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"A Public Office is a Public Trust"

September 17, 2014

Robert S. Cohen, Chief Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

RECEIVED
DIVISION OF ADMINISTRATIVE
HEARINGS
SEP 19 PM 12:16

Re: DOAH Case No. 13-1043EC
Commission on Ethics Complaint Nos. 10-157 & 10-182, cons., In re DAVID RIVERA

Dear Judge Cohen:

The Commission has entered an Order of Remand to the Division of Administrative Hearings in the above-referenced proceeding. We would appreciate your returning the matter to the Administrative Law Judge for the limited issue of recommendation of a civil penalty for the Commission's consideration.

The Advocate for this complaint is Diane Guillemette, Assistant Attorney General. She may be contacted at the Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050 [(850) 414-3300)].

The Respondent, David Rivera, is represented by Leonard M. Collins, who may be contacted at: Broad and Cassel, 215 S. Monroe St., Ste 400, Tallahassee, FL 32301 [(850) 681-6810)].

Enclosed with the Order of Remand are copies of the hearing transcript and exhibits, as well as Respondent's Objection to Remand, which are not included on DOAH's docket sheet.

Sincerely,

Millie Fulford

Millie Fulford
Complaint Coordinator

Enclosures

cc: Mr. Leonard Collins, Attorney for Respondent
Ms. Diane Guillemette, Commission Advocate

SEP 17 2014

COMMISSION ON ETHICS

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re **DAVID RIVERA,**)
)
 Respondent.)
)
)
)
 _____)

Complaint Nos. 10-157 & 10-182
DOAH Case No. 13-1043EC cons.

SEP 19 PM 1:13
STATE OF FLORIDA
COMMISSION ON ETHICS

ORDER OF REMAND

On June 6, 2014, the Administrative Law Judge with the Division of Administrative Hearings (DOAH) transmitted his Recommended Order to the Commission and to the parties, and the parties were notified of their right to file exceptions to the Recommended Order. Thereafter, both parties timely filed exceptions and the Advocate responded to the Respondent's exceptions. The Commission has not ruled on the exceptions. The Advocate and the Respondent jointly waived the 90-day time period imposed by Section 120.569(2)(1), Florida Statutes.

BACKGROUND

The ALJ's Recommended Order recommends that the Commission find that the Respondent, a former member of the Florida House of Representatives, violated the Code of Ethics for Public Officers and Employees in seven instances. It does not recommend a penalty.

The ALJ, in paragraph 95, states:

In cases concerning former members of the Florida Legislature who have violated provisions applicable to former members or whose violation occurred while a member of the legislature, as is the case here, the appropriate penalty is to be determined by the Speaker of the House of Representatives. § 112.324(8)(e), Fla. Stat.

AUTHORITY AND NECESSITY FOR REMAND

Section 112.324(8)(e), Florida Statutes, states:

(8) If, in cases other than complaints or referrals against impeachable officers or members of the Legislature, upon completion of a full and final investigation by the commission, the commission finds that there has been a violation of this part or of s. 8, Art. II of the State Constitution, *it is the duty of the commission to report its findings and recommend appropriate action to the proper disciplinary official or body as follows*, and such official or body has the power to invoke the penalty provisions of this part, including the power to order the appropriate elections official to remove a candidate from the ballot for a violation of s. 112.3145 or s. 8(a) and (i), Art. II of the State Constitution:

(e) The President of the Senate or the Speaker of the House of Representatives, whichever is applicable, in any case concerning a former member of the Legislature who has violated a provision applicable to former members or whose violation occurred while a member of the Legislature.

[emphasis supplied]

In contrast to Section 112.324(4), Florida Statutes, which precludes the Commission from recommending a penalty when a respondent is a sitting member of the Legislature, the portion of the law italicized above requires that, as with virtually all other public officers and employees, the Commission has a responsibility to recommend a penalty consistent with Section 112.317, Florida Statutes.

Section 120.57(1)(k)-(l), Florida Statutes, states:

(k) *The presiding officer [ALJ] shall complete and submit to the agency and all parties a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable*, and any other information required by law to be contained in the final order. All proceedings conducted under this subsection shall be de novo. The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but 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.

(l) The agency may adopt the recommended order as the final order of the agency. The agency in its final order 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 conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule 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. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. *The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.*

[emphasis supplied]

The Administrative Procedure Act clearly contemplates a penalty recommendation by the Administrative Law Judge as a predicate for the Commission's penalty recommendation. Therefore, the Commission remands this case to DOAH, requesting that the ALJ recommend a penalty under Section 112.317(1)(d), Florida Statutes, based on the record evidence and the existing findings of fact and conclusions of law. The Commission does not request additional findings of fact and conclusions of law.

DONE and ORDERED by the State of Florida Commission on Ethics meeting in public session on Friday, September 12, 2014.

September 17, 2014
Date Rendered

Linda M. Robison
LINDA MCKEE ROBISON
Chair

cc: Mr. Leonard Collins, Attorney for Respondent
Ms. Diane Guillemette, Commission Advocate
Mr. William R. Barzee, Complainant
Mr. Jackson Rip Holmes, Complainant
The Honorable W. David Watkins, Administrative Law Judge,
Division of Administrative Hearings