

8-27-01

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January 29, 2002

The Honorable Jeb Bush
Governor, State of Florida
The Capitol
Tallahassee, Florida 32399-0001

AP

50-4116EC
JBC

Re: In re DONALD JAMES, Complaint No. 99-083

Closed

Dear Governor Bush:

The State of Florida Commission on Ethics has completed a full and final investigation of a complaint filed against Mr. Donald James, who, at all times material to the complaint, was Division Chief of the Emergency Medical Services Division for the Miami Dade Fire and Rescue Department. Pursuant to Section 112.324(7), Florida Statutes, we are reporting our findings and recommending appropriate disciplinary action to you in this case.

Therefore, we are enclosing a copy of our final order in this matter, along with a copy of the Division of Administrative Hearings Administrative Law Judge's Recommended Order and a copy of our file. Although we have found that Mr. James has violated the Code of Ethics for Public Officers and Employees in the manner described by the Recommended Order, under the circumstances of the case, we are recommending that you not impose any penalty upon him.

If we may be of any assistance to you in your deliberations, please do not hesitate to contact us.

Sincerely yours,

Bonnie J. Williams
Executive Director

BJW:pdo

Enclosures

cc: Mr. David Rothman, Attorney for Respondent
Mr. James H. Peterson, III, Commission Advocate
Mr. Aubrey Fisher, Complainant

DATE FILED

JAN 29 2002

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

COMMISSION ON ETHICS

In re DONALD JAMES,)
)
 Respondent.)
)
)
)
)

Complaint No. 99-083
DOAH Case No. 00-4116EC

Final Order No. 02-001

FINAL ORDER AND PUBLIC REPORT

This matter came before the State of Florida Commission on Ethics, meeting in public session on January 24, 2002, pursuant to the Recommended Order of the Division of Administrative Hearings' Administrative Law Judge rendered in this matter on August 27, 2000 [a copy of which is attached and incorporated by reference]. The Administrative Law Judge ("ALJ") recommends that the Commission enter a final order and public report finding that the Respondent, DONALD JAMES, as Division Chief of the Emergency Medical Services ("EMS") Division for the Miami Dade Fire and Rescue Department, violated Section 112.3135(2)(a), Florida Statutes, by advocating for his brother in the interaction he had with Chief Brown after he learned that Chief Brown had not recommended his brother for the EMS-OIC position vacancy, and that the Respondent did not violate Section 112.313(6), Florida Statutes, during the same interaction. He recommends that the Commission dismiss that charge. As to the violation found, the ALJ recommends that the Respondent be reprimanded and a civil penalty of \$2,500 be imposed.

BACKGROUND

This matter began with the filing of a complaint on July 21, 1999 by Aubrey Fisher essentially alleging that the Respondent, DONALD JAMES, as Division Chief of Emergency Medical Services for the Miami Dade Fire and Rescue Department, violated Sections 112.313(6) and 112.3135(2)(a) of the Code of Ethics for Public Officers and Employees (Part III, Chapter 112, Florida Statutes). The allegations were found to be legally sufficient to allege possible violations of Sections 112.313(6) and 112.3135(2)(a), Florida Statutes, and Commission staff undertook a preliminary investigation to aid in the determination of probable cause. On June 6, 2000, the Commission on Ethics issued an order finding probable cause to believe that the Respondent had violated Section 112.313(6), Florida Statutes, by advocating for his brother to be selected for a position in the Department. Additionally, the Commission found probable cause to believe that the Respondent had violated Section 112.3135(2)(a), Florida Statutes, by advocating the appointment, employment, promotion, or advancement of his brother in or to a position in the Department in which he was serving or over which he exercised jurisdiction or control. This matter was forwarded by the Commission to the Division of Administrative Hearings for assignment of an ALJ to conduct the final hearing and prepare a recommended order. A formal evidentiary hearing was held before the ALJ on April 11-13, 2001. A transcript of the hearing was filed and the parties then filed proposed recommended orders with the ALJ. The ALJ's Recommended Order was transmitted to the Commission and to the parties on August 27, 2000, and the parties were notified of their right to file exceptions to the Recommended Order. Thereafter, both the Respondent and the Commission Advocate timely filed their exceptions to the ALJ's Recommended Order.

STANDARDS FOR REVIEW

Under Section 120.57(1)(l), Florida Statutes, an agency may reject or modify the conclusions of law and interpretations of administrative rules contained in the recommended order. However, the agency may not reject or modify findings of fact made by the 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. Dept. 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, resolve conflicts therein, or judge the credibility of witnesses, because those are matters within the sole province of the ALJ. Heifetz v. Dept. 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 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 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 of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

Having reviewed the Recommended Order and listened to the arguments of the parties, the Commission makes the following findings, conclusions, rulings and recommendations.

**RULINGS ON RESPONDENT'S EXCEPTIONS TO THE
ALJ'S FINDINGS OF FACT**

1. Respondent excepts to paragraph 24 of the ALJ's Recommended Order, which he claims is not based on competent substantial evidence. There, the ALJ finds that "Respondent and Chief Brown agreed that Chief Brown would make the selection for the EMS-OIC position vacancy." Respondent claims that after he informed Chief Brown, his immediate supervisor, that his brother would be applying for the position, he was not part of the decision-making process regarding who would make the selection.

As noted above, and as stated by the court in Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985):

It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence. State Beverage Department v. Ernal, Inc., 115 So. 2d 566 (Fla. 3d DCA 1959). If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other.

The ALJ properly fulfilled his function here. It is not our function to reweigh the evidence or attempt to draw different inferences from the evidence as long as there is competent, substantial evidence to support the ALJ's findings, as there is here. [See transcript at pp. 279, 280, and 300]. We also are not free to reevaluate the quantity and quality of the evidence beyond determining whether the evidence is competent and substantial. Because there is competent, substantial evidence

of record to support the ALJ's finding, Respondent's exception is rejected.

2. Respondent next excepts to the ALJ's Findings of Fact Nos. 28 and 30. With respect to the ALJ's Finding of Fact No. 28, the Respondent apparently objects to the second and third sentences (findings) which state: "In Respondent's view, an interview to discuss the knowledge, skills and abilities of the applicants was not necessary. Respondent was personally familiar with both David James and Aubrey Fisher." He argues that, because he did not testify that the reason that he did not question [interview] David James and Aubrey Fisher about their qualifications was because he was familiar with them, the ALJ's findings are not based on competent evidence. Rather, Respondent claims that he testified that he did not question or interview them about their qualifications because he allows the person being interviewed to take the lead in asking questions about the duties and responsibilities of the position, and then he informs them of what would be expected of them.

Nothing that the Respondent argues is contrary to or inconsistent with the ALJ's finding. There also is competent, substantial evidence of record from which the ALJ could find that the Respondent did not believe that it was necessary to interview applicants about their knowledge, skills and abilities. Likewise, there is competent, substantial evidence of record to indicate that Respondent was personally familiar with the qualifications of both David James and Aubrey Fisher. It is not our function to reweigh the evidence or to rewrite the ALJ's finding as long as there is competent, substantial evidence to support the finding, as there is here. We find that ALJ fulfilled his function of resolving conflicts, judging the credibility of witnesses, drawing permissible inferences from the evidence, and reaching ultimate findings of fact based on competent, substantial

evidence. Therefore, Respondent's exception is rejected.

In addition, although Respondent cites paragraph 30 of the ALJ's Findings of Fact at the beginning of his exception, he does not discuss any specific objections to this particular finding. Therefore, because Respondent has failed to raise any specific objection about Finding of Fact No. 30, and because competent substantial evidence of record supports this finding, Respondent's exception, if any, to Finding of Fact No. 30 is rejected.

3. Respondent next excepts to the second part of the ALJ's Finding of Fact No. 41, wherein he finds that "Respondent's comments affected Chief Brown's decision to recommend Aubrey Fisher and caused Chief Brown to refer the matter to Fire Chief Paulison." He argues that, because Chief Brown never changed his decision to recommend Aubrey Fisher, Chief Brown's decision had been made--he was done, Aubrey Fisher's name was written on the bid worksheets, and all that remained in the normal course of events was for the Fire Chief to make his decision--this finding is not supported by competent, substantial evidence.

Because competent, substantial evidence of record exists to support the ALJ's finding (see Transcript pp. 286-289, 292, 294), Respondent's exception is rejected. We also note that the ALJ does not find that Chief Brown changed his decision to recommend Aubrey Fisher. Rather, he finds that Respondent's comments affected Chief Brown's decision because immediately after hearing Respondent's arguments, Chief Brown took the matter to Fire Chief Paulison and if the Respondent had not raised his objection, the matter wouldn't have gone to the Fire Chief.

4. Respondent excepts to the ALJ's Finding of Fact No. 42, wherein he concludes that

“[b]y his comments to Chief Brown, Respondent was clearly advocating for the selection or recommendation of his brother over the selection or recommendation of Aubrey Fisher.” Respondent argues that this finding is inconsistent with the ALJ’s finding in paragraph 43, wherein he finds that Respondent believed that his comments to Chief Brown were directed to the fact that the bid award was not made to the most qualified applicant as required by the terms of the Position Vacancy Announcement, and his finding in paragraph 70, wherein he finds that Respondent challenged Chief Brown’s decision in the sincere belief that the most qualified applicant had not been selected as required by the terms of the Position Vacancy Announcement.

Because competent, substantial evidence exists to support the ALJ’s finding, Respondent’s exception is rejected. [See Transcript pp. 286-287, 291]. Furthermore, as noted above, it is the ALJ’s function to resolve conflicts, to judge the credibility of witnesses, to draw permissible inferences from the evidence, and to reach ultimate findings of fact based on competent substantial evidence. It is not our function to reweigh the evidence as long as there is competent substantial evidence to support the ALJ’s findings as there are here. We also find no inconsistency here. Regardless of Respondent’s intent in arguing his disagreement with Chief Brown’s decision, competent, substantial evidence of record exists to indicate that Respondent clearly was advocating for his brother.

5. Finally, Respondent excepts to the ALJ’s Finding of Fact No. 48, wherein he finds that “[i]f Respondent had not challenged Chief Brown’s decision to recommend Aubrey Fisher on March 11, 1999, there is a probability that Chief Brown’s recommendation would have stood and Aubrey Fisher would have been selected to fill the EMS-OIC position vacancy [because]

[r]ecommendations from the bid working meeting are generally accepted by the Fire Chief.” Respondent argues that this finding is contrary to the competent, substantial evidence presented at the hearing. We disagree.

Because the ALJ’s finding is supported by competent, substantial evidence of record, Respondent’s exception is rejected. [See Transcript pp. 165-166, 289, 382, 405].

6. Respondent next excepts to the ALJ’s findings of fact contained in his Conclusions of Law Nos. 59 and 64, wherein he finds or concludes that the Respondent “was a ‘public official’ within the meaning of Subsection 112.3135(2)(a), Florida Statutes, when he made his comments during and immediately after the bid working meeting on March 11, 1999,” and that “even though he had ostensibly removed himself from the selection process, by attending the bid processing meeting, challenging Chief Brown’s decision, and advocating his brother for the EMS-OIC position vacancy, Respondent clearly reasserted the delegated power to promote or advance [that] he had as a Division Chief.”

To the extent that the ALJ’s findings are factual in nature, they are dependent on the weight or credibility of the testimony of witnesses; they are susceptible of ordinary methods of proof; and they do not involve issues over which the Commission on Ethics has claimed special insight. Therefore, as the Court stated in Gojn v. Commission on Ethics, 658 So. 2d 1131 (Fla. 1st DCA 1995), it is for the ALJ “to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence.” Inasmuch as the ALJ’s conclusions that the Respondent was a “public official” and that he reasserted the delegated power that he had as a Division Chief

flow from the facts found, and inasmuch as they are supported by competent substantial evidence in the record, Petitioner's exception is rejected.

Respondent argues that because only the Fire Chief was vested with the authority to appoint, employ, or advance individuals within the Department, and because he had agreed in this particular case not to make a recommendation or selection of the EMS-OIC candidates/applicants, he was not a "public official" as that term is defined at Section 112.3135(1)(c), Florida Statutes. We reject this argument.

Respondent has not excepted or objected to the ALJ's Conclusion No. 61, wherein he finds that, pursuant to long-standing Department custom practice and procedure, Division Chiefs have been delegated authority and are expected to select and recommend candidates to fill position vacancies within their division. Therefore, as a Division Chief, Respondent meets the definition of a "public official," that is, an "employee in an agency" . . . to whom the authority has been delegated, . . . to recommend individuals for appointment, employment, promotion, or advancement in connection with employment in an agency . . ."

We cannot accept Respondent's assertion that, because he recused himself from the selection process in order to avoid running afoul of Section 112.3135(2)(a), he no longer has "delegated authority to make recommendations." He still possesses the delegated authority notwithstanding his or his supervisor's decision that he not exercise it in a particular case. See Commission Opinion CEO 93-16 and CEO 98-7. Just as a judge who recuses himself or herself from sitting on a case involving a relative remains a judge possessing all of the power and authority that comes with the office, we are of the opinion that a Miami- Dade County Fire Department Division Chief who recuses himself or herself or is recused from making a recommendation regarding an applicant for

a position within his or her division remains a Division Chief with the delegated authority to make recommendations regarding applicants for positions within his or her division. He or she still would be a “public official” within the meaning of Section 112.3135(1)(c), Florida Statutes.

7. Lastly, Respondent excepts to the ALJ’s Conclusion of Law No. 63, wherein he finds and concludes that the Respondent “clearly advocated for his brother in the interaction he had with Chief Brown after the Respondent learned that Chief Brown had not recommended his brother for the EMC-OIC position vacancy. Respondent argues that this finding or conclusion is inconsistent with the ALJ’s other findings that the “Respondent believed that his comments to Chief Brown were directed to the fact that the bid award was not made to the most qualified applicant as required by the terms of the Position Vacancy Announcement” [Finding of Fact No. 43], that “Respondent challenged Chief Brown’s decision in a sincere belief that the proper procedure had not been followed, in that the most qualified applicant had not been selected as required by the terms of the Position Vacancy Announcement” [Conclusion of Law No. 70], and that “there has been no clear and convincing evidence [presented to indicate] that he [the Respondent] intended to advocate for his brother’s promotion. . .” [Conclusion of Law No. 70].

We disagree with the Respondent’s contention that the ALJ’s findings are inconsistent. What the Respondent intended to convey to Chief Brown are questions of intent, properly reserved for the finder of fact. Kinney v. Dept. of State, Division of Licensing, 501 So. 2d 129, 132 (Fla. 5th DCA 1987). There is record support for the ALJ’s findings relative to the Respondent’s statements in the context in which they were made. However, notwithstanding the ALJ’s findings with respect to Respondent’s lack of wrongful intent in making his statements, there also is competent, substantial

evidence of record to support his ultimate finding that the Respondent advocated for his brother. Consequently, Respondent's exception is rejected.

COMMISSION ADVOCATE'S EXCEPTIONS TO THE ALJ'S
CONCLUSIONS OF LAW

1. The Commission Advocate excepts to the first, fifth, and sixth sentences in the ALJ's Conclusion of Law No. 70, where he finds as follows: "It has not been proved by clear and convincing evidence that Respondent acted corruptly, that is, with wrongful intent. In so doing, he, in fact, advocated his brother for promotion, but there is no clear and convincing evidence that he intended to advocate for his brother's promotion and that his comments to Chief Brown were made 'corruptly.' Respondent's overt response to learning that his brother had not received the bid and his open discussion with Chief Brown are inconsistent with wrongful, corrupt acts."

The Commission Advocate first argues that the ALJ's use of the term "with wrongful intent" in the first sentence is inconsistent with the definition of "corruptly" at Section 112.312(9), Florida Statutes, because it only partially defines the term. Next, he argues that the ALJ's finding or conclusion that there was "no clear and convincing evidence that the Respondent 'intended to advocate for his brother's promotion'" is inconsistent with his Conclusion of Law No. 64, wherein he finds that the Respondent "clearly reasserted the delegated power to promote" by "challenging Chief Brown's decision and advocating his brother for the EMS-OIC position vacancy," and the "plain meaning of the words" that the Respondent chose to use in challenging Chief Brown's decision. See the ALJ's Finding of Fact No. 38. The Commission Advocate urges the Commission to find that the ALJ's finding that the Respondent "did not intend to advocate" is unnecessary to support his conclusion that the Respondent did not act "corruptly." He prefers that

we focus on the Section 112.312(9), Florida Statutes, requirement that the act be “for the purpose of obtaining . . . any benefit.” He suggests that such a finding would be more consistent with the ALJ’s Findings Nos. 42 and 43. Lastly, the Commission Advocate excepts to the sixth sentence in the ALJ’s Conclusion of Law No. 70, wherein he finds: “Respondent’s *overt* response to learning that his brother had not received the bid and his *open* discussion with Chief Brown are inconsistent with wrongful, corrupt acts.” The Commission Advocate argues that the ALJ’s finding implies that “wrongful or corrupt acts must be secretive or clandestine as opposed to open or overt.”

2. We agree with the Commission Advocate and find that paragraph 70 of the ALJ’s Conclusions of Law, as modified in accordance with the Commission Advocate’s recommended changes, are more reasonable for the reasons stated by the Commission Advocate than the paragraph as originally written by the ALJ.

FINDINGS OF FACT

The Findings of Fact set forth in the Recommended Order are approved, adopted, and incorporated herein by reference.

CONCLUSIONS OF LAW

1. The Conclusions of Law set forth in the ALJ’s Recommended Order are approved, adopted, and incorporated herein by reference, with the exception of paragraph No. 70 which shall read as follows:

70. It has not been proved by clear and convincing evidence that Respondent acted corruptly. Upon hearing that his

brother had not been selected for the EMC-OIC position vacancy, Respondent had a sudden, emotional reaction. Given his belief that his brother was the most qualified applicant, that he felt that his brother had been unfairly treated in two previous bids, Chief Brown's inquiry moments before the bid working meeting indicating that he had paid little attention to the responsibility of making a selection, Respondent's reaction was not surprising. Respondent challenged Chief Brown's decision in a sincere belief that the proper selection procedure had not been followed, in that the most qualified applicant had not been selected as required by the terms of the Position Vacancy Announcement. In so doing, he, in fact, advocated his brother for promotion, but there has been no clear and convincing evidence his comments to Chief Brown were made "corruptly." In addition, Respondent initiated his own removal from the selection process and conducted himself appropriately until the morning of the bid working meeting.

2. Accordingly, the Commission on Ethics concludes that the Respondent, as Division Chief of the Emergency Medical Services Division for the Miami-Dade Fire and Rescue Department, violated Section 112.3135(2)(a), Florida Statutes, by advocating the appointment, employment, promotion, or advancement of his brother in or to a position in the Department in which he was serving. In addition, the Commission concludes that the Respondent did not violate Section 112.313(6), Florida Statutes, by advocating for his brother to be selected for a position in the Department. Therefore, that alleged violation is hereby dismissed.

RECOMMENDED PENALTY

Under the entirety of the circumstances of this case, we believe that the finding of a violation by the Respondent is sanction enough. Therefore, we recommend that no penalty be imposed.

Accordingly, in consideration of the foregoing and pursuant to Sections 112.317 and

112.324, Florida Statutes, the Commission recommends that the Governor impose no penalty upon the Respondent, Donald James.

ORDERED by the State of Florida Commission on Ethics meeting in public session on January 24, 2002.

January 29, 2002
Date Rendered

Ronald S. Spencer, Jr.
Ronald S. Spencer, Jr.
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, 2822 REMINGTON GREEN CIRCLE, SUITE 101, 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. David Rothman, Attorney for Respondent
Mr. James H. Peterson, III, Commission Advocate
Mr. Aubrey Fisher, Complainant
The Honorable Jeff B. Clark, Administrative Law Judge
Division of Administrative Hearings ✓