Mr. Spicola might not be eligible to be an "employee" of the Port Authority. This concern was based upon a policy memorandum dated March 4, 1988, from the Florida Department of Administration (hereinafter referred to as the "DOA Memo"), which the Port Authority had received in 1988.

15. The DOA Memo was sent to "All Florida Retirement System Reporting Units" and raised questions about the eligibility of attorneys and consultants to participate in the Florida Retirement System. A questionnaire was attached to the DOA Memo which all professionals on contract currently enrolled in the Florida Retirement System were requested to complete and return to the Department of Administration.

16. Mr. Sessums completed one of the questionnaires and filed it with the Department of Administration. Mr. Sessums continued to be treated as an employee and participated in the Florida Retirement System.

17. Despite the fact that Mr. Sessums was considered an "employee", Mr. Lee told Mr. Spicola that he did not believe that Mr. Spicola could be an "employee" of the Port Authority because of the DOA Memo. Mr. Lee believed for some reason that Mr. Sessums had been "grandfathered in".

18. Mr. Spicola told Mr. Lee that he would handle the matter.

19. Mr. Spicola made inquiries with the Department of Administration about his qualification as an "employee". A letter was sent to the Port Authority from the Department of Administration indicating that it was up to the Port Authority to decide Mr. Spicola's status.

20. Mr. Spicola was provided by Mr. Robert Hinkley, an employee of the Port Authority in finance and accounting, with a DOA employee questionnaire and a copy of the questionnaire that Mr. Sessums had filed with the Department of Administration.

21. Mr. Spicola or someone at his request completed the DOA employee questionnaire and submitted it to the Department of Administration. It contained essentially the same information that Mr. Sessums had included on the form he completed and filed. The form was signed by "James Brown", the recently hired Director of Administrative Service of the Port Authority.

22. The Department of Administration sent a letter to the Port Authority indicating that Mr. Spicola was an "employee" and was qualified to participate in the Florida Retirement System.

23. Although the evidence proved that Mr. Spicola desired to be an "employee", at least in part, so that he could continue to participate in the Florida Retirement System, the evidence failed to prove that he violated any ethics or other law, that he was not in fact correctly classified as an "employee" or that his actions to insure that he was treated as an "employee" are directly related to the charges against him.

24. The evidence concerning Mr. Spicola's actions in insuring that he was an "employee" does, however, support a conclusion that Mr. Spicola should not only reap the benefits of his treatment as an "employee" but must also suffer the consequences of failing to conform his conduct to the rules governing the actions of public employees.

D. Mr. Spicola's Referral of Legal Work While Employed by the Port Authority.

25. At the time Mr. Spicola became general counsel for the Port Authority, he had a 50 percent ownership interest in the law firm Spicola and Larkin, P.A., which he retained and continues to hold at the present time. (Stipulated Fact).

26. Between March 14, 1989, and December 31, 1990, Mr. Spicola referred a number of legal matters to the Spicola and Larkin, P.A., law firm. (Stipulated Fact).

27. During the period of time that Mr. Spicola was an employee of the Port Authority he referred legal matters to Spicola and Larkin, P.A., for which Spicola and Larkin, P.A., were paid approximately $70,695.89 in fees and costs.

28. The weight of the evidence failed to prove that the fees and costs paid to Spicola and Larkin, P.A. while Mr. Spicola was an employee of Port Authority were excessive or in any way unearned. The weight of the evidence also failed to prove that the Port Authority did not receive appropriate legal services for the fees and costs it paid.

29. Unlike Mr. Sessums, Mr. Spicola did not always attend Board meetings. Instead, the Port Authority paid for the services of attorneys from Spicola and Larkin, P.A., to attend Board meetings. The weight of the evidence, however, failed to prove that the Port Authority failed to receive adequate services for the fees it paid or that Mr. Spicola was avoiding work which he was being paid to provide.

30. The referral of legal work by Mr. Spicola to Spicola and Larkin, P.A., between March 14, 1989, and December 31, 1990, was a violation of Sections 112.313(3) and 112.313(7)(a), Florida Statutes. Mr. Spicola has acknowledged this violation and has only questioned the propriety and amount of any penalty to be recommended.

31. At the time that Mr. Spicola became an employee of the Port Authority, he was aware of the fact that his predecessor, Mr. Sessums, used attorneys of MacFarlane and other firms for business of the Port Authority.

32. Mr. Spicola did not obtain specific approval from the Board to use attorneys from his law firm or other firms to handle legal matters for the Port Authority. Mr. Spicola did not investigate or attempt to determine the steps that Mr. Sessums took before using MacFarlane for Port Authority legal work. Nor did Mr. Spicola inquire into the legality of Mr. Sessums actions or his own actions.

33. There was no effort on the part of Mr. Spicola to hide the fact that legal work of the Port Authority was being referred to attorneys of Mr. Spicola's own law firm and other firms.

34. All bills for legal work referred to Spicola and Larkin, P.A., were approved at public meetings by the Board.

35. Although Mr. Spicola was not specifically aware of the prohibitions of Sections 112.313(3) or 112.313(7)(a), Florida Statutes, and there was some basis for relying to some extent upon the actions of Mr. Sessums, Mr. Spicola should have looked into the matter to insure that his actions (and his predecessor's) were not a violation of the law. Based upon Mr. Spicola's involvement in government, Mr. Spicola should have been less casual about the actions he took which obviously involved the use of public funds for his own benefit.

E. The Discovery of Mr. Spicola's Error.

36. In October or November, 1990, Mr. Spicola first became aware that his referral of legal work was a violation of the Ethics Code when questioned about the practice by a reporter for the local newspaper.

37. Mr. Spicola telephoned the former Chairman of the Commission to determine whether he had been violating the Ethics Code. Mr. Spicola was referred to counsel for the Commission.

38. Based upon his conversation with the Commission, Mr. Spicola concluded that he had probably violated Ethics Code, reported this conclusion to the Chairman of the Port Authority and indicated that he would have to resign his employment.

39. At a December 31, 1990, meeting of Board Mr. Spicola's status was changed from that of an "employee" to that of an "independent contractor" effective January 1, 1991.

40. In changing his status, Mr. Spicola was no longer entitled to participate in the Florida Retirement System because he was no longer an "employee." Mr. Spicola was, however, able to continue the referral of Port Authority legal work to his law firm and other law firms because he is no longer subject to the Ethics Code.

41. Mr. Spicola has continued to refer Port Authority legal work to his law firm and other law firms since becoming an independent contractor in the same manner that he referred such work while he was an "employee" of the Port Authority.

CONCLUSIONS OF LAW

A. Jurisdiction.

42. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes (1991).

B. Burden of Proof.

43. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue of the proceeding. Antel v. Department of Professional Regulation, 522 So.2d 1056 (Fla. 5th DCA 1988); Department of Transportation v. J.W.C. Co., Inc. 396 So.2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So.2d 249 (Fla. 1st DCA 1977). In this proceeding it is the Commission, through the Advocate, that is asserting the affirmative. Therefore, the burden of proving the elements of Mr. Spicola's alleged violations was on the Commission.

C. The Charges Against Mr. Spicola.

44. Mr. Spicola has been charge with violating Sections 112.313(3) and 112.313(7)(a), Florida Statutes. Mr. Spicola has admitted that he committed both violations. The evidence also supports a conclusion that Mr. Spicola committed both violations.

Section 112.313(3), Florida Statutes, provides:

> (3) DOING BUSINESS WITH ONE'S AGENCY. No employee of an agency acting in his official capacity as a purchasing agent, or public officer acting in his official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his own agency from any business entity of which he or his spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or his spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to his own agency, if he is a state officer or employee, or to any political subdivision or any agency thereof, if he is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business. This subsection shall not affect or be construed to prohibit contracts entered into prior to:

(a) October 1, 1975.
(b) Qualification for elective office.
(c) Appointment to public office.
(d) Beginning public employment.

45. Section 112.313(7)(a), Florida Statutes, provides, in pertinent part, the following:

> (7) CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.
> (a) No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his private interests and the performance of his public duties or that would impede the full and faithful discharge of his public duties.

46. Mr. Spicola does not dispute that he violated both provisions. The only issue remaining to be resolved in this matter is the penalty to be imposed on Mr. Spicola for his admitted violations.

D. Penalty.

47. Section 112.317, Florida Statutes, provides a wide range of penalties which the Commission may impose upon an person who violates the Ethics Code, including violations of Sections 112.313(3) and 112.313(7)(a), Florida Statutes. In particular, Section 112.317, Florida Statutes, authorizes the following pertinent penalties for an "employee":

> . . . .
> 6. A civil penalty not to exceed $5,000.
> 7. Restitution of any pecuniary benefits received because of the violation committed.
> 8. Public censure and reprimand.

48. The Advocate has argued that a penalty of $2,000.00 per violation (a total of $4,000.00) and restitution in the amount of $7,000.00 should be imposed by the Commission on Mr. Spicola. Mr. Spicola has suggested that he bear the costs of his defense of this action and that no additional punishment be imposed. Neither party has cited any authority concerning the appropriate penalty in a case such as this, and neither proposal is recommended.

49. There are several reasons why Mr. Spicola's recommended penalty should be rejected. First, no evidence was presented to support a finding of fact as

to what costs, if any, Mr. Spicola has or will incur as a result of this proceeding. It cannot be assumed without proof that any costs have been incurred or, if so, the amount thereof.

50. Secondly, to impose no penalty on Mr. Spicola would be tantamount to ignoring the fact that he violated the Ethics Code.

51. Finally, and most importantly, although the facts of this case may mitigate against the imposition of the maximum penalty, the facts do not warrant the imposition of no penalty by the Commission.

52. The following facts warrant imposition of some penalty:

1. Mr. Spicola chose to be an "employee" of the Port Authority. Although Mr. Spicola could have referred the same work to his firm as an independent contractor, he chose to be and was an employee rather than an independent contractor.

2. Mr. Spicola is an attorney who has been involved in government service for many years. Although he has been given the benefit of the doubt as to whether he was actually aware that his actions violated the Ethics Code, he should have at least looked into the matter to be sure that his actions were not in violation of any law. Having been involved in government for as long as Mr. Spicola has, he should have been more circumspect about the actions he took which obviously involved use of public funds to benefit himself. Mr. Spicola's suggestion that his only error was in not reading the Ethics Code trivializes the Ethics Code and ignores Mr. Spicola's responsibility as a public servant and the concerns which any reasonable person should have about the use of public funds for his or her benefit. Mr. Spicola assumed too much.

53. Mr. Spicola suggests that he merely followed the precedent set by Mr. Sessums. Although partially true, Mr. Spicola did not indicate that he made any effort to determine what steps, if any, Mr. Sessums had taken to insure that his referral of work which resulted in the expenditure of public funds for the benefit of his law firm was not a violation of any law. Mr. Spicola merely assumed that it was okay.

54. That Mr. Spicola did not intentionally violate the law or intend to harm the Port Authority does militates against imposition of the maximum penalty available. The violations at issue do not require, however, proof of any malicious or wrongful intent or harm to a public agency.

55. Mr. Spicola promptly took steps to remedy the situation and has not attempted to dispute the charges against him, which also militates to some extent against imposition of the maximum penalty.

56. Taken as a whole, a penalty of less than the maximum penalty should be imposed.

57. The amount of the civil penalty recommended by the Advocate is reasonable. Although there are technically two violations, they are actually duplicate characterizations of the same act. A civil penalty of $4,000.00 (or $2,000.00 per violation) is reasonable.

58. The Advocate's recommendation that restitution should be required, however, is rejected. The evidence in this case failed to prove that the Port Authority did not receive full value for the services rendered to it by Mr.

Spicola's law firm or that Mr. Spicola's law firm was not otherwise entitled to the fees and costs it was paid. Therefore, restitution is not justified.

RECOMMENDATION

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

RECOMMENDED that the Commission on Ethics enter a Final Order and Public Report finding that the Respondent, Joseph G. Spicola, violated Sections 112.313(3) and 112.313(7)(a), Florida Statutes, as alleged in Complaint No. 91-4, and imposing a civil penalty of $4,000.00 on Mr. Spicola for such violations.

DONE and ENTERED this __24th__ day of March, 1992, in Tallahassee, Florida.

LARRY J. SARTIN
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this __24th__ day of March, 1992.

APPENDIX RECOMMENDED ORDER

The parties have submitted proposed findings of fact. It has been noted below which proposed findings of fact have been generally accepted and the paragraph number(s) in the Recommended Order where they have been accepted, if any. Those proposed findings of fact which have been rejected and the reason for their rejection have also been noted.

The Advocate's Proposed Findings of Fact

Proposed Finding of Fact Number	Paragraph Number in Recommended Order of Acceptance or Reason for Rejection
Section A:	
1	3.
2	4.
3	5.
4	25.
5	1-2 and hereby accepted.
6	Not supported by the weight of the evidence. But see 32 and 35.
Section B:	
1-2	7
3	11.
4	8-13.

Section C:

1	26.
2	27.
3	30.

Section D:

1	Hereby accepted.
2	9.
3	10.
4	32 and 35.
5	See 12. Advocate's Exhibit 6 does not support this proposed finding of fact. Advocate's Exhibit 6 is a copy of the minutes of a meeting of the Board of May 10, 1977. Mr. Lee, the Port Authority Director who testified he discussed the hiring of outside attorneys with Mr. Sessums did not come to the Port Authority until 1978. Mr. Lee did discuss the hiring of outside attorneys with Mr. Sessums but the practice had already been approved by the Board when that discussion was held.
6	See 11.
7	26-27 and hereby accepted.
8	Although true, the weight of the evidence failed to prove the dispute between Mr. Spicola and Mr. Lee was anything more than a philosophical dispute between the two men over their respective areas of authority. The matter was even discussed with the Chairman of the Board who agreed with Mr. Spicola that the legal work of the Port Authority was Mr. Spicola's responsibility. The evidence was insufficient to conclude that Mr. Spicola's dispute with Mr. Lee was part of any deliberate attempt to circumvent the Ethics Code.
9	See 9 and 10. The Board did not, however, approve every outside attorney hired before the attorney was hired. The Board, in 1977 and again in 1980, gave Mr. Sessums the general authority to make that decision and the Board ultimately approved the expenditure of fees and costs to outside attorneys.
10	32 and 34.
11	Not supported by the weight of the evidence.
12	29.
13	See 29.
14	See the discussion of finding of fact 8 of Section D.
15	Hereby accepted.

Section E:

1	5.
2	14.
3	14 and 17.
4	18 and 22.
5	19.
6-7	Hereby accepted.
8	20.
9	21.
10	Not supported by the weight of the evidence. At best Mr. Lee testified that the information, based upon the work that Mr. Spicola eventually performed for the Port Authority, was an "exaggeration." The evidence failed to prove that the information on the questionnaire, at the time it was completed, was not accurate.
11	21.

12	23.
13	Not supported by the weight of the evidence. See 23-24.

The Respondent's Proposed Findings of Fact

Proposed Finding of Fact Number	Paragraph Number in Recommended Order of Acceptance or Reason for Rejection
1	Hereby accepted.
2	3.
3	4.
4	25.
5	26.
6	3 and 6.
7-8	30.
9	36.
10	37.
11	38.
12	39.
13	9 and 31. But see 32 and 35.
14	See 41.
15	See the discussion of the Advocate's proposed finding of fact 8 in Section D.
16	Not supported by the weight of the evidence, except that the questionnaires did contain essentially the same information.
17	Not supported by the weight of the evidence. See 9-10 and 32-35.
18	Hereby accepted.
19	34.
20-25	Although generally true, these proposed findings of fact have very little probative value. They have been considered, but have been given little weight. Mr. Garcia was only one of the members of the Board and cannot speak for the entire Board.
26	See 28. But see 33 and 35.
27	20.
28	21.
29	Hereby accepted.
30	11.
31	11-12.
32	Hereby accepted.
33	See the discussion of the Advocate's proposed finding of fact 8 of Section D.
34	Hereby accepted.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

ALL PARTIES HAVE THE RIGHT TO SUBMIT WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. SOME AGENCIES ALLOW A LARGER PERIOD WITHIN WHICH TO SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD CONTACT THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE CONCERNING AGENCY RULES ON THE DEADLINE FOR FILING EXCEPTIONS TO THIS RECOMMENDED ORDER. ANY EXCEPTIONS TO THIS RECOMMENDED ORDER SHOULD BE FILED WITH THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE.

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AGENCY FINAL ORDER

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BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re JOSEPH G. SPICOLA,

Respondent.

Complaint No. 91-4
DOAH Case No. 91-6730EC

_____/

FINAL ORDER AND PUBLIC REPORT

This matter came before the Commission on Ethics on the Recommended Order rendered in this matter on March 24, 1992, by the Division of Administrative Hearings (a copy of which is attached and incorporated by reference). The Hearing Officer recommends that the Commission find that Respondent violated Sections 112.313(3) and(7), Florida Statutes. Respondent filed exceptions to certain language employed by the Hearing Officer in Part D of the Hearing Officer's Conclusions of Law, the "Penalty" section, and to the amount of penalty he recommended.

Having reviewed the Recommended Order, the Respondent's exceptions, and the record of the public hearing of this complaint, and having heard the arguments of counsel for the Respondent and the Commission's Advocate, the Commission makes the following findings, conclusions, rulings and recommendations:

Findings of Fact

The Findings of Fact set forth in the Recommended Order are approved, adopted, and incorporated herein.

Conclusions of Law

Paragraphs A, B and C of the Hearing Officer's recommended Conclusions of Law are approved, adopted, and incorporated herein by reference.

Recommended Penalty

1. Paragraph No. 2 of the Hearing Officer's recitation of facts as set forth in Part D (Penalty) on page 15 of the Hearing Officer's Recommended Order is modified to read:

> Mr. Spicola is an attorney who has been involved in government service for many years. although he has been given the benefit of the doubt as to whether he was actually aware that his actions violated the Ethics Code, he should have at least looked into the matter to be sure that his actions were not in violation of any law. Having been involved in government for as long as Mr. Spicola has, he should have been more circumspect about the actions he took which obviously involved use of public funds to benefit himself. Mr. Spicola's error was in not reading the Ethics Code and ignoring his responsibility as a public servant and the concerns which any reasonable person should have about the use of public funds for his or her benefit.

In making these changes, we note that the changes relate to the Hearing Officer's editorialized comments, rather than to the recommended penalty itself. However, the next two paragraphs on the top of page 16 of the Hearing Officer's Recommended Order, which Respondent also has requested be changed, shall remain the same and the Respondent's exceptions to the language employed by the Hearing Officer in these two paragraphs are rejected.

2. We reject the Hearing Officer's rationale for declining to recommend that restitution be assessed against Respondent as Section 112.317(1)(d)3., Florida Statutes, permits, because we find that his rationale is incorrect as a matter of law. Therefore, the last paragraph on page 16 shall be modified by striking the sentence at the bottom of page 16 and the top of page 17 and inserting the following:

> In addition to any criminal penalty or other civil penalty involved, Section 112.3l7(1)(d)3., Florida Statutes, among other things, permits the imposition of restitution against the public employee of any pecuniary benefits received because of the violation. However, a review of the record here indicates that there is insufficient evidence upon which to base a determination of the pecuniary benefits received because of the violations committed; therefore, no restitution is recommended.

3. We also reject the Hearing Officer's recommended penalty and, consequently, paragraphs Nos. 4 and 5 on page 16 of the Recommended Order. We find that the correct penalty in this case is a fine of $5,000 for each violation for a total penalty of $10,000. This penalty is appropriate for the following reasons:

a) Respondent is a lawyer of substantial experience of more than 30 years, who sat at the right hand of the Governor as his chief legal advisor. For a year and a half he repeatedly referred work to his own law firm,totaling approximately $71,000. He argues that his actions should be excused because he did not read the law. This excuse is not acceptable. We believe that we should be governed by our own precedent to the extent possible. Recently the case of In re Walter Stotesbury, Complaint No. 89-160, 14 FALR 1017 (1991), aff'd, Stotesbury v. State, Commission on Ethics, ___ So.2d ___ (Fla. 1st DCA 1992) (decided March 30, 1992), was affirmed by the First District Court of Appeal without opinion. In that case, the Commission recommended a penalty of $5,000 for two isolated instances in which Stotesbury, a member of an Airport Authority, not a lawyer with substantial experience of 30 years or more sold securities to and did business with a fixed based operator of the airport. Here, the Hearing Officer's recommended penalty appears to be a mere slap on the wrist for repeated transactions that occurred over a year and a half.

b) We also believe that a penalty that will be a deterrence to others should be imposed here. An increased penalty of $10,000 will indicate that a public employee/lawyer cannot refer almost $71,000 worth of business to a law firm of which he owns a 50% interest and receive only a relatively minor penalty in the amount of $4,000. Under these circumstances, the $4,000 penalty recommended by the Hearing Officer is not a deterrent; it is tantamount to the "cost of doing business."

Accordingly, the Commission on Ethics, having found that the Respondent, Joseph G. Spicola, violated Sections 112.313(3) and 112.313(7), Florida Statutes, recommends that a civil penalty be imposed upon Respondent in the amount of $10,000.

ORDERED by the State of Florida Commission on Ethics meeting in public session on Friday, June 5, 1992.

June 11, 1992
Date Rendered

_____
Dean Bunch
Chairman

YOU ARE NOTIFIED THAT YOU ARE ENTITLED, PURSUANT TO SECTION 120.68, FLORIDA STATUTES, TO JUDICIAL REVIEW OF AN ORDER WHICH ADVERSELY AFFECTS YOU. REVIEW PROCEEDINGS ARE COMMENCED BY FILING A NOTICE OF ADMINISTRATIVE APPEAL WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, AND ARE CONDUCTED IN ACCORDANCE WITH THE FLORIDA RULES OF APPELLATE PROCEDURE. THE NOTICE OF ADMINISTRATIVE APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

cc: Mr. John R. Lawson, Attorney for Respondent
Ms. Virlindia Doss, Commission Advocate
Mr.Richard L. Murphy, Complainant
Division of Administrative Hearings