

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: FRANK MOORE,) Case Nos. 10-1284EC
) 10-6456EC
Respondent.)
)
_____)

RECOMMENDED ORDER

On December 14-15, 2010, an administrative hearing was held in Bushnell, Florida, before Lisa Shearer Nelson, an administrative law judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Diane L. Guillemette
Office of the Attorney General
Plaza Level One, The Capitol
Tallahassee, Florida 32399-1050

For Respondent Candace Hawthorne, Esquire
Frank Moore: 319 East Main Street
Tavares, Florida 32278

For Respondent E. Gary Early, Esquire
Lonnie Evans: Messer, Caparello & Self, P.A.
2618 Centennial Place
Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

The issues for determination are whether Respondent, Frank Moore, violated section 112.313(6), Florida Statutes (2008), by misusing his position and/or resources within his trust to help Lonnie Evans in his 2008 re-election campaign for Mayor of Coleman; whether Respondent violated section 112.313(6) by engaging in a traffic stop of Timothy Brunson to discuss a

pending ethics complaint; and if either or both violations are proven, what penalties should be imposed?

PRELIMINARY STATEMENT

On December 4, 2009, Petitioner, the Florida Commission on Ethics (COE or Commission), issued an Order Finding Probable Cause in COE Case Number 09-100, finding that there was probable cause to believe that Respondent violated section 112.313(6), by misusing his position or resources within his trust help the Mayor in his re-election campaign. Factually, the complaint filed with the Commission alleged that the complainant, James Dingle, observed Chief Moore and Mayor Lonnie Evans in the police station on November 18, 2008, with copies of campaign flyers and a list of registered voters, talking about the mayoral election. The complainant also alleged that two witnesses had told Mr. Dingle that Moore and Evans were riding around in the Chief's police car campaigning. On March 10, 2010, the case was forwarded to the Division of Administrative Hearings and assigned case number 10-1284. On March 31, 2010, a Notice of Hearing was filed scheduling the case for hearing on June 29-30, 2010.

On June 2, 2010, a Joint Motion for Continuance was filed, in which the parties advised that there were cases pending before the Commission involving related issues and, with respect to one case, the same respondent. The parties requested that the case be continued so that, should probable cause be found in the cases pending before the Commission, all cases related to the alleged

facts could be consolidated for hearing. The Motion was granted and the case was rescheduled for September 23-24, 2010.

On July 21, 2010, the Commission issued an Order Finding Probable Cause on COE Complaint Nos. 10-016, 10-065, and 10-076, finding that there was probable cause to believe that Respondent Moore violated section 112.313(6), by misusing his position and/or resources while engaging in political activity in a Mayoral election campaign and by engaging in a traffic stop of Complainant to discuss a pending ethics complaint. The finding of probable cause was in response to complaints filed by Timothy Bronson, who alleged Respondent had come to his home on multiple occasions during business hours, campaigning for Lonnie Evans; by Ronnie Owens, who alleged that Respondent and Lonnie Evans came to his neighborhood campaigning for the mayor's re-election; and a supplemental complaint filed by Timothy Brunson alleging that Respondent made a traffic stop in order to talk to him about the previously filed ethics complaint. A complaint by Cynthia Martin was also referenced in the Order Finding Probable Cause: her complaint contained general allegations regarding unauthorized campaigning while on duty. The Order Finding Probable Cause was referred to the Division of Administrative Hearings on July 28, 2010, and assigned Case No. 10-6456.

A third Order Finding Probable Cause was issued against co-Respondent Lonnie Evans, based upon COE Complaint Nos. 10-043, 10-047, 10-074, and 10-075, with respect to complaints against

Mr. Evans filed by Ronnie Owens, Cynthia Martin, Lucy Burnette, and Timothy Bronson. The Order Finding Probable Cause against Lonnie Evans was also referred to the Division on July 28, 2010, for assignment of an administrative law judge.

At the request of the parties, the previously scheduled hearing was canceled and the cases were consolidated for the purposes of hearing and rescheduled for hearing December 14-15, 2010. The parties filed a Supplemental Prehearing Statement which contained stipulated facts that have, where relevant, been incorporated into the findings of fact below.

At hearing, Petitioner presented the testimony of Ronnie Owens, Cleveland Williams, Bob Bolesta, Carolyn Bolesta, Gloria Bronson, Timothy Bronson, Lucy Burnette, and James Dingle. Petitioner's Exhibits numbered 1-3 and 5-16 were entered into evidence. Respondent Evans presented the testimony of Carolyn Evans, Lonnie Evans, and Ron Maolli, while Respondent Moore testified on his own behalf and presented the testimony of Ann Moore, Akiko Teagle, and Richard Callaway. Respondents' Joint Exhibits numbered 1-10 were admitted into evidence. Respondent Moore also requested that an additional exhibit, consisting of statements made by Timothy and Gloria Brunson dated July 21, 2010, be admitted into evidence. Admission of those documents was denied, and they were proffered. Although not considered in the preparation of either Recommended Order, the proffered

statements are included, in a separate envelope, with the exhibits admitted into evidence and forwarded to the Commission.

At the close of the Commission's case, the Advocate moved to amend the pleadings to conform to the evidence, and the motion was denied. See Pilla v. Sch. Bd. of Dade Cnty., 655 So. 2d 1312, 1315 (Fla. 3d DCA 1995).

While the cases were consolidated for hearing, it was agreed that separate recommended orders for each respondent would be issued for consideration by the Commission. The Transcript of the proceedings was filed with the Division on January 10, 2011. All parties timely filed their Proposed Recommended Orders, which have been carefully considered in the preparation of this Recommended Order. All references to Florida Statutes are to the 2008 codification, unless otherwise indicated.

FINDINGS OF FACT

1. Frank Moore was an officer with the City of Coleman Police Department prior to Lonnie Evans' first election as Mayor, and became the Coleman Chief of Police at some point after Evans' first election as mayor. Chief Moore retired in 2010, but remains employed by the City of Coleman as a reserve officer.

2. Lonnie Evans served as mayor of the City of Coleman for twelve years. Prior to his service as mayor, he was on the City Council for 24 years.

3. Respondents Moore and Evans were, at all times relevant to this proceeding, subject to the requirements of chapter 112, part III, Florida Statutes, otherwise known as the Code of Ethics for public officers and employees.

4. Lonnie Evans ran for re-election as mayor in 2008, and was defeated by Eve Carruthers. The election was held on December 8, 2008.

5. Coleman is a small town in Sumter County, Florida, with approximately 600 residents and 200 registered voters. Because of the size of the community and the nature of their jobs, Frank Moore and Lonnie Evans know each other fairly well, and are, in turn, well-known in the community.

6. At the time relevant to this case, the police department in the City of Coleman consisted of three officers: the police chief, one additional full-time patrol officer, and one reserve officer. During at least part of the time relevant to these proceedings, the full-time patrol officer was James Dingle.

7. Mr. Dingle was hired in December of 2007. He was interviewed by Chief Moore and Mayor Evans, and Mayor Evans hired him on a conditional basis until his employment could be approved by the City Council, consistent with the town's charter.

8. Mr. Dingle was on probationary status for the first year of his employment. In October 2008, Frank Moore and Lonnie Evans determined that his probation should be extended, and in December 2008, his employment was terminated by vote of the City Council.

9. At the heart of Mr. Dingle's termination was his handling of traffic tickets and refusal to change the manner in which he handled them, after counseling by Chief Moore, and his unwillingness to follow orders given to him by his superiors. Mr. Dingle would routinely write tickets indicating that the offending driver was going less than his or her actual speed. The actual speed would be listed under "comments," whereas the speed Mr. Dingle fabricated would be listed on the ticket as the speed the offender was driving. Mr. Dingle felt it was a matter of officer discretion, and that it was "unethical" not to give drivers a break. Frank Moore, on the other hand, directed Mr. Dingle to use the actual speed when writing tickets, leaving the discretion up to the judge. After counseling by Chief Moore, Mr. Dingle continued to write tickets for the lower speed. Because he felt Chief Moore's direction to use the actual speed was unethical, he did not feel he needed to follow it.

10. On July 24, 2009, some seven months after Mr. Dingle was fired and eight months after the mayoral election, the Florida Commission on Ethics received a complaint by Mr. Dingle against Frank Moore, alleging that Moore was campaigning for Lonnie Evans while on duty (COE Case No. 09-100). No corresponding complaint was received from Mr. Dingle with respect to Mr. Evans. Specifically, the complaint stated:

On November 18, 2008, at or about 9:00 A.M. Chief Frank Moore failed to show for traffic court which he was subpoena to appear. . . . After I (James Dingle) completed traffic

court, I went to the Coleman Police Department and observed Frank Moore and the current mayor Lonnie G. Evans inside the Chief's office with several copies of campaign (flyers) laying on his desk, I also observed a voters list of the residence of Coleman who were registered to vote in the city election and phone numbers. On two separate occasions, when I walked into the police station I overheard the Mayor talking to an unknown person asking them to vote for him. Note: that the Mayor Evans and Chief Moore were inside the City of Coleman Police Station and using the City office supplies for Mayor Evens' campaign. On one occasion I observed the Mayor hang the phone up in the middle of his conversation when I walked back into Chief Moore's office.

Since Chief Moore is hard of hearing, I heard Chief Moore say to Mayor Evans "who else we can call." Note: that Chief Moore was on full uniform and on duty. I made contact with two of Coleman residences who advised me that Chief Moore was driving the Mayor around in the City's vehicle asking residences to vote for him. The following residences are willing to speak to any investigator in this matter: (1) Lucy Burnette (2) Ronnie Owens . . .

11. At hearing, Mr. Dingle acknowledged that he had no personal knowledge regarding the allegation that Chief Moore and Mayor Evans were campaigning in a city-owned vehicle, and had never witnessed them doing so.

12. Mr. Dingle's Coleman Police Department Daily Activity/Log Report for November 18, 2008, indicates that Mr. Dingle started his work shift at 12:30 p.m. and was in traffic court from 1:00 to 2:00 p.m. He claimed that he had stated the wrong time for the events because there were other

days that week where he had appeared in traffic court in the morning. The time records do not support this statement.

13. Mr. Dingle testified that on November 18, 2008, he entered the police station three times. The first time, he did not observe or hear anything unusual. The second time he entered, however, he claims that he heard Mayor Evans tell Chief Moore to "hush" or "be quiet." He also testified that he saw campaign flyers, envelopes and stamps on Chief Moore's desk. In addition, he saw a list that he believed to be a voter registration list on the desk. The third time he entered the police station, Mr. Dingle stated that he heard Chief Moore ask Mayor Evans "who else can you call to help him." He also claimed that the mayor again told the chief to be quiet because someone else was in the building.

14. Contrary to his written complaint, Mr. Dingle did not testify that he saw Mayor Evans use the police station telephone and did not testify that he heard anyone asking for a vote.

15. Mayor Evans owns and uses a cell phone. There is no clear and convincing evidence that any conversation that Mr. Dingle overheard took place using a city telephone. Mr. Evans' testimony that he did not use a city phone to campaign is credible and accepted.

16. The door of the police station locks when it is shut, and must be opened either with a key from the outside, or by someone opening it from the inside. In addition, there is a

pass-through window in Chief Moore's office through which he can observe people coming in and out of the police station. While Chief Moore is hard of hearing, he is not deaf, and he would have been able to see and hear people entering the building. His testimony that Evans at no time asked him to be quiet is credited.

17. Moreover, overhearing the comment "who else can you call" and concluding that the comment was campaign-related requires a leap that the undersigned is unwilling to take. There are a variety of city-related tasks and events that could require the mayor and the chief of police to work together that have nothing to do with campaigning for office. This comment, standing alone or in connection with the other observations Mr. Dingle recounted, is not clear and convincing evidence of campaigning using city resources or during work hours.

18. At some point, Mr. Dingle saw fit to remove a page from the typewritten list, along with a campaign flyer, from his supervisor's desk, presumably after Chief Moore left for the day. He did so at after his probation had been extended by Evans and Moore, and after he had received one if not two memos criticizing his performance. The list consists of a list of names and the designation "Coleman" under a column titled "City_Name." There is no title or heading on the document. There are no addresses, telephone numbers, or voter registration numbers on the list.

There is no clear and convincing evidence indicating the nature of the list or whether it actually depicted registered voters.^{1/}

19. Moreover, even if Mr. Dingle's testimony is credited, the presence of campaign flyers in the police station, standing alone, is not clear and convincing evidence of using city resources to campaign. The flyer was the same type of flyer posted in places all over town. Mrs. Moore testified that she had volunteered to stuff envelopes and print flyers for Mr. Evans, and did so at home over a period of several days. Mayor Evans supplied the stamps and envelopes. She then gave the envelopes and a box of flyers to her husband so that he could deliver the flyers to Mr. Evans and mail the envelopes from the post office adjacent to the police station. The Advocate offered no evidence to rebut this testimony. Moreover, as confirmed by the city clerk, the computer and printer in Chief Moore's office did not belong to the City of Coleman, but instead belonged to Chief Moore.

20. Based on the totality of the evidence presented, clear and convincing evidence did not establish that Chief Moore and Lonnie Evans were engaged in campaign activities in the police station on November 18, 2008.

21. On December 9, 2009, an Order Finding Probable Cause in COE Case No. 09-100, which forms the basis for DOAH Case No. 10-1284, was filed by the Commission on Ethics. The finding was reported in a local newspaper in January of 2010. Cynthia

Martin, a City of Coleman Council member, showed the newspaper article to Timothy Bronson. Ms. Martin had run against Lonnie Evans in a previous election for mayor, and lost.

22. As a result of Ms. Martin's encouragement, both Timothy Bronson and his mother, Gloria Bronson, filed complaints with the Commission against Chief Moore on January 22, 2010, nearly fourteen months after the last election in which Mr. Evans was a candidate (COE Complaint No. 10-016). Both complaints stated that the mayor and the chief of police had, for each election, come to their house and asked them to vote for Mayor Evans. Both indicated that Chief Moore had stated that if Evans was not elected, then he would lose his job.

23. The mayor of Coleman does not have the authority to hire or fire the police chief. Only the city council can take that action. Frank Moore continued to serve as police chief for the City of Coleman for well over a year after the election, until sometime in 2010, when he retired.

24. Cynthia Martin visited the Bronson's in their home and brought a notary with her so that the Bronsons could complete the complaints against Moore and Evans.

25. The Bronsons claimed that Chief Moore would drive by their home and pull into their driveway. They would come out to the fence and speak to him. From their position on the other side of the fence from the car, they claimed that they could see campaign signs for Lonnie Evans in the back floorboard of the

patrol car. Timothy Bronson also testified that on one occasion, Lonnie Evans was in the patrol car with Chief Moore, and asked his mother to vote for him. Mrs. Bronson did not testify to any such request by Lonnie Evans, and testified that when Frank Moore came to the house, Lonnie Evans was not with him.

26. Timothy claimed in his taped interview that Chief Moore was driving a white unmarked car, but at hearing insisted that the car Chief Moore drove on these occasions was gray. Mrs. Bronson, testified that the car was either white or "brownish."

27. Chief Moore acknowledges that he sometimes drove by the Bronson home, usually in response to a complaint by Mrs. Bronson, such as people speeding on her street. He agrees that he sometimes stopped and spoke to her and her son, but denies talking about the mayoral race. He also flatly denies ever having Lonnie Evans in his patrol car at the Bronson home.

28. The patrol cars have dark tinted windows in the back, and the view is obstructed by both the tint and the barrier separating the front and back seats. It is unlikely that either of the Bronsons would be able to see signs in the floorboard of the backseat from a location on the other side of the fence from the car.

29. Mrs. Bronson admitted at hearing that she suffers from short term memory loss as a result of a medical event.

30. Timothy Bronson filed a second complaint alleging the same thing on March 3, 2010, against Lonnie Evans (COE Case No. 10-043). He and his mother also filed amendments to their first complaint on March 17, 2010. Timothy Bronson alleged that Respondent pulled him over in order to talk to him about his complaint. Mrs. Bronson claimed that he followed her closely for a mile or so, and it intimidated her.^{2/} Clear and convincing evidence did not support Timothy Bronson's allegation.

31. On April 14, 2010, Lucy Burnette also filed a complaint with the Commission on Ethics, against Lonnie Evans. In her complaint (Ethics Complaint 10-074), she claimed that Mayor Evans came with Chief Moore to the local fruit stand, in the police car while Chief Moore was in uniform, asking her to vote for him. Ms. Burnette did not file a complaint against Chief Moore.

32. The complaint was written out by Cynthia Martin, while Ms. Burnette volunteered at the fruit stand. She acknowledged at hearing that some of the statements contained in the written statement were not true, and she wished that she had read the statement more closely before she signed it. For example, the statement in her complaint that "the former mayor asked me to vote for him while he was with the chief of police, in uniform" was not true. According to Ms. Burnette, Mr. Evans did not get out of the car and did not speak to her.

33. Ms. Burnette testified that Chief Moore and Mayor Evans came to the fruit stand in a gray city police car. Mayor Evans was in the passenger seat. Chief Moore got out of the car, according to Ms. Burnette, and told her she needed to talk to Mayor Evans about what she wanted and she could possibly get it. The only indication as to when this incident supposedly occurred was that it happened just before the 2008 election.

34. Ms. Burnette had an ongoing issue with the City of Coleman over her attempts to run a deli or barbeque on her property. At one point, while she claimed she was not a resident of Coleman, Chief Moore had been directed to "shut her down." She claimed that she wanted, but did not need, a license to operate, and that Chief Moore told her to talk to the mayor and he could help her get the license she sought.

35. Although the record is unclear, it appears that her licensure problem exists because her property is not zoned for commercial use, and that in order for her to get a license, she would have to seek a variance from the city council. In any event, Mayor Evans does not issue licenses or direct them to be issued. While he may have had some influence on the decision-making process, the comment made by Chief Moore, if in fact he made it, made no reference to the election or voting for Mayor Evans. Ms. Burnette simply made the assumption that Chief Moore was implying that a vote for Mayor Evans would help Ms. Burnette's efforts to receive a license. She even referred

to Chief Moore's statement as some sort of bribe by Mayor Evans, delivered through Chief Moore.

36. Chief Moore often stopped by the fruit stand on his way home from work to buy some fruit. Lucy Burnette often complained to him about her problems related to getting a license when he stopped by. He testified that he told her, on more than one occasion, that she should talk to Mayor Evans or members of the city council about her problem, but did not talk to her about the election or ask her for votes. His testimony is credited.

37. Lucy Burnette's written complaint indicates that there were witnesses to Chief Moore and Mayor Evans coming to the fruit stand in the police car. Investigator Maolli from the Commission on Ethics was unable to locate any witnesses to corroborate her account.

38. On April 14, 2010, Ronnie Owens filed complaints with the Commission on Ethics against both Chief Moore and Mayor Evans (COE Complaint Nos. 10-075 and 10-076). Cynthia Martin approached Mr. Owens and told him about "the election thing," and asked him if he saw Chief Moore and Lonnie Evans in the car together. She asked him to file complaints with the Commission on Ethics, and actually wrote out the complaints for him to sign.

39. Prior to Ms. Martin approaching him, Mr. Owens was not aware that there was any problem with the mayor and the police chief campaigning while on duty. He admitted that he filed the

complaint after he had a "run-in" with Chief Moore over an incident that took place at a local store.

40. The City of Coleman is bisected by a railroad track. Residents living in the neighborhood on the west side of the track are predominately African-American. This area of the town is sometimes referred to as "the quarters." It is not unusual for some residents of the quarters to sit at a table in a lot on the corner, or on someone's front porch, and play cards or dominos.

41. Mr. Owens claims that prior to the election, he and some other men were sitting at Mr. Robert T's house playing dominos. Mayor Evans and Chief Moore drove up in the gray Crown Vic and walked over to the men, and Chief Moore asked them to support Lonnie Evans in his election. One of the men asked Evans for a campaign sign, and Evans indicated he did not have any with him, but would bring one back. Mr. Owens testified that Lonnie Evans later returned, in his truck, and gave a campaign sign to one of the men.

42. Mr. Owens stated that there were five men present when Mayor Evans and Chief Moore came by the quarters. None of the other men testified at hearing, and Investigator Maolli was unable to find any who could corroborate that Evans and Moore came to the quarters in the police car while Moore was in uniform.

43. Each incident reported by the Bronsons, Ms. Burnette, and Mr. Owens involved the use of a city-owned police car while campaigning. The City of Coleman owns three police cars: a marked patrol car, a white Crown Victoria, and a gray Crown Victoria. The passenger compartment of the police cars contains a computer, printer, video system, radar unit, and other equipment. By necessity, this equipment takes up space not normally filled in a regular vehicle.

44. The City Council had approved Chief Moore's use of a car as a "take home" vehicle, and he used the white Crown Victoria almost exclusively. He drove the white police car back and forth to work from his home in Cedar Hill. He testified credibly that he was allowed to make stops in the city car, for example to pick up a grocery item, on his way to and from work. It was not permissible to use the car for personal entertainment or trips. Chief Moore also drove his personal car, a Buick Lucerne.

45. Lonnie Evans stopped driving, at the urging of his wife and son, by either September or early October of 2008 because of his declining eyesight. As a consequence, he did not drive during the 2008 campaign. He was driven to campaign by his wife, Carolyn, in their red Jeep SUV, by a member of the City Council and former postmistress Vergie Everett (who passed away in February of 2010) in her Cadillac, or on one occasion, by Chief Moore in his privately-owned Buick. Both men testified credibly

that when Chief Moore drove Mr. Evans, it was on a weekend and Chief Moore was dressed in jeans and a t-shirt.

46. Both men also testified that there was one occasion when Lonnie Evans rode in the front seat of the white police car while it was driven by Chief Moore. A benefit was held to help Cleveland Williams, a former member of the city council, who had become disabled. After the benefit, the proceeds were counted at City Hall and placed in an envelope for delivery. Mayor Evans accompanied Chief Moore to deliver the funds raised at the benefit. The two men rode past the location in the quarters where the men played dominos on their way to Mr. Williams' home, but did not stop.

47. Because of the amount of equipment and the "accumulated mess" in the police car, Mayor Evans found it exceedingly uncomfortable and was emphatic that he would not repeat the experience.

48. With the exception of one of the men in the quarters requesting a sign, there is no claim that at any time signs or flyers or campaign literature of any kind was distributed.

49. There was one occasion when, according to Chief Moore, campaign signs for both candidates were placed in a patrol car. On the one occasion when this occurred, teenagers had vandalized some campaign signs for both candidates. They were transported in the white police car to where the kids were congregated, and then placed in the marked patrol car and taken to the police

station where the parents of the suspected were contacted and shown the signs. His testimony is credited.

50. Based on the totality of the evidence presented, there is not clear and convincing evidence that Mayor Evans or Chief Moore ever used a city vehicle to campaign during the December 2008 election, and there is not clear and convincing evidence that Chief Moore campaigned on Lonnie Evans' behalf while on duty.

51. Bob and Carolyn Bolesta also testified to a conversation with Chief Moore that they believed occurred shortly before the 2008 election. Both denied ever seeing Chief Moore and Mayor Evans riding in a police car together. However, they both testified that, on occasion, Chief Moore would come by their home to check on them, as Mr. Bolesta had suffered from some significant health issues. On one occasion, the Bolestas testified that Bob Bolesta and Chief Moore discussed the election and Mr. Bolesta (who supported Eve Carruthers) expressed the view to Chief Moore that Mayor Evans "was in trouble." He stated that Chief Moore then said he would have to go see some people about the votes, and believed that Chief Moore initiated the conversation.

52. Frank Moore acknowledged going out to the Bolestas to check on them, and enjoyed speaking with them. He denied, however, asking them to support Lonnie Evans for mayor. Chief Moore did admit politics may have been discussed with

Mr. Bolesta, as Mr. Bolesta liked to talk about Coleman and what was going on in the town. Chief Moore denied initiated the discussion regarding the election and denied asking for votes.

53. The Bolestas were also often visited by James Dingle when he was with the police department. Mr. Bolesta often attended city council meetings, and was disturbed about James Dingle's termination from the police department.

54. The more credible evidence demonstrates that the Bolestas and Chief Moore did discuss politics as part of a general discussion, but that the discussion did not rise to the level of campaigning for Mayor Evans.

CONCLUSIONS OF LAW

55. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes (2010).

56. The Florida Commission on Ethics is authorized to conduct investigations and to make public reports on complaints concerning violations of chapter 112, part III, Florida Statutes, which is referred to as the Code of Ethics for Florida Public Officers and Employees.

57. The Advocate has the burden to establish the allegations in the Order Finding Probable Cause by clear and convincing evidence. Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997); see also Dep't of Banking & Fin. v.

Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

58. Clear and convincing evidence requires more than a preponderance of the evidence and less than the criminal standard of beyond a reasonable doubt. In re Graziano, 696 So. 2d 744, 753 (Fla. 1997).

59. As stated by the Supreme Court of Florida,

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

60. The Order Finding Probable Cause in Case No. 10-1284 alleges that Respondent violated section 112.313(6) "by misusing his position and/or resources within his trust to help the Mayor in his re-election campaign." Similarly, the Order Finding Probable Cause in Case No. 10-6456 alleges that a violation of the same provision "by misusing his position and/or resources while engaging in political activity in a Mayoral reelection campaign. The Commission also finds that there is probable cause to believe that the Respondent violated Section 112.313(6), by misusing his position by engaging in a traffic stop of Complainant to discuss a pending ethics charge."

61. Section 112.313(6) provides:

(6) 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.

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

63. Section 112.313(1) defines a "public officer" as "any person elected or appointed to hold office in any agency, including any person serving on an advisory body." Section 112.312(2) defines "agency" as "any state, regional, county, local or municipal government entity of this state"

64. "Corruptly" is defined in section 112.312(9) as "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."

65. In this case, it is clear Chief Moore was a public official at the time of the alleged incidents in this case. However the evidence was simply not clear and convincing that he used his official position, or resources within his trust, in order to gain a special benefit for himself or for Mayor Evans, or that any actions he took were taken corruptly.

66. Several of the complainants in this case had some motive for filing a complaint with the Commission. Officer Dingle was motivated by his termination as a police officer. Lucy Burnette had problem with the city's handling (or lack thereof) of her request for a license. Mr. Owens was upset by Chief Moore's handling of an unrelated incident. Others' testimony was either so inconsistent or lacking in detail as to fall short of the clear and convincing standard required to sustain a finding that Respondent violated section 112.313(6).

67. Moreover, with the exception of Officer Dingle's complaint, all of the complaints were filed well over a year after the election was over and upon the suggestion of Cynthia Martin. She even wrote out the complaints on two occasions. To describe the filing of the complaints as part of a conspiracy goes too far. However, it appears from the evidence that, other than Officer Dingle's, the complaints are grounded more on the power of suggestion than upon memory of actual events. With respect to Timothy Bronson's claim that Chief Moore stopped him

to ask about the complaint he filed, his testimony was simply not credible.

68. The probability that witnesses' memories were influenced by the suggestion of what might have happened is high where, as here, there was an instance where Respondent Moore drove Lonnie Evans to campaign before the election. However, the credible evidence presented demonstrates that when Chief Moore accompanied Lonnie Evans, it was on his own time and not in uniform. Similarly, there was an incident when the two were in the police car together. However, the purpose was not to campaign, but to deliver funds to the recipient of a benefit.

69. Although the Bolestas did not file a complaint with the Commission, the Commission was clearly empowered to investigate and consider information they provided. Fla. Admin. Code R. 34-5.0043. However, their testimony did not show that Chief Moore used his position or resources within his trust to secure a benefit for himself or for Mayor Evans. As found at paragraph 54, at best, the evidence demonstrates that Chief Moore may have participated in a discussion about local affairs, which included a discussion of the upcoming election. No violation of section 112.313(6) has been demonstrated.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED that the Florida Commission on Ethics enter a Final Order and Public Report finding that no violation of section 112.313(6) has been demonstrated.

DONE AND ENTERED this 16th day of February, 2011, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of February, 2011.

ENDNOTES

^{1/} The page of the list in evidence contains 36 names, starting with "Abney" and ending with "Belle." It is difficult to believe that a town with only 200 registered voters would have over 36 voters with names starting with the first two letters of the alphabet.

^{2/} The Commission on Ethics did not find probable cause based upon Mrs. Bronson's amendment to her complaint.

COPIES FURNISHED:

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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.