

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: TIMOTHY HOLMES,)
)
 Respondent.) Case No. 01-1820EC
)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a formal administrative hearing in this case on September 27, 2001, in Miami, Florida.

APPEARANCES

For Advocate: Virlindia Doss, Esquire
Department of Legal Affairs
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

For Respondent: James H. Greason, Esquire
801 Brickell Avenue
9th Floor
Miami, Florida 33130

STATEMENT OF THE ISSUES

Whether the Respondent, Timothy Holmes, violated Section 112.313(6), Florida Statutes, by making personal, long distance telephone calls at the expense of the City of Opa Locka, and, if so, what penalty is appropriate.

PRELIMINARY STATEMENT

On August 29, 2000, the Florida Commission on Ethics entered an Order Finding Probable Cause to believe that the

Respondent, while serving as a member of the Opa Locka City Commission, violated Section 112.313(6), Florida Statutes.

On May 9, 2001, this case was forwarded to Division of Administrative Hearings. On May 16, 2001, the case was set for final hearing on August 20 and 21, 2001, in Miami, Florida. The Respondent sought a continuance on July 30, 2001; the case was reset for September 27 and 28, 2001.

At the final hearing, the Advocate called six witnesses: Lindsay Connor, Sandra Doughlin, Winston Motley, Arlington Sands, Newall Daughtrey, and John Riley, and offered 11 exhibits into evidence. Seven of these exhibits were admitted into evidence and marked AE1-AE7. Four exhibits which were denied admission were proffered and marked AP1-AP4. Three other documents were received as court exhibits, not as evidence but as illustrative aids. These were marked CE1-CE3.

The Respondent called two witnesses: Brian Hooten and Danny Alvarez, and testified on his own behalf. The Respondent offered one exhibit, which was admitted and marked RE1.

No transcript was ordered; both parties timely submitted Proposed Recommended Orders.

FINDINGS OF FACT

1. The Respondent was elected to the Opa Locka City Commission on November 8, 1994, and served one four-year term.

2. As a member of the Opa Locka City Commission, the Respondent was subject to the requirements of Part III, Chapter 112, Florida Statutes, the Code of Ethics for public officers and employees. The Respondent was aware that as an elected public official he had the responsibility to ensure that public funds were spent for the public benefit.

3. The Opa Locka City Commission is the City of Opa Locka policy-making body.

4. Prior to the Respondent's term in office, when City Commissioners did not have offices at City Hall, the City installed and paid for a telephone in each Commissioner's home.

5. While it is unclear how many Commissioners serving concurrently with the Respondent had telephones which were provided by the City, in December 1994, a telephone was installed in the Respondent's home at City expense, and it remained in his home throughout his term of office.

6. The City paid all bills for the referenced telephone during the Respondent's term in office.

7. The ostensible public benefit obtained by installing a telephone in the Respondent's home was to allow him to be available to the administration and citizens of the City of Opa Locka.

8. The City had no policy restricting telephone use to official business; the Respondent testified that no one told him not to use the telephone for personal calls.

9. It was suggested that, approximately 10 years prior to the Respondent's term, the City Commission passed a resolution whereby the City would pay for personal, long distance charges for Commissioners. This is not credible. Section 116.041(5), Florida Statutes, requires that every resolution of a governing body be recorded in a book for that purpose. Absent unusual circumstances, the best evidence of such a resolution would be found in the official records of the City of Opa Locka.¹

10. During his term of office, the Respondent used the City installed telephone to make many personal, long distance telephone calls to family and friends. The only nexus these calls had to the City of Opa Locka was that the Respondent shared with his friends and family what was going on in the City and how he was doing as a City Commissioner.

11. When the telephone bill was received, the Respondent would forward the cover of the bill showing the total amount due to the City financial office for payment. These telephone bills were paid without question; no one in the City administration ever asked for "back up" information showing the nature of the long distance charges.

12. The charges for the personal, long distance telephone calls made by the Respondent on the City installed telephone totaled \$1,353 for the four years the Respondent was in office.

13. The personal, long distance telephone calls made by the Respondent to his family and friends had nothing to do with the business of the City of Opa Locka and no public purpose was served by these telephone calls.

CONCLUSIONS OF LAW

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

15. Section 112.322, Florida Statutes, and Rule 34-5.0015, Florida Administrative Code, authorize the 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.

16. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue in the proceeding. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

17. The standard of proof in a proceeding in which the Commission on Ethics seeks penalties under Section 112.317(1)(a), Florida Statutes, is "clear and convincing"

evidence. Latham v. Florida Commission on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997).

18. The "clear and convincing" standard requires:

[T]hat 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).

19. The Commission on Ethics has alleged that the Respondent violated Section 112.313(6), Florida Statutes, which provides:

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 s. 104.31.

20. 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 or her public duties.

21. Article II, Section 8 of the Constitution of the State of Florida advises: "A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse."

22. The Florida Supreme Court, en banc, declared: "Our organic law prohibits the expenditure of public money for a private purpose." State v. Clay County Development Authority, 140 So. 2d 576, 581 (Fla. 1962).

23. "It is essential to the proper conduct and operation of government . . . that public office not be used for private gain" Section 112.311(1), Florida Statutes, in part.

24. "It is declared to be the policy of the state that public officers . . . are agents of the people and hold their positions for the benefit of the public. . . . Such officers . . . are bound to observe, in their official acts, the highest standards of ethics consistent with this code and the advisory opinions rendered with respect hereto" Section 112.311(6), Florida Statutes, in part.

25. Making personal, long distance telephone calls on a telephone provided by the City to be used for public purposes is an inappropriate use of public property. Gordon v. Commission

on Ethics, 609 So. 2d 125 (Fla. 4th DCA 1992); In re: Julianne Holt, 1997 WL 1052530 (Division of Administrative Hearings).

26. The Advocate has demonstrated by clear and convincing evidence that the Respondent, an elected public official, over his four-year term of office, made \$1,353 in personal, long distance telephone calls on a telephone provided by the City of Opa Locka. In addition, he submitted telephone bills to the City of Opa Locka which included charges for these personal, long distance telephone calls and allowed the City of Opa Locka to pay for these personal, long distance telephone calls. In so doing, he used his elected position and property entrusted to him for personal gain and violated the public trust. His conduct is clearly corrupt and inconsistent with the proper performance of his public duties.

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 the Respondent, Timothy Holmes, violated Section 112.313(6), Florida Statutes. It is further recommended that the Respondent be ordered to pay a civil penalty of \$1,000, restitution of \$1,353, and suffer a public censure and reprimand.

DONE AND ENTERED this 9th day of November, 2001, in
Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of November, 2001.

ENDNOTE

1/ Subsection 166.041(1)(b), Florida Statutes, states:
" 'Resolution' means an expression of a governing body concerning
matters of administration, an expression of a temporary
character, or a provision for the disposition of a particular
item of the administrative business of the governing body";
Section 166.041(5), Florida Statutes, provides: "Every
ordinance or resolution shall, upon its final passage, be
recorded in a book kept for that purpose and shall be signed by
the presiding officer and the clerk of the governing body";
Section 166.041(6), Florida Statutes, states: "The procedure as
set forth herein shall constitute a uniform method for the
adoption and enactment of municipal ordinances and resolutions
and shall be taken as cumulative to other methods now provided
by law for adoption and enactment of municipal ordinances and
resolutions. By future ordinance or charter amendment, a
municipality may specify additional requirements for the
adoption or enactment of ordinances or resolutions or prescribe
procedures in greater detail than contained herein. However, a
municipality shall not have the power or authority to lessen or
reduce the requirements of this section or other requirements as
provided by general law."

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.