

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: RUDOLPH "RUDY" BRADLEY, ) Case No. 07-0321EC  
 )  
Respondent. )  
 )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, Administrative Law Judge Don W. Davis of the Division of Administrative Hearings held a final hearing in the above-styled cause on Thursday, April 5, 2007, in Tallahassee, Florida.

APPEARANCES

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

For Respondent: Wilson Jerry Foster, Esquire  
Law Offices of Wilson Jerry Foster  
1342 Timberlane Road  
Tallahassee, Florida 32312

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent, as a member of the Public Service Commission, violated Section 350.042, Florida Statutes, by knowingly receiving an ex parte communication from a utility company regarding a matter that was being considered at a Public Service Commission proceeding and failing to place the communication on the record within 15 days of its receipt.

PRELIMINARY STATEMENT

On April 26, 2006, the Florida Commission on Ethics issued an order finding probable cause to believe that Respondent, Rudolph "Rudy" Bradley, as a member of the Public Service Commission, violated Section 350.042, Florida Statutes. The case was forwarded to the Division of Administrative Hearings on January 17, 2007.

At the final hearing, the Advocate called three witnesses: Respondent (now a former Public Service Commissioner), Veronica Washington (Respondent's former secretary at the Public Service Commission), and Kimberly Griffin (Respondent's former executive assistant at the Public Service Commission). The Advocate also introduced seven exhibits into evidence. Respondent's counsel presented testimony of three witnesses: Harold McLean (former general counsel for the Public Service Commission), Veronica Washington, and Respondent. Respondent's counsel also introduced one exhibit into evidence.

A Transcript of the hearing was filed on April 24, 2007. The parties requested and were granted leave to file Proposed Recommended Orders within 30 days of the receipt of transcript. Both parties filed such orders, which have been reviewed and utilized in the preparation of this Recommended Order.

## FINDINGS OF FACT

1. Respondent served as a member of the Florida Public Service Commission (PSC) from January 2002 until January 3, 2006.

2. Respondent is subject to the requirements of Chapter 350, Florida Statutes, and Part III, Chapter 112, Florida Statutes, the Code of Ethics for public officers and employees, for his acts and omissions during his tenure as a member of the PSC.

3. Upon taking office in 2002, Respondent was given training regarding his responsibilities in dealing with ex parte communications between Commissioners and parties. As stated by Respondent, this training "was a continuous discussion."

4. Based on that training, Respondent was aware that Section 350.042, Florida Statutes, provided that should he, as a Public Service Commissioner, knowingly receive an ex parte communication from a party regarding a docketed matter, he was obligated to place the communication on the record.

5. October 14, 2002, the PSC held a special agenda conference to consider Docket No. 990649B-TP, which involved determining how much Verizon Telephone Company (Verizon) could charge other companies to lease its network.

6. As Docket No. 990649B-TP involved determining how much Verizon could charge, it is clear that Verizon was a party to the matter.

7. Several days prior to the special agenda conference, Michelle Robinson, who at the time was director of Verizon's Florida regulatory affairs, prepared and provided a memorandum (the "Verizon Memo") to Respondent's then chief aide, Kimberly Griffin, and to the aides of the other PSC Commissioners.

8. The Verizon Memo outlined Verizon's position regarding PSC staff recommendations on Docket No. 990649B-TP that were to be considered at the October 14, 2002, PSC special agenda conference meeting.

9. The Verizon Memo was from a party regarding a docketed matter. Although the Verizon Memo does not state at the top that it was from Verizon, the context of the Verizon Memo shows that it was from Verizon. In addition, since the document had a docket number on it, it was evident that it related to a docketed matter.

10. Both Ms. Robinson and Ms. Griffin understood that the Verizon Memo would be prohibited ex parte communication should it be given to Respondent. They also understood that it was permissible under Section 350.042, Florida Statutes, for Ms. Robinson to share the Verizon Memo with Ms. Griffin because

Ms. Griffin was PSC staff and the ex parte prohibitions of Section 350.042 did not apply to staff.

11. Veronica Washington, who was Respondent's secretary while Respondent was a Public Service Commissioner, testified that she would not have let Respondent see the Verizon Memo "[b]ecause it is ex parte communication because it is regarding an open docket."

12. During the PSC special agenda conference held October 14, 2002, Respondent read into the record, at length, comments and questions that were verbatim or almost identical to written statements contained in the Verizon Memo.

13. At the final hearing, Respondent testified that if he had known the questions were from the Verizon Memo he would have filed them on the record, "[b]ecause that's the statute. That's the law." Respondent also testified that his receipt of the ex parte communication was not "knowingly" and he blamed his receipt of the ex parte communication on his former aide, Kimberly Griffin. Per Respondent's testimony, it was "impossible" for him to have gotten the words he used at the conference from anyone but Ms Griffin.

14. Respondent's professed lack of knowledge that the questions and comments came from an interested party is at variance with the pre-hearing stipulation of the parties, the testimony of other witnesses and cannot be credited. The

context of the questions and comments indicate that they were from Verizon or another interested party challenging a staff recommendation.

15. Additionally, Respondent maintained Ms. Griffin should have placed the Verizon Memo on the record because she was supposed to have placed "all written communiqués" on the record. However, in a previous interview conducted by the Ethics investigator in connection with this case, Respondent did not mention this alleged obligation of his staff to place such things on the record. Further, Section 350.042(1), Florida Statutes, establishes that a PSC Commissioner's staff members do not have the responsibility of filing written communications that they (as opposed to Commissioners) receive from interested parties. Respondent's former aide, Ms. Griffin, and former secretary, Ms. Washington, understood that the ex parte prohibitions of the law did not apply to staff.

16. While maintaining that Ms. Griffin must have given him the materials recited by him into the record because he normally met with his aide prior to PSC meetings to receive materials, Respondent has no memory of discussing the subject Verizon issue with Ms. Griffin and testified that he "had no prior knowledge of" the Verizon Memo.

17. Testimony of Ms. Griffin establishes that, other than technical names or technical information which she would put in

quotes, she would never give verbatim language from regulatory entities or parties to a PSC Commissioner. Rather, Ms. Griffin explained, while she would sometimes provide actual verbiage from staff recommendations, she would only summarize information received from regulated entities. Ms. Griffin's understanding was that she could receive direct information from a regulatory lobbyist and act as a "buffer" between regulatory entities and Respondent by taking the information and providing it "to the Commissioner in a way that would make sure we were within ex parte rules." She was sure that she did not give a copy of the Verizon Memo or verbatim information or questions contained in the Verizon Memo to Respondent.

18. Michelle Robinson, who prepared the Verizon Memo for Verizon, also denied giving a copy of, or the information contained in, the Verizon Memo to Respondent.

19. Other than blaming his aide for giving him ex parte material at a pre-agenda meeting which he claims not to remember, Respondent has no explanation for the questions and comments he recited at the October 14, 2002, PSC special agenda conference. While admitting that the questions and comments were not his own, Respondent never told anyone that they were not his.

20. Ms. Griffin was in attendance at the October 14, 2002, special agenda conference. When she heard some of the questions

raised by Respondent regarding Verizon's position on the issue, she was surprised because, based upon what she had read and studied of the Verizon Memo, Respondent's comments sounded very similar to the Verizon Memo.

21. While Ms. Griffin tried to maintain her composure and did not press the issue during the agenda conference, afterwards she asked Respondent where he got the questions and what he was reading from. Respondent responded that "it was just some questions" he had come up with to ask.

22. Notwithstanding Respondent's lack of recall, the testimony of Ms. Griffin provided direct evidence that Respondent was evasive when confronted with his comments.

23. In the year following the October 14, 2002 PSC agenda conference, some of Respondent's comments, which Respondent now admits were almost identical to those contained in the Verizon Memo, were quoted and attributed to Respondent in a brief that Verizon filed in the Supreme Court of Florida. When newspaper articles came out reporting the incident, Respondent "had no external reaction." He did not respond to the newspapers and never told anyone that the questions and comments were not his own. He did not give notice to the parties that he had received the questions and comments, and never placed any document on the record disclosing the source of those questions and comments.



24. As established by the testimony and the evidence, Respondent knew at the time that he read the questions and comments at the PSC meeting that they were from an interested party to the proceeding.

25. Respondent knowingly received an ex parte communication from a utility company regarding a matter that was being considered at a PSC proceeding, and he failed to place the communication on the record within 15 days of its receipt.

#### CONCLUSIONS OF LAW

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

27. Section 350.042(7)(a), Florida Statutes, provides that “[i]t shall be the duty of the Commission on Ethics to receive and investigate sworn complaints of violations of this section pursuant to the procedures contained in ss. 112.322-112.3241.” In turn, Section 112.322, Florida Statutes, 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 (the Code of Ethics for Public Officers and Employees).

28. 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 Section 350.042, Florida Statutes.

Commission on Ethics proceedings, which seek recommended penalties against a public officer or employee, require proof of the alleged violation(s) by clear and convincing evidence. See Latham v. Florida Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997). Therefore, the burden of establishing by clear and convincing evidence the elements of Respondent's violations is on the Commission.

29. 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). 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.

30. Section 350.042, Florida Statutes (2002), which is applicable to this proceeding, provides:

350.042 Ex parte communications.—

(1) A commissioner should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, shall neither initiate nor consider ex parte communications concerning the merits, threat, or offer of reward in any proceeding other than a proceeding under s. 120.54 or s. 120.565, workshops, or internal affairs meetings. No individual shall discuss ex parte with a commissioner the merits of any issue that he or she knows will be filed with the commission within 90 days. The provisions of this subsection shall not apply to commission staff.

(2) The provisions of this section shall not prohibit an individual residential ratepayer from communicating with a commissioner, provided that the ratepayer is representing only himself or herself, without compensation.

(3) This section shall not apply to oral communications or discussions in scheduled and noticed open public meetings of educational programs or of a conference or other meeting of an association of regulatory agencies.

(4) If a commissioner knowingly receives an ex parte communication relative to a proceeding other than as set forth in subsection (1), to which he or she is assigned, he or she must place on the record

of the proceeding copies of all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received and all oral responses made, and shall give written notice to all parties to the communication that such matters have been placed on the record. Any party who desires to respond to an ex parte communication may do so. The response must be received by the commission within 10 days after receiving notice that the ex parte communication has been placed on the record. The commissioner may, if he or she deems it necessary to eliminate the effect of an ex parte communication received by him or her, withdraw from the proceeding, in which case the chair shall substitute another commissioner for the proceeding.

(5) Any individual who makes an ex parte communication shall submit to the commission a written statement describing the nature of such communication, to include the name of the person making the communication, the name of the commissioner or commissioners receiving the communication, copies of all written communications made, all written responses to such communications, and a memorandum stating the substance of all oral communications received and all oral responses made. The commission shall place on the record of a proceeding all such communications.

(6) Any commissioner who knowingly fails to place on the record any such communications, in violation of the section, within 15 days of the date of such communication is subject to removal and may be assessed a civil penalty not to exceed \$5,000.

(7)(a) It shall be the duty of the Commission on Ethics to receive and investigate sworn complaints of violations of this section pursuant to the procedures contained in ss. 112.322-112.3241.

(b) If the Commission on Ethics finds that there has been a violation of this section by a public service commissioner, it shall provide the Governor and the Florida Public Service Commission Nominating Council with a report of its findings and recommendations. The Governor is authorized to enforce the findings and recommendations of the Commission on Ethics, pursuant to part III of chapter 112.

(c) If a commissioner fails or refuses to pay the Commission on Ethics any civil penalties assessed pursuant to the provisions of this section, the Commission on Ethics may bring an action in any circuit court to enforce such penalty.

31. Taking elements derived from the above-quoted statute, it is concluded that the Respondent violated Section 350.042, Florida Statutes (2002), in that Respondent was a Public Service Commissioner; he knowingly received an ex parte communication relative to the merits of an issue in a proceeding to which he was assigned; and, he knowingly failed to place on the record that communication within 15 days of the date from his receipt of such communication.

#### PENALTY

As Respondent cannot be removed from his position with the PSC because he is no longer serving as a Public Service Commissioner, the remaining penalty that can be imposed for Respondent's violation is a civil penalty not to exceed \$5,000. § 350.042(6), Fla. Stat. (2000). Given the nature of

Respondent's violation and his failure to take responsibility for his actions, it is appropriate to enter a final order with the maximum civil penalty of \$5,000.

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, Rudolph "Rudy" Bradley, violated Section 350.042, Florida Statutes (2002), and imposing a civil penalty of \$5,000.00.

DONE AND ENTERED this 11th day of June, 2007, in Tallahassee, Leon County, Florida.



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DON W. DAVIS  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 11th day of June, 2007.

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.