FLORIDA
COMMISSION ON ETHICS
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BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

CONFIDENTIAL

In re: Colleen Reilly,

Respondent. **Complaint No. 15-085**

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ADVOCATE'S RECOMMENDATION

The undersigned Advocate, after reviewing the Complaint and Report of Investigation filed in this matter, submits this Recommendation in accordance with Rule 34-5.006(3), F.A.C.

RESPONDENT/COMPLAINANT

Respondent, Colleen Reilly, served as Interim Orange County Clerk of Courts. Complainant is Jeffrey Ashton of Orlando, Florida.

JURISDICTION

The Executive Director of the Commission on Ethics determined that the Complaint was legally sufficient and ordered a preliminary investigation for a probable cause determination as to whether Respondent violated Sections 112.313(6), and 112.313(7)(a), Florida Statutes. The Commission on Ethics has jurisdiction over this matter pursuant to Section 112.322, Florida Statutes.

The Report of Investigation was released on September 4, 2015.

ALLEGATION ONE

Respondent is alleged to have violated Section 112.313(6), Florida Statutes, by obtaining substantial funds from Orange County, which she claimed as a severance package, while still employed as Interim Clerk of Courts.

APPLICABLE LAW

Section 112.313(6), Florida Statutes, provides as follows:

> 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.

The term "corruptly" is defined by Section 112.312(9), Florida Statutes, as follows:

> "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.

In order to establish a violation of Section 112.313(6), Florida Statutes, the following elements must be proved:

1. Respondent must have been a public officer or employee.

2. Respondent must have:
   a) used or attempted to use his or her official position or any property or resources within his or her trust,
   or
   b) performed his or her official duties.

3. Respondent's actions must have been taken to secure a special privilege, benefit or exemption for him- or herself or others.

4. Respondent must have acted corruptly, that is, with wrongful intent and for the purpose of benefiting him- or herself or another person from some act or omission which was inconsistent with the proper performance of public duties.

ANALYSIS

In December 2009, Respondent entered into an employment agreement with the Orange County Clerk of Courts (Clerk) Lydia Gardner to serve as the Clerk's Chief Administrative Officer. (ROI 10) The term of the agreement was to "continue as long as Lydia Gardner remains Clerk." (ROI 10) According to the agreement, Respondent's termination of employment would be "by the Clerk when employment with the Clerk's office ends for any reason other than voluntary resignation by the CAO." (ROI 10, Exhibit B)

On May 8, 2013, Governor Rick Scott appointed Respondent to replace Lydia Gardner, upon her death, as interim Orange County Clerk of Courts. (ROI 5, 6) Although Respondent was classified officially as on a leave of absence as CAO during her term as Interim Clerk, she performed the duties of both positions for the duration of her tenure. (ROI 6)

On May 9, 2013, Stephan Carter, Orange County Clerk of Courts' then-General Counsel, visited Respondent in her work area and called her into a spare office. (ROI 9) According to Tracy Gasinski, the Clerk's Payroll Administrator, Carter informed Respondent that as a result of the Clerk's death, his and Respondent's employment agreements with the Clerk's Office were terminated and they should receive the severance "payout" due to them pursuant to the terms of their agreements. (ROI 9)

Gasinski stated that Carter informed her that Respondent, as the Interim Clerk of Court, approved the payouts, and that he insisted numerous times that the payouts be direct deposited into their bank accounts. (ROI 11) Further, Carter informed Gasinski that the payout was a confidential matter, instructing her to keep it quiet. (ROI 11) Gasinsk noted that direct deposit of

a "special payroll," something other than the normal payroll, is not the normal method of operation in the Clerk's Office. (ROI 11) Gasinski explained that a special payroll is always administered through a paper check, not direct deposit. (ROI 11) Gasinski processed the request within 24 hours to both Respondent's and Carter's bank accounts. (ROI 11) Respondent received $92,816.24, which included severance and bonus pay, along with a buyout of vacation hours. (ROI 12) The net payout was $65,307.87. (ROI 12)

Approximately two days after Respondent received her payout, Carter informed Gasinski that he and Respondent were not happy with the amount of money she deposited into their accounts and they believed they were due more. (ROI 13) Gasinski explained she interpreted their agreements to base the payout amounts to equal six months of salary. (ROI 13) Carter informed Gasinski that they wanted the time calculated by the days -180 days verses six months- and that their sick leave payout was incorrectly calculated. (ROI 13) Gasinski voided the original deductions from the payouts and, within two days, Respondent has reimbursed the Clerk's Office for her payout amount of $65,307.87 through a personal check. (ROI 13) It was Carter pressuring Gasinski for more money that apparently exposed a matter that may have otherwise gone undetected. (ROI 30)

Gasinski reported that she began to feel uncomfortable with the matter because she had never arranged a payout in the manner in which these payouts occurred. (ROI 14) In the past, there was always paperwork from Talent Management – an Employee Change Notice (ECN) – but there was no ECN for Respondent. (ROI 14) Gasinski explained that she proceeded without an ECN in this case because the situation was presented to her through employees with the highest authority in the Clerk's Office. (ROI 14) Gasinski contacted her department head, Chief Financial Officer Mike Murphy, who informed her that because there was an employment

agreement in place, the matter was not payroll-related and he advised her to contact Talent Management. (ROI 18) For this reason and due to her discomfort, Gasinski contacted the Director of Talent Management, Joann Gammichia, and asked for her assistance. (ROI 14, 18) Gasinski told Gammichia that Carter was pressuring her to get the paperwork completed by the end of the day because Respondent wanted it completed before Carter left work that day. (ROI 17) Gammichia, who was "shocked" by the situation, instructed Gasinski not to proceed with the new payout without the proper documents from Talent Management and the required signatures. (ROI 15, 17) When Carter learned that Gammichia was involved, he became upset and informed Gasinski that he would meet with Gammichia about the situation. (ROI 15) According to Gammichia, when Carter came to her office they had a "confrontation." (ROI 19) According to Gammichia, Carter was "hostile and threatening to her" and informed her that she was in direct violation of an order from the Clerk, that she had no authority in the matter, no right to interfere, and he demanded that she "get out of his personal business." (ROI 19)

Gammichia then met with her supervisor, Cathi Balboa, and after review of the agreements decided that the payout request was "out of line" because their interpretations of the agreements differed from Respondent and Carter's interpretation. (ROI 20) They believed the contract was a termination of employment severance payout and not a contract termination payout. (ROI 20) They contacted Respondent, who was at home sick that day, and Respondent became confrontational and upset that Gammichia and Balboa were involved in the matter and Respondent told them to "butt out." (ROI 20)

The next day, Respondent called a meeting with Balboa, Murphy, and Carter. (ROI 20) At the meeting, Respondent informed them that she was ending both contracts and Respondent determined that she and Carter should be paid according to the terms of the agreements as they

requested. (ROI 21) Respondent and Carter refused to initiate ECNs so Gammichia did so indicating an "action code 24 (termination), and included the following comment: 'End of contract payout of $83,295.20 180 day salary per contract. Vacation and sick leave will remain intact.'" (ROI 21) Respondent refused to sign that ECN. (ROI 21) Respondent signed the ECN she had changed to read: "action code 25 (other), with the comment, CAO on leave of absence while serving in court appointed position." (ROI 21) Respondent had Carter's ECN changed from: "action code 25 (other) with the comment, 'End of contract payout of $106,449.01 ($23,980.50 vacation, $5,624.51 sick, $76,844.00 180 days salary per contract). Carried over 56 hour [sic] of vacation'" to read: "action code 25 (other)," with the comment, "Rate of pay now including deferred compensation." (ROI 22)

After an ECN was signed, Carter requested that 56 hours be left in his vacation leave account and that he be paid for 100 percent of his sick leave, which is against office policy. (ROI 15) According to the Clerk's Office policy, upon separation from employment employees only receive 25 percent of sick leave payout. (ROI 15) On May 23, 2013, Gasinski processed the second payout checks for Respondent and Carter. (ROI 15) Respondent received a gross amount for a severance and bonus payout of $115,329.60, which did not include her vacation and sick leave balance. (ROI 16) The net amount was $82,152.08. (ROI 16)

In January 2014, Eddie Fernandez was appointed as Clerk. (ROI 6)

Upon notification of the payouts, Fernandez hired a private law firm[1] to conduct a neutral objective investigation of the Clerk's office records relating to the severance payouts for Respondent and Carter. (ROI 7, Exhibit A) The firm provided its "opinion about the propriety or impropriety of the actions taken by Ms. Reilly [Respondent] and Mr. Carter...." (Exhibit A1) The findings include, in part:

[1] Rumberger, Kirk & Caldwell, P.A., Orlando, Florida.

1. Respondent's and Carter's actions created a conflict of interest and "[e]ven if the actions were undertaken negligently or through the exercise of mistake, rather than intent, the lack of judgment and the irresponsible deficiency in due diligence leads us to the conclusion that there are grounds to terminate these senior employees of your office." (Exhibit A1-4)

2. Even though Respondent and Carter had competent, long-term, outside counsel on retainer for employment matters, neither sought counsel's advice to determine the propriety of the payments. (Exhibit A2)

3. The Clerk's Office should contact the Florida Department of Law Enforcement to review the matter. (Exhibit A4)

4. There is sufficient ground to terminate Respondent and Carter. (Exhibit A4)

5. The Clerk's Office should demand full reimbursement of the payments made, separate from any severance obligations. (Exhibit A4)

6. There was no contractual basis for the severance payouts to either Respondent or Carter. (Exhibit A11-13)

On April 16, 2014, the Florida Department of Law Enforcement (FDLE) received a request from the Clerk Fernandez, to investigate misconduct allegations against Respondent. (ROI 5) FDLE indicated that "[p]robable cause exists to charge Stephan Carter and Colleen Reilly [Respondent] with Grand Theft, a felony of the first degree, in violation of Florida Statute 812.014(2)(a)1. Specifically, the Clerk's Office was deprived a total of $271,772.71 for 'severance' to Carter and Reilly [Respondent] when they were in fact ineligible for the payouts." (Complaint p. 40) Jeffrey L. Ashton, State Attorney, Ninth Judicial Circuit, declined to prosecute because "we have not found the evidence sufficient to warrant the filing of criminal charges...." (ROI 5, Complaint p. 3)

The evidence indicates that Respondent corruptly used or attempted to use her official position as Interim Clerk of Courts to secure a special privilege or benefit for herself. According to Carter, he and Respondent spoke about their employment agreements the day after the Clerk died. (Exhibit A10) They considered a number of possibilities regarding their future employment

and their employment agreements. (Exhibit 10A) They felt they might not be retained by the new Clerk of Court. (Exhibit 10A) They considered taking the position that their contracts/employment agreements did not expire at Gardner's death and to ask the new clerk to honor the agreements. (Exhibit 10A) They concluded that their unified position would be that they were entitled to the severance and, to remove the question from the control of the new Clerk, Respondent would terminate both of them while Respondent was still in office. (Exhibit 10A) However, they would continue their employment relationships with the Clerk of Courts. (Exhibit 10A) Even though it was, as Carter stated "debatable," whether severance would be owed if the new Clerk terminated their employment, they sought to quickly seek the money. (ROI 9, Exhibit A10)

Respondent's corrupt intent to misuse her office for personal benefit is evidenced also by her conduct:

- Respondent's agreement provided that the ending of her employment with the Clerk's Office for any reason would constitute a "termination" of the agreement requiring the payment of severance; Respondent demanded a severance payout although her employment did not end. (Exhibit A12)

- Respondent's agreement stated that there would not be a severance payout if Respondent's employment were terminated by resignation; Respondent terminating her own agreement appears to be the equivalent of a voluntary resignation in which payment would not be warranted. (Exhibit A12)

- All employee movement and payment matters are routed through Talent Management and are accompanied by an ECN. (ROI 31) Respondent became confrontational and upset and told other employees to "stay out of it" and "butt out" when Talent Management personnel became involved. (ROI 20, 28)

- Respondent attempted to bypass the normal channels for financial payouts and went directly to payroll, bypassing Talent Management, and attempted to avoid the normal, necessary paperwork. (ROI 17, 19)

- Respondent would not sign an ECN which included details of her payout. (ROI 21)

- Respondent called a meeting of those employees who questioned the payouts and started out by asking what they believed their roles were in the organization and where their loyalties lay. (ROI 29)

- Although all the other employees involved in this matter held a different interpretation of the agreements than Respondent or Carter, Respondent prohibited them from consulting the Clerk's labor attorney who was on retainer because it was a "private" matter. (ROI 29, Exhibit A2)

Respondent, as a public official, used her official position and/or office to obtain direct personal financial gain for herself and another which she knew or should have known she was not entitled to receive.

Therefore, based on the evidence before the Commission, I recommend that the Commission find probable cause to believe that Respondent violated Section 112.313(6), Florida Statutes.

ALLEGATION TWO

Respondent is alleged to have violated Section 112.313(7)(a), Florida Statutes, by obtaining substantial funds from Orange County, which she claimed as a severance package, while still employed as Interim Clerk of Courts.

APPLICABLE LAW

Section 112.313(7)(a), Florida Statutes, provides as follows:

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP. (a) No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her

private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

In order to establish a violation of Section 112.313(7), Florida Statutes, the following elements must be proved:

1. Respondent must have been a public officer or employee.

2. Respondent must have been employed by or have had a contractual relationship with a business entity or an agency.

3. Such business entity or state or agency must have been subject to the regulation of, or doing business with, the agency of which the Respondent was an officer or employee.

OR

1. Respondent must have been a public officer or employee.

2. Respondent must have held employment or a contractual relationship that will:

a) create a continuing or frequently recurring conflict between the Respondent's private interests and the performance of the Respondent's public duties;

or

b) impede the full and faithful discharge of the Respondent's public duties.

ANALYSIS

The facts under Allegation One apply to this analysis also.

The first part of Section 112.313(7)(a), Florida Statutes, prohibits a public officer or employee from having an employment or contractual relationship with a business entity doing business with or subject to the regulation of the Orange County Clerk of Courts. No conflict of interest is created under this part of the statute because Respondent did not have a prohibited relationship with another business entity which was doing business with or subject to regulation by the Respondent's employer-agency.

The second part of Section 112.313(7)(a), Florida Statutes, prohibits private employment of a public employee if the employment would create a continuing or frequently recurring conflict between the employee's private interests and the performance of her public duties, or would impede the full and faithful discharge of her public duties. For purposes of the Code of Ethics, a "conflict of interest" is defined in Section 112.312(8), Florida Statutes, to mean "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest." Based upon this definition, the Court in Zerweck v. State Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982), held that Section 112.313(7)(a) "establishes an objective standard which requires an examination of the nature and extent of the public officer's [or employee's] duties together with a review of his private employment to determine whether the two are compatible, separate, and distinct or whether they coincide to create a situation which 'tempts dishonor.'" In essence, the statute recognizes that one cannot "serve two masters." It is not alleged that Respondent held outside, private employment in addition to her public duties, therefore, the second part of Section 112.313(7)(a), Florida Statutes, is not applicable to the facts in this matter either.

Therefore, based on the evidence before the Commission, I recommend that the Commission find no probable cause to believe that Respondent violated Section 112.313(7)(a), Florida Statutes.

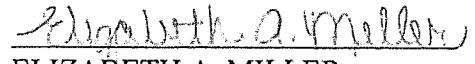
RECOMMENDATION

It is my recommendation that:

1. There is probable cause to believe that Respondent violated Section 112.313(6), Florida Statutes, by obtaining substantial funds from Orange County, which she claimed as a severance package, while still employed as Interim Clerk of Courts.

2. There is no probable cause to believe that Respondent violated Section 112.313(7)(a), Florida Statutes, by obtaining substantial funds from Orange County, which she claimed as a severance package, while still employed as Interim Clerk of Courts.

Respectfully submitted this 21st day of September, 2015



ELIZABETH A. MILLER
Advocate for the Florida Commission
on Ethics
Florida Bar No. 578411
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 414-3300, Ext. 3702