

himself for consideration for both the position of Zoning Hearing Officer as well as Code Enforcement Special Magistrate.

The matter was forwarded to the Division of Administrative Hearings for assignment of an Administrative Law Judge ("ALJ") to conduct a formal hearing and prepare a recommended order ("RO"). A formal hearing was held before the ALJ on August 25-26, 2016. On January 31, 2017, the ALJ entered his RO finding that Respondent violated Sections 112.313(6) and 112.313(16)(c), Florida Statutes, and recommending a penalty of \$5,000 per violation (\$10,000 total) against the Respondent.

Thereafter, the Respondent and Advocate timely submitted exceptions to the RO, each responded to the respective exceptions, each engaged in oral argument before the Commission at its meeting on April 21, 2017, and the Commission rendered its Final Order and Public Report ("Final Order") on April 26, 2017. In the Final Order the Commission recommended that the Governor impose a \$10,000 civil penalty (\$5,000 per violation) and public censure and reprimand on the Respondent.

On May 25, 2017, the Respondent appealed the Commission's Final Order to the First District Court of Appeal ("DCA" or "Court"). Both the Respondent and the Advocate filed briefs as to the appeal and participated in oral argument before the Court. On March 29, 2018, the Court rendered its opinion affirming the Commission's finding that Respondent violated Section 112.313(6), but reversing its finding that he violated Section 112.313(16)(c), Florida Statutes. In light of the reversal as to the finding that the Respondent violated Section 112.313(16)(c), Florida Statutes, the Court remanded the case to the Commission for reconsideration of the penalty.

On April 13, 2018, the Respondent filed with the DCA a Motion for Rehearing *En Banc* as well as a Motion for Certification. On May 4, 2018, the Court rendered its order denying

Respondent's motions for rehearing *en banc* and certification. Thereafter, this matter was scheduled for reconsideration by the Commission on Ethics of the penalty portion of its Final Order.

In furtherance of assisting the Commission's deliberations, on May 7, 2018, a letter requesting written comments regarding the appropriate penalty was transmitted to the Respondent and Advocate. On May 21, 2018, the Advocate's Suggestion of Appropriate Civil Penalty was filed with the Commission. As of the date of the memorandum transmitting this draft Final Order, Respondent has not provided any written comments regarding the penalty in this matter.

In the Advocate's comments she argues that pursuant to Section 112.317(1), Florida Statutes, three sanctions may be recommended by the Commission—public censure and reprimand; civil penalty not to exceed \$10,000; and/or restitution of any pecuniary benefits received because of the violation committed. With respect to the Respondent's violation of Section 112.313(6) predicated upon a finding by the ALJ and this Commission that he corruptly misused his official position, the Advocate requests that the Commission recommend a civil penalty of \$5,000 as well as public censure and reprimand.

In support of her request for a monetary civil penalty of \$5,000, the Advocate states that the ALJ in his RO recommended the imposition of \$5,000 per violation. Following the First DCA's order as to the Respondent's appeal, she asserts that there is one violation remaining. She argues that the ALJ, the Commission, and the Court have all determined that competent substantial evidence supports the finding that the Respondent violated Section 112.313(6), Florida Statutes. She asserts that at its meeting on April 21, 2017, the Commission adopted the ALJ's recommendation of a civil penalty of \$5,000 and that nothing in the additional record (nothing

from the Court's decision) supports mitigation, waiver, or reduction of this penalty. As such, she asserts that the civil penalty of \$5,000 for the violation of Section 112.313(6) should stand.

In support of her request for the imposition of the penalty of public censure and reprimand, the Advocate argues that nothing in the record of this case after the appeal supports the elimination of the public censure and reprimand penalty. She further asserts that the imposition of the penalty of public censure and reprimand is in accordance with the penalties in similar Commission cases wherein a violation of Section 112.313(6), Florida Statutes, has been found to exist. In particular, she cites to *In re Renee Lee*, Case No. 11-6063EC (Fla. DOAH July 11, 2012)¹ and *Stephan Carter v. Commission on Ethics*, No. 5D17-1141 2018 WL 1136076 (Fla. 5th DCA Feb. 27 2018),² in support of the requested penalty. She states that in the matter *In re Renee Lee* a \$5,000 civil penalty and public censure and reprimand was imposed upon a county attorney for a violation of Section 112.313(6) for authorizing a legal opinion justifying a one percent raise in her salary without need for county commission approval. She further notes that the findings of this Commission as well as the penalty were later affirmed by the Second District Court of Appeal in *Renee Lee v. Commission on Ethics*, 141 So. 3d 187 (Fla. 2nd DCA 2013). Moreover, she points out that in the case of *Stephan Carter v. Commission on Ethics*, No. 5D17-1141 2018 WL 1136076 (Fla. 5th DCA Feb. 27, 2018), a \$10,000 civil penalty and public censure and reprimand was affirmed by the Fifth District Court of Appeal for a violation of Section 112.313(6) for obtaining funds in the form of severance from Orange County while continuing to be employed as the general counsel to the Orange County Clerk of Court.

¹ See *In re Renee Lee*, Complaint No. 09-115. See also, Final Order No. 12-177.

² See *In re Stephan Carter*, Complaint No. 15-088. See also, Final Order No. 17-007.

The Advocate argues that in the instant matter, there is no question that the conduct was not an isolated instance but rather occurred over the course of many months. She states that the record reflects that the Respondent's deceptiveness included drafting a contract for himself and his law firm in which he unilaterally increased his billable hourly rate, which he thereafter refused to negotiate with the City Commission. She states that he believed that this contract would shield him from the unethical behavior he was about to perpetrate on his client, the City, and the public. She argues that he then deceived the City Commission—his client and employer—into appointing him to two public positions to commence only after his City Attorney position ended. She argues that the record indicates that the Respondent intended to serve in those positions while also serving as back-up attorney to the City's in-house counsel. She argues that this scheme required that he act in the contradictory capacity as a neutral arbitrator over disputes with the City while at the same time representing the best interests of the City.

The Advocate further contends that the misconduct at issue occurred in the Respondent's official capacity, using knowledge and resources to create an unfair advantage for himself and for his personal benefit.

She argues that the Respondent's testimony in the record indicates that he will not take any care to avoid unethical conduct in the future. She asserts that the Respondent has not accepted responsibility and accountability for his actions nor has he identified his conduct as inappropriate.

The Advocate contends that Respondent's intentional misconduct threatened the public's trust and confidence in the City's public officials.

The Advocate asserts that the Respondent has argued against the penalty of public censure and reprimand because the ALJ in his RO stated that "[e]xcept for his involvement in the development of the two ordinances relating to the Zoning Hearing Officer and Special Magistrate,

nothing in the record suggests that Respondent ever provided less than exemplary legal services to the City" However, the Advocate contends that this statement does not mean that Respondent's tenure as City Attorney was spotless. The Advocate asserts that at the final hearing in this matter, she sought to set forth and prove the elements of the ethics violations at issue and not to disparage the Respondent with evidence of other bad acts. Yet, she notes that evidence in the record indicates that the Respondent wielded power over his employers (i.e., the City Commission). At one public meeting, wherein the City Commissioners discussed the amount of attorney's fees the Respondent had been charging the City, she notes that the Respondent referred to a Commissioner as "a cancer, this one person has become a cancer here on this commission with regard to this issue."³ She states that Respondent went on to state that "[e]very single issue that gets raised in a commission meeting has something to do with me and attorney's fees. And I will tell you that if this item is on the agenda for the next meeting, I will not participate in that discussion. I will get up and walk out of these commission meetings. At some point in time the four of you [other Commissioners] have got to put your foot down and say, enough's enough . . . And I will ask the chair to remove that item from the agenda if it shows up."⁴ This record evidence, the Advocate argues, demonstrates insubordination and a lack of respect by Respondent to the City Commission he served, and reveals that his tenure with the City was, in fact, less than exemplary.

In summation, the Advocate argues that a penalty must be fair to society, fair to the Respondent, and severe enough to deter others whom may be tempted to become involved in the violations. Thus, Respondent's misconduct in this matter should not be taken lightly. She contends that the weight of the matter clearly falls opposite the Respondent's side of the scale of justice. The

³ Transcript of final hearing, pp. 142-143.

⁴ *Id.*

Advocate contends that a sanction of a \$5,000 civil penalty and public censure and reprimand is consistent with the law and with cases previously adjudicated by the Commission and upheld by the courts. Therefore, the Advocate requests that the Commission recommend its previous recommendation of a \$5,000 civil penalty and public censure and reprimand.

Disposition

In accordance with penalties imposed in prior cases involving the misuse of public office and based upon a review of the complete record, as well as the arguments of the parties, the Commission on Ethics finds that a civil penalty of \$5,000, as well as public censure and reprimand, is warranted. Based upon its review of the record in this proceeding the ALJ and this Commission have found that competent substantial evidence exists supporting the finding that Respondent violated Section 112.313(6), Florida Statutes. Further, the First DCA on appeal found that "competent, substantial evidence supports the ALJ's implicit finding that [Respondent] acted corruptly" by misusing his position as city attorney to create an unfair advantage for himself and gain a personal benefit.⁵ The court further opined that the record evidence indicates that Respondent knew that his conduct was wrong and inconsistent with the proper performance of his public duties.⁶ In light of the presence of competent substantial evidence supporting the Commission's finding that Respondent violated Section 112.313(6), Florida Statutes, the Court affirmed the Commission's determination in this matter. Thus, in essence, what is now before us is the issue of what is the appropriate penalty for a *corrupt* (inconsistent with proper performance of public duty and wrongful) use of public position in violation of Section 112.313(6), a very serious violation of the Code of Ethics which the Court affirmed. Accordingly, the Commission

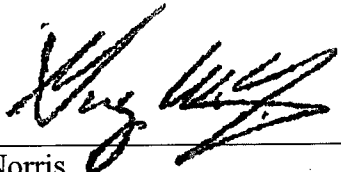
⁵ *Robert K. Robinson v. Commission on Ethics*, Case No. 1D17-2187 (Fla. 1st DCA Mar. 29, 2018), pp. 6-8.

⁶ *Id.*

on Ethics recommends that the Governor publicly censure and reprimand Respondent and impose a civil penalty of \$5,000 upon Respondent for the violation of Section 112.313(6) found in this matter.

ORDERED by the State of Florida Commission on Ethics meeting in public session on July 27, 2018.

August 1, 2018
Date Rendered



Guy W. Norris
Chair, Florida Commission on Ethics

THIS ORDER CONSTITUTES FINAL AGENCY ACTION. ANY PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER HAS THE RIGHT TO SEEK JUDICIAL REVIEW UNDER SECTION 120.68, AND SECTION 112.3241, FLORIDA STATUTES, BY FILING A NOTICE OF ADMINISTRATIVE APPEAL PURSUANT TO RULE 9.110 FLORIDA RULES OF APPELLATE PROCEDURE, WITH THE CLERK OF THE COMMISSION ON ETHICS, AT EITHER 325 JOHN KNOX ROAD, BUILDING E, SUITE 200, TALLAHASSEE, FLORIDA 32303 OR P.O. DRAWER 15709, TALLAHASSEE, FLORIDA 32317-5709; AND BY FILING A COPY OF THE NOTICE OF APPEAL ATTACHED TO WHICH IS A CONFORMED COPY OF THE ORDER DESIGNATED IN THE NOTICE OF APPEAL ACCOMPANIED BY THE APPLICABLE FILING FEES WITH THE APPROPRIATE DISTRICT COURT OF APPEAL. THE NOTICE OF ADMINISTRATIVE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE DATE THIS ORDER IS RENDERED.

cc: Mr. Mark Herron, Attorney for Respondent
Mr. Brennan Donnelly, Attorney for Respondent
Mrs. Elizabeth A. Miller, Commission Advocate
Ms. Conni Bruni, Complainant
The Honorable Robert S. Cohen, Division of Administrative Hearings