

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

In Re: ELI TOURGEMAN) CASE NO. 93-5183EC
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Susan B. Kirkland, held a formal hearing in this case on December 29, 1993, in Miami, Florida.

APPEARANCES

For the Advocate: Stuart F. Wilson-Patton, Attorney
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050

For Respondent: Richard Waserstein, Attorney
913 Normandy Drive
Miami Beach, Florida 33141

STATEMENT OF THE ISSUES

Whether Respondent violated Section 112.313(6), Florida Statutes, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On March 11, 1992, the Florida Commission on Ethics (Commission) issued an Order Finding Probable Cause, that Respondent, Eli Tourgeman, violated Section 112.313(6), Florida Statutes, by influencing or attempting to influence the town of Surfside's recreation department employees to award summer camp scholarships to his nephews. On September 3, 1993, the Commission requested that the Division of Administrative Hearings conduct a public hearing. The proceeding was scheduled for hearing on December 29, 1993.

The Advocate for the Commission called Jeffrey Naftal, Adele Weisberg, and Robert Silvers as witnesses. The Advocate's exhibits A-D were entered into evidence. Respondent called Peter Cohen, Marcella Tourgeman, and Fanny Tourgeman Elias as witnesses.

The transcript was filed on February 14, 1994. At the hearing, the parties agreed to file proposed recommended orders within ten days of the filing of the transcript. The Advocate requested an extension of time to file the proposed recommended orders, which request was granted, extending the time to file proposed recommended orders to March 18, 1994. The parties timely filed their proposed recommended orders. The parties' proposed findings of fact are addressed in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. Respondent, Eli Tourgeman (Tourgeman), was a city council member for the town of Surfside, Florida, (Surfside) from 1986 to 1988. He served as vice-mayor of Surfside for two years beginning in 1988. In 1990 he became mayor of Surfside and served for two years.

2. Tourgeman was a member of the Northshore/Miami Beach Kiwanis Club (Kiwanis Club) for many years, including 1987 through 1990.

3. Tourgeman held a full-time position with Glendale Federal Bank during 1986 through 1992.

4. Surfside sponsors a children's summer camp each year. The camp is open to resident and nonresident children of Surfside. Nonresident children are charged a higher registration fee than Surfside residents.

5. Beginning in approximately 1983, prior to the time Tourgeman became a member of the Kiwanis Club, the Kiwanis Club helped sponsor the summer camp by giving \$350 to Surfside each year. The \$350 was to be used to provide two \$100 camp scholarships to two needy children with the remainder of the money to be used to pay for a field day barbecue and trophies for the campers. Each year the summer camp project would be presented to the board of the Kiwanis Club for a vote on whether to fund the project.

6. The Kiwanis Club had no criteria for awarding the scholarships except that the recipients must be in financial need. The determination of who would receive the scholarships was left to Surfside. The Kiwanis Club did not require that Surfside report each year how the funds were used for the summer camp program, or who, if anyone, was awarded a scholarship.

7. At all times pertinent to this proceeding Adele Weisberg was the director for the Department of Recreation for Surfside. The Town Manager had supervisor authority over Ms. Weisberg, including the authority to hire and fire her. The Town Commission could dismiss the Town Manager for cause. Neither the city council members, the vice-mayor or the mayor had direct authority over Ms. Weisberg.

8. Among Ms. Weisberg's duties was the administration of the summer camp program and the determination of who would receive the Kiwanis Club scholarships. She had no guidelines in determining who would be awarded a scholarship except that the child be in financial need.

9. Neither Surfside nor the Kiwanis Club advertised the availability of the scholarships. From 1983 until 1987, Surfside did not receive any applications for the scholarships and thus did not award any scholarships for the summer camp, but used the funds for the summer camp, including the field day and the purchase of trophies.

10. Tourgeman had two nephews, Abraham Tourgeman and Sean Young, who lived each summer with Tourgeman's mother in Surfside. During the remainder of the year, the nephews lived in Miami with their mothers, Tourgeman's sisters. Abraham and Sean were considered residents for the purpose of the summer camp enrollment because they resided with their grandmother during the summer months.

11. In 1987, Abraham Tourgeman's mother wanted to send him to summer camp but could not afford to do so. Tourgeman advised his sister that the Kiwanis Club provided two \$100 scholarships each year. He agreed to call the recreation department and inquire about the summer camp scholarships. Tourgeman called Ms. Weisberg and told her that his nephew wanted to go to summer camp but was in financial need and that he wanted his nephew to receive a Kiwanis Club scholarship. Ms. Weisberg viewed the request as that of a Kiwanis Club member rather than a public officer. Ms. Weisberg told him to tell his sister, Fanny Tourgeman Elias, to call her. Ms. Elias called Ms. Weisberg, who advised Ms. Elias that she would have to come over that day to register her son or he would not be able to get into summer camp. Ms. Elias went the same day and filled out the application form.

12. Both Sean Young and Abraham Tourgeman met the financial need criterion and qualified for a scholarship.

13. For the summer camp session of 1987, Abraham Tourgeman received a \$100 Kiwanis Club scholarship. Sean Young also attended summer camp in 1987, but did not receive a scholarship.

14. In 1988, the Kiwanis Club again funded the summer camp program. Tourgeman personally delivered the check to Ms. Weisberg. Tourgeman advised Ms. Weisberg that he wanted his nephew to receive a Kiwanis Club scholarship. Ms. Weisberg viewed the request as a request from a Kiwanis Club member rather than a public officer. Sean Young received a \$100 Kiwanis Club scholarship to attend summer camp in 1988.

15. In 1989, the Kiwanis Club again funded the summer camp program. Again Tourgeman advised Ms. Weisberg that he wanted his nephew to have a Kiwanis Club scholarship. Ms. Weisberg viewed the request as that of a Kiwanis Club member rather than a public officer. Abraham Tourgeman received a \$100 Kiwanis Club scholarship to attend summer camp in 1989.

16. In 1990, Tourgeman recommended to the Kiwanis Club board that the summer camp funding be renewed. The board voted approval of the funding in June, 1990.

17. In 1990, Sean Young was unable to get into summer camp because he waited too late to register and the camp was filled. Abraham Tourgeman was either too late in applying for summer camp or was too old to be admitted into the program; thus he was unable to be attend summer camp in 1990.

18. Tourgeman called Ms. Weisberg and told her that Abraham Tourgeman would agree to volunteer as a counselor for the 1990 summer camp session, but Ms. Wiesberg advised Tourgeman that she already had enough volunteers.

19. Ms. Weisberg viewed Tourgeman as the contact person with the Kiwanis Club for the summer camp program. In 1990 Ms. Weisberg had been advised that the funding had been approved and she called Tourgeman to inquire whether they would get the check from the Kiwanis Club. Tourgeman advised her that unless his nephews were allowed to go to summer camp, the check would not be forthcoming. Ms. Weisburg viewed Tourgeman's threat as that of a Kiwanis Club member rather than a public officer.

20. The Recreation Department prepared flyers for the annual summer camp field day, but did not include on the announcement, as it had in previous years, that the Kiwanis Club was helping to sponsor the festivities.

21. Ron Silvers, who was secretary for the Kiwanis Club in 1990, learned that the Kiwanis Club was not being included as a sponsor for the 1990 summer camp and he called Ms. Wiesberg. She advised him of the conversation with Tourgeman.

22. On July 24, 1990, the Kiwanis Club check was delivered to Surfside for the 1990 summer camp program.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes. Section 112.322, Florida Statutes, and Rule 34-5.0015, Florida Administrative Code, authorize the Florida Commission on Ethics (Commission) to conduct investigations and make public reports on complaints concerning violations of Part III, Chapter 112, Florida Statutes (the Code of Ethic for Public Officers and Employees).

24. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue of the proceeding. 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 349 (Fla. 1st DCA 1977). In this proceeding it is the Commission, through the Advocate, that is asserting the affirmative: that Tourgeman violated Section 112.313(6), Florida Statutes. Therefore the burden of proving the elements of Tourgeman's alleged violations is on the Commission.

25. Section 112.313(6), Florida Statutes provides:

MISUSE OF PUBLIC OFFICE--No public officer or employee of an agency shall corruptly use or attempt to use his official position or any property or resource which may be within his trust, or perform his official duties, to secure a special privilege, benefit, or exemption for himself or others. This section shall not be construed to conflict with s. 104.31.

26. For purposes of Section 112.313(6), the term "corruptly" is defined by Section 112.312(9), Florida Statutes, as follows:

'Corruptly' means done with a wrongful intent and for the purpose of obtaining or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his duties.

27. In order for it to be concluded that Tourgeman violated Section 112.313(6), Florida Statutes, the following elements must be proven by a preponderance of the evidence:

1. Tourgeman was a public officer or employee of an agency.
2. Tourgeman used or attempted to use his official position or property or resource within his trust or performed his official duties.
3. Tourgeman's actions were done with an intent to secure a special privilege, benefit, or exemption for himself or others; and
4. Tourgeman's actions were done "corruptly" that is,
 - (a) done with a wrongful intent, and
 - (b) done for the purpose of benefiting from some act or omission which was inconsistent with the proper performance of public duties.

28. Tourgeman was a public officer and was subject to the Florida Code of Ethics for Public Officers and Employees, Part III of Chapter 112, Florida Statutes. He served consecutive two-year terms as a council member, as vice-mayor and as mayor of Surfside from 1986 through 1992.

29. The evidence presented failed to establish that Tourgeman used or attempted to use his position as city council member, vice-mayor or mayor of Surfside to gain a special benefit for himself or others.

30. The Advocate cites *In re Lancaster*, 5 F.A.L.R. 1567-A, 1571-A (1983), for the proposition that it could reasonably be inferred that Tourgeman had some influence in decisions affecting Ms. Weisberg's employment and in such a relationship there is an implicit understanding on Ms. Weisberg's part that failure to find favor with the superior for any reason might constitute a threat to her employment. Such argument is not persuasive. In *Lancaster*, the respondent was a supervisor of elections who had the authority to hire and fire deputy supervisors. He made sexual advances to two deputy supervisors and another employee whom he had hired. There is no evidence that Tourgeman had the authority to fire or discipline Ms. Weisberg. In fact, the evidence is to the contrary. Ms. Weisberg did not feel that Mr. Tourgeman was requesting the scholarships in his capacity as a public officer but that the request, that the scholarship be awarded to his nephew, and the threat to withhold the Kiwanis Club funds was done in his capacity as a member of the Kiwanis Club.

31. Tourgeman did corruptly use his position as a member of the Kiwanis Club but not as a public official to attempt to gain special benefits for his nephews, i.e., summer camp scholarships. While this may not be morally right, it is not a violation of Section 112.313(6), Florida Statutes.

RECOMMENDATION

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

RECOMMENDED that a final order and public report be entered dismissing the Complaint.

DONE AND ENTERED this 29th day of April, 1994, in Tallahassee, Leon County, Florida.

SUSAN B. KIRKLAND
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 29th day of
April, 1994.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 93-5183EC

To comply with the requirements of Section 120.59(2), Florida Statutes (1993), the following rulings are made on the parties' proposed findings of fact:

Advocate's Proposed Findings of Fact.

1. Paragraph 1: The first three lines are accepted in substance. The last two lines are rejected as constituting a conclusion of law.
2. Paragraph 2: Accepted in substance.
3. Paragraph 3: The last sentence is rejected as unnecessary. The remainder of the paragraph is accepted in substance.
4. Paragraph 4: The first two sentences are accepted in substance. The remainder is rejected as subordinate to the facts actually found.
5. Paragraph 5: The first, fifth, sixth and seventh sentences are accepted in substance. The second, third, and fourth sentences are rejected as unnecessary.
6. Paragraph 6: Rejected as unnecessary.
7. Paragraphs 7-9: Accepted in substance.
8. Paragraph 10: The third sentence is rejected as unnecessary. The first and second sentences are accepted in substance to the extent that Tourgeman was involved in the summer camp program as a member of the Kiwanis Club. The last sentence is rejected as not supported by the greater weight of the evidence as it relates to 1987 and 1989, but accepted as to 1988.
9. Paragraph 11: Accepted in substance.

10. Paragraph 12: The first and second sentences are rejected as subordinate to the facts actually found. The third sentence is accepted in substance.
11. Paragraph 13: The first and last sentences are accepted in substance. The second sentence is rejected as subordinate to the facts actually found.
12. Paragraph 14: The first and last sentences are accepted in substance. The second sentence is rejected as not supported by the greater weight of the evidence to the extent that Tourgeman called back, otherwise, it is accepted in substance. The last sentence is accepted in substance.
13. Paragraph 15: Accepted in substance.
14. Paragraphs 16-17: Rejected as subordinate to the facts actually found.

Respondent's Proposed Findings of Fact. (Amended Recommended Order)

1. Paragraphs 1-3: Rejected as not supported by the greater weight of the evidence presented at hearing.
2. Paragraphs 4-10: Accepted in substance.
3. Paragraph 11: The last sentence is rejected as unnecessary. The remainder of the paragraph is accepted in substance. (It should be noted that Respondent has cited to the deposition of Adele Weisberg. Ms. Weisberg's deposition is not in evidence.)
4. Paragraph 12: Rejected as subordinate to the facts actually found.
5. Paragraph 13: Accepted in substance.
6. Paragraph 14: Rejected as unnecessary and subordinate to the facts actually found.
7. Paragraph 15-17: Accepted in substance.
8. Paragraph 18: Rejected as unnecessary and subordinate to the facts actually found.
9. Paragraph 19: Accepted in substance.
10. Paragraphs 20-21: Rejected as mere recitation of testimony.
11. Paragraph 22: The first sentence is accepted in substance. The second sentence is rejected as argument. The third sentence is rejected as not supported by the greater weight of the evidence. The fourth sentence is accepted in substance.
12. Paragraph 23: Rejected as constituting argument.
13. Paragraph 22 (second) Rejected as constituting argument.
14. Paragraph 23 (second) Rejected as constituting a conclusion of law.

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 ten 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.

=====
AGENCY FINAL ORDER
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BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re ELI TOURGEMAN,

Respondent.

DOAH NO: 93-5183EC
Complaint No. 91-73
Final Order No. COE 94-28

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FINAL ORDER AND PUBLIC REPORT

This matter came before the Commission on Ethics on the Recommended Order rendered in this matter on April 29, 1994 by the Division of Administrative Hearings (DOAH) [a copy of which is attached and incorporated by reference]. The Hearing Officer recommends that the Commission enter a final order and public report dismissing the complaint filed against the Respondent in this matter.

Both the Advocate for the Commission and the Respondent filed exceptions to the Recommended Order, the Advocate filed a response to the Respondent's exceptions, and the Respondent did not file a response to the Advocate's exceptions.

The Advocate takes exception to paragraph 30 of the Recommended Order, arguing that the Hearing Officer erred as a matter of law in concluding that the lack of independent ability on the part of a public official to terminate or discipline the public employment or status of a public employee precludes the finding of coercion in the superior-subordinate relationship. Further, the Advocate's exceptions go on to request that the Commission modify the conclusion of law contained in paragraph 30 to recognize that there can be an implicit understanding on an employee's part that failure to find favor with a superior for any reason might constitute a threat to his employment--that coercion or misuse of one's public position under Section 112.313(6), Florida Statutes, can occur regardless of whether or not a public official has the actual power to fire, discipline, or sanction a particular employee. However, the Advocate's exceptions also assert that in this particular matter the totality of the circumstances, including the fact that the Respondent, when he did make a threat, made one related to the withholding of the Kiwanis money rather than one directed toward the employee's employment and the fact that the employee herself perceived no danger to her employment, preclude a finding that the Respondent attempted to make use of the influence he had, as a public official, over the employee.

The Respondent takes exception to paragraph 31 of the Recommended Order, arguing that the Hearing Officer's legal conclusions that the Respondent "did corruptly use his position as a member of the Kiwanis Club" and that the same "may not be morally right" are gratuitous comments not relevant to any issues before the Hearing Officer. The Advocate responds to the exception by arguing that the language contained in paragraph 31 is necessary to explain the Hearing Officer's decision, which ultimately was entered in favor of the Respondent.

Under Section 120.57(1)(b)10, Florida Statutes, an agency may reject or modify the conclusions of law and interpretations of administrative rules contained in the recommended order. However, the agency may not reject or modify findings of fact made by the Hearing Officer unless a review of the entire record demonstrates that the findings were not based on competent, substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. See, e.g., *Freeze v. Dept. of Business Regulation*, 556 So.2d 1204 (Fla. 5th DCA 1990); and *Florida Department of Corrections v. Bradley*, 510 So.2d 1122 (Fla. 1st DCA 1987). Competent, substantial evidence has been defined by the Florida Supreme Court as such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusions reached." *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957).

The agency may not reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses, because those are matters within the sole province of the hearing officer. *Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Consequently, if the record of the DOAH proceedings discloses any competent, substantial evidence to support a finding of fact made by the Hearing Officer, the Commission is bound by that finding.

Having reviewed the Recommended Order, the Advocate's exceptions, the Respondent's exceptions, the Advocate's response to the Respondent's exceptions, and the record of the public hearing of this matter that has been placed before

the Commission, and having considered the arguments of the Respondent and the Advocate made before the Commission at its final consideration of this matter, the Commission makes the following findings, conclusions, rulings, and recommendations:

Rulings on Advocate's Exceptions

Under our precedent [see, e.g., In re LANCASTER, 5 F.A.L.R., 1565-A (Fla. Comm. on Ethics 1983)], we have found that implicit coercion can be present regardless of whether a respondent is vested with the power to hire, discipline, or otherwise affect a public employee's employment. We believe that to be a correct interpretation of Section 112.313(6) and see no reason to deviate from that reasoning. Therefore, the conclusion of law found in paragraph 30 of the Recommended Order is modified to be consistent with our reasoning expressed above. However, under the particular facts of this matter, we determine that the Respondent, for the reasons set forth in the Advocate's exceptions and in the Hearing Officer's Recommended Order as modified herein, did not violate Section 112.313(6), Florida Statutes. Accordingly, the Advocate's exception is granted.

Rulings on Respondent's Exceptions

Whether the Respondent's actions were taken as a member of the Kiwanis club rather than as a public official is relevant to the issue of whether the Respondent misused his public position in violation of Section 112.313(6). However, the term "corruptly," by definition, is applicable only to the actions of a public servant in connection with his public duties and Section 112.313(6) does not address private capacity conduct, such as that of a member of a service club. Therefore, while it thus was proper in the course of trying the charges in this matter and considering any applicable defenses thereto for the Hearing Officer to determine that the Respondent's actions were not taken in his capacity as a public official but rather were taken in his capacity as a member of the Kiwanis Club, the legal term "corruptly" is not available to be ascribed to the Respondent's private conduct. Similarly, whether the Respondent's actions were "morally right" is not a matter addressed by the Code of Ethics or at issue in this matter. Thus, the Respondent's exception is granted and paragraph 31 of the Recommended Order is hereby amended to read:

31. Tourgeman did not as a public official attempt to gain special benefits for his nephews, i.e., summer camp scholarships. Therefore, there was not a violation of Section 112.313(6), Florida Statutes.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

1. The Conclusions of Law set forth in the Recommended Order are approved, adopted, and incorporated herein by reference except as modified above.

2. The Commission finds that the Respondent, Eli Tourgeman, did not violate Section 112.313(6), Florida Statutes, as alleged in the complaint filed in this matter.

Accordingly, this Complaint is hereby dismissed.

ORDERED by the State of Florida Commission on Ethics meeting in public session on Thursday, July 14, 1994.

July 20, 1994
Date Rendered

R. Terry Rigsby
Chairman

THIS ORDER CONSTITUTES FINAL AGENCY ACTION. ANY PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER HAS THE RIGHT TO SEEK JUDICIAL REVIEW UNDER SECTION 120.68f FLORIDA STATUTES, BY FILING A NOTICE OF ADMINISTRATIVE APPEAL PURSUANT TO RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, WITH THE CLERK OF THE COMMISSION ON ETHICS, 2822 REMINGTON GREEN CIRCLE, SUITE 101, TALLAHASSEE, FLORIDA 32308; OR P. O. DRAWER 15709, TALLAHASSEE, FLORIDA 32317-5709; AND BY FILING A COPY OF THE NOTICE OF APPEAL ACCOMPANIED BY THE APPLICABLE FILING FEES WITH THE APPROPRIATE DISTRICT COURT OF APPEAL. THE NOTICE OF ADMINISTRATIVE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE DATE THIS ORDER IS RENDERED.

cc: Mr. Richard Wasserstein, Attorney for Respondent
Mr. Stuart F. Wilson-Patton, Commission Advocate
Mr. Alan Rubin, Complainant
Division of Administrative Hearings