

PRELIMINARY STATEMENT

On June 8, 2004, the Florida Commission on Ethics (Commission on Ethics) issued an Order finding probable cause to believe that Respondent, Lisa Marie Phillips, as a member of the Bradenton Beach City Commission, violated Subsection 112.313(6), Florida Statutes (2004), by using her position to threaten and/or intimidate Ronald Ockerman, the Complainant. The case was forwarded to the Division of Administrative Hearings on May 4, 2005.

Prior to the final hearing, the parties submitted a Joint Pre-hearing Stipulation, which included two stipulated facts. These stipulated facts required no proof at hearing.

At the final hearing, the Advocate called five witnesses: Shelly Hodges, Ronald Ockerman, Nancy Ockerman, Gloria Morotti, and Respondent. The Advocate offered and had six exhibits received into evidence. Respondent testified on her own behalf, but did not submit any exhibits.

At the conclusion of the hearing, upon agreement of the Advocate and Respondent, the due date for filing proposed recommended orders was December 15, 2005. Prior to that date, Respondent filed an unopposed Motion to Extend the Time for filing Proposed Recommended Orders. The motion was granted, and the time for filing proposed recommended orders was extended to December 23, 2005. No transcript of the hearing was filed.

FINDINGS OF FACT

1. Respondent, Lisa Marie Phillips (Respondent), has continuously served as a member of the Bradenton Beach City Commission since her election in November 2003.

2. Shortly after her election, Respondent signed an Oath of Office for her position as a city commissioner and received a number of training materials regarding standards of conduct for public officials, including the Commission on Ethics' Code of Ethics for Public Officers and Employees.

3. Respondent also reviewed a training videotape that addressed potential liability for certain acts as a city commissioner. While the videotape did not specifically discuss the Code of Ethics, it warned that aggressive behavior by a city commissioner could result in civil liability.

4. Respondent is subject to the requirements of Part III, Chapter 112, Florida Statutes (2004), the Code of Ethics for Public Officers and Employees, for her acts and omissions during her tenure as a member of the Bradenton Beach City Commission.

5. On Saturday, January 3, 2004, at approximately 11:30 a.m., Ronald Ockerman and his wife, Nancy Ockerman, were in Bradenton Beach, Florida, in their red pick-up truck. Mr. Ockerman was driving, headed east on 22nd Street North. Just before the intersection of 22nd Street North and Avenue B, Mr. Ockerman either stopped or slowed his vehicle to check for

cross traffic. Although there was no stop sign or traffic light at the intersection, Mr. Ockerman slowed down or stopped at the intersection because the view down Avenue B was partially obscured by foliage and because he was concerned about some young drivers in the neighborhood.

6. Respondent and her 16-year-old daughter were behind the Ockermans in Respondent's vehicle, a Saturn View. Respondent was driving the vehicle and her daughter was a passenger. They were returning home to prepare to attend a funeral of Respondent's close friend. When Mr. Ockerman slowed down or stopped at the intersection, Respondent became impatient and blew her horn.

7. Mr. Ockerman responded by directing an obscene hand gesture, colloquially known as "shooting the bird," at Respondent. Mr. Ockerman then slowly drove his truck east through the intersection toward an alley on the right that ran behind the Ockerman's home just down the street.

8. Respondent drove her car through the intersection past the Ockermans and pulled around at an angle on the road in front of their truck, thereby requiring Mr. Ockerman to stop prior to the alley.

9. Respondent then exited her vehicle and walked toward Mr. Ockerman's truck. Mr. Ockerman also exited his vehicle. When Respondent reached the area close to where Mr. Ockerman

was, she waived her middle finger at Mr. Ockerman, imitating the obscene gesture he had directed at her, and asked him, "What's this, what's this?" Respondent also commented that "this is road rage," and asked why Mr. Ockerman had stopped at the intersection.

10. At some point during the confrontation, Mr. Ockerman advised Respondent that he was going to call the police. Respondent responded by challenging Mr. Ockerman to "go ahead and call the police." Respondent then told Mr. Ockerman that she was a city commissioner, that she "owned" or controlled the police, and that the police worked for her. Respondent also told Mr. Ockerman to follow her because she was going to give him a ticket.

11. Several neighbors saw the confrontation. One of the neighbors, Gloria Morotti, was out watering her plants on her upstairs patio on the southeast corner of 22nd Street North and Avenue B when she first heard the confrontation. Ms. Morotti went down to the scene and attempted to calm the situation. Ms. Morotti told Respondent, "You have road rage. Road rage will kill you." Ms. Morotti noticed that her words had little effect at the time.

12. Two other neighbors, Shelly Hodges and her husband, who lived on the northeast corner of the same intersection, also witnessed the confrontation between Respondent and Mr. Ockerman.

Ms. Hodges heard Respondent say to Mr. Ockerman that she "owned" the police. Ms. Hodges also heard Respondent tell Mr. Ockerman to follow her so that she could give him a ticket.

13. Although Respondent told Mr. Ockerman to follow her to the police station so she could give him a ticket, she made no statements and took no actions that compelled Mr. Ockerman to follow her to the police station. In fact, Mr. Ockerman did not follow Respondent as she requested.

14. While Mr. Ockerman did not follow Respondent as she had requested, based on Respondent's assertions that she was a city commissioner and "owned" the police, Mr. Ockerman decided not to call the police.

15. The confrontation ended when Respondent returned to her car. Mr. Ockerman drove down the alley behind his home to unload a shower door that he had in the back of his truck. Respondent drove east down 22nd Street North a short way, turned around, and then proceeded to turn right on Avenue B to her residence.

16. Later that day, Respondent attended the funeral of a close friend. On her way home from the funeral, Respondent decided to apologize to Mr. Ockerman for her behavior and role in the verbal altercation. She stopped by the Ockerman' house that day and apologized to Mr. Ockerman and extended her hand to Mr. Ockerman. Although Mr. Ockerman took Respondent's hand, he

warned her that he was still going to see an attorney about the incident on Monday.

17. Mr. Ockerman felt that his rights had been interfered with and that Respondent had purposely intimidated him by using her position. As noted in paragraph 14, based on what Respondent had told him, he felt that it would do no good to call the Bradenton Beach Police, and he never did.

18. Some time after the verbal altercation between Respondent and Mr. Ockerman and after he talked to his attorney, Mr. Ockerman reported the incident to the Manatee County Sheriff's Office. Specifically, Mr. Ockerman reported that Respondent had "assaulted" him. The Sheriff's Office investigated the incident and concluded that no assault occurred. Thus, the Sheriff's Office did not file charges against Respondent. Thereafter, in addition to filing a complaint with the Commission on Ethics, Mr. Ockerman filed a civil lawsuit against Respondent, which was still pending at the time of the final hearing in this case.

19. Undoubtedly, Respondent was upset and angry when Mr. Ockerman "shot a bird" at her and threatened to call the police. According to Respondent, the obscene gesture directed to her by Mr. Ockerman made her "feel violated."

20. Notwithstanding her personal feelings about the conduct and statement of Mr. Ockerman described in paragraph 19,

Respondent knew that it was wrong for her to use her position as a city commissioner for her personal benefit. First, Respondent admitted at the final hearing that she invoked her position as a city commissioner to "one-up" Mr. Ockerman during the confrontation. Second, Respondent regretted her conduct, as evidenced by her apology to Mr. Ockerman the day of the confrontation and verbal exchange. Third, as noted in paragraph 2, Respondent received training and materials regarding the standards of conduct for public officials, including the Code of Ethics for Public Officers and Employees.

21. In sum, the evidence clearly and convincingly showed that Respondent violated Subsection 112.313(6), Florida Statutes (2004), by misusing her position as a member of the Bradenton Beach City Commission to threaten and/or intimidate Mr. Ockerman.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2004).

23. Section 112.322, Florida Statutes (2004), and Florida Administrative Code Rule 34-5.0015 authorize the Commission on Ethics to conduct investigations and to make public reports on complaints concerning violations of Part III, Chapter 112, Florida Statutes (2004).

24. 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 on Ethics, through its Advocate, that is asserting the affirmative, that Respondent violated Subsection 112.313(6), Florida Statutes (2004). Here, where the Commission on Ethics seeks to impose penalties against a public officer, it must prove the alleged violation(s) by clear and convincing evidence. See Latham v. Florida Commission on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997).

25. As noted by the Supreme Court:

[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). The Supreme Court of Florida also explained, however, that although the

"clear and convincing" standard requires more than a "preponderance of the evidence," it does not require proof "beyond and to the exclusion of a reasonable doubt." Id.

26. Subsection 112.313(6), Florida Statutes (2004), 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 s. 104.31.

27. The term "corruptly" is defined by Subsection 112.312(9), Florida Statutes (2004), 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.

28. In order for it to be concluded that Respondent violated Subsection 112.313(6), Florida Statutes (2004), the Advocate must establish the following elements:

1. Respondent must have been a public officer or employee.
2. Respondent must have:
 - a) used or attempted to use his or her official position or any

property or resources within his
or her trust, or

b) performed his or her official
duties.

3. Respondent's actions must have been taken to secure a special privilege, benefit or exemption for himself or herself or others.
4. Respondent must have acted corruptly, that is, with wrongful intent and for the purpose of benefiting himself or herself or another person from some act or omission which was inconsistent with the proper performance of his or her public duties.

29. The parties have stipulated that Respondent, as a member of the Bradenton Beach City Commission, is subject to the requirements of Part III, Chapter 112, Florida Statutes (2004). Therefore, the first element required to show a violation of Subsection 112.313(6), Florida Statutes (2004), has been established.

30. It must also be shown that Respondent used or attempted to use her public position. In order to prove this element, all that is required is an attempt to use one's public position to secure a special privilege, benefit, or exemption. Respondent admits that she advised Mr. Ockerman of her public position during their private confrontation. It was also clearly demonstrated that, during the confrontation, Respondent told Mr. Ockerman that she "owned" or controlled the police. As

noted by the Commission on Ethics, "the mere invocation of one's status as a public official may constitute a use of office."

See Final Order and Public Report in In Re: Tom Ramiccio, 23 F.A.L.R. 895, 902 (Florida Commission on Ethics 2000), aff'd per curiam, 792 So. 2d 471 (Fla. 4th DCA 2001). Here, the evidence clearly established that Respondent used or attempted to use her position.

31. The evidence also clearly demonstrated that Respondent used her office to secure a special privilege, benefit, or exemption for herself. While only an attempt need be shown, the evidence clearly revealed that Respondent's statements to Mr. Ockerman were intimidating and dissuaded from him contacting the Bradenton Beach Police Department. The context of Respondent's statements that she was a city commissioner and that she owned or controlled the police evidenced her intent to intimidate Mr. Ockerman with the power of her position during a private dispute. Respondent's admission that she invoked her public position to "one up" Mr. Ockerman further supports this conclusion.

32. Finally, given the timing and context of Respondent's statements to Mr. Ockerman during the confrontation, there can be no doubt that Respondent acted with the requisite corrupt intent as defined in Subsection 112.312(9), Florida Statutes (2004), quoted above.^{1/} As in In re: Jimmy Whaley, 20 F.A.L.R.

2267 (Florida Commission on Ethics 1997), where a city commissioner's "choice of words and tone of voice" evidenced his intent to misuse his official position, Respondent's choice of words and tone of voice, while invoking the power of her public position to intimidate Mr. Ockerman during their confrontation, demonstrated Respondent's corrupt intent.

33. Although Respondent was angry during the confrontation, the evidence showed that she acted in a deliberative manner with the requisite corrupt intent. As noted by the Commission on Ethics in its Final Order and Public Report in In re: Fred Peel, 15 F.A.L.R. 1187 (Florida Commission on Ethics 1992):

It is possible for the corrupt intent required by the statute to be formed instantaneously, and a premeditated plan for securing a special benefit is not required by the statute. Even a reflexive reaction may rise to the level of corrupt intent, depending on the circumstances. Id.

34. Furthermore, the evidence clearly and convincingly demonstrated that Respondent knew at the time she made her intimidating statements that they were inappropriate and inconsistent with the proper performance of her public duties. In Ramiccio, the court found that the context in which a remark was made indicated intention to threaten in a manner that was inconsistent with the respondent's performance of his public duties.

35. In sum, the clear and convincing evidence presented at the final hearing established each of the requisite elements to prove that Respondent violated Subsection 112.313(6), Florida Statutes (2004), by using her position to threaten and/or intimidate Mr. Ockerman.

RECOMMENDATION

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

RECOMMENDED that a final order and public report be entered finding that Respondent, Lisa Marie Phillips, violated Subsection 112.313(6), Florida Statutes (2004), and recommending that a civil penalty of \$2,000 be imposed.

DONE AND ENTERED this 1st day of February, 2006, in Tallahassee, Leon County, Florida.

Carolyn S. Holifield

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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of February, 2006.

ENDNOTE

^{1/} In its discussion of the "misuse of office" statute, the Commission on Ethics in CEO 91-38 opined that even identification of oneself as a city council member in correspondence may be inappropriate, depending on the context. Specifically, the Commission on Ethics concluded that it would be inappropriate for a public official to identify himself as a council member in a letter "being sent to settle a strictly private dispute with a debtor or creditor." CEO 91-38, p. 2.

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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.