DATE FILED

SEP 16 2009

COMMISSION ON ETHICS

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re **BRENDA PRIESTLY-JACKSON,**)
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Respondent.)
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)

Complaint No. 08-022
DOAH Case No. 09-0388EC
COE Final Order No. 09-241

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2009 SEP 10 A 10:34
DIVISION OF ADMINISTRATIVE HEARINGS

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 Brenda Priestly-Jackson did not violate Section 112.313(6), Florida Statutes, by using her position as a member of the Duval County School Board to influence placement of her children in magnet schools without following proper procedures.

BACKGROUND

This matter began with the filing of an ethics complaint in 2008 alleging that the Respondent, Brenda Priestly-Jackson, as a member of the Duval County School Board, violated the Code of Ethics for Public Officers and Employees by claiming residence in the School District she serves while actually living outside the District and renting a house from a School District vendor, by using the District-issued credit card to pay for hotel and other unauthorized charges, and refusing to reimburse the District, and by pressuring the Complainant to promote

the Respondent's husband and place her children in a magnet school "for which there were wait-lists, and for which she had made no application."

The allegations regarding renting a house from a School District vendor, using the District-issued credit card, and pressuring the Complainant to promote the Respondent's husband and place her children in a magnet school were found to be legally sufficient and Commission staff undertook a preliminary investigation to aid in the determination of probable cause. On December 10, 2008, the Commission on Ethics issued an order finding probable cause to believe the Respondent had violated Section 112.313(6), Florida Statutes, by misusing her position to attempt to influence placement of her children in magnet schools without following proper procedures. 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 by video teleconference on May 8, 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 Advocate filed two exceptions to the ALJ's Recommended Order, to which the Respondent timely filed a response. No exceptions were filed by the Respondent.

Having reviewed the Recommended Order, the record of the proceedings, and Advocate'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 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 Advocate's first exception speaks to the ALJ's finding, in paragraph 19 of the Recommended Order, that the testimony of Dr. Sally Hague, Director of School Choice and Pupil Assignment Operations for the School District and the person to whom the Respondent first spoke about transferring her children, was "less than clear." The paragraph reads:

> Dr. Hague's recollection of any reference Respondent made to her position as a School Board member during this phone call is less than clear. When asked whether Respondent referred to herself as a School Board member during this conversation, Dr. Hague testified, ". . . she did refer to herself as a board member at one point. . . .Well, I mean, she did say, you know, as a board member, you know, if there was any way to place her children at Kite." Dr. Hague acknowledged that Respondent was "search[ing] for other ways that we might be able to move the students to Henry F. Kite."

The Advocate argues, and the hearing transcript, at Vol. I, pp. 38 and 62, confirms, that Dr. Hague did testify that the Respondent referenced her public position during the course of their telephone conversation. However, the context and manner of the reference is not explained in any more detail than what appears in the quote above. In addition, when asked how many times the Respondent had contacted her regarding her children, Ms. Hague at first answered "I know she's contacted me three times for her children" but later corrected herself, "Maybe it was two times now. I am getting myself confused here." (Transcript Vol. I, pp. 32-33) When questioned about an email related to the matter Ms. Hague referred to personal notes, saying, "I

had just made myself some notes referencing the emails. I'm getting a little foggy for some reason." and later, "Sorry. I'm just getting a little nervous here or something. (Transcript Vol. I, pp. 41-42)

The assessment of the clarity of a witness' testimony is a matter within the purview of the ALJ, who has available to him or her not just a cold transcript, but the ability to observe the witness' appearance and demeanor. In light of the testimony referenced above, we cannot say that the ALJ's finding here was unsupported by competent substantial evidence, and the exception is denied.

Exception 2

The Advocate's second exception goes to the Finding of Fact in paragraph 17, which states:

> At the time she made the phone call to Dr. Hague, Respondent had a general understanding that there had been at least one individual on the Superintendent's staff (the Superintendent prior to Dr. Wise) who had been permitted to have her child transferred to a different magnet program without going through the application process. The only other School Board member who testified, Nancy Bonner, was also aware of one such instance, as was Mr. Sundstrom, the Chief-of-Staff to the former Superintendent.

The Advocate's first objection to this finding is that there is no competent substantial evidence that the Respondent was aware of the other instances of waiver *at the time* she spoke to Dr. Hague. The only evidence in the record on the issue of when she acquired this knowledge is the Respondent's testimony that when she sent an email one week later, she "had background general knowledge," of other individuals having received waivers.[1] (Transcript, Vol. I, p. 140)

[1] Another School Board member, Nancy Broner, testified that the propriety of one of the waivers was questioned at a School Board meeting. (Transcript Vol. II, p. 169) As Ms. Broner and the Respondent have both served on the School Board since November 2002 (Transcript Vol. II, pp. 129, 151) it is *possible* that the Respondent was aware of the matter as a result of that meeting. However, no evidence was introduced on the issue.

The Respondent argues that the ALJ could infer from the fact that the Respondent had this "background general knowledge" on June 5, the date of the email, that she also had it on May 28, the date of the telephone call. However, she points to nothing in the record which would support such an inference.

While an ALJ may draw permissible inferences from testimony, in the complete absence of anything in the record to suggest that the Respondent had this knowledge on May 28, 2007 (the date of the telephone call), such an inference is mere speculation, and this part of the exception is accepted. The paragraph will be amended to read:

> Respondent had a general understanding that there had been at least one individual on the Superintendent's staff (the Superintendent prior to Dr. Wise) who had been permitted to have her child transferred to a different magnet program without going through the application process. The only other School Board member who testified, Nancy Bonner, was also aware of one such instance, as was Mr. Sundstrom, the Chief-of-Staff to the former Superintendent.

The Advocate next objects to the part of the finding referencing School Board member Broner and Mr. Sunsdtrom's knowledge of prior waivers. In her response to the Advocate's exceptions, the Respondent notes that there had been two previous waivers: one for Marsha Oliver and one for Ed Pratt-Daniels. With respect to Ms. Oliver's child, School Board member Broner testified only that she "had heard about" the child's placement in the magnet program. (Transcript, Vol. II, pp. 159-160) She testified that she was aware of the situation with Mr. Pratt-Daniels because it had been raised at a School Board meeting by a Board member, who reported that some parents had questioned why the waiver had been granted. (Transcript, Vol. II, p. 169)

Mr. Sundstrom testified only regarding the Oliver waiver. He testified that Dr. Wise [the Complainant and former School Superintendent] "was unaware of it" and that "until this came up

this came up with Brenda Priestly-Jackson making the allegation[2] it had not been on my radar . . . ." (Transcript, Vol. II, p. 120.)

The finding of fact is misleading in that it suggests: a) that Mr. Sundstrom was aware that waivers had been granted *prior* to the Respondent's allegation that such waivers had been given to "much of" Dr. Wise's staff; b) that waivers were not an unusual occurrence; and, c) that the Respondent's knowledge of the two previous waivers would undercut the element of corrupt intent in her own request for a waiver.[3] Nevertheless, there is competent substantial evidence to support the finding, and this part of the exception is denied.

The Nature of the Respondent's Actions

The ALJ's repeated reference to the Respondent's having acted in her capacity as a mother, (paragraphs 12, 20, 42) as opposed to having acted as a member of the School Board calls for comment on the statutory standard applicable in this case. Section 112.313(6) does not prohibit a public officer or employee from seeking a private benefit; it prohibits the corrupt *use or attempted use of position* in that pursuit. There seems to be no dispute that the Respondent was at all times acting in furtherance of her personal interests as a mother, and she was not alleged to have violated Section 112.313(6) by simply seeking to further those interests. The allegation was that she used or attempted to use her public position to advance those personal interests. To the extent that the Recommended Order can be read as suggesting that acting to further personal interests obviates a violation of Section 112.313(6), we wish to clarify that it does not.

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[2] In her June 5, 2007 email, which responded to an email from Mr. Sundstrom indicating that the application and wait list procedure could not be waived, and if waived could present an appearance of impropriety, the Respondent had stated that "Although this procedure was waived for much of your staff Dr. Wise, I will fill out the application and I will put their names on the waiting list." (Adv. Ex 1)

[3] Arguably, to the extent that that the Respondent knew or believed that others had received special treatment based on their public positions, her request for similar treatment would suggest wrongful intent on her own part.

FINDINGS OF FACT

Paragraph 17 of the Recommended Order is modified as stated above. The balance of the Findings of Fact as set forth in the Recommended Order are approved, adopted, and incorporated herein by reference.

CONCLUSIONS OF LAW

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

2. Accordingly, the Commission on Ethics concludes that the Respondent, Brenda Priestly-Jackson, did not violate Section 112.313(6), Florida Statutes, by using her position as a member of the Duval County School Board to influence placement of her children in magnet schools without following proper procedures.

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

September 16, 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: Ms. Cindy Laquidara, Attorney for Respondent
Mr. Mark Herron, Attorney for Respondent
Ms. Jennifer Erlinger, Commission Advocate
Mr. Joseph Wise, Complainant
The Honorable Barbara Staros, Administrative Law Judge
Division of Administrative Hearings