STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: OEL WINGO,	)	
	)	
Respondent.	)	Case No. 11-6265EC
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on April 10 and 11, 2012, in Daytona Beach, Florida, before Administrative Law Judge W. David Watkins of the Division of Administrative Hearings.

APPEARANCES

For Advocate: Diane L. Guillemette, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399

For Respondent: J. Brennan Donnelly, Esquire
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2618 Centennial Place
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STATEMENT OF THE ISSUE

The issue in this case, as stipulated by the parties, is whether Respondent violated section 112.313(6), Florida Statutes (2010),[1/] by attempting to enter into, or by entering into, pre-dated employment agreements, and/or by attempting to destroy or destroying public records and/or evidence of wrongdoing and/or by attempting to enter into or entering into agreements which exceeded the Respondent's purchasing authority.

PRELIMINARY STATEMENT

On October 26, 2011, the Commission on Ethics ("Commission") entered an Order Finding Probable Cause finding that there was reasonable cause to believe that Respondent, in her capacity as the City Manager of the City of Holly Hill, violated section 112.313(6), Florida Statutes, by attempting to enter into, or entering into, employment agreements with the City's department heads that showed an incorrect date. On December 11, 2011, the Commission referred the matter to the Division of Administrative Hearing ("DOAH") for the assignment of an administrative law judge, to conduct a formal administrative hearing, and to enter a recommended order.

Prior to the hearing, the parties filed a Joint Prehearing Stipulation in which they stipulated to several facts and conclusions of law. The parties' stipulations have been incorporated below to the extent relevant.

A final hearing was conducted on April 10 and 11, 2012, in Daytona Beach, Florida. At the final hearing, the Advocate presented the testimony of the following witnesses: Respondent; Mark Barker, the complainant; Kurt Swartzlander; Scott Gutauckis; Ronnie Spencer; Scott Simpson; Joshua Fruecht; and Diane Cole (by deposition). Respondent presented the testimony of Roland Via and Respondent.

The Advocate presented 28 exhibits, which were admitted into evidence. The Respondent presented one additional exhibit, which was admitted into evidence.

The three-volume Transcript of the hearing was filed on May 3, 2012. The parties agreed to file proposed recommended orders by June 2, 2012. Both parties timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent, Oel Wingo was employed as the city manager for the City of Holly Hill (City) from January 1, 2010, until October 2010. Prior to serving in that capacity, she was the assistant city manager for the City of Palm Coast for ten years, and the assistant city manager for the City of Ocala for five years. Respondent earned a Ph.D. in Education Administration from the University of Florida.

2. At all times material to the allegations herein, the City operated under a commission/city manager form of government. This meant that the commission decided policy, while the city manager was responsible for implementing policy and handling all operational matters, including the hiring and firing of personnel.

3. Respondent's employment as city manager was governed by an employment agreement. The agreement provided for the payment

of severance pay to Respondent in the event she was "terminated" by the City. Under section 10 of the agreement, termination could occur under a number of scenarios, including the following:

> If the Employer reduces the base salary, compensation or any other financial benefit of the Employee, unless it is applied in no greater percentage than the average reduction of all department heads, such action shall constitute a breach of this agreement and will be regarded as a termination.

4. In the event that Respondent was terminated pursuant to the above provision, "[T]he Employer shall provide, initially, a severance payment equal to six months' salary at the current rate of pay . . . ."

5. Respondent's employment agreement with the City further provided that she would not be entitled to receive severance benefits in the event she was terminated for cause. At the time she was terminated from her employment as city manager, Respondent's annual rate of pay was $124,500.00.

6. When Respondent assumed her duties as city manager, the City was experiencing significant budget problems because of declining property values, and the resultant reduction in tax revenues. Faced with a reduced budget, Respondent was nonetheless charged with the duty to maintain the current level of city services. Consequently, Respondent implemented budget cuts, reorganizations, layoffs, and position eliminations within months of her arrival. Understandably, the atmosphere in city

commission meetings was, at times, tense and volatile. Similarly, the rapid personnel changes negatively affected employee morale and fostered resistance to many of the changes proposed by Respondent.

7. When Respondent was hired by the City, only one City department head, City Clerk Valerie Manning, had an employment contract. Ms. Manning's contract with the City provided that if the City were to reduce her compensation in a greater percentage than the applicable across-the-board reduction for all City employees, she could elect to resign and "be terminated without cause," and therefor eligible for full severance benefits. Manning left the employ of the City in April, 2010.

8. In April 2010, Respondent replaced Manning with Joshua Fruecht. Fruecht testified that he requested an employment contract soon after he was hired. Respondent told him she would consider it after he had worked for the City for six months.

9. Early during Respondent's employment with the City she and the City Attorney, Scott Simpson, had conversations about the desirability of the department heads having employment agreements because, as department heads, they had no protection from arbitrary termination. Entering into employment agreements with the department heads would protect them from being terminated by the city commission for personal reasons. By that time Respondent had already been approached by Administrative Services

Director Kurt Swarzlander, who was concerned about his position and also wanted an employment agreement.

10. On May 6, 2010, Respondent e-mailed Attorney Simpson with the following inquiry:

> We recently discussed the need to contract with Department Heads. Previously, the City Clerk had a contract. I am reviewing similar employment contracts from other cities and would like to pursue this for several reasons.
>
> My primary question for you is whether these contracts must go before the Commission. My interpretation of the Charter and my hiring and firing capabilities is that they do not, as long as I remain within the adopted job descriptions and pay ranges.

11. Later that day, Simpson responded to Respondent's inquiry as follows:

> I agree that an employment contract with department heads should be within your authority as the City Manager. However, if severance is going to be provided to the department heads, then I would recommend having the commission approve this change in benefits even if individually the cost would not exceed your spending authority as cumulatively they probably would and it is a new benefit. This should not be an issue as the commission approved this for the City Clerk.

12. Roland Via served on the city commission from November 2005 through November 2010, and was the mayor when Respondent was hired as the city manager. Mr. Via testified that in January 2010, during her first month of employment, Respondent

advanced the idea of employment agreements for City department heads. According to Respondent, employment agreements would permit the City to hire the best managerial talent from other cities and provide a benefit to both the City and the employee.

13. In May 2010, Respondent negotiated an employment agreement with Brad Johnson to serve as the public works director. The contract was executed without approval by the City Commission. City Attorney Simpson and Respondent collaborated in the preparation of the contract. Mr. Johnson's agreement provided that if the City were to reduce his financial benefits in a greater percentage than the applicable across-the-board reduction for all City employees, he could resign and be terminated without cause, thus being eligible for full severance benefits. Specifically, section 4(c) of Mr. Johnson's employment agreement provided as follows:

> If the City reduces the financial benefits of the Employee in a greater percentage than the applicable across-the-board reduction for all City employees, or if the City refuses, allowing written notice, to comply with any other provision benefitting the Employee as set forth herein, then Employee may, at his/her option, elect to resign and be "terminated without cause" within the meaning of Section 4(a) of the Agreement and shall receive all compensation and benefits in Section (4)(a). Such resignation shall be in writing to the City Manager.

In the event there was a termination under the above circumstances, Mr. Johnson's agreement provided that the City

would pay a minimum of four months' salary and benefits pursuant to the City's Personnel Policies.

14. Respondent forwarded an e-mail to the members of the City Commission on May 7, 2010, informing them of her decision to enter into an employment agreement with Mr. Johnson based on a similar agreement with the former City Clerk, Ms. Manning. Respondent also informed the commissioners that the "City Attorney has advised that we consider utilizing employment agreements with new Department Heads."

15. At the time Respondent offered an employment agreement to Mr. Johnson, she elected not to do so for the other department heads. This was because she needed more time to evaluate each department head's capabilities and determine on a case by case basis whether offering contracts to them would in the best interest of the City. However, the unrebutted testimony established that early in her tenure as city manager Respondent had formulated the intent to enter into employment contracts with qualified department heads at some future time.

16. When Respondent entered into the written agreement with Mr. Johnson she was aware of the potential limitations imposed on her purchasing authority as a result of the severance provisions of the employment agreement. However, at the time that Respondent entered into the agreement with Mr. Johnson, no language was suggested or offered by the city attorney regarding

the limitations imposed on the city manager's purchasing authority by virtue of the City's purchasing code.

17. While Respondent was hired by unanimous vote of the City commission, her relationship with certain commissioners, particularly Commissioner Glass and Commissioner Patton, began to deteriorate within the first months of her employment. This was the result of several actions by Respondent, including challenging Commissioner Glass about directing an employee to expend funds in a manner inconsistent with commission action, and deciding not to authorize the use of City funds to pay for the spouses and children of commissioners to attend the League of Cities convention. As a result of this friction, Respondent testified, she was threatened by Commissioner Glass on more than one occasion.

The July 28, 2010, Employment Agreements (Dated May 21, 2010)

18. At a city commission workshop on the evening of July 27, 2010, Commissioner Patton suggested that Respondent take a 20 percent cut in pay, and that salaries of the department heads also be reduced. At the time that Commissioner Patton suggested the pay cuts, the only department head that had an employment agreement was Mr. Johnson. However, no formal motion was made at this meeting to cut Respondent's or department head pay, and no evidence was introduced that any action was ever taken by the city commission on this suggestion.

19. In the hours immediately following the commission meeting of July 27, 2010, which Respondent and other witnesses characterized as being "vicious, dysfunctional, screaming and yelling," Respondent wrote a resignation letter and prepared a list of things that needed to be done before she left the City. Among the items on Respondent's "to do" list was to prepare and complete the employment agreements that she and the city attorney had been discussing for department heads.

20. Respondent testified that she had two reasons for implementing employment agreements immediately following the July 27th commission meeting. The first was to protect the department heads from the personal vendettas of the city commission. The second was to ensure that the City had a professional management team in place and continuity of professional management.

21. On the morning of July 28, 2010, Respondent met with all of her department heads at the regularly scheduled weekly executive team meeting. She informed them that she would be working with the human resources director, Diane Cole, to immediately prepare employment agreements for all department heads modeled on the Brad Johnson, May 21, 2010, employment agreement. The reason given by Respondent for the agreements was that the department heads "should all have some protections due to the atmosphere within the city . . . ." During this meeting

she also informed her department heads of her intention to resign as city manager.

22. Respondent directed Ms. Cole to use the exact same agreement as had been prepared for Mr. Johnson, and to include the same dates as were included in that agreement. Accordingly, each of the employment agreements was dated as being signed on May 21, 2010, and each contained the same severance pay provision at section 4(c), as did Mr. Johnson's agreement. Likewise, the effective date of each of the employment agreements was June 7, 2010.

23. On the afternoon of July 28, 2010, each of the department heads, except Police Chief Barker, who was out of town, was presented with and signed their respective employment agreement. Although not present, Chief Barker conferred by telephone with Respondent regarding the employment agreement and advised her that he would not sign a "post-dated" agreement.

The July 29, 2010, Agreements

24. Upon further reflection that evening, Respondent became concerned about the "signature date" of May 21, 2010, appearing on contracts actually signed on July 28, 2010. This concern was no doubt fueled by Chief Barker's comment regarding the "post-dated" nature of the agreements. Accordingly, Respondent decided to have new agreements prepared the following day which would reflect signature dates of July 29, 2010. In addition, both she

and Ms. Cole had noted that the some of the agreements signed on July 28, 2010, contained typographical errors that needed to be corrected.[2/]

25. On July 29, 2010, Respondent presented a second employment agreement to each of the City department heads for them to sign. Each employment contract was dated as having been executed on July 29, 2010. Each of the employment agreements contained the identical language at section 4(c) as had appeared in the earlier versions signed the previous day. Similarly, the "effective date" of each agreement remained June 7, 2010.

26. Following the execution of the agreements on July 29, 2010, Respondent instructed Ms. Cole to destroy all the agreements dated May 21, 2010. Ms. Cole testified that Respondent directed her to destroy them because they were drafts, they contained typographical errors, and they had been superseded by the July 29, 2010, agreements. Notwithstanding her direction that the hardcopies be destroyed, Respondent testified that she understood that a copy of all of the agreements dated May 21, 2010, remained on the City's computer system, consistent with the City's record retention procedures.

27. The new agreements tied Respondent's potential severance benefits to base salary reductions of all department heads whose severance benefits were, in turn, tied to reductions in pay and benefits to all City employees.[3/] Thus, any potential

benefit to Respondent of the new agreements would depend on the type of action taken by the City. At least three scenarios were possible. First, if the City proposed cutting Respondent's pay and benefits by 20 percent, with no other corresponding reductions to department heads or city personnel, there would be no new benefit to Respondent. She would be entitled to severance as provided in her employment agreement, because her pay and benefits were being cut in a greater percentage than her department heads. Second, if the City reduced salary and benefits paid to department heads or city personnel by 10 percent, but reduced Respondent's pay and benefits by 20 percent, there would be no new benefit to Respondent. She would be entitled to severance as provided in her employment agreement, because her pay and benefits were being cut in a greater percentage than her department heads. Third, if the City reduced Respondent's salary and benefits by 20 percent and her department heads by 20 percent, and the remaining City employees by five percent, Respondent would receive no new benefit. She would not be entitled to severance as provided in her employment agreement because her pay and benefits were not being cut in a greater percentage than her department heads. Under this scenario, the department heads would be entitled to elect to treat the disproportionate pay and benefit reduction as a "termination

without cause," and while the department heads would benefit, Respondent would not.

28. On or about August 20, 2010, having heard about the employee contracts, City Commissioner Rick Glass telephonically requested a copy of all the employment agreements "from 5/21 to present . . . ." In response, Respondent sent an e-mail to all the City Commissioners, the Executive Team, and to the City Attorney stating, in part:

> Pursuant to the advice of the City Attorney and based on the fact that the Commissioners previously approved the concept of a Department Head Employment Agreement in 2008, the City Attorney prepared an Employment Agreement in May 2010 for implementation. See Attached. Consistent with the City Manager's approved purchasing authority, all non-union managers were subsequently offered the opportunity to enter into the proposed employment agreement.
> The Employment Agreement protects the City as well as the professionals. The City is protected by ensuring that we have sufficient lead time, four months, prior to a resignation to ensure we have adequate coverage for a professional position and services can continue uninterrupted.

29. Respondent provided the recipients of the e-mail a copy of "the agreement prepared by the City Attorney."

30. On August 23, 2010, Commissioner Glass sent an e-mail to Respondent requesting a copy of the "first signed copy of the employee agreements predated back to May 2010, that Scott, Brad,

Diane, Josh, Oel, Kurt, Ron, and Mark signed! Not the contracts you had them re-sign on July 29th."

30. In response, on August 23, 2010, Respondent wrote:

> This is a follow-up to Mr. Glass's request for Employment Agreement signed on May 21, 2010. The only Department Head that signed an agreement on that date is Brad Johnson. At that time, I chose not to have the other Department Heads sign Employment Agreements as I felt that I needed more time to determine their capabilities in their jobs and whether an employment agreement which committed the City to those individuals was in the best interest of the City.
>
> Subsequently, given the tone of the Commission meetings, the pressure to terminate certain individuals, as well as the pressure to treat those without union contracts differently, I chose to provide those employees with the same agreement that Brad Johnson signed on May 21, 2010. I felt morally and ethically obligated to ensure that those employees had similar protections to those employees with union agreements. These employees signed an agreement on July 28, 2010, which still had the May 21, 2010 date on it. On July 29, 2010, we corrected not only the date to reflect July 29, 2010, but several other errors related to titles and responsibilities within the proposed agreements.
>
> It was never my intent to imply that these employees had signed the agreement on May 21, 2010. It was my intent to show that they had the same protective status as Brad Johnson acquired on May 21, 2010, so that all were treated the same. As the date could have reflected a different intent and there were other errors in the intermediate document, I corrected the proposed employment agreement the next day and had the managers

> sign a new agreement. The documents signed on July 28, 2010, are considered draft or intermediate records which are not in and of themselves considered public records and were disposed of in accordance to state guidelines.

31. In an August 24, 2010, e-mail, Attorney Simpson responded to Ms. Wingo's August 23, 2010, e-mail. He wrote that inasmuch as the documents in question "contained errors that were corrected, including the date, and the revised agreements was [sic] subsequently executed by the City Manager and the employees. Based on these facts the original agreements executed would appear to be drafts or precursors to the final employment agreement." Mr. Simpson concluded, "draft documents are not public records."

The August 30, 2010, Agreements

32. On August 30, 2010, yet a third version of the employment agreements was presented to each of the department heads. These agreements were prepared and executed following communications with Attorney Simpson regarding whether the severance pay provisions of the July 30, 2010, agreements potentially exceeded Respondent's purchasing authority of $25,000. At issue was the manner in which Respondent had originally calculated the potential severance benefits available to the department heads under the agreements. In an e-mail dated August 24, 2010, Attorney Simpson expressed his concern that the

severance pay provisions in the July 30, 2010, agreements had the potential to exceed $25,000 for all of the department heads, with the exception of Joshua Fruecht.

33. The third and final version of the agreement addressed the limitations in the severance benefits offered as a result of the limits on the city manager's purchasing authority set forth in the City's purchasing ordinances. Specifically, section 4(a) of the agreement was amended to provide:

> (a) In the event the Employee is terminated without cause by the City while the Employee is willing and able to perform the duties of the position as Human Resources Manager, the City agrees, subject to the below conditions, to pay the Employee a minimum of four (4) months of salary and ~~benefits~~ health insurance provided to the Employee pursuant to the City's Personnel Policies not to exceed the City Manager's purchasing Authority. Additionally, the City shall be responsible to pay all leave accruals at the Employee's current rate of pay, consistent with City Personnel Rules and Regulations. (Emphasis in original).

34. Each of the employment agreements signed on August 30, 2010, reflects execution on that date. Other than the signature date and revision to section 4(a), the August 30, 2010, agreements are identical to the July 29, 2010, versions.

35. There is no persuasive evidence in this record that Respondent did not have authority to enter into employment agreements with the City's department heads on behalf of the City. To the contrary, the City's outside labor counsel opined

that a strong argument could be made that the city manager possesses the authority to enter into employment contracts, subject to the city manager's purchasing authority.

36. Similarly, Attorney Simpson testified that he believed Respondent had the authority to enter into employment agreements. The only question in his mind was whether the agreements should be presented to the City Commission for review and approval, since in his opinion, offering a severance benefit was a policy issue.

37. There is no question that the City's department heads received a benefit from having employment agreements with the City. It protected them from arbitrary personnel actions and provided severance benefits under certain circumstances. Specifically, their pay and benefits could not be reduced unless there was a corresponding reduction for all City employees.

38. The evidence adduced at hearing does not clearly and convincingly establish that Respondent acted corruptly in entering into pre-dated employment agreements with her department heads, or in directing that the July 28, 2010, versions of the agreements be destroyed. Rather, the competent substantial evidence established that Respondent believed that she was acting in a manner consistent with the proper performance of her duties as city manager.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2011).

40. Respondent was 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 city manager of the City of Holly Hill.

41. During her tenure as the city manager of Holly Hill Respondent was subject to chapter 119, Florida Statutes, "the public records law."

42. Section 112.322 and rule 34-5.0015 authorize the Commission to conduct investigations and to make public reports on complaints alleging violations of the Code of Ethics.

43. In this proceeding, the Commission, through its Advocate, is asserting the affirmative of the issue: that Respondent violated section 112.313(6), for which Respondent should be penalized. Therefore, as the parties stipulated, the Advocate has the burden of establishing by clear and convincing evidence the elements of Respondent's alleged violations. Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997), citing Dep't of Banking & Fin. v. Osborne Stern, 670 So. 2d 932 (Fla. 1996), and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

44. As stated by the Florida Supreme Court:

> 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 witnesses must be lacking in confusion as to 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, 492 So. 2d 797, 800 (Fla. 4th DCA 1983)). Accord Westinghouse Electric Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991) ("Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous.").

The Predated Employment Agreements

45. The Advocate's position in this proceeding is that Respondent violated section 112.313(6) by entering into falsely dated employment contracts in an effort to insulate herself from a reduction in pay, and then destroyed the falsely dated contracts in violation of Florida's public records law.[4/]

46. Section 112.313(6) 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 which section 104.31.

47. The term "corruptly" is defined by section 112.312(9) as follows:

> "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 proper performance of his or her public duties.

48. Breaking down the foregoing provisions into their component parts, the Advocate's charge of a violation of section 112.313(6) requires proof of three distinct elements. First, the Advocate must prove that Respondent was a public officer, employee of an agency, or local government attorney at the time of the alleged violation. Second, the Advocate must prove that Respondent used or attempted to use her official position, or any other property or resources within her trust, or performed her official duties to secure a special privilege, benefit, or exemption for herself or others. Third, the Advocate must prove that Respondent acted corruptly, as statutorily defined to mean that Respondent acted with wrongful intent and for the purpose of benefiting herself or another from some act or omission which is inconsistent with the proper performance of her public duties.

49. Respondent stipulated that she was the city manager of Holly Hill at the time of the alleged violation and, as such, is subject to the requirements of the Code of Ethics. Therefore, the first element necessary to prove a violation of section 112.313(6) is established.

50. Respondent used her official position as city manager to direct that the three iterations of the employment agreements be prepared for the City's department heads. Respondent also used her official position to direct that the copies of the employment agreements signed on July 28, 2010, but dated May 21, 2010, be destroyed following execution of the second version of the agreements on July 29, 2010.

51. The employment agreements between the City and the various department heads had the potential to provide a special benefit for the City's department heads. The agreement protected them from arbitrary personnel actions and provided severance benefits in certain circumstances. Specifically, their pay and benefits could not be reduced unless there was a corresponding reduction for all City employees.

52. It is less clear that the employment agreements between the City and the various department heads provided a special benefit for Respondent. It is the Advocate's position that Respondent attempted to insulate herself from a possible reduction in pay through the agreements with the department heads

since the implementation of a sizable reduction in pay (e.g. 20%) for department heads would expose the City to liability for severance payments in excess of the contemplated salary reduction. According to the Advocate, this exposure to liability in excess of expected savings would make the City commission less likely to reduce Respondent's and the department heads' salaries. Thus, any potential benefit to Respondent would be dependent upon the type of action contemplated by the City to reduce the pay and benefits of Respondent, the department heads and the other city employees.

53. Regardless of whether a special benefit accrued, or had the potential to accrue to Respondent, it is undisputed that the employment agreements provided a special benefit to the City's department heads. Thus, it is necessary to determine whether Respondent acted "corruptly" in securing that special benefit for the department heads.

54. To satisfy the statutory element of corrupt intent, clear and convincing evidence must be adduced that Respondent acted "with reasonable notice that her conduct was inconsistent with the proper performance of her public duties and would be a violation of the law or the code of ethics." Blackburn v. State, Comm'n on Ethics, 589 So. 2d 431, 434 (Fla. 1st DCA 1991).

55. "Direct evidence of [wrongful] intent is often unavailable."[5/] Shealy v. City of Albany, Ga., 89 F.3d 804, 806

(11th Cir. 1996); see also State v. West, 262 So. 2d 457, 458 (Fla. 4th DCA 1972) ("[I]ntent is not usually the subject of direct proof.").

56. Circumstantial evidence, however, may be relied upon to prove the wrongful intent which must be shown to establish a violation of section 112.313(6). See U.S. v. Britton, 289 F.3d 976, 981 (7th Cir. 2002) ("As direct evidence of a defendant's fraudulent intent is typically unavailable, specific intent to defraud may be established by circumstantial evidence and by inferences drawn from examining the scheme itself that demonstrate that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension.") (internal quotation marks omitted). For instance, such intent may be inferred from the public servant's actions. See Swanson v. State, 713 So. 2d 1097, 1101 (Fla. 4th DCA 1998) ("Appellant's actions are sufficient to show intent to participate."); State v Breland, 421 So. 2d 761, 766 (Fla. 4th DCA 1982) ("Actions manifest intent."); and G. K. D. v. State, 391 So. 2d 327, 328-29 (Fla. 1st DCA 1980) ("Appellant testified that he did not intend to break the window, but the record indicates that he did willfully kick the window, and he may be presumed to have intended the probable consequences of his actions.").

57. In this case the evidence persuasively established that there were legitimate, non-corrupt reasons for Respondent to

enter into employment contracts with her department heads. Specifically, the agreements would protect department heads from arbitrary actions that might be taken by a dysfunctional city commission that was under extreme pressure to reduce expenses. More importantly, the agreements would help ensure continuity of important professional managers during a period of political and financial crisis in the city, thereby reducing the likelihood of disruption of city services to its citizens. Securing the employment agreements on behalf of the City was entirely consistent with the proper performance of Respondent's duties as city manager.

58. The conclusion that Respondent was not corruptly motivated to enter into the employment agreements is bolstered by the fact that at the time Respondent made the decision to offer the contracts to her department heads (on July 28, 2010) she could not have expected to benefit personally from the new agreements. This is because when the first versions of the agreements were executed Respondent had already decided to resign her position as city manager, and had publicly announced that decision to her department heads. Thus, the new agreements would not have affected her personal situation, since under her contract with the City she would not be entitled to severance pay under any circumstances if she resigned.

59. Similarly, this record does not support by clear and convincing evidence the conclusion that Respondent acted corruptly in instructing Ms. Cole to prepare the agreements with a signature date of May 21, 2010. The Advocate asserts that Respondent's motivation in doing so was to give the appearance that the employment agreements existed on May 21, 2010, well before the commission's discussion regarding potential reductions in pay for Respondent and the department heads. The Advocate's theory that Respondent was attempting to deceive the commission as to the date the agreements were signed is rejected. The evidence reflects that Respondent notified the Mayor and commissioners via e-mail on May 7, 2010, that she would be entering into an employment agreement with Mr. Johnson. She made no mention at that time of preparing to enter into agreements with anyone else. Thus, she could not have reasonably believed that she could "dupe" the commissioners into believing the other agreements were signed on the same date as Mr. Johnson's, since she had made no mention of them in her e-mail shortly before Mr. Johnson's agreement was signed. The evidence does not demonstrate that "the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension." U.S. v. Britton, at 981.

Destruction of the Pre-dated Agreements

60. The Advocate asserts that Respondent violated section 838.022, Florida Statutes, when she directed that the first version of the agreements (signed on July 28, 2010) be destroyed. Section 838.022 provides in relevant part:

> 838.022 Official misconduct.—
>
> (1) It is unlawful for a public servant, with corrupt intent to obtain a benefit for any person or to cause harm to another, to:
>
> (a) Falsify, or cause another person to falsify, any official record or official document;
>
> (b) Conceal, cover up, destroy, mutilate, or alter any official record or official document or cause another person to perform such an act;

61. "To be guilty of official misconduct [as proscribed by Florida statute], a public servant must knowingly falsify, or cause another to falsify, an official record or document, acting with corrupt intent, that is, done with knowledge that the act is wrongful and with improper motives, to obtain a benefit for himself or herself or another or to cause unlawful harm to another." Aurigemma v. State, 801 So. 2d 982, 985 (Fla. 4th DCA 2001). In other words, section 112.313(6) contains a general intent of knowing the act is unlawful but also requires a specific intent that it be done with the intent to cause a

benefit to himself or another." See also Bauer v. State, 609 So. 2d 608, 610 (Fla. 4th DCA 1992).

62. The crime of official misconduct includes the same element of mens rea as does section 112.313, i.e., corrupt intent. Regardless of whether the July 28, 2010, version of the employment agreements constituted public records or official documents,[6/] the evidence in this record does not clearly and convincingly establish that Respondent knew that the agreements met the definition of public records or official documents, and therefore should not be destroyed. To the contrary, Respondent believed that they had been superseded by the agreements signed the following day and as such, constituted drafts or precursors of the final employment agreements. Respondent's understanding in this regard is consistent with the conclusion reached by City Attorney Simpson. In this instance the Advocate has not established by clear and convincing evidence that Respondent acted with corrupt intent when she directed that the July 28, 2010 version of the agreements be destroyed.

Limitations on City Managers Purchasing Authority

63. Finally, the Advocate asserts that entering into employment agreements which exceeded her spending authority was inconsistent with the proper performance of Respondent's public duties, in violation of section 112.313(6).

64. Section 30-63(a) of the City of Holly Hill's Code of Ordinances provides, in pertinent part, as follows:

> All supplies, equipment and contractual services, except as otherwise provided herein, when the cost thereof shall exceed $25,000 shall be purchased by formal written contract and/ or purchase orders from the lowest and best responsible bidder, after due notice inviting proposals; . . .

Section 30-66 provides that "[a]ll contracts, when the sum is $25,000 or less, may be awarded by the city manager to the lowest and best bidder. All contracts when the amount is in excess of $25,000, the city commission may award to the lowest and best bidder."

65. The definition of "contractual services" in the City's purchasing code provides:

> "Contractual services" as "all telephone, gas, water, electric light and power service, towel and cleaning service, insurance, leases and concessions, demolition of buildings, rental, repair or maintenance of equipment, machinery and other city owned property, and other like services. The tern 'services' shall not include professional services which are unique in their nature and not subject to competition."

In addition, the City's purchasing code provides that:

> The purchasing guidelines in this article shall be applicable to the expenditure of any funds of the city, including community redevelopment tax increment revenue and grant funds, unless other purchasing requirements are specifically applicable.

66. Even assuming the severance provision of the agreements exceeded Respondent's purchasing authority, the evidence does not clearly and convincingly establish a corrupt intent on Respondent's part. If indeed the severance benefits exceeded the Respondent's purchasing authority that result would appear to flow from an error in the calculation of the benefits, rather than from an intentional act inconsistent with the proper performance of Respondent's public duties.

67. Moreover, it is not clear as a matter of law that the City's purchasing code applied to limit the severance benefits provided in the employment agreements. If read literally, the language providing that the purchasing code was "applicable to the expenditure of any funds of the city," would mean that Respondent would be restrained from employing any individual whose cumulative salary and benefits exceeded $25,000. No evidence was adduced at the hearing that Respondent's authority to hire employees was so limited. It is worth noting that section 30-63(a) speaks to "supplies, equipment and contractual services" while the City's purchasing code speaks to "purchasing guidelines" and "purchasing requirements." This terminology is inconsistent with the human relations vernacular generally applied to regular employees of an organization, such as "salary" or "compensation", and compels the conclusion that the ordinance and code were not intended to limit the compensation paid to

regular employees of the city.[7/] Accordingly, Petitioner did not prove by clear and convincing evidence that Respondent violated section 112.313(6) by entering into employment agreements which could result in severance payments in excess of $25,000.

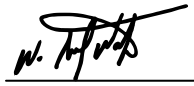
68. Petitioner having failed to prove by clear and convincing evidence that Respondent violated section 112.313(6), as alleged in the Order Finding Probable Cause, the Complaint must be dismissed.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Commission on Ethics issue a Final Order dismissing the Complaint issued against Respondent in the instant case.

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



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this 8th day of August, 2012.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2010 version, which was the law in effect at the time of the alleged statutory violations.

[2/] Mr. Swaertzlander recalled that some of the agreements for the other department heads contained errors, although his did not.

[3/] At the time the new agreements were prepared, Respondent's entitlement to severance pay was already tied to Mr. Johnson's compensation, since his employment contract was already in effect.

[4/] The Advocate also alleges that Respondent violated section 839.13, Florida Statutes, which provides in part:

> . . . if any . . .public officer, or any employee of . . .a public agency. . . shall . . . falsify any minutes, documents, books, or any proceedings whatever of or belonging to any public office within this state or if the person shall cause or procure any of the offenses aforesaid to be committed, or be in anywise concerned therein, the person so offending shall be guilty of a misdemeanor of the first degree punishable as provided in S. 775.082 or s. 775.083.

[5/] "Direct evidence [of wrongful intent] is evidence that, if believed, would prove the existence of [wrongful] intent without resort to inference or presumption." King v. La Playa-De Varadero Restaurant, No. 02-2502, 2003 WL 435084 *3 n.9 (Fla. DOAH February 19, 2003) (Recommended Order).

[6/] City Attorney Simpson's e-mail of August 24, 2010, to the City Commission and Respondent quoted the following language of Florida's Supreme Court in Shevin v. Byron, Harless, Schaffer, Reid & Assocs., 379 So.2d. 633 (Fla. 1980):

> To give content to the public records law which is consistent with the most common understanding of the term "record," we hold that a public record, for purposes of section 119.011(1), is any material prepared in connection with official agency business which is intended to perpetuate, communicate,

> or formalize knowledge of some type. To be contrasted with "public records" are materials prepared as drafts or notes, which constitute mere precursors of governmental "records" and are not, in themselves, intended as final evidence of the knowledge to be recorded. Matters which obviously would not be public records are rough drafts, notes to be used in preparing some other documentary material, and tapes or notes taken by a secretary as dictation. Inter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of an agency's later, formal public product, would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business.
>
> It is impossible to lay down a definition of general application that identifies all items subject to disclosure under the act. Consequently, the classification of items which fall midway on the spectrum of clearly public records on the one end and clearly not public records on the other will have to be determined on a case-by-case basis.

Attorney Simpson concluded his e-mail to Respondent by stating:

> As represented by the City Manager, the original documents that were signed contained errors that were corrected, including the date, and the revised agreements was (sic) subsequently executed by the City Manager and the employees. Based on these facts the original agreements executed would appear to be drafts or precursors to the final employment agreement. As indicated above, draft documents are not public records.

[7/] This conclusion is consistent with Attorney Helsby's opinion in his letter of September 29, 2010, that the purchasing

limitation set forth in chapter 30 of the Code of Ordinances "does not on its face appear applicable to employment contracts . . . ."

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.