

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: KEVIN BEARY,)
)
 Respondent.) Case No. 07-1820EC
)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Carolyn S. Holifield, held a formal hearing in the above-styled case on December 13, 2007, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this limited proceeding is whether the issuance of the Order Finding Probable Cause against Respondent affects his substantial interests and was based on an unadopted rule,¹ as contemplated in Subsection 120.57(1)(e)1., Florida Statutes (2006).²

PRELIMINARY STATEMENT

On January 31, 2007, the Florida Commission on Ethics ("Commission") issued an Order Finding Probable Cause to believe that Respondent, Kevin Beary, while Sheriff of Orange County, violated Subsections 112.313(3), 112.313(6), 112.313(7)(a), and 112.313(8). On April 19, 2007, the Commission referred the case to the Division of Administrative Hearings ("DOAH").

On July 11, 2007, Respondent filed a Motion to Invalidate Agency Action Based on Unpromulgated Rule. Thereafter, on July 17, 2007, he filed an Amended Motion to Invalidate Agency Action Based on Unpromulgated Rule ("Amended Motion").

The Amended Motion asserts that the following findings in the Commission's Order Finding Probable Cause are based on an unpromulgated rule: (1) Respondent violated Subsection 112.313(3), by doing business with his agency; and (2) Respondent violated Subsection 112.313(7)(a), by having an employment or contractual relationship with an entity or entities doing business with his agency or which relationships

created conflicts of interest and public duties. The Amended Motion also alleges that the Commission relied on or based the foregoing findings on an unpromulgated rule, which it asserts is included in an advisory opinion, CEO 99-2, issued by the Commission.

The Amended Motion requests that the undersigned conduct a de novo review of the Commission's probable cause findings, determine that such finding was based on an unpromulgated rule, conclude that such rule cannot be justified as provided in Subsection 120.57(1)(e), and dismiss the allegations of the Order Finding Probable Cause, which are based on the unpromulgated rule.

In response, the Commission filed a Motion to Strike or Dismiss Respondent's Motion to Invalidate Agency Action Based on [an Alleged] Unpromulgated Rule ("Motion to Strike or Dismiss").

On September 17, 2007, a telephonic hearing was held on the Amended Motion and the Motion to Strike or Dismiss. Thereafter, on November 9, 2007, an Order Granting Request for De Novo Review Pursuant to 120.57(1)(e) was entered, which provided that the public hearing in the above-styled case be expanded to determine whether the probable cause findings were based on an unpromulgated rule.

On November 29, 2007, the Administrative Law Judge entered an Order Granting Partial Stay and Re-Scheduling Hearing. That

Order stayed this proceeding pending resolution of Respondent's interlocutory appeal to the Fifth District Court of Appeal, except for the portion of this proceeding related to the instant Subsection 120.57(1)(e) challenge. The Order rescheduled that part of the hearing for December 13 and 14, 2007.

Prior to the final hearing, the parties submitted a Joint Pre-Hearing Stipulation containing facts which were admitted and required no proof at hearing.

At the final hearing, the parties offered 11 joint exhibits (Joint Exhibits 1 through 5 and 11 through 16), all of which were received into evidence. The Advocate offered five exhibits (Exhibits 6 through 10), all of which were received into evidence. Respondent presented the testimony of Phillip Claypool, the executive director and general counsel of the Commission, and the deposition transcript of James T. Moore, a former commissioner of the Florida Department of Law Enforcement ("FDLE"), as Joint Exhibit 16. The Advocate also presented the testimony of Phillip Claypool.

At the conclusion of Respondent's case, the Advocate made an ore tenus motion for involuntary dismissal. The undersigned reserved ruling on the motion and advised the parties that the motion would be addressed in the recommended order.

The Transcript was filed with the Division of Administrative Hearings on January 4, 2008. At the conclusion

of the hearing, the parties requested and were allowed to file proposed recommended orders 30 days after the Transcript was filed; by doing so, the time was waived for issuance of the recommended order. Both parties timely filed Proposed Recommended Orders, which have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, Respondent has been employed by and continuously served as the Sheriff of Orange County, Florida, since taking office in January 1993, having been elected to four successive terms.

2. In the aftermath of the September 11, 2001, terrorist attacks, the Governor by Executive Order, later codified by the Florida Legislature, created seven Regional Domestic Security Task Forces (Task Forces) mirroring the seven FDLE geographical regions throughout the state.

3. Members of the Task Forces were appointed by the Commissioner of FDLE.

4. As a representative of local law enforcement, Respondent qualified, by law, for appointment as a member of one of the Task Forces created by Section 943.0312.³

5. Co-chairs of the Task Forces were also appointed directly by the Commissioner of FDLE. The law required that one co-chair be the FDLE special agent in charge of the operational

region, the other a local sheriff or chief of police from within the operational region. The co-chairs of the Task Forces were appointed directly by the Commissioner of FDLE.⁴

6. Respondent, as Sheriff of Orange County, was appointed co-chair of Region 5 Task Force with that region's FDLE special agent in charge.

7. Task Forces are advisory bodies to FDLE. The Task Forces also provided operational support to FDLE in its performance of functions pertaining to domestic security.⁵

8. On or about August 5, 2005, the Commission received a Complaint designated as Complaint 05-105. Complaint 05-105 was filed against Respondent in his capacity as "Sheriff of Orange County."

9. The executive director of the Commission found that based on the information provided in the Complaint, the allegations contained therein were sufficient to warrant a preliminary investigation.

10. An investigation was conducted by Investigator Ronald D. Moalli of the Commission, and a Report of Investigation was released on the investigation on September 5, 2006.

11. On November 22, 2006, Respondent filed a written Response to the Report of Investigation with the Commission.

12. Respondent's Response to the Investigation cited a number of Commission opinions ("CEOs") in support of an argument

that Respondent did not have a contractual or employment relationship subject to the prohibitions of Subsection 112.313(7)(a). The response also contained a number of legal and factual arguments contending that the Report of Investigation did not support a finding of probable cause as to the allegations against Respondent.

13. On December 19, 2006, the Advocate's Recommendation was filed with the Commission.

14. The Advocate's Recommendation stated that based on evidence before the Commission, the Advocate recommended that there was probable cause to believe that Respondent violated five provisions of the Code of Ethics for Public Officers and Employees ("Code of Ethics"), including violations of Subsections 112.313(3) and 112.313(7)(a).

15. The Advocate's Recommendation does not reference CEO 99-2, nor does it reference any statements contained in that advisory opinion.

16. On January 9, 2007, Respondent filed a written Response to the Advocate's Recommendation.

17. On January 26, 2007, during its executive session, the Commission conducted a hearing to determine probable cause in this case.

18. Probable cause hearings before the Commission are not conducted ex parte as in some agencies. Rather, in addition to

materials submitted by the parties, oral argument is permitted. However, the Commission does not give Respondents notice of Chapter 120 rights, and due process rights do not attach until after probable cause is found. § 112.324(3), Fla. Stat.

19. At the probable cause hearing, the Commission had before them the Complaint, the Report of Investigation, Respondent's Response to the Report of Investigation, the Advocate's Recommendation, and Respondent's Response to the Advocate's Recommendation. Fla. Admin. Code R. 34-5.006(5). In addition to the foregoing, the Advocate and counsel for Respondent made oral arguments at the probable cause hearing.

20. The Advocate argued:

There's a suggestion in the response [of Respondent] that this wasn't his agency, that his only agency was the sheriff's office. I've got some materials. I've spoken to Mr. Herron about this, and I believe he would concur, that for purposes. . . .

I am citing CEO 99-2. For the purposes of these two provisions, and they're talking about subsection (3), the doing business with prohibition, and subsection (7), the contractual conflict prohibition.

The Commission has said for purposes of these two provisions, we must determine the agency of the advisory board members. And then they speak of two other opinions. We reiterated our view that in determining an individual's agency for purposes of the Code of Ethics, an advisory board to a governing body is part of that body.

So, being on the task force, [Respondent's] agency was FDLE. That's the point.

21. At the probable cause hearing, following the argument of the Advocate and counsel for Respondent, the Commission voted to accept the recommendation of the Commission's Advocate with respect to four of the five violations of the Code of Ethics.

22. On January 31, 2007, the Commission issued the Order Finding Probable Cause to believe that Respondent violated four provisions of the Code of Ethics.

23. Respondent alleges the Commission relied on and based the findings of probable cause to believe that Respondent violated Subsections 112.313(3) and (7)(a) on the following statement in CEO 99-2.

[I]n determining an individual's "agency" for purposes of the Code of Ethics, an advisory board to a governing board is part of that body.

24. Under existing law, CEO 99-2 is not binding on Respondent.⁶

25. Arguments of counsel are not binding on the Commission. Moreover, the Advocate's arguments to the Commission are not rules.

26. None of the written documents before and available to the Commission at the probable cause hearing, refer to or mention CEO 99-2 or the application of that advisory opinion.

27. In its Order Finding Probable Cause, the Commission ordered, in accordance with Chapter 120 that a public hearing be held on the allegations set forth in the Order Finding Probable Cause.

28. On or about April 19, 2007, the Commission referred Complaint 05-105 to DOAH and requested a formal administrative hearing and to enter a recommended order regarding whether Respondent violated the Code of Ethics as alleged by the Order Finding Probable Cause.

29. Two of the four allegations set forth in the Order Finding Probable Cause material to this segment of the proceeding state that Respondent violated:

a. Section 112.313(3), Florida Statutes, by doing business with his own agency.

b. Section 112.313(7)(a), Florida Statutes, by having employment or contractual relationship with a business entity or entities doing business with Respondent's agency

30. As of the date of this proceeding, the public hearing on the Complaint had been stayed pending the outcome of this proceeding and of an appeal of a discovery matter.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this

proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2007).

32. The Commission is authorized to conduct investigations and to make public reports on Complaints concerning violations of Part III, Chapter 112. § 112.322, Fla. Stat., and Fla. Admin. Code R. 34-5.0015.

33. Respondent initiated this proceeding under Subsection 120.57(1)(e) and seeks "to invalidate agency action based on an unpromulgated rule." As a basis for this action, Respondent asserts findings of probable cause are based on an advisory opinion, CEO 99-2, which is an unadopted rule.

34. Subsection 120.57(1)(e) provides:

(e)1. Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge.

35. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue of the proceedings. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981), Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977), cert. denied, 370 So. 2d 458 (Fla. 1979).

36. In this case, Respondent is asserting the affirmative of the issue related to Subsection 120.57(1)(e). Therefore,

Respondent has the initial burden. To meet that burden, Respondent must establish by a preponderance of evidence that: (1) there was agency action that affected his substantial rights; and (2) the agency action was based on an agency statement that was an unadopted rule. Implicit in the latter is Respondent's burden to establish that the agency statement is a rule.

Analysis of Claim Under Subsection 120.57(1)(e)1.

37. Initially, Respondent has the burden to establish that he has standing under Subsection 120.57(1)(e)1. In order to do so, Respondent must establish that his "substantial interests" have been affected by the agency action.

38. To be substantially affected by an agency statement, Respondent must establish "a real and sufficiently immediate injury in fact." Lanoue v. Fla. Department of Law Enforcement, 751 So. 2d 94, 96 (Fla. 1st DCA 1999). This injury, in fact "must not be based on pure speculation or conjecture." Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995).

39. Respondent presented no evidence at this proceeding to establish that he suffered a "real and sufficiently immediate injury" because of the findings of probable cause. Instead, Respondent's counsel merely argued, "This Order of Probable

Cause substantially affects [Respondent's] substantial interest."⁷

40. In absence of any evidence that the findings of probable cause substantially affected his interests, Respondent does not have standing.

41. Assuming, though not concluding, that Respondent has standing in this proceeding pursuant to Subsection 120.57(1)(e), he must establish that the agency statement is a rule within the meaning of Subsection 120.52(15).

42. In this case, Respondent alleges the Commission's advisory opinion, CEO 99-2, and the specified findings in the Order Finding Probable Cause are agency statements that rules.

43. Subsection 120.52(15) defines "rule" as follows:

(15) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. . . .

44. Courts have found that any agency statement that either requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law is a rule. See Balsam v. Department of Health and Rehabilitative Services, 452 So. 2d 976, 977-978,

(Fla. 1st DCA 1984); State Department of Administration v. Harvey, 356 So. 2d 323 (Fla. 1st DCA 1978).

45. Pursuant to Section 112.322, the Commission renders CEOs (advisory opinions) upon the request of public officials, candidates for public office, and public employees as to the application of the Code of Ethics to specific facts.

§ 112.322(3)(a), Fla. Stat. These opinions, until amended or revoked, are binding only on the conduct of the officer, employee or candidate who requested the opinion or with reference to whom the opinion was sought, unless material facts were omitted or misstated in the request for the opinion.

§ 112.322(3)(b), Fla. Stat. Hence, the advisory opinions contained in CEOs are not statements of general applicability.

46. The reasoning in CEO 99-2 interprets and advises on the applicability of the Code of Ethics as to a particular set of facts and circumstances and is binding only on the individual who requested the opinion. Accordingly, CEO 99-2 is not a statement of general applicability as the statements and interpretations included therein do not apply to Respondent⁸ or anyone except the person who requested the opinion. Moreover, CEO 99-2 is dispositive on the specific set of facts and circumstances provided by the individual requesting the opinion.

47. Based on the conclusion in the above paragraph, CEO 99-2 is not a rule within the meaning of Subsection 120.52(15).

48. Respondent also asserts that the Commission's Order Finding Probable Cause is an agency statement of general applicability that has not been adopted as a rule. (Presumably, Respondent is referring not to the entire Order Finding Probable Cause, but to the findings of probable cause related to violations of Subsections 112.313(3) and (7)(a).)

49. Respondent asserts that the findings of probable cause at issue in this proceeding are statements of general applicability that implement, interpret, or prescribe law or policy. However, Respondent offers no evidence in support of his assertion.

50. The Commission is empowered to make findings of probable cause, conduct the complaint process, and make findings as to whether a violation of the Code of Ethics has occurred. §§ 112.322 and 112.324, Fla. Stat. In this case, so far, the Commission has only found that "there is probable cause to believe" that Respondent violated Subsections 112.313(3) and (7)(a). The findings of probable cause apply only to Respondent and do not implement, interpret or prescribe law. Rather, the findings reflect that based on the evidence

presented, the Commission believes that Respondent violated the above-referenced provisions of the Code of Ethics.

51. In order to sustain a probable cause determination, there must merely be "some evidence considered by the panel that would reasonably indicate that the violation has occurred." See Fish v. Dept. of Health, Board of Dentistry, 825 So. 2d 421, 423 (Fla. 1st DCA 2002). A determination of whether Respondent violated Subsections 112.313(3) and (7)(a) will be addressed at a subsequent proceeding⁹ where the allegations must be proved by clear and convincing evidence. See Latham v. Florida Commission on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997).

52. In light of the foregoing, the Order Finding Probable Cause and the findings contained therein are not rules within the meaning of Subsection 120.52(15), Florida Statutes. Conclusion Under Subsection 120.57(1)(e)1.

53. As noted above, Petitioner failed to establish that he had standing to bring a claim under Subsection 120.57(1)(e), Florida Statutes. However, even if he had standing based on the above conclusions, Respondent's claim would fail as he did not establish that the agency statements are rules within the meaning of Subsection 120.52(15), Florida Statutes. As stated in United Wisconsin Life Insurance Co. v. Dept. of Insurance, Case No. 01-3135 (DOAH November 27, 2001) (Final Order November 27, 2001); affirmed 831 So. 2d 239 (Fla. 1st DCA 2002),

"[i]f the statements alleged to be rules in the [c]omplaint, are not rules, then the inquiry needs to go no further." That being the case, there is no need to analyze the agency statement in the context of Subsection 120.57(1)(e)2., Florida Statutes.¹⁰

Probable Cause Findings Not Subject to Section 120.57 Proceedings

54. The Advocate has asserted that the proceeding which Respondent initiated under Section 120.57(1)(e) to invalidate agency action finding probable cause to believe that Respondent violated provisions of the Code of Ethics, is not subject to a challenge under Section 120.57.

55. In support of this position, the Advocate relies on Subsection 120.57(5), Florida Administrative Code Rules 34-5.006 and 28-106.101, and the cases discussed below.

56. Subsection 120.57(5) provides: "This section does not apply to agency investigations preliminary to agency action." In a concurring opinion in Manasota-88 Inc. v. Gardinier, et. al., 481 So. 2d 948, 951 (Fla. 1st DCA 1986), Judge Smith noted that "preliminary, probable cause type determinations cannot ordinarily be regarded as agency action triggering the right to a 120.57 hearing, unless the right to a hearing is supported by the statutory framework guiding the particular agency action in question."

57. Florida Administrative Code Rule 34.5.006(4) gives Respondent and the Advocate the right "to attend the hearing at which the probable cause determination is made." Pursuant to that rule, Respondent and the Advocate are permitted to make "brief oral statements in the nature of oral argument at the probable cause hearing," but are precluded from presenting testimony or other evidence.

58. Florida Administrative Code Rule 34.5.006(5) provides that the probable cause determination is the conclusion of the preliminary investigation. Such preliminary proceedings are excluded from Section 120.57. Subsection (5) of that statutory provision provides: "This chapter does not apply to agency investigations preliminary to agency action."

59. Consistent with the provisions cited in the above paragraph, Florida Administrative Code Rule 28-106.101 provides: "This chapter applied to all proceedings under Chapter 120, F.S., except as follows: . . . (2) Agency investigations or determinations of probable cause preliminary to agency action[.]"

60. Subsection 112.324(3) provides, in pertinent part:

(3) A preliminary investigation shall be undertaken by the commission of each legally sufficient complaint over which the commission has jurisdiction to determine whether there is probable cause to believe that a violation has occurred. . . If the commission finds from the preliminary

investigation probable cause to believe that this part has been violated or that any other breach of the public trust has been committed, it shall so notify the complainant and the alleged violator in writing. . . Upon request submitted to the commission in writing, any person who the commission finds probable cause to believe has violated any provision of this part or has committed any other breach of the public trust shall be entitled to a public hearing. Such person shall be deemed to have waived the right to a public hearing if the request is not received within 14 days following the mailing of the probable cause notification required by this subsection. . . .

61. Based on the foregoing, Respondent has no right to challenge the Commission's findings of probable cause in Subsection 120.57(1)(e). Rather, it is clear that Respondent's Section 120.57 rights were triggered after the Commission made its probable cause determination. As noted above, Respondent has exercised that right. However, at the time of this proceeding, that matter was stayed pending the outcome of this proceeding and of a pending appeal.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a Final Order and Public Report be entered on this part of the proceedings only, finding that:

(1) Respondent, Kevin Beary, failed to show that the issuance of the Order of Probable Cause against him affects his substantial

interests and was based on an unadopted rule, as contemplated by Subsection 120.57(1)(e)1.; and (2) dismissing Respondent's Amended Motion to Invalidate Agency Action Based on Unpromulgated Rule.

DONE AND ENTERED this 11th day of August, 2008, in Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of August, 2008.

ENDNOTES

^{1/} The term "unadopted rule" and "unpromulgated rule" are used interchangeably.

^{2/} All references to Chapters, Sections and Subsections are to Florida Statutes (2006), unless otherwise indicated.

^{3/} Subsection 943.0312(1)(c) provides:

Each task force membership may also include representatives of state and local law enforcement agencies, . . . and other persons deemed appropriate and necessary by the task force co-chairs.

4/ Subsection 943.0312(1)(b) provides:

Each task force shall be co-chaired by the department's special agent in charge of the operational region in which the task force is located and by a local sheriff or chief of police from within the operational region.

5/ Subsection 943.0312(1), which established the regional domestic security task force framework, provided:

To assist the department and the Chief of Domestic Security in performing their roles and duties in this regard, the department shall establish a regional domestic security task force in each of the department's operational regions. The task forces shall serve in an advisory capacity to the department and the Chief of Domestic Security. . . .

6/ While the Commission on Ethics has authority to issue advisory opinions, those opinions are binding only on the conduct of the public officer or employee or candidate that sought the opinion.

(3)(a) Every public officer, candidate for public office, or public employee, when in doubt about the applicability and interpretation of this part or s. 8, Art. II of the State Constitution to himself or herself in a particular context, may submit in writing the facts of the situation to the Commission on Ethics with a request for an advisory opinion to establish the standard of public duty. Any public officer or employee who has the power to hire or terminate employees may likewise seek an advisory opinion from the commission as to the application of the provisions of this part or s. 8, Art. II of the State Constitution to any such employee or applicant for employment. An advisory opinion shall be rendered by the commission, and each such opinion shall be numbered, dated, and published without naming the

person making the request, unless such person consents to the use of his or her name.

(b) Such opinion, until amended or revoked, shall be binding on the conduct of the officer, employee, or candidate who sought the opinion or with reference to whom the opinion was sought, unless material facts were omitted or misstated in the request for the advisory opinion. (Emphasis added.)

Subsection 112.322(3)(a).

^{7/} With regard to the issue of "substantial interest," Respondent's counsel further stated:

I don't believe anybody here suggests that the finding of probable cause is nothing for Sheriff Beary to worry about, no problem, no big deal, that it does not affect a substantial interest; and that the agency action is based on an unadopted rule or not contained in the statute. That's the definition. I think we demonstrated that.

^{8/} In the Pre-hearing Stipulation, Respondent stipulated or admitted that "[u]nder existing law, advisory opinion CEO 99-2 is not binding on him."

^{9/} The hearing on the underlying complaint had been stayed at the time of this proceeding.

^{10/} Subsection 120.57(1)(e)2. provides:

2. The agency action shall not be presumed valid or invalid. The agency must demonstrate that the unadopted rule:

a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority derived from the State Constitution, is within that authority;

- b. Does not enlarge, modify, or contravene the specific provisions of law implemented;
- c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;
- d. Is not arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;
- e. Is not being applied to the substantially affected party without due notice; and
- f. Does not impose excessive regulatory costs on the regulated person, county, or city.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.