2-16-04 Div. of Administrative Hearings

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STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES,

WFO-Clos

Petitioner,

vs.

DOAH Case No.: 03-3208; 03-3209
BPR DOCKETS Nos. 2003040435; 2003056262

CLARCONA RESORT CONDOMINIUM ASSOCIATION, INC.,

Respondent.
_____/

FINAL ORDER

The Director of the Division of Florida Land Sales, Condominiums, and Mobile Homes (Division) enters this Final Order in the above referenced matter.

PRELIMINARY STATEMENT

1. On April 1, 2003, the Division issued a Notice To Show Cause which alleged that the Respondent, Clarcona Resort Condominium Association, Inc. (Clarcona) violated section 718.111(12)(b) and (c), Florida Statutes, by not providing

unit owners timely access to association records. The Notice advised Clarcona of its right to request a hearing pursuant to chapter 120, Florida Statutes.

2. The procedural history of the proceedings before the Division of Administrative Hearings (DOAH) are set out by the Administrative Law Judge (ALJ) in the Recommended Order, which is incorporated in this Final Order.

3. On February 16, 2004, the ALJ entered a Recommended Order finding that Clarcona violated subsection 718.111(12)(b), Florida Statutes (2003) and recommending that the Division assess Respondent a penalty of $7,500.

4. Neither party filed a transcript of the hearing.

5. Clarcona filed exceptions to the Recommended Order on March 1, 2004.

6. On March 4, 2004, the Division filed a Motion for Clarification and Amendment of the Recommended Order without objection by Clarcona. The motion sought clarification of the burden of proof standard relied upon by the ALJ.

7. On March 8, 2004, the ALJ entered an Order on Motion for Clarification in which the ALJ revised paragraph 17 of the Recommended Order to find that the Division had satisfied its burden of proving the allegations in the Notice to Show Cause by clear and convincing evidence.

8. On March 22, 2004, Clarcona filed its Amended Written Exceptions to Recommended Order.

9. On March 30, 2004, the Division filed its Response to Exceptions.

RULINGS ON EXCEPTION

A. Exceptions to Findings of Fact

10. Clarcona excepts to Findings of Fact 3, 6, 7, 8, and 11. Clarcona asks the Division to modify the facts found by the ALJ based upon the investigator's report and the testimony of witnesses. The Division's response admits inadvertent error on the dates cited by the ALJ in Findings of Fact 3 and 6 by reference to the Investigator's Report and the Notice to Show Cause. Based upon agreement of the parties and a review of the documents, the inadvertent error as to dates in Findings of Fact 3 and 6 are adopted. These findings are revised as shown by underlining as follows:

> 3. By letter hand delivered to the Respondent's office on August 13, 2002, Mike Sims, a Clarcona unit owner, asked to review the Respondent's financial records, including accounts receivable and a "reserve study."
>
> 6. The Association manager made an appointment with Mr. Faulk for August 23, 2002, to review the requested records. During the appointment, Mr. Faulk reviewed some of the requested information.

11. The Division must make a complete review of the record, including the transcripts in order to reject findings of fact, and a party filing exceptions must provide the transcripts to the Division. Rabren v. Dep't of Prof'l Reg., 568 So. 2d 1283, 1290 (Fla. 1st DCA 1990); Edwards v. Dep't of Health & Rehabilitative Servs., 592 So. 2d 1249 (Fla. 4th DCA 1992); Booker Creek Preservation, Inc. v. State, Dep't of Envt'l Reg., 415 So. 2d 750 (Fla. 1st DCA 750). Clarcona did not file a transcript. Without a review of the entire record, which requires the Division to review the transcript of the hearing, the Division may not reject or modify any finding of fact. § 120.57(1)(l), Fla. Stat.

12. Furthermore, effective June 4, 2003, section 120.57(1)(k), Florida Statutes, provides:

> An agency need not rule on an exception that does not clearly identify the disputed portion of the recommended

> order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

Because Clarcona did not include any citation to the record or a transcript of the record, it failed to comply with section 120.57(1)(k), Florida Statutes. For these reasons, the Division rejects Clarcona's exceptions. Without a full record to review, the Division may not reject an ALJ's finding of fact based upon any one piece of evidence in the record.

13. Florida case law holds that an agency reviewing a recommended order is not authorized to reevaluate the quantity and quality of the evidence presented at an administrative hearing beyond determining whether the evidence is competent and substantial. Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). On reviewing a recommended order, an agency may not reweigh the evidence, resolve the conflicts, or judge the credibility of witnesses, as those are evidentiary matters within the province of the ALJ as the fact-finder. See Martuccio,v. Dep't of Prof'l Reg., 622 So. 2d 607 (Fla. 1st DCA 1993); Heifetz v. Dep't of Bus. Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). The Division is bound by the ALJ's factual findings where the record of the hearing discloses any competent, substantial evidence supporting the findings of fact. Florida Dep't of Corrections v. Bradley, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987).

14. Even if the agency had the record to review, Clarcona's exceptions would be rejected because they would require the agency to reweigh the credibility of witnesses, reweigh the evidence, reassess evidence, resolve conflicts in testimony, insert new testimony into the record, or revise testimony. See § 120.57(1)(l), Fla. Stat.; Martuccio v.Dep't of Prof. Reg., 622 So. 2d at 609. For all of the foregoing reasons, Clarcona's exceptions to the ALJ's Findings of Fact 7, 8, and 11 are rejected.

B. Exceptions to Conclusions of Law

15. Clarcona excepted to Conclusions of Law 17, 19, 21, 22, 23, and 24.

16. Clarcona argues that the Division did not meet the standard of proof of clear and convincing evidence as found by the ALJ in the amended order. Agencies may not reweigh the evidence in light of the burden of proof, but may only revise those conclusions of law over which they have "substantive jurisdiction." § 120.57(1)(l), Fla. Stat. (2003). Clarcona acknowledges that the Division must prove its case by clear and convincing evidence, but argues that it did not do so based upon one witness's testimony. The ALJ found that the Division had met its burden of proof. The correct burden of proof and a weighing of the evidence to determine if the burden has been met does not fall within the area of law over which the Division has substantive jurisdiction. This exception is rejected.

17. Clarcona excepts to paragraph 19 on the grounds that an arbitration order interprets this provision to permit the parties to waive the 5 business day requirement for providing access to association records and that the evidence supports a finding of mutual waiver. To reach this conclusion, it would be necessary to adopt Clarcona's asserted fact that the unit owners agreed to an extension of the 5 day access requirement. The ALJ did not find that the unit owners agreed to an extension of the 5 days. The Division responds that an agency may not insert new findings of fact into the record or supplement findings rejected by the ALJ without a review of the entire record. Rejection or modification of a conclusion of law is not a basis for rejecting or modifying a finding of fact. § 120.57(1)(l), Fla. Stat. (2003). Because Clarcona's exception requires

a modification of a factual finding to reach the conclusion that the unit owners waived the 5 day deadline, this conclusion is rejected.

18. Clarcona excepts to Conclusion of Law 21. Clarcona argues that the penalty is a departure from the essential requirements of law because the ALJ failed to mitigate the penalty amount based on its assertion that the association followed the advice of its accountant to not allow access to the accounting records until the reports were complete. Clarcona cites Florida Administrative Code Rule 61B-21.003(3)(b)2, which provides that reliance on written professional advice may be a mitigating factor. Clarcona also argues that the Division should reject the ALJ's conclusion based upon arbitration decisions applying the willfulness standard found in section 718.111(12)(c), Florida Statutes, as the ALJ did not find that the association willfully failed to provide access to the records within 5 days.

19. The Division rejects Clarcona's exception to Conclusion of Law 21. First, section 718.111(12)(b), Florida Statutes, requires the association to grant unit owners access to its official records within 5 days. Under subsection 718.111(12)(c), Florida Statutes, if the association does not grant a unit owner access to its official records within 10 working days of a unit owner's written request, then a rebuttable presumption that the association's noncompliance was willful arises and the unit owner is entitled to damages and attorney's fees. The arbitration decisions cited by Clarcona interpreted and applied subsection 718.111(12)(c), Florida Statutes, which explains the discussion in these decisions about willful noncompliance and damages. These cases do not support Clarcona's argument that section 718.111(12)(b), Florida Statutes, imposes a requirement that a finding of willful noncompliance is a condition to finding a violation

and imposing a penalty where the association does not provide access to its records within 5 days. Clarcona's argument is rejected.

20. Clarcona excepts to Conclusion of Law 22 on the grounds that the ALJ's finding of fact that the association did not permit a unit owner timely access was incorrect. Clarcona charges the ALJ with "ignoring" the evidence of unit owner waiver. Rejection or modification of a conclusion of law is not a basis for rejecting or modifying a finding of fact. § 120.57(1)(l), Fla. Stat. (2003). Because Clarcona's exception requires a modification of a factual finding to reach the conclusion that the unit owners waived the 5 day deadline, this conclusion is rejected.

21. Clarcona excepts to Conclusion of Law 23, which finds that an association must type the minutes of any meeting within 5 days of the meeting if a request to review the minutes is received because meeting minutes are official records under section 718.111(12)(a)6, Florida Statutes. The parties agree that this reading of the law overlooks the rule requirement that tape recordings of meetings are the official record of the meeting for purposes of the statute until the minutes of the meeting are transcribed and approved. The Division has recently issued a declaratory statement in In Re: Petition for Declaratory Statement, Sidney H. Firestone, Vice President, No. 2 Condominium Association Palm Greens at Villa Del Ray, Inc., Docket No. 2003053516 (May 7, 2003), which found:

> The rule expressly designates the tape recording of the board meeting to be an official record until the minutes of the meeting are prepared and approved. It ceases to be an official record once the minutes are approved and the board discards the tape. Therefore, if a unit owner requests a copy of the tape or to listen to the tape while it is deemed an "official record" under the rule, then the association is required to permit the unit owner to have access to the tape.

Usually, the minutes are typed and prepared for the next meeting, but not within 5 days. An association may comply with section 718.111(12)(b), Florida Statutes, by either providing the tape recording of the meeting or the transcribed minutes of the meeting, whichever is available, within 5 days. It is not permissible to simply not provide any minutes or require a unit owner to wait several months. This conclusion is as reasonable or more reasonable than requiring an association to type minutes within 4 days of a meeting. Therefore, paragraph 23 is amended to read:

> 23. Section 718.111(12)(a)6, Florida Statutes, provides that the official records of an association include a "book," which contains the "minutes of all meetings of the association." Such a requirement indicates that the minutes of all association meetings must be kept as part of the association's official records. The association shall allow any unit owner access to the minutes in whatever format the minutes are in within 5 days of a unit owner's written request. § 718.111(12)(b), Fla. Stat. An association may comply by giving unit owners access to the tape recording of the minutes within the time frame set by statute if the minutes have not yet been transcribed. More than four months passed after Mr. Wood's request before the minutes were placed in a typed form and made available for resident inspection.

22. Clarcona urges the Division to modify Conclusion of Law 24 by accepting as mitigating factors: (1) the association's reliance on professional advice; (2) lack of harm to residents; (3) its cooperation with the Division; and (4) acts of God (manager was undergoing medical treatment). Reliance on accounting advice must be related to the contents of accounting records and not to the issue of whether an association must comply with a statutory requirement of allowing unit owners access to the official records. Denying access to official records that are the property of all unit owners constitutes harm. The statute recognizes this in applying a penalty, damages, and attorney's fees for willful noncompliance. The need to resort to an administrative hearing to enforce compliance with the statute refutes the association's asserted

cooperation. An act of God is defined as "[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado" or a natural phenomena that is "exceptional, inevitable, and irresistible, the effects of which could not be prevented or avoided by the exercise of due care or foresight." Black's Law Dict. 28 (7th ed. 2000). While some may consider illness to be divinely imposed, Clarcona has not provided any legal authority supporting this argument and none was found. If the manager was unavailable during the 5 days, then a board member could have granted the unit owners access to the records. Therefore, Clarcona's exception is rejected.

23. Clarcona asks the Division to reject the Recommended Order in its entirety on the grounds that the ALJ's impartiality "may have been compromised" by the filing of two *ex parte* communications from one of the complainants. The association claims it has been prejudiced. One letter was sent to ALJ T. Kent Wetherall on January 20, 2004, who was originally assigned to hear the case. The case was transferred to ALJ Quattlebaum, who presided over the hearing. There is no indication that ALJ Quattlebaum received or read the first letter, which was sent to ALJ Wetherall. The transfer of the case from ALJ Wetherall to ALJ Quattlebaum cured any prejudice that may have arisen from the first communication. ALJ Quattlebaum entered a notice of *ex parte* communication for the second letter, which was addressed to him. The second letter is dated after the Recommended Order and after the clarifying order. The second letter could have no bearing on the ALJ's determination because it came after his order was entered. Under the Administrative Procedure Act, any party may respond to an *ex parte* communication within 10 days of notice. § 120.66(2), Fla. Stat. The ALJ "may, if

necessary to eliminate the effect of an ex parte communication, withdraw from the proceeding." Id. Because the first letter was sent to the originally assigned ALJ who withdrew from the case when it was transferred to the presiding ALJ, and the second letter came after the entry of the Recommended Order and the clarifying order, neither ex parte communication could have prejudiced the conclusion of this case. Clarcona has failed to demonstrate prejudice. Clarcona's exception is rejected.

FINDINGS OF FACT

24. The Division hereby adopts and incorporates by reference the Findings of Fact numbered 1, 2, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, and 15 as set forth in the Recommended Order. The Division modifies the Findings of Fact 3 and 6 to correct an inadvertent error as stipulated to by the parties and as set forth in full in paragraph 10 of this order.

CONCLUSIONS OF LAW

25. The Division hereby adopts and incorporates by reference the Conclusions of Law numbered 16, 17 as amended by Order on Clarification, and 18 through 22, 24 and 25 as set forth in the Recommended Order. The Division amends paragraph 23 as set forth in paragraph 21 of this order as being a more reasonable interpretation and application of section 718.111(12)(b), Florida Statutes, then the ALJ's paragraph 23. The Division accepts the ALJ's ultimate finding that Clarcona violated section 718.111(12)(b), Florida Statutes (2003), and the recommended penalty.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that:

1. Respondent cease and desist from any further violations of chapter 718, Florida Statutes.

2. Respondent pay a penalty of $7,500 by cashier's check or money order made payable to Treasurer, State of Florida, Department of Business and Professional Regulation within 45 days of the date of this Order, which Respondent shall mail by certified mail to Tracy J. Corbitt, Acting Bureau Chief, Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-1030.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 28th day of April, 2004.

MICHAEL T. COCHRAN,
Acting Director
Division of Florida Land Sales,
Condominiums, and Mobile Homes
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-10??

NOTICE OF RIGHT OF APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY ANY PARTY SUBSTANTIALLY AFFECTED BY THIS FINAL ORDER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE AGENCY CLERK, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, AT 1940 NORTH MONROE STREET, TALLAHASSEE, FLORIDA 32399-1007 WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Certified Mail to Robert L. Taylor, Esq., Taylor & Carls, P.A., 850 Concourse Parkway South, Suite 105, Maitland, Florida 32751-6145, this 3rd day of May, 2004.

Robin McDaniel
ROBIN MCDANIEL, Docket Clerk

Copies furnished to:

Division of Administrative Hearings
Joseph S. Garwood, Office of the General Counsel
Tracy J. Corbitt, Acting Bureau Chief of Compliance