

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: DONALD JAMES, )  
 )  
 Respondent. ) Case No. 00-4116EC  
 )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a formal hearing in the above-styled case in Miami, Florida, April 11-13, 2001.

APPEARANCES

For Advocate: James H. Peterson, III, Esquire  
Office of the Attorney General  
The Capitol, Plaza Level 01  
Tallahassee, Florida 32399-1050

For Respondent: David Rothman, Esquire  
Jeanie Melendez, Esquire  
Thornton & Rothman, P.A.  
200 South Biscayne Boulevard  
First Union Financial Center, Suite 2690  
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STATEMENT OF THE ISSUES

The issues for determination are: Whether Respondent, as the Division Chief of the Emergency Medical Services Division for the Miami Dade Fire and Rescue Department, violated Subsections 112.3135(2)(a) and 112.313(6), Florida Statutes, by advocating for the appointment, employment, promotion or

advancement, of his brother within that Department, and, if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On June 6, 2000, the Florida Commission on Ethics issued an order finding probable cause to believe that Respondent, Donald James, while a Division Chief of the Emergency Medical Services Division for the Miami Dade Fire and Rescue Department (the "Department"), violated Subsection 112.313(6), Florida Statutes, by advocating for his brother to be selected for a position in the Department. Additionally, the Florida Commission on Ethics found that there was probable cause to believe that Respondent violated Subsection 112.3135(2)(a), Florida Statutes, by advocating the appointment, employment, promotion, or advancement of his brother in or to a position in the Department in which he was serving or over which he exercised jurisdiction or control.

The case was forwarded to the Division of Administrative Hearings for assignment to an Administrative Law Judge on or about October 5, 2000. On October 18, 2000, the case was set for final hearing on January 23-25, 2001; reset for January 17-19, 2001; and, after a motion for continuance, set for final hearing on April 11-13, 2001.

At the final hearing, the Advocate called eight witnesses: David James, Robert David Paulison, Patricia Frosch, James J.

Brown, John Moore, Stan Hills, Gary Rainey, and Respondent, Donald James. The Advocate offered 21 exhibits, AE1-AE21, that were received into evidence. The Advocate also offered the deposition of Respondent, AE22, but the deposition was not admitted into evidence. Respondent testified on his own behalf and offered fourteen exhibits; five of Respondent's exhibits, RE1-2, RE4-6, were received into evidence, but Respondent's Exhibits RE3 and RE7-RE14 were not received into evidence.

The Transcript of the final hearing was filed on May 23, 2001. It was agreed at the close of the final hearing that proposed recommended orders would be filed by July 31, 2001. Both parties filed Proposed Recommended Orders.

#### FINDINGS OF FACT

1. The Department is a department within Miami-Dade County, and Respondent, as an employee of the Department, is a Miami-Dade County employee paid by Miami-Dade County ("County").

2. Respondent has been an employee of the Department for approximately 25 years.

3. In February and March 1999, Respondent was Division Chief of the Emergency Medical Services Division for the Department. He was transferred to the Communications Division, effective April 5, 1999, where he currently serves as Division Chief of Communications for the Department.

4. Respondent is currently an employee of an "agency" and was an employee of an "agency" within the meaning of the Code of Ethics for Public Officers and Employees, Part III, Chapter 112, Florida Statutes, while serving as Division Chief of the Department's Emergency Medical Services Division.

5. Respondent is subject to the provisions of Subsection 112.313(6), Florida Statutes, for his acts or omissions during his tenure as Division Chief of the Department's Emergency Medical Services ("EMS") Division. As a Division Chief for the Department, Respondent is subject to laws, rules and regulations governing County employees, including State ethics laws and County and Department rules and regulations regarding nepotism, hiring, promotion, and advancement of employees within the Department.

6. As a Division Chief for the Department, Respondent was expected to be familiar with State ethics laws and County and Department rules and regulations regarding nepotism, hiring, promotion, and advancement of employees within the Department.

7. In February 1999, there was a vacancy for the position of Emergency Medical Services Officer in Charge ("EMS-OIC") within the Department.

8. The EMS-OIC position is a second-in-command staff position within the Department's EMS division that reports directly to the EMS Division Chief.

9. The EMS-OIC position is a position subject to the terms and conditions of the Collective Bargaining Agreement between Miami-Dade County and the Dade County Association of Fire Fighters, Local 1403 ("the Union").

10. Vacancies for Department positions subject to the Collective Bargaining Agreement are filled by a process known as the "bid system." Applicants for vacancies submit "bids," listing in order of preference, positions for which they are applying.

11. The bid system is a method administered by the Department that allows Department employees to vie for positions on a competitive basis. Most operational positions are filled based purely on seniority, but the higher level staff positions, such as the EMS-OIC position, are usually filled after comparing qualifications. The job description for the particular vacancy listed in the Position Vacancy Announcement outlines the criteria, certifications, and requirements for a position.

12. Division Chiefs are responsible for the content of job descriptions for vacancies within their respective divisions for inclusion in the Position Vacancy Announcement.

13. As Division Chief of the Department's EMS Division, Respondent was responsible for reviewing the job description for the EMS-OIC Position already on file with the Department and making any appropriate changes.

14. The Position Vacancy Announcement is compiled twice a year and contains job descriptions for vacancies submitted by the various Department Division Chiefs for positions within their divisions.

15. Article 14.3 of the Collective Bargaining Agreement provided as follows:

Where Department requirements provide for an evaluation of applicants [sic] qualifications, evaluation of job performance, written test, and demonstrated abilities to perform in the position sought, qualifications will be relevant to the position bided. A written description of those qualifications will be provided to Local 1403, two (2) weeks prior to the bid announcement. The same criteria will be applied equally to each bidder in establishing the relative ranking. Time-in-grade will be a major consideration in making selections among those bidding. If all qualifications are equal, the most senior person will receive the award. In the event employees were hired or promoted on the same date, time-in-grade seniority for bid purposes will be determined by the employee's position on the eligibility list.

16. Pursuant to the written policies and procedures of the Department, the Fire Chief is the Director of the Department and is vested with the authority to hire, promote, transfer, and assign individuals to positions within the Department.

17. It is the long-standing custom and practice of the Department for its Division Chiefs to make the initial selection

regarding the best applicant among those bidding for staff positions within their divisions.

18. The Department's Director, Fire Chief R. David Paulison, expects his Division Chiefs to recommend to him their choice from applicants who apply for staff level positions such as the EMS-OIC position.

19. By virtue of his position as EMS Division Chief, Respondent would have been delegated the initial responsibility of selecting the person to fill the EMS-OIC Position, subject to approval by the Fire Chief.

20. All bids are "worked" at a bid working meeting of Division Chiefs and select administrative personnel. In addition to Respondent's authority to recommend by virtue of his position as Division Chief, the evidence also suggested that Respondent and other participants of the group at the bid working meeting were expected to provide input into the process and deliver a solution in the form of recommendations to fill the job vacancies.

21. There are three different criteria for selecting individuals to fill position vacancies within the Department. Most operations vacancies are filled based solely on seniority. For vacancies in Rescue, as Driver Operators, at the airport, on the Air Truck, and in a Hazardous Materials Unit, applicants must meet certain minimum qualifications, such as having a

particular certification or driver's license. Of the applicants having the minimum qualifications, the most senior applicant will be selected. The overwhelming majority of positions are filled using these two criteria. The position vacancy at issue in this case, EMS-OIC, is a forty-hour administrative staff position, and unlike the other position vacancies mentioned, is allowed to be awarded based on a third criteria, the most qualified applicant.

22. The position vacancy announcement for the EMS-OIC position issued by the Department on February 12, 1999 (effective February 22, 1999), provided as follows:

This Position is responsible to the EMS Division Chief for the coordination of on-going operational training activities of the EMS Bureau and will replace the Division Chief in his absence. It is an administrative staff position responsible for planning, organizing and implementing various activities of the Division to include the direct supervision of 12 EMS Captains and 2 EMS research and development lieutenants. The EMS-OIC will ensure that all EMS related training needs are met for the license re-certification of all paramedics and EMTs. This position will also serve as the liaison with other Fire Departments, EMS Bureaus, physicians and hospitals, and will assist the EMS Division Chief in systems research, operational analysis, budget preparation, managing division projects and serve as Protocol Committee Chairman.

Qualifications: Requires State Paramedic Certification and Fire Department Protocol



Certification. Must currently hold the rank of Chief Fire Officer.

Persons seeking this position must have knowledge of applicable HRS rules and regulations; possess strong verbal and written communication skills; demonstrate a comprehensive understanding of department EMS policies and procedures and be able to effectively prioritize and organize work assignments. Familiarity or experience in the development of organizational policies, standard operating procedures and medical and/or administrative protocols is a must.

Proficiency in the use of personal computer is a requirement of the position.

A resume of any training, experience, education or certification and a summary of practical experience that can serve to substantiate the skills, knowledge and abilities listed for the position must be attached to the Assignment Preference Form for consideration when awarding the bid. Preference will be given to the most qualified applicant.

The work schedule for this position is four 10-hour days per week.

The new roles and responsibilities of this position require that interested personnel meet with the Emergency Medical Services Division Chief prior to the bids being awarded. This may be accomplished by phone if necessary. The purpose of this meeting will be to answer any questions the bidder may have, discuss the direction and philosophy of the EMS Division and discuss the knowledge, skills and abilities of the applicant. The EMS Division Chief will meet with the bidder on duty if needed. Please call between 8AM and 4PM to schedule this interview.

23. Some time prior to the bid working meeting, perhaps several months, Respondent learned from his brother, David James, who was also a Department employee, that David James was going to bid the EMS-OIC position vacancy. Respondent was knowledgeable of anti-nepotism and ethics laws; and recognizing that this presented a potential conflict, Respondent advised his immediate superior, Chief James J. Brown, of the potential conflict. This was done by a telephone conversation, by e-mail, or both. In the same conversation, Respondent reminded Chief Brown of previous conversations they had had regarding David James' involvement in two previous bids for the same position. In the previous bids, both Respondent and David James believed that David James had not been treated fairly.

24. After being notified of the potential conflict, Respondent and Chief Brown agreed that Chief Brown would make the selection for the EMS-OIC position vacancy. Neither told Fire Chief Paulison that Chief Brown, instead of Respondent, was going to make the selection for the EMS-OIC position vacancy.

25. The EMS-OIC position was an advancement or promotion over the job that David James held at the time. It was a coveted position that allowed those who held it to be paid more than a Division Chief. It had more responsibility and administrative duties, and paid approximately \$5,000 a year more than the position that David James held at that time.

26. In March 1999, David James, Aubrey Fisher and Ronald Adkinson, who were all Department employees at the time, submitted applications consisting of Assignment Preference Sheets with attached résumés (collectively "bids") for the EMS-OIC position vacancy.

27. After the bids were submitted, but prior to the bid award, David James and Aubrey Fisher contacted Respondent and Respondent discussed with them the duties of the position and answered questions the two applicants had. Respondent did not review the résumés of any EMS-OIC position vacancy applicant. Respondent explained at the final hearing that since he took himself out of the process, there would be no need to review applicants' résumés.

28. Although Respondent talked with Aubrey Fisher and David James, Respondent did not conduct an interview with them to discuss their knowledge, skills, and abilities in connection with their applications for the EMS-OIC position as provided in the job description. In Respondent's view, an interview to discuss the knowledge, skills and abilities of the applicants was not necessary. Respondent was personally familiar with both David James and Aubrey Fisher.

29. Respondent testified that he did not tailor the interview process to avoid nepotism, but rather conducted his

discussions with the applicants in accordance with his experience as a Division Chief who conducts prebid interviews.

30. The process in which position vacancies within the Department are awarded, including the EMS-OIC position vacancy, is known as the "bid awards process." As part of this process, the "bid working meeting" is held at the Department where decisions regarding which applicants have been selected to fill the various vacancies are announced. Bid worksheets are then prepared at this meeting, listing the applicants chosen, which are then submitted to the Fire Chief. The official certified bid awards list is issued upon approval of the Fire Chief.

31. On February 22, 1999, a memorandum was distributed to all of the Department's Division Chiefs, including Respondent, announcing that the bids would be "worked" on Thursday, March 11, at 8:00 a.m. in the Director's Conference room, and stating, in part, that "Division representatives must be on time and have authority to make decisions without counsel on who will be awarded a bid for their Division."

32. On the morning of March 11, 1999, Chief Brown approached Respondent at the bid working meeting and asked him, "How was the selection process made, was it seniority or was it most qualified?" This surprised Respondent because it indicated to him that Chief Brown had not read the Position Vacancy Announcement.

33. Prior to the start of the bid working meeting, Chief Brown reviewed the résumés submitted by Aubrey Fisher, David James, and Ronald Adkinson for the EMS-OIC position vacancy. After reviewing the résumés, Chief Brown determined that all three applicants were essentially equally qualified. So he "fell back on what had been the determining factor in a lot of situations, that was seniority," and awarded the EMS-OIC position to the most senior, Aubrey Fisher.

34. The bid working meeting began at 8:00 a.m. on the morning of March 11, 1999, in the Director's conference room. There were approximately 12 to 25 people at the bid working meeting, including: Respondent; Special Assistant John Moore, who was coordinating the meeting; Management Representative Patricia Frosch; Labor Representative Stan Hills; a number of Division Chiefs; and others who had an interest in the bid process. Moments before the bid working meeting began, Chief Brown told John Moore of his decision and asked John Moore to make the announcement at the meeting. Chief Brown then left the room.

35. At the beginning of the bid working meeting, John Moore told the individuals filling out the bid worksheets of Chief Brown's selection of Aubrey Fisher to fill the EMS-OIC position. Respondent only heard the announcement "out of one

ear" because he was not really paying attention, but rather was reading a newspaper.

36. Realizing that Aubrey Fisher had been selected, Respondent stated to those present that he had a problem with Aubrey Fisher's selection. Respondent became visibly angry and upset and stated words to the effect that his brother had been "cheated" or "screwed" again.

37. Patricia Frosch, left the room, found Chief Brown, and brought Chief Brown back into the room, whereupon Respondent told Chief Brown that his decision was wrong, and asked how the bid had been assigned. Someone suggested that Respondent and Chief Brown take their discussion out of the conference room, which they did.

38. Respondent and Chief Brown continued their discussion during which Respondent mentioned the qualifications of his brother. Chief Brown told Respondent that, based upon his review of the résumés, the applicants were equally qualified, and that when two people were equally qualified, the position goes to the senior person. But Respondent stated, "J.J., that's ridiculous, David has a bachelor's degree in public administration, he's been a Division Chief of numerous areas within this Department and has served those positions well. He has numerous seminars. He's taught at the Executive Development Academy for the International Association of Black Fire

Fighters, he has a number of years in the area in finance.

J.J., excuse me, Fisher can't hold a candle to this man." Chief Brown believed Respondent was sincere in his belief that the rules had been improperly applied and that the most qualified applicant had not been selected.

39. Respondent attended the bid working meeting in his official capacity as a Division Chief.

40. If not for Respondent's official position as a Division Chief and the respect Chief Brown had for Respondent, Respondent would not have had an opportunity to challenge Chief Brown's decision at the time or in the manner in which he did.

41. Chief Brown gave Respondent's comments more credence because Respondent was the EMS Division Chief and because he and Respondent had served together for more than twenty years and he knew Respondent to be a sincere, good, "by the book," man. Respondent's comments affected Chief Brown's decision to recommend Aubrey Fisher and caused Chief Brown to refer the matter to Fire Chief Paulison.

42. By his comments to Chief Brown, Respondent was clearly advocating for the selection or recommendation of his brother over the selection or recommendation of Aubrey Fisher. With the exception of his momentary outburst at the bid working meeting and following discussion with Chief Brown, Respondent made no

other attempts to advocate the selection or recommendation of his brother.

43. Respondent believed that his comments to Chief Brown were directed to the fact that the bid award was not made to the most qualified applicant as required by the terms of the Position Vacancy Announcement.

44. Chief Brown eventually stated that if Respondent felt that strongly about it he would take the issue to the Fire Chief. In response, Respondent said something to the effect of, "That's all I want."

45. Chief Brown then took the issue to Fire Chief Paulison. At that time, Chief Brown did not tell the Fire Chief that he recommended Aubrey Fisher. Rather, he told the Chief that there was a controversy between the selection of Aubrey Fisher and David James.

46. Respondent did not return to the bid working meeting, as he had no other vacant positions in the EMS division. Respondent then telephoned his brother and advised him that Chief Brown had recommended Aubrey Fisher for the EMS-OIC position vacancy.

47. After considering the three applications with staff, Chief Paulison decided that David James was the most qualified and gave the job to Respondent's brother, David James.



48. If Respondent had not challenged Chief Brown's decision to recommend Aubrey Fisher on March 11, 1999, there is a probability that Chief Brown's recommendation would have stood and Aubrey Fisher would have been selected to fill the EMS-OIC position vacancy. Recommendations from the bid working meeting are generally accepted by the Fire Chief.

#### CONCLUSIONS OF LAW

49. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Subsection 120.57(1), Florida Statutes.

50. Section 112.322, Florida Statutes, and Rule 34-5.0015, Florida Administrative Code, authorize the Florida Commission on Ethics to conduct investigations and to make public reports on complaints concerning violations of Part III, Chapter 112, Florida Statutes (the Code of Ethics for Public Officers and Employees).

51. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue of the proceedings. Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). In this proceeding, it is the Commission, through its Advocate, that is asserting the affirmative: that Respondent violated Subsections 112.3135(2)(a) and 112.313(6),

Florida Statutes. Therefore, the burden of establishing by clear and convincing evidence the elements of Respondent's violations is on the Commission.

52. As noted by the Supreme Court of Florida:

[C]lear 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 explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such 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: Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

53. Subsection 112.3135(2)(a), Florida Statutes, provides in its pertinent part as follows:

A public official may not appoint, employ, promote, or advance, or advocate for appointment, employment, promotion, or advancement, in or to a position in the agency in which the official is serving or over which the official exercises jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual or if such appointment, employment, promotion, or advancement is made by a

collegial body of which a relative of the individual is a member.

54. In order to establish a violation of Subsection 112.3135(2)(a), Florida Statutes, the following elements must be proved:

1. Respondent must have been a public officer or employee in whom was vested the authority by law, rule or regulation, or to whom the authority had been delegated, to appoint, employ, promote or advance individuals or to recommend individuals for appointment, employment, promotion or advancement in connection with employment in an agency, including the authority as a member of a collegial body to vote on the appointment, promotion or advancement of individuals employed by Respondent's agency.

2. Respondent must have appointed, employed, promoted or advanced, or advocated for appointment, employment, promotion or advancement, a relative of Respondent.

3. Such appointment, employment, promotion or advancement, or advocacy for same, must have been in or to a position in the agency in which Respondent was serving or over which Respondent exercised jurisdiction or control.

55. It is clear that David James was a "relative" of Donald James. Subsection 112.3135(1)(d), Florida Statutes ("brother" included in definition of "relative").

56. Both Respondent and his brother, David, were employees of Miami-Dade County which is an "agency" within the meaning of Subsection 112.3135(2)(a), Florida Statutes. Subsection 112.3135(1)(a)4, Florida Statutes ("county" included in definition of "agency").

57. Respondent was the EMS Division Chief within the Department and thus serving in or exercising control over the "agency" in which his brother, David James, had applied for the EMS-OIC position.

58. The EMS-OIC position for which David James applied was an advancement or promotion. It was a coveted position within the Department that allowed those who held it to make more than a Division Chief. It had more responsibility and administrative duties, and paid approximately \$5,000 a year more than the position that David James held at that time.

59. Respondent was a "public official" within the meaning of Subsection 112.3135(2)(a), Florida Statutes, when he made the comments during and immediately after the bid working meeting on March 11, 1999.

60. The term "public official" is defined by Subsection 112.3135(1)(c), Florida Statutes, as:

[A]n officer, including a member of the Legislature, the Governor, and a member of the Cabinet, or an employee of an agency in whom is vested the authority by law, rule, or regulation, or to whom the authority has been delegated, to appoint, employ, promote, or advance individuals or to recommend individuals for appointment, employment, promotion, or advancement in connection with employment in an agency, including the authority as a member of a collegial body to vote on the appointment, employment, promotion, or advancement of individuals.

61. Within the Department, Division Chiefs have been delegated authority and are expected to select and recommend candidates to fill position vacancies within their division. While not reduced to written policy, this authority is derived from long-standing Department custom, practice and procedure.

62. Respondent initially removed himself from the selection process reflecting appropriate concern that his involvement would violate anti-nepotism laws. However, he did not completely disassociate himself from the process. He reminded Chief Brown of discussions they had previously had to the effect that his brother had not been treated fairly in two previous bids for the EMS-OIC position vacancy. He met with his brother and another applicant in a meeting called for by the EMS-OIC Position Vacancy Announcement. And, unfortunately, he elected to attend the bid working meeting, even though the EMS-OIC position vacancy was the only position vacancy in which his division was involved.

63. "Advocate" is not defined in the statute, but, its meaning is clear and unambiguous. "Advocate" is defined in the American Heritage Dictionary (2000) as "to speak, plead, or argue in favor of." If statutory terms are to be given their ordinary meaning as stated in City of Miami Beach v. Galbut, 626 So. 2d 192, 193 (Fla 1993) then Respondent clearly advocated for his brother in the interaction he had with Chief Brown after

Respondent learned that Chief Brown had not recommended his brother for the EMS-OIC position vacancy.

64. Even though he had ostensibly removed himself from the selection process, by attending the bid processing meeting, challenging Chief Brown's decision and advocating his brother for the EMS-OIC position vacancy, Respondent clearly reasserted the delegated power to promote or advance he had as a Division Chief.

65. Also relevant to these proceedings is Subsection 112.313(6), Florida Statutes, which provides:

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

66. The term "corruptly" is defined by Subsection 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 or her public duties.

67. In order to establish a violation of Subsection 112.313(6), Florida Statutes, the following elements must be proved:

1. Respondent must have been a public officer or employee.
2. Respondent must have:
  - (a) used or attempted to use his official position or any property or resources within his trust,
  - (b) performed his official duties.
3. Respondent's actions must have been taken to secure a special privilege, benefit or exemption for himself or others.
4. Respondent must have acted corruptly, that is with wrongful intent and for the purpose of benefiting himself or another from some act or omission which was inconsistent with the proper performance of public duties.

68. Respondent is an employee of an agency that is subject to the provisions of Subsection 112.313(6), Florida Statutes, for his acts or omissions during his tenure as Division Chief of the Department's EMS Division.

69. Respondent attended the bid working meeting in his capacity as a Division Chief. As a result of his advocacy for his brother, he reinserted himself into the selection process.

70. It has not been proved by clear and convincing evidence that Respondent acted corruptly, that is, with wrongful intent. Upon hearing that his brother had not been selected for the EMS-OIC position vacancy, Respondent had a sudden, emotional reaction. Given his belief that his brother was the most

qualified applicant, that he felt that his brother had been unfairly treated in two previous bids, Chief Brown's inquiry moments before the bid working meeting indicating that he had paid little attention to the responsibility of making a selection, Respondent's reaction was not surprising. Respondent challenged Chief Brown's decision in a sincere belief that the proper selection procedure had not been followed, in that the most qualified applicant had not been selected as required by the terms of the Position Vacancy Announcement. In so doing, he, in fact, advocated his brother for promotion, but there has been no clear and convincing evidence that he intended to advocate for his brother's promotion and that his comments to Chief Brown were made "corruptly." Respondent's overt response to learning that his brother had not received the bid and his open discussion with Chief Brown are inconsistent with wrongful, corrupt acts. In addition, Respondent initiated his own removal from the selection process and conducted himself appropriately until the morning of the bid working meeting.

71. The maximum penalty that can be imposed for each of Respondent's violations is a civil penalty of \$10,000, public censure and reprimand, dismissal from employment and forfeiture of no more than one-third of his salary per month for no more than 12 months. Section 112.317, 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 finding that Respondent, Donald James, violated Subsection 112.3135(2)(a), Florida Statutes, imposing a civil penalty of \$2,500 for Respondent's violation of the anti-nepotism provisions found in Subsection 112.3135(2)(a), Florida Statutes, reprimanding him for the violation, and finding that Respondent did not violate Subsection 112.313(6), Florida Statutes, and dismissing that charge.

DONE AND ENTERED this 27th day of August, 2001, in Tallahassee, Leon County, Florida.

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JEFF B. CLARK  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of August, 2001.

COPIES FURNISHED:

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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.