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DATE FILED

OCT 21 2003

COMMISSION ON ETHICS

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re **RUDY MALOY**,

Respondent.

AP

JVL-Clos

Complaint No. 01-011
DOAH Case No. 02-1231EC

Final Order No. 03-584

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DIVISION OF ADMINISTRATIVE HEARINGS

FINAL ORDER AND PUBLIC REPORT

This matter came before the State of Florida Commission on Ethics, meeting in public session on October 16, 2003, pursuant to the Recommended Order of the Division of Administrative Hearings' Administrative Law Judge rendered in this matter on April 25, 2003.

BACKGROUND

This matter began with the filing of a complaint on January 26, 2001 by Eugene Danaher alleging that the Respondent, Rudy Maloy, as a member of the Leon County Board of County Commissioners, violated Sections 112.313(2) and 112.313(6), of the Code of Ethics for Public Officers and Employees (Part III, Chapter 112, Florida Statutes). The allegations were found to be legally sufficient to allege possible violations of the Code of Ethics and Commission staff undertook a preliminary investigation to aid in the determination of probable cause. On July 31, 2001, the Commission on Ethics issued an order finding probable cause to believe that the Respondent had violated Sections 112.313(2) and 112.313(6), Florida Statutes, by soliciting sexually oriented favors from female staff members with the understanding that his official actions or judgment would thereby be influenced, and by using his position to engage in sexually

or romantically oriented comments, behavior, and/or invitations to female staff members. The matter was then forwarded to the Division of Administrative Hearings for assignment of an Administrative Law Judge (ALJ) to conduct the formal hearing and prepare a recommended order. A formal evidentiary hearing was held on January 13-14, 17, 22, 24, and 27, 2003. A transcript was filed with the ALJ and both parties timely filed proposed recommended orders. In addition, the Respondent filed a Memorandum of Law urging dismissal of all ethics charges involving "sexual harassment." The ALJ's recommended order was transmitted to the Commission and to the parties on April 25, 2003, and the parties were notified of their right to file exceptions to the recommended order. Thereafter, the Advocate filed exceptions to the ALJ's recommended order and the Respondent filed a response to the Advocate's exceptions. The Respondent also submitted a "Chronological Summary of Events," and the Advocate submitted a response.

At the July 24, 2003 Commission meeting, the Commission voted to accept all of the Advocate's exceptions and ordered its staff to draft an Order of Remand incorporating the Advocate's conclusions of law and remand the matter to the Division of Administrative Hearings for additional consideration. That Order was rendered on September 5, 2003. On September 15, 2003, in response to the Order of Remand, the ALJ entered an Order Declining Remand acknowledging that the "Commission's limited implied authority to remand a case to DOAH properly may be exercised in 'exceptional circumstances.'" However, he concluded, "the alleged errors do not present exceptional circumstances or otherwise justify a remand." In addition, the ALJ stated that he was "not persuaded that he misunderstood or misapplied the governing Florida law." The Order Declining Remand ended with the following statement:

> Finally, as a practical matter, the undersigned effectively has done what the Commission wants--i.e. 'reconsider[ed] the evidence of record for additional findings in light of the . . . substituted Conclusions of Law'--and resolved not to replace or supplement any existing findings of fact with new ones. This is because, even when viewed through the prism of the Commission's substituted Conclusions of Law, the findings of fact still look to the undersigned to be thorough and complete, responsive to each and every material allegation, and decisive as to all the issues of material fact in dispute. Having covered the factual waterfront, there is simply nothing more the undersigned can do.

Thus, the matter is back before the Commission for final agency action.

STANDARDS FOR REVIEW

Under Section 120.57(1)(l), 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 ALJ 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 ALJ. 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 ALJ, the Commission is bound by that finding.

Under Section 120.57(1)(l), Florida Statutes, an agency may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

Having reviewed the recommended order and the entire record of the proceeding, the Advocate's exceptions and the Respondent's response thereto, and having heard the arguments of the parties, the Commission makes the following findings, conclusions, rulings and recommendations.

RULINGS ON EXCEPTIONS

Initially, we note that at the same time Respondent filed his Response to the Advocate's Exceptions, he filed a separate document entitled "Respondent's Chronological Summary of Events." A response was thereafter filed by the Advocate, noting that the submittal was unauthorized, was not supported by citations to the record, and contained additional argument.

Section 120.57(1)(k), Florida Statutes, and Rule 28-106.217, Florida Administrative Code, contemplate only the filing of exceptions to the recommended order and a response to the other party's exceptions. Inasmuch as this purported "Chronological Summary" is neither, it will not be considered nor addressed in our rulings on the exceptions.

The Advocate's exceptions attempt to rescue the case from a finding of no violation. However, the Advocate knows, as do we, that our legal ability to reject an Administrative Law

Judge's findings of fact is extremely circumscribed by statute and case law.

There was a plethora of testimony from the witnesses about the Respondent's conduct and their perceptions about his ability to affect their employment:

> ...he would often come up behind me and would rub me on my shoulders... [T.101]
>
> He came up and stroked my arm several times... [T.102]
>
> He grabbed me or hugged me from the side and kissed me on the cheek. [T.107]
>
> We were just riding down in the elevator going home for the day and he kissed me on the lips. [T.110]
>
> . . . he could go in and complain about me. [T.140]
>
> . . . he would come in the office sometimes and touch my leg or rub my leg...[T.311]
>
> . . . we ended up in a sexual relationship. [T.312]
>
> He had already stated that he was going to relocate me, that he was not sure that this thing was going to work out, and I just kind of felt like, hey, if I don't do this, my job is gone. [T. 329]
>
> Did I want it? No. But I felt like I was going to lose my job. [T.330]
>
> So I, you know, agreed to meet with him, and we had sex. [T.443]
>
> He said that if I had a sexual relationship with him, that I could be sure that I would be – that I would move up in the County. [T.461]
>
> So we are getting up to leave and he comes to me and slips his hands through my jacket and pulls me close. . . [T.518]
>
> . . . and Mr. Maloy put his hand in my lap. [T.520]
>
> . . . and we're getting up to leave and he pulls me close again and it is really close, like a man will pull for his wife. . . . And he pulls me really close to him and I'm just -- I start -- he's leaning down to kiss me . . . [T.521]

> I was more scared; I was more scared because he is a big man, he is big, and I was just really scared, I just – he is my boss. I was like – I just really didn't think that anyone would believe me. [T.522]
>
> And he gave me another hug and he did tell me that, like his whole touchy-feely type of thing was just what all politicians do. [T.525]
>
> . . . he would want to talk about swimming naked in the pool or wanting to be spanked . . . [T.526]
>
> I was scared. I was scared for my job. He was my boss. I – and then I was just like – I mean, who do I go to? You are supposed to be like one of the Gods of Leon County and, I mean, who is going to fire you? [T.527]
>
> . . . he would shut the door and he would always try to put his hands on my lap . . . [T.528]
>
> . . . always when he was about to leave he would always pull me close to hug me. [T.528]

Notwithstanding, the ALJ chose not to believe these witnesses over the Respondent's denials. Under the statutory and case law, we cannot reweigh the evidence and reach a contrary result where, as here, the ALJ's findings of fact are supported by competent substantial evidence and the proceedings complied with the essential requirements of law. Therefore, the Advocate's exceptions to the ALJ's findings of fact are rejected.

The Commission's legal authority to reject or modify the ALJ's conclusions of law is not as restricted as it is for findings of fact. We retain the ability to reject or modify conclusions of law over which we have substantive jurisdiction as long as rejection or modification of conclusions of law do not form the basis for rejection or modification of findings of fact. For the reasons set forth in the Advocate's exceptions to the conclusions of law, which we accept, we reject or modify the following conclusions of law because the Commission's substituted conclusions of law ***are as or more reasonable*** than those of the ALJ:

The second, third, fourth, and fifth paragraphs of Endnote 6 to Paragraph 11 are stricken.

Paragraph 52 is modified as follows:

> Findings of fact in a prosecution for violation of Section 112.313(6), Florida Statute, must be based on clear and convincing evidence. Section 120.57(1)(j), Florida Statutes; Latham v. Florida Commission on Ethics, 694 So.2d 83 (Fla. 1st DCA 1997).

Paragraphs 54, 55, the last sentence of 57, 58-78, and 81 and their attendant endnotes (25-33) are stricken and replaced with the following:

Public office or employment

54. The parties have stipulated that the Respondent, as a Leon County Commissioner, was a public officer subject to the requirements of Part III, Chapter 112, Florida Statues.

Use or attempted use of official position

55. A use of position may occur in many ways. One is when the public office or employment is referenced or invoked. Indeed, "the act of identifying oneself as an officeholder is a 'use' of office." CEO 99-08, and see, CEO 91-38 ("whether a corrupt misuse of official position has occurred in a given situation depends on how and for what purpose the stationery will be used, rather than upon the fact of its use. In terms of whether the Council member's letter would be a corrupt misuse of position, we see no difference between her using the proposed stationery and her using plain stationery for a letter in which she refers to herself as a Council member. Either way, the recipient of the letter is informed of the Council member's public position. This may be appropriate, as in the political contexts noted above, or it may be inappropriate, for example, if the letter were being sent to settle a strictly private dispute with a debtor or creditor.") This concept is not unique to the Florida Commission on Ethics. In, In re Hon. Christopher Brown, 626 N.W. 2d 403 (Mich. 2001) a judge was

suspended without pay for 15 days after being charged with "attempting to use the prestige of [his] office to gain a personal advantage." The facts were that Judge Brown was in a traffic accident, and when one of the first officers on the scene was an officer whom Brown knew, he instructed him to run the other driver's name through a state law enforcement database and issue her a ticket. The court said that the existing relationship between the officer and the Judge coupled with respondent's attempted direction to the officer concerning the type of investigation that he should conduct with regard to the other driver gave rise to an appearance of impropriety and had the potential to erode the public's confidence in the judiciary, and further stated that "respondent's direction to the officer, in our judgment, was not in the nature of a mere call to investigation, it was not simply a spontaneous expression of anger or pique, and it was more than a generalized call to the officer to do something about an unfortunate situation. Rather, when made to an officer who was aware of respondent's judicial status, such direction, in our opinion, invoked respondent's judicial status in an inappropriate manner." Id., at 406, fn. 2. (e.s)

56. Acts undertaken by a public officer calculated with the realization of his position vis-à-vis that of his audience is a use of office. While a use of office is implicit in the employer/employee or superior/subordinate relationship (In re: L.H. Lancaster, 5 FALR 1567-A, 1571-A (Ethics 1983), it may also be found where the officer has no employment relationship nor even any actual ability to impact the target. See, In re Tom Ramiccio, 23 FALR 895 (Ethics 2001). Finding a violation of Section 112.313(6), Florida Statutes, where a Mayor told a florist who was aware of his position that she need not expect any more business from the City if she could not support him for re-election, notwithstanding there being no employment relationship between the two nor even any ability by Ramiccio to make good his threat. See also In re: Eli Tourgeman, 16 FALR 4110, 4112 (Ethics 1994). "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."

57. Acting with the knowledge of one's position of power relative to the weaker position of a target is a use of office. See, In re: Raymond Bruner, 2 FALR 1034 (Ethics 1980), appeal dism'd., Bruner v. Commission on Ethics, 384 So. 2d 1339 (Fla. 1st DCA 1980).

58. In addition, in cases involving the use of office to make sexual advances, the Commission has found significance in the fact that the advances are made on public time, amid the trappings of the official's public office. See, In re: Ambrose Garner, 5 FALR 105-A (Ethics 1982) aff'd., Garner v. Commission on Ethics, 439 So. 2d 894 (Fla. 2nd DCA 1983) (noting: "the unwanted sexual advances were made either in the Respondent's office at the Community College during normal working hours, or while the Respondent and the female personnel were engaged in business relating to the college"), and In re: Alfred Welch, 14 FALR 4275 (Ethics 1992) (Respondent's "actions were taken either in his office during normal working hours or were sufficiently connected to his official position").

59. Testimony as to fear of negative employment consequences is also a factor to be considered in determining whether a use of office has occurred. The interpretation of the target is relevant, as, "a threat is not a state of mind in the threatener; it is an appearance to the victim." U.S. v. Holzer, 816 F.2d 304, 310 (C.A.7 1987) In Holzer, a judge repeatedly asked lawyers appearing before him for loans. No overt threats were made and there was no evidence that the judge did actually retaliate against anyone who turned him down. The court said, "When a judge urgently and insistently asks a lawyer in a case before him for a loan, the request connotes an implied threat (or so a jury could reasonably conclude) to rule against the lawyer if he turns the

judge down," and that the judge "could leave [the lawyers] to draw the natural inference that if they didn't play ball he might retaliate." Id. at 310.

60. In addition, a reasonable fear can demonstrate the implicit or explicit threat that is a misuse of office. In U.S. v. Nedza, 880 F. 2d 896 (7th Cir. 1989), a state senator was charged with conspiracy to extort and Hobbs Act extortion by obtaining funds from a businessman through wrongful use of fear, i.e., fear that senator would wield official powers against the victim. Nedza argued that the victim was unreasonable in believing that, as a state senator, Nedza had the ability to impact his business. The court noted that another senator had testified that state senators exercise enormous influence in areas outside the scope of their traditional duties, but went on to point out that, "de jure ability to perform the promised acts is not required." Rather, the court said, "the issue is not whether the extortionist is ultimately effective. Rather, the point is whether [the victim] would have reasonably believed, *at the time of the extortionate act,* that Nedza could deliver the power of his office for the victim's benefit." Id., at 902. (Citations omitted)

Special benefit

61. Securing sexual favors from employees is a special privilege or benefit. In re: Raymond Bruner, 2 FALR 1034, 1036-A (Ethics 1980); appeal dismissed, Bruner v. Commission on Ethics, 384 So. 2d 1339 (Fla. 1st DCA 1980). Sexual favors are a benefit as the term is used in the statute, (Garner v. Commission on Ethics, 439 So.2d 894 (Fla. 2nd DCA 1983), as is the ability to engage in sexual comments and lewd actions. In re: Lawrence R. Hawkins, 18 FALR 2078, 2093 (Ethics 1995).

Corrupt intent

62. Corrupt intent is shown where the officer acted with wrongful intent, that is, with reasonable notice that his conduct was inconsistent with the proper performance of public duties and would be a violation of the law or the Code of Ethics in part III of chapter 112, (Blackburn v. Commission on Ethics, 589 So. 2d 431 (Fla. 1st DCA 1991) and the action is inconsistent with the proper performance of the officer's public duties.

63. Prior Commission final orders and opinions provide fair and reasonable notice as to what conduct is prohibited by Section 112.313(6). Blackburn, supra.

64. Proof of violation of Section 112.313(6), Florida Statutes, does not depend on whether the conduct alleged constitutes sexual harassment as the term may be used in other contexts. See, Garner v. Commisson on Ethics, 415 So. 2d 67 (Fla. 1st DCA 1982), In re: E. Walt Pellicer, 9 FALR 4387, 4401 (Ethics 1987), (in proceedings under Section 112.313(6), Florida Statutes, the Commission is not concerned with whether the Respondent's conduct constituted sexual harassment proscribed by guidelines of the Equal Employment Opportunity Commission (EEOC) or by any other statutory or regulatory scheme. The Commission is concerned only with the standards of Section 112.313(6), Florida Statutes"), and In re: Gary Latham, 21 FALR 1619, 1621 (Ethics 1997), (violations of Section 112.313(6), F.S., do not hinge on definitions of sexual harassment found in other regulatory schemes), and see generally, Commission on Ethics v. Sullivan, 430 So.2d 928, 934, (Fla. 1st DCA, 1983) (the prohibited misuse of public office might or might not be a violation of another statute), accord, In re James Barr, 13 SW 3d 525, 535-536 (Tex. Rev. Trib. 1998) (disciplining a judge for, among other things, referring to female assistant district attorneys in his court as "babes" and making other inappropriate remarks of a sexual nature to women required to appear in his courtroom or under his supervision. "We must note that the specific matters before this Review

Tribunal as they relate to Judge Barr's sexually offensive comments and gestures are not whether his behavior constituted 'sexual harassment' as such.")

65. While "sexual harassment," as the phrase is used as a term of art in Title VII cases, is not synonymous with a misuse of office, the fact that a respondent has had sexual harassment training or has been informed of laws relating to sexual harassment is significant and should be considered in determining whether the official in question had adequate notice of what conduct is to be avoided, because such information or training puts a public official on notice that unwanted overtures may subject him to legal consequences.

However, even with these modifications to the conclusions of law, because of the restrictions imposed on the Commission by Chapter 120, Florida Statutes--which give nearly unbridled authority over findings of fact to an ALJ--we are unable to find that the Respondent's conduct constituted violations of Sections 112.313(2) and 112.313(6), Florida Statutes.

FINDINGS OF FACT

The findings of fact as set forth in the recommended order are hereby adopted.

CONCLUSIONS OF LAW

1. The ALJ's conclusions of law, except as rejected or modified herein, are hereby adopted.

2. Based upon our review of the complete record, there is competent substantial evidence to support the ALJ's findings of fact and his ultimate finding that the Respondent did not violate Sections 112.313(2) and 112.313(6), Florida Statutes.

Accordingly, the Commission on Ethics finds that the Respondent, as an employee of the Florida Department of Transportation and as a member of the Leon County Board of County

Commissioners, did not violate Sections 112.313(2) and 112.313(6), Florida Statutes, as alleged in the complaint. Therefore, the complaint is hereby dismissed.

DONE and ORDERED by the State of Florida Commission on Ethics meeting in public session on October 16, 2003.

October 21, 2003
Date Rendered

RICHARD L. SPEARS
Chair

THIS ORDER CONSTITUTES FINAL AGENCY ACTION. ANY PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER HAS THE RIGHT TO SEEK JUDICIAL REVIEW UNDER SECTION 120.68, 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, 3600 MACLAY BOULEVARD SOUTH, SUITE 201, P.O. DRAWER 15709, TALLAHASSEE, FLORIDA 32317-5709; AND BY FILING A COPY OF THE NOTICE OF APPEAL ATTACHED TO WHICH IS A CONFORMED COPY OF THE ORDER DESIGNATED IN 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. Mark Herron, Attorney for Respondent
Mr. Bruce Minnick, Attorney for Respondent
Ms. Virlindia Doss, Commission Advocate
Mr. Eugene Danaher, Complainant
The Honorable John G. Van Laningham, Administrative Law Judge
Division of Administrative Hearings