

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: STEPHAN CARTER,

Case No. 16-3637EC

Respondent.
_____ /

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016), on September 20 and 21, 2016, in Orlando, Florida.

APPEARANCES

For Advocate: Elizabeth A. Miller, Esquire
Office of the Attorney General
Plaza Level 01, The Capitol
Tallahassee, Florida 32399

For Respondent: Stephan Carter, pro se
2153 Chinook Trail
Maitland, Florida 32751

STATEMENT OF THE ISSUES

The issues in this matter are whether Respondent violated section 112.313(6), Florida Statutes (2013),^{1/} by obtaining funds from Orange County in the form of a severance payment while remaining employed as General Counsel for the Orange County Clerk of Courts; and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On October 28, 2015, the Florida Commission on Ethics (the "Commission") issued an Order Finding Probable Cause to believe that Respondent, Stephan Carter, while serving as General Counsel for the Orange County Clerk of Courts, violated section 112.313(6). The Commission found that Respondent used his position to obtain substantial funds in the form of a severance package while still employed as General Counsel for the Orange County Clerk of Courts.

The Commission forwarded the case to the Division of Administrative Hearings ("DOAH") on June 28, 2016.

The final hearing was held on September 20 and 21, 2016. At the final hearing, the Advocate for the Commission (the "Advocate") offered the testimony of Daniel J. Gerber, Thomas Gonzalez, Joann Gammichia, Tracy Gasinski, Mike Murphy, and Cathleen Balboa. Advocate's Exhibits 1 through 22 were admitted into evidence. Respondent testified on his own behalf and offered the testimony of Gary Wilson. Respondent's Exhibit 1 was admitted into evidence.

A court reporter recorded the final hearing. A three-volume Transcript of the proceeding was filed on November 16, 2016. At the close of the hearing, the parties were advised of a ten-day timeframe following DOAH's receipt of the Transcript to file post-hearing submittals. The Advocate filed a Proposed Recommended

Order which was duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Respondent, Stephan Carter, served as General Counsel for the Orange County Clerk of Courts (the "Clerk's Office") from June 2003 through April 1, 2014. Respondent was a public employee at all times material to this action.

2. Respondent was personally hired by Lydia Gardner, the Orange County Clerk of Courts. In January 2005, Respondent and Ms. Gardner executed an employment contract (the "Employment Agreement"). The Employment Agreement was signed by Respondent and Ms. Gardner, in her capacity as the Clerk of Courts, on January 10, 2005, and January 13, 2005, respectively.

3. The Employment Agreement, paragraph 6, entitled "Termination of Employment," established that the Clerk would pay Respondent a fee should the Clerk terminate the Employment Agreement prior to its expiration date (the "Severance Payment"). Paragraph 6 specifically provided:

The Clerk may declare this agreement terminated at any time. . . . The Clerk shall promptly pay to the General Counsel a sum equal to i) the salary and deferred compensation that is accrued but unpaid as of the date of the termination, plus ii) an amount equal to the pro rata portion of his salary for all accrued but unused leave time, plus, iii) an amount equal to the salary and deferred compensation that the General Counsel would have received during the

180 days immediately following the date such termination takes effect, as if this agreement had not been terminated.

4. At the final hearing, Respondent explained that when he accepted the position of General Counsel (then titled "Legal Counsel") with the Clerk's Office in June 2003, he informed Ms. Gardner that he would only agree to work for the Clerk's Office if he could be protected from losing his position. Therefore, Respondent sought and obtained the Severance Payment provision should he be terminated for any reason other than his voluntary resignation.

5. The Employment Agreement provided that Respondent's term of employment continued until January 6, 2009. On January 7, 2009, Respondent and Ms. Gardner entered a signed agreement wherein the Employment Agreement was "extended indefinitely."

6. On February 5, 2013, Respondent and Ms. Gardner signed a second amendment to the Employment Agreement.^{2/} This "clarification of terms" stated:

[A]s to the definition of termination in paragraph 6, for the purposes of the contract, termination by the Clerk includes the ending of the employment relationship for any reason other than General Counsel's voluntary resignation.

The amendment also provided that an \$11,000 annual payment into Respondent's deferred compensation plan contained in the original Employment Agreement be considered compensation under Florida

Administrative Code Rule 60S-6.001(15) (relating to pensions) and not a fringe benefit.

7. In February 2013, Ms. Gardner became gravely ill. Ms. Gardner's illness caused her to be absent from the Clerk's Office.

8. In Ms. Gardner's absence, Colleen Reilly, the Chief Administrative Officer for the Clerk's Office, assumed Ms. Gardner's responsibilities. Ms. Reilly was hired in 2009. At that time, Respondent prepared an employment contract for Ms. Reilly modelled on his own Employment Agreement.

9. In April 2013, Ms. Reilly approached Respondent to talk about their future employment with the Clerk's Office. Ms. Gardner's health was deteriorating. Respondent and Ms. Reilly discussed the impact of Ms. Gardner's death on their positions. Ms. Reilly was also concerned whether the new Clerk of Courts would honor their Employment Agreements.

10. Respondent and Ms. Reilly's conversation led to a discussion regarding how they could protect the Severance Payments under their respective Employment Agreements. Respondent and Ms. Reilly considered several possibilities. One position was that their Employment Agreements would remain in effect upon Ms. Gardner's death, and they could ask the new Clerk of Courts to honor the payout terms. Respondent, however, determined that the Employment Agreements were not clear on

whether he and Ms. Reilly were entitled to the Severance Payments following a change of administration. Therefore, they became concerned whether the new Clerk of Courts would be legally bound to honor the Severance Payments should he or she decide not to retain their services.

11. Respondent, without seeking legal guidance or consulting with outside counsel for the Clerk's Office, concluded that the Employment Agreements would terminate upon Ms. Gardner's death. At the final hearing, Respondent explained that he considered his employment to be tied specifically to Ms. Gardner and not the Clerk's Office. Therefore, Respondent reasoned that because both he and Ms. Reilly were hired by and worked directly for Ms. Gardner, her death would terminate their contracts. This termination, of course, would also entitle Respondent (and Ms. Reilly) to the Severance Payment because his employment would have ended for a reason other than his voluntary resignation.

12. Respondent and Ms. Reilly also discussed their plans once their Employment Agreements were terminated. Respondent informed Ms. Reilly that he believed that after the Employment Agreement was terminated, they could continue to work for the Clerk's Office as "at-will" employees without employment contracts. Respondent encouraged Ms. Reilly to take her Severance Payment then stay in her position with the Clerk's Office. He intended to do the same.

13. Late in April 2013, Ms. Reilly informed Respondent that she was planning to visit Ms. Gardner, who was on convalescent leave at her home, to ask her to formally terminate the Employment Agreements and make them at-will employees of the Clerk's Office. Respondent encouraged Ms. Reilly's endeavor. Respondent then drafted two versions of a memorandum Ms. Gardner could sign to effectuate the termination of their contracts. Ms. Gardner, however, did not agree to terminate the Employment Agreements or sign the paperwork Respondent had prepared. Consequently, the Employment Agreements remained in effect.

14. When Ms. Reilly was not able to obtain Ms. Gardner's consent to terminate the Employment Agreements, Respondent began to consider Ms. Reilly's authority to terminate his Employment Agreement. Respondent determined that Ms. Reilly could terminate his contract under section 28.09, Florida Statutes, and they could still receive the Severance Payments. Section 28.09 describes the appointment of a clerk ad interim in the case of a vacancy occurring in the office of a clerk by death. Section 28.09 states that the clerk ad interim "shall assume all the responsibilities [and] perform all the duties" of the clerk. Therefore, because Ms. Reilly would assume all the powers of Ms. Gardner, she would be authorized to terminate his Employment Agreement.

15. Ms. Gardner passed away on May 8, 2013.

16. On May 9, 2013, Ms. Reilly was officially appointed as Clerk Ad Interim for the Clerk's Office.

17. Also on May 9, 2013, Respondent and Ms. Reilly immediately took steps to obtain their respective Severance Payments. To effectuate their plan, Ms. Reilly promptly terminated both their Employment Agreements using her newfound authority as the interim Clerk. Respondent hoped that this step would remove any questions of their entitlement to the Severance Payment that might be raised by the new Clerk of Courts.

18. Respondent then went directly to the Clerk's Payroll office. There, he approached Tracy Gasinski, the payroll administrator for the Clerk's Office. Respondent informed her that Ms. Reilly had approved him to receive a payout. Respondent declared that his payout was authorized because his Employment Agreement was terminated. Respondent also instructed Ms. Gasinski to pay Ms. Reilly's payout under her Employment Agreement. Respondent stressed that he wanted both payouts processed immediately. Finally, Respondent advised Ms. Gasinski that nobody needed to know about the payout.

19. Ms. Gasinski felt pressured by Respondent. However, based on his representation that Ms. Reilly had approved the payout, she immediately processed a final paycheck for Respondent (and Ms. Reilly), which included the Severance Payment provided

in his Employment Agreement. Ms. Gasinski calculated a payout for Respondent in the gross amount of \$110,290.61. This figure included a Severance Payment of \$76,844.00. In addition, per his request, Respondent was also paid \$27,822.10 for all his unused vacation leave (405.57 hours times a rate of \$68.60), as well as \$5,624.51 for his unused sick leave (327.96 hours times a rate of \$17.15). Ms. Gasinski paid 25 percent of Respondent's sick leave per Clerk's Office policy.

20. The next day, on May 10, 2013, Ms. Gasinski issued Respondent a check in the amount of \$58,400.00 which was deposited directly into Respondent's personal bank account. Ms. Gasinski also deposited a final paycheck into Ms. Reilly's bank account.

21. On or about May 20, 2013, however, Respondent returned to see Ms. Gasinski. He was not happy with his payout. Respondent told Ms. Gasinski that the amount she deposited was incorrect, and he was due more money. Respondent demanded several adjustments which would maximize his Severance Payment.

a. First, referencing the February 5, 2013, amendment to his Employment Agreement, Respondent wanted the \$11,000 he received as deferred compensation to be incorporated into his base salary thereby increasing his rate of pay.

b. Second, Ms. Gasinski, in calculating Respondent's Severance Payment, computed the final payout based on six month's

salary in accordance with the standard practice of the Clerk's Office. Respondent, however, insisted that his Severance Payment be calculated based on "180 days" as specifically stated in his Employment Agreement at paragraph 6. This mathematical adjustment increased Respondent's payout by including payment for all Saturdays and Sundays.^{3/}

c. Third, Respondent demanded that he receive 100 percent payout for his remaining sick leave instead of just 25 percent as was the Clerk's Office policy.

d. Fourth, Respondent requested that 56 hours (7 days) be reserved in his vacation leave account and not paid out.^{4/}

22. Following their meeting, Ms. Gasinski voided the initial payout check. However, she was not comfortable with Respondent's request based on her understanding of employment contracts. Respondent's and Ms. Reilly's transactions were out of the ordinary course of business for the Clerk's Office. In her experience, final paychecks to Clerk's Office employees were always accompanied by paperwork from the Clerk's Office's Talent Management division. This paperwork came in the form of an Employee Change Notice ("ECN"). However, Respondent did not produce, nor had Ms. Gasinski received, an ECN supporting Respondent's payout.

23. In Clerk's Office accounting practices, Talent Management and the Payroll office act as a check and balance for

each other. Typically, Talent Management initiates the paperwork, and then Payroll issues the checks. The normal process for a payout when a Clerk's Office employee leaves employment is for Talent Management to notify Ms. Gasinski who then processes the final payout. Respondent did not have the authority to direct Ms. Gasinski to issue the checks. Similarly, Ms. Gasinski did not have the authority to write checks to either Respondent or Ms. Reilly. Furthermore, a final payout upon termination is always via a paper check. Direct deposit to a personal bank account is never an option. The terminated employee picks up the paper check from Talent Management who verifies that the employee's garage pass and badge have been returned.

24. Because of her discomfort with issuing Respondent's payout check, Ms. Gasinski sought advice from her supervisor, Mike Murphy, the Chief Financial Officer for the Clerk's Office. Mr. Murphy suggested that Ms. Gasinski contact Talent Management.

25. On May 21, 2013, Ms. Gasinski spoke to Joann Gammichia, the Director of Talent Management, about Respondent's request for a payout. When Ms. Gammichia learned of the situation, she had immediate concerns. First, Ms. Gammichia wondered why Payroll was issuing a check without any documentation from Talent Management such as an ECN. Ms. Gammichia testified that each employment activity requires completion of an ECN which acts as a

recordkeeping system for the Clerk's Office. Because Respondent approached Ms. Gasinski in the Payroll office directly, no ECN or other written record was generated explaining why the Clerk's Office was issuing the payout to Respondent. Ms. Gammichia explained that the policy of the Clerk's Office is that payouts, severance checks, termination, or any kind of position change should only occur with an ECN in order to maintain and track the complete history of an employee's tenure with the Clerk's office.

26. Ms. Gammichia also wondered why Respondent went directly to Ms. Gasinski with his demands. The normal starting point for employee changes begins with Talent Management, and the end of the line is financial services and Payroll. The fact that Respondent was attempting to verbally change his employment status in the Payroll office was "highly irregular." Ms. Gammichia was also puzzled why the Clerk's Office was issuing a severance payout on an employment contract when the employment was not ending.

27. Consequently, Ms. Gammichia told Ms. Gasinski not to issue the adjusted payout check. Ms. Gasinski then notified Respondent via e-mail dated May 21, 2013, that she could not process the final payout until she received the proper documentation from Ms. Gammichia in Talent Management.

28. Shortly thereafter, Respondent visited Ms. Gammichia's office to inquire why she was involved in his payout matter.

According to Ms. Gammichia, Respondent became "pretty aggressive." Respondent told Ms. Gammichia that she had no authority or business being involved. It was a personal matter. Respondent warned Ms. Gammichia that she was directly violating an order from Ms. Reilly to make the Severance Payments. Ms. Gammichia informed Respondent that not only was she involved, but she was not authorizing the payout check to go through. Ms. Gammichia further advised Respondent not to contact Ms. Gasinski regarding the payout.

29. Later that day, Ms. Gammichia contacted her supervisor, Cathi Balboa, the Director of Administrative Services for the Clerk's Office, to discuss Respondent's payout request. Ms. Gammichia relayed to Ms. Balboa that Ms. Gasinski was upset because she was being asked to prepare a large payout based only on verbal instructions without any supporting paperwork. At the final hearing, Ms. Balboa recalled that Respondent's urgent request for a payout was highly irregular. Ms. Balboa relayed that the Clerk's Office should not issue a final payout unless an employee was truly terminated from his or her position.

30. Based on their concerns, Ms. Gammichia and Ms. Balboa called Ms. Reilly, who was sick at home, to confirm whether Ms. Reilly was aware of the payouts that Respondent said she had authorized. Ms. Gammichia also wanted to report the fact that

Ms. Gasinski felt that she was being coerced and harassed by Respondent.

31. Ms. Gammichia described Ms. Reilly's reaction as hostile and negative. Ms. Reilly did not seem happy that others were involved. Ms. Reilly asked Ms. Balboa, "How did you get involved in this?"

32. The next morning, on May 22, 2013, Ms. Reilly returned to the Clerk's Office and called a meeting with Mr. Murphy, Ms. Balboa, and Respondent. Ms. Reilly opened the meeting by asking Mr. Murphy and Ms. Balboa "what do you think your role is in this organization," and "where do your loyalties lay?" Ms. Reilly then announced that "it was a private matter, it was their personal business, [and] to stay out of it." Ms. Balboa testified at the final hearing that Ms. Reilly intimidated her in their meeting. Mr. Murphy conveyed that he understood that they were not to get involved in the severance payout matter.

33. After the meeting, Ms. Gasinski was told to proceed with the payouts for Respondent and Ms. Reilly.

34. On May 23, 2013, Ms. Gasinski processed a second severance payout check for Respondent and Ms. Reilly. Ms. Gasinski prepared for Respondent a revised final paycheck in the total amount of \$156,443.11. This amount included a Severance Payment of \$106,387.20. Respondent was also paid \$25,826.23 for his vacation leave (349.57 hours times a rate of

\$73.88), as well as \$24,229.68 for all his unused sick leave (327.96 hours times a rate of \$73.88). A check in the net amount of \$99,125.45 was deposited in Respondent's personal bank account.

35. On May 23, 2013, Respondent repaid the initial payout of \$58,400.00 to the Clerk's Office by personal check.

36. After Ms. Reilly terminated his Employment Agreement on May 9, 2013, Respondent never left his position with the Clerk's Office. Respondent considered himself an at-will employee and continued to report to work as General Counsel. There was never any break in his employment. At no time did Respondent (or the Clerk's Office) initiate or complete any paperwork to rehire Respondent after either Ms. Gardner's death or Ms. Reilly terminated his Employment Agreement. No documentation was prepared transitioning Respondent from a contract employee to an at-will employee. Respondent continued to perform the same duties under the same terms, conditions, and compensation contained in the Employment Agreement as if he never left office.^{5/}

37. At the final hearing, Respondent testified why his interpretation of his Employment Agreement justified his actions and motives. Respondent first remarked that his Employment Agreement was not typical for a Clerk's Office employee. It contained certain provisions which were not to be "exposed

generally," such as the termination clause and the contract termination fee. Therefore, he desired to keep his employment terms quiet. Respondent further disclosed that he did not initiate an ECN because his Severance Payment was not a human resources issue, it was a matter of contract.

38. Respondent also explained that at the end of 2008, when his Employment Agreement was nearing its initial termination date, Respondent became concerned with his future at the Clerk's Office. He began to wonder what would happen if Ms. Gardner left her position as Clerk. Therefore, he prepared, then executed, the 2009 amendment to the Employment Agreement extending it "indefinitely." In 2013, Respondent prepared, then executed, the second amendment clarifying the term "termination."

39. Regarding collecting his Severance Payment without leaving his position with the Clerk's Office, Respondent contended that just because his Employment Agreement was terminated (thus, entitling him to the Severance Payment) did not mean he had to leave employment with the Clerk's Office. Respondent characterized the payment as a "contract termination fee." Therefore, he asserted that the Clerk could terminate his Employment Agreement without actually terminating him from his position as General Counsel. Consequently, nothing prevented him from becoming an at-will employee. Accordingly, when Ms. Reilly terminated the Employment Agreements on May 9, 2013, by

exercising her prerogative as the interim Clerk, she also decided that both Respondent and she would stay on with the Clerk's Office as at-will employees until the new Clerk of Courts determined what to do with them.

40. In February 2014, the new Clerk of Courts, Eddie Fernandez, determined to initiate an investigation to review the propriety of the 2013 Severance Payments to Respondent and Ms. Reilly.

41. On March 28, 2014, Respondent was placed on administrative leave with pay.

42. On April 1, 2014, after the investigation recommended that Respondent's employment be terminated, Respondent resigned from his position with the Clerk's Office. As a condition of his resignation, Respondent was not eligible for rehire by the Clerk's Office.

43. Respondent reimbursed the full amount of the money that he received as the Severance Payment from the Clerk's Office.

44. Commenting on the circumstances of his resignation and restitution, at the final hearing, Respondent urged that he did not act dishonestly, but, maybe he exercised bad judgment. Respondent also proclaimed that he received his Severance Payment because the interim Clerk ordered it, not by reason of his actions or conduct. Therefore, he personally never violated any duty of his office.

45. Based on the evidence and testimony presented during the final hearing, the competent substantial evidence in the record establishes, by clear and convincing evidence, that Respondent acted corruptly, with a wrongful intent, in seeking and obtaining the Severance Payment when he never intended to leave his public employment with the Clerk's Office. Accordingly, the Advocate proved that Respondent violated section 112.313(6).

CONCLUSIONS OF LAW

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

47. Section 112.322, Florida Statutes (2016), and Florida Administrative Code Rule 34-5.0015 authorize the Commission to conduct investigations and make public reports on complaints concerning violations of Part III, chapter 112, entitled Code of Ethics for Public Officers and Employees (the "Florida Code of Ethics").

48. The Commission has jurisdiction over this matter to determine whether any violations of the Florida Code of Ethics have occurred. § 112.324(3), Fla. Stat.

49. Respondent, as General Counsel for the Clerk's Office, was a public employee subject to the requirements of chapter 112.

50. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue in the proceedings. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977); see also Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996) ("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."). In this proceeding, the Commission, through its Advocate, has the burden to establish whether Respondent violated section 112.313(6).

51. Commission proceedings which seek recommended penalties against a public officer or employee require proof of the alleged violation by clear and convincing evidence. See Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997).

52. Clear and convincing evidence is a heightened standard that requires more proof than a mere preponderance of the evidence. Clear and convincing evidence requires that the evidence "must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts at 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 Davey, 645 So. 2d 398, 404 (Fla. 1994); Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

53. Section 112.313(6) states:

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.

54. The term "corruptly" is defined by section 112.312(9)

as:

"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 the proper performance of his or her public duties.

55. To satisfy the statutory requirement of "wrongful intent," the Advocate must prove that Respondent acted "with reasonable notice that [his] conduct was inconsistent with the proper performance of [his] public duties and would be a violation of the law or the [Florida Code of Ethics]." Blackburn v. State, Comm'n on Ethics, 589 So. 2d 431, 434 (Fla. 1st DCA 1991).

56. Section 112.311 expresses the Legislative intent behind the Florida Code of Ethics and states, in pertinent part:

(1) It is essential to the proper conduct and operation of government that . . . public office not be used for private gain other than the remuneration provided by law.

* * *

(4) It is the intent of this act to implement these objectives of protecting the integrity of government

* * *

(5) It is hereby declared to be the policy of the state that no officer or employee of a state agency or of a county, city, or other political subdivision of the state . . . shall . . . engage in any business transaction or professional activity; or incur any obligation of any nature which is in substantial conflict with the proper discharge of his or her duties in the public interest. To implement this policy and strengthen the faith and confidence of the people of the state in their government, there is enacted a code of ethics setting forth standards of conduct required of state, county, and city officers and employees, and of officers and employees of other political subdivisions of the state, in the performance of their official duties. It is the intent of the Legislature that this code shall serve not only as a guide for the official conduct of public servants in this state, but also as a basis for discipline of those who violate the provisions of this part.

(6) It is declared to be the policy of the state that public officers and employees, state and local, are agents of the people and hold their positions for the benefit of the public. . . . *Such officers and employees are bound to observe, in their official acts, the highest standards of ethics consistent with this code* and the advisory opinions rendered with respect hereto regardless of personal considerations, recognizing that promoting the public interest and *maintaining*

the respect of the people in their government must be of foremost concern. (Emphasis added).

57. As stated in Blackburn:

It is quite apparent that the primary concern of these statements of legislative intent and purpose lies in avoiding conflicts of interest by public officials in matters under their charge, and eliminating private gain, directly or indirectly, by financial compensation or otherwise, in carrying out their official duties on behalf of the government they are sworn to serve. Section 112.311(5) specifically refers to the code of ethics enacted in this part to implement the policy and intent recited in the preceding subparagraphs (1) through (4), and the standards of conduct set forth in section 112.313 must be construed in the context of these provisions.

Id. at 435.

58. Stated succinctly, to establish a violation of section 112.313(6), the Advocate must prove by clear and convincing evidence that Respondent, as a public employee, 1) used, or attempted to use, his official position; 2) to secure a special benefit 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." Siplin v. Comm'n on Ethics, 59 So. 3d 150, 151 (Fla. 5th DCA 2011), see also Bennett v. Comm'n on Ethics, 871 So. 2d 924, 926 (Fla. 5th DCA 2004).

59. The Advocate alleges that Respondent violated the Florida Code of Ethics, specifically section 112.313(6), by seeking and obtaining a severance payout from the Clerk's Office while never intending to leave employment as General Counsel.

60. Based on the competent substantial evidence in the record, the clear and convincing evidence establishes that Respondent corruptly used his official position to obtain a special benefit for himself (and for another). The Advocate persuasively demonstrates that Respondent participated in (if not instigated) a scheme whereby the Clerk's Office would pay him his Severance Payment under his Employment Agreement, but he would continue to be employed as General Counsel for the Clerk's Office under the exact same compensation, terms and conditions contained in the Employment Agreement. Respondent's actions to collect a "double salary" were inconsistent with the proper performance of his public duties. Accordingly, Respondent's acceptance of his Severance Payment without leaving public service was unjustified and violated the Florida Code of Ethics.

61. The Advocate's primary argument is that because Respondent never intended to leave his position with the Clerk's Office once his Employment Agreement was terminated (either by Ms. Gardner's death or Ms. Reilly's decree), he was not entitled to the Severance Payment. The Advocate's argument has merit. The terms and conditions of the Employment Agreement indicate

that Respondent's entitlement to the Severance Payment was predicated on Respondent's term of employment ending. The heading of the Employment Agreement, paragraph 6, itself is entitled "Termination of Employment." The Advocate's argument is also supported by the second amendment to the Employment Agreement that Ms. Gardner agreed to in February 2013, which stated:

As to the definition of termination in paragraph 6, for purposes of the contract, termination by the Clerk includes the **ending of the employment relationship** for any reason other than General Counsel's voluntary resignation." (Emphasis added).

62. Furthermore, the Employment Agreement established that Respondent's Severance Payment was to equal the salary, deferred compensation, and unused leave time that Respondent "would have received during the 180 days immediately following the date such termination takes effect, as if this agreement had not been terminated." (Emphasis added). Respondent recognized that the purpose of the Employment Agreement's termination clause was to protect him from unemployment. In an e-mail to Ms. Reilly dated May 2, 2013, Respondent opined that:

The purpose of the clause was to make us to hold [sic] in the event we were terminated. That is, what we would have received over the following six months had we still been under The [sic] contract.

The Employment Agreement did not express that the Clerk's Office (or Ms. Gardner) agreed to compensate Respondent with both the

Severance Payment and his regular salary. Yet, Respondent did receive the benefit of both payments for the 180 days following the termination of his Employment Agreement. Consequently, Respondent's receipt of his Severance Payment when he was still to be paid his salary was not warranted because he suffered no loss of compensation as envisioned by the terms of the Employment Agreement.

63. Further, the totality of the evidence proves, clearly and convincingly, that Respondent acted with reasonable notice that his conduct was inconsistent with the proper performance of his duties as a public employee and contrary to the Florida Code of Ethics. Respondent's actions demonstrate that at the time he sought to have his Employment Agreement terminated, he had no intention of leaving his position with the Clerk's Office. Yet, he knowingly pursued a plan to obtain his Severance Payment as if he were, in fact, terminated from public employment.

64. The manner in which Respondent orchestrated his termination so that he could collect his Severance Payment shows that he was aware his receipt of the payout was questionable. First, Respondent attempted to bypass the normal financial accounting channels to obtain his Severance Payment. Respondent sought to avoid creating a record of his transaction. He did not initiate or prepare any documentation to effectuate his termination (or transition to an at-will employee). Instead, he

approached the Payroll clerk directly to obtain his check rather than going through Talent Management. Respondent also explicitly cautioned Ms. Gasinski to tell no one of his payout. Later, when Ms. Gammichia questioned the payout, Respondent "aggressively" challenged why she had become involved in the matter and admonished her not to violate Ms. Reilly's order to issue the Severance Payments.

65. Furthermore, Respondent's communications in the months prior to Ms. Gardner's death indicate that he knew his interpretation of the Severance Payment provision would likely be disputed. In February 2013, Respondent drafted a "clarification" of his Employment Agreement explaining that the term "termination" included "the ending of the employment relationship." On May 2, 2013, as if the February 2013 amendment was not explicit enough to accomplish his objective, Respondent drafted another memorandum for Ms. Gardner to sign to officially terminate his employment contract and make him an at-will employee. Ms. Gardner refused to sign this memorandum.

66. Finally, at the final hearing Respondent conceded that his interpretation of the Severance Payment was "debatable." Respondent acknowledged that he may have exercised "bad judgement." Even if he did believe that his legal analysis was sound, he was well aware that other Clerk's Office employees, e.g., Ms. Gasinski, Ms. Gammichia, Mr. Murphy, and Ms. Balboa,

had serious questions about the legitimacy of the Severance Payment. See e.g., In Re Renee Lee, Case No. 11-6063EC, RO at 20-21 (Fla. DOAH July 11, 2012) ("it was incumbent on [the public employee], in the proper performance of her professional duties, to make inquiry so as to be clear about the facts on which she offered a legal opinion.").

67. In seeking to obtain his Severance Payment, Respondent essentially sought to have his cake and eat it too. Respondent purposefully pushed to have his "employment relationship" terminated. He then continued working for the Clerk's Office in the same position under the same compensation, terms, and conditions as set forth in the Employment Agreement. Respondent cannot have it both ways. The purpose of the Severance Payment was not to enrich Respondent with \$156,443.11 of public funds while he remained employed in the identical position and earning the same salary. If Respondent desired to collect his Severance Payment under his Employment Agreement; then, ethically, he should have left his position once Ms. Reilly terminated his contract. On the other hand, if Respondent wanted to continue working for as a public servant for the Clerk's Office, then he should not have colluded with Ms. Reilly to have his Employment Agreement terminated.

68. Furthermore, Respondent abused his public position of trust by demanding subordinate employees process the Severance

Payment without the proper documentation or justification. But for his official position, Respondent would not have been able to direct Clerk's Office employees to issue the public funds to him.

69. Accordingly, Respondent's pursuit and receipt of the Severance Payment was unethical in violation of Florida law. Contrary to the Florida Code of Ethics, Respondent used his public office for private gain. He did not observe "the highest standards of ethics" consistent with the Florida Code of Ethics. Neither did he recognize that "promoting the public interest and maintaining the respect of the people in their government must be of foremost concern." See § 112.311(1) and (6), Fla. Stat.

70. In sum, the competent substantial evidence in the record establishes that Respondent, a public employee, pursued and received a Severance Payment to obtain a direct private financial gain. Further, Respondent acted "corruptly" in that he reasonably should have known that his receipt of the Severance Payment, while never intending to leave his position as General Counsel for the Clerk's Office, was inconsistent with the Florida Code of Ethics. Accordingly, the Advocate proved, by clear and convincing evidence, that Respondent violated section 112.313(6).

71. Recommended Penalty: The penalties applicable to a public officer who violates the Florida Code of Ethics include impeachment, removal from office, suspension from office, public censure and reprimand, forfeiture of no more than one-third of his

or her salary for no more than 12 months, a civil penalty not to exceed \$10,000, and restitution of any pecuniary benefit received because of the violation committed. § 112.317(1)(a), Fla. Stat. Neither chapter 112, part III, or chapter 34-5 recognize any aggravating or mitigating factors to consider when determining the appropriate penalty.

72. Respondent is no longer employed with the Clerk's Office and has reimbursed the Clerk's Office the full amount of the Severance Payment. Therefore, the only penalties to consider are a civil penalty and public censure and reprimand.


73. In light of the facts in this matter, the undersigned determines that a civil penalty is not warranted. Respondent returned all moneys he obtained through his unethical conduct. Respondent also resigned from his position with the Clerk's Office. He is not eligible for rehire. At this time, imposing a fine on Respondent does not appear to accomplish any meaningful objective except retribution.^{6/} Aside from the subject matter of this action, by all accounts, Respondent served competently and dutifully during the time he was employed by the Clerk's Office. Ms. Gardner commented on Respondent's "extraordinary performance and leadership."^{7/} Both Ms. Gardner and Ms. Reilly extended Respondent merit increases to his salary based on his "individual performance."^{8/}

74. Accordingly, the undersigned recommends a public censure and reprimand as the appropriate penalty for Respondent's violation of section 112.313(6). This penalty should effectively address Respondent's unethical conduct and denounce his unacceptable behavior.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Commission enter a final order finding that Respondent, Steven Carter, violated section 112.313(6), Florida Statutes; and that Respondent be subject to public censure and reprimand.

DONE AND ENTERED this 3rd day of January, 2017, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of January, 2017.

ENDNOTES

1/ Unless otherwise indicated, all references to the Florida Statutes are to the 2013 version, which was the law in effect at the time of the alleged statutory violation.

2/ The 2012 date by Respondent's signature is apparently a typographical error.

3/ Ms. Gasinski explained that "Six months" of salary represents only 40 hours of pay a week. On the other hand, "180 days" as Respondent requested translates to 56 hours of pay a week.

4/ Ms. Murphy testified that an employee who separates from the Clerk's Office is not authorized to hold onto any annual leave hours.

5/ Respondent also received a merit increase of 3.0 percent to his base salary on December 30, 2013.

6/ Generally, the five principles of sentencing include 1) denunciation, 2) deterrence, 3) protect the public, 4) retribution, and 5) rehabilitation.

7/ See Advocate Exhibit 3 which is a letter from Ms. Gardner to Respondent, dated January 7, 2009.

8/ On November 26, 2012, Respondent received a merit increase raising his hourly salary from \$64.72 to \$68.60. On December 30, 2013, Respondent received an increase in his base rate of pay of 3.0 percent.

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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.