

IN THE EXECUTIVE ETHICS COMMISSION
OF THE STATE OF ILLINOIS

PAUL D. THOMPSON, in his capacity as)
INTERIM INSPECTOR GENERAL FOR THE)
OFFICE OF THE ILLINOIS SECRETARY)
OF STATE,)
)
Petitioner,)
)
v.)
)
DAVID FEIN,)
Respondent.)

No. 21-EEC-002

DECISION

This cause is before the Commission upon Petitioner’s Unopposed Motion for Summary Judgment. The parties of record in this matter and their addresses are:

Petitioner, PAUL D. THOMPSON, in his capacity as Interim Inspector General for the Office of the Illinois Secretary (324 West Monroe Street, Springfield, Illinois 62704), who is represented by Assistant Attorneys General Francis Neil MacDonald (fmacdonald@atg.state.il.us) on behalf of Attorney General Kwame Raoul (Office of the Illinois Attorney General, 100 W. Randolph Street, 11th Floor, Chicago, Illinois 60601).

Respondent David Fein, who is represented by attorneys Patrick E. Croke and Alexa C. Warner of Croke Fairchild Morgan & Beres, (180 N. LaSalle Street, Suite 2750, Chicago, Illinois 60604, pcroke@crokefairchild.com and awarner@crokefairchild.com)

On the basis of the record, including the witness statements that were filed with the Unopposed Motion for Summary Judgment, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. At all times relevant to this matter, Respondent provided lobbying services for Exelon Generation Company, LLC (“Exelon”), his corporate employer.
2. At all times relevant to the alleged misconduct, Respondent was a registered with the Illinois Secretary of State as a lobbyist for Exelon.
3. At all times relevant to this matter, Exelon had in place a corporate-wide policy (the “Exelon Policy”) that prohibits Exelon lobbyists from engaging in sexual harassment under

the State Officials and Employees Ethics Act (“Ethics Act”), as made applicable to lobbyists by the Lobbyist Registration Act.

4. Respondent completed his annual Secretary of State ethics training and Exelon’s sexual harassment prevention training on January 21, 2019.

5. At some point during the first half of 2019, Exelon’s Human Resources (“HR”) department became aware of allegations that Respondent may have engaged in conduct with certain Exelon employees that violated the Exelon Policy.

6. On or about August 23, 2019, *Crain’s Chicago Business* published an article concerning allegations that Respondent had engaged in conduct with certain Exelon employees that violated the Exelon Policy (the “*Crain’s Article*”).

7. Based on the publication of the *Crain’s Article*, the Inspector General initiated an investigation regarding Respondent’s alleged misconduct.

8. Several hours after publication of the *Crain’s Article*, Respondent’s Exelon group leader received a text message from an Exelon employee (“Witness A”) that stated, “I feel I need to tell you that I’ve also had unwelcome and inappropriate experiences with David. I am willing to share those with you, or if you think it would be more appropriate, I can report them through other channels.” Witness A subsequently informed Respondent’s group leader that Respondent had engaged in inappropriate and unwanted physical contact with her on March 19, 2019, and again on April 29, 2019.

9. Respondent held a senior supervisory position over Witness A in Exelon’s organizational hierarchy, and she and Respondent had attended the March 19, 2019, and April, 29, 2019, events in connection with their professional duties as lobbyists for Exelon.

10. On March 19, 2019, after General Assembly hearings, several people associated with Exelon’s lobbying efforts, including Witness A and Respondent, gathered at a hotel bar. Respondent flattered Witness A’s professional work and told her how wonderful and attractive she was.

11. Once the March 19, 2019, gathering broke up, Witness A went to her room. At about 2:00 a.m., however, Respondent knocked on Witness A’s hotel room door and told her he wanted to speak with her. Because Respondent was one of her supervisors, Witness A (in pajamas at that time) opened the door and let him in.

12. Once inside Witness A’s hotel room, Respondent stated that he and his wife had separated and that he found Witness A attractive. He put his hand on her leg and tried to kiss her. Witness A told Respondent, “You’ve got to leave,” which he did.

13. The next morning, March 20, 2019, Respondent stopped by Witness A’s desk and said, “I was drunk. There’s no excuse,” to which Witness A replied, “That’s right, there is no excuse for that.”

14. On April 29, 2019, at the end of formal activities at a second lobbyist-related event in Springfield, a group including Respondent and Witness A gathered at a second hotel bar.

15. Witness A left the April 29, 2019, gathering early to take the elevator to her hotel room, but Respondent followed her into the elevator.

16. As Witness A reached her floor and began to exit the elevator, Respondent put his hands on Witness A's face and tried to kiss or hug her. Witness A told Respondent to stop, pulled away from him, and left the elevator.

17. On August 24, 2019, senior company leadership informed Respondent that he was being separated from further employment with Exelon.

18. Subsequently, Respondent elected to allow his lobbyist registration with the Illinois Secretary of State to lapse and has not registered as a lobbyist since 2019.

19. Witness A felt offended, sexually harassed, oppressed, and placed at professional risk by Respondent's wrongful actions toward her. His conduct, both in March and April 2019, put her in a situation where her workplace successes could be misperceived as being based on inappropriate personal conduct rather than merit.

20. Further, Witness A found Respondent's conduct to be wrong, unwelcome, grossly inappropriate, offensive, and improper.

21. After an investigation by the Inspector General, during which Respondent admitted to the above allegations against him, the Petitioner filed a complaint before the Commission.

CONCLUSIONS OF LAW

1. Petitioner Paul D. Thompson is the Interim Inspector General for the Office of the Secretary of State, duly appointed to by the Illinois Secretary of State pursuant to 15 ILCS 305/14(a) to exercise the powers of the Inspector General

2. As a registered lobbyist at the time of the alleged misconduct, Respondent was subject to the terms and conditions of the Lobbyist Registration Act (25 ILCS 170/1 *et seq.*).

3. The Lobbyist Registration Act states in relevant part that "All persons have the right to work in an environment free from sexual harassment. All persons subject to this Act shall refrain from sexual harassment of any person." 25 ILCS 170/4.7(a).

4. The Lobbyist Registration Act defines "sexual harassment" as:

[A]ny unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when: (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (iii) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. For the purposes of this definition, the phrase "working environment" is not limited to a physical location

an employee is assigned to perform his or her duties and does not require an employment relationship.

25 ILCS 170/4.7(d)

5. A violation of Section 4.7(a) of the Lobbyist Registration Act is “considered a violation of the State Officials and Employees Ethics Act, subject to the jurisdiction of the Executive Ethics Commission and to all penalties under Section 50-5 of the State Officials and Employees Ethics Act.” 25 ILCS 170/10(a-5).

6. Respondent’s March 19, 2019, conduct toward Witness A in their working environment was of a sexual nature and was sufficiently severe or pervasive to create an intimidating, hostile, or offensive working environment for Witness A

7. Respondent’s April 29, 2019, conduct toward Witness A in their working environment was of a sexual nature and was sufficiently severe or pervasive to create an intimidating, hostile, or offensive working environment for Witness A.

8. Respondent violated Section 4.7(a) of the Lobbyist Registration Act on March 19, 2019, and again on April 29, 2019.

9. Section 50-5(h) of the Ethics Act prescribes that the penalty for a violation of Section 4.7 of the Lobbyist Registration Act is as follows:

Any natural person or lobbying entity who intentionally violates Section 4.7, paragraph (d) of Section 5, or subsection (a-5) of Section 11 of the Lobbyist Registration Act is guilty of a business offense and shall be subject to a fine of up to \$5,000. The Executive Ethics Commission, after the adjudication of a violation of Section 4.7 of the Lobbyist Registration Act for which an investigation was initiated by the Inspector General appointed by the Secretary of State under Section 14 of the Secretary of State Act, is authorized to strike or suspend the registration under the Lobbyist Registration Act of any person or lobbying entity for which that person is employed for a period of up to 3 years. In addition to any other fine or penalty which may be imposed, the Executive Ethics Commission may also levy an administrative fine of up to \$5,000 for a violation specified under this subsection (h). Any penalty imposed by an ethics commission shall be separate and distinct from any fines or penalties imposed by a court of law or by the Secretary of State under the Lobbyist Registration Act.

5 ILCS 430/50-5(h)

ANALYSIS

Motions that are potentially dispositive of the case must be determined by the Commission. 2 Ill. Adm. Code 1620.510(d). Granting summary disposition in an administrative

proceeding is comparable to granting summary judgment under Section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005). *Bloom Tp. High School v. Ill. Commerce Comm'n*, 309 Ill. App. 3d 163, 177, 242 Ill. Dec. 892, 903, 722 N.E.2d 676, 687 (1st Dist. 1999); *Cano v. Vill. of Dolton*, 250 Ill. App. 3d 130, 138, 189 Ill. Dec. 883, 889, 620 N.E.2d 1200, 1206 (1st Dist. 1993). Summary judgment is appropriate only where “the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” 735 ILCS 5/2-1005(c).

Where, as here, the material facts are undisputed, a triable issue precluding summary judgment may yet exist where reasonable persons might draw different inferences from the undisputed facts. Summary judgment should be allowed only when the right of the moving party is clear and free from doubt. *Adams v. N. Ill. Gas Co.*, 211 Ill.2d 32, 43, 284 Ill. Dec. 302, 310, 809 N.E.2d 1248, 1256 (2004). In this case Respondent disputes neither the facts nor the conclusion that he violated section 4.7(a) of the Lobbyist Registration Act.

Petitioner’s motion asserts that Respondent has violated subsections (a) and (d) of section 4.7 of the Lobbyist Registration Act and subsections (a) and (d) of section 5-65 of the Ethics Act. Subsections 4.7(d) and 5-65(d), however, merely define the term “sexual harassment,” and neither contains a prohibition that can be violated.

Subsection 5-65(a) prohibits sexual harassment, but it applies only to “all persons subject to [the Ethics Act].” Those subject to the Ethics Act are employees and officials of State agencies, which do not include private sector registered lobbyists. See definitions of “employee,” “State employee,” and “State agency” at 5 ILCS 430/1-5. Section 10 of the Lobbyist Registration Act, however provides:

“A violation of Section 4.7 or paragraph (d) of Section 5 shall be considered a violation of the State Officials and Employees Ethics Act, subject to the jurisdiction of the Executive Ethics Commission and to all penalties under Section 50-5 of the State Officials and Employees Ethics Act.” 25 Ill. Comp. Stat. Ann. 170/10(a-5).

Thus, although section 10 makes sexual harassment by a registered lobbyist a violation of the Ethics Act, it does not make it a violation of section 5-65 of the Ethics Act specifically.

Given the lack of dispute as to both facts and as to whether Respondent’s acts constituted sexual harassment, the Commission grants the motion and finds that Respondent has twice violated Section 4.7(a) of the Lobbyist Registration Act. Consequently, Respondent is deemed to have committed two separate violations of the Ethics Act and is subject to penalties as provided in the section 50-5 of the Ethics Act.

Petitioner’s motion calls for no relief other than a fine, but neither party has recommended a specific amount, leaving any penalty to the Commission’s discretion. Commission rules establish 14 aggravating and mitigating factors the Commission may consider in assessing an appropriate fine. 2 Ill. Adm. Code 1620.530(b). Respondent has filed a Mitigation Statement, to which Petitioner has not responded with either an objection or statement relating to aggravating factors. There is no evidence in the record with respect to some of the factors, but it is clear that Respondent was in a position of authority over Witness A, had

received training on the State’s prohibition of sexual harassment by a lobbyist, and had sexually harassed Witness A even after acknowledging the inappropriateness of his initial misconduct. In addition, the nature of the conduct was such that his public conduct was demeaning to Witness A, and his private advances alone in her room late at night and in an elevator would be particularly intrusive and unsettling. However, also in the record is Respondent’s cooperation with the Inspector General’s investigation, his willingness to take accountability for his misconduct through his admissions of culpability and allowing his lobbyist registration to lapse. Moreover, in a typical disciplinary case, the Commission would consider the application of mitigating and aggravating factors in the context of determining whether to make disciplinary recommendations (5 ILCS 430/20-55) or to “issue injunctive relief up to and including discharge of a State employee” (5 ILCS 430/50-10). Respondent was removed from his job by his employer when the allegations came to light.

Nonetheless, while the Commission finds Respondent’s mitigation statement to be credible, including assertions that his sexual misconduct was not premeditated and that he was under significant distress due to personal circumstances, Respondent’s actions were unwelcome, inappropriate, offensive, and potentially damaging to Witness A’s career. Additionally, the State has a strong interest in preventing future acts of sexual harassment through a combination of punitive measures and deterrence. Thus, it appears that a substantial penalty is warranted, but not necessarily the maximum penalties as set forth in the Ethics Act.

WHEREFORE, the Executive Ethics Commission hereby:

1. Levies against Respondent an administrative fine of \$2,000 for his March 19, 2019, violation of section 4.7(a) of the Lobbyist Registration Act;
2. Levies against Respondent an administrative fine of \$4,000 for his April 29, 2019, violation of section 4.7(a) of the Lobbyist Registration Act; and
3. Suspends the Respondent’s lobbyist registration through December 31, 2021.

This is a final decision. Commission rules (2 Ill. Adm. Code 1620) do not provide for reconsideration.

SO ORDERED.

ENTERED: April , 2021

This Decision is signed in counterparts. The “entered” date is the date of the last required signature. See 2 Ill. Adm. Code 1620.530(d).

Commissioner

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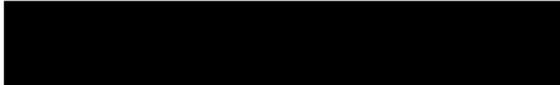
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