

OCT 29 2014**BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS****COMMISSION ON ETHICS**

In re DAVID McLEAN,

Respondent.

Complaint No. 12-062

DOAH Case No. 14-1114EC

Final Order No. 14-111

FINAL ORDER AND PUBLIC REPORT

This matter came before the State of Florida Commission on Ethics ("Commission"), meeting in public session on October 24, 2014, on the Recommended Order ("RO") of an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH") rendered on August 28, 2014.

Background

This matter began with the filing of an ethics complaint (which included an amendment) by Michael Casey ("Complainant") in 2012 against David McLean ("Respondent"). The complaint alleged that the Respondent, as a Commissioner and Vice Mayor of the City of Margate ("City"), violated the following Florida Statutes: Section 112.313(6) (Misuse of Public Position), by misusing a City credit card; Section 112.3143 (Voting Conflicts), by voting on a motion to censure him and by voting on measures involving the use of City credit cards; Section 112.313(7) (Conflicting Employment or Contractual Relationship), by improperly representing his employer before a special meeting of the City Commission on August 15, 2011, addressing his employer's company's liquor license application. By an order dated June 18, 2012, the Commission on Ethics' Executive Director determined that allegations of the complaint concerning misuse of City credit cards and representing his employer before the City

Commission were legally sufficient to indicate possible violation of Sections 112.313(6), 112.313(7)(a), and 112.3143(3)(a) and ordered Commission staff to investigate the complaint, resulting in a Report of Investigation ("ROI") dated December 7, 2012.

By order dated January 30, 2013, the Commission found probable cause to believe the Respondent violated Section 112.313(6), Florida Statutes, by using a City of Margate credit card for personal use (Count I), violated Section 112.3143(3)(a), Florida Statutes, by voting on a City Commission measure to censure him (Count II), and violated Section 112.313(7)(a), Florida Statutes (Count IV), by being employed by and representing an establishment seeking approval before the City Commission to use an alcoholic beverage license. The Commission found no probable cause to believe the Respondent violated Section 112.3143(3)(a), Florida Statutes, by voting on City Commission measures regarding City credit card use (Count III).

The matter was forwarded to DOAH for assignment of an ALJ to conduct a formal hearing and prepare a recommended order. A formal evidentiary hearing was held before the ALJ via video teleconference on July 10, 2014. After conducting off-the-record negotiations, the Advocate and the Respondent agreed to the dismissal of the count alleging that the Respondent improperly voted on a motion to censure him in violation of Section 112.3143 (Count II). The Advocate and Respondent also agreed that, if the Ethics Commission has jurisdiction over the count alleging the Respondent improperly represented his employer before the City Commission in violation of Section 112.313(7)(a)(Count IV), the ALJ would apply a factual stipulation to be filed by the parties to determine whether the Respondent committed the alleged violation. The Respondent and the Advocate further agreed that, if the Advocate prevailed on Count IV, the Ethics Commission would impose no additional penalty in addition to the penalty imposed for violation of Count I (alleging that the Respondent misused a City credit card). The agreement between the Respondent and the Advocate stipulated that if Respondent is guilty of Count I,

Count IV, or Counts I and IV, the penalty would be a \$3,000 civil fine, censure, and a reprimand. The Respondent and the Advocate filed a joint factual stipulation on July 18, 2014. Both the Respondent and the Advocate filed proposed recommended orders with the ALJ.

On August 28, 2014, the ALJ entered his Recommended ("RO") finding, under Conclusions of Law, that the Commission lacked investigative jurisdiction under Section 112.322(1), Florida Statutes, and thus lacked jurisdiction to issue a public report finding that Respondent committed the violation alleged in Count IV and, for these reasons, DOAH lacked subject matter jurisdiction over Count IV. The ALJ further found that, even if the Ethics Commission had jurisdiction, the Advocate failed to prove a violation of Section 112.313(7)(a)(Count IV). The ALJ recommended that the Commission enter a final order dismissing Counts II and IV, determining that Respondent violated Section 112.313(6), as alleged in Count I, and imposing a fine of \$3,000, censure, and public reprimand against the Respondent.¹

On September 11, 2014, the Advocate timely filed (with the Commission) exceptions to the RO. No exception was filed by the Respondent. Both the Respondent and the Advocate were notified of the date, time, and place of our final consideration of this matter; and both were given the opportunity to make argument during our consideration.

Standards of Review

Under Section 120.57(1)(l), Florida Statutes, an agency may reject or modify the conclusions of law and interpretations of administrative rules contained in a recommended order. However, the agency may not reject or modify findings of fact made by an ALJ unless a review

¹Count III, alleging that the Respondent improperly voted on measures involving the use of City credit cards in violation of Section 112.3143(3)(a), Florida Statutes, is not at issue in this Final Order. As stated above, the Commission in its January 30, 2013, order found no probable cause as to Count III.

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. Department 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, may not resolve conflicts in the evidence, and may not judge the credibility of witnesses, because such evidential matters are within the sole province of the ALJ. Heifetz v. Department 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 on Ethics 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 the interpretations 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 or interpretation and must make a finding that its substituted conclusion or interpretation is as or more reasonable than that which was rejected or modified.

Having reviewed the RO and the entire record of the proceeding and the Advocate's exceptions and having heard the arguments of the Advocate and the Respondent, the

Commission on Ethics makes the following rulings, findings, conclusions, recommendation, and disposition:

Rulings on Advocate's Exceptions

1. In her first exception, the Advocate takes issue with paragraphs 27 and 28 of the RO (which is within the portion of the RO labeled CONCLUSIONS OF LAW), and which state:

27. The sole jurisdictional questions are whether Complainant swore or affirmed to the facts constituting Counts I and IV. These questions arise because Complainant never complied with the form's request for an explanation of his complaints, but instead signed, under oath, two complaint forms, to which Complainant attached a total of 14 documents. One of these documents consists of a typewritten letter by Complainant that, although not addressed to the Ethics Commission, serves as an explanation of the complaints stated in the letter. Several of these documents contain Complainant's handwritten notes, which include various complaints against Respondent.

28. In addressing these jurisdictional issues, the Advocate misses the point in its supplemental proposed recommended order when it argues that Complainant is not required to base his complaint on matters within his personal knowledge, or that the Ethics Commission may consider matters materially related to the complaint at issue. Resolution of the jurisdictional questions in this case does not turn on the quality of Complainant's knowledge of the facts, or whether the facts reported by Complainant are hearsay or are materially related to the subject complaint. The jurisdictional questions are whether Complainant has filed a sworn complaint as to the matters contained in Counts I and IV or to anything else to which the subjects of Counts I and IV are materially related. The jurisdictional statute does not require much, but it requires that a complainant be willing to, and in fact, swear or affirm to the facts underlying her complaint.

2. More particularly, the Advocate requests that the Commission reject all of the content or verbiage of paragraphs 27 and 28 and substitute the following language (offered on page 5 of the Advocate's Exceptions to Recommended Order) for the totality of the language of RO paragraphs 27 and 28:

The Commission on Ethics has an obligation to investigate alleged violations of the Florida Ethics Code: Upon a written complaint executed on a form prescribed by the commission and signed under oath or affirmation by any person . . .

Section 112.324(1)(a) Fla. Stat. The Complaint and Complaint Amendment forms filed in this case are forms prescribed by the Commission through Rule 34-7.010, F.A.C. The Oath sworn to by the Complainant states:

I, the person bringing this complaint, do depose on oath or affirmation and say that the facts set forth in the foregoing complaint and attachments thereto are true and correct to the best of my knowledge and belief. (Complaint p.1, Amended Complaint p. 1)

In this case, the Complainant submitted properly signed and notarized valid complaints.

3. In her second exception, the Advocate takes issue with paragraphs 29, 30, and 31 of the RO (which is within the portion of the RO labeled CONCLUSIONS OF LAW), and which state:

29. Complainant clearly explained--and thus swore to--the charges set forth in Count I. Complainant stated that Respondent misused a City credit card in the handwritten notes on the following documents: the City credit card agreement, the Ethics Commission letter dated May 16, 2012, and the minutes of the meeting of the City commission on March 21, 2012. Also, Complainant's typewritten letter at page six of the Complaint twice charges Respondent with misusing a City credit card.

30. Complainant has not so clearly explained--and thus sworn to--the charges set forth in Count IV. No handwritten notation touches on Respondent's appearance at the August 15, 2011, special meeting of the City commission for the Tiki Bar, nor is this matter mentioned in the typewritten letter on page six of the Complaint.

31. Respondent's appearance at the August 15, 2011, special meeting of the City commission is mentioned in only two documents--both online articles in the MargateNews.net. Signing the complaint form verifies that "the facts set forth in the complaint and attachments thereto are true and correct." This means either that the complainant is verifying the facts explained in the complaint and contained in the attachments, or the complainant is verifying the facts explained in the complaint and verifying that the attached documents are true copies of the originals. In other words, the form leaves unanswered the question of whether the language, "the facts set forth in the," modifies "complaint" or "complaint" and "attachments."

4. The Advocate requests that the Commission delete paragraphs 29, 30, and 31 and substitute the following language (offered on page 7 of the Advocate's Exceptions to Recommended Order), for the totality of the language in RO paragraphs 29, 30, and 31:

The handwritten notes on the attachments to the complaint and amended complaint address several issues, among which are the non-payment of a promissory note, Respondent's misuse of City credit cards and his dealings concerning a tiki bar. (Complaint pp. 4, 6, Amended Complaint pp. A3-A8)

Complainant also submitted copies of articles from the Margate news. (Complaint pp. 7-9) One article details the special meeting wherein Respondent represented his then-business partner for a vote on whether to grant his business' partner's tiki bar a 2COP. (county permission to sell alcohol from a particular establishment.) (Complaint p. 8) The news articles were an "attachment thereto" and as such, they became part of the sworn complaint to be considered by the Commission.

5. In her third exception, the Advocate takes issue with paragraphs 32, 33, and 34 of the RO (which is within the portion of the RO labeled CONCLUSIONS OF LAW), and which state:

32. The Advocate would argue that "complaint" and "attachments" are modified by "the facts set forth in the." But case law does not favor a liberal interpretation of this jurisdictional statute in support of jurisdiction. Compare Kinzel v. City of N. Miami, 212 So. 2d 327 (Fla. 3d DCA 1968) (failure to timely file a verified complaint within statutory timeframe to challenge an election not excused due to the "general proposition that when a statutory action is availed of[,] the provisions for its exercise must be strictly followed").

33. In an older, but more extensive, opinion, Edgerton v. International Co., 89 So. 2d 488 (Fla. 1956), the Florida Hotel and Restaurant Commissioner commenced a proceeding to suspend or revoke a hotel and coffee shop license, and the licensee filed a petition for a writ of prohibition. A statute required the commissioner to commence any suspension and revocation proceeding within 60 days of the alleged offense. No statute defined when a proceeding was commenced, but one statute provided that a proceeding "shall be by" serving a copy of the notice on the licensee, and another statute provided that all notices to be served shall be "delivered personally . . . or by registered letter." The commissioner mailed the notice on the 59th day, and it was delivered on the 61st day.

34. The court rejected the argument that commencement occurred when the commissioner mailed the notice. Citing several opinions, the court noted that administrative authorities are creatures of statute and have only such powers that statutes confer on them, and the court is required to prohibit any exercise of power if there is "reasonable doubt" as to its "lawful existence" (citation omitted). *Id.* at 489-90.

6. The Advocate requests that the Commission delete paragraphs 32, 33, and 34 and substitute the following language (offered on page 8 of the Advocate's Exceptions to Recommended Order), for the totality of the language in RO paragraphs 32, 33, and 34:

Prior court ruling supports a liberal inclusion of facts within a sworn complaint. The Fifth District Court of Appeal in Osborne v. Commission on Ethics, 951 So.

2d 25 (Fla. 5th DCA 2007), reviewed a Commission on Ethics Order denying an award of attorney's fees from Milanick payable to Osborne because the body of the ethics complaint filed by Milanick did not contain the false allegations that formed the basis of the award. In Osborne, the false allegations were subsequently submitted by Milanick's counsel during the course of the investigation. Id. at 27. The Court considered the added false statements to be part of the complaint and reversed the Commission's Order denying the award, stating that the Commission's view of the complaint was "too restricted." Id.

7. In her fourth exception, the Advocate takes issue with paragraph 35 of the RO (which is within the portion of the RO labeled CONCLUSIONS OF LAW), and which states:

35. Reasonable doubt exists as to whether Complainant swore or affirmed to Respondent's appearance on August 15, 2011, at the special meeting of the City commission. To resolve this doubt in favor of jurisdiction is unsupported by the case law and risks ignoring the statutory requirement of a sworn complaint. If a complainant is not required to identify his complaints in a clear manner, but is allowed merely to attach a thick pile of news articles lobbying a variety of charges at public officials and meeting minutes covering a myriad of statements by the public and commission members, the sworn complaint form is a mere conduit of the unsworn complaints of the publisher and commission.

8. The Advocate requests that the Commission delete paragraph 35 and substitute the following language (offered on page 9 of the Advocate's Exceptions to Recommended Order), for the totality of the language in RO paragraph 35:

The layperson wishing to file an ethics complaint should not be held to the standard wherein he be charged with labeling the public official's wrongdoing with all possible statutory violations. The Complainant in this case attached handwritten notations and filed newspaper articles which include reference to Respondent representing his employer/business partner at a Commission meeting to grant the new tiki bar a license to sell alcohol. (Complaint p. 8) The Complaints exemplify what is required to put the subject matter and events before the Commission on Ethics under Section 112.324, Florida Statutes and the Commission Rules. The Executive Director of the Commission on Ethics is empowered to review the facts contained in the complaint, determine whether a breach of public trust exists, and order an investigation as appropriate. Rule 34-5002(1), F.A.C. In sum, a layperson should not be limited to presenting possible wrongdoing only by wording the submission as would a lawyer.

9. In her fourth exception, the Advocate takes issue with paragraph 36 of the RO (which is within the portion of the RO labeled CONCLUSIONS OF LAW), and which states:

36. As for Count IV, the Ethics Commission lacks investigative jurisdiction, under section 112.322(1), Florida Statutes, and thus lacks the jurisdiction, under section 112.322(2)(b), Florida Statutes, to issue a public report finding that Respondent committed the violation alleged in Count IV. For these reasons, DOAH lacks subject matter jurisdiction over Count IV.

10. The Advocate requests that the Commission delete paragraph 36 and substitute the following language (offered on page 9 of the Advocate's Exceptions to Recommended Order), for the totality of the language in RO paragraph 36:

In addition, the Commission on Ethics may look outside the four corners of the complaint and consider violations and parties not contemplated by the complainant. The legislature actually made this a duty of the Commission. Section 112.322, Florida Statutes states:

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 and of any other breach of public trust, as provided in s. 8(f), Art. II of the State Constitution, *including investigation of all facts and parties materially related to the complaint at issue.* (Emphasis added.)

Rule 34-5.0043, F.A.C. further explains:

(1) Facts materially related to the complaint include facts which tend to show:

* * *

(a) A separate violation of Art. II, Sec. 8, Fla. Const. or the Code of Ethics by the respondent from that alleged in the complaint which arise out of or in connection with the allegations of the complaint.

* * *

(2) Where facts materially related to the complaint are discovered by the investigator during the course of the investigation, the Executive Director shall order an investigation of them and the investigator shall include them in the investigative report. The Advocate may recommend and the Commission may order a public hearing as to those violations of the Code of Ethics which are indicated by such facts. From that point in the proceedings until final disposition of the complaint, such facts shall be treated as if they were initially alleged in the complaint at issue.

11. In her fifth exception, the Advocate takes issue with paragraph 37 to the extent that it restates prior conclusions rejected by the Commission.

12. The Advocate requests that the Commission revise paragraph 37 to delete the following language (offered on page 11 of the Advocate's Exceptions to Recommended Order) from RO paragraph 37:

"In the alternative, even if the Ethics Commission has jurisdiction . . ."

13. To the extent the ALJ has concluded that the Commission lacks investigative jurisdiction where a complaint contains allegations based in whole or in part on attached documents, where such allegations do not expressly state all possible statutory violations, and where the Commission investigation includes facts materially related to the complaint at issue, such is an erroneous view of the law. Therefore, while we adopt RO paragraphs 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37 to the extent such paragraphs make factual findings, we reject their contents, express or implied, concluding the Commission lacks investigative jurisdiction as stated above and we adopt the revisions recommended in the Advocate's exceptions.

14. In so doing, we are aware that the ALJ made a determination that the evidence in this matter was insufficient to establish that the Respondent violated Section 112.313(7)(a), Florida Statutes, and his determination is of an evidential fact nature or an "ultimate fact" nature, which we cannot now disturb. Goin v. Commission on Ethics, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995).

15. However, as the agency Constitutionally and statutorily charged with administering Section 112.3143(3)(a), our action as to paragraphs 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37 of the RO is not without good reason. While the proofs in this particular case did not rise to the level of establishing a violation of Section 112.313(7)(a), we cannot adopt as our own a view that the Commission lacks investigative jurisdiction as stated above in paragraph 13.

By substituting our view of the law for that of the ALJ, we find that the substituted view is as or more reasonable than the ALJ's view.

16. To summarize, we are aware of the requirements and limitations of Chapter 120, Florida Statutes, concerning review by an agency of a recommended order of an ALJ. Goin, supra. However, we also are aware of deference accorded an agency regarding its construction of a statute which it administers. Velez v. Commission on Ethics, 739 So. 2d 686 (Fla. 5th DCA 1999). To those ends, it is not our intent or our action to disturb any finding of fact of the ALJ; but it is our intent and our effect, under Section 120.57(1)(l), Florida Statutes, to reflect the correct legal interpretation of the Commission's jurisdiction.

Findings of Fact

The Commission on Ethics accepts and incorporates into this Final Order and Public Report 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 and Public Report the conclusions of law in the Recommended Order from the Division of Administrative Hearings.

Disposition

Accordingly, the Commission on Ethics dismisses Counts II and IV, determines that Respondent violated Section 112.313(6), as alleged in Count I, and recommends that the Governor impose a fine of \$3,000, censure, and public reprimand against the Respondent as agreed by the Respondent and the Advocate and recommended by the ALJ.

ORDERED by the State of Florida Commission on Ethics meeting in public session on
October 24, 2014.

October 29, 2014
Date Rendered

Linda M. Robison
Linda McKee Robison
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, AND SECTION 112.3241, 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, AT EITHER 325 JOHN KNOX ROAD, BUILDING E, SUITE 200, TALLAHASSEE, FLORIDA 32303 OR 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. C. Edward McGee, Attorney for Respondent
Ms. Diane L. Guillemette, Commission Advocate
Mr. Michael Casey, Complainant
The Honorable Robert E. Meale, Division of Administrative Hearings