

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: DANIEL CALABRIA,

Respondent.

Case No. 14-4678EC

RECOMMENDED ORDER

On March 10, 2015, a disputed fact hearing was held in this case by video teleconference with sites in Tallahassee and St. Petersburg before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Advocate: Melody A. Hadley, Esquire
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For Respondent: Joseph A. Corsmeier, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether the Respondent is guilty of using or attempting to use his position as mayor of the City of South Pasadena for his benefit or the benefit of candidates that he supported in the 2014 city commission election, in violation of section 112.313(6), Florida Statutes (2013).

PRELIMINARY STATEMENT

The Ethics Commission received a sworn complaint that the Respondent committed the alleged violation on the Friday before the city commission election on Tuesday, March 11, 2014. The Ethics Commission investigated, found probable cause, and referred the matter to the Division of Administrative Hearings.

At the final hearing, six joint exhibits were admitted in evidence. (Joint Exhibits 5 and 6 are transcripts of deposition testimony of two witnesses, which were admitted in lieu of live testimony.) The Advocate for the Ethics Commission called five witnesses, including the Respondent, and had Advocate Exhibits 7 through 9 and 11 through 13 admitted in evidence. The Respondent testified in his case and had one exhibit admitted in evidence.

A Transcript of the final hearing was filed on March 24, 2015. The parties filed proposed recommended orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. In March 2014, the Respondent was the mayor of the City of South Pasadena, having been elected the year before. City commission elections were scheduled for Tuesday, March 11. There were two contested slots. The incumbents were Max Elson and Arthur Penny. The challengers were Harris Blair and Robert Small. The Respondent supported the challengers and donated to their campaigns to unseat the incumbents, who had been voting

against the Respondent's positions since his election as mayor. Of the two elections, the Respondent was more interested in unseating Penny, who regularly opposed the mayor.

2. Pasadena Liquors is a retail business operating in the City of South Pasadena. It was operated by Jimmy Valenty, whose family trust owned the business. Although not a resident and not eligible to vote in the city commission elections, Valenty supported Elson, who was a personal friend. A few weeks before the election, Elson mentioned to Valenty that the campaign signs Valenty allowed him to place outside Pasadena Liquors kept disappearing. Elson asked if Valenty would let him use the marquee inside the front window. Valenty agreed. Elson then asked if Valenty also would let Penny use it. Valenty had no personal interest in Penny's campaign but agreed to his friend's request. Valenty arranged the letters on the marquee to read: "VOTE ELSON AND PENNY CITY COMMISSIONER."

3. During the week before the election, the Respondent received telephone calls regarding the marquee from several constituents who were supporting Blair and Small. They did not recall the marquee being used to solicit votes for city commission elections in the past and questioned whether it was legal. The Respondent was not aware of the sign before receiving the telephone calls and told his constituents that he would look into it.

4. On Friday, March 7, the Respondent went to Pasadena Liquors to talk to Valenty and tell him about the telephone calls he had received. Valenty asked if the Respondent was there as mayor, and the Respondent said, no, he was there as a concerned customer or concerned citizen. During the discussion about the propriety and legality of the sign, Valenty asked to see the city's sign ordinance. The Respondent offered to get a copy of it for Valenty.

5. Normally, the mayor would not be involved in enforcement of the city's sign ordinance. The city's government is run by the mayor and five commissioners, all elected positions. The city has five departments. The mayor oversees the administration department. Each commissioner oversees one of the other four departments. Code enforcement, which includes enforcement of the sign ordinance, is part of the community improvement department (CID). Code violations usually would come to the attention of the city through either a code enforcement inspection or a citizen complaint, which would be referred to code enforcement for investigation. It was the CID director's job to interpret, as necessary, the ordinances being enforced. His interpretation would stand unless the city commission overruled him.

6. In March 2014, Commissioner Elson was in charge of and oversaw the CID. The CID's director, Neal Schwartz, reported directly to Commissioner Elson. After talking to Valenty, the

Respondent went to Schwartz's office, told him about his conversation with Valenty, and asked for a copy of the sign ordinance pertaining to the Pasadena Liquors marquee. Schwartz copied the sign ordinance, which was long and convoluted, and highlighted the pertinent provisions. It was the CID director's opinion that the sign was legal, in part because the marquee was a "reader board" with changeable letters.

7. The CID director offered to check with the county election supervisor to verify his opinion and was told that the city clerk, who directed the administration department overseen by the Respondent, was in charge of city elections. It was not clear from the evidence whether the Respondent was still present in the office of the CID director when he telephoned the county elections supervisor.

8. It was clear that the Respondent had left the CID director's office before the CID director talked to the city clerk. When the clerk was asked, she was of the opinion that the sign was legal because it was not paid political advertising. She was prepared to tell the Respondent her opinion if he contacted her.

9. The Respondent did not contact the city clerk for her opinion. After meeting with the CID director, the Respondent returned to Pasadena Liquors to show Valenty the sign ordinance. Valenty saw nothing in the highlighted portions of the sign

ordinance that made it clear to him that the sign was illegal, but there appeared to him to be a size limitation. Valenty got a tape measure and concluded that the sign exceeded the size requirements. Valenty asked if the Respondent was requiring him to remove the signage from the marquee. The Respondent said no, it was up to Valenty to decide what to do with the sign. Valenty was planning to remove the sign the next day anyway to replace it with advertising for St. Patrick's Day, so he decided to go ahead and switch the signage on the marquee that day.

10. At the election on March 11, the incumbents won.

11. After information was reported to him about the Respondent's actions regarding the Pasadena Liquors marquee, Commissioner Penny swore out an Ethics Commission complaint alleging that the Respondent went to Pasadena Liquors and demanded that the owner remove the "vote-for-the-incumbents" sign by falsely telling him that he was in violation of the political advertisement laws, after insisting that the CID director call the supervisor of elections and not waiting for the opinion of the city clerk as to the sign's legality.

12. After receiving and reading the ethics complaint, the Respondent brought a copy to Valenty because his name was mentioned, and the Respondent thought he should know about it. Valenty read it and said there was nothing negative in it about him, so he was not concerned about it. The Respondent did not

try to influence Valenty's reaction to the complaint, and there was no evidence that there was anything else to this encounter.

13. A few months later, the Respondent asked the city clerk to begin the process of recognizing the lounge at Pasadena Liquors for being open for 25 years and to be sure to say that it was at his request. When the city clerk broached the subject with Valenty, he declined the honor because the timing suggested to him that the recognition was to "make up for" any hard feelings that arose from the issue regarding the business's election sign. In fact, the timing was a coincidence. The city had recognized Pasadena Liquors for the 10th anniversary of its lounge being open, and other businesses in the city were recognized similarly when they reached landmark anniversaries.

14. It was not proven by clear and convincing evidence that the Respondent's actions with respect to the Pasadena Liquors marquee were taken for the purpose of influencing the election, and it is unlikely that they had any influence on the election. In part for these reasons, it was not proven by clear and convincing evidence that the Respondent's actions with respect to the Pasadena Liquors marquee were taken for the purpose of securing a special privilege, benefit, or exemption for himself or the unsuccessful candidates. It also was not proven by clear and convincing evidence that the Respondent's actions with

respect to the Pasadena Liquors marquee were taken with corrupt intent.

CONCLUSIONS OF LAW

15. Section 112.313(6), Florida Statutes (2013), provided:

(6) Misuse of public position. - No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with s. 104.31.

"'Corruptly' means done with a wrongful intent and for the purpose of obtaining . . . 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. (2013). This means there must be proof that the Respondent 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." Siplin v. Comm'n on Ethics, 59 So. 3d 150, 151 (Fla. 5th DCA 2011) (citations omitted).

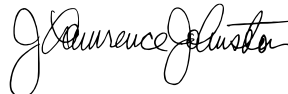
16. The elements of an ethics violation, including corrupt intent, must be proven by clear and convincing evidence. Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83, 86 (Fla. 1st DCA 1997).

17. The Advocate's evidence did not prove by clear and convincing evidence that the Respondent corruptly used or attempted to use his official position or any property or resource within his trust, or performed his official duties, to secure a special privilege, benefit, or exemption for himself or others.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Ethics Commission enter a final order dismissing the charges against the Respondent.

DONE AND ENTERED this 12th day of May, 2015, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of May, 2015.

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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.