

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: MALCOM THOMPSON,) Case No. 12-3500EC
)
Respondent.)
)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held on January 8, 2013, in Kissimmee, Florida, before Thomas P. Crapps, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Advocate: Melody A. Hadley, Esquire
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For Respondent: Brennan Donnelly, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent, Malcom Thompson, as Clerk of the Court for Osceola County, Florida, violated section 112.313(6), Florida Statutes (2011),^{1/} by using his position to intimidate Osceola County Clerk of the Court employees in order to enhance his personal and political power and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On September 12, 2012, the Florida Commission on Ethics (Commission) issued an Order Finding Probable Cause alleging that Respondent, Malcom Thompson (Mr. Thompson), violated section 112.313(6) by using this position to intimidate the Clerk of the Court employees in order to enhance his personal and political power. As a result of the finding, on October 25, 2012, the Commission transmitted the case to DOAH for a final hearing.

The hearing was held on January 8, 2013. At the final hearing, the Advocate presented the testimony of Mr. Thompson, Kimberlee Zander (Ms. Zander), Latifa Ramdani (Ms. Ramdani), Peggy Lay (Ms. Lay), Kimberly Hennecy (Ms. Hennecy), Lisa Cubero (Ms. Cubero) and Melissa Benoit (Ms. Benoit). Mr. Thompson testified on his own behalf. The parties did not offer any exhibits into evidence.

On February 8, 2013, the one-volume transcript was filed with DOAH. The parties submitted proposed recommended orders on February 14, 2013, which the undersigned has considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times relevant to this case, Mr. Thompson was the Clerk of the Court for Osceola County, Florida.

2. On December 29, 2011, Mr. Thompson was working in his office with his administrative assistants Ms. Ramdani and Ms. Lay. It was the day before the New Year's holiday, and Mr. Thompson directed Ms. Ramdani to remove Christmas cards that were on display. Ms. Ramdani told Mr. Thompson that she wanted to keep the Christmas cards up until after the holidays. Mr. Thompson became agitated with her, and he placed his open hand on Ms. Ramdani's shoulder and pushed her into a door.

3. Ms. Ramdani did not receive any physical injury from Mr. Thompson's action, but she became angry and started complaining that he had pushed her. In response, Mr. Thompson said that he did not push her, and that he apologized. After this exchange, Mr. Thompson decided to leave Ms. Ramdani alone. Ms. Lay, who was working in the office, witnessed the incident.

4. On January 4, 2012, after returning from the New Year's Day holiday, Ms. Lay told Ms. Hennecy, the Deputy Clerk of the Court, about Mr. Thompson pushing Ms. Ramdani, and how upset Ms. Ramdani had been about the incident. Ms. Hennecy thought the allegation was serious and contacted the Clerk's Human Relations (H.R.) Director, Ms. Zander.

5. Based on Ms. Hennecy's report, Ms. Zander began an investigation. She interviewed Ms. Ramdani and corroborated the allegation that Mr. Thompson had pushed her. During the interview, Ms. Ramdani told Ms. Zander that she was afraid of

Mr. Thompson. There is no evidence that Ms. Ramdani filed a written complaint against Mr. Thompson based on the December 29, 2011, incident. However, it was Ms. Zander's opinion that Ms. Ramdani made a verbal complaint to H.R.

6. Ms. Zander then interviewed Mr. Thompson, and he stated that "he did it again." He explained that he had been joking around with Ms. Ramdani, and that she had gotten mad with him. Mr. Thompson then told Ms. Zander to interview Ms. Lay, and that she would corroborate his story.

7. Ms. Zander interviewed Ms. Lay, who corroborated that Mr. Thompson had pushed Ms. Ramdani, but disputed that it had been unintentional or a joke. It was Ms. Lay's impression that Mr. Thompson had pushed Ms. Ramdani in anger. Ms. Zander, in a lack of candor, told Mr. Thompson that Ms. Lay had confirmed aspects of his story, neglecting to tell him the key difference.

8. Based on H.R.'s standard practice of separating employees who may have a conflict, Ms. Zander determined that it was best to move Ms. Ramdani's work space from Mr. Thompson's office on the sixth floor of the courthouse to the H.R. department located on the second floor. Ms. Zander made this recommendation to Ms. Henney and Mr. Thompson on January 4, 2012. Mr. Thompson agreed that Ms. Ramdani could be moved if it was her choice.

9. Initially, on January 4, Ms. Ramdani informed Ms. Zander that she did not want to relocate her office. However, the next day Ms. Zander informed Ms. Ramdani that her work space was being moved to the second floor from Mr. Thompson's office based on safety concerns.

10. On January 5, 2012, Mr. Thompson learned that Ms. Ramdani was being relocated to the second floor. He told Ms. Zander and Ms. Hennecey that Ms. Ramdani was to be treated like any other employee, and not given any privileges. Apparently, Mr. Thompson allowed Ms. Ramdani more leeway in his office suite than other employees, such as telephone privileges, extended breaks, religious holidays, and leaving work early, if she worked through lunch. Further, Ms. Ramdani was to be under Ms. Zander's supervision, and written up if she did not follow the rules. Mr. Thompson restated his position to Ms. Zander that the whole incident was being blown out of proportion.

11. Generally, whenever there is an allegation of a conflict between employees, Ms. Zander, as H.R. director, would conduct an investigation and offer a resolution to the conflict. However, Ms. Zander credibly testified that she did not feel comfortable with investigating the allegation that Mr. Thompson had pushed Ms. Ramdani because he was "my boss."

12. Some time during the beginning of her investigation, Ms. Zander decided to speak with Captain Toomey, an Osecola

County Sheriff's officer, who worked in the courthouse.

Ms. Zander asked Captain Toomey whether she had a duty to report the incident. Captain Toomey asked for more details and initially said that the victim, Ms. Ramdani, had to come forward. Later, Captain Toomey called and indicated that he had a responsibility to report the incident.

13. Mr. Thompson went on scheduled annual leave for the week of January 9 through 13, 2012.

14. Some time on January 9, 2012, the Florida Department of Law Enforcement (FDLE) sent an officer to investigate the allegation that Mr. Thompson had pushed Ms. Ramdani. The officer interviewed Ms. Ramdani and other Clerk of the Court employees concerning the incident and informed them that the on-going investigation was confidential and that the employees were not to discuss the matter. Ms. Zander shared with Ms. Hennecey that the FDLE investigation was on-going, and that it was confidential.

15. Ms. Ramdani told the FDLE officer what happened and stated that she did not want to pursue any criminal charges against Mr. Thompson. Ms. Ramdani credibly testified that she did not want to pursue any action for religious reasons, and based on her fear of embarrassment to her family and being in the news.

16. The FDLE officer informed Ms. Zander that Ms. Ramdani did not want to pursue any criminal charges against Mr. Thompson.

17. On January 9, 2012, at the end of the day, Ms. Hennecey called Mr. Thompson to give him an update on the office. One item of interest reported concerned a call Ms. Hennecey had received from Gary Ketchum, the spouse of one of Mr. Thompson's political opponents. Mr. Ketchum had called to confirm an allegation that Mr. Thompson has pushed an employee and had used a derogatory slur against the employee. Mr. Thompson became very upset when he heard about Ketchum's call.

18. Not surprisingly, Mr. Thompson cut his vacation short and returned to the office bright and early the next day, January 10, 2012. It was Mr. Thompson's intention to meet with Ms. Ramdani and "smooth things over." As Ms. Ramdani was parking her car, Mr. Thompson called her cell phone and said that he wanted to speak with her. Ms. Ramdani told Mr. Thompson that she did not want to speak with him, and then she noticed his car pulling into the courthouse parking lot. Ms. Ramdani was surprised and worried to see Mr. Thompson driving into the parking lot because he was supposed to be on vacation. Ms. Ramdani parked her car and proceeded into the courthouse. Mr. Thompson parked his car and entered the building in a side entrance.

19. That morning, Ms. Cubero was the first person to arrive for work in the H.R. department. As she opened the door and turned on the lights, she was startled to see Mr. Thompson

standing in the office. She was surprised because Mr. Thompson was supposed to have been on vacation. Mr. Thompson asked to see Ms. Zander, but was told that she had not yet arrived. Within a minute or so, Ms. Ramdani arrived at the second floor office. Mr. Thompson, again, asked Ms. Ramdani to come upstairs and speak with him. Ms. Ramdani initially declined his invitation, but then changed her mind after Mr. Thompson gave assurances that everything would be fine.

20. While Mr. Thompson and Ms. Ramdani left the second floor, Ms. Cubero sent Ms. Zander a text message that Mr. Thompson was looking for her and that he had taken Ms. Ramdani upstairs for a meeting. Ms. Zander, who had just pulled into the parking lot, decided she needed to interrupt the meeting between Mr. Thompson and Ms. Ramdani. Ms. Zander credibly testified that she was worried about Ms. Ramdani's safety. At first, Ms. Zander attempted to find a male employee or Captain Toomey to accompany her to the meeting on the sixth floor because she was afraid. Ms. Zander explained that she wanted to find a male to go with her because Mr. Thompson had a "temper" and that he was a large man. Because Ms. Zander was unable to find the male employee, and Captain Toomey would not go with her, Ms. Zander took two H.R. employees with her to the meeting, Ms. Cubero and Ms. Benoit.

21. Ms. Ramdani and Mr. Thompson rode separate elevators up to the sixth floor. On entering the office suite, Ms. Ramdani told Mr. Thompson that she did not want to meet with him in his conference room, so they sat in Ms. Lay's work area. Ms. Lay was already working at her desk.

22. Ms. Lay credibly testified that Mr. Thompson was agitated, appeared angry, and indicated that he was going to "get to the bottom of things," and going to identify who "leaked" the December 29, 2011, incident to the public.

23. Ms. Lay was fearful that Mr. Thompson thought that she was the "leak." Consequently, Ms. Lay told Mr. Thompson about the FDLE investigation.

24. Ms. Lay's information about the FDLE investigation thunderstruck Mr. Thompson, and he became extremely angry. He immediately grabbed the phone and began attempting to call his lawyer. Ms. Lay and Ms. Ramdani attempted to calm him. However, Mr. Thompson was extremely angry because he felt betrayed that his Deputy, Ms. Hennecy, and his employees had not told him about the FDLE investigation, and he believed the whole thing was being blown out of proportion.

25. Ms. Zander, Ms. Benoit, and Ms. Cubero entered the sixth floor office. Ms. Zander began telling Mr. Thompson that he could not conduct this meeting with Ms. Ramdani. Mr. Thompson, in a highly agitated state, told Ms. Zander and the other

employees "young ladies, grab a chair and sit down."

Consequently, Ms. Zander, Ms. Cubero ,and Ms. Benoit joined Mr. Thompson, Ms. Ramdani, and Ms. Lay for this impromptu meeting.

26. Mr. Thompson then began to loudly and angrily question Ms. Zander, "What have you done? Who gave you the right to contact FDLE?" Ms. Zander started to answer and moved in her chair, and Mr. Thompson sprung from his chair and stood over Ms. Zander angrily shaking his finger in her face and yelling at her: "don't jump up on me"; "don't raise your voice to me"; and "shut up little girl." All of the participants at the meeting credibly testified that Mr. Thompson was red in the face, visibly angry, and that they felt afraid. Sensibly, Ms. Ramdani told Mr. Thompson to sit back down, and put his hands in his pockets. He then complied with Ms. Ramdani's instruction.

27. Because Ms. Cubero began crying at the meeting, Mr. Thompson asked her what was wrong, and whether she was afraid of him. Ms. Cubero stated that she was afraid of him. Mr. Thompson then asked each of the women at this meeting if they were afraid of him. All of the women stated that they were afraid of him. Although the employees were fearful, Mr. Thompson did not verbally threaten or touch anyone during this meeting. Rather, the employees' fear appeared to be caused by Mr. Thompson's explosive anger and his loud and aggressive

manner. Mr. Thompson, in a complete lack of self-awareness, testified that he did not understand why the meeting participants said that they were afraid of him.

28. During the meeting, Mr. Thompson said several times that he did not think there was a case against him because without a "complainant there is no complaint." It was Mr. Thompson's impression that Ms. Ramdani had not filed a formal complaint against him. There was no evidence that Mr. Thompson directed anyone at the meeting to dismiss the H.R. complaint or change their story, or that he sought to discredit Ms. Ramdani.

29. The length of this meeting was approximately two and a half hours. It is undisputed that the portion of the meeting where Mr. Thompson stood over Ms. Zander lasted just a few moments. Near the conclusion of the meeting, Ms. Ramdani expressed the concern that Mr. Thompson would terminate the employment of her and the others at the meeting. Mr. Thompson told them that as long as he was Clerk of the Court they would not lose their jobs. Ms. Ramdani then asked for Mr. Thompson to give this promise in writing. Oddly, Mr. Thompson wrote his promise on a "post-it" note, but refused to sign it. This "post-it" note was not offered into evidence.

30. At the conclusion of the meeting, Mr. Thompson was of the impression that it had been a productive meeting and ended pleasantly. However, Ms. Zander, felt differently and eventually

filed a criminal assault charge and the ethics charge against Mr. Thompson for his behavior during the meeting.

31. The day after the January 10, 2012, meeting, Ms. Ramdani decided to move back to her office in Mr. Thompson's office suite on the sixth floor. Ms. Ramdani credibly testified that she decided to move back to the sixth floor because she could not get any work done in the second floor office. Further, she credibly testified that she did not want to pursue the criminal action against Mr. Thompson, or the ethics charge against Mr. Thompson. Further, Ms. Ramdani agreed with the description of Mr. Thompson as a "good boss."

32. On January 20, 2012, Mr. Thompson had another meeting with Ms. Zander with his general counsel present. Mr. Thompson asked her "what was her end-game" and "what would it take to make this go away." Ms. Zander indicated that she did not have a plan on how to resolve the issue concerning Ms. Ramdani's allegation, and that Mr. Thompson would have to resolve the issue with Ms. Ramdani. Mr. Thompson is credited in his testimony that his meaning of "end-game" referred to him asking how Ms. Zander planned to resolve the allegations, not as showing any wrongful intent.

33. There was no evidence that Mr. Thompson took any employment or retaliatory action against the employees that attended the January 10, 2012, meeting.

34. A jury acquitted Mr. Thompson on the charge that committed a battery of Ms. Ramdani. Further, in a separate case, the trial judge entered a judgment of acquittal on Ms. Zander's claim that Mr. Thompson assaulted her during the January 10, 2012, meeting.

CONCLUSIONS OF LAW

35. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.57(1) and 120.569, Fla. Stat.

36. The Commission is authorized to conduct investigations and make public reports on complaints concerning violations of the Code of Ethics for Public Officers and Employees, part III, chapter 112, Florida Statutes. See § 112.322, Fla. Stat., and Fla. Admin. Code R. 34-5.0015. Mr. Thompson, as the Clerk of the Court for Osceola County, is subject to the Code of Ethics for Public Officers and Employees.

37. The Advocate bears the burden of showing by clear and convincing evidence that Mr. Thompson violated section 112.313(6). See Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997).^{2/}

38. The Commission's Order Finding Probable Cause states "that there is probable cause to believe that Respondent, as Clerk of the Court for Osceola County, Florida, violated section 112.313(6), Florida Statutes, by using his position to

intimidate Osceola County Clerk of the Court employees in order to enhance his personal and political power."

39. In order to conclude that Mr. Thompson violated section 112.313(6) the Advocate must prove that Mr. Thompson, as a public officer: (1) used or attempted to use his official position; (2) "to secure a special privilege, benefit or exemption" for himself or another; and (3) acted "corruptly" in doing so, that is, with wrongful intent and for the purpose of benefiting himself or another person from some act or omission, which is inconsistent with the proper performance of his public duties.^{3/} In order to satisfy this statutory element, proof must be adduced that Mr. Thompson acted "with reasonable notice that [his or] her conduct was inconsistent with the proper performance of [his or] her public duties and would be a violation of the law or code of ethics" Blackburn v. Comm'n on Ethics, 589 So. 2d 431, 434 (Fla. 1st DCA 1991); Bennett v. Comm'n on Ethics, 871 So. 2d 924, 926 (Fla. 5th DCA 2004).

40. Turning to the facts here, the undersigned finds that the Advocate failed to prove by clear and convincing evidence that Mr. Thompson violated section 112.313(6).

41. There is no dispute that Mr. Thompson was a public officer and that in conducting the January 10, 2012, meeting with his employees he used his official position. Therefore, the Advocate established the first element of section 112.313(6).

42. The Advocate argues that Mr. Thompson used his position as the Clerk with the corrupt intent to secure the benefit of having Ms. Ramdani withdraw her allegation against him, or in the alternative to discredit her, through intimidation. The facts here do not show by clear and convincing evidence that Mr. Thompson corruptly intended to secure any benefit or privilege for himself from the January 10, 2012, meeting.

43. The question of whether or not Mr. Thompson's words and actions created an atmosphere of intimidation at the January 10, 2012, meeting is a close call. One cannot ignore the facts of Mr. Thompson's imposing physical presence,^{4/} his known temper, and the fact that he could terminate the employment of Ms. Ramdani and the others at will, as lending support for the argument that an atmosphere of intimidation existed at the January 10, 2012, meeting. However, the evidence clearly shows that Mr. Thompson did not threaten Ms. Ramdani, or the other employees at the meeting. He did not ask for or direct that the H.R. complaint be dropped or changed, he did not promise any benefits or retribution, and did not ask them to lie about the incident. Moreover, Mr. Thompson did not make any statement threatening the meeting participants' employment. The evidence showed that in response to a question from Ms. Ramdani, Mr. Thompson assured the employees that they had jobs as long as he remained the Clerk of the Court. In fact, there was no evidence that Mr. Thompson took

any adverse employment action against the employees that attended the January 10, 2012, meeting.

44. Finally, both Mr. Thompson and Ms. Zander believed that Ms. Ramdani's complaint based on the December 29, 2011, incident was not withdrawn after the January 10, 2012, meeting. This conclusion is supported by the fact that Mr. Thompson and Ms. Zander had a short discussion on January 20, 2012, about what was her plan, or "end-game," on how to resolve the issue. Ms. Zander told Mr. Thompson that she did not have plan at that time. Based on this conversation, neither Mr. Thompson nor Ms. Zander believed that the H.R. complaint had been withdrawn or discredited. Obviously, Mr. Thompson and Ms. Zander would not be discussing the incident had the H.R. complaint been withdrawn or discredited. Therefore, it follows that Mr. Thompson did not secure the benefit alleged by the Advocate.

45. The facts in this case do not show any direct or indirect threats or actions by Mr. Thompson. Therefore, this case is factually different from past cases where a public official has been found guilty of violating section 112.313(6). In prior cases, the facts have generally shown a threat or comments made by the public official seeking to secure the special privilege, benefit, or exemption. See In re: Coretta Udell-Ford, 2009 Fla. Div. Adm. Hear LEXIS 1431, Fla. DOAH 08-2725EC, Jan. 29, 2009 (city commissioner violated

section 112.313(6), Florida Statutes (2006), when she improperly invoked her position as a member of the city commission during a confrontation with a police officer concerning a traffic stop, and demanded that the chief of police terminate the officer, and encouraged citizens to attend a public meeting to intimidate the police officer); COE 09-042, Mar. 11, 2009; In re: Lisa Marie Phillips, 2005 Fla. Div. Adm. Hear. LEXIS 1434, DOAH Case No. 05-1607, Dec. 23, 2005 (city commissioner violated section 112.313(6), Fla. Stat. (2004), when she stated that she "owned" or controlled the police during a traffic confrontation with another motorist, and the statement intimidated and dissuaded the motorist from calling the police); COE Final Order 06-026, Apr. 26, 2006; In re: Charles Dean, 2008 Fla. Div. Adm. Hear. LEXIS 43, DOAH Case No. 07-0646EC (city commissioner violated section 112.313(6) when he threatened chief of police by stating, "I am coming for your job, and I am going to work hard to get rid of you"); COE Final Order 08-79, April 23, 2008; and In re: Jimmy Whaley, 1997 Fla. Div. Adm. Hear. LEXIS 5438, DOAH Case No. 97-143EC, May 6, 1997), paragraph 9, (city commissioner violated 112.313(6) when he attempted to have local police reduce his son's speeding ticket to a warning, and he made it clear that he was not happy with the officer who issued the ticket or the police department in general; used a "choice of words and tone of voice during his conversation with Chief Sword, [so that] the

police chief believed that Respondent's official actions or judgment with regard to the Springfield Police Department would be influenced and adversely affected by Officer Rowswell's refusal to reduce the ticket to a warning"); COE 97-18, Sept. 9, 1997.

46. On the whole, Mr. Thompson's actions show that he does not control his temper and often speaks loudly, but his actions here do not show that he intended to intimidate his employees to secure a benefit. Mr. Thompson, as the head of the Clerk's office, has the ultimate responsibility to assure that the organization runs without problems. Mr. Thompson did nothing wrong wanting to meet with Ms. Ramdani in an attempt to resolve the personnel issue. In fact, Ms. Zander admitted that she did not initially have a plan on how to resolve the issue, and that ultimately Mr. Thompson would have to resolve the problem with Ms. Ramdani. Ideally, it would have been better for Mr. Thompson to allow Ms. Zander an opportunity to initiate a resolution, and it would have been better for him to exercise control over his anger. However, the failure to meet those ideals does not equate to Mr. Thompson acting corruptly.

47. Based on the foregoing, the undersigned finds that the Advocate failed to meet its evidentiary burden of showing by clear and convincing evidence that Mr. Thompson violated section 112.313(6).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Ethics find that Mr. Thompson did not violate section 112.313(6), Florida Statutes.

DONE AND ENTERED this 6th day of March, 2013, in Tallahassee, Leon County, Florida.



THOMAS P. CRAPPS
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of March, 2013.

ENDNOTES

^{1/} References to Florida Statutes shall be the 2011 version unless otherwise indicated.

^{2/} 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)).

^{3/} "Corruptly" is statutorily defined as being "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." § 112.312(9), Fla. Stat. (2011).

^{4/} Mr. Thompson is a large man, standing almost six feet four inches tall.

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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.