11-1-02

2/10/03
nl

STATE OF FLORIDA
DEPARTMENT OF FINANCIAL SERVICES
OFFICE OF FINANCIAL INSTITUTIONS AND SECURITIES REGULATION

At

JDP-Closed

FILED
03 FEB 11 PM 2:11
UNIT
ADMINISTRA
HEARINGS

MICKIE A. LEONARD and LAST CHANCE SPECIAL, INC.,

Petitioners,

v.

DEPARTMENT OF BANKING AND FINANCE,

Respondent.
_____/

DOAH Case No. 02-1280
DBF Case No. 4104-B-3/02

Final Order

Effective January 7, 2003, the Florida Legislature created the Department of Financial Services and under the Financial Services Commission created the Office of Financial Institutions and Securities Regulation (hereafter the "Office"), abolishing the former Department of Banking and Finance (hereafter the "Department."). Section 20.121, Florida Statutes. As a result thereof, the Office is the statutory successor to the Department. In addition, the Director of the Office is the successor to the Comptroller for final agency action in financial institutions regulatory and administrative matters. This Final Order will reflect these legislative changes.

On November 1, 2002, Administrative Law Judge J.D. Parrish of the Division of Administrative Hearings ("DOAH"), pursuant to Sections 120.569, and 120.57, Florida Statutes, issued a Recommended Order in the above captioned case. A copy of the Recommended Order is attached and incorporated as Exhibit A to this Final Order.

Petitioners Mickie A. Leonard and Last Chance Special, Inc., ("Leonard") filed untimely

exceptions to the Recommended Order on November 18, 2002. Treating the exceptions as if they were timely filed, the Department's trial counsel filed a timely response. On December 10, 2002, Petitioners filed an unauthorized pleading styled "Reply to the Department's Response to Petitioners' Exceptions to the Recommended Order." Because Fla. Admin. Code Rule 28-106.217 authorizes the filing of exceptions to proposed orders, and responses to the exceptions only, Leonard's exceptions, albeit untimely, will be considered in the Order while the unauthorized "Reply" will not.

At issue in this proceeding is whether to sustain the Department's rejection, in November, 2001, of the divestiture plan submitted by Leonard on April 23, 2001. Leonard asserted that her plan complied with the Final Order entered by the Department on June 9, 2000, in Mickie A Leonard and Application of Mickie A. Leonard for Control of Sunniland Bank v. Department of Banking and Finance and James McLaughlin, Thomas Leonard, and Raymond Hensler, DOAH Case No. 99-1664, *aff'd*, 790 So. 2d 1111 (2001) ("the Divestiture Order"). A copy of the Divestiture Order is attached and incorporated as Exhibit B to this Final Order.
The Divestiture Order required Leonard to, within 15 days of June 9, 2000, submit a divestiture plan, and within 90 days divest herself of her controlling interest in Sunniland Bank. Leonard failed to file any divestiture plan with the Department until April 11, 2001. After the Department informed Leonard that this plan was not in compliance with the Final Order, Leonard submitted another plan on April 23, 2001, which plan was the subject of the instant administrative proceeding.

The administrative hearing requested by Petitioners was conducted from August 26 through August 28, 2002, and the case remained under DOAH's jurisdiction for the ALJ to enter a Recommended Order. However, on October 16, 2002, Petitioners furnished the Department

their "Second Amended Divestiture Plan" and filed in this case a "Notice of Withdrawal of Petition for Formal Hearing." On October 31, 2002, Petitioners filed another pleading styled "Motion to Relinquish Jurisdiction" in which they maintained that DOAH no longer had jurisdiction over this matter, and that the case was moot. These filings served as Petitioners' waiver of their right to challenge the Department's rejection of Leonard's proposed divestiture plan of April 23, 2001. The ALJ issued her Recommended Order on November 1, 2002.

Despite Petitioners' abandonment of their challenge to the Department's rejection of Leonard's proposed divestiture plan, they nonetheless filed numerous exceptions to the ALJ's Recommended Order. Although these exceptions were untimely filed, and there is some question regarding Petitioners' right to file exceptions after they voluntarily dismissed their challenge to the Department's action, the Office will nonetheless address their exceptions. The Department's trial counsel submitted no exceptions to the Recommended Order.

Standard of Review

Before turning to Leonard's exceptions, it is important to note that the Office is required by Florida administrative law to give substantial deference to the factual findings of a DOAH Administrative Law Judge (ALJ). It is settled law that an agency may not disturb findings of fact contained in a Recommended Order of a DOAH ALJ unless it determines from a complete review of the record that the findings are not supported by competent, substantial evidence. Section 120.57(l)(1), Florida Statutes; *See* Belleau v. Dept. of Environmental Protection, 695 So.2d 1305 (Fla. 1st DCA 1997); Fla. Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987); Martuccio v. Dept. of Professional Regulation, 622 So.2d 607 (Fla. 1st DCA 1993). An agency head may not canvass the record for evidentiary support for alternative factual findings not made by the ALJ, and substitute his or her preferred view of the record for that

adopted by the trier of fact. *See* Bay County School Bd. V. Bryan, 679 So.2d 1246 (Fla. 1st DCA 1996). Nor may an agency head rely on supposed "special expertise" in an area of substantive law to overrule findings of fact with which he or she disagrees. *See* Holmes v. Turlington, 480 So.2d 150 (Fla. 1st DCA 1985). In short, once an ALJ has made findings as to a disputed factual matter, which findings are supported by competent, substantial evidence in the record, as defined in Chapter 120, Florida Statutes, those findings are binding on all parties to the litigation. See Goin v. Commission on Ethics, 658 So.2d 1131 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So.2d 489 (Fla. 1st DCA 1995); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla 1st DCA 1985). As to conclusions of law, courts will not overturn an agency's determination within the sphere of its expertise unless it is clearly erroneous. *See, e.g.*, Department of Ins. v. Volusia Hosp. Dist., 438 So.2d 815, 820 (Fla.1983), *appeal dismissed for want of a substantial federal question*, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed.2d 149 (1984).

Petitioners' Exceptions

Petitioners except to all but one of the ALJ's Findings of Fact. They urge the Office to adopt a view of the facts different from that found by Judge Parrish, and to overturn the vast majority of findings contained in the Recommended Order. Of the nineteen exceptions filed by the Petitioners to the ALJ's Findings of Fact, seventeen assert the absence of competent, substantial evidence. Petitioners also except to four of the five conclusions of law of the Recommended Order, insisting that the DOAH "lost" jurisdiction in this matter when the Petitioners filed their Notice of Withdrawal of Petition for Formal Hearing on October 16, 2002.

Petitioners claim that paragraphs 2, 4 through 8, and 10 through 20 in the Findings of Fact are each, in whole or part, unsupported by substantial competent evidence. But it is evident from the Recommended Order that Judge Parrish performed a detailed review of the

documentary evidence as well as the five volumes of hearing transcripts. Upon consideration, the Office concludes that each of these findings is supported by competent, substantial evidence in the record, considered as a whole. These exceptions are rejected.

Petitioners except to the finding in paragraph 3, claiming that it is irrelevant. But this finding is anything but irrelevant, since it expresses the very core of this action and the cause of the Divestiture Order. This exception is therefore rejected.

Petitioners except to the finding in paragraph 9, asserting that Judge Parrish should have been more specific in identifying the date of the divestiture plan referred to in the finding. The record discloses that on April 11, 2001, under threat of civil money penalties, Leonard filed a divestiture plan with the Department. Leonard was informed that the plan was not in compliance with the Final Order and on April 23, 2001, submitted another plan, which plan was the subject of the hearing and the only plan considered by Judge Parrish. Petitioners' exception to the ALJ's failure to mention the precise day in April on which Leonard submitted this plan is an irrelevant quibble, and is therefore rejected.

Petitioners claim that paragraphs 11, 15, 16, and 17 of the Findings of Fact contain conclusions of law. In paragraph 11 the ALJ found: "The Petitioner did not implement any divestiture plan that would have complied with the terms of the Final Order." It is undeniable that the Divestiture Order required Ms. Leonard to abandon her efforts to exercise control over Sunniland Bank, and to divest herself of shares in the bank so that she owned or controlled less than 25 percent of the voting shares of the bank. She was required to accomplish this by submitting, within 15 days of June 9, 2000, a legally sufficient divestiture plan which was to be fully implemented within 90 days of June 9, 2000. The plan could provide either for an outright sale of the shares or the establishment of a trust controlled by an independent trustee acceptable

to the Department under the terms of a trust agreement approved by the Department. It is equally undeniable that even Leonard's initial proposed divestiture plan was submitted more than 300 days after June 9, 2000, rather than within 15 days, as required by that Order. The plan at issue here, that submitted on April 23, 2002, did not include a firm commitment by Leonard to sell her unlawful control position. Nor did it provide an independent trustee acceptable to or trust terms approved by the Department. This ultimate finding of fact is correct as a matter of fact and law.

In paragraph 15, the ALJ found that, as a matter of fact, the proposed trustee, Meyer, did not have the requisite experience or knowledge to serve as an independent trustee. This is a pure finding of fact, well supported by substantial record evidence (Tr. at 34, 265-66, and 381). Meyer had no idea what he was expected to do as trustee for Leonard. (Tr. at 34, 201-07, 197-210, 285-87, 289, 291, 293-97, and 362-64). This finding embodies a credibility determination which the Office is powerless to overturn. Department of Health & Rehabilitative Servs. V. Yhap, 680 So.2d 559 (Fla. 1st DCA 1996).

In paragraph 16, the ALJ found that Meyer failed to submit financial information regarding his financial circumstance and business dealings to the Department. Not only did Meyer refuse to provide the Department with background information regarding his finances and business activities, he also refused to discuss his business dealings or financial circumstance at hearing. (Tr. at 300-01, and 351). In the Recommended Order, at paragraph 16, the ALJ correctly noted that an inquiry by the Department into Meyer's background was necessary to determine his fitness to act as a fiduciary for Leonard. As she aptly stated: "[a] trustee must be a person capable of independent thought and action and Mr. Meyer is simply not qualified to take Ms. Leonard on." *See* Exhibit A at paragraph 25. There is substantial, competent evidence to support this finding.

In paragraph 17, the ALJ accurately found that none of the divestiture proposals submitted by Leonard actually divested her of the shares for purposes of selling the shares. Furthermore, each proposal allowed Leonard to revoke the trust at will, without prior regulatory notice and approval. There is substantial, competent evidence in the record to support these findings.

These challenged findings embody the ALJ's positive evidentiary determination that Leonard failed to submit a divestiture plan that complied with the Divestiture Order. These findings are ultimate factual findings that are fully supported by the evidentiary record. They cannot be disregarded by the Office by the expedient of characterizing them as "conclusions of law" and must be considered by the Director in the formation of conclusions of law in this matter. J.J Taylor Companies, Inc. v. Department of Business and Professional Regulation, 724 So. 2d 192 (1st DCA 1999). Therefore, the exceptions to paragraphs 11, 15, 16, and 17 are rejected.

The Petitioners except to the Finding of Fact in paragraph 14, asserting that the Petitioners proposed Mr. Meyer as trustee well before August of 2001. The fact that Leonard proposed Meyer as Trustee "well before August of 2001" is irrelevant and harmless error in the context of this matter, but the finding is hereby adjusted to strike the word "next" and insert in its place "in April, 2001". Otherwise, this exception is rejected.

Turning to the Conclusions of Law section, Petitioners except to the statement in paragraph 21 that DOAH has jurisdiction over this matter. They argue that their brief Notice of Withdrawal of Petition for Formal Hearing, filed on October 16, 2002, well after the evidentiary hearing in this case, served to strip DOAH of jurisdiction and render these proceedings moot. However, the Petitioners' Notice of Withdrawal of Petition for Formal Hearing did not divest

DOAH of jurisdiction over this matter. See *Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc.*, 630 So. 2d 1123 (Fla. 2d DCA 1993) affirmed, 645 So. 2d 374 (Fla. 1994); *Holmes Regional Medical Center, Inc. v. Agency for Health Care Administration*, 737 So. 2d 608 (Fla. 1st DCA 1999); *City of North Port, Fla. v. Consolidated Minerals, Inc.*, 645 So. 2d 485 (Fla. 2d DCA 1994); *Middlebrooks v. St. Johns River Management Dist.*, 529 So. 2d 1167 (Fla 5th DCA 1988). When Petitioners rested at the conclusion of the evidentiary hearing they had requested, the matter was submitted for decision by Judge Parrish. The subsequent tactical decision by Petitioners and their counsel to withdraw the underlying petition for hearing, action obviously taken to avoid the entry of an adverse recommended order, was simply ineffective, as Judge Parrish correctly ruled.

Nor did that filing, or Petitioners' act of providing to the Department a Second Amended Divestiture Plan, also on October 16, 2002, render this case moot, as the Petitioners also claim in their exception to paragraph 21, and in their exception to paragraph 22. This is so for numerous reasons, including but not limited to:

a. The sole purpose of this proceeding was to determine whether the Department erred in rejecting Leonard's April 23, 2001 divestiture plan. That plan was rejected for a number of reasons, including the lack of independence and unsuitability of the proposed trustee, and the extent of Leonard's control over the stock shares to be held in trust. Some of these issues are capable of reappearing in this matter, and even reappear in the Second Amended Divestiture Plan that Petitioners now rely on to claim that this case is moot. For instance, Leonard's October 16, 2002 plan, like her plan of April 23, 2001, would unacceptably reserve for her the right to retain some powers of her unlawful control position, specifically the right to control the vote of all of her shares in connection with a potential sale of the bank.

b. The Department never consented to the dismissal of these proceedings, or the amendment of this action to address a new Divestiture Plan.

c. Because the purpose of the proceeding requested by Petitioners was to determine whether the Department erred in rejecting Leonard's April 23, 2001 divestiture plan, withdrawal of their Petition did not signify the end to the judicial or administrative labor to finalize the propriety of that action. The Department's [or Office's] cases in administrative litigation are all resolved by Final Order. Even when all parties voluntarily agree to a settlement of a DOAH case, a motion is made to DOAH requesting that it transfer jurisdiction back to the originating agency for entry of a Final Order.

For the foregoing reasons, the Petitioners' exceptions to paragraphs 21 and 22 are rejected.

Finally, the Petitioners except to both paragraphs 24 and 25, claiming that they each contain findings of fact not supported by competent substantial evidence, are not based on law, and invite "a lengthy and unnecessary trip through the appeals system." To the contrary, all facts referenced in both findings are well supported by competent substantial evidence replete throughout the record and any legal conclusions are absolutely correct. The claim that these conclusions invite "a lengthy and unnecessary trip through the appeals system," amounts to no more than the expression of displeasure at the outcome of the proceeding and a threat to appeal unless the conclusion is overruled. This forms no valid basis for an exception, and these exceptions are rejected.

The record in this case shows that Leonard has attempted to retain control over the shares in the former Sunniland Bank, despite being prohibited from doing so by the Department's Order of June 9, 2000. In order for Leonard to be deemed even in belated compliance with the

Department's Order, she must either sell her unlawful control position or entrust it to a wholly independent trustee. She may not reserve any rights to vote those shares. The plan of April, 2001, failed this test. The plan of October 16, 2002, also fails this test.

II. Final Order

Based on the foregoing findings of fact and conclusions of law, it is

ORDERED:

1. The proceedings in DOAH case No. 02-1280 were in compliance with applicable law.
2. In paragraph 14 of the Recommended Order, the words "in April 2001" shall be substituted for the word "August". All other Findings of Fact in the Recommended Order are supported by competent, substantial evidence in the record as a whole and are adopted by reference by the Office.
3. All Conclusions of Law in the Recommended Order, as augmented herein, are adopted by reference.
4. Meyer is unacceptable to serve as the independent trustee.
5. The trust agreements entered into between Leonard and Meyer violated the Final Order from DOAH Case No. 99-1664 because Leonard, through the voting trust agreements, retained the right to vote approximately 49 percent of the outstanding common stock of Sunniland Bank in situations involving the sale of Sunniland Bank.
6. Leonard's proposed Divestiture Plan is rejected because it did not provide assurances that Leonard would be unable to exercise ownership or control of 25 percent or more of the voting shares of Sunniland Bank.
7. Within 31 days from the date of rendition of this order, the Petitioners shall submit a divestiture plan which is acceptable to the Office. The divestiture plan must provide for

divestiture of control either by outright sale of all shares owned or controlled by Petitioner Leonard in excess of 24.9 percent of the bank's total shares or by the establishment of a trust to hold such shares, which trust will be controlled by an independent trustee acceptable to the Office under the terms of a trust agreement approved by the Office.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 10th day of February, 2003.

Don Saxon, Director
Office of Financial Institutions and
Securities Regulation

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE CLERK OF THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THIS ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via U. S. Mail to Ed Dougherty and Thompkins White, Igler & Dougherty, P.A., 1501 Park Avenue East, Tallahassee, Florida 32301, this 10th day of February, 2003.

Michael A. Kliner
Chief Counsel
Office of Financial Institutions and
Securities Regulation
200 East Gaines Street
Tallahassee, Florida 32399-0379

Copies furnished to:

The Honorable J.D. Parrish
Administrative Law Judge
Division of Administrative Hearings

Don Saxon, Director
Office of Financial Institutions and
Securities Regulation