BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re FRANK PETERMAN, JR., Respondent.	)	Complaint No. 09-153 DOAH Case No. 11-2309EC Final Order No. 12-002

FINAL ORDER AND PUBLIC REPORT

This matter came before the State of Florida Commission on Ethics ("Commission"), meeting in public session on February 3, 2012, on the Recommended Order ("RO") of an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH") rendered on December 30, 2011.

Background

This matter began with the filing of an ethics complaint by David A. Plyer ("Complainant") against Frank Peterman, Jr. ("Respondent" or "Peterman") indicative of Peterman's having misused his public position as Secretary of the Florida Department of Juvenile Justice ("DJJ" or "Department") regarding his state-paid travel. Thereafter, the Commission conducted a preliminary investigation of the complaint and, based on the investigation, found that probable cause existed to believe the Respondent, as Secretary of the Department, violated Section 112.313(6), Florida Statutes, by incurring excessive travel

costs between St. Petersburg, Florida and Tallahassee, Florida, after receiving reasonable notice and admonition from the Governor's administration that the travel was excessive. Subsequently, the matter was referred to DOAH, where the ALJ conducted a formal hearing on the issue, under Section 120.57(1), Florida Statutes, participated in by the Respondent, who was represented by counsel, and the Advocate in behalf of the Commission, resulting in the instant RO which is before the Commission for review and final agency action. In the RO, the ALJ recommends that the Commission enter a final order and public report finding that the Respondent violated Section 112.313(6), Florida Statutes, and that the Commission recommend to the Governor the imposition of a civil penalty against the Respondent of $5,000 and a public censure and reprimand. Thereafter, the Respondent timely filed exceptions to the RO and the Advocate timely filed responses to the exceptions. Both the Respondent and the Advocate were noticed as to our consideration of the RO, and both appeared and made argument at our consideration of the RO.

Standards of Review of a DOAH Recommended Order

Under Section 120.57(1)(l), 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.

However, the agency may not reject or modify findings of fact made by an ALJ unless the agency first determines from a review of the entire record, and states with particularity in its order, that the findings of fact were not based upon competent, substantial evidence or that the proceedings upon which the findings were based did not comply with 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.

Having reviewed the RO, the record of the DOAH proceeding, the exceptions, and the responses to the exceptions, and having heard argument of both the Respondent and the Advocate, the Commission on Ethics makes the following rulings, findings, conclusions, determinations, dispositions, and recommendations:

Rulings on Respondent's Exceptions

Respondent timely filed eleven numbered exceptions. Each will be treated below via numbering corresponding to that in the exceptions.

In Exception 1, Respondent takes exception to the last two sentences of paragraph 18 of the RO, arguing that the Commission should "revise" these findings of fact to his benefit. More particularly, Respondent argues that these findings of fact are "based on pure speculation without any evidentiary support."

The findings concern February 29, 2008 travel from Tallahassee to Tampa, followed by travel back to Tallahassee on March 3. The two sentences in question read:

> There was nothing on Mr. Peterman's calendar that showed state business was being conducted. Since Mr. Peterman arrived after the close of business on Friday and returned before the beginning of the business day on Monday, the trip was not for state business and was for the purpose of Mr. Peterman returning to his primary residence.

This exception is rejected. The record contains competent, substantial evidence supporting the finding that there was nothing on the Respondent's calendar that showed state business was being conducted from Friday, February 29, 2008, after 5:00 p.m. (when the Respondent got to Tampa from Tallahassee), until Monday, March 3, 2008, before 8:00 a.m. (when the Respondent got back to Tallahassee from Tampa). See Advocate's Exhibits 8 and 9, and see the testimony of Corine Brown, Secretary Specialist for DJJ, who kept Respondent's calendar, in volume II of the DOAH hearing transcript. Further, Advocate's Exhibits 1, 8, and 9, Ms. Brown's testimony, and other evidence of record, including evidence supporting the "weekend" nature of the days, dates, and times of the travel to and from Tampa and Tallahassee, supported the inference made by the ALJ, as the trier of fact, that the trip was not for state business but, instead, was for the purpose of the Respondent returning to his

primary residence. Thus, the ALJ evaluated the witnesses' testimony, including that of the Respondent himself, and the other evidence, and made her factual determinations. She did not "arbitrarily" reject the Respondent's testimony, as suggested in this exception; and it is not the province of this Commission to reweigh the evidence or make new or different findings of fact from those determined by the ALJ.

Similarly, in Exception 2, the Respondent takes exception to the last two sentences of Paragraph 19 of the RO, claiming "pure speculation without any evidential support" as to the ALJ's findings. Paragraph 19 of the RO concerns a Friday, May 2, 2008 flight from Tallahassee to Tampa (arriving at 7:25 p.m.), followed by car travel from Tallahassee to St. Petersburg on Sunday, May 4, 2008, followed by a Monday, May 5, 2008, flight back to Tallahassee, leaving at 10:25 a.m. and arriving at 11:20 a.m. The two sentences read:

> Given the time that it would take to get from St. Petersburg to Tampa to catch a 10:25 a.m. flight, there would be no work time in the Wildwood office, and the calendar showed no work. It is not understandable why the travel records also show a car trip to St. Petersburg on May 4, 2008, but whether Mr. Peterman went by airplane or automobile, the trip was not for state business and was for the purpose of Mr. Peterman returning to his primary residence.

This exception, too, is rejected. The record contains competent, substantial evidence supporting these findings, and

the ALJ, as the finder of fact, drew a fair inference. See the record cites regarding Exception 1, above, and see Advocate's Exhibit 3.

In Exception 3, the Respondent again makes argument, as in Exceptions 1 and 2, but regarding paragraph 20 of the RO, which concerns a Friday, August 22, 2008 flight from Tallahassee to Tampa, arriving at 3:50 p.m., a Monday, August 25, 2008 flight back to Tallahassee, arriving at 12:12 a.m., and an August 26, 2008 return to Tampa, arriving at 3:50 p.m. This exception is rejected for the reasons stated as to Exceptions 1 and 2. There is competent, substantial evidence supporting paragraph 20, including the testimony of Corine Brown on page 38 of volume II of the DOAH hearing transcript.

In Exception 4, the Respondent excepts to paragraph 21 of the RO, to the extent that the paragraph "finds or implies that Mr. Peterman's travel between Tampa and Tallahassee was excessive." Paragraph 21, in its entirety, reads:

> On January 13, 2009, Mr. Peterman flew from Tampa to Tallahassee, and flew back from Tallahassee to Tampa on January 14, 2009. The following day, January 15, 2009, Mr. Peterman flew from Tampa to Tallahassee and returned to Tampa by air on January 16, 2009. His calendar showed that he had two appointments at the Wildwood office on January 15, 2009.

This exception is rejected. Paragraph 21 is a finding of fact. There is competent, substantial evidence to support

paragraph 21, including the citations to the record listed above regarding Exceptions 1, 2, and 3, and including Advocate's Exhibits 1, 2, 6, 7, 8, and 9. Further, assuming arguendo that the claim made by the Respondent in this exception--that, as a matter of law, Mr. Peterman, as the head of DJJ, had discretion to determine whether to incur travel as well as the method of travel--is correct, the same would not disturb the factual findings of paragraph 21 or its evidential underpinnings. Also, it is apparent that any such discretion would be limited to valid public business trips and would not include bogus, no-public-business trips such as those found by the ALJ.

In Exception 5, the Respondent makes argument, similar to that made regarding Exceptions 1, 2, and 3, but as to paragraph 22 of the RO. Paragraph 22 reads:

> On March 28, 2009, a Saturday, Mr. Peterman flew from Miami to Tampa rather than to Tallahassee. He took a 7:00 flight on Monday, March 30, 2009 to Tallahassee. The trip to Tampa from Miami was to return to his primary residence as evidenced by his early morning flight to Tallahassee on March 30, 2009. Thus, the flight to Tallahassee would not have been incurred except for his desire to spend the weekend at his St. Petersburg home.

This exception is rejected. There is competent, substantial evidence to support this paragraph, including the evidence cited regarding Exceptions 1 through 4, above; and the inferences found by the ALJ are supported by the evidence.

Exception 6 is like Exception 5, but instead concerns a Saturday, September 19, 2009 flight from Miami to Tampa, followed by a Monday, September 21, 2009 flight from Tampa to Tallahassee, followed by a return flight to Tampa (paragraph 23 of the RO). There is competent, substantial evidence to support paragraph 23. This exception is rejected for the reasons Exception 5 and the other similar Exceptions are rejected.

Exception 7 takes issue with the portions of paragraph 24 of the RO "which finds that Mr. Peterman's travel to St. Petersburg was not for state business but [was] for the purpose of returning to his primary residence," arguing that the paragraph is a finding of fact based on "pure speculation" and not on competent, substantial evidence. This exception is rejected. Paragraph 24 reads:

> Mr. Peterman claimed that while he was at the Wildwood office that he met with children and parents of children concerning the care provided by DJJ, met with staff in the various facilities in the middle region of Florida, and talked with persons waiting in the lobby of his office. However, Mr. Peterman's calendar does not account for a large amount of the time that he purportedly spent at the Wildwood office, and his testimony was vague, characterized by generalities rather than in specifics. The evidence established that Mr. Peterman made a concerted effort to make sure that he spent his weekends in St. Petersburg where he had his primary residence and was pastor of a church.

The evidential facts found in this paragraph are supported by competent, substantial evidence; and the ALJ's

characterization/evaluation of the Respondent's DOAH hearing testimony is uniquely within her province as the trier of fact. Further, to the extent that the last sentence of paragraph 24 could be said to be a finding of "ultimate fact" by the ALJ, the same is supported by competent, substantial evidence, is within the province of the ALJ, and cannot be disturbed by this Commission. Goin v. Commission on Ethics, 658 So. 2d 1131 (Fla. 1st DCA 1995).

In Exception 8, the Respondent argues that the ALJ, in paragraph 30 of the RO, found the Respondent in violation of the statute [Section 112.313(6), Florida Statutes, Misuse of Public Position] "for conduct for which he was not charged in the Order Finding Probable Cause." In paragraph 30, the ALJ determined:

> . . . Mr. Peterman used his position as Secretary of DJJ to travel to his primary residence at state expense when there was no state purpose for the travel.

The Commission's Order Finding Probable Cause states:

> . . . there is probable cause to believe the Respondent, as Secretary of the Florida Department of Juvenile Justice, violated Section 112.313(6), Florida Statutes, by incurring excessive travel costs between St. Petersburg, Florida and Tallahassee, Florida, after receiving reasonable notice and admonition from the Governor's administration that the travel was excessive.

This exception is rejected. The wording of the ALJ's determination is substantively the same as that of the Order Finding Probable Cause; the ALJ's determination is consistent with the Order. Further, the record of the proceedings demonstrates that the Respondent was on notice as to the charge against him and that he was able to mount a thorough and vigorous, though unsuccessful, defense at DOAH. Further, no matter which variant of the substantive wording is used, it is clear that the evidence supports the Respondent's misuse of state travel.

Exception 9 takes issue with the ALJ's determination in paragraph 31 of the RO that various actions of the Respondent, as determined by the ALJ, show that the Respondent corruptly used his public position to travel home at state expense. This exception has a three-fold focus, asserting (1)that there is no competent, substantial evidence that the Respondent traveled to and from St. Petersburg for no other reason than to be home on the weekends, (2)that the ALJ's determination that the Respondent's state travel was a way for the Respondent to continue his church ministry is not based on any "specific evidence adduced at the hearing that he did so," and that state-travel-supported continuation of the ministry was an incidental private benefit not violative of the statute under Blackburn v.

State, Commission on Ethics, 589 So. 2d 431 (Fla. 1st DCA 1991), and (3)that travel guidance to the Respondent from the Governor's Office and DJJ travel directives did not apply to the Respondent because he was a "public officer" rather than a "public employee." This exception is rejected.

"Corruptly," for purposes of Section 112.313(6), Florida Statutes, is defined in Section 112.312(9), Florida Statutes, to mean

> 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.

The ALJ has correctly applied this definition to the Respondent's conduct, both factually and legally. Contrary to what the Respondent apparently argues in this exception--that the ALJ found that the Respondent never traveled to St. Petersburg other than for the purpose of being home on weekends, and thus that there is no competent, substantial evidence to support this finding--in paragraph 31 the ALJ actually found that the Respondent continued to travel without cutbacks in frequency and without switching from air to car travel, as counseled by the Governor's Office, and with knowledge of need-to-restrict-travel memoranda the Respondent himself authored, and that in some instances (trips) the travel was for no other

reason than to be home on the weekends. And, the ALJ then correctly determined that the Respondent corruptly used his position to get home at state expense. The absence of work entries on the Respondent's calendar related to particular trips, the timing of the trips, especially as to times of day, "weekend emphasis," location, and frequency, matters all evident from the DOAH record, support the ALJ's determination that the Respondent engaged in some state-paid trips for no other reason than to get home.

As to the Respondent's assertion that no specific evidence supports the ALJ's conclusion that the Respondent used state travel to continue his church ministry, the DOAH record supports the ALJ's findings that certain trips had no state work purpose (see the record cites treating Exceptions 1 through 7, herein), and thus the determination of the ALJ that state travel furthered the Respondent's ministry (located at his church in the St. Petersburg area; volume II, page 46, DOAH hearing transcript) is a fair inference made by the ALJ. Also, as to this second assertion/focus by the Respondent regarding Exception 9, Blackburn, supra, does not insulate the Respondent. In Blackburn, the Court found that an ethics respondent could not be found in violation of Section 112.313(6) unless she was on notice that her conduct was contrary to the proper

performance of her public duties. In this matter, the advice to the Respondent from the Governor's Office to cut back on travel, especially air travel, and the travel memoranda authored by the Respondent himself put the Respondent on such notice. Further, while Blackburn may allow one's enjoyment of a private benefit ancillary or subordinate to a primary public purpose, such as convenience to home occasioned by a valid state business trip, it does not countenance manipulation of public travel and resources for trips where there was no state business, such as has been shown in this matter. Lastly, regarding Exception 9, the Respondent's assertion that he is an "officer," not an "employee," and thus above travel requirements and restrictions, is unsupported by fact or law. The record is replete with evidence showing the Respondent's travel was treated under the statutory scheme applicable to the public capacity travel of both officers and employees,[1] albeit not in conformity with the honest and proper use of public travel on certain trips, as found by the ALJ. Further, Whiley v. Scott, 36 Fla. L. Weekly, S451 (Fla. August 16, 2011), cited by the Respondent, is inapposite to the instant situation. Whiley concerned the separation of powers between the Governor and the Legislature regarding rulemaking; it did not concern distinctions between

[1] Section 112.061, Florida Statutes (Per diem and travel expenses of public officers, employees, and authorized persons).

holding public office, versus holding public employment, in the context of proper, versus sham, public capacity travel.

Exception 10 takes issue with the ALJ's determination in paragraph 32 of the RO that the Respondent's travel between Tallahassee and St. Petersburg during 2008 and 2009 was excessive, arguing that the determination is not supported by competent, substantial evidence. This exception is rejected.

Assuming that this determination is a finding of fact and not a conclusion of law, it is supported by competent, substantial evidence. Further, this determination is only the first sentence of paragraph 32. Other sentences of this paragraph find, based upon competent, substantial evidence, that the Respondent's travel records do not support a state-business need for the amount of time that the Respondent spent in St. Petersburg and that the majority of the travel to St. Petersburg was to assure that the Respondent spent his weekends in St. Petersburg with his family and to pastor his church.

In Exception 11, the Respondent fails to take exception to any particular portion of the RO and this failure is contrary to the requirements of Section 120.57(1)(k), Florida Statutes. In this "exception" he argues that the proceedings involving him should not continue, and that the ethics complaint against him, and even the Commission's Order Finding Probable Cause, should

be dismissed. In requesting dismissal, the Respondent argues that the proceedings thus far have deprived him of due process of law under the United States Constitution and under the Florida Constitution. More particularly, he argues that neither the Order Finding Probable Cause, nor the Commission Advocate's answers to his interrogatories in the DOAH proceeding (served after the ALJ denied his motion for a more definite statement), contained sufficient specificity to place him on notice as to which travel costs or trips he would have to defend against.

This exception is rejected. It is apparent from the face of the Order Finding Probable Cause, the record of the DOAH proceedings in this matter, the contents of the RO, and the contents of the Respondent's exceptions to the RO that the Respondent was on meaningful notice as to the allegations against him and that he exercised a thorough opportunity to defend. Further, Constitutional issues cannot be decided in an administrative proceeding. Florida Public Employees Council 79, AFSCME v. Dept. of Children & Families, 745 So. 2d 487 (Fla. 1st DCA 1999).

Findings of Fact

The Commission on Ethics accepts and incorporates into this Final Order And Public Report the findings of fact in the Recommended Order from the Administrative Law Judge of the

Division of Administrative Hearings rendered on December 30, 2011. The findings are based upon competent, substantial evidence, and the proceedings upon which the findings are based complied with essential requirements of law.

Conclusions of Law

The Commission on Ethics accepts and incorporates into this Final Order And Public Report the conclusions of law in the Recommended Order from the Administrative Law Judge of the Division of Administrative Hearings rendered on December 30, 2011.

Disposition

Accordingly, the Commission on Ethics, via rendition of this Final Order And Public Report, accepts the recommendation of the Administrative Law Judge that it enter a final order and public report finding that the Respondent, Frank Peterman, Jr., violated Section 112.313(6), Florida Statutes, and that it recommend to the Governor imposition of a civil penalty against the Respondent in the amount of $5,000 and public censure and reprimand.

ORDERED by the State of Florida Commission on Ethics

meeting in public session on February 3, 2012.

_____
Date Rendered

_____
Robert J. Sniffen
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. David A. Plyer, Complainant
The Honorable Susan Belyeu Kirkland,
Division of Administrative Hearings