

Cheryl Forchilli
Chair
Roy Rogers
Vice Chair
Linda D. Conahan
Larry R. Handfield
Michael D. Joblove
Frank Kruppenbacher
Jean M. Larsen
Albert P. Massey, III
Robert J. Sniffen



State of Florida
COMMISSION ON ETHICS
P.O. Drawer 15709
Tallahassee, FL 32317-5709

3600 Maclay Blvd., South, Suite 201
Tallahassee, FL 32312

Philip Claypool
Executive Director

Virilindia Doss
*Deputy Executive
Director*

(850) 488-7864 Phone
(850) 488-3077 (FAX)
www.ethics.state.fl.us

September 15, 2009

The Honorable Jeff Atwater
President of the Senate
312 Senate Office Building
404 North Monroe St.
Tallahassee, FL 32399-1100

Re: Complaint No. 06-274, In re GARY SIPLIN

Dear Senator Atwater:

The State of Florida Commission on Ethics has completed a full and final investigation of a complaint filed against Sen. Gary Siplin. Pursuant to Section 112.324(4), Florida Statutes, we are reporting our findings to you in this case.

Therefore, we are enclosing a copy of our file and the Final Order and Public Report in this matter, finding that Sen. Siplin violated Section 112.313(6), Florida Statutes, in the manner described in the order.

If we may be of any assistance to you in your deliberations, please do not hesitate to contact us. We would appreciate your informing us of the manner in which you dispose of this matter.

Sincerely,

A handwritten signature in black ink that reads "Philip C. Claypool".

Philip C. Claypool
Executive Director

PCC/vad

Enclosures

cc: Mr. Mark Herron, Counsel for Respondent
Mr. James H. Peterson, III, Commission Advocate
Mr. Marcus Robinson, Complainant

2009 SEP 17 10 35
DIVISION OF
ADMINISTRATIVE
HEARINGS
FILED

DATE FILED

SEP 15 2009

COMMISSION ON ETHICS

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re **GARY SIPLIN,**)
)
 Respondent.)
)
 _____)

Complaint No. 06-274
DOAH Case No. 08-3482EC
COE Final Order No. 09-240

FILED
DIVISION OF
ADMINISTRATIVE
HEARINGS
SEP 17 AM 10:35

FINAL ORDER

This matter comes before the Commission on Ethics, meeting in public session on September 11, 2009, pursuant to the Recommended Order of the Division of Administrative Hearings' Administrative Law Judge rendered in this matter on July 20, 2009. The Recommended Order (a copy of which is attached and incorporated herein by reference), recommends that the Commission enter a final order finding that Gary Siplin violated Section 112.313(6), Florida Statutes, by using his position as a State Senator to bully a deputy sheriff into yielding to Respondent's desire to access a stadium parking lot via a barricaded route.

BACKGROUND

This matter began with the filing of an ethics complaint in 2006 alleging that the Respondent, Gary Siplin, a State Senator, attempted to use his position as a member of the Florida Legislature to avoid or circumvent a posted traffic blockade.

The allegations were found to be legally sufficient and Commission staff undertook a preliminary investigation to aid in the determination of probable cause. On August 1, 2007, the Commission on Ethics issued an order finding probable cause to believe the Respondent had violated Section 112.313(6), Florida Statutes, by using his position as a State Senator to bully

Complainant into yielding to Respondent's desire to access a stadium parking lot via a barricaded route. The matter was then forwarded to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge (ALJ) to conduct the formal hearing and prepare a recommended order. Prior to the hearing the Advocate and the Respondent submitted a joint prehearing statement. A formal evidentiary hearing was held before the ALJ on May 19, 2009. A transcript was filed with the ALJ and the parties timely filed proposed recommended orders. The ALJ's Recommended Order was transmitted to the Commission, the Respondent, and the Advocate on July 20, 2009, and the parties were notified of their right to file exceptions to the Recommended Order. Thereafter, the Respondent filed six¹ exceptions to the ALJ's Recommended Order, to which the Advocate timely filed a response. No exceptions were filed by the Advocate.

Having reviewed the Recommended Order, the record of the proceedings, and Respondent's exceptions, the Commission makes the following findings, conclusions, rulings and determinations:

STANDARDS FOR REVIEW

Under Section 120.57(1)(l), Florida Statutes, an 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

¹ The exceptions are misnumbered, with number 5 skipped.

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 conclusions of law or interpretations of administrative rules, the agency must state with particularity its reasons for rejecting or modifying such conclusions of law or interpretations of administrative rules 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. An agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action.

RULINGS ON EXCEPTIONS

Exception 1

The Respondent's first exception speaks to the ALJ's finding of fact in paragraph number 7, which states:

At this point in time, it was approximately 1:00 p.m., some three or four hours prior to kickoff for the football game. It is, as Respondent testified, highly unlikely the parking lot would be full

at that time. In fact, a picture taken by Respondent's sister-in-law upon their arrival indicates that the lot was essentially empty. [Footnote omitted] Therefore, it makes no sense that the law enforcement officers would tell Respondent the lot was full. The deputy's testimony is more credible on the issue of whether Respondent was told that the lot was full.

The Respondent argues that the last two sentences of the finding of fact are unsupported by competent and substantial evidence. He states, "the pictures were taken to establish that the deputies had told Respondent that the parking lot was full."²

Whether the parking lot was full does not appear to have been in dispute at the hearing. The issue was whether the Respondent had been *told* by law enforcement officers that the parking lot was full. The pictures may³ establish that the parking lot was not full, but they do not establish what the deputies said to the Respondent. The Respondent's sister-in-law took the pictures, (Transcript p. 111) and she did not appear at the hearing or otherwise offer testimony, but to the extent that there is any evidence that she took the pictures because the Respondent was told the lot was full, such evidence was directly rebutted. Corporal Russell testified "I never told him his parking lot was full." [T 100] Deputy Robinson also explained, in detail, the events of the day, and his recitation of events does not reflect that the Respondent was ever told the lot was full. [T 43-52] The "Hispanic female officer" that Mrs. Siplin testified was the first to tell them the lot was full (Transcript, p. 107) was never mentioned by the Respondent and was not produced, and no motive for the officers to falsify was ever offered.

The ALJ in this instance simply assessed the credibility of the witnesses. That he found

² This is a different characterization of the evidence than the Respondent offered the ALJ. In his Proposed Recommended Order, at paragraph 22, the Respondent states that his wife "testified that the pictures were taken to show that the parking lot which they were told was full was not, in fact, full."

³ In a footnote to the finding of fact, the ALJ notes: "At final hearing, Respondent could not positively identify himself in the photograph, but stated the picture had been taken immediately upon arrival in the parking lot as evidence that the lot was not full. Respondent's credibility on this point is questionable."

the Respondent's credibility lacking is well documented in the Recommended Order not only in footnote 3, already cited, but in other findings not challenged in the exceptions, such as paragraph 20,

In the Joint Prehearing Stipulation . . . Respondent acknowledged that he is subject to the Code. However, he stated under oath at final hearing, 'I don't know what I stipulated to. The lawyer does. I don't know.' The incredulity of this testimony (especially coming from a member of the Florida Bar and a public officer) makes Respondent's statements concerning other facts about the incident less believable.

paragraph 23,

His complete lack of recall of the events makes it difficult to give any of his testimony much weight.

and paragraph 24,

. . . Respondent's testimony was not precise and explicit. Respondent was confused about the facts at issue. Upon a comparative consideration of the demeanor of the witnesses, the context of the statements, and the undisputed facts, it is difficult to give any degree of certainty to the testimony of Respondent.

Issues of credibility are for the trier of fact, and this exception is accordingly denied.

Exception 2

Paragraphs 34 and 35 state:

34. The Commission has, by clear and convincing evidence, established that Respondent:

- Is a public servant and a public official;
- Did identify himself as a state senator for the purpose of seeking to avoid or circumvent a traffic barrier;
- Attempted to gain an advantage or special benefit solely on the basis of his position as a public official; and
- Acted corruptly as defined by statute.

35. Respondent made it a point to advise each law enforcement officer with whom he came in contact on November 18, 2006, of his position, i.e., a state senator. It is apparent that Respondent acted with wrongful intent to obtain a benefit, albeit, very minute in the scheme of things, for himself and his family members (wife,

sister-in-law, and niece).

This exception speaks to the second bulleted point above: the finding that the Respondent "did identify himself as a state senator for the purpose of seeking to avoid or circumvent a traffic barrier," and to paragraph 35.

These are findings of fact, and are well supported by the evidence. The Respondent's claim that he identified himself by his title "as part of his explanation of why he needed to get through [sic] barricade"⁴ is undercut by the lack of any explanation of how the fact that the Respondent is a State Senator would necessitate his getting through a barricade. In paragraph number 18, unchallenged by the Respondent, the ALJ points out that

Although his parking pass indicated that Rio Grande Avenue was the route to take, there is no indication that Respondent believed such written instructions superseded traffic laws or officers' instructions. Even if Respondent was being erroneously told that the lot was full, he provided no rational basis for disobeying the law or the instructions from law enforcement officers.

In addition, Deputy Robinson testified that the Respondent, "asked me if I knew who he was," and "made a comment that I really didn't know who I was messing with and that he needed to get through. He referenced his parking pass. After informing me he was a senator, told me he needed to make it through whether the road was closed or not." (Transcript pp. 47-48) Corporal Russell testified that the Respondent "advised me he was Senator Gary Siplin, and that he was having a problem with the officer who was there at the scene." (Transcript p. 92)

As to the part of paragraph 35 stating that the Respondent "made it a point to advise each law enforcement officer with whom he came in contact on November 18, 2006, of his position, i.e., a state senator," this finding is supported by the testimony of the officers, and even the

⁴ The Respondent testified that he identified himself by his title "Because they gave Senator Siplin the ticket" (Transcript, p. 22)

testimony of the Respondent's own wife supports the finding that the Respondent introduced himself as "Senator Siplin" to every officer he met. (Transcript pp. 107, 109)

It is the ALJ's responsibility to resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. *Heifetz v. Department of Bus. Reg.*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). He did exactly that here, and the exception is rejected.

Exception 3

Again the Respondent contests paragraphs 34 and 35, this time challenging the ALJ's finding, bulleted in paragraph 34, that the Respondent "attempted to gain an advantage or special benefit solely on the basis of his position as a public official," and the last sentence of paragraph 35, which states, "It is apparent that Respondent acted with wrongful intent to obtain a benefit, albeit, very minute in the scheme of things, for himself and his family members (wife, sister-in-law, and niece)."

The Respondent makes the argument that: a) his parking pass "directed the Respondent to access the designated lot through the barricaded road," b) since the instructions called for him to go through the barricade, he was *entitled* to go through the barricade, and, c) since he was entitled to go through the barricade, his effort to do so was not an attempt to secure a special benefit.

This argument misstates a material fact. The record evidence only indicates, and the ALJ found in paragraph 4, that the parking pass called for the Respondent to go down Rio Grande Avenue. There is no evidence that the parking pass conveyed upon the Respondent an entitlement to proceed through a traffic barricade, and the ALJ specifically found in paragraph

18, quoted fully above, that there was no indication that Respondent believed the instructions on the parking pass superseded traffic laws or officers' instructions.

The ALJ found in paragraph 17, "[n]o vehicles were allowed through the barrier other than the one driven by Respondent. Other cars attempted to travel north on Rio Grande Avenue throughout the day, but they were all redirected back to Carter Street. Only Respondent was allowed through the barrier" The Respondent does not challenge this finding.

The ability to take a route denied to others is the benefit the Respondent sought and received, and this exception is denied.

Exception 4

The Respondent here challenges the ALJ's finding, bulleted in paragraph 34, that the Respondent, "[a]cted corruptly as defined by statute," as well as paragraphs 35 and 36, which read

35. Respondent made it a point to advise each law enforcement officer with whom he came in contact on November 18, 2006, of his position, i.e., a state senator. It is apparent that Respondent acted with wrongful intent to obtain a benefit, albeit, very minute in the scheme of things, for himself and his family members (wife, sister-in-law, and niece).

36. Further, Respondent's willful refusal to obey traffic laws and the instructions given by uniformed police officers was contrary to his obligations under the Code. Such behavior is wrong for any citizen and is especially egregious for a member of the Legislature and a practicing attorney.

The basis of this exception is that "obeying the traffic laws and instructions given by law enforcement personnel is not a 'public duty' encompassed within the definition of corrupt intent set forth in Section 112.312(9), Florida Statutes." Obeying traffic laws and law enforcement instructions, the Respondent argues, is not a public duty, but rather "is a duty required of

ordinary citizens."

Pursuant to Section 112.312(9), Florida Statutes, "corruptly" is defined as

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.

The "act or omission" here was not the disobedience of traffic laws or law enforcement instructions. It was the use of position. Section 112.311(1), Florida Statutes, declares it to be the policy of the state that public office not be used for private gain other than the remuneration required by law. In other words, the Respondent had a public duty not to use his position to obtain a private, personal benefit. Beyond this, the Code calls for officials to "uphold the Constitution of the United States and the State Constitution, and to perform efficiently and faithfully their duties *under the laws of the federal, state, and local governments* (Section 112.311(6), Florida Statutes) (emphasis supplied) and the oath of office required for Senators calls for them to swear to "support, protect, and defend the Constitution and Government of the United States and the State of Florida." Article II, Section 5(b), Florida Constitution. The Respondent cannot realistically say that he had no duty, as an elected State Senator, to obey the laws of the state he serves.

For these reasons, and insofar as the objections to paragraph 35 have already been addressed, the exception is rejected.

Exception 5 (Labeled "Exception 6" by the Respondent)

This exception challenges the ALJ's penalty recommendation. The Respondent correctly argues that pursuant to Section 112.324(4), Florida Statutes, in cases involving members of the Legislature, the Commission may only recommend a penalty if asked to do so by the Legislature.

See, In re Mike Langton, 14 FALR 4175 (Commission on Ethics 1992) (Commission is not empowered to recommend a penalty for any statutory violation by a member of the Legislature absent a request from the Legislature.) The Advocate concedes this point, and the exception is granted.

Exception 6 (Labeled "Exception 7" by the Respondent)

In this exception the Respondent, while acknowledging that Section 112.324(4), Florida Statutes, specifically authorizes this Commission to make a finding of violation and forward its findings to the Senate, argues that these statutory requisites encroach upon the power of each house to be the sole judge of the qualifications of the members.

The Respondent relies on Florida Commission on Ethics v. Plante, 369 So. 2d 332 (Fla. 1979) for the proposition that the Commission may not transmit its finding of a violation to the President of the Senate. This is a misrepresentation of the court's holding in that case, and so a brief explication of that case, and its history, is in order.

Plante dealt with an allegation that various senators had violated Article II Section 8(a) and (h), Florida Constitution (1976) by failing to make financial disclosure. The Commission found probable cause to believe a violation had been committed and sought to refer that finding to the President of the Senate. The senators appealed, and the First District held that the Commission "may not transmit a finding of *probable cause* to the President of the Senate in an attempt to commence a disciplinary action against a senator." (emphasis supplied.) *Id.*, at 334. The court found the probable cause order void and entered a permanent stay of its transmittal to the Senate President. Plante v. Florida Commission on Ethics, 354 So. 2d. 87 (Fla. 1st DCA 1977). The Commission on Ethics then went on to find a violation, and the senators appealed

that decision. The First District found that action to be in conflict with its prior opinion, and held it void. Plante v. Commission on Ethics, 356 So. 2d 1356 (Fla. 1st DCA 1978). The Commission appealed this order to the Florida Supreme Court.

The Florida Supreme Court quashed the district court's opinion, disagreeing with the senators' argument that the Commission could investigate an allegation and summarize the evidence, but could not reach a conclusion as to whether the conduct proved constituted a breach of public trust. The court said:

A reading of the language [of the Constitution], with the Sunshine Amendment's purpose in mind, and common sense, dictates that the commission reach some conclusion at the end of an investigation. Inherent in reaching such a conclusion is the power of the commission to decide what is a breach of the public trust. The commission is the only agency that has the authority initially to construe the constitution on this point.

Florida Commission on Ethics v. Plante, 369 So. 2d 332, 336-337 (Fla. 1979). The court went on to hold that the report was not binding on the Legislature and did not commence official action for discipline.

Twelve years later, in Section 14, Chapter 91-85, Laws of Florida, the Legislature amended Section 112.324 to specify the procedures for complaints filed against members of the Legislature. The statute requires that in cases pertaining to members of the Legislature, this Commission forward any finding of violation to the Speaker or President, as applicable, "who shall refer the complaint to the appropriate committee for investigation and action which shall be governed by the rules of its respective house." Although the finding of a violation is final agency action, binding on the Respondent and subject to reversal only by the appellate courts, the report does not bind the Senate to any action.

To the extent that the Respondent argues that this legislatively-mandated procedure is unconstitutional, we are without authority to grant the exception. Communications Workers of America v. City of Gainesville, 697 So. 2d 167 (Fla. 1st DCA 1997) ("Administrative Procedure Act does not purport to confer authority on administrative law judges or other executive branch officers to invalidate statutes on constitutional or any other grounds.")

The exception is denied.

FINDINGS OF FACT

The Findings of Fact as set forth in the Recommended Order are approved, adopted, and incorporated herein by reference.

CONCLUSIONS OF LAW

The Conclusions of Law as set forth in the Recommended Order are approved, adopted, and incorporated herein by reference.

Accordingly, the Commission on Ethics concludes that the Respondent, Gary Siplin violated Section 112.313(6), Florida Statutes, by using his position as a State Senator to bully a deputy sheriff into yielding to Respondent's desire to access a stadium parking lot via a barricaded route.

DONE and ORDERED by the State of Florida Commission on Ethics meeting in public session on Friday, September 11, 2009.

September 15, 2009
Date Rendered

Cheryl Forchilli
CHERYL FORCHILLI
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. James H. Peterson, III, Commission Advocate
Mr. Marcus Robinson, Complainant
The Honorable R. Bruce McKibben, Administrative Law Judge
Division of Administrative Hearings