

DIVISION OF ADMINISTRATIVE HEARINGS  
**FILED**  
DATE 3/2/2015

BEFORE THE  
STATE OF FLORIDA  
COMMISSION ON ETHICS

**DATE FILED**  
APR 30 2014  
COMMISSION ON ETHICS

In re DAVID BERRONES, )  
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Respondent. )  
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Complaint No. 11-166  
DOAH Case No. 13-1752EC  
Final Order No. 14-057

**FINAL ORDER AND PUBLIC REPORT**

This matter came before the State of Florida Commission on Ethics (Commission), meeting in public session on April 25, 2014, on the Recommended Order (RO) of an Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH) rendered on February 28, 2014.

**Background**

This matter began with the filing of an ethics complaint (which included an amendment) by Lois Jones ("Complainant"), in 2011, against David Berrones ("Respondent"). The complaint alleged that the Respondent, as a member of the Board of Directors of the Homestead Housing Authority ("Authority"), violated Sections 112.313(6) (Misuse of Public Position) and 112.313(7) (Conflicting Employment or Contractual Relationship), Florida Statutes, by orchestrating the hiring of a business associate as Executive Director of the Authority even though he was unqualified for the position; violated Section 112.313(6) by coercing the Authority's former Executive Director into hiring "his" workers for a painting project, by independently writing a contract, by conspiring with other Board members to further their personal agendas, and by traveling outside Florida at public expense to attend a meeting with no preceding Board discussion or resulting report; and violated Section 112.313(7) by having a contractual or employment relationship with the mayor of the City

of Homestead. By an order dated March 23, 2012, the Commission on Ethics' Executive Director determined that the allegations of the complaint concerning the hiring of the Executive Director of the Authority and the hiring of workers for a painting project were legally sufficient to indicate possible violations of the Section 112.313(6) and 112.313(7) and ordered Commission staff to investigate the complaint, resulting in a Report of Investigation (ROI) dated November 30, 2012. Because the ROI reported the materially-related fact that the Respondent voted to hire the Executive Director of the Authority, the Commission on Ethics' Executive Director, by an order dated December 11, 2012, ordered a supplemental investigation as to a possible violation of Section 112.3143(3)(a), Florida Statutes (Voting Conflict).

By order dated March 13, 2013, the Commission found probable cause to believe the Respondent, as an Authority board member, violated Section 112.3143(3)(a), Florida Statutes, by voting to approve the appointment of a business associate as Executive Director of the Authority. In the order, the Commission found no probable cause to believe the Respondent violated Section 112.313(6), Florida Statutes, by supporting a business associate who did not have necessary qualifications for the position of Executive Director of the Authority or by coercing the Authority into hiring "his" workers for a painting project. The Commission also found no probable cause to believe the Respondent violated Section 112.313(7), Florida Statutes, by having a contractual relationship with the Executive Director of the Authority.

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 on January 7, 2014, including the presentation of witnesses and the admission of exhibits. A transcript of the hearing was provided, and both the Respondent and the Advocate for the Commission on Ethics filed proposed recommended orders with the ALJ.

On February 28, 2014, the ALJ entered his Recommended Order (RO) recommending that the Commission issue a public report finding that the evidence presented at the DOAH hearing was insufficient to establish clearly and convincingly that Respondent violated Section 112.3143(3)(a), Florida Statutes. On March 13, 2014, the Advocate timely filed (with the Commission) exceptions to the RO; and on March 24, 2014, the Respondent filed a response to the Advocate's exceptions, in which the Respondent asked the Commission to deny the Advocate's exceptions. 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 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, the Advocate's exceptions, and the Respondent's response to the exceptions, and having heard the arguments of the Advocate and the Respondent, the Commission on Ethics makes the following rulings, findings, conclusions, and disposition:

#### **Rulings on Advocate's Exceptions**

1. In her first exception, the Advocate takes issue with paragraph 9 of the RO (which is within the portion of the RO labeled FINDINGS OF FACT), and which states:

Respondent and Mr. Hentschel did not form Xcaret for the purpose of engaging in general real estate business; rather, they formed Xcaret for the sole purpose of showing the Investment Group, who expressed their interest in investing in two particular properties (i.e., the Sixth Avenue Property and the Triangle Property), that there was a legal entity ready to accept the Investment Group's particular investment funds.

2. More particularly, the Advocate requests that the Commission reject all of the content or verbiage of paragraph 9 and substitute the following language (offered in paragraph I of the Advocate's Exceptions to Recommended Order) for the totality of the language of RO paragraph 9:

Pursuant to the Department of State Record, Xcarat [sic] Group, LLC was formed to conduct "any and all lawful business."

3. The Respondent, in his response to the exception, argues that the Advocate's exception should be rejected because RO paragraph 9 is supported by competent substantial evidence.

4. We reject the Advocate's exception as to paragraph 9 of the RO because we find that paragraph 9 is supported by competent substantial evidence.

5. In her second exception, the Advocate takes issue with paragraph 15 and an endnote referenced in paragraph 15 of the RO (which is within the portion of the RO labeled FINDINGS OF FACT), and which states:

While Xcaret was a legal entity on the date of the subject vote, the record is clear that it was not an active business enterprise on that date. [Endnote 1.]

[Endnote 1] – Petitioner elicited testimony from Respondent and Mr. Hentschel that they likely would have been willing to pursue business opportunities through Xcaret had appropriate investors been located. That speculative testimony is not relevant to the issue of whether Respondent and Mr. Hentschel were business associates at the time of the subject vote.

6. The Advocate requests that the Commission delete paragraph 15 and also delete the endnote referenced in the paragraph and substitute for paragraph 15 the following language (offered in paragraph II of the Advocate's Exceptions to Recommended Order), for the totality of the language in RO paragraph 15:

Respondent and Mr. Hentschel testified that they likely would have been willing to pursue business opportunities through Xcaret, had appropriate investors been located. A legal business entity which has not been dissolved and is merely in-between projects can still be considered an active business enterprise.

7. The Respondent, in his response to the exception, argues that the Advocate's exception is a generalized blanket statement that was not considered by the ALJ and does not apply to the facts of the case.

8. We reject the Advocate's second exception concerning paragraph 15 and the endnote referenced in paragraph 15 of the RO, because they contain findings of fact supported by competent substantial evidence.

9. Although we have rejected the Advocate's exceptions, we modify the language in paragraph 27 of the RO (which is within the section of the RO labeled CONCLUSIONS OF LAW), which states:

The law is clear that the relationship between Respondent and Mr. Hentschel must be examined to determine whether Mr. Hentschel was a business associate of the Respondent at the time the Respondent cast the subject vote. The facts of this case are clear that Xcaret, while technically still a corporation, was a defunct business enterprise. Consequently, the undersigned concludes that Mr. Hentschel was not a business associate of Respondent at the time Respondent cast the suspect vote.

10. To the extent that the ALJ has concluded that an ongoing legal entity organized to do commercial business cannot be considered an active business enterprise unless it is actively conducting a particular project, and thus that owners of its non-publicly-traded stock are not "business associates," such is an erroneous view of the law. Therefore, while we adopt RO paragraph 27 to the extent that it makes factual findings, we reject its contents, express or implied, that conclude that an entity formed for commercial purposes must have an active project in order to be a "business enterprise."

11. 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 was a business associate of the Executive Director of the Housing Authority and, therefore, any finding as to the Executive Director's special private gain or loss was moot and that this 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).

12. However, as the agency Constitutionally and statutorily charged with administering Section 112.3143(3)(a), our action as to paragraph 27 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 112.3143(3)(a), we cannot adopt as our own a view that an ongoing legal business entity formed for commercial purposes is not a business enterprise during times when it is inactive as to particular projects, as whether or not such a business entity is actively doing business, it is still a business enterprise. 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.

13. 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 the 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)(1), Florida Statutes, to adopt a view of the meaning of "business enterprise" that differs from the legal conclusion indicated by the ALJ in the RO.

### **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 finds that the Respondent did not violate Section 112.3143(3)(a), Florida Statutes, regarding his vote to hire an Executive Director of the Housing Authority.



ORDERED by the State of Florida Commission on Ethics meeting in public session on

April 25, 2014.

April 30, 2014  
Date Rendered

Morgan R. Bentley  
Morgan R. Bentley  
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 325 JOHN KNOX ROAD, BUILDING E, SUITE 200, TALLAHASSEE, FLORIDA 32303); 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. Craig C. Minko, Attorney for Respondent  
Mr. Scott Bassman, Attorney for Respondent  
Ms. Diane L. Guillemette, Commission Advocate  
Ms. Lois Jones, Complainant  
The Honorable Claude B. Arrington, Division of Administrative Hearings