

JUL 29 2020

COMMISSION ON ETHICS

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICSIn re ALEX DIAZ DE LA PORTILLA,)
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 Respondent.))
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_____))Complaint No. 17-092
DOAH Case No. 19-2521EC
Final Order No. 20-074

FINAL ORDER AND PUBLIC REPORT

This matter came before the State of Florida Commission on Ethics ("Commission"), meeting in public session on July 24, 2020, on the Recommended Order ("RO") of an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH") rendered on May 26, 2020.

Background

This matter began with the filing in 2017 of an ethics complaint against the Respondent. By order dated August 10, 2017, the Executive Director of the Commission on Ethics determined that the complaint was legally sufficient to indicate possible violation of Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes, by the Respondent, by failing to make accurate disclosures on his 2016 CE Form 6, Full and Public Disclosure of Financial Interests, as to his assets, liabilities, and/or net worth, and ordered that the complaint be investigated. The complaint was investigated and a written Report of Investigation (ROI), dated December 4, 2018, was entered. In her recommendation, dated December 12, 2018, the Commission's Advocate recommended that the Commission find probable cause under Article II, Section 8, and Section 112.3144, that the Respondent submitted an inaccurate CE Form 6 for the year 2016. By its order dated January 30, 2019, the Commission found probable cause under

Article II, Section 8, and Section 112.3144, regarding the Respondent's 2016 CE Form 6. Both the ROI and the Advocate's Recommendation, on which the Order Finding Probable Cause is based, refer to the Respondent not disclosing loans to his campaign, and to the Respondent not accurately disclosing the value of his home. Thereafter, the matter was forwarded to DOAH for a hearing before an ALJ. The DOAH hearing resulted in the instant RO, which essentially recommends that the Commission issue a public report finding that the Respondent did not violate Article II, Section 8 or Section 112.3144. Following issuance of the RO, the Advocate timely filed exceptions to it. The Respondent did not submit any exceptions to the RO and did not respond timely in writing to the Advocate's exceptions. Both Respondent and Advocate were notified of the date, time, and place of the Commission's final consideration of this matter; and both were given the opportunity to make argument during the Commission's consideration.

Standards of Review

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)(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.

An agency may accept a hearing officer's findings of fact and conclusions of law yet still reject the recommended penalty and substitute an increased or decreased recommended penalty. Criminal Justice Standards and Training Comm'n v. Bradley, 596 So. 2d 661, 664 (Fla. 1992). Under Section 120.57(1)(l), Florida Statutes, an agency may reduce or increase the recommended penalty only upon a review of the complete record, stating with particularity the agency's reasons for reducing or increasing the recommended penalty, and citing to the record in support of its action.

Having reviewed the RO, the complete record of the proceeding, and Advocate's exceptions, and having heard the arguments of the Advocate and the Respondent, the Commission on Ethics makes the following rulings, findings, conclusions, and disposition:

Ruling on Advocate's Exceptions¹

1. In EXCEPTION ONE, Advocate argues that the ALJ is incorrect as a matter of law in his view that a loan to one's own campaign is not a loan (an asset) within the meaning of financial disclosure, and in his view that one's subjective opinion as to whether a loan is a loan controls the nature of whether something is or is not a loan. This exception is granted. We disagree with the legal conclusions of the ALJ that a loan to one's own campaign is not a loan and that one's subjective belief as to whether something is a loan controls as to whether that something is or is not a loan. Instead, we find that a loan to one's own campaign can be a loan (an asset) that must be disclosed, regardless of one's subjective belief. Our reasoning in this regard is based in substantive law concerning what is a loan, including provisions of Chapter 106, Florida Statutes, concerning loans to a candidate's own campaign. In doing so, we find that our view of the law is as or more reasonable than that of the ALJ.

2. In EXCEPTION TWO, Advocate argues that the ALJ is incorrect as a matter of law in his view that an appraisal for purposes of valuing real property for financial disclosure can be other than what is defined as an appraisal under Florida law governing appraisals. This exception is granted. We disagree with the legal conclusion of the ALJ that appraisal-like functions (e.g., a comparative market analysis, or CMA) are an "appraisal" within the meaning of Florida law. Instead, we find that "appraisal" means what Florida Statutes (Chapter 475) define the term to mean. In doing so, we find that our view of the law is as or more reasonable than that

¹ In ruling on the exceptions, it is the intent of this order to treat their substance, regardless of whether the exception is labeled pertaining to a finding of fact or a conclusion of law, and regardless of whether the determination by the ALJ in his RO is labeled as a finding of fact or a conclusion of law. More particularly, given the restrictions of Chapter 120, Florida Statutes (the Administrative Procedure Act), on an agency's ability to alter findings of fact of an ALJ, versus the greater ability of an agency to alter or disagree with conclusions of law of an ALJ, this order addresses what in substance are conclusions of law within the RO, not what in substance are findings of fact.

of the ALJ. However, in so finding, we do not limit what can support an accurate disclosure of the value of property to only the value established by the Office of the Property Appraiser or the value established by an "appraisal" as defined in Chapter 475, Florida Statutes; rather, we find that other evidence of accurate value [e.g., a good-faith comparative market analysis (CMA) by a real estate professional as to value, or on-line information from reliable sources as to value] also can be relevant as to accurate valuation.

3. In EXCEPTION THREE, Advocate makes the same argument as in EXCEPTION TWO. This exception is granted and our findings, reasoning, and language as to EXCEPTION TWO are made here, again, and incorporated by reference.

4. In EXCEPTION FOUR, the Advocate seeks to add to the ALJ's determinations an additional determination that the Commission, as a matter of law, has the authority to proceed in regard to Article II, Section 8, Florida Constitution, as well as in regard to Part III, Chapter 112, Florida Statutes. This exception is granted. While lack of a reference in paragraph 73 of the RO to Article II, Section 8, may merely be an oversight, we find that the Commission does have authority under that provision of the Constitution. Our reasoning in this regard is based in the language of Article II, Section 8 and in the language of Part III, Chapter 112, Florida Statutes, including Section 112.322, Florida Statutes. In so finding, we determine that our view of the law is as or more reasonable than the view, if any, of the ALJ that the Commission lacks authority under Article II, Section 8.

5. In EXCEPTION FIVE, Advocate argues that the ALJ was wrong as a matter of law in determining that a candidate, when qualifying, is required to file a Form 6 with the Commission, instead of the Division of Elections. This exception is granted. We find that the filing location for a candidate is, instead of the Commission, the Division; see, inter alia, Section 99.061(5), Florida

Statutes. In so finding, we determine that our view of the law is as or more reasonable than the view of the ALJ.

6. In EXCEPTION SIX, as in previous exceptions dealt with herein, Advocate argues that a loan, as a matter of law, is a loan, regardless of one's subjective belief. This exception is granted for the reasons set forth above with the previous similar exceptions; and our reasoning and language above is adopted herein and incorporated by reference.

7. In EXCEPTION SEVEN, Advocate argues in harmony with argument as to EXCEPTION THREE. This exception is granted; and the reasoning, findings, and language as to EXCEPTION THREE are adopted and incorporated herein.

8. In EXCEPTION EIGHT, Advocate argues that paragraph 93 of the RO is inaccurate as a matter of law in finding that motive is an essential element of a failure to make a required disclosure, in finding that an essential element of a failure to disclose is that a reader/member of the public be misled by the failure to disclose, and in finding that one's subjective belief as to whether something is a loan is controlling as to whether that something is a loan. This exception is granted. We disagree with the ALJ and find that, as a matter of law, motive is not an essential element, that the misleading of a particular person is not an essential element, and that one's subjective belief as to whether something is a loan is not controlling. Our reasoning in this regard is based in the language of the provisions requiring disclosure (Article II Section 8 and Section 112.3144) not requiring motive as an element, not requiring the misleading of a particular person, and not requiring a subjective belief as to whether something is a loan. In doing so, we determine that our view of the law is as or more reasonable than that of the ALJ.

9. In EXCEPTION NINE, Advocate argues that the ALJ confused the charge, or alleged violation, against the Respondent for failure to accurately disclose the value of his home

with the evidence obtained in the DOAH discovery process relevant to prove inaccurate disclosure of the value, and also precluded the Advocate from presenting evidence obtained in DOAH discovery as to the value. To the extent that paragraphs 95, 96, and 97 of the RO (the paragraphs at issue under this exception) conclude that, as a matter of law, the Order Finding Probable Cause in this matter failed to put the Respondent on notice as to the charge against him, we disagree with the ALJ; and we view evidence obtained during discovery relevant to prove a charge as distinguishable from the charge. Our reasoning in this regard includes the wording of the Order Finding Probable Cause and the wording of the Statement of the Issues in the RO, both of which state the filing of an inaccurate CE Form 6 for the year 2016 as the charge or the issue. We find that our view of the law is as or more reasonable than that of the ALJ.

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 Division of Administrative Hearings, other than those determinations of the ALJ dealt with above which substantively are conclusions of law.

Conclusions of Law

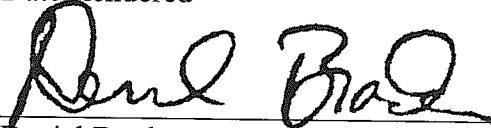
Except to the extent dealt with above in granting Advocate's exceptions, the Commission on Ethics accepts and incorporates into this Final Order and Public Report the conclusions of law in the Recommended Order from the Division of Administrative Hearings.

Disposition

Accordingly, due to the strictures of the Administrative Procedure Act and the ALJ's factual findings or lack thereof as to whether the Respondent violated the law, the Commission on Ethics determines that Respondent did not violate Article II, Section 8, Florida Constitution, or

Section 112.3144, Florida Statutes, by filing an inaccurate CE Form 6, "Full and Public Disclosure of Financial Interests," for the year 2016.

ORDERED by the State of Florida Commission on Ethics meeting in public session on July 24, 2020.

July 29, 2020
Date Rendered

Daniel Brady
Chair, Florida Commission on Ethics

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, AND SECTION 112.3241, 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, AT EITHER 325 JOHN KNOX ROAD, BUILDING E, SUITE 200, TALLAHASSEE, FLORIDA 32303 OR P.O. DRAWER 15709, TALLAHASSEE, FLORIDA 32317-5709; 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. Benedict P. Kuehne, Attorney for Respondent
Mr. Mark Herron, Attorney for Respondent
Ms. Melody A. Hadley, Commission Advocate
Mr. Juan-Carlos Planas, Complainant
The Honorable Lawrence P. Stevenson, Division of Administrative Hearings