

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: HERBERT ZISCHKAU, III, ) Case No. 11-3967EC  
 )  
Respondent. )  
 )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A final hearing was conducted in this case on November 29, 2011, via video teleconference with sites in Daytona Beach and Tallahassee, Florida, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Advocate: Melody A. Hadley, Esquire  
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For Respondent: Darren J. Elkind, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether Respondent violated section 112.3143(3)(a), Florida Statutes (2009), by voting on a

December 9, 2009, motion on whether to investigate his actions, and if so, what is an appropriate penalty.

PRELIMINARY STATEMENT

On June 22, 2011, the Florida Commission on Ethics (Commission) issued an Order Finding Probable Cause to believe that Respondent Herbert S. Zischkau, as a member of the Deltona City Commission, violated section 112.3143(3)(a), Florida Statutes (2009). The Commission on Ethics found probable cause with regard to one of seven alleged violations. The Commission forwarded the case to the Division of Administrative Hearings on August 11, 2011.

A Notice of Hearing dated August 25, 2011, scheduled the hearing for November 2, 2011.

On October 13, 2011, the Advocate filed an unopposed Motion for Continuance. The undersigned issued an Order Granting Continuance and Re-scheduling Hearing by Video-teleconference on October 14, 2011, rescheduling the hearing for November 29, 2011. The hearing took place as scheduled.

At hearing, the Advocate did not call witnesses. The Advocate and Respondent offered Joint Exhibits 1 through 3, which were admitted into evidence. Respondent offered the testimony of Randall Morris and the deposition testimony of Marsha Segal-George, Esquire, as Respondent's Exhibit 1, which was admitted into evidence.

A Transcript comprising of one volume was filed on December 12, 2011. The Advocate timely filed her Proposed Recommended Order. On December 22, 2011, Respondent filed a Motion for Extension of Time to File Proposed Recommended Order, to which the Advocate filed an objection. Upon consideration, the Motion for Extension of Time is granted. The parties' Proposed Recommended Orders have been duly considered in the preparation of this Recommended Order.

References to the Florida Statutes are to the 2011 version, unless otherwise indicated.

FINDINGS OF FACT

1. At all times pertinent to these proceedings, Respondent served as a member of the Deltona City Commission (City Commission).

2. Respondent is subject to the requirements of Part III, chapter 112, Florida Statutes, the Code of Ethics for public officers and employees, for his acts and omissions as a member of the City Commission.

Background

3. On August 18, 2008, the City Commission approved a multi-million dollar Land Purchase Contract by which the City of Deltona (the City) was to acquire property from Howland Crossings, LLC.

4. Respondent was an opponent of the purchase of the property by the City from Howland Crossings, LLC.

5. As a condition for closing on the property, Howland Crossings was obligated to obtain a permit from the St. Johns River Water Management District (SJRWMD). On November 29, 2009, Respondent filed a Petition for Administrative Hearing with the SJRWMD in opposition to the issuance of the permit.

6. On December 8, 2009, the City Manager, Faith Miller, sent a memorandum to the Mayor and City Commissioners which addressed Ms. Miller's concern with Respondent having filed the Petition for Administrative Hearing related to the proposed purchase of the property.

The Vote in Question

7. Also on December 8, 2009, the City Mayor, Dennis Mulder, wrote a memo to Commission members informing them that he had decided to call a special meeting for the following day. The memo stated in its entirety:

I've decided to call a Special Meeting for Wednesday, December 9, 2009 at 4:30 pm in the Commission Chambers regarding Commissioner Zischkau's petition with SJRWMD (St. Johns River Water Management District).

Items for exclusive discussion will be:

A. Potential Formal Request by Commission to have Commissioner Zischkau withdraw his petition with SJRWMD.

B. Conflict letter received by City Manager regarding Mr. Fowler and solutions.

C. Concerns regarding possible violations of the City of Deltona Charter and/or Florida laws of various nature, yet undefined, and possible processes that may be taken by the Commission.

Thank you,

Mayor Mulder

8. Marsha Segal-George served in the capacity of acting City Attorney at the December 9, 2009, City Commission meeting at issue here. Ms. Segal-George has worked in local government for over 30 years, having served as a county attorney, county manager, city attorney, and city manager.

9. According to Ms. Segal-George, it is customary to receive an agenda package prior to the commencement of a meeting of a public body to review in advance. She did not receive any materials to review prior to the December 9 meeting in question.

10. Before the meeting commenced, Ms. Segal-George talked to the Mayor briefly to express her concerns and discomfort that she did not have any documents regarding the meeting, as it was her responsibility to advise the Commission and it "creates a very--kind of uncomfortable feeling for the lawyer, because we like to be prepared and we like to be able to advise our client."

11. Documents were distributed by the mayor after the meeting started. These documents comprised three proposed motions under the heading "Potential Motions offered by the Mayor for special meeting of December 9, 2009."

12. Item C, the motion at issue in this proceeding, reads as follows:

I move that due to possible past, present and future conflict that the City Manager quickly hire an attorney or firm she feels is experienced enough, affordable and has not done work for the City in the past to assist this Commission thru (sic) her on helping to determine whether the actions of Commissioner Zischkau violated the City Charter, or any other laws or rules and, if applicable, any and all methods of resolution that are available to the City Commission. In addition, for the purity of this process and its results once this person or firm is hired, no Commissioner or the Mayor, or officer, permanent or acting, of the City, other than the City Manager, shall contact this attorney or firm. The results shall be released to the Commission as a body at one time for consideration.

13. Ms. Segal-George was "shocked" by this motion, in that the city attorney had not been consulted with regards to these issues and "they were fairly serious issues . . . it is not the type of thing that you would put in the hands of a city manager. . . it would be something that the attorney . . . would be involved, and so I was shocked by it."

14. When asked during her deposition if she had thought at that time that Respondent or anyone else had a conflict of

interest regarding the vote, would she have interrupted and said something about it, she replied. "Yes, I would have. And I didn't." It continues to be Ms. Segal-George's opinion that Respondent did not have a conflict of interest when he voted on the motion at issue.<sup>1/</sup>

15. Respondent voted against the motion. However, the motion passed with a vote of 4-3. Prior to the vote, Commissioner Zischkau did not state publically to the assembly the nature of the vote or the nature of any potential interest he might have in the matter. The fact that this motion related to Commissioner Zischkau was abundantly clear from the wording of the motion itself to anyone reading it or hearing it read at the meeting.

16. As a result of the passage of the motion, a law firm other than the one serving as City Attorney was hired by the City Commission to provide a legal opinion as to whether Respondent violated the City Charter and the provisions of the Ethics Code. The conclusion reached by this law firm was that Respondent's actions did not violate either the City Charter or the Ethics Code.<sup>2/</sup>

17. Randall Morris has served as a City Commissioner of the City of Lake Mary, Mayor of the City of Lake Mary, County Commissioner for Seminole County, Chairman of the Board of County Commissioners of Seminole County, and on numerous other

public bodies. In his experience, receiving an agenda packet with proposed motions at the dais with no advance notice of what he would be receiving and what will be voted upon " . . . would be extraordinary, and in my experience, I've never experienced that."

18. The weight of the evidence does not establish the allegation that Respondent's vote in question inured to his private gain or loss when he voted on the motion to retain counsel to investigate his actions regarding filing a petition with the SJRWMD relative to the purchase of land from Howland Crossings.

#### CONCLUSIONS OF LAW

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

20. 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).

21. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue of the proceedings. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 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 112.3143(3)(a), Florida Statutes, by voting on a motion regarding whether to investigate his actions.

22. 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. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997). Therefore, the Advocate has the burden to establish the allegations in the Order Finding Probable Cause by clear and convincing evidence.

23. 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)).

24. It is alleged in the Order Finding Probable cause that Respondent violated section 112.3143(3) (a) by voting at the December 9, 2009 City Commission meeting on a motion to retain counsel to investigate whether or not Respondent violated the City Charter and the Ethics Code.

25. Section 112.3143(3) (a), Florida Statutes, provides as follows:

Voting conflicts.-

\* \* \*

(3) (a) No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; . . . Such public officer shall, prior to the vote being taken, publically state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes. (emphasis added)

26. The term "conflict" or "conflict of interest" is defined by section 112.312(8), Florida Statutes, as follows:

(8) "Conflict or "conflict of interest" means a situation in which regard for a private interest tends to lead to disregard of a public duty or interest.

27. In construing the pertinent language of section 112.3143(3) (a), the Advocated interpreted the word "special" in

regard to the vote in question as it relates to Respondent being the person impacted by the vote. The Advocate interpreted "special gain or loss" as "an interest in the outcome of the investigation and any ramifications, vindication or implication of Respondent's actions, personal reputation/observations of the public, expense and time related to the investigation."

28. The critical question in this analysis is, what does a "special private loss or gain" mean? This was addressed by the Eleventh Circuit Court of Appeals in George v. City of Cocoa, Fla., 78 F.3d 494, 496 (11th Cir. 1996). In its discussion of the issue, the Court referenced several Commission opinions. The Court's opinion reads in pertinent part:

Florida law imposes on elected officials an affirmative duty on all matters before them; abstaining from a vote is prohibited unless "there is, or appears to be, a possible conflict of interest under . . . § 112.3143." . . . The statutory provision dealing with mandatory abstention from city council voting is Fla. Stat. Ann. § 112.3143(3)(a). . . . Under § 112.3143(3)(a), the identification of a "special gain or loss" to the city council member as a result of his or her vote is a necessary condition for disqualification.

A "special gain or loss" described by the voting conflicts statute almost always (if not always) refers to a financial interest of the public official that is directly enhanced by the vote in question. See Izaak Walton League of America v. Monroe County, 448 So. 2d 1170, 1173 n.8 (Fla. App. 3 Dist. 1984) (explaining that § 112.3143 does not apply "to bias or prejudice on the part of a

public officer based on other than private economic interests or relationships" (quoting Op. Fla. Comm. Ethics 79-14 (1979)); see also Op. Fla. Comm. Ethics 90-20 (1990) (holding that a city council member, whose property would be affected by proposed special assessment, must abstain from voting, "given the direct, personal, financial effect striking the assessment would have on [his] interests); Op. Fla. Comm. Ethics 79-14 (1979) (holding that a city council member may not abstain from voting on matters involving his personal foe and stating that "it is clear that, when adopting the Code of Ethics, the Legislature was concerned primarily with the effect of a public official's economic interests and relationships upon the performance of his public duties, rather than the effect of his personal preferences and animosities.") (emphasis in original).

29. Thus, elected officials have an affirmative duty to vote, unless the circumstances fit within an exception as in section 112.3143(3) (a). In interpreting this statutory provision, the Commission has acknowledged that this exception should be strictly construed. See Comm'n on Ethics Op. 08-11. (" . . . [T]he primary purpose of Section 286.012 is to require public officers to vote and take a position on the issues before their public bodies and thus that its exception to the voting requirement should be strictly construed, lest officials and their boards be paralyzed due to excessive voting abstentions . . . .")

30. As the Eleventh Circuit found in George, supra, a "special private gain" described in section 112.3143(3)(a) almost always, if not always, refers to a financial interest. Moreover, the Commission has "not found the statute to be applicable to measures where there was sufficient uncertainty at the time of the vote as to whether, and, if so, to what extent, gain or loss would result from the measure, that we found such gain or loss to be remote and speculative." Comm'n on Ethics Op. 07-15. At the time of the vote, it was impossible to know that the result of any "investigation" would be negative or positive. Applying the logic of that advisory opinion, the advice of the independent law firm, even if it had found a conflict existed, would not have bound the Commission in its actions.

31. Further, there was sufficient uncertainty at the time of the vote, as to whether, and if so, to what extent, any "vindication or implication" or "expenses and time related to the investigation" would result. The Mayor's motion itself was extremely vague and ambiguous referencing the "possible violations" of the City Charter and "Florida laws of various nature, yet undefined" and "possible processes that may be taken" by the City Commission. The undersigned is not persuaded that Respondent's personal reputation or observations of the

public constitute a special private gain or loss as contemplated by section 112.3143(3) (a) .

32. The evidence adduced at hearing failed to clearly and convincingly establish that Respondent's vote at the December 9, 2009, City Commission meeting inured to his special gain or loss.

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, Herbert S. Zischkau, did not violate section 112.3143(3) (a), Florida Statutes.

DONE AND ENTERED this 8th day of February, 2012, in Tallahassee, Leon County, Florida.



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Barbara J. Staros  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 8th day of February, 2012.

ENDNOTES

1/ The undersigned is aware that neither she nor the Commission on Ethics is bound by the legal opinions of the City Attorney or the outside counsel hired to address this issue.

2/ It is noted that the discussion contained in this legal opinion regarding a possible violation of section 112.3143 focused on Respondent's vote on a property escrow matter at a December 30, 2009, Commission meeting. It is further noted, however, that the legal opinion is extensive (19 pages) and addresses the "application of the relevant City Charter and Ethics Code provisions" regarding the following question: Whether the conduct and activities of Commissioner Zischkau concerning the Property transaction violate the City Charter and/or applicable ethics provisions provided by Part III of chapter 112, Florida Statutes.

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.