FLORIDA
COMMISSION ON ETHICS
AUG 08 2022
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BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re: Ernesto Torres,

Respondent. **Complaint No.: 22-027**

_____/

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, Ernesto Torres, served as a member of the City Commission of the City of St. Augustine Beach, Florida. Complainant is Daniel Carswell of St. Augustine Beach, 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 Article II, Section 8(g)(2), Florida Constitution,[1] and Sections 112.313(2) and 112.313(6), 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 July 21, 2022.

[1] This section will be redesignated as Article II, Section 8(h)(2) on December 31, 2022.

ALLEGATION ONE

Respondent is alleged to have violated Article II, Section 8(g)(2), Florida Constitution, by abusing his public position to obtain a disproportionate benefit for his wife and/or himself.

APPLICABLE LAW

Article II, Section 8, provides as follows:

> **Ethics in government.**—A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:
>
> (g)(1) A code of ethics for all state employees and nonjudicial officers prohibiting conflict between public duty and private interests shall be prescribed by law.
>
> (2) A public officer or public employee shall not abuse his or her public position in order to obtain a disproportionate benefit for himself or herself; his or her spouse, children, or employer; or for any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest.

ANALYSIS

Respondent served as a member of the St. Augustine Beach City Commission from 2020 until his resignation in January 2022, which was precipitated by the facts of this case. (ROI 9) During the late evening hours of January 22, 2022, Respondent's then-wife, Nicole Torres', vehicle was pulled over by law enforcement whereby she was placed under arrest and charged with Driving Under the Influence (DUI). (ROI 9) Respondent was a passenger in the car. (ROI 9)

At 12:13 a.m. on January 23, 2022, St. Augustine Beach Police Commander Travis Harrell placed a call to Chief Daniel Carswell[2] informing him that Mrs. Torres was stopped for a traffic violation resulting in her arrest for DUI after she refused to submit to a field sobriety test. (ROI 4,

[2] Unless otherwise stated, all officers are affiliated with the St. Augustine Beach Police Department.

5, 9) Respondent incessantly began calling Commander Harrell, who did not answer Respondent's calls. (ROI 4)

Thereafter, Respondent incessantly began calling Chief Carswell and, after not answering Respondent's multiple calls, Chief Carswell finally answered at 12:25 a.m. (ROI 4) He observed that Respondent's speech was mumbled and slurred as though intoxicated. (ROI 4) Respondent informed Chief Carswell that his wife was in handcuffs and sitting in the back of a patrol vehicle. (ROI 4) During the course of 29 phone calls to Chief Carswell, Respondent repeatedly said, "Chief, I'm sorry," "Come on Chief, please," "Dan, Dan, please," "Come on Dan. My wife is in the back of the car. Help me!" and "If you don't help me, think of all the credibility you will lose with me and the Commission." (ROI 4, 5)

After one particular call to Chief Carswell, Respondent handed Corporal Bruce Cline his phone, who advised Chief Carswell that Respondent's conduct was becoming borderline criminal due to obstruction which could result in his arrest. (ROI 4) Chief Carswell instructed Corporal Cline to handle the situation as he would for any other citizen and to advise Respondent to stop calling him. (ROI 4, 5) The calls did not stop and at 12:35 a.m. Chief Carswell informed Respondent that he was communicating with his staff and his repeated calls were interfering with his duties. (ROI 4) At 12:40 a.m., Chief Carswell advised Respondent that his wife would be taken to jail and he should accept the officers' offer to be transported home. (ROI 4)

Respondent refused to accept that his wife was being arrested. (ROI 4, 8) Corporal Cline asked Respondent several times to stay in his vehicle and contact someone to take custody of the vehicle or else it would be towed. (ROI 8) When Corporal Cline returned to his patrol vehicle, Respondent unsteadily stumbled toward the patrol vehicle and began pulling on the door handle in an attempt to open the door. (ROI 9) Corporal Cline was uncomfortable with Respondent's

actions because of the potential implications concerning his career and the police department. (ROI 8)

Respondent's comments to law enforcement at the scene were: "I served overseas with [Sheriff] Robby [Hardwick]. Really? This is what you are going to do? That's fine. I will call the Sheriff," "I've been to Iraq with [Sheriff] Robbie Hardwick. What are you going to do? Arrest me too," "Do you feel good about yourselves? I voted for your pay raises. You're welcome," and he began clapping his hands when Mrs. Torres was placed under arrest, and stated, "Congratulations guys, congratulations. You're a joke. You guys are a freaking joke." (ROI 4, 6, 7, 8, 9)

When Chief Carswell warned Respondent not to call Sheriff Hardwick and, again, to accept a ride home from the officers, Respondent replied, "Are you Serious? You are not going to help me?" (ROI 4) Chief Carswell advised Respondent that his conduct placed him in a tough situation. (ROI 4) Not only was he losing respect for Respondent, but it would also be unethical for him to intervene, and he could lose his job by interfering. (ROI 4) Furthermore, the credibility of the police department would be damaged if he helped Respondent. (ROI 4) Respondent replied, "Well, think of all the credibility you will be losing with me if you don't help me." (ROI 4, 5) Chief Carswell took this unappreciated comment as a direct threat and he hung up the phone. (ROI 4)

Subsequently, Respondent attempted to reach Chief Carswell by phone 17 more times and once by text. (ROI 4) Respondent placed a total of 29 phone calls to Chief Carswell and 18 unanswered calls and texts to Commander Harrell. (ROI 4, 7)

A use of position may occur in many ways. One is when the public office is referenced or invoked. "[T]he act of identifying oneself as an officeholder is a 'use' of office." CEO 91-38, CEO 99-08. Chief Carswell presumably knew Respondent served on the City Commission even though Respondent never mentioned his public position to the Chief. (ROI 6) Respondent never

specifically asked him to do anything, although, he repeatedly pleaded for help. (ROI 5, 6) Corporal Cline stated that Respondent mentioned he was a "Commissioner" and asked, "Don't you know who I am?" (ROI 6) This may be appropriate, as in the political context, but here, Respondent invoked his official status in an inappropriate manner.

Here, Respondent's ability to excessively phone the police chief and a commander to seek a favor is a disproportionate benefit. Most individuals would not have had a direct line of communication to high level officers of the police department to seek favors. It is doubtful the officers would have tolerated such behavior from others. Respondent did not treat his public position as a public trust. He did not use the powers and resources of his public office only to advance the public interest but, rather, to obtain personal benefits or pursue private interests during a law enforcement encounter.

Therefore, based on the evidence before the Commission, I recommend that the Commission find probable cause to believe that Respondent violated Article II, Section 8(g)(2), Florida Constitution.

ALLEGATION TWO

Respondent is alleged to have violated Section 112.313(2), Florida Statutes, by soliciting a favor from law enforcement with the understanding that his official actions or judgment would be influenced.

APPLICABLE LAW

Section 112.313(2), Florida Statutes, provides as follows:

> SOLICITATION OR ACCEPTANCE OF GIFTS. No public officer, employee of an agency, local government attorney, or candidate for nomination or election shall solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service, based upon any understanding that the vote, official action, or judgment of the public officer,

employee, local government attorney, or candidate would be influenced thereby.

In order to establish a violation of Section 112.313(2), Florida Statutes, the following elements must be proved:

1. Respondent must have been either a public officer, a public employee or a candidate for nomination or election.

2. Respondent must have solicited or accepted something of value to him or her, including a gift, loan, reward, promise of future employment, favor, or service.

3. Such solicitation or acceptance must have been based upon an understanding that the Respondent's vote, official action or judgment would be influenced thereby.

ANALYSIS

The facts are set forth above under Allegation One. This allegation requires the public officer to be the recipient of the thing of value he solicited or accepted. Respondent solicited something *presumably* of value to him – that is, a favor – from law enforcement officers to release his wife without arrest.

The ethics law prohibits a transaction in which there is *quid pro quo* ("this for that"). In other words, the law prohibits a public official from taking official action in exchange for a personal benefit. The archetypal example being someone who provides "this money" for "that action" by a public official.

Several questions arise: must the "this for that" be in the form of an explicit agreement, therefore, must there be a meeting of the minds; or if one of the parties merely asked for something from the other is that enough?

These questions were tackled by the Administrative Law Judge (ALJ) in the ethics case *In Re: Rudy Maloy* (2003 WL 1960343 (Fla. DOAH Recommended Order, Apr. 25, 2003)) (Final Order No. 03-584, Oct. 16, 2003). In the *Maloy* case, the ALJ wrote:

> It is clear that the noun "understanding" as used in Section 112.313(2) was intended to denote "a mutual agreement not formally entered into but in some degree binding on each side." See Merriam-Webster OnLine Dictionary. The statute thus requires that there be a meeting of the minds between the public officer who receives (or is requesting) the gift and the person who confers (or is being asked for) the gift pursuant to which each understands that the gift is being given (or solicited) for the purpose of influencing some official action of the recipient.

In this case, a meeting of the minds did not occur between Respondent and any of the law enforcement officers. *Cf. Castillo v. State*, 835 So. 2d 306, 309 (Fla. 3d DCA 2002) (evidence was insufficient to convict police officer on criminal charge of accepting unlawful compensation where, in the absence of any spoken understanding, the officer could simply have thought that the driver voluntarily had sex with him, rather than - as she believed - to avoid being arrested for DUI). Accordingly, the alleged violation in this case cannot be established.

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(2), Florida Statutes.

ALLEGATION THREE

Respondent is alleged to have violated Section 112.313(6), Florida Statutes, by using or attempting to use his public position to secure favorable treatment for himself and/or his wife.

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

The facts are set forth above under Allegation One. As a public official, Respondent may not use his public office for his own private gain or for that of other persons. Respondent invoked his official position to influence law enforcement officers to secure an unwarranted privilege (i.e., release of his wife) that was not properly available. Thus, elements one, two, and three are established.

Corrupt intent is shown where the public official acted with wrongful intent, that is, with reasonable notice that his conduct was inconsistent with the proper performance of public duties and would be a violation of the law or the Code of Ethics in Part III of Chapter 112. *Blackburn v. Commission on Ethics*, 589 So. 2d 431 (Fla. 1st DCA 1991) Prior Commission final orders and opinions provide fair and reasonable notice as to what conduct is prohibited by Section 112.313(6), Florida Statutes, *Blackburn, supra.*

In this matter, Respondent wanted the officers to act contrary to their official duties and possibly departmental policy. They had knowledge of Respondent's position of power relative to their weaker positions. His implicit threats ("I voted for pay raises for you guys;" "If you don't help me, think of all the credibility you will lose with me and the Commission;" I will call the Sheriff, etc.) caused the Chief and Corporal Cline to reasonably fear retribution. It is the interpretation of the targeted individuals, the law enforcement officers, that is relevant as "a threat is not a state of mind in the threatener; it is an appearance to the victim." *U.S. v. Holzer*, 816 F.2d 304, 310 (C.A.7 1987) In *Holzer*, a judge repeatedly asked lawyers appearing before him for loans. No overt threats were made and there was no evidence that the judge did actually retaliate against anyone who turned him down. The court said, "When a judge urgently and insistently asks a lawyer in a case before him for a loan, the request connotes an implied threat (or so a jury could reasonably conclude) to rule against the lawyer if he turns the judge down," and that the judge "could leave [the lawyers] to draw the natural inference that if they didn't play ball he might retaliate." *Id.* at 310.

Respondent's interference with the officers' duties and his statements and conduct in the early morning hours show a clear intent to use his position as a commissioner to improperly influence the officers' actions.

Respondent admitted his conduct, behavior, and comments were fueled by alcohol and as described in the complaint. (ROI 9) He took responsibility for his actions and has left office. Regardless, Respondent's corrupt actions to improperly use his position to coerce law enforcement officers to grant a significant benefit to his wife is a violation of the law.

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.

RECOMMENDATION

1. There is probable cause to believe that Respondent violated Article II, Section 8(g)(2), Florida Constitution, by abusing his public position to obtain a disproportionate benefit for himself and/or his wife.

2. There is no probable cause to believe that Respondent violated Section 112.313(2), Florida Statutes, by soliciting a favor from law enforcement with the understanding that his official actions or judgment would be influenced.

3. There is probable cause to believe that Respondent violated Section 112.313(6), Florida Statutes, by using or attempting to use his public position to secure favorable treatment for himself and/or his wife.

Respectfully submitted this 9th day of August, 2022.

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CEO 91-38 -- July 19, 1991

CONFLICT OF INTEREST

CITY COUNCIL MEMBER USING STATIONERY SIMILAR TO OFFICIAL CITY STATIONERY AND NOT PURCHASED WITH PUBLIC FUNDS FOR PURPOSES NOT DIRECTLY RELATED TO CITY BUSINESS

To: (Name withheld at the person's request.)

SUMMARY:

No prohibited conflict of interest is created automatically by a city council member's use of stationery similar to the city's official stationery for campaign, fund-raising, and personal purposes, when the stationery is not paid for with city funds. However, the use of such stationery in a particular context may constitute a corrupt misuse of official position in violation of Section 112.313(6), Florida Statutes, to the same extent as the use of plain stationery in a letter that refers to the council member's public position.

QUESTION:

Does the Code of Ethics for Public Officers and Employees prohibit a city council member from using privately purchased stationery bearing a reproduction of the image of the city's seal, the title of the Council member, the name of the city, the city hall address and telephone number, and a statement that the stationery was not paid for with city funds, for purposes not directly related to city business?

Your question is answered in the negative.

In your letter of inquiry, telephone conversation with our staff, and further written materials transmitted to our staff, you advise that . . . . , a member of the City Council of the City of Lauderhill, inquires whether the Code of Ethics prohibits her from using stationery bearing a reproduction of the seal of the City, her title, her name, the name of the City, the address and telephone number of City hall, and a statement that the stationery was not paid for with City funds, for campaign purposes, fund-raising purposes, and personal letters. You further advise that the stationery would not be paid for with public funds.

Section 7.03 of the City's charter provides:

> The city clerk shall act as the clerk of the council and shall perform such other duties as may be prescribed by the mayor. As clerk, s/he shall have custody of the public records of the city, shall be official custodian of the seal of the city and shall affix the said seal to all instruments requiring same.

It is the position of your office that this provision of the City Charter prohibits the use of the actual impression seal of the City by anyone except the City Clerk, but that the Charter does not in any way prohibit the use of the seal by elected officials for other purposes, such as the reproduction of the image of the seal on stationery utilized by the elected officials. The stationery in question would have the image of the seal reproduced on it and would not bear the impression seal.

Section 112.313(6), Florida Statutes, is the provision of the Code of Ethics applicable to your inquiry. It provides:

> MISUSE OF PUBLIC POSITION.--No public officer or employee of an agency shall corruptly use or attempt to use his official position or any property or resource which may be within his trust, or perform his official duties, to secure a special privilege, benefit, or exemption for himself or others. This section shall not be construed to conflict with s. 104.31.

For purposes of this provision, the term "corruptly" is defined 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 public duties. [Section 112.312(7), Florida Statutes.]

This provision prohibits the Council member from corruptly using property or resources within her trust to secure for herself or others a special privilege, benefit, or exemption.

Arguably, use of the City seal, one's official title, and the name of the City even on stationery not paid for by City funds constitutes a use of public position that may be violative of Section 112.313(6), when such use has no public purpose. However, a situation virtually identical to the facts you present recently came before this body in the context of a complaint, In re ILENE LEIBERMAN, Complaint No. 90-71. In that matter, the Mayor of the City of Lauderhill used stationery the same as that proposed for use by the Council member, with the title and personal name being the only differences, for writing City electors and recommending to them particular candidates in a City Council election. There, we found that probable cause did not exist to believe that the Mayor had corruptly misused her official position. Previously, we found in In re John Curlee, Complaint No. 89-45, that a highway patrolman's wearing of his uniform while appearing in a television commercial for a Florida Senate candidate did not violate Section 112.313(6). The argument put forth by the highway patrolman was that his uniform was part of his persona and that its use was protected as constitutional free expression. It therefore seems equally true, under the facts before us, that the Council member's use of such stationery, provided it is not paid for with City funds, is not automatically prohibited by the Code of Ethics.

We are of the opinion that whether a corrupt misuse of official position has occurred in a given situation depends on how and for what purpose the stationery will be used, rather than upon the fact of its use. In terms of whether the Council member's letter would be a corrupt misuse of position, we see no difference between her using the proposed stationery and her using plain stationery for a letter in which she refers to herself as a Council member. Either

way, the recipient of the letter is informed of the Council member's public position. This may be appropriate, as in the political contexts noted above, or it may be inappropriate, for example, if the letter were being sent to settle a strictly private dispute with a debtor or creditor.

While we do not possess the authority to make a final interpretation or adjudication of the meaning of the provision of the City Charter quoted above, there does seem to us to be a distinction between use of the City's official impression seal on stationery or documents when such use is not for a public purpose and use of the image of the seal in printed form on stationery not paid for by public funds. Use of the impression seal for other than public purposes would inhibit its availability for use for public purposes and could constitute or lead to fraudulent authentication of documents as official records or true and correct copies of public records.

Further, the Legislature has recently enacted Chapter 91-59, Laws of Florida, which provides:

> Section 1. The governing body of a county or municipality may, by ordinance, designate an official county or municipal seal. The manufacture, use, display, or other employment of any facsimile or reproduction of the county or municipal seal, except by county or municipal officials or employees in the performance of their official duties, without the express approval of the governing body is a second-degree misdemeanor, punishable as provided in section 775.082 or section 775.083, Florida Statutes.
>
> Section 2. This act shall take effect upon becoming a law.

If the City Council of Lauderhill designates an official municipal seal pursuant to this law, you should request another opinion from us, as this law would appear to limit your use of a reproduction of the City seal on stationery not used for official business.

Accordingly, we find that use of stationery not purchased with public funds and bearing a reproduction of the city's seal, the title of the council member, the name of the city, the city hall address and telephone number, and a statement that the stationery was not paid for with city funds, for purposes not directly related to city business, is not prohibited by the Code of Ethics for Public Officers and Employees.

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

CEO 99-8 -- June 8, 1999

MISUSE OF POSITION

LETTER OF RECOMMENDATION WRITTEN ON OFFICIAL STATIONERY OR ON PERSONAL STATIONERY WHICH IDENTIFIES CIRCUIT COURT CLERK'S OFFICIAL POSITION

To: JoAnne Holman, St. Lucie County Clerk of Circuit Court (Fort Pierce)

SUMMARY:

A Circuit Court Clerk's providing a letter of recommendation for an appointment, job, or grant for a person who has nothing to do with the business of the Clerk's Office or of any agencies that it deals with, using stationery purchased with her own personal funds that identifies the writer as the Circuit Court Clerk, would not violate any provision of the Code of Ethics for Public Officers and Employees, so long as there is no quid pro quo of value to the Clerk in exchange for her recommendation, such as a campaign contribution, and there is no other benefit to the Clerk other than the incidental political benefit of gaining the goodwill of the constituent. Providing such a letter of recommendation using official stationery and public resources would not violate any provision of the Code of Ethics for Public Officers and Employees so long as there is no quid pro quo of value to the Clerk in exchange for her recommendation, such as a campaign contribution, where there will be no other benefit to the Clerk other than the incidental political benefit of gaining the goodwill of the constituent, and where there is no other rule, regulation, or policy prohibiting the use of the resources of the office for such purposes.

QUESTION 1:

Does the Code of Ethics for Public Officers and Employees prohibit you, a Circuit Court Clerk, from writing a letter of recommendation for an appointment, job, or grant for a person who has nothing to do with the business of the Clerk's Office or of any agencies that it deals with, using stationery purchased and mailed using your own personal funds but which identifies your official position?

Under the circumstances described below, this question is answered in the negative.

In your letter of inquiry you advise that you have lived in St. Lucie County all of your life and have been employed by the Office of the Clerk of the Circuit Court since 1972. You advise further that you have been the Clerk of the Court since 1993.

Many times, you write, you are asked to write letters in support of young people receiving grants, in support of applications for employment, or recommending someone to serve on a board, matters which in no way relate to the Clerk's office or any agencies with which you deal. In the past, you advise, you have written and mailed such letters on plain stationery and in plain envelopes. However, because you are the Clerk of the Circuit Court 24 hours a day, whether or not you actually are working in your office, you believe that you should be able to write these letters on stationery which identifies you as the Clerk of the Circuit Court, but which you have purchased with your own personal funds.

Along with your letter, you provided a sample of the stationery that you propose using. Rather than containing a facsimile of your Clerk's Office's seal, as your official stationery does, it has pictured together at the top of the stationery on the left side the scales of justice, a gavel, and a book, and at the top on the right side is your name and "St. Lucie County Clerk of Circuit Court."

The Code of Ethics does not contain any provision that expressly addresses the use of one's public position to provide recommendations for others. Section 112.313(6), Florida Statutes, is the provision of the Code of Ethics most applicable to your inquiry. It provides as follows:

> MISUSE OF PUBLIC POSITION.--No public officer or employee of an agency 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.

For purposes of this provision, the term "corruptly" is defined 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. [Section 112.312(9), Florida Statutes.]

This provision prohibits you from using or attempting to use your official position, as Clerk of the Circuit Court, or any resources which may be within your trust to secure a special privilege or benefit for yourself or another, where your actions are taken with wrongful intent for the purpose of obtaining a benefit for yourself or another and are inconsistent with the proper performance of your public duties.

In addition, Section 112.313(2), Florida Statutes, provides:

> SOLICITATION OR ACCEPTANCE OF GIFTS.CNo public officer, employee of an agency, local government attorney, or candidate for nomination or election shall solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service, based upon any understanding that the vote, official action, or judgment of the public officer, employee, local government attorney, or candidate would be influenced thereby.

In essence, this provision prohibits you from taking any action in your official capacity if it is in exchange for anything of value to you.

In CEO 91-38, we found that the use of stationery similar to a city's official stationery for campaign, fund-raising, and personal purposes, even when the stationery was not paid for with city funds, would constitute a corrupt misuse of official position in violation of Section 112.313(6) to the same extent as the use of plain stationery in a letter that refers to a council member's public position would. We noted that use of the city seal, the public official's official title, and the name of the city, even on stationery not paid for with city funds, constitutes a use of public position that may be violative of Section 112.313(6), when such use has no public purpose. We wrote:

> We are of the opinion that whether a corrupt misuse of official position has occurred in a given situation depends on how and for what purpose the stationery will be used, rather than upon the fact of its use. In terms of whether the council member's letter would be a corrupt misuse of position, we see no difference between her using the proposed stationery and her using plain stationery for a letter in which she refers to herself as a Council member. Either way, the recipient of the letter is informed of the Council member's public position. This may be appropriate in the political contexts noted above, or it may be inappropriate, for example, if the letter were being sent to settle a strictly private dispute with a debtor or creditor.

In that opinion, we also referenced In re Ilene Liebermann, Complaint No. 90-71, in which we found no probable cause to believe that Ms. Liebermann had corruptly misused her official position by using stationery bearing, among other things, the seal of the city, her title, and her name, for writing city electors and recommending to them particular candidates. In addition, we referenced In re John Curlee, Complaint No. 89-45, in which we found that a highway patrolman's wearing of his uniform while appearing in a television commercial for a Florida Senate candidate did not violate Section 112.313(6). There, we accepted the argument that the highway patrolman's uniform was part of his persona and its use was protected as constitutional free expression. Consequently, we concluded that where a member of a city council used stationery bearing a reproduction of the seal of her city, her title, the name of her city, the address and telephone number of city hall, and a statement that the stationery was not paid for with city funds for campaign purposes, fund-raising purposes, and personal letters--purposes not directly related to city business--such use was not automatically prohibited by the Code of Ethics.

Although the use of official stationery was not at issue in In re George Keller, Complaint No. 97-169, the use of one's public position was involved. There, we accepted the argument that the official's actions were consistent with the "time honored custom of public officials writing letters of recommendation in response to a constituent's request for himself or herself" and found that there was no probable cause to believe that Mr. Keller, a city council member, had violated Section 112.313(6) by identifying himself as a member of the City Council while testifying as a character witness on behalf of a constituent whom he knew only because she had contacted him to complain about her treatment by a particular police officer.

Where personal stationery is used and no public resources are expended in making the recommendation, your providing a letter of recommendation for an appointment, job, or grant for a person who has nothing to do with the business of the Clerk's Office or of any agencies that it deals with is no different from agreeing to be listed as a character reference. The person reviewing the application will learn, or already know, of your public position and will be given a favorable recommendation of the applicant. Such an action, although it involves the use of public position, would not be "inconsistent with the proper performance of public duties" or made with "wrongful intent." This assumes, of course, that there is no quid pro quo of value to you in exchange for your recommendation, such as a campaign contribution, and that there will be no other benefit to you other than the incidental political benefit of gaining the goodwill of the constituent.

Accordingly, under the circumstances described above we find that your providing a letter of recommendation for an appointment, job, or grant for a person who has nothing to do with the business of the Clerk's Office or of any agencies that it deals with, using stationery purchased with your own personal funds that identifies you as the Circuit Court Clerk, would not violate any provision of the Code of Ethics for Public Officers and Employees.

QUESTION 2:

> Does the Code of Ethics for Public Officers and Employees prohibit you, a Circuit Court Clerk, from writing a letter of recommendation for an appointment, job, or grant for a person who has nothing to do with the business of the Clerk's Office or of any agencies that it deals with, using official stationery and resources of your office?

Under the circumstances described below, this question also is answered in the negative.

As noted above, the Code of Ethics does not contain any provision that directly addresses the use of one's public position to provide a favorable reference for someone. In the absence of some quid pro quo for that official act, the only provision in the Code that would address such actions is the provision that prohibits the "corrupt" misuse of public position to benefit oneself or another.

In In re Thomas R. Mariani, Complaint No. 96-238, we concluded that there was no probable cause to believe that Section 112.313(6) had been violated where a city mayor had written letters of recommendation on city stationery which were processed, copied, and mailed at taxpayer expense. There, it was alleged that, notwithstanding a resolution or policy of the city that official stationery not be used for "expressions of personal opinions" on matters not involving city business, the mayor repeatedly used city stationery to write letters of recommendation for personal friends who had never worked for the city. He also allegedly wrote a letter supporting a church's purchase of some property to the Resolution Trust Corporation on behalf of a local minister whose church had supported him. After investigation, we determined, as we did in the Lieberman case, that, although the act of identifying oneself as an officeholder is a "use" of office, such use of office for the purpose of making recommendations does not violate Section 112.313(6). Next, we found that, because there can only be a violation of Section 112.313(6) where the use of one's public office or the resources thereof is inconsistent with the proper performance of one's public duties and undertaken with wrongful intent and because elected and appointed officials are often called upon to write letters of recommendation or recognition as part of their constituent work, responding to such requests may be said to be a part of a public officer's public duties, not violative of Section 112.313(6) where there is no showing of wrongful intent on the part of the public official to improperly benefit the public official or another. It further appeared from the investigation that the city's policy did not expressly prohibit the use of city resources for such letters of recommendation. We also noted that in In re: Anthony Mosca, Complaint No. 94-56, we had found no probable cause to believe that a violation had occurred where a county commissioner had used county resources to write a "character reference" letter on behalf of an acquaintance being sentenced on DUI charges.

Based on our precedent, we are of the opinion that where public stationery and resources are used in making the recommendation, your providing a letter of recommendation for an appointment, job, or grant for a person who has nothing to do with the business of the Clerk's Office or of any agencies that it deals with would not be "inconsistent with the proper performance of public duties" or done with "wrongful intent," and therefore would not constitute a corrupt use of official position to benefit yourself or the applicant, where there is no quid pro quo of value to you in exchange for your recommendation, such as a campaign contribution, where there will be no other benefit to you other than the incidental political benefit of gaining the goodwill of the constituent, and where there is no other rule, regulation, or policy prohibiting the use of the resources of your office for such purposes.

Accordingly, under the circumstances described above we find that your providing a letter of recommendation for an appointment, job, or grant for a person who has nothing to do with the business of the Clerk's Office or of any agencies that it deals with, using official stationery and public resources, would not violate any provision of the Code of Ethics for Public Officers and Employees.

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 3, 1999 and **RENDERED** this 8th day of June, 1999.

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Charles A. Stampelos
Chair