

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: DAVID N. TOLCES,

Case No. 21-2887EC

Respondent.

RECOMMENDED ORDER

Pursuant to notice, Administrative Law Judge Robert L. Kilbride of the Division of Administrative Hearings (DOAH) held a hearing in the above-styled case on January 13, 2022, via Zoom conference.

APPEARANCES

For Advocate: Elizabeth A. Miller, Esquire
Melody A. Hadley, Esquire
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The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

For Respondent: Mark Herron, Esquire
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STATEMENT OF THE ISSUES

The issues for determination are whether Respondent, David N. Tolces, as Interim General Counsel to the Broward County Housing Authority (BCHA), violated section 112.313(6), Florida Statutes, by using his official position in an attempt to secure a special privilege or benefit for himself and/or his law firm, Weiss Serota Helfman Cole & Bierman, PL (Weiss Serota); and, if so, what is the appropriate penalty to be imposed.

PRELIMINARY STATEMENT

On February 10, 2021, the Florida Commission on Ethics (Commission) issued an Order Finding Probable Cause concluding that Respondent, David N. Tolces, as Interim General Counsel to the BCHA, violated section 112.313(6) by using his official position in an attempt to secure a special privilege or benefit for himself and/or his law firm, Weiss Serota. The case was forwarded to DOAH on September 21, 2021.

A hearing was scheduled for November 22 and 23, 2021. A Joint Motion to Continue was filed on November 15, 2021, and was granted. The hearing was rescheduled for January 13 and 14, 2022. A Joint Prehearing Stipulation was filed by the parties on January 6, 2022.

At the hearing, Advocate called four witnesses: Respondent, Teisha Palmer, Ann Deibert, and Steven Zelkowitz. Respondent, David Tolces, called two witnesses: Mark O' Laughlin and himself.

Advocate offered twenty exhibits into evidence all of which were admitted and will be referred to as "AEx. #." Respondent had no separate exhibits and relied on Advocate's exhibits. To the extent Respondent used any of Advocate's exhibits, they will be referred to as "REx. #." The exhibits included video recordings of several relevant public board meetings of the BCHA.

On January 14, 2022, the undersigned granted Respondent's Unopposed Motion to Extend the Time to Submit Proposed Recommended Orders for 30 days after the filing of the Transcript. The transcript of the proceedings was filed with the DOAH Clerk on February 9, 2022.

Both parties timely filed proposed recommended orders, which were reviewed and considered by the undersigned in the preparation of this

Recommended Order. References to statutes, rules, or regulations are to those in effect on the date of the act, conduct, or omission in question.

FINDINGS OF FACT

The undersigned makes the following findings of material and relevant fact:

The Parties and Witnesses

1. The BCHA is a public housing agency established in June 1969 under the U.S. Housing Act of 1937 and chapter 421 of the Florida Statutes. It is an Independent Special District of the State of Florida. (AEx. 15, Bates stamped p. 55). It has its own policies and does not follow the Broward County government's policies, procedures, and ordinances.

2. BCHA is governed by a five-member Board of Commissioners (Board) appointed to staggered four-year terms by the Governor of Florida. The Board is responsible for hiring the chief executive officer, who is responsible for agency operations. (AEx. 15, Bates stamped p. 55).

3. Ann Deibert had been employed in some capacity by BCHA for 46 years. During all relevant times, she served as the chief executive officer, board secretary, and the contracting officer for the proposal which is the subject of this case: Request for Proposal (RFP) for General Legal Services, Solicitation No. RFP 20-283.

4. From 2001 to 2019, Respondent, David Tolces, practiced local government law with Goren, Cherof, Doody & Ezrol (Goren). In 2014, he became Florida Bar board certified in city/county local government law and currently maintains that certification. (AEx. 17, Bates stamped pp. 130, 136). Board certification identifies lawyers who have special knowledge, skills, and a high proficiency in a designated area of the law. Board certification requires extensive training, studying and testing.¹

¹ <https://www.floridabar.org/about/cert/cert-applications-and-requirements/cert-cc/>

5. Prior to the incidents in question, Respondent had served as general counsel and interim general counsel for the BCHA for approximately 15 years.

6. Respondent served in the position of general counsel through a contract with his law firm and was subject to the Code of Ethics in his position as general counsel and interim general counsel.

7. Respondent testified that he was a "local government attorney" (as that term is defined in chapter 112).

8. Teisha Palmer is an accountant for the BCHA. In late 2019 and 2020, she was the interim acting procurement manager for the BCHA. Palmer served as the BCHA's designated contact person for RFP 20-283.

9. Steven Zelkowitz is currently an attorney with Spiritus Law, LLC. In December 2019 and early 2020, he was employed with the law firm of Fox Rothschild, LLP, which was selected for the award under RFP 20-283. (AExs. 6, 13, Bates stamped p. 46).

Background Regarding the Need for Legal Services at the BCHA

10. For many years, the Goren law firm held a contract with the BCHA to provide legal services, and Respondent was the designated lawyer at the firm serving as the BCHA's general counsel. (AEx. 1, Bates stamped p. 1).

11. In December 2019, Respondent informed the members of the BCHA Board that he was leaving Goren and joining the law firm of Weiss Serota, where he became a partner. (AEx. 1, Bates stamped p. 1; AEx. 17, Bates stamped pp. 159, 163).

12. When Deibert was informed that the Goren firm would not continue as the BCHA's legal representative, the Board unanimously accepted Deibert's recommendation that Respondent remain as interim general counsel until a request for proposal for legal services could be issued and finalized.

The RFP Process Followed by the BCHA to Obtain Legal Services

13. On February 14, 2020, the BCHA Procurement Department issued RFP 20-283, seeking applicants to provide general legal services to the

BCHA. (AEx. 15). Four law firms submitted proposals to the RFP, including Respondent's firm, Weiss Serota.

14. Respondent submitted a response to RFP 20-283 on March 17, 2020, for Weiss Serota. He identified himself as the authorized representative for his law firm. (AEx. 17, Bates stamped pp. 129, 159).²

15. Respondent acknowledged that he had read and fully reviewed RFP 20-283 before he submitted the response on behalf of Weiss Serota.

16. As explained more fully below, paragraph 12 of RFP 20-283 sets forth in detail how communication among the relevant parties could occur, in order to ensure a fair and impartial procurement process. (AEx. 15, Bates stamped p. 64).

17. The BCHA's designated contact person for the RFP was Teisha Palmer. Her email address and phone number were readily accessible and located on the cover of the RFP. (AEx. 15, Bates stamped p. 53).

18. Throughout the RFP, an applicant was referred to as a "proposer" or "respondent." (AEx. 15).

19. The "Proposal Submission Form – Exhibit A" required all proposers to acknowledge and sign the following provisions, which are found in two separate locations in the RFP:

15. Contract Award

By completing, executing and submitting the Form of Proposal, Exhibit A, the proposer agrees to abide by all terms and conditions pertaining to this RFP. (AEx. 15, Bates stamped p. 71)

* * *

² The firm's fee proposal included a monthly retainer of \$4,750.00, plus hourly fees for legal services at the rate of \$235.00 per hour in the first and second year. The retainer increased to \$5,000.00 per month and \$245.00 per hour in the third and fourth year. In addition, there was a separate fee proposed for handling eviction cases. (AEx. 17, Bates stamped p. 149). By any reasonable account, the ability to secure a legal services contract paying those rates and fees would have represented considerable and consistent income to the firm.

3. He/she is agreeing to abide by all terms and conditions pertaining to this solicitation document as issued by BCHA including an agreement to execute a contract form.
(AEx. 17, Bates stamped p. 132)

20. It was undisputed that by signing³ the face of the application and reviewing all the provisions of the RFP, Respondent affirmed that he would abide by all terms and conditions pertaining to the solicitation document.
(AEx. 17, Bates stamped p. 132).

Alleged Violation of the "Cone of Silence"

21. Set out in bolded and underlined text on page 12 of the RFP was paragraph 12. This provision constitutes the heart of this case. Said another way, it was Respondent's alleged violation of this paragraph that formed the basis of the ethics violation asserted by the Commission.

22. Respondent testified that "[e]very paragraph [in the RFP] is important." However, he did not know why paragraph 12 was bolded and underlined for emphasis.⁴

23. Significantly, the RFP stated on page 12:

12. Administrative Terms and Conditions
In order to maintain a fair and impartial competitive process, BCHA shall avoid private communication concerning this procurement with prospective Proposers during the entire procurement process. From the issue date of this RFP until the final award is announced, Proposers are not allowed to communicate about this RFP for any reason with any BCHA staff, any member of the Board of Commissioners, any member of the Board of Directors, or Audit Committee members except through the RFP Point of

³ On March 17, 2020, Respondent signed that provision. (AEx. 17, Bates stamped pp. 132-133).

⁴ It was undisputed that Respondent did not participate in the drafting or preparation of RFP 20-283.

Contact, identified on the cover page, in writing via e-mail, during the Pre-Proposal Conference (if any), as otherwise defined in this RFP or as provided by existing work agreements(s). Prohibited communication includes all contact or interaction, including but not limited to, telephonic communications, emails, faxes, letters, or personal meetings, such as lunch, entertainment, or otherwise. BCHA reserves the right to reject the proposal of any Proposer violating this provision. If any Respondent has any reason, not related to this RFP, to contact any of the above parties, they will be required to disclose to that party that they are a respondent in this solicitation. Failure to adhere to these requirements may result in disqualification from the solicitation.
(AEx. 15, Bates stamped p. 64)

24. This type of provision is commonly referred to as a "cone of silence." Generally, a cone of silence in a governmental procurement document prohibits or strictly limits the type of contact that is permitted between the government agency and those vendors or firms choosing to participate. Strict compliance with this provision is considered important to the integrity of the government solicitation process. In this case, the provision spelled out that "failure to adhere to these requirements may result in disqualification." *Id.*

25. Respondent was familiar with and had dealt with similar cones of silence or "anti-lobbying provisions" in RFPs, during the course of his legal career.

26. Although adherence to the cone of silence was mandatory, a penalty for a violation was discretionary with the BCHA. More to the point, paragraph 12 of the RFP contained strict provisions regarding communications during the solicitation process lasting until a final award was made. The essential provisions of that section are summarized as follows:

a. *The directive to BCHA staff, employees, and Board members:*

No private communication with Proposers

b. *The directive to Proposers:*

No communications for any reason with BCHA

c. *When:*

From the issue date of the RFP, until the final award was announced

d. *Exceptions to the cone of silence:*

Only through the RFP Point of Contact and in writing via e-mail or during the Pre-Proposal Conference

e. *What was prohibited:*

All contact or interaction

f. *What was NOT prohibited:*

Communications not related to the RFP

Id.

27. The purpose of these provisions was to protect the integrity of the BCHA's contracting process. *Id.*

28. As noted, the only allowable exceptions for communication were (1) written emails to the RFP Point of Contact (i.e., Teisha Palmer), (2) oral presentations during the Pre-Proposal Conference held by the Evaluation Committee, or (3) as provided by existing work agreements.⁵

⁵ The last exception is not applicable in this case.

29. Notably, Respondent acknowledged and understood that the cone of silence in paragraph 12 did not have a provision allowing a proposer to speak about the RFP at a public meeting.⁶

30. Finally, conversations and contact were authorized for reasons *not related to* the RFP, but the proposer was required to disclose that he or she was "a respondent in this solicitation." *Id.*

Meetings of the Evaluation Committee

31. As stated previously, the RFP was issued on February 14, 2020, and was publicly advertised. On May 5, 2020, the evaluation committee⁷ reviewed and rated the proposals and selected two shortlisted firms. On May 7, 2020, the evaluation committee interviewed the two shortlisted firms – Fox Rothschild, LLP, and Weiss Serota. (AEx. 6).

32. As noted, Respondent attended both the May 5 and 7 evaluation committee meetings where he was allowed "to speak, and explain, and talk, and answer questions" in both private and public portions of these meetings.

33. After these meetings, the evaluation committee also ranked the proposers.

34. On May 8, 2020, Palmer issued Memorandum 2020-05 (Memo) to the Board advising that the evaluation committee interviewed the firms that were shortlisted and selected Fox Rothschild, LLP, as the top-ranked proposer. (AEx. 6).

⁶ Also worth noting was the fact that, prior to the May 19, 2020, board meeting Respondent actively participated on two separate occasions at public meetings to meet the evaluation committee and introduce his firm's attorneys. Respondent was also provided the opportunity at those meetings to share with the committee why he and his firm were the most qualified for the position. In short, Respondent had a full and fair opportunity to state his case for selection as the firm to provide the legal services. As more fully explained below, these meeting opportunities offered by the BCHA fully complied with section 286.0114(2), Florida Statutes.

⁷ The evaluation committee was comprised of Tisha Pinkney, Director of Real Estate Management (Chair); Jeffrey Sutton, Controller; and Timothy Thomas, Investigator. (AEx. 4, Bates stamped p. 16; AEx. 6).

35. Palmer's Memo did not announce the final award. It only made a recommendation for the Board to consider. The final approval of the recommended firm was the Board's responsibility.

36. The committee process and the resulting Memo cleared the way for the Board to take the next step in the RFP process. After approving the recommendation of Fox Rothschild, LLP, the next step involved the BCHA negotiating specific contract terms and compensation with the highest ranked proposer, or the Board could reject the evaluation committee's recommendation.

37. Consequently, a vote on the evaluation committee's selection and recommendation of Fox Rothschild, LLP, as the successful awardee, was ready for a full Board vote on May 19, 2020.

May 19, 2020, Board Meeting

38. The BCHA held a public board meeting via Zoom on May 19, 2020. Part of the agenda included voting on the firm recommended by the evaluation committee in its Memo.

39. Respondent was listed in the meeting minutes as "Legal Counsel: David Tolces, Weiss Serota Helfman Cole & Bierman." He was performing his normal duties at the meeting as a local government attorney and was bound by the Code of Ethics.

40. Item Number VII on the agenda was "Resolution 2020-11: Approving contract with Fox Rothschild, LLP for General Legal Services." (AEx. 7, Bates stamped pp. 35-36).

41. During the portion of the meeting devoted exclusively to Resolution 2020-11, Respondent spoke up without prompting and stated, "Mr. Chair can I make a brief comment."⁸

42. At that point, Respondent is seen reaching to retrieve something, which presumably was a note pad or script with prewritten notes on it.

⁸ The relevant portion of the meeting was captured on video and was reviewed by the undersigned several times.

Respondent is observed looking down several times as he continued to speak, referring to his prepared notes. (AEx. 20).

43. Chair O'Loughlin responded to Respondent and said, "Please, please," allowing Respondent to speak. The following verbatim discussion ensued on the record:

Tolces: Just very briefly regarding this specific item. David Tolces, Board Attorney. This is on Resolution 2020-11. On behalf of myself and my law firm [unintelligible] [I appreciate] the work of the Evaluation Committee that went into making this recommendation to the Board. However, I owe it to myself, and to the agency, and my firm to make this request. I would specifically request that the Board of Commissioners review the proposals themselves, review the evaluations that were conducted, and come to their own determination based upon three factors: the amount of years of – 15 years of experience with this agency, my knowledge of Broward County, the presence of a local attorney/firm. ...

Mr. Kozich:⁹ Excuse me. I object to Mr. Tolces making comments because

Tolces: Mr. Kozich. Noah, can you mute him please?

Noah: Yes.

Mr. Kozich: Because you're looking - you're doing something ...

Tolces: 15 years of experience, local Broward County

Mr. Kozich: He's making ... bite of the apple. He's trying to make [sic] a second bite of the apple. He should not be granted that ... he should not be allowed to do that.

⁹ Mr. Kozich is a member of the public.

Chair: Listen, I am about to make a motion to table the entire agenda and cancel this meeting if we cannot get this under control.

Male:^[10] I don't disagree.

Female: I will, I will support it.

Chair: So, we're about to cancel the meeting until this is straightened out and we can redo it another time because this is unacceptable.

Female: Definitely. You need to mute Mr. Kozich. You have to talk only when ... this is the public comment. But, you need to behave, Sir.

Mr. Kozich: Excuse me. You're allowing Mr. Tolces to make comments out of turn, too.

Female: He's our lawyer.

Mr. Kozich: He could have made comments in the public session. He should have made his comments in the public session.

Male: Yes.

Chair: I'd like to make a motion to recess any and all meetings that we have scheduled today until such time that the technology is corrected so that we can have a meeting that's uninterrupted and basically in control as to the state guidelines and regulations for open government meetings.

The motion was seconded, voted on and the meeting was abruptly adjourned.

44. Respondent testified at the DOAH hearing that he had been speaking on behalf of himself and his law firm at this meeting.

45. At this critical juncture, Respondent was aware that the final award had not been made. He was also aware, and on notice, that paragraph 12 of

¹⁰ The male and female are unidentified members of the Board of Commissioners.

the RFP, which he was familiar with, did not permit these types of comments to be made since the final award had not yet been made.

46. The inescapable finding and conclusion is that Respondent took advantage of his position as Board counsel on the dais and interjected himself into the ongoing and nearly complete RFP process. He sought to overturn the evaluation committee's recommendation and ultimately have the contract awarded instead to his firm—Weiss Serota.

47. Respondent believed he was speaking to the Board "just like any member of the public." At the public Zoom meeting, he inexplicably "imagined himself" stepping down from the dais and taking a position at the podium where members of the public speak to address the Board. However, Respondent acknowledged that his comments did not occur during the "public comment" portion of the meeting.

48. As Respondent was making his remarks about the legal services contract, a member of the public objected out loud and on the record. Instead of pausing and rethinking the propriety of his remarks, Respondent forged ahead and asked to have the person's voice muted, essentially shutting down the person's objection. (AEx. 20).

49. Respondent was only allowed to continue to speak because of his longstanding public position and influence over the Board. As one Commissioner remarked near the end of the meeting: He was permitted to speak because "He's our lawyer." (AEx. 20).

50. Deibert testified that Respondent's remarks were, in her opinion, an attempt "to influence the outcome of the award in his favor, and basically trying to influence the board to overrule and to negate the work of the evaluation committee and throw it out and reverse the award to himself and his firm."

Letters to and from Respondent After the Meeting

51. On May 26, 2020, Attorney Zelkowitz sent a letter to Respondent, with a copy to Palmer for distribution to the executive director and the Board as well. The letter expressed, in part, Fox Rothschild's "belief that ... in speaking out at a public board meeting utilizing your position as interim general counsel" was inappropriate and requested that Respondent "adhere to the terms of the RFP and Florida law by not speaking on this matter, and instead, fully recuse yourself from the discussion." (AEx. 8).

52. Shortly thereafter, Respondent sent an undated response to Zelkowitz expressing his disagreement, in part, "with the statements contained in your letter, which appears to be nothing more than a baseless threat intended to dissuade my firm and me from advocating to continue as general counsel... ." Respondent continued, "there is absolutely no law or rule precluding me from speaking publicly about the Housing Authority's RFP process during a duly noticed meeting." (AEx. 9).

May 27, 2020, Board Meeting

53. At the May 27, 2020, meeting, the Board unanimously approved a "motion to approve agency entering into contract negotiations with final contract to be brought back before the Board for approval." (AEx. 11, Bates stamped p. 44). (This pertained to the proposed new relationship with Fox Rothschild, LLP.) Respondent attended the May 27, 2020, meeting in his capacity as Board counsel.

54. It was undisputed that an unsuccessful proposer had the opportunity to challenge the intent to award by filing an appeal.

55. The final award to Fox Rothschild, LLP, was "[c]ontingent upon negotiation of fair and reasonable compensation." (AEx. 6).

June 23, 2020, Board Meeting

56. On June 23, 2020, a final award of the legal services contract was made to Fox Rothschild, LLP, by the Board. (AEx. 13, Bates stamped p. 46; AEx. 14, Bates stamped p. 51).

57. At the DOAH hearing, Deibert and Palmer were questioned extensively about their interpretation of the RFP's cone of silence. Their interpretation of the RFP's cone of silence was largely irrelevant, since it is the undersigned's duty to interpret the provision and assess its impact on the outcome of the case. Regardless, Respondent never discussed the cone of silence with either of them in advance of the May 19, 2020, meeting. As a result, their opinions had no bearing whatsoever on the conduct or action taken by Respondent at the meeting.

Relevant Provisions of Chapter 286, Florida Statutes

58. Respondent acknowledged at the hearing that proposers were restricted from conversing privately with the BCHA during the cone of silence. However, he believed he could speak at the May 19, 2020, public meeting as a member of the public, despite his status as interim general counsel. He provided no specific case law to support his position, and relied on the provisions of section 286.0114.

59. That statute allows members of the public to provide input prior to decisions being made by a public agency. It provides, in relevant part:

286.0114 Public meetings; reasonable opportunity to be heard; attorney fees.—

(1) For purposes of this section, "board or commission" means a board or commission of any state agency or authority or of any agency or authority of a county, municipal corporation, or political subdivision.

(2) Members of the public shall be given a reasonable opportunity to be heard on a proposition before a board or commission. The opportunity to be heard need not occur at the same meeting at

which the board or commission takes official action on the proposition if the opportunity occurs at a meeting that is during the decision-making process and is within reasonable proximity in time before the meeting at which the board or commission takes the official action. This section does not prohibit a board or commission from maintaining orderly conduct or proper decorum in a public meeting. The opportunity to be heard is subject to rules or policies adopted by the board or commission, as provided in subsection (4).

60. What Respondent overlooks is that the BCHA evaluation committee provided not one, but two, opportunities for Respondent, as a member of the public and also a responder to the RFP, to meet with them and advocate for his law firm prior to its recommendation to select Fox Rothschild, LLP.

61. Respondent took advantage of both those opportunities and met with the evaluation committee on May 5 and 7, 2020.

62. This process—involving opportunities to meet with the evaluation committee—fully complied with the provisions of section 286.0114(2), outlined above. As a result, Respondent had a full and fair opportunity to be heard and advocate for himself and his firm as a member of the public, and as a proposer under the RFP.

CONCLUSIONS OF LAW

63. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

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

65. 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., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); *Balino v. Dep't of Health Rehab. Servs.*, 348 So. 2d 349 (Fla. 1st DCA 1977).

66. In this proceeding, the Commission, through its Advocate, is asserting the affirmative: that Respondent violated section 112.313(6). Proceedings of this nature, seeking penalties against a public officer or employee, require proof of the alleged violation(s) by clear and convincing evidence. *See Latham v. Fla. Comm'n on Ethics*, 694 So. 2d 83 (Fla. 1st DCA 1997). As a result, the burden of establishing Respondent's violation by clear and convincing evidence was on the Commission.

67. As noted by the Supreme Court of Florida:

[C]lear 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: Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

68. Respondent was charged by the Commission with violating section 112.313(6), which provides:

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), the following elements must be proven by clear and convincing evidence:

- a. Respondent must have been a public officer, public employee of an agency, or local government attorney;
- b. Respondent must have:
 - i. used or attempted to use his official position or any property or resources within his trust, or
 - ii. performed his official duties;
- c. Respondent's actions must have been taken to secure a special privilege, benefit, or exemption for himself or others;
- d. Respondent must have acted corruptly, that is, with wrongful intent and for the purpose of benefiting himself or another person from some act or omission which was inconsistent with the proper performance of public duties.

The First Element: Was Respondent a Public Officer or Local Government Attorney

69. The BCHA is a legislatively created "special district." As such, "the standards of conduct provided in subsections (2), (4), (5), (6), and (8) [of section 112.313] shall apply to any person who serves as a local government attorney." § 112.313(16)(b), Fla. Stat.

70. Respondent testified that he is a "local government attorney" which is defined as:

[A]ny individual who routinely serves as the attorney for a unit of local government. The term shall not include any person who renders legal services to a unit of local government pursuant to contract limited to a specific issue or subject, to specific litigation, or to a specific administrative proceeding. For purposes of this section, "unit of local government" includes, but is not limited to municipalities, counties, and special districts. § 112.313(16)(a), Fla. Stat.

71. As a local government attorney, Respondent is accountable for his actions which must comply with the Florida Code of Ethics found in part III, chapter 112.

72. Therefore, the first element of a violation of section 112.313(6) was proven.

The Second Element: Did Respondent Use His Official Position, Property or Resources

73. Respondent initiated improper contact between himself and the BCHA Board during a period when the cone of silence was in effect. It was during a portion of the meeting when public comments were not permitted.

74. Chair O'Loughlin allowed Respondent to speak (i.e., "Please, please.") because of his influence and official position as the Board's attorney. As evidence, Mr. Kozich, a member of the public, attempted to comment at the same time as Respondent. Respondent responded by calling for Mr. Kozich's microphone to be muted and him silenced.

75. Respondent could not lawfully step away from his role as the Board's attorney, with its attendant duties and responsibilities, and advocate on behalf of his law firm during the portion of the May 19, 2020, meeting he chose.

76. Respondent identified himself as "David Tolces, Board Attorney." He was permitted to speak from a position of authority on the dais only because, as one Commissioner exclaimed, "He's our lawyer." To the Board members and to the public, Respondent's comments were made as a local government attorney, and not a private citizen.

77. Respondent used his official position on the dais to speak out at the meeting.

78. Therefore, the second element of a violation of section 112.313(6) was proven.

The Third Element: Were Respondent's Actions Taken To Secure a Special Privilege or Benefit for Himself or Others

79. The special privilege or benefit that Respondent improperly pursued at the May 19, 2020, meeting was to use his influential position and platform to advocate on behalf of himself and his law firm, despite the existence of a cone of silence. He took advantage of his position as Board counsel to do so. That opportunity was not available to the other proposers who complied with the rules set out in the RFP, and who respected the cone of silence.

80. Respondent's motivation and intent in speaking out was clear—to influence the decision based on his past and existing relationship with the BCHA. As Respondent stated in his letter to Zelkowitz, it appears you are trying "to dissuade my firm and me from advocating to continue serving as general counsel for the Housing Authority (as I have done successfully for the last 15 years)." However, at that point in the solicitation process, communication with the BCHA Board regarding the RFP was still prohibited.

81. Respondent's comments were unmistakably made to secure a special privilege or benefit for himself or his firm—changing the outcome of the award to his firm.

82. Therefore, the third element of a violation of section 112.313(6) was proven.

The Fourth Element: Did Respondent Use His Position "Corruptly," as the Term is Defined in the Statute.

83. To satisfy the statutory element of corrupt intent, clear and convincing evidence must be presented 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 Code of Ethics. *Blackburn v. State, Comm'n on Ethics*, 589 So. 2d 431, 434 (Fla. 1st DCA 1991).

84. Reasonable notice that his comments would be improper was afforded to Respondent, and others, by paragraph 12 of the RFP. The RFP spoke clearly and distinctly on this point. The language was clear and unambiguous. The text was bolded and underlined to draw attention to this provision. Respondent testified that he read that provision of the RFP and, by his signature, he agreed to abide by its terms.

85. Respondent had reasonable notice that a customary cone of silence was in effect and understood the reasonable scope of its terms. Nonetheless, he interrupted the meeting with prepared notes for the purpose of improperly influencing the process in an unfair manner.

86. His requests at the May 19, 2020, meeting, summarized below, improperly sought a special privilege or benefit for him and his law firm. His intent was corrupt in that he sought to completely waylay and undermine the work of the evaluation committee, and restart the procurement process which was nearly completed.

87. In practical terms, he was asking the Board to ignore and discard the hard work and efforts of the evaluation committee in several ways:

- a. Respondent asserted that each Board member should *review* the proposals from each of the law firms.
- b. He insisted that each Board member should *evaluate* the proposals.
- c. He told the Board that they should *make their own determination* (i.e., who the successful proposer should be) considering three factors: his 15 years

with the BCHA, his knowledge of Broward County, and that his firm was a local firm.¹¹

88. Likewise, it is undeniable from the facts and reasonable inferences, that his actions and comments were a last-minute attempt to subvert the valid process the BCHA had in place to promote fairness and integrity in the selection process.

89. Respondent had previously dealt with cone of silence provisions, and was well versed in the rules of "contracting silence," both through his extensive experience in local government law and his specialized knowledge of governmental law gained through board certification.

90. Respondent's comments at the May 19, 2020, board meeting were in direct contravention of the rules all proposers were expected to follow. The violation was an attempt to subvert and compromise the integrity of the process and was contrary to fair competition.

91. Therefore, the fourth element of a violation of section 112.313(6) was proven.

The Cone of Silence in the RFP Complied with the Provisions of Section 286.0114

92. Chapter 286 is Florida's Government in the Sunshine Law. It provides a right of access to governmental proceedings of public boards or commissions at both the state and local levels. The law is equally applicable to elected and appointed boards, and applies to any gathering of two or more members of the same board to discuss matters which will foreseeably come before

¹¹ Each one of Respondent's "requests" involved setting aside work the evaluation committee had already done.

that board for action. § 286.01, Fla. Stat.; *Sarasota Citizens for Responsible Gov't v. City of Sarasota*, 48 So. 3d 755, 762 (Fla. 2010).¹²

93. It is undisputed that section 286.0114 applies to the BCHA.

94. Notably, however, the opportunity to be heard does not need to occur at the same meeting that the official action takes place, so long as it occurs during the decision-making process and is within reasonable proximity in time before the official action is taken. These conditions were met in this case.

95. Furthermore, the law provides that the opportunity to be heard is "subject to rules or policies adopted by the Board." § 286.0114, Fla. Stat. As a result, the BCHA's cone of silence in paragraph 12 was consistent with this provision.

96. The BCHA and the evaluation committee followed the statute by affording not one, but two, opportunities for Respondent, as a member of the public and a proposer, to lawfully advocate for his law firm. Thus, the Board was in full compliance with section 286.0114 in implementing the cone of silence in paragraph 12 of the RFP.

97. Additionally, Respondent attended meetings on May 5 and 7, 2020, to advocate for himself and his law firm--both prior to the committee issuing a recommendation.

98. Accordingly, the cone of silence outlined in the RFP did not deprive Respondent of a "reasonable opportunity to be heard" and complied with the provisions of section 286.0114.

99. Section 286.0114 is plain and unambiguous. Courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications."

¹² The Government in the Sunshine Law applies to "any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision." The statute thus applies to public collegial bodies within this state, at the local, as well as state level. *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971). "All governmental entities in Florida are subject to the requirements of the Sunshine Law unless specifically exempted." *Sarasota Citizens*, 48 So. 3d at 762 (Fla. 2010).

State v. Peraza, 259 So. 3d 728, 730 (Fla. 2018) (citations omitted). In addition, "[a] basic tenet of statutory construction compels a court to interpret a statute so as to avoid a construction that would result in unreasonable, harsh, or absurd consequences." *State of Florida v. Atkinson*, 831 So. 2d 172, 174 (Fla. 2002).

100. Respondent's suggested interpretation of the statute would render meaningless the BCHA's cone of silence and lead to an incongruous result under the circumstances of this case.

101. Additionally, the Legislature did not intend for section 286.0114 to abolish authorized cones of silence. For example, the Legislature provided language for a similar period of silence in solicitations pursuant to section 287.057(25), Florida Statutes.¹³

102. Paragraph 12 of the RFP is lawful and in full compliance with the provisions of section 286.0114.

Local Government Attorney Prohibition—Section 112.313(16)(c)

103. Respondent erroneously concluded in his response letter to Attorney Zelkowitz that "there is absolutely no law or rule precluding me from speaking publicly about the Housing Authority's RFP process during a duly noticed meeting."

104. Under the facts in this case, Respondent was not permitted to speak to the Board on this subject during any portion of the agenda. At a minimum, he should have remained silent or recused himself from representing the Board during the agenda item. Unfortunately, he did neither.

¹³ §287.057(25), Fla. Stat. – Procurement of commodities and contractual services – Each solicitation for the procurement of commodities or contractual services shall include the following provision: "Respondents to this solicitation or persons acting on their behalf may not contact, between the release of the solicitation and the end of the 72-hour period following the agency posting the notice of intended award, excluding Saturdays, Sundays, and state holidays, any employee or officer of the executive or legislative branch concerning any aspect of this solicitation, except in writing to the procurement officer or as provided in the solicitation documents. Violation of this provision may be grounds for rejecting a response."

105. As a local government attorney, Respondent is prohibited from representing himself or his law firm (the entity) in which Respondent is member or partner "before the unit of local government to which the local government attorney provides legal services." § 112.313(16)(c), Fla. Stat. While this statutory violation was not charged, it lends support to the conclusion that Respondent was not permitted to advocate for his law firm during the May 19, 2020, meeting.

106. The Commission has opined that section 112.313(16)(c) "expressly prohibits a local government attorney or law firm in which the local government attorney is a member, partner, or employee from representing a private individual or entity before the unit of local government to which the local government attorney provided legal services." CEO 17-18 (December 13, 2017).

107. In CEO 17-18, the requester of the opinion was private counsel contractually retained by the Miami-Dade Value Adjustment Board (VAB). The requester met the statutory definition of local government attorney. He inquired whether he could challenge the assessed property value of his own home and/or property before the VAB. The Commission found this activity lawful because he would be appearing before the VAB in his individual capacity as a private citizen, representing solely his own interests as the property owner.

108. The Commission went on to explain that the local government attorney "would be prohibited from representing another person or entity, including a corporation, trust, limited liability company, or similar entity with a 'legal personhood,' in a proceeding before the [VAB]." CEO 17-18.

109. Respondent's conduct in representing his law firm at the May 19, 2020 Board meeting was contrary to the above referenced statute. Furthermore, Respondent, as a board-certified attorney in his field, should have known that his actions were unlawful under this provision.

110. The clear and convincing evidence presented at the final hearing established that Respondent violated section 112.313(6), by using his official position in an attempt to secure a special privilege or benefit for himself and/or his law firm, Weiss Serota.

Applicability of *Robinson v. Commission on Ethics*, 242 So. 3d 467 (Fla.1st DCA 2018)

111. As outlined above, the undersigned has considered a variety of district court opinions. However, the *Robinson* opinion offers the most direct and persuasive guidance for this case. It is similar to this case in several material respects.

112. To summarize, *Robinson* involved an alleged violation of subsections (6) and (16) of section 112.313. Ultimately, the district court found a violation of subsection (6), but not subsection (16). The case involved alleged ethical violations committed by Robinson while he was serving as a contracted city attorney. In *Robinson* there were several noteworthy similarities to the facts of this case.

113. Robinson, like Respondent, had served for an extensive period of time as the city attorney under contracts with his law firms (13 years for Robinson, 15 years for Respondent).

114. Respondent, like Robinson, held a position of great influence with the city as its long-serving city attorney.

115. Robinson, like Respondent, understood that his tenure as city attorney was ending.

116. Robinson, unlike Respondent, drafted and presented ordinances to the city commission to create the position of zoning hearing officer and code enforcement special magistrate to which he sought appointment.

117. Robinson, attempted to persuade the city commission that he was "uniquely qualified" or the best candidate for those positions. Respondent's comments on May 19, 2020, were intended for the same purpose.

118. Most compelling here was that Respondent essentially wanted the BCHA to set aside the work already performed by the evaluation committee, essentially starting the review process all over again. More specifically, he requested that the Board *review* the proposals again, *evaluate* the proposals again and *make their own determination*. In short, throw out the results and start the whole process over again.

119. In this case, Respondent acted with clear notice that his conduct in speaking out at the May 19, 2020, meeting was not permitted. *See Blackburn*. This is underscored by the clear and unmistakable language of the RFP at paragraph 12, which put him on notice that he was not entitled to advocate the position of his firm at any point in the procurement process, including during the May 19, 2020, meeting because a final award had not been made.

120. Comments from the court in *Robinson* are instructive for this case as well. The court observed:

[T]he ALJ in this case was presented with conflicting narratives about Robinson's 11th hour effort to obtain the zoning hearing officer and code enforcement special magistrate positions. Was it simply a magnanimous gesture of a long-time and faithful public servant motivated by the best of intentions, as Robinson contended? Or, was it a "corrupt" act motivated by Robinson's pecuniary self-interest in preserving a portion of the income stream from the City that he had enjoyed for the past 13 years, as the commission contended? It was the ALJs prerogative - as the fact-finder charged with weighing and balancing the direct and circumstantial evidence - to reject Robinson's narrative and view the evidence consistent with the narrative advocated by the Commission.

121. While Respondent did not participate in the drafting of the RFP (as in *Robinson*), his interruption and comments on May 19, 2020, were comparable in their scope, effect and impact on the effective operation of a governmental body.

122. More directly, Respondent, by his comments, intended to (1) set aside the hard work done by the evaluation committee, (2) totally undermine the lawful procurement process established by the BCHA, and (3) improperly influence the Board in his position of authority on the dais to revisit and restart the selection process all over again. There is no other reasonable or logical explanation for his conduct.

123. This conclusion is further supported by the fact that he knew he was not entitled to speak, but simply could not restrain himself in the face of losing the position he had enjoyed for many years. He undoubtedly thought about his plans in advance and scripted his comments in advance of the public meeting.

124. Under the circumstances and facts of this case and applying the law outlined in the *Robinson* case, the undersigned is compelled to conclude that Respondent violated section 112.313(6) as alleged by the Commission in its Order Finding Probable Cause.

RECOMMENDED PENALTY

125. The penalties available to consider for a local government attorney who violated section 112.313(6) include: public censure and reprimand, a civil penalty not to exceed \$10,000, and restitution. § 112.317(1)(e), Fla. Stat.

126. A primary purpose of civil penalties is to deter misconduct by securing obedience to the law. *See Tull v. United States*, 481 U.S. 412 (1987); *see also Hudson v. United States*, 522 U.S. 93 (1997) ("all civil penalties have some deterrent effect"). Thus, an imposition of a penalty is important to deter future ethical misconduct and critical to ensure the public's trust and confidence in the system. A legitimate purpose in imposing an appropriate penalty is to lower the incentive to engage in this type of misconduct and, thus, aid the state in enforcement of the ethics statute.

127. In this case and after carefully considering and weighing all the relevant circumstances and factors, the imposition of a civil penalty in the


amount of \$2,500.00 serves these purposes and is appropriate. The public nature of this proceeding and the issuance of this Recommended Order serve as a sufficient public censure of his conduct.

128. Based on the above-stated factors and Respondent's extensive experience and knowledge of local government laws, the undersigned recommends that a civil penalty of \$2,500.00 be imposed against Respondent.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order and public report be entered finding that Respondent, David Tolces, violated section 112.313(6), Florida Statutes, and that a civil penalty of \$2,500.00 be imposed against Respondent.

DONE AND ENTERED this 11th day of April, 2022, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
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Filed with the Clerk of the
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this 11th day of April, 2022.

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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.