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OCT 19 2005

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

COMMISSION ON ETHICS
DIVISION OF
ADMINISTRATIVE
HEARINGS
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In re CHARLES OSBORNE,)
)
 Respondent.)
)
 _____)

Complaint No. 03-091
Final Order No.05-599

04-4110 FE

HLH
Closed

FINAL ORDER DENYING ATTORNEY FEES AND COSTS

Background

This matter came before the State of Florida Commission on Ethics, meeting in public session on October 14, 2005, on the Recommended Order (RO) of an Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH) concerning a petition for attorney fees and costs filed by Charles Osborne (the Respondent in the underlying ethics complaint and the petitioner in the fees/costs matter) against Alexander J. Milanick (the Complainant in the underlying ethics complaint and the respondent in the fees/costs matter). In his RO, the ALJ determined that a material fact was falsely alleged against Osborne by Milanick (orally via James J. Kearns, then an attorney for Milanick, during the course of the investigation of the ethics complaint rather than within the written ethics complaint) regarding the underlying ethics complaint, and recommends that the Commission enter an order requiring Milanick

to pay Osborne attorney fees and costs in the amount of \$4,976.00. Milanick filed exceptions to the ALJ's RO and Osborne responded to the exceptions. Therefore, Osborne and Milanick having been noticed as to the Commission's consideration of this matter and having been given the opportunity to appear and argue their positions to the Commission, the Commission makes the following rulings, determinations, findings, and conclusions.¹

Rulings on Milanick's Exceptions

1. Milanick excepts to the portion of paragraph 1 of the RO finding that A1A is the "main" north-south route through the Town of Beverly Beach, arguing that A1A is the "only" north-south route through the Town. This exception is rejected. Paragraph 15(c) of the Joint Pre-Hearing Stipulation, which reads "[t]here is only one road (A-1-A) which passes through the Town of Beverly Beach on the peninsula," constitutes competent substantial evidence supportive of the finding of the RO, notwithstanding the particular choice of wording of the ALJ. (Stip.13)

¹ In this final order, references to the pre-hearing stipulation filed at DOAH will be "Stip.", followed by appropriate page number(s); references to the transcript of the DOAH hearing will be "T.", followed by appropriate page number(s); and references to the evidential exhibits of the DOAH hearing will be by the marked lettering/numbering appearing on the face of the items, such as "P.", followed by a number, or "R.", followed by a number.

2. Milanick excepts to paragraph 6 of the RO which finds that a Town annexation ordinance was defective, arguing that the finding is repugnant to a writ of mandamus directed by the District Court of Appeal (Fifth District) and entered by the Circuit Court (Seventh Circuit) in litigation between himself and the Town, and thus arguing that the ALJ should not have considered Osborne's DOAH hearing testimony regarding "defects" in the ordinance. This exception is rejected. There is competent substantial evidence supportive of the ALJ's finding (see, inter alia, T.34-38), the previous court case itself [Milanick v. Town of Beverly Beach, 820 So. 2d 317 (Fla. 5th DCA 2001)] supports there being errors in the ordinance, and (assuming arguendo that the court case determined that the ordinance was not defective) the doctrine of res judicata did not bar the ALJ's consideration of evidence on the matter of defects or his making findings as to defects.²

3. Milanick excepts to the portion of paragraph 8 of the RO in which the ALJ finds that "the Town Attorney, Pat McCormick, suggested that it would be necessary to start the

² Chiefly because, assuming arguendo identity of parties as to Osborne and Milanick, there is no identity of thing sued for or cause of action, an attorney fees proceeding under Section 112.317(8), Florida Statutes, being different from a mandamus action on an annexation ordinance. Similarly, whether the ordinance was "defective" or whether it simply contained "errors" or mere "scrivener's errors" vis-à-vis the significance of the same in a mandamus proceeding versus significance regarding Osborne's defense regarding the allegations of the ethics complaint does not preclude the ALJ's consideration and determination of ordinance "defects" under the doctrines of collateral estoppel or issue preclusion.

process from the beginning if the land was to be annexed," arguing that the finding is inaccurate and arguing that the finding is "legally irrelevant" because of the aforementioned decision of the Fifth DCA. This exception is rejected. There is competent substantial evidence to support the finding [see page 2 of the minutes of the March 4, 1998 meeting of Town Commission (R.13)]; and, assuming arguendo that the Fifth DCA annexation/mandamus decision conflicts with the ALJ's finding, the decision does not control, via res judicata or similar doctrines, issues in ethics complaint attorney fees/costs matters (see paragraph 2 above).

4. Milanick excepts to the finding of the ALJ in paragraph 12 of the RO, that a discussion between Kearn (Milanick's counsel at the time) and Osborne "became heated and accusatory," arguing that the finding is "misleading." This exception is rejected. There is competent substantial evidence to support the finding [see the transcript of the July 21, 1999 Town Commission meeting(R.3)].

5. Milanick excepts to the ALJ's finding in paragraph 14 of the RO, that "[n]o creditable evidence was adduced which indicated that Mayor Osborne visited Syd Crosby for the purpose of preventing the recording of the annexation of Dr. Milanick's property," arguing that the evidence supports a contrary

finding. This exception is rejected. There is competent substantial evidence to support the finding (T.37-38).³

6. Milanick excepts to the finding in paragraph 15⁴ of the RO which finds that no "glitch bills" which would annex Milanick's land into the Town were passed by the Town, arguing that the finding is in error because the DOAH hearing record reflects that the Town passed a glitch bill to correct any technical defects in the earlier annexation ordinance. This exception is rejected. The import of the finding is that the property was not annexed into the Town, by glitch bill or otherwise, and lack of annexation is supported by competent substantial evidence (T.112).

7. Milanick excepts to the portion of paragraph 16 of the RO finding that Kearn attended a Town Commission meeting on February 2, 2000 and that minutes of the meeting noted that Kearn was accompanied by "a person taking notes," arguing that the finding is irrelevant and immaterial. This exception is rejected. The finding is based on competent substantial evidence (R.17).

8. Milanick excepts to the finding in paragraph 16 of the RO that Kearn wrote the Town Attorney accusing Osborne of

³ To complete his findings in paragraph 14 of the RO, the ALJ included the sentence: "Mr. Crosby concluded from the beginning that Ordinance 95-9-4 was not recordable."

⁴ Incorrectly identified by Milanick in his exceptions as paragraph 14 of the RO.

"exercising dictatorial efforts to prevent citizens to speak at town meetings," arguing that the tenor of the finding suggests that Kearn acted improperly in writing the Town Attorney. This exception is rejected. There is competent substantial evidence to support the finding (R.18).

9. Milanick excepts to the finding of paragraph 19 of the RO explaining dismissal of a mandamus petition by the Circuit Court, arguing that the finding is "surplusage." This exception is rejected. The finding is supported by competent substantial evidence (see Stip.12 and Milanick v. Town of Beverly Beach, supra).

10. Milanick excepts to the portion of paragraph 21 of the RO which determines that "[t]he adoption of the matters recited in the complaint as true, by the appellate court, does not make them facts because no evidence was taken in the case," arguing that the determination is a conclusion of law rather than a finding of fact, and engaging in a lengthy argument regarding mandamus and related substantive and procedural law. Apparently, the thrust of this exception is Milanick's view that matters relating to allegations of the ethics complaint by Milanick against Osborne could not be determined by the ALJ because they had previously been determined by the Circuit Court in the mandamus/annexation litigation (whether or not the

Circuit Court took evidence to support its decision). This exception is rejected. To the extent the language of paragraph 21 excepted to is a finding of fact (that the Court took no evidence in the mandamus case) it is supported by competent substantial evidence (see P.3 and Milanick v. Town of Beverly Beach, supra). To the extent the language is a conclusion of law, it is in harmony with our view, expressed above, that the orders of the Courts in the annexation/mandamus action are not res judicata for purposes of this ethics fees/costs matter.

11. In his exception numbered 11 (also directed at paragraph 21 of the RO), Milanick presents more of his views regarding mandamus and argues that portions of paragraph 21 are "editorial comments" and "mere dicta." This exception is rejected. To the extent that the paragraph is not germane to the issues of the fees/costs matter, they do not impact our decision. Further, to the extent the paragraph contains a finding of fact (that "[t]he complaint does not allege that Mr. Osborne took any action, as mayor, because he wished to obtain a personal advantage and does not allege that the annexation of Dr. Milanick's real property would affect Mr. Osborne's real property in terms of value or otherwise"), the finding is supported by competent substantial evidence. (P.5)

12. Milanick excepts to the ALJ's finding (in paragraph 22 of the RO) that Milanick's property had not been annexed into the Town as of the date of the DOAH hearing, arguing that the finding "is superfluous and should be stricken." This exception is rejected. There is competent substantial evidence to support the finding (T.105).

13. Milanick excepts to the ALJ's finding (in paragraph 23 of the RO) that Osborne, as mayor, "was not helpful in causing the annexation to occur," arguing that our final order should reflect that Osborne "actively opposed" the annexation. This exception is rejected. There is competent substantial evidence supporting the finding (T.33,35).

14. Milanick excepts to the ALJ's determination (in paragraph 24 of the RO) that "[Osborne] could act in this regard so long as he did not secure a special privilege, benefit, or exemption for himself, as opposed to a general benefit," arguing that the same is a conclusion of law and not a finding of fact, and arguing that as a conclusion of law it is not accurate. This exception is rejected. To the extent the portion of the paragraph excepted to constitutes a conclusion of law regarding the operation of Section 112.313(6), Florida Statutes (the statute Milanick's ethics complaint indicated had been violated by Osborne), it is not incorrect. The statute does not prohibit

a public officer's acting without the intent to specially benefit himself or another.⁵ To the extent it is a finding of fact (that Osborne did not receive any special, private benefit from opposing Milanick's annexation), it is supported by competent substantial evidence. (T.43-44)

15. Milanick excepts to paragraph 24 of the RO in general, arguing that the paragraph "mischaracterize[s] the nature of [Milanick's] ethics complaint." This exception (which does not materially differ from Milanick's exception numbered 14) is rejected for the reasons exception 14 is rejected.

16. Milanick excepts to paragraph 27 of the RO (which determined that items in a letter/affidavit from Kearn/Milanick to the Ethics Commission were misleading because they indicated that they were found to be true by the Circuit Court when in fact they were not based on any evidentiary proceedings of the Court) arguing that res judicata bars such a determination by

⁵ Statutes provide:

MISUSE OF PUBLIC POSITION.—No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with s. 104.31. [Section 112.313(6), Florida Statutes.]

'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. [Section 112.312(9), Florida Statutes.]

the ALJ. This exception is rejected. Res judicata does not apply to the ALJ in this fees/costs matter due to issues arising out of a mandamus/annexation case. See the res judicata discussion previously in this final order.

17. Milanick excepts to the finding in paragraph 28 of the RO that Milanick knew or should have known that an allegation of the ethics complaint (that Osborne "did not want anymore general commercial land in the Town, which could jeopardize his personal investment in the Town") was untrue, arguing that the allegation of the ethics complaint was true. This exception is rejected. The import of the finding is that Milanick either knew or should have known that Osborne's opposition to Milanick's annexation was not based in personal, private, financial-type concerns, but was based in general or other reasons; and the import of the finding is based on competent substantial evidence. (T.95)

18. In his exception numbered 18, Milanick again takes issue with paragraph 28 of the RO, arguing that the ALJ is incorrect in his emphasis that Section 112.313(6), Florida Statutes, has as an essential element special private benefit rather than general governmental conduct or concerns. This exception is rejected; see paragraph 17 above of this final order.

19. Milanick excepts to the ALJ's finding that Osborne incurred \$4,976.00 in reasonable attorney fees and costs in defense of the ethics complaint filed by Milanick (paragraph 32 of the RO), arguing that there is insufficient evidence to support the finding. This exception is rejected. There is competent substantial evidence supporting the finding, including expert testimony. (T.45-46, 147-152, 229-230—along with Exhibit B to the petition for costs and fees; Stip.14)

20. Milanick excepts to the ALJ's findings (in paragraph 39 of the RO) that "Mr. Osborne did not live adjacent to, or in the vicinity of, the Milanick property" and that "it is unlikely that the annexation of the Milanick property would have an economic effect on Mr. Osborne's property," arguing that the findings are not supported by the DOAH record. This exception is rejected. There is competent substantial evidence to support the ALJ's finding that Osborne did not live adjacent to, or in the vicinity of, the Milanick property (Stip.12, 13); and there is competent substantial evidence to support the finding that it is unlikely that the annexation would have an economic effect on Osborne's property (T.43,44; Stip.12,13).

21. In his exception numbered 21, Milanick refers to paragraph 40 of the RO, in which the ALJ makes findings regarding knowledge and conduct of Kearn (Osborne's former

attorney). The exception does not assert that the findings lack evidential support; rather the exception makes argument regarding the legal significance of the findings regarding Milanick as a fees/costs respondent (ethics Complainant).⁶ The legal argument is dealt with below in this final order.

22. Milanick excepts to the ALJ's finding (in paragraph 40 of the RO) that Osborne's property was not "anywhere near" Milanick's property, arguing that the finding is "a subjective statement not supported by the record." This exception is rejected. There is competent substantial evidence to support the finding. (Stip.12, 13; T.129)

23. Milanick excepts to the ALJ's determination (in paragraph 41 of the RO) that the actions of Kearn were the actions of Milanick, vis-à-vis statements or communications regarding Osborne, because Kearn is the attorney or alter ego of Milanick. This exception primarily makes argument regarding a matter of law which is addressed below in this final order.⁷

24. In his exception numbered 24, Milanick makes the same legal argument he made in his previous exception regarding

⁶ However, the Commission on Ethics determines that a review of the complete record does not show that the ALJ's finding that Milanick filed an ethics complaint with knowledge that it contained (or with reckless disregard for whether it contained) a false allegation material to a violation of the Code of Ethics is supported by competent substantial evidence. Kearn's oral statements to the Commission's investigator notwithstanding, the evidence is insufficient to support a finding that Milanick filed a malicious ethics complaint as required by the statute.

⁷ There is competent substantial evidence to support that Kearn was Milanick's attorney; and Milanick apparently does not contest this in his exception.

paragraph 41 of the RO. This exception makes argument regarding a matter of law which is addressed below in this final order.

25. In his exception numbered 25 (as well as in his exceptions numbered 26 and 27), Milanick notes "material omissions from the Recommended Order that are supported in this record, but not reflected in the [Recommended] Order." To the extent that this exception seeks to have the Commission make additional findings from the evidence, it is rejected. Regarding factual matters, it is improper for a reviewing agency (e.g., this Commission) to make its own findings on the evidence rather limiting itself to a review of the evidence to determine whether there is support for the ALJ's findings. Inverness Convalescent Center v. Department of Health and Rehabilitative Services, 512 So. 2d 1011 (Fla. 1st DCA 1987).

26. Milanick's exception numbered 26 is rejected; see paragraph 25 above.

27. Milanick's exception numbered 27 is rejected; see paragraph 25 above.

28. Milanick's exception numbered 28 and the balance of his exceptions in his Respondent's Exceptions To Recommended Order concern the ALJ's determinations in the Conclusions Of Law portion of the RO (and elsewhere in the RO where the substance of the content makes conclusions of law) that Section

112.317(8), Florida Statutes, supports an award of attorney fees and costs against an ethics complainant because of statements of an attorney of the complainant made after the filing of the ethics complaint. Stated somewhat differently, the issue is whether the ALJ's view of the law (construction of the statute) is correct. We find that the ALJ's view of the law is not correct and conclude that Section 112.317(8) cannot be violated in a situation, such as the instant matter, where a complainant does not file a sworn complaint with knowledge that the complaint contains a false allegation (or with reckless disregard for whether the complaint contains a false allegation) of fact material to a violation of Part III, Chapter 112, Florida Statutes. In making our conclusion (in rejecting the conclusion of the ALJ⁸), we operate under Section 120.57(1)(1), Florida Statutes,⁹ which provides in relevant part:

The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction When rejecting or modifying such

⁸ The RO of the ALJ lacks a discussion as to whether the statute encompasses statements or communication outside of those made in a sworn ethics complaint. However, the conclusions of law portion of the RO quotes the statute and states (in paragraph 52) that "Mr. Osborne has proved entitlement to attorney fees in accordance with Section 112.317(8)."

⁹ The false allegation that the ALJ attributes to Milanick (via Kearn) is that "Kearn knew that Osborne did not live immediately south of the Milanick property" but that Kearn nevertheless communicated to the Commission that Osborne lived in close proximity to the Milanick property (see paragraph 50 of the RO). However, the DOAH record contains no competent substantial evidence that any such allegation is contained within an ethics complaint filed by Milanick.

conclusion of law . . . , the agency must state with particularity its reasons for rejecting or modifying such conclusion of law . . . and must make a finding that its substituted conclusion . . . is as or more reasonable than that which was rejected or modified.

In particular, one of our reasons for rejecting the view that the requirements of Section 112.317(8) can be satisfied by statements not contained within the ethics complaint itself (much less by outside-of-the-complaint statements made by a complainant's attorney during the course of the investigation of the complaint) is that the plain language of the statute requires that the false or reckless statement be made personally by the complainant in the written, sworn ethics complaint. Section 112.317(8),¹⁰ with emphasis supplied, 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

¹⁰ An ethics complaint means a written, sworn/affirmed complaint; it does not mean oral statements made during an ethics investigation. See Sections 112.322(1) and 112.324(1), Florida Statutes, which provide in relevant part, respectively:

It is the duty of the Commission on Ethics to receive and investigate sworn complaints of violation of the code of ethics as established in this part

Upon a written complaint executed on a form prescribed by the commission and signed under oath or affirmation by any person, the commission shall investigate any alleged violation of this part

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.

A statute's plain and ordinary meaning must be given effect unless to do so would lead to an unreasonable or ridiculous result. City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993). Another reason for our conclusion of law is that Section 112.317(8) is a statute that is penal in nature and that thus it is a statute that must be strictly construed [construed in favor of a person (e.g., Milanick) against whom it is sought to be applied]. Couch v. Commission on Ethics, 617 So. 2d 1119 (Fla. 5th DCA 1993). Galbut, supra. In regard to our conclusion, we make a finding that it is as or more reasonable than the interpretation of the statute by the ALJ which we reject, in light of our reasons stated above and in light of the Commission on Ethics being the proper agency to interpret the ethics statutes of Chapter 112. Couch, supra.¹¹

¹¹ An effect of our concluding that the ALJ's view of the statute is erroneous is to grant Milanick's exceptions as to the ALJ's legal conclusions regarding the statute. However, in so doing, we specifically reject Milanick's

Findings of Fact

Except to the extent that the findings of fact of the ALJ substantively constitute conclusions of law rejected or modified above and except for the Commission on Ethics' rejection above of the ALJ's finding that Milanick filed an ethics complaint against Osborne knowing that it contained (or with reckless disregard for whether it contained) a false allegation of fact material to a violation of the Code of Ethics, the Commission on Ethics accepts and incorporates into this final order the findings of fact in the Recommended Order from the Division of Administrative Hearings.

Conclusions of Law

Except to the extent rejected or modified above, the Commission on Ethics accepts and incorporates into this final order the conclusions of law in the Recommended Order from the Division of Administrative Hearings.

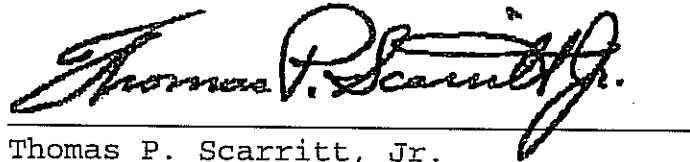
position (see Milanick's exception numbered 30) that the current language of Section 112.317(8), the language applicable to this matter, requires as an element necessary for an award of fees and costs that a complaint be both frivolous and without basis in law or fact. In addition, we reject Milanick's position that the malicious intent to injure the reputation of an ethics respondent must be demonstrated "by some act apart from the filing of the ethics complaint itself"; the correct interpretation of the statute is that malicious intent to injure a respondent's reputation is demonstrated by filing a complaint with knowledge that it contains a false allegation (or with reckless disregard for whether it contains a false allegation) of fact material to a violation of the Code of Ethics. See In re MICHAEL ADDICOTT, Commission on Ethics Complaint No. 02-076.

Disposition

Accordingly, the Commission on Ethics rejects the recommendation of the Administrative Law Judge that it enter an order requiring Milanick to pay Osborne \$4,976.00 in attorney fees and costs, and hereby denies Osborne's request for attorney fees and costs under Section 112.317(8), Florida Statutes.

ORDERED by the State of Florida Commission on Ethics meeting in public session on October 14, 2005.

October 19, 2005
Date Rendered



Thomas P. Scarritt, 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, P.O. DRAWER 15709, TALLAHASSEE, FLORIDA 32317-5709 (PHYSICAL ADDRESS AT 3600 MACLAY BLVD., SOUTH, SUITE 201, TALLAHASSEE, FLORIDA); 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. Martin A. Pedata, Attorney for Charles Osborne
Mr. Robert J. Riggio, Attorney for Charles Osborne
Mr. Gary S. Edinger, Attorney for Alexander J. Milanick
Division of Administrative Hearings