DATE FILED

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COMMISSION ON ETHICS

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re **RUDY MALOY,**

Respondent.

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

IN closed

ORDER OF REMAND

On April 25, 2003, the Administrative Law Judge with the Division of Administrative Hearings (DOAH) transmitted his Recommended Order to the Commission and to the parties, and the parties were notified of their right to file exceptions to the Recommended Order. Thereafter, the Advocate timely 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.

On July 24, 2003, this matter came before the Commission and the parties were given an opportunity to argue their exceptions and responses thereto. Thereafter, the Commission voted to have its staff prepare a draft order that would accept the Advocate's exceptions and remand the matter to the Division of Administrative Hearings.

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 and an employee of the Florida Department of Transportation, 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."

On April 25, 2003, the ALJ entered his Recommended Order in this case concluding that the Respondent had not violated Sections 112.313(2) and 112.313(6), Florida Statutes. At the Commission's July 24, 2003 meeting, it voted to accept the Advocate's Exceptions and remand the matter back to the ALJ.

AUTHORITY AND NECESSITY FOR REMAND

The inherent authority of a state agency to remand an administrative case back to DOAH for further proceedings where the reasons for the ALJ's findings are not apparent from the record or where erroneous conclusions of law render it impossible for the agency to enter a coherent final order is well established by the controlling case law of Florida. See, e.g., Department of Environmental Protection v. Dept. of Management Services, Div. of Adm. Hearings, 667 So.2d 369 (Fla. 1st DCA 1995); Collier Development Corporation v. State, Dept. of Environmental

Regulation, 592 So.2d 1107 (Fla. 2d DCA 1991); Dept. of Professional Regulation v. Wise, 575 So.2d 713 (Fla. 1st DCA 1991); Manasota 88, Inc. v. Tremor, 545 So.2d 439 (Fla. 2d DCA 1989); Miller v. State, Dept. of Environmental Regulation, 504 So.2d 1325 (Fla. 1st DCA 1987). The Florida courts have also ruled that, in cases where a DOAH hearing officer has failed to perform his basic function of making findings of fact explicitly based on the evidence presented, remand to DOAH is obligatory. Id. at 1327; Cohn v. Dept. of Professional Regulation, 477 So.2d 1039, 1047 (Fla. 3d DCA 1985).

Here, where the ALJ restated the issue to be decided allowing erroneous legal conclusions to flow therefrom; where the ALJ made findings of fact under a standard of evidence lower than that required by Section 120.57(1)(j), Florida Statutes; and where the ALJ affirmatively declined to make findings of fact on certain critical issues which deprived the Commission of its ability to fulfill its constitutional responsibility to report on alleged breaches of public trust, remand is necessary. Accordingly, the Commission accepts the Advocate's exceptions in their entirety, and

A. Modifies the ALJ's Statement of the Issue consistent with the Commission's Order Finding Probable Cause and the Joint Prehearing Statement submitted by the parties on January 8, 2003, to read:

> Whether the Respondent violated Section 112.313(6), Florida Statutes, by using his position to engage in sexually or romantically oriented comments, behavior, and/or invitations to female staff members.

B. Strikes the second, third, fourth, and fifth paragraphs of Endnote 6 to Paragraph 11.

C. Strikes Paragraph 52 and replaces it with:

> 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).

D. Strikes Paragraphs 54, 55, the last sentence of 57, 58-78, and 81 and their attendant endnotes (25-33) and replaces them with the following Conclusions of Law, which are as or more reasonable than those of the ALJ:

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 that 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, "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.), 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, nor was there 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 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 her conduct was inconsistent with the proper performance of her 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 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.

E. Rejects the ALJ's Findings of Fact Paragraphs 7 through 50, on the grounds that the incorrect application of the law, the failure to find facts necessary, and the finding of facts based on a lower standard than that required by law caused the proceedings to fail to comply with the essential requirements of law; and

F. Remands the case to the ALJ to reconsider the evidence of record for additional findings in light of the correct legal standards as set forth in the substituted Conclusions of Law.

DONE and ORDERED by the State of Florida Commission on Ethics meeting in public session on September 4, 2003.

September 5, 2003
Date Rendered

RICHARD L. SPEARS
Chair

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