

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re C. E. "ED" DEPUY, JR.,)	
)	
Respondent.)	Complaint No. 08-107
)	DOAH Case No. 10-1285EC
)	
)	Final Order No.11-137
_____)	

FINAL ORDER AND PUBLIC REPORT

This matter came before the State of Florida Commission on Ethics (Commission), meeting in public session on October 21, 2011, on the Recommended Order (RO) of an Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH) rendered on August 11, 2011.

Background

This matter began with the filing of an ethics complaint (which included an amendment) by Steven Slade ("Complainant" or "Slade"), in 2008, against C. E. "Ed" DePuy, Jr. ("Respondent" or "DePuy"). The complaint alleged that the Respondent, as a Leon County Commissioner, violated Section 112.3143(3)(a), Florida Statutes (the voting conflicts law), regarding County Commission votes/measures concerning a development in which Respondent had lot-purchase interests, and violated Article II, Section 8, Florida Constitution, by failing to disclose sources or amounts of income on certain of the Respondent's CE Form 6

(Full and Public Disclosure of Financial Interests) filings. By order dated September 15, 2008, the Commission on Ethics' Executive Director determined that the allegations of the complaint were legally sufficient to indicate possible violations of the statute and the Constitution and ordered Commission staff to investigate the complaint, resulting in a Report Of Investigation dated October 20, 2009. By order dated December 9, 2009, the Commission found probable cause to believe the Respondent, as a Leon County Commissioner, violated Section 112.3143(3)(a), Florida Statutes, regarding four votes/measures which affected a real estate development in which Respondent had an interest, and found probable cause to believe the Respondent violated Article II, Section 8, Florida Constitution, by failing to disclose income received in 2007 on his 2007 CE Form 6. In the same order, the Commission found no probable cause to believe the Respondent violated Article II, Section 8, as to the 2006 CE Form 6 secondary source of income allegation (effectively dismissing that allegation).

The matter was forwarded to DOAH for assignment of an ALJ to conduct a formal hearing and prepare a recommended order. Thereafter, the matter was placed in abeyance at DOAH and returned to the Commission, resulting in additional investigation and proceedings which yielded a Supplemental Order

Finding Probable Cause, entered September 8, 2010, which found probable cause to believe the Respondent had violated Section 112.3143(3)(a) and Article II, Section 8, in additional manners or instances. The matter was returned to DOAH and a formal evidentiary hearing was held before the ALJ on February 16, 2011, including the presentation of witnesses and the admission of exhibits. A transcript of the hearing was provided, and both the Respondent and the Advocate for the Commission on Ethics filed proposed recommended orders with the ALJ.

On August 11, 2011, the ALJ entered his Recommended Order (RO) recommending that the Commission issue a public report finding that the evidence presented at the DOAH hearing was insufficient to establish clearly and convincingly that Respondent violated Section 112.3143(3)(a) or Article II, Section 8, in any of the alleged instances other than the instance of not reporting income on his 2007 CE Form 6, recommending that the public report find that the evidence presented at the DOAH hearing established clearly and convincingly that Respondent violated Article II, Section 8, by failing to disclose income received in 2007 on his 2007 CE Form 6 (Full and Public Disclosure of Financial Interests), and recommending that such violation merits a civil penalty of \$1,000 against the Respondent. On August 25, 2011, the Advocate

timely filed (with the Commission) exceptions to the RO; and on September 6, 2011, the Respondent filed a response to the Advocate's exceptions. No exception was filed by the Respondent to the allegation as to which the ALJ recommended the finding of a violation and the imposition of a penalty. Both the Respondent and the Advocate were notified of the date, time, and place of our final consideration of this matter; and both were given the opportunity to make argument during our consideration.

Standards of Review

Under Section 120.57(1)(1), Florida Statutes, an agency may reject or modify the conclusions of law and interpretations of administrative rules contained in a recommended order. However, the agency may not reject or modify findings of fact made by an ALJ unless a review of the entire record demonstrates that the findings were not based on competent, substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. See, e.g., Freeze v. Department of Business Regulation, 556 So. 2d 1204 (Fla. 5th DCA 1990), and Florida Department of Corrections v. Bradley, 510 So. 2d 1122 (Fla. 1st DCA 1987). "Competent, substantial evidence" has been defined by the Florida Supreme Court as such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support

the conclusions reached." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

The agency may not reweigh the evidence, may not resolve conflicts in the evidence, and may not judge the credibility of witnesses, because such evidential matters are within the sole province of the ALJ. Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Consequently, if the record of the DOAH proceedings discloses any competent, substantial evidence to support a finding of fact made by the ALJ, the Commission on Ethics is bound by that finding.

Under Section 120.57(1)(1), Florida Statutes, an agency may reject or modify the conclusions of law over which it has substantive jurisdiction and the interpretations of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion or interpretation and must make a finding that its substituted conclusion or interpretation is as or more reasonable than that which was rejected or modified.

Having reviewed the RO and the entire record of the proceeding, the Advocate's exceptions, and the Respondent's

response to the exceptions, and having heard the arguments of the Advocate and the Respondent, the Commission on Ethics makes the following rulings, findings, conclusions, dispositions, and recommendations:

Rulings on Advocate's Exceptions

1. In her first exception, the Advocate takes issue with all of paragraphs 84 through 103 of the RO (all of which are within the portion of the RO labeled CONCLUSIONS OF LAW), and with portions of paragraphs 159, 160, 161, 162, 166, and 167 (which, too, are labeled CONCLUSIONS OF LAW). More particularly, the Advocate requests that the Commission reject outright all of the content or verbiage of paragraphs 84-103 and substitute language offered in her exception (language numbered 84 through 90 in her exception) for the totality of the language of RO paragraphs 84-103. The Advocate also requests that the Commission reject (delete, not incorporate within the Commission's Final Order and Public Report) various sentences of paragraphs 159, 160, 161, 162, 166, and 167 of the RO, thereby modifying or making a substitution as to the meaning of those paragraphs.

The thrust of this exception is that the ALJ, while making a fact-finding-based decision in favor of the Respondent regarding the voting conflict allegations which cannot be

disturbed by the Commission under the evidential record from the DOAH hearing, unnecessarily wrote, in the excepted-to paragraphs, about "ministerial matters," erroneously concluding that Section 112.3143(3)(a) does not encompass such matters. That is, it appears that the Advocate is arguing that to the extent that the ALJ has concluded that an action or decision in which a public body has no discretion (e.g., to approve or disapprove) can never constitute a vote or measure from which special private gain or loss can inure, such is an erroneous view of the law. The Respondent, in his response to the exception, argues that although the RO paragraphs the Advocate objects to are within the portion of the RO labeled CONCLUSIONS OF LAW, they actually contain or are imbedded with findings of fact, which findings are much less susceptible, under Chapter 120, Florida Statutes, to our rejection or modification as a reviewing agency.

We accept the Advocate's first exception. In so doing, we are aware that the ALJ's determination that the evidence in this matter was insufficient to establish that the various votes of the County Commission in which the Respondent participated inured to the Respondent's special private gain or loss or to that of certain others is of an evidential fact nature or an

"ultimate fact" nature, which we cannot now disturb. Goin v. Commission on Ethics, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995).

However, as the agency Constitutionally and statutorily charged with administering Section 112.3143(3)(a), our rejection and substitution as to paragraphs of the RO, as suggested by the Advocate, is not without good reason. While the proofs in this particular case did not rise to the level of establishing a violation of Section 112.3143(3)(a), we refuse to adopt as our own, the ALJ's view of the significance of a vote or measure being "ministerial." Our reasons for this include our judgment as an agency not to put into our decisional history (via an adoption of the RO unaltered) the ALJ's "ministerial versus nonministerial" view of the meaning of the statute. While our decisional history regarding the statute includes our view that certain measures/votes can be preliminary or procedural and, thus, can be matters not triggering the voting conflicts law, such a concept differs qualitatively from the ALJ's ministerial concept. Another reason for our not including this construction of the statute in our final order in this matter is that a purpose of the statute is to prevent public officers from voting on matters that directly affect themselves or certain others. That a public board could be forced by a court to take an action (mandamus in a ministerial matter) does not mean that the

board's taking the action, without the need for mandamus from a court, does not directly affect (directly cause gain or loss to) the persons or entities who are the subject of the action. Also, the need or lack of need to seek mandamus, occasioned by a public board's "voluntary" action or inaction in nondiscretionary matters, itself can be a special gain or loss under the statute. In other words, we do not believe that a correct construction of the statute includes a view that a legislative, executive, quasi-judicial, or other type of action or inaction by a collegial body, which directly affects a public officer or certain others, is not within the purview of the statute simply because it is potentially subject to a request for and the granting of a writ of mandamus. In rejecting the ALJ's "ministerial" construction of the statute and substituting language suggested by the Advocate, we find that the substituted view is as or more reasonable than the ALJ's view.

2. In her second exception, the Advocate requests that the Commission delete portions of paragraphs 132, 148, 149, 166, and 167 of the RO, all of which are labeled CONCLUSIONS OF LAW. Essentially, the Advocate argues that the ALJ's references to "piercing the corporate veil," or to the lack of such a "piercing," in these paragraphs of the RO, unnecessarily or erroneously import into construction of the meaning of Section

112.3143(3)(a) a concept from corporate law related to liability of otherwise immune corporate officers, directors, or stockholders for the corporation's wrongful acts. In other words, the Advocate is arguing that under Section 112.3143(3)(a), it is not, as a matter of law, necessary, or even relevant, to pierce the corporate veil to show that a person or entity is a public officer's principal or employer regarding voting conflicts, provided the evidence in a particular case shows a respondent to have been working for a particular person or entity. In his response to this exception, the Respondent argues that the Advocate is seeking to undermine findings of fact imbedded in the challenged paragraphs.

We accept the Advocate's second exception. While recognizing, as the Advocate expressly does in this exception, that the findings of fact of the ALJ in this particular matter do not establish that certain persons or entities necessary for a determination of a violation of the statute were the Respondent's principal, we do not agree that the statute is validly construed to require a "piercing of the corporate veil." Had the evidence presented to him been sufficient, the ALJ could have found, as a matter of fact, that certain persons or entities were the Respondent's principal, without relying on legal doctrine from corporate law. In fact, such was the

approach taken by another ALJ in a somewhat similar matter. See In re IRVING ELLSWORTH, Complaint No. 02-108, DOAH Case No. 04-0701EC, COE Final Order No. 06-024 (Commission on Ethics 2006). As the Advocate suggests, "piercing the corporate veil" concerns liability regarding wrongful acts of corporations, their leadership, or their shareholders, and such evidence or proof is not necessarily relevant to a given respondent's principal-agent status. In making these rejections or modifications, we find that the resulting language (the language of our final order adopting the RO, less the language of the RO rejected or modified) is as or more reasonable than that rejected or modified.

3. To summarize, we are aware of the requirements and limitations of Chapter 120, Florida Statutes, concerning review by an agency of a recommended order of an ALJ. Goin, supra. However, we also are aware of the deference accorded an agency regarding its construction of a statute which it administers. Velez v. Commission on Ethics, 739 So. 2d 686 (Fla. 5th DCA 1999). To those ends, it is not our intent or our action, by our granting of the Advocate's exceptions, to disturb any finding of fact of the ALJ; but it is our intent and our effect to view the legal elements of Section 112.3143(3)(a) differently

than the views indicated by some of the writings of the ALJ in the RO.

Findings of Fact

Except to the extent that the findings of fact of the ALJ substantively constitute conclusions of law rejected or modified above, the Commission on Ethics accepts and incorporates into this Final Order And Public Report the findings of fact in the Recommended Order from the Division of Administrative Hearings.

Conclusions of Law

Except to the extent rejected or modified above, the Commission on Ethics accepts and incorporates into this Final Order And Public Report the conclusions of law in the Recommended Order from the Division of Administrative Hearings.¹

¹The Final Order And Public Report in this matter incorporates the Recommended Order of the ALJ, not in full, but with certain of its paragraphs stricken or modified as in the Advocate's Exceptions To Recommended Order, and incorporates the Advocate's Exceptions To Recommended Order. Both of these documents are incorporated by reference into, and thus are part and parcel of, this Final Order And Public Report.

Disposition

Accordingly, the Commission on Ethics finds that the Respondent did not violate Section 112.3143(3)(a), Florida Statutes, regarding the votes/measures concerning a development (Centerville Farms) in which he had an interest, either personally or as to a corporate principal by which he was retained, or the parent or subsidiary organization of a corporate principal by which he was retained; finds that the Respondent did not violate Article II, Section 8, Florida Constitution, by failing to disclose a secondary source of income received in 2007 on his CE Form 6 (Full and Public Disclosure of Financial Interests); but finds that the Respondent violated Article II, Section 8, Florida Constitution, by failing to disclose income received in 2007 on his CE Form 6. For the violation, the Commission recommends a civil penalty against the Respondent in the amount of \$1,000.

ORDERED by the State of Florida Commission on Ethics

meeting in public session on October 21, 2011.

Date Rendered

Susan Horovitz Maurer
Vice Chair

THIS ORDER CONSTITUTES FINAL AGENCY ACTION. ANY PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER HAS THE RIGHT TO SEEK JUDICIAL REVIEW UNDER SECTION 120.68, FLORIDA STATUTES, BY FILING A NOTICE OF ADMINISTRATIVE APPEAL PURSUANT TO RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, WITH THE CLERK OF THE COMMISSION ON ETHICS, P.O. DRAWER 15709, TALLAHASSEE, FLORIDA 32317-5709 (PHYSICAL ADDRESS AT 3600 MACLAY BLVD., SOUTH, SUITE 201, TALLAHASSEE, FLORIDA); AND BY FILING A COPY OF THE NOTICE OF APPEAL ATTACHED TO WHICH IS A CONFORMED COPY OF THE ORDER DESIGNATED IN THE NOTICE OF APPEAL ACCOMPANIED BY THE APPLICABLE FILING FEES WITH THE APPROPRIATE DISTRICT COURT OF APPEAL. THE NOTICE OF ADMINISTRATIVE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE DATE THIS ORDER IS RENDERED.

cc: Mr. Mark Herron, Attorney for Respondent
Ms. Diane L. Guillemette, Commission Advocate
Mr. Steven Slade, Complainant
The Honorable Lawrence P. Stevenson
Division of Administrative Hearings