

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: CARY PIGMAN,

Case No. 16-5781EC

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this matter on January 3 and 4, 2017, by video teleconference sites in Tallahassee and West Palm Beach, Florida, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Advocate: Melody A. Hadley, Esquire
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Tallahassee, Florida 32399

For Respondent: D. Ty Jackson, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Representative Cary Pigman violated section 112.313(6), Florida Statutes, by linking his efforts to obtain legislative funding for the Okeechobee School District ("School District") to retaliate and/or attempt to retaliate

against an employee of the School District and; if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On September 14, 2016, the Florida Commission on Ethics ("Commission") issued an Order Finding Probable Cause to believe that Edwin Cary Pigman ("Respondent" or "Representative Pigman"), as a member of the Florida House of Representatives, violated section 112.313(6). The Order Finding Probable Cause against Respondent was referred to DOAH on October 6, 2016, for assignment of an administrative law judge.

The case was scheduled for hearing on January 3 and 4, 2017. The final hearing proceeded as scheduled.

At hearing, the Advocate presented the testimony of four witnesses: Kenneth Kenworthy, superintendent of Okeechobee County Schools; Tracy Downing, complainant; Keith Powell, investigator for the Commission; and Respondent. Advocate did not offer any exhibits into evidence.

Respondent testified on his own behalf and presented the testimony of Kenneth Kenworthy. Respondent's Exhibits numbered 2, 5, and 7 were admitted into evidence.

The proceedings were transcribed and the three-volume Transcript was filed on January 24, 2017. All parties timely filed their proposed recommended orders, which have been carefully considered in the preparation of this Recommended

Order. All references to the Florida Statutes are to the 2015 codification, unless otherwise indicated.

FINDINGS OF FACT

1. Respondent serves as a member of the Florida House of Representatives, District 55, which includes Okeechobee County, Florida. He has served in the position since 2012.

2. Representative Pigman received ethics training when he became a Legislator.

3. On October 16, 2015, Respondent and State Senator Denise Grimsley ("Senator Grimsley") held a Legislative Delegation meeting ("delegation meeting") in Okeechobee County to allow constituents, organizations, and agencies to present legislative requests and share information.

4. Okeechobee County Superintendent Kenneth Kenworthy ("Superintendent Kenworthy") appeared at the Legislative Delegation meeting and requested three items: 1) funding for the lowest 300 schools in reading to add an extra hour a day; 2) accountability and assessment for learning games not calculated; and 3) support for the School District's application to the Florida Department of Education^{1/} for approximately 60 million dollars in special facilities funds to build a new Okeechobee high school.^{2/}

5. Prior to the delegation meeting, Superintendent Kenworthy had asked that his principals attend the meeting if

free. Attendance was voluntary. Tracy Downing ("Mrs. Downing"), principal of South Elementary School ("South") in Okeechobee County, attended the meeting at the request of her supervisor, Superintendent Kenworthy, along with other school district representatives. Mrs. Downing invited parents to attend the meeting and one parent attended.

6. Mrs. Downing has 21 years in the education profession and the last 11 years she has been an administrator. She has been the principal at South for two years.

7. Before the delegation meeting started, Representative Pigman went down the rows shaking hands and introducing himself to the attendees. When Respondent got to Mrs. Downing, she introduced herself as Tracy Maxwell, her maiden name instead of Tracy Downing. Mrs. Downing squeezed his hand, continued to hold Representative Pigman's hand after the handshake for an extended period of time and stared at him making him uncomfortable until he started blinking, and he had to pull away from her grasp.

8. During the meeting, Mrs. Downing directed an obscene gesture at Representative Pigman. She had her middle finger on her face purposely flipping him a bird,^{3/} which means "f___ you."

9. Mrs. Downing was angry at Respondent and acted inappropriately because of Respondent's over yearlong romantic relationship with then Elizabeth Maxwell ("E. Maxwell"), the

then-separated wife of Mrs. Downing's brother, Devin Maxwell ("Maxwell"). At least 10 months of the relationship was public.

10. Maxwell was incarcerated at the time of the delegation meeting and Mrs. Downing believed Respondent was visiting then E. Maxwell at the marital home, "sleeping in [her] brother's bed," and had moved into her brother's house.

11. In November 2015, Representative Pigman's current wife, then E. Maxwell, obtained audio recordings from the jail that had taped conversations of visits between Mrs. Downing and Maxwell. The conversations included discussions regarding the delegation meeting and the education of E. Maxwell and Maxwell's daughter.

12. After hearing the exchange of the jailhouse recordings, Respondent felt obligated to report Mrs. Downing's misbehavior to her supervisor, Superintendent Kenworthy, because her conduct reflected negatively on the School District. Respondent felt it was his duty to report the principal's rudeness and stop such future behaviors.

13. Soon thereafter, E. Maxwell arranged a meeting with Superintendent Kenworthy to report Mrs. Downing's misbehavior at the delegation meeting and to discuss E. Maxwell's daughter's educational progress at South with her aunt, Mrs. Downing, the principal. One scheduled meeting was cancelled when Representative Pigman could not attend. The earliest

Superintendent Kenworthy, Representative Pigman and E. Maxwell could meet was December 8, 2015.

14. On December 8, 2015, Representative Pigman and E. Maxwell played portions of the four audio taped jail conversations between Mrs. Downing and Maxwell for Superintendent Kenworthy in his office. The recorded tapes included a conversation regarding the legislative delegation meeting where Mrs. Downing confirmed her inappropriate conduct and bragged to her brother "I gave that man hell" during the legislative hearing. Mrs. Downing detailed the incident to her brother on the recordings. She said that "Pigman was there shaking all the principals hands and when he got to me he said I am Cary Pigman, and I said I am Tracy Maxwell. And, then he blinked rapidly like three four times and I wouldn't let go of his hand and he pulled his hand out of my hand. Then, when he sat down [for the meeting] I looked at him two hours straight. Every time he would look at me he would blink like he was really uncomfortable. Then, Andy Brewer and I walked out of the courthouse and we stood there and stared him down until he got in his stupid little jeep and drove off with Justin Morgan." On the jailhouse recordings, Mrs. Downing also called Representative Pigman a bastard multiple times. Mrs. Downing further explained to her brother "every time [Respondent] looked at me I-actually, well, I probably shouldn't say this"

15. After listening to the audio recordings, Representative Pigman informed Superintendent Kenworthy about Mrs. Downing's inappropriate conduct during the delegation meeting. Respondent told Superintendent Kenworthy that he could not believe the callous disregard for this district, when he looked at Mrs. Downing in the delegation meeting, she had her middle finger up to her forehead, flipping him off. Respondent expressed his dissatisfaction with Mrs. Downing's behavior to Superintendent Kenworthy and also questioned whether Mrs. Downing could be the best Okeechobee School District has to offer. Respondent explained to Superintendent Kenworthy the performance of Mrs. Downing in leadership gives me pause. Representative Pigman also said this incident will be in the "back of my mind when thinking about the school district."^{4/}

16. Neither Respondent nor E. Maxwell mentioned or asked for discipline for Mrs. Downing during the meeting.

17. Respondent believed Maxwell had stopped the previous request for a transfer of E. Maxwell's daughter to North Elementary School ("North"). Respondent recognized that he was sensitive when it came to incidents related to E. Maxwell's divorce proceedings and decided not to participate in the second part of the meeting.

18. After Respondent was finished expressing his concerns about Mrs. Downing's conduct, he went in the hallway and left

E. Maxwell alone to meet with Superintendent Kenworthy regarding her daughter going to North.

19. After the meeting, Superintendent Kenworthy found out that space was available at North and a zone waiver was granted for E. Maxwell's daughter. That same day Superintendent Kenworthy contacted E. Maxwell and notified her that space was available at North in fourth grade but not with the teacher she requested.

20. Superintendent Kenworthy was concerned that one of his principals behaved in such a manner as was reported to him by Respondent.

21. On December 9, 2015, Superintendent Kenworthy met with Mrs. Downing and reviewed what had been reported to him from the previous day's meeting with Respondent and E. Maxwell. Superintendent Kenworthy shared the contents of what he learned from listening to the jailhouse audiotapes of Mrs. Downing talking with her brother. Superintendent Kenworthy also told Mrs. Downing he had concerns about her behavior during the delegation meeting and her following the Respondent after that meeting.

22. Mrs. Downing acknowledged to Superintendent Kenworthy that she was behind Representative Pigman a couple of blocks for a portion of her normal route back to work. Mrs. Downing also admitted her wrongdoings and confessed to Superintendent

Kenworthy that she introduced herself as Maxwell, instead of Mrs. Downing, held Representative Pigman's hand after shaking it until he had to pull it away, and flipped Representative Pigman off when he looked at her in the audience. Mrs. Downing apologized for her behavior and explained to Superintendent Kenworthy that she was extremely upset with the family situation between Respondent, her brother, and her brother's estranged wife, E. Maxwell.

23. Superintendent Kenworthy informed Mrs. Downing that she was at the delegation meeting representing the district and her public actions displayed were conduct unbecoming a school principal and unprofessional behavior. He also informed her that her public misconduct was what he was addressing, not the interactions with her brother. Superintendent Kenworthy concluded the meeting by informing Mrs. Downing that he would decide what consequences were appropriate for her actions. Mrs. Downing suggested to Superintendent Kenworthy that he should reprimand her.

24. On December 14, 2015, E. Maxwell came in and signed the zone waiver to move her daughter to North.

25. Superintendent Kenworthy continued investigating Mrs. Downing's conduct from the delegation meeting in order to decide the appropriate discipline. His investigation followed the School District's procedures when a complaint has been

received. Superintendent Kenworthy interviewed Jill Holcomb, who sat next to Mrs. Downing at the delegation meeting, and Andy Brewer, who walked out of the meeting with Mrs. Downing. He also talked to school board members and the school board attorney.

26. On December 17, 2015, Superintendent Kenworthy watched the video of the delegation meeting, but the video only showed the left side of the room and Mrs. Downing sat on the right side during the meeting.

27. That same day, Superintendent Kenworthy met with Mrs. Downing and her husband and explained that he determined that Mrs. Downing violated several district policies with her harassing conduct including: principals of professional conduct; bullying and harassment policy; good moral character requirement; and the code of ethics.

28. During that same meeting, Superintendent Kenworthy requested that Mrs. Downing share anything with him that Representative Pigman had stated that was not true. Mrs. Downing admitted flipping Respondent off but clarified she did not flip him off multiple times. Superintendent Kenworthy explained that the number of times did not make a difference because her behavior was not excused. Mrs. Downing informed Superintendent Kenworthy that she did not realize one obscene gesture in the spur of the moment would lead to something like this. Mrs. Downing and her husband also did not disagree with the

district policies Superintendent Kenworthy outlined in the meeting that Mrs. Downing violated by her conduct at the public delegation meeting.^{5/}

29. Superintendent Kenworthy did not take in consideration who reported Mrs. Downing's public misconduct when deciding the appropriate discipline. Respondent did not play any role in Superintendent Kenworthy's decision to discipline Mrs. Downing. Even if it had been a private citizen instead of Respondent who reported Mrs. Downing, Superintendent Kenworthy would have disciplined Mrs. Downing the same.

30. Superintendent Kenworthy offered Mrs. Downing an opportunity to resign from her position or he would move forward with termination.

31. On December 18, 2015, Superintendent Kenworthy spoke to Mrs. Downing again by phone. She indicated "this one moment of indiscretion has caused her a lot" and "she didn't know why she did it." Mrs. Downing asked the superintendent to consider her 20 years of service to the district and requested a settlement regarding discipline.

32. On December 19, 2015, Mrs. Downing called Superintendent Kenworthy and informed him that she would not be resigning.

33. On or about December 22, 2015, Mrs. Downing filed the instant ethics complaint against Respondent.

34. Superintendent Kenworthy decided that he did not want to publicly air either a principal's misbehavior or the Maxwells' and Pigmans' personal issues, and he took into consideration Mrs. Downing's 20 plus year work history with the district and switched Mrs. Downing's discipline from termination to a suspension.

35. On December 29, 2015, Superintendent Kenworthy spoke to Mrs. Downing about a settlement and offered her a 10-day suspension without pay for her misconduct at the delegation meeting, which violated the school board rules. Mrs. Downing accepted and served the suspension. She is still employed with the district as a principal.

36. By letter dated January 4, 2016, Superintendent Kenworthy disciplined Mrs. Downing with a 10-day suspension. The suspension without pay letter outlined Mrs. Downing's actions and School Board violations and stated:

[W]hile on duty representing the school district, the manner in which you introduced yourself shook hands to the point an individual became so uncomfortable as to blink extensively later bragged that you gave this person 'hell' during the hearing and stared him down, and used your middle finger to flip him off while acting like you were scratching your face constitutes a violation

37. On or about January 22, 2016, Senator Grimsley and Representative Pigman wrote a letter of support to the Office of

Educational Facilities at the Florida Department of Education for the new high school.

38. On or about February 9, 2016, Superintendent Kenworthy received a letter from the Pre-Application Review Committee at the Florida Department of Education informing him that the committee convened on December 10, 2015, and reviewed the proposed new high school project. The committee denied the request after determining that the project is not a critical need for Okeechobee County.

39. On September 14, 2016, an Order Finding Probable Cause was issued alleging Respondent violated section 112.313(6).

CONCLUSIONS OF LAW

40. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016).

41. Respondent is subject to the requirements of chapter 112, part III, Florida Statutes, and the Code of Ethics for Public Officers and Employees, for his acts and omissions as a member of the Florida House of Representatives.

42. Section 112.322 and Florida Administrative Code Rule 34-5.0015, authorize the Commission to conduct investigations and to make public reports on complaints concerning violations of chapter 112, part III.

43. The burden of proof, absent a statutory directive to the contrary, is on the Commission, the party asserting the affirmative of the issue of these proceedings. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977). In this proceeding, it is the Commission, through its Advocate, that is asserting the affirmative: that Respondent violated section 112.313(6).

44. The Advocate has the burden to establish the allegations in the Order of Finding Probable Cause by clear and convincing evidence. See Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997).

45. As noted by the Supreme Court of Florida:

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 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, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

46. Clear and convincing evidence requires more than a preponderance of the evidence, and less than the criminal

standard of beyond a reasonable doubt. In re: Graziano, 696 So. 2d 744, 753 (Fla. 1997).

47. The Order Finding Probable Cause in this matter alleges that "Respondent, as a member of the Florida House of Representatives, violated section 112.313(6) by linking his efforts to obtain legislative funding for the Okeechobee School District to retaliation and/or an attempt to retaliate against an employee of the School District."

48. Section 112.313(6) provides in pertinent part:

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.

49. In order to establish a violation of section 112.313(6), the Advocate must prove that: 1) the Respondent is or was a public officer or employee; 2) Respondent used or attempted to use his or her official position or any property or resources within his trust; 3) Respondent's actions were taken in order to secure a special benefit for himself or for others; and 4) Respondent's actions were taken corruptly.

50. Section 112.313(1) defines a "public officer" as "any person elected or appointed to hold office in any agency including any person serving on an advisory body."

51. The term "corruptly" is defined by section 112.312(9), and provides in pertinent part:

"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.

52. To satisfy the statutory element that one acted "corruptly," proof must be adduced 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 code of ethics. See Siplin v. Comm'n on Ethics, 59 So. 3d 150, 151-152 (Fla. 5th DCA 2011); Kinzer v. State Comm'n on Ethics, 654 So. 2d 1007, 1010 (Fla. 3d DCA 1995).

53. The standard for a finding of corruption "not only requires that the conduct complained of be done with a wrongful intent, it also requires the 'act or omission' be 'inconsistent with the proper performance of [the official's] public duties.'" Blackburn v. State, Comm'n on Ethics, 589 So. 2d 431, 436 (Fla. 1st DCA 1991).

54. In this case, it is clear that Respondent was a public official at the time of the conduct at issue, the December 8,

2015, meeting between Respondent, Superintendent Kenworthy, and then E. Maxwell, now Elizabeth Pigman, Respondent's current wife. However, the evidence was simply not clear and convincing that Respondent used his official position, to link "his efforts to obtain legislative funding for the Okeechobee School District to retaliation and/or an attempt to retaliate against an employee of the School District" as charged by the Commission.

55. The credible evidence demonstrates Mrs. Downing overstepped her role as a principal at the delegation meeting by behaving unprofessionally when she intentionally grasped Respondent's hand and inappropriately held on to the point where Respondent became uncomfortable, started blinking, and had to pull away. Mrs. Downing further engaged in misconduct when she stared Respondent down and directed an obscene gesture, flipping a bird, at Respondent, in public while there representing the School District. It is understandable that Respondent would have had concerns and reported Mrs. Downing's inappropriate behavior to her supervisor, Superintendent Kenworthy, as would any concerned citizen. Being in the Legislature does not strip a legislator's right to report wrongdoings of a public employee.

56. The undersigned is also not persuaded that the Advocate demonstrated Respondent's actions meet the standard for corruption. The record is void of any evidence to show either Representative Pigman or Elizabeth Pigman, the current wife,

tried to leverage their status by threatening, asking for, or discussing discipline, suspension, termination or any other punishment for Mrs. Downing during the December 8, 2015, meeting with Superintendent Kenworthy. The record only shows that Mrs. Downing's unprofessional harassing behavior was reported and a second zone waiver was requested.

57. Additionally, no evidence proved a discussion of voting, funding, or funding requests took place in the December 8, 2015, meeting with Superintendent Kenworthy. The record lacks credible evidence to show Respondent either used his position as a State Representative or any efforts to manipulate Superintendent Kenworthy into addressing the delegation meeting incident with Mrs. Downing. Moreover, no reliable evidence regarding funding is interconnected with Respondent. When the meeting took place with Superintendent Kenworthy, the Okeechobee high school funding request was still pending at stage one before the Pre-Application Review Committee at the Department of Education. Respondent does not play any role with the Pre-Application Review Committee. Furthermore, the funding issue never went before the Legislature since the request was denied at the agency level stage for not meeting the critical need test.

58. The record also lacks competent substantial evidence demonstrating Representative Pigman's words were retaliatory or threatening. Although, the undersigned finds that Respondent's

statement that the incident will be in the "back of my mind when thinking about the school district" was a poor choice of words, at most, the statement can only be perceived as nebulous because the statement lacks any specificity.

59. The Advocate contends in its Proposed Recommended Order that during the discovery process, it found that Respondent or another received the special benefit of a zone waiver being granted; and therefore, the third element of section 112.313(6) (c) is met. The undersigned rejects such a contention.

60. It has long been established that making reference to a statutory violation without supporting factual allegations does not place Respondent on notice of the charges against him.

Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996) (reference to the statute without supporting factual allegation insufficient to place Appellant on notice of charges against him). Here, the Order Finding Probable Cause fails to allege any zone waiver facts and the discovery process is not an adequate method to either charge a violation or place Respondent on notice to defend himself. It is noteworthy to point out that the undersigned already ruled on this issue during the hearing. As such, the undersigned will neither consider nor find a violation regarding the zone waiver since no related facts were alleged in the Order of Finding of Probable Cause charging

document because such a ruling would be a violation of due process.

61. Therefore, the Advocate failed to prove the allegations sought to be established by clear and convincing evidence. Accordingly, no violation of section 112.313(6) has been demonstrated.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that the Florida Commission on Ethics enter a final order and Public Report finding that Respondent, Cary Pigman, did not violate section 112.313(6) and dismiss the case.

DONE AND ENTERED this 27th day of March, 2017, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of March, 2017.

ENDNOTES

^{1/} A request for special facilities funds starts at the Florida Department of Education. A Pre-Application Review Committee at the Department of Education determines whether the project is of critical need. If the Pre-Application Review Committee determines the project is a critical need, then the request goes into the Florida Department of Education's budget, then before the Legislature to approve the budget items as part of the state budget.

^{2/} Superintendent Kenworthy did not ask for funding directly at the Legislative Delegation meeting, but shared the district would be applying for special facilities funding at the Department of Education, and he requested support.

^{3/} Mrs. Downing's contention that she did not make an obscene gesture and "flip a bird" at Respondent but only had her finger on her eyebrow is not found to be credible and is rejected. On December 9, 2015, meeting with Superintendent Kenworthy, Mrs. Downing admitted using her middle finger and that her actions were wrong. She even apologized. Additionally, she acknowledged her obscene behavior a second time in the meeting of December 17, 2015, where Mrs. Downing informed Superintendent Kenworthy that she only did it one time, which is competent evidence that Mrs. Downing used her middle finger as an obscene gesture at Representative Pigman during the delegation meeting.

^{4/} Superintendent Kenworthy's testimony is found to be credible regarding the December 8, 2015, meeting, and his notes, Respondent's Exhibit 2, persuaded the undersigned to resolve conflicts in his favor.

^{5/} Based on the candor and demeanor and Respondent's Exhibit 2, Superintendent Kenworthy's testimony is found to be more credible than Mrs. Downing.

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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.