

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: NANCY OAKLEY,

Case No. 18-2638EC

Respondent.
_____ /

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings ("DOAH"), on September 24, 2018, in Clearwater, Florida.

APPEARANCES

For Advocate: Melody A. Hadley, Esquire
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Tallahassee, Florida 32399-1050

For Respondent: Kennan George Dandar, Esquire
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STATEMENT OF THE ISSUES

The issues are whether Respondent violated section 112.313(6), Florida Statutes (2018), by exhibiting inappropriate behavior toward city staff; and, if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On April 25, 2018, the Commission on Ethics ("Commission") issued an Order Finding Probable Cause to believe that Respondent violated section 112.313(6) of the Code of Ethics for Public Officers and Employees. In accordance with Florida Administrative Code Chapter 28-106, the chairman of the Commission requested that the public hearing of this complaint be conducted by DOAH and referred the complaint to DOAH on May 18, 2018.

The case was assigned to the undersigned, who entered a Notice of Hearing scheduling the final hearing for July 25, 2018. Advocate filed an agreed-upon motion to continue the hearing, and the final hearing was rescheduled for July 25 and 26, 2018. The final hearing again was rescheduled for September 24, 2018. Advocate filed its Motion in Limine to Exclude Respondent's Documentary Evidence and Motion in Limine to Exclude and/or Limit the Testimony of Respondent's Witnesses on September 19, 2018. On September 19, 2018, Advocate's Motion Requesting Official Recognition was filed. The documents referenced in Advocate's Motion Requesting Official Recognition are listed as Advocate's Exhibits 3 and 5. Respondent did not file a written response to any of the three motions.

On September 24, 2018, the hearing commenced as scheduled. At the hearing, the Advocate presented the testimony of Cheryl

McGrady Crawford, Dave Marsicano, Travis Palladeno, Francine Jackson, Tom Verdensky, Joseph Campagnola, Terry Lister, and Respondent. The parties have agreed to use the September 10, 2018, deposition transcript of Nicole Bredenburg's testimony in lieu of live testimony. Advocate's Exhibits 3, 5, and 6 were admitted into evidence. Respondent testified on her own behalf and presented the testimony of Robin Vander Velde, Ron Little, Linda Hein, Doreen Moore, Jim Madden, and Elaine Poe. Respondent's Exhibit 1 was admitted into evidence.

A two-volume Transcript of the proceedings was filed on October 18, 2018. By agreement of the parties, proposed recommended orders were initially due on October 26, 2018. On October 16, 2018, Advocate for the Commission filed its Agreed upon Motion for Extension of Time to File Proposed Recommended Orders, requesting to extend the filing time until November 9, 2018. The motion was granted. A Second Agreed Motion to Extend Time to File Proposed Recommended Orders was filed on November 9, 2018, requesting the time be extended until November 13, 2018, due to a family emergency for Respondent's counsel. The motion was granted. The parties filed their Proposed Recommended Orders, which have been duly considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2018), unless otherwise noted.

FINDINGS OF FACT

1. Respondent served as a city commissioner of Madeira Beach from 2007 through March 2013, and was reelected to the office in March 2017.

2. Shane Crawford served as the city manager of Madeira Beach from January 2012 through July 2017.

3. Cheryl McGrady Crawford served as a full-time employee of Madeira Beach in different capacities: intern for the planning and zoning coordinator; in the building department; and city clerk. In addition, she served as the executive assistant to then-City Manager Shane Crawford from September 2012 through February 2017, where her job responsibilities included acting as deputy clerk when the city clerk was unable to attend a function or meeting.

4. David Marsicano has been serving as Madeira Beach's public works and marina director for 17 years.

5. Travis Palladeno served as the mayor of Madeira Beach from 2011 through 2017.

6. Terry Lister served as a city commissioner of Madeira Beach from 2008 through 2018.

7. Francine Jackson was a Madeira Beach employee for approximately 11 years. Her last position was as the assistant to Public Works Director Marsicano from 2012 through 2014.

8. Thomas Verdensky is the president of the Old Salt Foundation, which is a volunteer organization.

9. Joseph Campagnola is a retired 13-year New York City police officer who has volunteered as head of security (coordinates sheriff's department and personal guards) for Old Salt Foundation events for the past nine years.

10. Nicole Bredenberg was present at the November 3, 2012, Madeira Beach City Commission ("City Commission") meeting.

11. Respondent is subject to the requirements of chapter 112, part III, the Code of Ethics for Public Officers and Employees, for her acts and omissions during her tenure as a city commissioner of Madeira Beach. See § 112.313(6), Fla. Stat. and City Charter Section 2-31 Duties and Responsibilities.

12. As a city commissioner of Madeira Beach, Respondent took an oath "to faithfully perform the duties of [her] office and the Constitution of [sic] the laws of the State of Florida and the United States of America."

13. As a city commissioner of Madeira Beach, Respondent was prohibited from interfering with administration as provided: "The Board of Commissioners nor any member thereof shall give orders to any subordinate or Officer of said City, either publicly or privately, directly or indirectly."

14. As a city commissioner, Respondent's responsibilities included attending City Commission meetings, regular or special.

At the City Commission meetings, the city clerk is responsible for taking the meeting minutes. If the city clerk is unavailable, a substitute is needed or the meeting cannot be held.

15. Mr. Palladeno told the new Madeira Beach city manager, Shane Crawford, that he wanted an outdoor meeting since they are a beach community. In November 2012, an outdoor City Commission meeting was held in conjunction with the King of the Beach Tournament, a fishing tournament occurring biannually in Madeira Beach. The meeting was to recognize Bimini, Bahamas, as Madeira Beach's sister city with a presentation of a key to the city and a proclamation. The King of the Beach Tournament is organized by the Old Salt Fishing Foundation.

16. The event was held on a baseball field having field lights, which turned on as it started to get dark.

17. Respondent was present at this event in her official capacity to participate in the meeting. She had consumed alcohol at the all-day fishing tournament.

18. Then-city clerk, Aimee Servedio, could not attend this meeting, so a substitute was required or the meeting could not go forward. Ms. McGrady (prior to her becoming Ms. Crawford) had been assigned the role of deputy clerk and was prepared to take minutes.

19. Respondent dislikes Ms. Crawford because she believed, without any proof produced at hearing and a firm denial at hearing by Ms. Crawford, that she and Shane Crawford were having an affair at the time of the meeting at issue, which was prior to their marriage.

20. The City Commission could not start the meeting the evening after the tournament because Respondent refused to go on stage due to Ms. McGrady's role as deputy clerk. There was a heated discussion between Shane Crawford, Ms. McGrady, and Respondent. Respondent actually refused to attend the meeting if Ms. McGrady was present, and demanded that she be removed from the area.

21. Mr. Palladeno and an official Bimini representative were in the vicinity of the heated discussion. Referring to Ms. McGrady, and in her presence, Mr. Palladeno heard Respondent say, "You need to get that f[***]ing b[itch] out of here." Mr. Palladeno rushed in to move the Bimini representative away from the situation.

22. Lynn Rosetti, who at that time was the planning and zoning director, had to fill in because Respondent refused to attend the meeting if city employee, Ms. McGrady, was allowed to substitute for the city clerk. Respondent's actions interfered with Ms. McGrady's job duties.

23. After the meeting was over, Respondent approached Shane Crawford with Ms. McGrady, David Marsicano and his then-wife Shelley, and Nicole Bredenberg also in the immediate area.

24. Using her tongue, Respondent licked City Manager Shane Crawford up the side of his neck and face. This act was witnessed by Ms. McGrady, Mr. Marsicano, Mr. Bredenberg, and Mr. Verdensky.

25. Respondent then groped City Manager Shane Crawford by grabbing his penis and buttocks. This act was witnessed by Ms. McGrady and Mr. Bredenberg.

26. Respondent then threw a punch at Ms. McGrady after she told Respondent that her actions were inappropriate. Mr. Marsicano's ex-wife intervened and confronted Respondent.

27. Mr. Verdensky, who testified that he had been licked by Respondent on a different occasion, called for the head of security, Joseph Campagnola.

28. Mr. Campagnola arrived between one to two minutes after the call. By the time he arrived, Respondent was walking away. However, he found Shane Crawford, Ms. McGrady, and Ms. Marsicano. He was told by Mr. Crawford that Respondent licked his face and grabbed him, which was corroborated by Mr. Marsicano and Ms. McGrady.

29. Mr. Marsicano, who testified he had also been licked by Respondent on a different occasion, has a distinct memory of

Respondent's actions at the November 2012 City Commission meeting because of the "disruptions and shenanigans" that happened before, during, and after the meeting. He had to lead his wife away because she was so upset with Respondent.

Mr. Marsicano also testified that he witnessed the face-licking of Mr. Crawford by Respondent. He subsequently spoke with Francine Jackson about what happened at that meeting.

30. Ms. Jackson was not present for the November 2012 City Commission meeting. However, that following Monday or Tuesday, she discussed the weekend with Mr. Marsicano and was informed by him that Respondent licked Mr. Crawford's face.

31. Ms. McGrady was placed in a predicament when Respondent's animosity towards her became overt and physical. Respondent created a hostile environment and employees were rightfully fearful of retaliation if they reported Respondent's actions.

32. Robin Vander Velde is a former city commissioner of Madeira Beach and has known Respondent since 2007. Ms. Vander Velde was outraged about an ethics complaint being filed against her very good friend of ten years. Present in her capacity as a city commissioner at the November 2012 meeting, her recollection of the events was foggy, at best.

33. Ron Little is Respondent's best friend of 20 years and Ms. Vander Velde's boyfriend. He honestly acknowledged that it is a given that he would want to help Respondent.

34. Mr. Little was unaware of Respondent's Driving under the Influence ("DUI") arrest, petit theft arrest, alleged participation in a United States Postal Service ("USPS") mail hoax, and the reasons why she left her City of Clearwater employment.

35. Elaine Poe is a former city commissioner of Madeira Beach. Ms. Poe was unaware of Respondent's petit theft arrest, alleged participation in a USPS mail hoax, and why she left her City of Clearwater employment.

36. While Ms. Poe was at the November 2012 meeting, she did not recall the meeting starting late.

37. Jim Madden is a former city manager of Madeira Beach. He was also unaware of Respondent's petit theft arrest and alleged participation in a USPS mail hoax.

38. Doreen Moore was unaware of Respondent's petit theft arrest and alleged participation in a USPS mail hoax.

39. Linda Hein met Respondent in 2016. She was unaware of Respondent's petit theft arrest.

40. Originally, Ms. Hein did not remember attending the November 2012 meeting until her memory was refreshed;

regardless, she could not provide eyewitness testimony concerning the alleged licking incident.

41. Michael Maximo, is the former Madeira Beach community services director. He testified he had been licked by Respondent on a different occasion, during the soft opening of a Bubba Gump's Restaurant in John's Pass Village. He recalled the details of the specific incident and said Respondent was inebriated at the time, and she came over to him and licked his face and neck in the presence of her husband, who quickly escorted her from the building. Mr. Maximo refuted the testimony of Respondent's witnesses as his knowledge of Respondent's reputation in the community was as a "fall down drunk," who should not be representing the community. This was a different picture from the one painted by Respondent's friends who, while admitting she liked to have a drink or several with them and others, they could not imagine her licking someone in public.

CONCLUSIONS OF LAW

42. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

43. Section 112.322 and Florida Administrative Code Rule 34-5.0015 authorize the Commission to conduct

investigations and to make public reports on complaints concerning violations of part III, chapter 112 (the Code of Ethics for Public Officers and Employees).

44. The burden of proof, absent a statutory directive to the contrary, is on the Commission, the party asserting the affirmative of the issue of these proceedings. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977). In this proceeding, it is the Commission, through its Advocate, that is asserting the affirmative: that Respondent violated section 112.313(6). Commission proceedings, which seek recommended 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). Therefore, the burden of establishing by clear and convincing evidence the elements of Respondent's violation is on the Commission.

45. 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)).

The Supreme Court of Florida also explained, however, that, although the "clear and convincing" standard requires more than a "preponderance of the evidence," it does not require proof "beyond and to the exclusion of a reasonable doubt." Id.

46. Section 112.313(6), the statute under which Respondent is charged, provides in part:

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

47. Section 112.313(6) may be broken down into the following elements:

- a. Respondent must have been a public officer or employee.
- b. Respondent must have:
 - 1) used or attempted to use his or her official position or any property or resources within his or her trust, or
 - 2) performed his or her official duties.
- c. Respondent's actions must have been taken to secure a special privilege, benefit or exemption for him - or herself or others.
- d. 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.

48. In section 112.312(9), the term "[c]orruptly" 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."

49. The Latham court found that section 112.313(6) includes within its proscriptions sexual harassment of an employee or an attempt to obtain sexual favors from a subordinated employee. See also Garner v. Fla. Comm'n on Ethics, 415 So. 2d 68 (Fla. 1st DCA 1982); Comm'n on Ethics v. Lancaster, 421 So. 2d 711 (Fla. 1st DCA 1982); and Bruner v. State Comm'n on Ethics, 384 So. 2d 1339 (Fla. 1st DCA 1980).

50. "In addition, the statute [section 112.313(6)] does not specifically require that as a result of a public officer's efforts to obtain a benefit from an employee, that employee will necessarily be impacted in any particular way." Garner v. Comm'n on Ethics, 439 So. 2d 894, 895 (Fla. 2d DCA 1983).

51. "It is possible for the corrupt intent required by the statute to be formed instantaneously, and a premeditated plan for securing a special benefit is not required by the statute. Even a reflexive reaction may rise to the level of corrupt intent,

depending on the circumstances.” In Re: Fred Peel, 15 F.A.L.R. 1187 (Comm’n on Ethics, 1992).

52. Section 112.311(6) also provides:

It is declared to be the policy of the state that public officers and employees, state and local, are agents of the people and hold their positions for the benefit of the public. They are bound to uphold the Constitution of the United States and the State Constitution and to perform efficiently and faithfully their duties under the laws of the federal, state, and local governments. Such officers and employees are bound to observe, in their official acts, the highest standards of ethics consistent with this code and the advisory opinions rendered with respect hereto regardless of personal considerations, recognizing that promoting the public interest and maintaining the respect of the people in their government must be of foremost concern.

53. “Maintaining the respect of the people” is a level of conduct for which a public official should strive. It is what the public should be able to expect from its officials. A public official’s conduct is exhibited through her words and actions.

54. The first element from section 112.313(6) concerning misuse of a public position was proven. During the relevant time period, Respondent served as a city commissioner of Madeira Beach and was acting in her official capacity, at a meeting of the City Commission, when the violation occurred.

55. The second, third, and fourth elements were proven as well. Clear and convincing evidence was presented that

Respondent disregarded her responsibilities as a city commissioner. Respondent first held the November 2012 City Commission meeting hostage until city employee, Cheryl McGrady Crawford (Cheryl McGrady at the time), was removed from her sight and not allowed to take the minutes of the meeting, the reason she was attending in the first place. Respondent allowed her hatred of Ms. McGrady to cause her to rebuke her oath of office and not perform the duties of her office. Additionally, Respondent committed an assault and battery of Mr. Crawford, a city employee, at the same meeting. The testimony, which is credited, proved she also committed additional assaults and batteries on two other city employees, Mr. Marsicano and Mr. Maximo, and the head of the Old Salt Foundation, Mr. Verdensky, on previous occasions.

56. The facts that are consistent from the testimony of the witnesses called by the Advocate are: 1) that Respondent delayed the start of the City Commission meeting by refusing to allow Ms. McGrady to participate in her official capacity; 2) she cursed Ms. McGrady, a city employee; 3) she committed a battery against the city manager by licking his neck and face and groping him; and 4) she assaulted Ms. McGrady by throwing a punch at her. The fact that the credible witnesses are not retelling the exact same version of the events, word for word, after six years, is evidence that they did not collaborate on the facts of

Respondent's violation in order to "get the story straight." Any discrepancies in their testimony, especially concerning the exact location (whether on stage where the meeting was taking place, in front of the stage, or a short distance from the stage) of where the actions complained of took place, are insignificant and do not mitigate the bizarre behavior of Respondent.

57. While a "motive" generally does not matter, a fabrication of facts would. In this case, no evidence was presented to show an ulterior motive in filing the complaint. It is generally established that the courts will not inquire into motives which actuate plaintiffs in bringing lawsuits.

"Character evidence is only admissible if the party places its character in evidence, and even then, it is only admissible by way of reputation evidence." Midtown Enters. v. Local Contractors, Inc., 785 So. 2d 578, 580-81 (Fla. 3d DCA 2001).

58. No credible evidence was presented to demonstrate why seven witnesses would fabricate facts of this nature. A fabricated story would be well-rehearsed and allege facts more mainstream, such as an unwanted kiss, or unwanted hug--not licking someone's face. The fact that Respondent had engaged in similar behavior in the past, in public settings and involving persons with employment or service to the city, makes the testimony, and her actions directed at Mr. Crawford, that much more believable. The act of licking a person on the face and

neck is too unusual to be contrived by multiple witnesses and multiple victims. No credible evidence was presented to support some conspiracy or plan by the witnesses and victims against Respondent.

59. In its case-in-chief, Respondent called six witnesses who testified as character witnesses. However, Respondent did not present their testimony as evidence of her truthfulness in the community and, in fact, none of the witnesses discussed Respondent's truthfulness or reputation for honesty or truth in the community. Accordingly, Respondent introduced their testimony to show that they believed licking Shane Crawford's face on November 3, 2012, was not in conformity with her reputation in the community, which is impermissible. None of them testified they witnessed the events resulting in the charges being brought against Respondent.

60. Section 90.404, Florida Statutes, concerns character evidence primarily when offered as a basis of inferring that, because the person has a particular disposition or reputation, she acted in conformity with that reputation on the occasion in question. This testimony is said to be offered to prove a person's propensity. This section generally limits the admissibility of character evidence offered for this purpose to a few enumerated situations in criminal cases. See Ehrhardt, Florida Evidence, 2014 Edition, section 404.1. As such, it is

not applicable in the instant case. See Bulkmatic Transport Co. v. Taylor, 860 So. 2d 436, 447 (Fla. 1st DCA 2003) (Evidence of a defendant's driving history was inadmissible to prove that he acted in conformity with this history on the day an accident occurred.).

61. Each of Respondent's witnesses testified that Respondent does not have a reputation for "licking the faces of people," or they had never heard anyone say that Respondent licks the faces of men and women, or other testimony similar in nature. The unusual and unwanted act of licking someone's face in public is not the type of behavior generally considered when talking about someone's reputation in the community. If someone's reputation was as a serial face-licker, most likely that person would have suffered some consequences for such repeated unwanted contact. The issue here is not whether Respondent "does this all the time," but whether she publicly licked the face of four testifying witnesses, one of whom was attacked in the highly public setting of the City Commission meeting.

62. The following matters, all of which were testified about at hearing, tend to adversely affect or at least negatively reflect upon a person's, in this case Respondent's, "good" character: arrest for DUI, arrest for petit theft, disciplinary employment action, forced resignation from employment, and perpetrating a USPS mail hoax.

63. The six witnesses called by Respondent were each friends of hers who have seen her drinking on numerous occasions, many of those occasions being with them. Four of them were not even aware of the admitted interaction between Respondent and Ms. McGrady which delayed the meeting, even though Respondent admitted to that portion of the allegations. None of these witnesses used the words "alcoholic" or "alcohol abuser," but they were forthcoming in their testimony that Respondent had consumed several drinks on multiple occasions either in their presence, or while they were partaking of alcohol themselves. A finding cannot be made in this matter that Respondent is, in fact, an alcoholic, but the testimony of her witnesses, her prior DUI, the three cases of licking a man's face in public prior to the City Commission meeting, and the incidents occurring at the meeting, all point to someone who may have an alcohol problem. Counseling or treatment, while not being ordered by the undersigned, might be a worthwhile road to travel for Respondent.

64. Based upon the foregoing findings of fact and conclusions of law, the clear and convincing evidence presented at the final hearing established that Respondent violated section 112.313(6), and should receive discipline from the Commission.

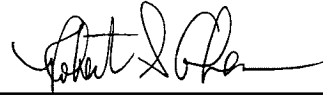
65. The penalties available for a public officer who violates the Code of Ethics include: impeachment, removal from office, suspension from office, public censure and reprimand,

forfeiture of no more than one-third of his or her salary per month for not more than 12 months, a civil penalty not to exceed \$10,000, and restitution of any pecuniary benefit received because of the violation committed. See § 112.317(1)(a), Fla. Stat. While the charges brought against Respondent are serious, the undersigned finds that suspension or removal from office is not appropriate in this case. A public censure and reprimand, along with less than the maximum civil penalty will send the message to Respondent that her actions were unwarranted and, hopefully, will serve as a wake-up call to her to voluntarily seek appropriate counseling and/or treatment for her behavior.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Ethics enter a final order finding that Respondent, Nancy Oakley, violated section 112.313(6), Florida Statutes, and imposing a public censure and reprimand and a civil penalty of \$5,000.

DONE AND ENTERED this 7th day of December, 2018, in
Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of December, 2018.

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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.