STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: RUDY MALOY,	)	Case No. 02-1231EC
	)	
Respondent.	)	
	)	

ORDER DECLINING REMAND

This case is back before the undersigned following the entry, on September 4, 2003, of an Order of Remand ("Order") by which the Florida Commission on Ethics ("Commission") has sought to remand this case to the undersigned for further proceedings. At a telephone conference on September 15, 2003, the parties advised the undersigned that no additional pleadings or papers would be filed. Accordingly, the matter is ripe for adjudication.

Authority for Remand

A.

In reviewing the Order, the undersigned is mindful that the Commission is an agency, not an appellate court; as such, its authority to articulate binding pronouncements of law (subject to judicial review) is limited to the party whose substantial interests are being determined at the moment.[1] It is the case, therefore, that where the Administrative Law Judge ("ALJ") has fully discharged all of his duties under the Administrative Procedure Act ("APA") and there are no exceptional

circumstances, the Commission lacks the power to issue a mandate directing the Division of Administrative Hearings ("DOAH") to conduct further proceedings consistent with the Commission's opinion that the ALJ committed reversible error in his Recommended Order. These are important principles, fitting to note, because DOAH's independence—and hence the fairness of formal administrative proceedings—would be compromised if agencies (which are *litigants* when under DOAH's jurisdiction[2]) were entitled to dictate the law to the impartial ALJ, much as an appellate court authoritatively decides the law or a trial judge instructs a jury.[3]

As an impartial arbiter, then, the duty of the undersigned is to treat an agency's statements of law (except when duly promulgated as rules) as the arguments of a party litigant, nothing more nor less, and to consider them in the same manner as any other party's arguments. Accordingly, the parties are assured that, as a neutral judge, the undersigned views the Commission's "substituted Conclusions of Law" and assignments of error, not as rulings to be followed, but as legal arguments to be evaluated, fairly and dispassionately.

B.

The proposition that state agencies have "inherent authority" to remand cases to DOAH is not quite as well settled as the Commission would have it. While it is true that the

Second District Court of Appeal, by issuing writs of mandamus to reluctant hearing officers, once enforced a robust, implied agency power to remand, *see Collier Development Corp. v. State Dept. of Transp.*, 592 So. 2d 1107, 1109 (Fla. 2d DCA 1991); *Manasota 88, Inc. v. Tremor*, 545 So. 2d 439, 441-42 (Fla. 2d DCA 1989), other courts have been more circumspect.

For example, instead of compelling DOAH's submission to the litigating agency via extraordinary writ (and avoiding an immediate decision as to whether the agency or the ALJ is correct on the law) as the second district did, the First and Fourth District Courts of Appeal generally have elected to settle disputed legal issues on the merits. *See Agency for Health Care Admin. v. Mount Sinai Medical Center of Greater Miami*, 690 So. 2d 689, 692 (Fla. 1st DCA 1997)(treating petition for mandamus as one for interlocutory review of ALJ's refusal to conduct evidentiary hearing on attempted remand); *State Dept. of Environmental Protection v. Dept. of Management Services, Div. of Admin. Hearings*, 667 So. 2d 369, 370-71 (Fla. 1st DCA 1995)(granting petition for review of non-final order declining remand, concluding that hearing officer had erred in various respects, and remanding for further proceedings at DOAH); *Department of Prof. Reg. v. Wise*, 575 So. 2d 713, 716-16 (Fla. 1st DCA), *rev. denied*, 584 So. 2d 997 (Fla. 1991)(sidestepping question whether agency has power to remand, even as concurring

judge would recognize implicit power to remand for clarification of recommended findings); *Florida Dept. of Law Enforcement, Criminal Justice Standards and Training Com'n v. Dukes*, 484 So. 2d 645, 647 (Fla. 4th DCA 1986)(in agreeing to review non-final recommended order because agency otherwise would be effectively unable to appeal hearing officer's evidentiary rulings, court noted that the APA did not authorize agency to remand case to hearing officer with instructions to admit the evidence in question).

The general rule is that because agencies have at best *implied* authority to remand cases to DOAH prior to the entry of a final order, there being no *statutory* authority to do so, such action is justified only under "exceptional circumstances," and the ALJ has the power to refuse the remand. *See Henderson Signs v. Florida Dept. of Transp.*, 397 So. 2d 769, 772 (Fla. 1st DCA 1981)(hearing officer acted within authority in denying remand where case presented no exceptional circumstances); *see also Berry v. State Dept. of Environmental Reg.*, 530 So. 2d 1019, 1022 (Fla. 4th DCA 1988)(assuming without deciding that agency had authority to remand, hearing officer did not err in refusing the remand, where hearing officer had complied with essential requirements of law); *Florida Dept. of Transp. v. J.W.C. Co., Inc.* 396 So. 2d 778, 785-86 (Fla. 1st DCA 1981)(concluding that *reviewing court* can remand for further fact finding; declining

to hold that *agency* has inherent authority to remand, while leaving open possibility that agency might have such authority in exceptional circumstances).

Examples of exceptional circumstances under which an agency's implied power to remand would be acknowledged can be found in the reported decisions. In *Miller v. State Dept. of Environmental Reg.*, 504 So. 2d 1325, 1325-26 (Fla. 1st DCA 1987), it was held that remand was appropriate where the agency, after receiving a recommended order, changed its mind about the validity of a permit condition with which the applicant had complied, and which the hearing officer, consistent with the agency's litigating position, had upheld.[4] As a consequence of the agency's changing its regulatory position, additional findings of fact were required regarding the environmental impact, if any, expected to result from the revision of the affected permit condition. *Id.* at 1327.[5] In *Board of Medicine v. Mata*, 561 So. 2d 364, 367-68 (Fla. 1st DCA 1990), the court held that in a licensing proceeding, where the statutes governing applications for licensure required the licensing board to consider all material information coming to light prior to the grant or denial of the license, it was appropriate for the agency to remand the case to DOAH for further proceedings to resolve disputed issues of fact involving alleged misconduct discovered after the issuance of the recommended order. Neither

of these cases, clearly, involved circumstances similar to those presently facing the undersigned.

The undersigned concludes that the Commission's limited implied authority to remand a case to DOAH properly may be exercised in "exceptional circumstances." The Commission's implied authority respecting remand is held in check initially by the ALJ, who possesses the authority, subject to judicial review, to refuse the remand if, in his view, the circumstances are not exceptional. *See Henderson*, 397 So. 2d at 772. Further, because the question whether exceptional circumstances exist is a question of law[6] over which the Commission does not have substantive jurisdiction, the Commission cannot modify or reject the ALJ's resolution of the issue. *See* § 120.57(1)(l), FLA. STAT.[7] It is appropriate, therefore, for the undersigned to determine independently whether remand is warranted.

Necessity of Remand

A.

The Commission urges that remand is necessary because the ALJ:

> [1] restated the issue to be decided allowing erroneous legal conclusions to flow therefrom; . . .
>
> [2] made findings of fact under a standard of evidence lower than that required by Section 120.57(1)(j), Florida Statutes; and . . .

> [3] affirmatively declined to make findings of fact on certain critical issues . . . .

Order at 3. In light of these alleged errors, the Commission wants the undersigned to "reconsider the evidence of record for additional findings in light of the correct legal standards as set forth in the substituted Conclusions of Law." Order at 7. The three premises on which the remand is said to rest will be considered in turn.

First premise. As the sole author of the Recommended Order, the undersigned can declare unequivocally, as literally no one else can, that the statement of the issues on pages 1 and 2 of the Recommended Order in fact had no bearing on any conclusions of law.[8] If the Commission disagrees with the conclusions of law in the Recommended Order, then it may reject or modify them within the limitations prescribed in Section 120.57(1)(l), Florida Statutes.

Second Premise. The Commission's contention that a "lower" standard of proof than that required by law was used refers to several *exculpatory* findings of fact that were based on the greater weight of the evidence. The contention is founded on the mistaken idea that *all* findings of historical fact, even those that exonerate the accused, must be based on clear and convincing evidence. Suffice it to say that from the unassailable proposition that the accused in these proceedings

need not prove his innocence follows the conclusion that exculpatory findings *need not even be made*, much less be supported by clear and convincing evidence.[9] Besides, to the extent issues concerning the interpretation and application of the standard of proof are legal in nature, such issues plainly are not within the Commission's substantive jurisdiction, and thus the Commission is powerless to second-guess the undersigned on these points. *See* § 120.57(1)(l), FLA. STAT.

Third premise. In its third ground for remand, the Commission argues that the ALJ must make positive findings as to whether or not the accused committed the acts comprising each violation alleged, rather than making negative findings that particular allegations were not proved clearly and convincingly. What the Commission overlooks is that when the trier of fact, after weighing the evidence, finds that an allegation was *not* clearly and convincingly proven true, he *has* made a finding of fact, *see Goin v. Commission on Ethics*, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995)——a finding that fully disposes of the allegation because the accused is not required to prove his innocence.[10] Anyway, as just mentioned, issues concerning the interpretation and application of the standard of proof, to the extent they constitute questions of law, are not within the Commission's substantive jurisdiction. *See* § 120.57(1)(l), FLA. STAT.

The undersigned concludes that the alleged errors do not present exceptional circumstances or otherwise justify a remand.

B.

In addition to considering the three stated grounds for the remand, the undersigned has also reviewed the Commission's "substituted Conclusions of Law" to ascertain whether he overlooked or misapprehended any rules of decision crucial to the outcome of this case, which mistakes, if any, he should like to correct on remand. As it happens, the Commission's legal conclusions appear largely to track the contentions that were made previously by the Commission's Advocate in her Proposed Recommended Order. To be sure, these arguments were carefully considered by the undersigned in preparing the Recommended Order. To the extent the Commission's contentions are not reflected in the Recommended Order, they were deemed unpersuasive. Upon reflection, the undersigned is not persuaded that he misunderstood or misapplied the governing Florida law.

C.

Finally, as a practical matter, the undersigned effectively has done what the Commission wants—*i.e.* "reconsider[ed] the evidence of record for additional findings in light of the . . . the substituted Conclusions of Law"—and resolved not to replace or supplement any existing findings of fact with new ones. This is because, even when viewed through the prism of the

Commission's "substituted Conclusions of Law, the findings of fact still look to the undersigned to be thorough and complete, responsive to each and every material allegation, and decisive as to all the issues of material fact in dispute. Having covered the factual waterfront, there is simply nothing more the undersigned can do.

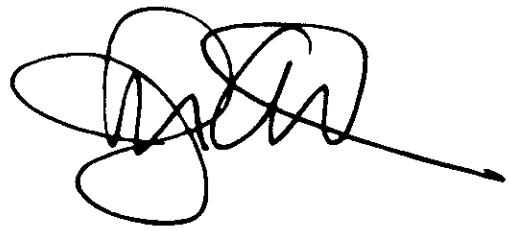
Conclusion

The undersigned believes—and hopes most fair-minded, objective observers, whatever their opinions about how this case should be decided, would agree—that the Recommended Order is a carefully written document which reflects a thoughtful and even-handed examination and resolution of all the issues presented. In the Recommended Order are set forth what were intended to be thorough, detailed, and precise findings of fact deliberately and painstakingly tailored to conform to the governing Florida law, together with a legal discussion that the author thought was logically reasoned, comprehensive, and persuasive. The undersigned remains convinced that the Recommended Order is correct and complete and clearly explains, for the benefit of the parties, the appellate court, and the public, exactly why it is recommended that Rudy Maloy be found not guilty of the pending ethics charges.

Disposition

For the foregoing reasons, the undersigned declines to accept the Order of Remand, and it is ORDERED that the record shall be returned forthwith to the Commission for further proceedings.

DONE AND ORDERED this 15th day of September, 2003, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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ENDNOTES

[1]/ When the agency and the Administrative Law Judge reach conflicting conclusions regarding the law, it is properly for the appellate court, not the agency, to authoritatively resolve such disagreements (unless of course an appeal is *not* taken, in which case the agency's legal conclusions become binding on the affected party). If the appellate court rules that additional fact-finding is required, then the court can remand the case for further proceedings before the Division of Administrative Hearings. *See Cohn v. Department of Prof. Reg.*, 477 So. 2d

1039, 1047 (Fla. 3d DCA 1985)(holding that where the court of appeal determines that the hearing officer erred in deciding a point of law, the court must remand to the hearing officer for another hearing if disputed issues of material fact subsist).

[2]/ *See* § 120.569(2)(a), FLA. STAT. ("The referring agency shall take no further action with respect to a proceeding under s. 120.57(1), except as a party litigant, as long as the division has jurisdiction over the proceeding under s. 120.57(1)."); *see also* endnote 5, *infra*. By convention, the Commission is not named as party in proceedings before DOAH. The fact remains, however, that the Commission *is* the prosecuting agency.

[3]/ Ask yourself: If you were litigating against an opponent who was allowed conclusively to give the law to the officer charged with making a determination as to how the dispute should be resolved, would you be confident of receiving the benefit of the officer's independent judgment?

[4]/ The hearing officer, it should be added, accepted the remand, ultimately issuing a second recommended order. *Id.* at 1325. Thus, the hearing officer's authority to refuse the remand was not addressed in *Miller*.

[5]/ Commenting on the APA's requirement that referring agencies take no action except as a parties litigant while DOAH has jurisdiction over formal administrative proceedings, which requirement is currently codified in § 120.569(2)(a), FLA. STAT., *see* endnote 2, *supra*, the *Miller* court stated in a *dictum* that the subject statutory "prohibition is clearly confined to action while the hearing officer retains jurisdiction, and is simply irrelevant to agency action in performance of quasi-adjudicative functions after the submission of a recommended order." *Id.* at 1327. While this statement is correct as far as it goes, it cannot reasonably be taken to mean that the referring agency is authorized, not only to *urge*, but to *compel* the ALJ to make findings of fact in accordance with the agency's legal conclusions, provided the agency orders the ALJ to follow its conclusions while jurisdiction is vested in the agency. If this larger proposition were true, then the agency, *before* referring the case to DOAH, could enter an order directing the ALJ to make findings of fact consistent with the agency's stated legal conclusions, which order would be tantamount to jury instructions. This is because, were it to be accepted that the agency has the power to make its legal conclusions binding on the ALJ *after* the hearing (when jurisdiction returns to the

agency), then there would be no principled basis upon which to deny the agency such power *before* the hearing (when jurisdiction is first in the agency), the only thing separating the two being *time*, a distinction that does not affect the outcome. Going a step further, if the agency has the power to make its legal conclusions binding on the ALJ, then it *should* do so at the very beginning, well before the final hearing, rather than after the issuance of a recommended order, for that would be more efficient—and, in its transparency, more honest. Because the undersigned finds nothing in the APA contemplating a power of referring agencies to authoritatively instruct ALJs on the law before DOAH acquires jurisdiction, he concludes that agencies likewise do not possess such power after DOAH relinquishes jurisdiction—not, at least, where the circumstances are unexceptional.

[6]/ There is no suggestion in the cases that an evidentiary hearing should be held regarding the existence in fact of exceptional circumstances. If this *were* a fact question, however, then it would be for the ALJ to decide, not the agency.

[7]/ This latter point is one the Second DCA could not have considered in *Collier* and *Tremor*. Those cases were decided in the years 1991 and 1989, respectively, when agencies had broad power to reject or modify hearing officers' conclusions of law. Indeed, the fact that agencies enjoyed such freedom to reject hearing officers' legal conclusions is what persuaded the Second DCA that obedience to an agency's order of remand must be a nondiscretionary or ministerial act on the hearing officer's part—a conclusion that was essential to the grant of mandamus. *See Tremor*, 545 So. 2d at 441-42.

Circumstances changed in 1996, when the legislature substantially amended the APA. One revision enacted that year, which remains in force, *see* § 120.57(1)(l), forbids litigating agencies from rejecting or modifying administrative law judges' conclusions of law on matters outside their substantive jurisdiction. *See* Ch.96-159, LAW OF FLORIDA § 19. (The subject provision was originally codified in paragraph j of § 120.57(1). *See* § 120.57(1)(j), FLA. STAT. (1997)). The undersigned concludes that to the extent *Collier* and *Tremor* can be read to suggest that ALJs have no choice but to do as the agency says on remand, those decisions are not good law in the wake of the 1996 APA amendments.

[8]/ As best the undersigned can tell from reviewing the Advocate's Exceptions (which the agency accepted *in toto*), at the heart of the Commission's complaint about the statement of issues is the assertion that the undersigned relied upon federal law, namely Title VII, as the basis for the findings of fact. The assertion is untrue, as the undersigned, having been solely responsible for the fact-findings in question, uniquely can attest. In fact, ironically, one of the points stressed in the Recommended Order is that decision-makers in cases such as this must deliberately *put aside* popular notions about sexual harassment, which are largely the product of Title VII, in favor of a "rigorous application of the [Florida] statutory text." R.O. at 32. Because the applicable Florida statutes and rules do not define (or mention) "sexual harassment" as an ethics violation, there is a danger, the undersigned explained, that undisciplined decision-makers might use Title VII-derived concepts (which have seeped into the popular culture)—or other personal opinions regarding right and wrong behavior—to fill the void, which could result in the enforcement of moral codes other than the Florida Ethics Code. The undersigned took the time to discuss these concerns in part to underscore that he had conscientiously applied the Florida Ethics Code *and nothing but* the Florida Ethics Code.

[9]/ Logically, too, an exculpatory finding based on a preponderance of evidence is really just a positive and more informative way of expressing the dispositive negative finding of fact that the agency has failed to prove an allegation by clear and convincing evidence.

[10]/ Not to belabor the point, but if the Commission has failed to prove by clear and convincing evidence that the accused committed the alleged violation, then the accused is just as "not guilty," for purposes of the ethics prosecution, as if the evidence had conclusively established his innocence.

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