DATE FILED
APR 26 2005
COMMISSION ON ETHICS

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re **MICHAEL ADDICOTT,**
Respondent.

AT

Complaint No. 02-076
DOAH Case No. 04-0043FE
COE Final Order No. 05-207

mmp
CWS

FINAL ORDER DENYING ATTORNEY'S FEES AND COSTS

This matter comes before the Commission on the Recommended Order of the Administrative Law Judge (ALJ) from the Division of Administrative Hearings (DOAH) rendered on November 4, 2004 (a copy of which is attached and incorporated herein by reference), in which he recommends that the Commission enter a final order denying Michael Addicott's petition for attorney's fees and costs.

BACKGROUND

The initial proceeding began with the filing of a complaint on June 14, 2002, by Robert Nieman alleging that Michael Addicott, Mayor of the Town of Golden Beach, had violated the Code of Ethics for Public Officers and Employees. An amendment to the complaint was filed on September 20, 2002 and, after being found legally sufficient, an investigation was undertaken. Nieman's complaint against Addicott was consolidated with complaints filed by other complainants (Complaint Nos. 02-145, 02-172, and 03-028) and, on October 21, 2003, the Commission on Ethics entered an order finding no probable cause to believe that the Respondent had violated Sections 112.313(6) and 112.3135(2)(a), Florida Statutes, thereby dismissing the complaints. Thereafter, Addicott timely filed a Fee Petition against Nieman pursuant to Section

112.317(8), Florida Statutes, and the matter was forwarded to DOAH for assignment of an ALJ to conduct a formal hearing and prepare a recommended order. The formal hearing was held on June 17 and 18, 2004. A transcript was filed with the ALJ and both parties timely filed proposed recommended orders. After the ALJ rendered his Recommended Order on November 4, 2004, the parties were notified of their right to file exceptions. Addicott timely filed exceptions but Nieman, who was not represented by counsel during these proceedings, filed neither exceptions nor a response to Addicott's exceptions.

Having reviewed the Recommended Order, the record of the proceedings, and Respondent's exceptions, the Commission makes the following findings, conclusions, rulings and determinations:

STANDARDS FOR REVIEW

Under Section 120.57(1)(l), Florida Statutes, an agency may not reject or modify findings of fact made by the ALJ unless a review of the entire record demonstrates that the findings were not based on competent, substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. See, e.g., Freeze v. Dept. of Business Regulation, 556 So.2d 1204 (Fla. 5th DCA 1990); and Florida Department of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987). Competent, substantial evidence has been defined by the Florida Supreme Court as such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusions reached." DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957).

The agency may not reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses, because those are matters within the sole province of the ALJ. Heifetz

v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Consequently, if the record of the DOAH proceedings discloses any competent, substantial evidence to support a finding of fact made by the ALJ, the Commission is bound by that finding.

Under Section 120.57(1)(l), Florida Statutes, an agency may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretations of administrative rules, the agency must state with particularity its reasons for rejecting or modifying such conclusions of law or interpretations of administrative rules 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.

STATEMENT OF THE LAW

The statutory basis that enables a respondent to seek attorney's fees against a complainant is Section 112.317(8), Florida Statutes, which provides:

> In any case in which the commission determines that a person has filed a complaint against a public officer or employee ***with a malicious intent to injure the reputation of such officer or employee by filing the complaint with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint contains false allegations of fact material to a violation of this part***, the complainant shall be liable for costs plus reasonable attorney's fees incurred in the defense of the person complained against, including the costs and reasonable attorney's fees incurred in proving entitlement to and the amount of costs and fees. If the complainant fails to pay such costs and fees voluntarily within 30 days following such finding by the commission, the commission shall forward such information to the Department of Legal Affairs, which shall bring a civil action in a court of competent jurisdiction to recover the amount of such costs and fees awarded by the commission. **[e.s.]**

Prior to 1995, Section 112.317(8), Florida Statutes, read as follows:

> In any case in which the commission determines that a person has filed a complaint against a public officer or employee ***with a malicious intent to injure the reputation of such officer or employee and in which such complaint is found to be frivolous and without basis in law or fact***, the complainant shall be liable for costs plus reasonable attorney's fees incurred by the person complained against. If the complainant fails to pay such costs voluntarily within 30 days following such finding and dismissal of the complaint by the commission, the commission shall forward such information to the Department of Legal Affairs, which shall bring a civil action to recover such costs. [e.s.]

By amending Section 112.317(8) to delete the "frivolous and without basis in law or fact" language and by adding language that required "knowledge" or "reckless disregard" for whether the complaint contained false allegations, we believe that the Legislature intended that the "actual malice" standard enunciated in New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964), was indeed applicable to proving entitlement to attorney's fees and costs in proceedings brought pursuant to Section 112.317(8), Florida Statutes. Therefore, we note as a matter of law that the ALJ applied the correct standard in the proceedings below.

The burden of proof was on Addicott to prove that Nieman filed the complaint with a malicious intent to injure the reputation of Addicott and by filing it with knowledge that it contained one or more false allegations or with reckless disregard for whether it contained false allegations of fact material to a violation of the Code of Ethics. However, the ALJ found that Nieman did not have actual knowledge that any of the allegations were false. Recommended Order, Paragraph 16. He also found that Nieman did not make any of the allegations with reckless disregard as to whether they were true or false. Recommended Order, Paragraph 17. Therefore, the ALJ concluded, Addicott failed to prove entitlement to fees under Section

112.317(8), Florida Statutes.

If a respondent successfully proves entitlement to fees, he must then prove the amount of costs and reasonable fees he incurred in defending against the complaint, as well as the costs and reasonable fees he incurred in proving entitlement to fees. The case of Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), established the method for determining the amount of reasonable attorney's fees. In Rowe, the court held:

> The first step in the lodestar process requires the court to determine the number of hours reasonably expended on the litigation. Florida courts have emphasized the importance of keeping accurate and current records of work done and time spent on a case, particularly when someone other than the client may pay the fee. [citations omitted.] To accurately assess the labor involved, the attorney fee applicant should present records detailing the amount of work performed. Counsel is expected, of course, to claim only those hours that he could properly bill to his client. Inadequate documentation may result in a reduction in the number of hours claimed, as will a claim for hours that the court finds to be excessive or unnecessary. The "novelty and difficulty of the question involved" should normally be reflected by the number of hours reasonably expended on the litigation.
>
> The second half of the equation, which encompasses many aspects of the representation, requires the court to determine a reasonable hourly rate for the services of the prevailing party's attorney. In establishing this hourly rate, the court should assume the fee will be paid irrespective of the result, and take into account all of the Disciplinary Rule 2-106 factors except the "time and labor required," the "novelty and difficulty of the question involved," the "results obtained," and "[w]hether the fee is fixed or contingent." The party who seeks the fees carries the burden of establishing the prevailing "market rate," *i.e.*, the rate charged in that community by lawyers of reasonably comparable skill, experience and reputation, for similar services.
>
> The number of hours reasonably expended, determined in the first step, multiplied by a reasonable hourly rate, determined in the second step, produces the lodestar, which is an objective basis for the award of attorney fees. Once the court arrives at the lodestar figure, it may add or subtract from the fee based upon a "contingency risk" factor and the "results obtained."

Id., at 1150-1151. Thus, in computing attorney's fees in cases brought pursuant to Section 112.317(8), the ALJ should determine the number of hours reasonably expended on the litigation and the reasonable hourly rate for the type of litigation.

With regard to costs and fees for proving entitlement to, and the amount of, costs and fees, Kaminsky v. Lieberman, 675 So.2d 261 (Fla. 4th DCA 1996), is instructive There, the court held:

> [t]he commission must provide a hearing for Lieberman to establish fees and costs which were incurred after the last day of the hearing. We affirm that portion of the Commission's ruling requiring that all evidence of fees and costs be introduced at the hearing to the extent that such expenses had already been incurred or were incurred during the hearing.

Id., at 262. Therefore, the ALJ was correct as a matter of law when he noted in Footnote 10 to Paragraph 29 of the Recommended Order that the Commission must provide an additional hearing for the successful fee petitioner to establish fees and costs incurred after the last day of the hearing.

RULINGS ON EXCEPTIONS

Addicott has filed 55 pages of exceptions to a Recommended Order that was 39 pages long. We will address them sequentially:

1. Addicott's first exception is directed to that part of Paragraph 45, denominated a Conclusion of Law, where the ALJ wrote:

> When evaluated in this context, it appears to the undersigned that on those occasions when Nieman testified that he did not have "any evidence," Nieman was attempting to communicate the idea that he did not have any first hand evidence of the allegation inquired about.

Addicott then proceeds to recite evidence in the record that supports his contention that Nieman's admitted lack of evidence underlying his allegations of misconduct by Addicott is, ipso facto, proof of malicious intent.

We do not find that the ALJ was "reading Nieman's mind" when he commented about Nieman's testimony or that he committed any error by making an observation about Nieman's testimony. The ALJ proceeded to write:

> It was clear from the other statements by Nieman that on such occasions he was not admitting that he had no information at all. Rather, he testified that he was aware of hearsay evidence that supported his allegations.

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

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

The ALJ properly fulfilled his function here. Moreover, there is competent substantial evidence in the record to support the ALJ's findings. Nieman deposition p. 42, 93; T.459, 461, 465, 466, 471-474, 475, 486, 492, 503, 507. Therefore, Addicott's Exception No. 1 is rejected.

2. Addicott's Exception No. 2 is directed to portions of the ALJ's Findings of Fact in Paragraphs 7 and 9 which, he asserts, are not based upon competent substantial evidence.

These findings are based upon competent substantial evidence in the record, particularly

T. 203-205, 272-276; 287-289; 376, 411-415; 427; 569-570; Nieman deposition, pp. 7-12; Cuenca deposition, pp. 5-9; Nieman Exhibit 1. For that reason, Addicott's Exception No. 2 is rejected.

3. Addicott's Exception No. 3 takes issue with the Conclusions of Law in Paragraphs 34 through 41. He argues that the ALJ's reliance on New York Times v. Sullivan, 376 U. S. 254, 84 S. Ct. 710 (1964), and its progeny in construing the term "reckless disregard" for purposes of Section 112.317(8), Florida Statutes, was clearly erroneous.

As already discussed, the ALJ was correct as a matter of law when he noted that the term "reckless disregard" as used in Section 112.317(8), Florida Statutes, is the same as that used in New York Times v Sullivan, supra. Therefore, we find no error in the ALJ's Conclusions of Law and Exception No. 3 is rejected.

4. Addicott's Exception No. 4 is directed at the Conclusion of Law in Paragraph 33 and its Footnote 8, where the ALJ noted that appellate decisions involving Section 112.317(8), Florida Statutes, decided prior to 1995 when the statutory language was amended were "not especially helpful in ascertaining the correct interpretation and application" of Section 112.317(8), Florida Statutes.

There are few appellate decisions which cite to Section 112.317(8), Florida Statutes, and most were decided prior to 1995. None of the reported decisions discusses the term "reckless disregard" and thus, there is nothing "clearly erroneous" about the ALJ's statement to that effect. Exception No. 4 is therefore rejected.

5. Addicott's Exception No. 5, directed at the Recommended Order's Paragraph 4 (labeled a Finding of Fact), Paragraph 31 (labeled a Conclusion of Law), and Footnote 11, argues

that the ALJ erred in limiting the scope of his Recommended Order to only two of the allegations Nieman made because those were what Addicott pled in his Fee Petition.

We find no error in the challenged findings and conclusions. Rule 34-5.0291(2), Florida Administrative Code, requires a petitioner for fees to "state with particularity the facts and grounds which would prove entitlement to costs and attorney's fees." The hearing transcript contains a colloquy on whether Addicott was limited to challenging Nieman on only those matters pled in his Fee Petition (T.222-230), and the ALJ correctly understood that to prevail, Addicott had to prove the facts and grounds pled in his Fee Petition. That Addicott failed to meet the burden of proof in this matter is not a legal error on the part of the ALJ. For these reasons, Exception No 5 is rejected.

6. Addicott's Exceptions Nos. 6 and 7 do not reference any particular Finding of Fact or Conclusion of Law but seem to be directed to Findings of Fact Paragraphs 16 and 17 In these two findings, the ALJ reached the ultimate finding of fact, i.e., that Nieman did not have actual knowledge that any of his allegations were false and that he did not make any of the subject allegations with a reckless disregard as to whether they were true or false. These ultimate findings were the whole purpose of the two-day fact-finding hearing before the ALJ which resulted in his Recommended Order now before us. We have no inclination to violate the proscriptions of Section 120.57(1)(l), Florida Statutes, or the extensive caselaw which clearly limits an agency's ability to substitute its judgment for that of the finder-of-fact and second-guess the ALJ. Heifetz, supra, and Smith v. Department of Health & Rehabilitative Services, 555 So.2d 1254 (Fla. 3d DCA 1989). Additionally, our complete review of the record assures us that these findings are based upon competent substantial evidence. Therefore, Exceptions Nos. 6 and

7 are rejected.

7 Exception No 8 is directed to Nieman's Exhibit 1, which was admitted into evidence by the ALJ. The exhibit itself is an interoffice memorandum from the Interim Town Manager to Addicott dated August 26, 1999, which surfaced ***after*** Nieman filed his complaint against Addicott and is discussed in Paragraphs 8 and 9 of the Recommended Order.

Although Addicott argues that the ALJ erred in admitting it into evidence, he provides no legal basis for why it was error to receive it into evidence. Indeed, the exhibit was authenticated by its author (T. 398-403), and recognized by its named recipient (T 280-289). Thus, the weight and relevance to be given to the memorandum was for the ALJ to decide. Heifetz, supra. In addition, whether or not Nieman knew about the memorandum when he filed the amendment to his complaint in September 2002, he believed at the time he filed his complaint that Addicott was behind the hiring of his son, and the memorandum's existence tends to prove that Nieman's allegation was not false. Addicott's Exception No. 8 is therefore rejected.

8. Addicott's Exception Nos. 9 through 14 are directed to the ALJ's findings and conclusions with regard to the attorney's fees and costs that Addicott incurred in defending against the complaint as well as those he incurred in proving entitlement to costs and reasonable attorney's fees. Because the ALJ concluded, as a matter of law, that Addicott was not entitled to fees and we agree, there is no reason to address Addicott's exceptions in this regard. Therefore, Addicott's Exception Nos. 9 through 14 are rejected. However, we note that with regard to cost items, where a petitioner has proven entitlement to reasonable attorney's fees and costs, the Commission has construed Section 112.317(8), Florida Statutes, to, as a matter of law, allow costs for expert witness testimony as well as the use of paralegals and law clerks incurred in the

defense of the respondent/fee petitioner as well as in proving entitlement to and the amount of reasonable attorney's fees and costs.

9. Addicott's Exception No. 15 relates to Conclusion of Law Paragraph 45, where the ALJ found that "there is simply no clear and convincing evidence that, at the time he made the allegations at issue here, Nieman acted with a reckless disregard . . . ." The exception is directed only at the last two sentences of Paragraph 45.

The ALJ found that Nieman "was aware of hearsay evidence that supported his allegations." The weight and sufficiency of the evidence that Nieman relied upon in filing his complaint against Addicott was for the ALJ to determine. That Nieman relied, in part, on hearsay evidence does not prove malicious intent or reckless disregard for purposes of Section 112.317(8), Florida Statutes. In addition, as we already stated in our discussion of Exception No 1, this finding is based upon competent substantial evidence Accordingly, we reject Addicott's Exception No. 15.

10. Addicott's Exception No. 16 apparently is directed to Paragraphs 16, 17, 43 and 45 of the Recommended Order. He contends in it that the ALJ erred in finding that the allegations Nieman made with regard to the motor vehicle accident involving Aaron Addicott were neither false nor reckless.

In this exception, Addicott merely wants the Commission to reweigh all of the evidence that the ALJ considered and reach a contrary conclusion. We decline to do so. Heifetz, supra. The record evinces competent substantial evidence to support the ALJ's finding, and we will not disturb it. We therefore reject Addicott's Exception No. 16.

11. Addicott's final exception, Exception No. 17, asserts that the ALJ "erred in ignoring

numerous undisputed material facts and erred in not making various conclusions of law."

Not surprisingly, the proposed findings and conclusions that Addicott complains were not made by the ALJ are contained, nearly verbatim, in the proposed findings and conclusions he urged the ALJ to make in the Proposed Recommended Order he filed with DOAH after the conclusion of the formal hearing. It is clear from reading the ALJ's Recommended Order that Addicott's proposed findings and conclusions did not harmonize with the ALJ's view of the evidence. Inasmuch as we rely upon the ALJ to fulfill the fact-finding function after listening to all of the testimony and reviewing the exhibits admitted to evidence, and because we have no reason to second-guess the ALJ where his findings and conclusions are supported by competent substantial evidence, we will not re-write the Recommended Order to reach the contrary conclusion urged by Addicott. Thus, Addicott's Exception No. 17 is rejected.

12. Finally, we note that in his Conclusion, Addicott urges the Commission to reject the ALJ's findings of fact and conclusions of law and substitute those findings and conclusions proposed by Addicott for those actually made by the ALJ. Such actions by an agency are expressly prohibited by Section 120.57(1)(l), Florida Statutes, where, as here, there is competent substantial evidence to support the findings, where the conclusions are legally correct, and where the proceedings complied with the essential requirements of law.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

1. The Conclusions of Law as set forth in the Recommended Order are approved,

adopted, and incorporated by reference.

2. The petition for attorney's fees and costs filed by Respondent/Petitioner Michael Addicott against Complainant/Respondent Robert Nieman is hereby DENIED.

DONE and ORDERED by the State of Florida Commission on Ethics meeting in public session on Thursday, April 21, 2005.

April 26, 2005
Date Rendered

JOEL R. GUSTAFSON
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, 3600 MACLAY BOULEVARD SOUTH, SUITE 201, P.O. DRAWER 15709, TALLAHASSEE, FLORIDA 32317-5709; AND BY FILING A COPY OF THE NOTICE OF APPEAL ATTACHED TO WHICH IS A CONFORMED COPY OF THE ORDER DESIGNATED IN THE NOTICE OF APPEAL ACCOMPANIED BY THE APPLICABLE FILING FEES WITH THE APPROPRIATE DISTRICT COURT OF APPEAL. THE NOTICE OF ADMINISTRATIVE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE DATE THIS ORDER IS RENDERED.

cc: Mr. James Birch, Attorney for Respondent/Petitioner Michael Addicott
Mr. Robert Nieman, Complainant/Respondent
The Honorable Michael M. Parrish, Administrative Law Judge
Division of Administrative Hearings