STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: BRENDA PRIESTLY-JACKSON,	)	Case No. 09-0388EC
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A final hearing was conducted in this case on May 8, 2009, via video teleconference with sites in Jacksonville and Tallahassee, Florida, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Respondent violated Section 112.313(6), Florida Statutes (2007), 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, and if so, what is an appropriate penalty.

PRELIMINARY STATEMENT

On December 10, 2008, the Florida Commission on Ethics (Commission) issued an Order Finding Probable Cause to believe that Respondent Brenda Priestly-Jackson (Respondent), as a member of the Duval County School Board, violated Section 112.313(6), Florida Statutes (2007). The Commission forwarded the case to the Division of Administrative Hearings on January 23, 2009.

A Notice of Hearing dated February 4, 2009, scheduled the hearing for April 16, 2009.

On February 10, 2009, Respondent filed an unopposed Motion for Continuance of Final Hearing. The undersigned issued an Order Granting Continuance and Re-scheduling Hearing on February 16, 2009. The order scheduled the hearing by video teleconference for May 8, 2009. The hearing took place as scheduled.

At hearing, the Advocate called three witnesses: Dr. Sally Hague, David Sundstrom, and Respondent. The Advocate offered Exhibits Numbered 1 through 7. The Advocate's Exhibits numbered 1 and 6 were admitted into evidence. The Advocate's Exhibits numbered 3, 4, 5, and 7 were admitted as Joint Exhibits.

Exhibit numbered 2 was admitted in part. Respondent testified on her own behalf and called one other witness, Nancy Broner.

A Transcript comprised of two volumes was filed on June 5, 2009. The parties timely filed their Proposed Recommended Orders which have been duly considered in the preparation of this Recommended Order.

On June 17, 2009, the parties filed a Joint Notice to Clarify Record, which has been duly noted.

References to the Florida Statutes are to the 2007 version, unless otherwise indicated.

FINDINGS OF FACT

1. At all times pertinent to these proceedings, Respondent has served as a member of the Duval County School Board (School Board). She was elected to the School Board in 2002 and represents District IV.

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

3. Respondent and her husband, DeAndre Jackson, have four children, all of whom attend or attended public schools in Duval County. Mr. Jackson is a teacher at Jean Ribault Senior High School, which is the high school from which Respondent graduated.

4. The Duval County School District (School District) offers a number of school-choice options. Of the 123,400 students in the School District, about 30,000 students participate in school-choice options, attending schools other than their neighborhood or zoned school. Magnet schools constitute one of the school-choice options in the School District.

5. Magnet schools are schools that offer a specialized program or theme for students to participate in based on the student's interests, skills, or talents. Parents of students may apply if they wish their child to attend a magnet school that is outside that student's neighborhood or zoned school.

6. School Board Policy 5.46 is entitled Magnet Schools and Programs (Policy). Pursuant to this Policy, parents wishing their children to enter a magnet program may apply in January or February for the upcoming school year. After the application deadline, the applications are processed and a computer lottery generates assignments based on student preference and space availability. The lottery typically occurs in early April, and students who are not selected are placed on waiting lists.

7. Participants in the lottery have weighted entry points, which include the following "preferences" identified in the Policy as follows: (a) whether the student lives in the magnet school's attendance area; (b) whether the student participated

in the magnet program at a prior grade level; (c) whether the student has a sibling who attends the magnet school; and (d) whether the student's address is in an attendance area of a Title I school.

8. Dr. Sally Hague is the Director of School Choice and Pupil Assignment Operations for the School District. Her duties include oversight of most of the school-choice options in the School District.

9. According to Dr. Hague, there are preferences outside of the Policy which are also recognized. Children of active-duty military personnel receive a priority imposed by statute. Dr. Hague also recognizes a preference for students who have toured the school with parents during the application period.

10. Additionally, children of School Board employees who are members of collective bargaining units may be given a preference. Specifically, employees who are teachers and members of Duval Teachers United have the option under the collective bargaining agreement for their children to attend school at their work site or the nearest appropriate school, subject to consideration given to space and racial balance. When a parent chooses to exercise this contractual right to place his or her child at or near the school where the parent works, that parent would contact Dr. Hague.[1/] The collective

bargaining agreement does not set out a deadline regarding making such a request.

11. Dr. Hague receives calls from many parents of students in the School District, including calls from parents who are teachers and parents who are School Board members.

12. Respondent had the occasion to call Dr. Hague at times regarding her children. Shortly after Respondent was elected to the School Board in 2002, Respondent called Dr. Hague regarding her children's school placements. Respondent again called Dr. Hague in 2005, requesting a transfer for one of her children from one school to another. In both instances, Dr. Hague considered Respondent to be calling as a mother, not as a School Board member.

13. During the 2006-2007 school year, two of Respondent's children, Ky. J. and Ka. J., attended John E. Ford K-8 Montessori School, a magnet school.[2/]

14. Late in the 2006-2007 school year, Respondent was informed by Ka.'s teacher that Ka. should skip a grade. Respondent believed that Ka. was not overly mature and wished to transfer him to a different magnet school. Additionally, Respondent was concerned that Ka.'s FCAT scores were "flat academically" compared to prior years.

15. As a result of her concerns, Respondent began considering options for the next school year. One of the

options Respondent was considering was transferring her children to another magnet school, Henry F. Kite. In late May 2007, Respondent again contacted Dr. Hague regarding a change in the placement of Ky. and Ka.

16. Respondent's telephone contact to Dr. Hague occurred after the application period for magnet schools placement in the 2007-2008 school year had passed. She did not contact Dr. Hague earlier in the school year because she was not aware of the relevant issues regarding Ka. (i.e., his teacher's recommendation that he skip a grade and his FCAT scores).

17. 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.

18. The testimony regarding the content of this telephone conversation varies to some extent. Respondent has no recollection of making any reference to being a School Board member during her conversation with Dr. Hague.

19. 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."

20. Moreover, the evidence is clear that Dr. Hague knew from the first conversation with Respondent in 2002 regarding her children that Respondent was a School Board member. Dr. Hague also testified that in each instance, Respondent called her as a mother and that Dr. Hague was not asked by Respondent to violate any rule or policy:

> Well, she [Respondent] has children in the school system and she was calling in reference to her children and their school assignment, not unlike any one of 300, 400 calls I would take during the course of a month from parents who call to inquire about placement with their children, or movement on a waiting list, or any number of things that the parents call me about regarding school assignments.

21. When asked whether she felt intimidated by the phone call, Dr. Hague replied that she did not feel any intimidation

during the phone call. When asked if she felt pressured, she replied, “Maybe pressure’s not the right word, some persistence, I think on her part to see if there were any options from moving the students to Kite.” Dr. Hague continues to perceive her working relationship with Respondent as a good one. There is no evidence to suggest that Respondent demanded that her children be placed at Kite. Respondent said nothing to indicate that she might take some sort of adverse action against Dr. Hague if Dr. Hague did not approve a transfer, and in fact, did not take any adverse action toward Dr. Hague.

22. After informing Respondent that the application period had passed, Dr. Hague referred Respondent to then-Superintendent, Joseph Wise.

23. After speaking with Dr. Hague, Respondent contacted Superintendent Wise via telephone and left a voicemail regarding the placement of her children in magnet schools for the 2007-2008 school year. Respondent “loosely” recalled what she said in the voicemail, and stated that she told Superintendent Wise that Dr. Hague told her to contact him.

24. Superintendent Wise delegated the task of communicating with Respondent regarding this matter to his then-Chief-of-Staff, David Sundstrom.[3/] Mr. Sundstrom contacted Dr. Hague who explained the application process for magnet schools to him.

25. Respondent was next contacted on June 5, 2007, via e-mail by Mr.Sundstrom regarding her children's placement in magnet schools for the 2007-2008 school year.

26. In the e-mail, Mr. Sundstrom advised her that the lottery period had passed, that she had not yet filled out any application to move her children to another magnet school, and that there was a waiting list at Kite for the grades she requested.

27. Respondent replied in approximately an hour and copied Dr. Wise. While she alleged in the e-mail that she was aware of waivers provided to members of Dr. Wise's staff, she stated that she would submit late applications to place her children on the waiting list.

28. Respondent and Mr. Sundstrom exchanged additional e-mails on June 5, 2007. For some time prior to the June 5, 2007, e-mails, the relationship between Respondent and then-Superintendent Wise, and his Chief of Staff, had deteriorated. According to Mr. Sundstrom, Respondent's working relationship with Superintendent Wise deteriorated within months of his arrival in Duval County and was "really an unhealthy arrangement or relationship" in the months preceding the June 2007 e-mails. Mr. Sundstrom very openly did not and does not like or respect Respondent. Similarly, Respondent distrusted Mr. Sundstrom and believed that he was trying to undermine her work as a board

member. The e-mails exchanged between Respondent and Mr. Sundstrom in June 2007 reflect the high level of tension between the two which came about prior to the issue raised herein.

29. After becoming aware of the e-mails concerning Respondent filling out applications late for her children, Dr. Hague asked a member of her staff to prepare applications for Respondent to sign to request placement of her children on the waiting list for Henry F. Kite. This was solely at Dr. Hague's direction as a courtesy to Respondent, and was not requested by Respondent.

30. On July 16, 2008, Respondent signed and submitted applications for placement of her children in magnet schools for the 2007-2008 school year. Her son, Ka., was placed on the waiting list. Only five students were on the waiting list for Henry F. Kite, substantially fewer than waiting lists for more highly competitive schools. Ka. was moved into an open spot at Kite when the waiting list was exhausted.

31. The weight of the evidence does not establish the allegation that Respondent asserted a "School Board member privilege" in her communications with Dr. Hague or Superintendent Wise.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. See § 120.57(1), Fla. Stat. (2008).

33. Section 112.322, Florida Statutes, and Florida Administrative Code Rule 34-5.0015, authorize the Commission 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).

34. 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, the Commission, through its Advocate, is asserting the affirmative, i.e. that Respondent 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.

35. Commission proceedings that 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 Commission must establish its burden in this case by clear and convincing evidence.

36. As noted by the Supreme Court of Florida:

> Clear 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: Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

37. Section 112.313(6), Florida Statutes, provides as follows:

> 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.

38. The term "corruptly" is defined by Section 112.312(9), Florida Statutes, as follows:

> (9) "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.

39. The first element, that Respondent is a public officer, has been established by stipulation of the parties.

40. To establish a violation of Subsection 112.313(6), Florida Statutes, it must next have been established that Respondent: (a) used or attempted to use her official position (b) to secure a special privilege or benefit for herself or others. These elements have not been proven by clear and convincing evidence.

41. The evidence adduced at hearing failed to clearly and convincingly establish that Respondent used or attempted to use her position as a member of the School Board to secure a special privilege for herself or others, i.e., influence placement of her children in a magnet school without following proper procedures.

42. Dr. Hague's recollection of her telephone conversation with Respondent was not precise or explicit, nor were her recollections distinctly remembered. There is nothing improper about a School Board member, as a parent, making inquiry as to placement options for her children. This is especially true when at the time, Respondent and others had a general understanding that this had been done in the past for staff in the Superintendent's office. The evidence did not establish

that Respondent demanded a School Board member "privilege." Moreover, this was not a situation in which a School Board member called a School District employee with whom she had never spoken and made sure the person knew she was a School Board member thereby "putting her on notice" of who she was dealing with. On the contrary, Dr. Hague had spoken to Respondent in the past regarding similar placement issues and was well aware of Respondent's position. Dr. Hague also perceived that Respondent was calling in her capacity as a mother, as she had done in the past.

43. Additionally, this is not an instance wherein threats or intimidation were used (compare, e.g., In re: Coretta Udell-Ford, (during traffic stop, Respondent identified herself as a city council member and stated to officer, "That might not mean nothing to you now, but it will mean something in the morning . . . " Council member then drove to police station and demanded police chief to fire the officer), COE Final Order No. 09-042 filed March 16, 2009, DOAH Case No. 08-2725EC; In re: Lisa Marie Phillips, (statement by City Commission member that she "owned" or controlled police during traffic confrontation with another motorist was intimidating and dissuaded complainant from calling police.) COE Final Order No. 06-026 filed April 26, 2006, DOAH Case No. 05-1607EC.

44. There is no competent evidence of exactly what Respondent stated in the voicemail to Superintendent Wise. Section 120.57(1)(c), Florida Statutes. The only competent evidence is Respondent's "loose" recollection that she told Superintendent Wise in the voicemail that Dr. Hague told Respondent to call him. Accordingly, the evidence does not establish that Respondent invoked a School Board member privilege in the voicemail.

45. Based on the foregoing conclusions, the second and third elements necessary to prove a violation of Subsection 112.313(6), Florida Statutes, have not been established. Therefore, the element of "corrupt intent" need not be addressed. See In re: Danny Howell, DOAH Case No. 05-4333, Recommended Order entered September 12, 2007, adopted in full, COE Final Order 07-147 filed December 5, 2007; In re: Glendell Russ, DOAH Case No. 00-2536, adopted in full, COE Final Order No. 01-005 filed June 13, 2001.

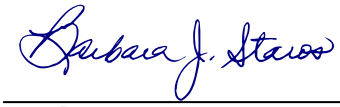
RECOMMENDATION

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

RECOMMENDED:

That the Commission enter a final order finding that Respondent, Brenda Priestly-Jackson, did not violate Section 112.313(6), Florida Statutes.

DONE AND ENTERED this 20th day of July, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of July, 2009.

ENDNOTES

[1/] The record is not clear as to the proximity of Henry F. Kite School to Jean Ribault High School where Mr. Jackson teaches.

[2/] In an attempt to maintain student confidentiality, the names of Respondent's children will be referenced by their initials. Since both of the children's first names begin with the same letter, their first names will be referenced by the first two letters of their names.

[3/] Nor did Superintendent Wise, the Complainant herein, testify at the final hearing. The voicemail and its contents were not saved and are not in evidence. Mr. Sundstrom's testimony regarding how he acquired knowledge of the content of the voicemail is ambiguous, as he could not recall whether he actually heard the voicemail or whether Dr. Wise told him about it. Consequently, the alleged content of the voicemail, and e-mails written by Dr. Wise, are hearsay, and are not sufficient to support a finding of fact as contemplated in Section 120.57(1)(c), Florida Statutes.

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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.