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DIVISION OF ADMINISTRATIVE HEARINGS

DATE FILED

JUN 11 2002

COMMISSION ON ETHICS

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

AP

In re MORRIS MICHAEL SCIONTI,

Respondent.

Complaint No. 99-040
DOAH Case No. 01-1439EC
Final Order No. 02-060 JBC-CWS

FINAL ORDER AND PUBLIC REPORT ENTERED UNDER PROTEST

This matter came before the State of Florida Commission on Ethics, meeting in public session on June 6, 2002, pursuant to the Recommended Order of the Division of Administrative Hearings' Administrative Law Judge rendered in this matter on January 4, 2002 and his Order Declining Remand [copies of which are attached and incorporated by reference]. In his Recommended Order, the Administrative Law Judge ("ALJ") recommends that the Commission enter a final order and public report finding that the Respondent, MORRIS MICHAEL SCIONTI, as the former Executive Director of the Florida State Athletic Commission ("Athletic Commission," currently known as the "Florida State Boxing Commission."[1]), violated Section 112.313(6), Florida Statutes, "to the extent that [he] solicited and accepted tickets or complimentary admissions to boxing matches" for his or other Athletic Commission members' guests from promoters, and recommending the imposition of a civil penalty of $1,000, public censure and reprimand, and the dismissal of the remaining alleged violations, as set forth in the Order Finding Probable Cause.

[1]See Section 548.003(1), Florida Statutes.

BACKGROUND

This matter began with the filing of a complaint and amendment on April 16 and June 9, 1999, respectively, by Marcia G. Cooke, Chief Inspector General in the Executive Office of the Governor, alleging that the Respondent, Morris Michael Scionti, as Executive Secretary of the Florida Athletic Commission violated 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(2), 112.313(4), 112.313(6), 112.3148(3), and 112.3148(4), Florida Statutes, and Commission staff undertook a preliminary investigation to aid in the determination of probable cause.

On October 5, 2000, the Commission on Ethics issued an order finding probable cause to believe that the Respondent had violated Sections 112.313(2), Florida Statutes, by soliciting a $100,000 donation from Don King and/or Don King Productions, Inc., on behalf of the Florida State Boxing Foundation ("Foundation") which was "established" in part by the Respondent; Section 112.313(4), Florida Statutes, by (a) accepting the $100,000 donation from Don King or Don King Productions, Inc., on behalf of the Foundation, when he knew or should have known that the donation may have been given to influence his official actions relative to his advocating for the acceptance of long-term promotional contracts in Florida by the Athletic Commission and/or the licensing of Don King and/or Don King Productions, Inc., as a promoter despite the existence of a pending indictment in violation of Athletic Commission rules; (b) soliciting boxing officials for political contributions and donations to the Foundation, and (c) soliciting a boxing official for a loan and travel expenses for Ms. Cathy Reed; Section 112.313(6), Florida Statutes, by (a) soliciting funds for the Foundation from persons or entities regulated by the Athletic Commission; (b) soliciting

political contributions from persons regulated by the Athletic Commission; (c) signing a letter prepared by Boxing Promoter Don King's attorney on Athletic Commission stationery, which indicated that the Athletic Commission's interpretation of Section 548.056, Florida Statutes, as stated in letters written by former Executive Director Don Hazelton, was the former Executive Director's personal opinion rather than the opinion or policy of the Athletic Commission, in order to benefit Don King or Don King Productions, Inc.; (d) preparing and reading a position paper opposed to the position taken by the former Executive Secretary of the Athletic Commission relative to the interpretation of Section 548.056, Florida Statutes, and denying that the earlier position was, in fact, the position of the Athletic Commission in order to strengthen the arguments of Don King or Don King Productions, Inc., for the use of exclusive long-term promotional contracts in Florida, when he knew the contrary to be true, or as a reward for the $100,000 contribution to the Foundation; (e) lying to the members of the Athletic Commission who relied on his representation at its November 5, 1998 meeting regarding the preparation of the paper that he read to the Athletic Commission at its August 13, 1998 meeting; (f) soliciting tickets or complimentary admissions to boxing matches for his or other Athletic Commission members' guests from promoters; (g) soliciting a loan and travel expense payments from Boxing Judge Peter Trematerra; (h) rewarding Boxing Judge Peter Trematerra with an assignment to judge a World Title fight for telling the Athletic Commission what Respondent wanted him to say, despite Mr. Trematerra's allegedly not having the requisite experience to warrant such an assignment; (i) not giving Boxing Judge Paul Herman boxing assignments that his experience may have warranted after he [Mr. Herman] refused to appear and testify as Respondent wanted him to before the Athletic Commission; (j) making judging assignments based on personal considerations of perceived loyalty or disloyalty to Respondent, rather

than on the experience levels of the judges; (k) directing Athletic Commission staff to remove Mr. Trematerra's and Mr. Herman's names from fight assignments after they provided affidavits concerning Respondent's conduct to the Department of Business and Professional Regulation's Inspector General; and (l) representing falsely to the Salvation Army and to the public on Athletic Commission stationery that Mr. David Walker had completed 16 hours of his obligatory community service; and Sections 112.3148(3) and 112.3148(4), Florida Statutes, by soliciting and accepting, respectively, tickets and free admissions from promoters.

This matter was forwarded by the Commission to the Division of Administrative Hearings ("DOAH") 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 August 13-17, 2001. A transcript of the hearing was filed and the parties filed proposed recommended orders with the ALJ. The ALJ's Recommended Order was transmitted to the Commission and to the parties on January 4, 2002, and the parties were notified of their right to file exceptions to the Recommended Order. Thereafter, both the Respondent and the Commission Advocates timely filed their exceptions to the ALJ's Recommended Order. Respondent also filed a response to the Commission Advocates' exceptions.

On March 14, 2002, the Commission reserved ruling on the Respondent's and Advocates' exceptions, and remanded the case to DOAH for the entry by the ALJ of an order explaining his Conclusion of Law in paragraph 49 of his Recommended Order wherein he concluded without explanation that the Respondent did not act "corruptly" when he prepared a memo indicating that David Walker had completed 16 hours of community service on two Saturdays, September 6 and 13, 1997. However, on April 24, 2002, after concluding that his Conclusion of Law is a conclusion of law over which the Commission has substantive jurisdiction, and that pursuant to Section

120.57(1)(j), Florida Statutes, the Commission may reject or modify such conclusion of law, the ALJ entered an Order Declining Remand and returned jurisdiction to the Commission for further proceedings.

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 hearing officer. 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.

RULING ON RESPONDENT'S EXCEPTION TO THE ALJ'S CONCLUSION OF LAW

1. Respondent excepts to paragraph 48 of the ALJ's Recommended Order to the extent that the ALJ concludes that Respondent's actions were corrupt as defined in Subsection 112.312(9), Florida Statutes. In paragraph 48, the ALJ concludes:

> Evidence established clearly and convincingly that Respondent solicited and accepted free tickets from boxing promoters and caused individuals names to be placed on "pass lists" who had no legitimate reason for being admitted to the particular boxing event without paying an admission charge. In so doing, Respondent was acting in his official capacity, his actions were corrupt as defined, and these actions were done to obtain a special benefit for himself or another person.

Respondent argues that this conclusion is not supported by competent, substantial evidence because the testimony given at trial clearly contradicts this conclusion.

2. In order for the ALJ to find that the Respondent acted corruptly, Respondent argues, Blackburn v. State of Florida, Commission on Ethics, 589 So. 2d 431 (Fla. 1st DCA 1991), requires

the ALJ to find that he acted with "reasonable notice" that his conduct was inconsistent with the proper performance of his public duties. In view of Don Hazelton's failure to advise him that the practice of asking promoters for free tickets or passes for relatives, friends, political associates, and other individuals, who had no legitimate Athletic Commission function,[2] and in view of Respondent's inheriting an [Athletic Commission] policy under which the previous Executive Director and members of the Athletic Commission sought free tickets and/or passes for such people [Tr. 277 & 596], Respondent asserts that he "had every reason to believe that this practice [of soliciting free tickets and passes from promoters] was acceptable [Tr. 278 & 289]. Therefore, he claims that he was not acting with "reasonable notice" that his conduct was inconsistent with the proper performance of his public duties, and "evidence of wrongful intent is totally lacking."

3. Respondent writes that he testified about the type of individuals who he believed were appropriate, at the time, to be placed on the "pass list"-- people who he thought had some legitimate connection to the sport of boxing in Florida. Such people included legislators who regulated the sport or who oversaw the sport of boxing, Complainant writes. Respondent claims that his testimony is corroborated by the testimony of Allen Grossman, who, as an attorney for the Florida Attorney General's office, served as legal advisor to the Athletic Commission while he [the Respondent] served as its Executive Director [Tr. 278].

4. Respondent also argues that there is no evidence that he received free tickets for any purpose that was inconsistent with the proper performance of his public duties. Rather, he claims that by attempting to assist, as requested, in the "presentation of a State boxing event," he was acting

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[2]Don Hazelton was the Executive Director of the Athletic Commission [Tr. 124, 358] , who was replaced in that position by the Respondent, and who the Athletic Commission hired to be a consultant to the Respondent for a six month transition period [Tr. 523-524, 592, & 608].

in a manner entirely consistent with the proper performance of his public duties. Nevertheless, as he settled into his position as Executive Director, Respondent writes, he instituted further inquiry into the issue in an effort to determine what "activities" were and were not appropriate.

5. Respondent's exception is rejected.

6. As the ALJ correctly noted in paragraph 42 of his Conclusions of Law, an element of a Section 112.313(6) violation is that the Respondent, as a public officer or employee, "corruptly" use or attempt to use his official position or the resources within his trust. "Corruptly" is defined at Section 112.312(9), Florida Statutes, to mean

> done with wrongful intent and for the purpose of obtaining, or compensating or receiving compensation from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.

Initially, we note that intent is a matter for the trier of fact to determine. Dobry v. State, 211 So. 2d 603 (Fla. 3d DCA 1968). It is seldom susceptible of direct proof, but is usually shown by circumstantial evidence. Busch v. State, 466 So. 2d 1075 (Fla. 3d DCA 1984); Williams v. State, 239 So. 2d 127 (Fla. 4th DCA 1970). It also "may be presumed from the facts and circumstances surrounding the act." Board of Regents v. Videon, 313 So. 2d 433 (Fla. 1st DCA 1975).

7. In our view, the ALJ's determination that the Respondent acted "corruptly" is an ultimate finding of fact, which we may not reject without determining that there is no competent, substantial evidence to support it. Goin v. Commission on Ethics, 658 So. 2d 1131, at pp. 1138-1139 (Fla. 1st DCA 1995).

8. In addition to finding that the "solicitation and acceptance of free tickets and misuse of 'pass lists' to boxing events by commissioners and staff of the Athletic Commission has historically been a problem" [Tr. 139, 277, & 596], the ALJ found and concluded:

22. . . . . [While] [i]t is clearly appropriate for commissioners and staff who have a legitimate function associated with a boxing event to be admitted to the event without paying an admission fee[,] [i]t is similarly clear that it is inappropriate for relatives, friends, political associates, and other individuals who have no legitimate Athletic Commission function to gain free admission to a boxing event as a result of an association with the Athletic Commission.

23. Respondent gave Peter Trematerra free tickets to several boxing events [Tr. 41]. Respondent placed an attorney who had no Athletic Commission involvement on the pass list "all the time" [Tr. 40]. Respondent solicited free tickets from a promoter in the Lou Duva organization.

24. Respondent signed a receipt for twenty 75-dollar tickets and thirty 50-dollar tickets for a January 31, 1998, boxing event at the Ice Palace in Tampa [Tr. 305-306].

25. During his tenure as Executive Director, Respondent solicited and accepted free tickets to boxing events from event promoters [Tr. 148], or caused the names of individuals who had no legitimate function related to the Athletic Commission to be placed on "pass lists" which allowed free admissions to boxing events [Tr. 144-145, 170, 280, 285-289, 357-358; & Advocates Exhibit 34] .

9. Respondent has not excepted to any of these findings by the ALJ, in fact, with the exception of paragraph 48 of the ALJ's Conclusions of Law, he urges us to accept the "rest and remainder of the Recommended Order. Therefore, consistent with Court's direction in Goin v. Commission on Ethics, 658 So. 2d 1131 (Fla. 1st DCA 1995), that 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," we find that the ALJ's conclusion that the Respondent acted "corruptly," as that term is defined at Section 112.312(9), Florida Statutes, is a permissible inference drawn from the competent, substantial evidence of record and his findings in paragraphs 22 through 25 of his Findings of Fact.

Since the Goin case also teaches us that where reasonable minds could differ as to whether an individual acted "corruptly," and, as here, the finder of fact is persuaded that the Commission Advocates have met their burden of proof, we are bound by law to leave that determination of intent to the fact finder.

10. Although the Respondent claims that his testimony about the types of individuals who he believed were appropriate to be placed on the "pass list," that is, people who he believed had some legitimate connection to the sport of boxing , was corroborated by Alan Grossman [Tr. 278], the contrary appears to be true. In response to the question whether he [Mr. Grossman] had given the Respondent advice about the propriety of his accepting free tickets from promoters, Mr. Grossman responded:

> I believe I took a general position that it was not appropriate for [the Respondent] or anybody else related to the [Athletic] Commission to be obtaining and using tickets from promoters for anything other than the purpose of the staff necessary for the fights.

Tr. at p. 288.

11. It is abundantly clear from the record of these proceedings that the Respondent was aware, that is, he had "reasonable notice,"at least in March 1997, of the Department of Business and Professional Regulation's administrative policy against the solicitation and acceptance of gifts, i.e., tickets and passes from anyone that he regulated [Advocates' Exhibit No. 7], and of our staff's opinion and advice against his accepting tickets from promoters [Tr. 281 & Advocates' Exhibits Nos. 20 and 21], but chose to ignore that advice and recommendation by continuing to solicit and accept such free tickets and passes after March 1997 for persons who had no legitimate Athletic Commission function at the boxing matches. See Advocates' Exhibits Nos. 33 and 34.

12. Notwithstanding Respondent's claim about the appropriateness of including State

legislators' names on the free ticket or pass lists for boxing matches, the Legislature did not regulate the sport of boxing within the State of Florida except through the passage of laws. Nor did the Legislature oversee the sport. Rather, the Athletic Commission, through its staff, was charged by the Legislature with that function. Moreover, Respondent's assertion that his providing names to promoters for purposes of "assisting, as requested, in the presentation of a State boxing event" is indicative of his not acting in a manner inconsistent with the proper performance of his public duties may be true if one assumes that the Athletic Commission's function was to assist in the "presentation" of boxing events. However, Chapter 548, Florida Statutes, did not create the Athletic Commission to function as a boxing promoter. Rather, the Athletic Commission appears to have been created to regulate those individuals and entities involved in the sport. Consequently, for us to adopt the Respondent's argument that he could not have acted "corruptly" because he believed that the people for whom he was soliciting free tickets and passes from promoters would benefit the sport in Florida, and therefore he did not act with "reasonable notice" that his actions of soliciting and accepting free tickets and passes from promoters were inconsistent with the proper performance of his public duties, would work an absurd result here by denying the application of Section 112.313(6), Florida Statutes, in a situation most deserving of its deterrent effect.

COMMISSION ADVOCATES' EXCEPTION TO THE ALJ'S CONCLUSIONS OF LAW

1. The Commission Advocates except to paragraph 49 of the ALJ's Conclusions of Law wherein he finds and concludes:

> 49. The evidence demonstrates clearly and convincingly that the memo authored by Respondent with reference to the actual days on

> which David Walker performed community service was inaccurate. I do not find that this inaccuracy was done corruptly as defined in Subsection 112.312(9), Florida Statutes.

This paragraph concerns the issue of whether the Respondent violated Section 112.313(6), Florida Statutes, by falsely representing to the Salvation Army, which provided probation services for the Court, and the public on Athletic Commission stationery that David Walker had completed 16 hours of his obligatory community service. Paragraph 49 is the only portion of the Conclusions of Law in the Recommended Order on this issue.

2. The pertinent findings of fact in the Recommended Order are as follows:

> 27. In September 1997, David Walker performed 16 hours of community service at the Tampa office of the Athletic Commission.
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> 28. Two documents were signed by Respondent, one a letter dated September 2 1, 1997, indicating that David Walker had performed 16 hours of community service; the second, a memo indicating that David Walker had completed the 16 hours of community service on two Saturdays, September 6 and 13, 1997.
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> 29. David Walker testified that he had completed the community service on weekdays.

The ALJ's Finding of Fact No. 27 appears to be based on his Finding of Fact No. 29.

3. The term "corruptly" includes several statutory "elements" and is defined in Section 112.313(9), Florida Statutes, as follows:

> 'Corruptly'means 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.

As the First District Court of Appeal noted in Blackburn v. State, Commission on Ethics, 589 So. 2d 431, (Fla. 1st DCA 1991):

> An essential element of the charged offense under section 112.313(6) is the statutory requirement that appellant acted with wrongful intent, that is, that she acted with reasonable notice that her conduct was inconsistent with the proper performance of her public duties and would be a violation of the law or the code of ethics in part III of chapter 112. [Id., at p. 434.]

In addition, the Court stated:

> The statutory definition of 'corruptly' in section 112.312(7) not only requires that the conduct complained of be done with a wrongful intent, it also requires that the 'act or omission' be 'inconsistent with the proper performance of [her]public duties. [Id. at p. 436.]

4. The Advocates' exception argues that the meaning of the term "corruptly," as defined at Section 112.312(9), Florida Statutes, was misinterpreted and misapplied, and the definition is a matter of law over which the Commission has substantive jurisdiction. The Advocates argue that Respondent submitted a letter as an official record to David Walker's probation officer on Athletic Commission letterhead intending that the information provided therein would be used in the probation officer's report to the judge regarding Mr. Walker [Advocates' Exhibit No. 32]. As Executive Director of the Athletic Commission, the Advocates assert, the Respondent misrepresented to the probation officer that Mr. Walker had completed his community service on two weekend days [Tr. 436-437 &Advocates' Exhibit No. 32]. The Advocates also argue that Respondent's misrepresentation was made to benefit Mr. Walker within the criminal justice system and to prevent him from having to fulfill the requirements placed upon him through the Court as required by Section 948.031, Florida Statutes. Further, they argue that it is "patently inconsistent" with the proper performance of Respondent's public duties for him to submit "false records" to the court system regarding a probationer."

5. The Respondent, on the other hand, argues that the ALJ's basis for concluding that

he did not act "corruptly" was the lack of evidence to establish that he intentionally submitted inaccurate information.

6. Our review of the record on this issue indicates that David Walker, a long time, very good friend of the Respondent [according to the Respondent, Tr. 434-5], testified that he completed 16 hours of community service at the offices of the Athletic Commission, and did not do so on the two Saturdays in question [Tr. 441]. Walker also testified that Respondent was there when he did the work, that Respondent let him into the Athletic Commission's offices, and that Respondent was there to verify what Walker had done [Tr. 447-81. However, the Respondent testified that he was not there when Walker did the hours [Tr. 433], that he was probably out of town [Tr. 437], that there probably was no supervision of Mr. Walker [Tr. 438], and that he was not there to let Walker into the offices [Tr. 475]. Mr. Walker also testified that he submitted Respondent's memorandum referencing his performing his community service hours on two Saturdays to his probation officer knowing the statement to be false [Tr. 442-3].

7. Notwithstanding the above, the ALJ simply concluded that the Respondent did not act "corruptly" without providing any explanation as to what element of statutory proof was lacking or otherwise how the proof failed to justify the conclusion that the Respondent acted "corruptly," as the defined term has been construed by the First District Court of Appeal in Blackburn, supra.

8. Because the Commission on Ethics is charged with the constitutional responsibility of issuing a public report on each complaint concerning a breach of public trust by a public officer or employee [See Article II, Section 8(f), Florida Constitution], and because the ALJ provided no explanation as to how he had concluded that the Respondent did not act "corruptly," we remanded the case to DOAH in order him to enter another order explaining paragraph 49 of his Conclusions

of Law. This the ALJ declined to do, claiming that such a conclusion is the type over which the Commission has substantive jurisdiction and is free to modify or reject.

9. However, as we noted in our response to Respondent's exception above,

> [i]n our view, the ALJ's determination that the Respondent acted "corruptly" is an ultimate finding of fact, which we may not reject without determining that there is no competent, substantial evidence to support it. Goin v. Commission on Ethics, 658 So. 2d 1131, at pp. 1138-1139 (Fla. 1st DCA 1995).

Furthermore, in Goin v. Commission on Ethics, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995) the Court wrote:

> [T]he question of whether the facts, as found in the recommended order, constitute a violation of rule or statute is a question of ultimate fact which the agency may not reject without adequate explanation. Langston v. Jamerson, 653 So. 2d 489 (Fla. 1st DCA 1995).

10. Here, the ALJ concluded that the Respondent did not act "corruptly," as that term is defined at Section 112.312(9), Florida Statutes, when he represented in his letter or memoranda that David Walker completed 16 hours of community service at the offices of the Athletic Commission over the course of two Saturdays despite (a) there being no record of Mr. Walker having entered the building on either of those days [Advocates Exhibit No. 32]; (b) there being no supervision of Mr. Walker by the Respondent or any other employee of the Athletic Commission during any time that Mr. Walker allegedly was performing his community service at the Athletic Commission's office [Tr. 437-438]; (c) there being a discrepancy in the testimonial evidence as to how Mr. Walker gained access to the offices of the Athletic Commission (Mr. Walker testified that the Respondent let him in [Tr. 447-448], while the Respondent testified that he either may have given his key to Mr. Walker or someone else may have let him in Tr. 476-476]); and (d) Mr. Walker's testimony that he

completed his community service at the Athletic Commission office during the week, rather than on two Saturdays [Tr. 437].

11. Although we agree with the Advocates' assertions that Respondent's misrepresentation benefited Mr. Walker and that Respondent's preparing false statements in his official capacity which he knew would be submitted to the court was inconsistent with the proper performance of his public duties, the determination as to whether a public official or employee acted "corruptly" within the meaning of that term as defined at Section 112.312(9), Florida Statutes, is still an ultimate finding of fact. While we disagree with the ALJ's finding of ultimate fact because we do not believe that it is supported by the evidence, we also do not agree with the ALJ that we are free to reject or modify this finding of ultimate fact. As the Court stated in Manasota 88, Inc. v. Tremor, 545 So. 2d 439 (Fla. 2d DCA 1989):

> Agency fact-finding independent of and supplementary to D.O.A.H. proceedings has been specifically disapproved. See e.g. Friends of Children v. Department of Health and Rehabilitative Services, 504 So. 2d 1345 (Fla. 1st DCA 1987).

Therefore, in accordance with the suggestion of the First District Court of Appeals in Barfield v. Department of Health, Board of Dentistry, 805 So. 2d 1008, 1013 (Fla. 1st DCA 2001),[3] we reject

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[3]

> Section 120.68(1), Florida Statutes (1999), providing the avenue of judicial review to parties adversely affected by agency action, implies that an agency harmed by recommended conclusions which it is powerless to reject has the option of either *entering a final order under protest* and thereafter appealing from its own order as a party adversely affected, or of seeking immediate judicial review from the ALJ's recommended order. The latter alternative is available only if "review of the final agency decision would not provide an adequate remedy" to the agency. [E.S.]

Barfield at 1013.

the Advocates' exception to paragraph 49 of the ALJ's Conclusion of Law and adopt paragraph 49 under protest.

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. With the exception of paragraph 49 of the ALJ's Conclusions of Law, the remaining Conclusions of Law set forth in the Recommended Order are approved, adopted, and incorporated herein by reference, and the Commission on Ethics concludes that the Respondent, as former Executive Director of the Florida State Athletic Commission, violated Section 112.313(6), Florida Statutes, by soliciting and accepting tickets or complementary admissions to boxing matches for his or other Athletic Commission members' guests from promoters.

2. In accordance with the suggestion of the Court in Barfield v. Department of Health, Board of Dentistry, 805 So.2d 1008, 1013 (Fla. 1st DCA 2001), the ALJ's statement in paragraph 49 of his Conclusions of Law that the Respondent did not act corruptly by preparing a memo incorrectly referencing the days on which David Walker performed community service is approved, adopted, and incorporated herein by reference, under protest.

3. In addition, the Commission concludes that, with the exception of our finding of a violation of Section 112.313(6), Florida Statutes, by the Respondent relative to his solicitation and

acceptance of tickets and complementary admissions to boxing matches, and our Conclusion of Law No. 2, Respondent did not violate Sections 112.313(2), 112.313(4), 112.313(6), 112.3148(3), and 112.3148(4), Florida Statutes, as otherwise alleged in our Order Finding Probable Cause. Therefore, those alleged violations are hereby dismissed.

RECOMMENDED PENALTY

1. Based on the ALJ's findings that the Respondent received fifty tickets with a value of $3,000.00 for just one fight and that his acceptance of tickets and complementary admissions occurred on more than one occasion even after he was advised by attorneys from both the Department of Business and Professional Regulation and the Commission on Ethics against accepting such complementary tickets and admissions from promoters, the Commission Advocates except to the ALJ's recommendation of the imposition of a $1,000.00 civil penalty against the Respondent for his violation of Section 112.313(6), Florida Statutes. The Advocates argue that the $1,000.00 recommended civil penalty is "insufficient" in that it allows the Respondent to "profit" from his wrongdoing. The Advocates argue that Respondent's "flagrant" violations require the imposition of the maximum fine of $5,000.00.[4]

2. Under the circumstances of this case as noted by the Advocate, the Commission

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[4]At the time that the complaint was filed, Section 112.317, Florida Statutes, the penalty provision of the Code of Ethics, authorized the imposition of a maximum civil penalty of $10,000, rather than $5,000. The $5,000 maximum civil penalty was changed to a $10,000 maximum civil penalty as a result of the Legislature's enactment of Section 8 of Chapter 94-277, Laws of Florida, which became effective on January 1, 1995, prior to Respondent's assuming the position of Executive Director of the State Athletic Commission.

agrees with the Advocates that a civil penalty of $5,000.00 would be appropriate.

3. In consideration of the foregoing and pursuant to Sections 112.317 and 112.324, Florida Statutes, the Commission recommends that the Governor impose a civil penalty upon the Respondent, Morris Michael Scionti, in the total amount of $5,000.00, and that he receive a public censure and reprimand.

ORDERED UNDER PROTEST by the State of Florida Commission on Ethics meeting in public session on June 6, 2002.

June 11, 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: Ms. Julie A. Reynolds, Attorney for Respondent
Mr. Joseph Donnelly and Ms. Veronica E. Donnelly, Commission Advocates
Ms. Marcia G. Cooke, Chief Inspector General, Executive Office of the Governor, Complainant
The Honorable Jeff B. Clark, Administrative Law Judge
Division of Administrative Hearings