

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re CHARLES ERICKSEN, JR.,)
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Respondent.)
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_____)

Complaint No. 14-232
DOAH Case No. 16-5246FE

Final Order No. 17-126

FINAL ORDER DETERMINING COSTS AND ATTORNEY FEES

This matter came before the State of Florida Commission on Ethics ("Commission"), meeting in public session on December 8, 2017, on the Recommended Order ("RO") of an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH") rendered on September 21, 2017.

Background

The RO resulted from litigation at DOAH pursuant to the Commission's transmittal to DOAH of Charles Ericksen, Jr.'s (the respondent in Complaint No. 14-232 and the petitioner as to costs and fees) petition for costs and attorney fees filed against Kimberle B. Weeks (the complainant in the Complaint and the respondent as to costs and fees). After entry of the RO, the parties (Ericksen and Weeks) had 15 days to file with the Commission exceptions to the RO. Weeks untimely filed exceptions (on October 9, 2017), Ericksen filed no exceptions, and Ericksen filed a response to Weeks' exceptions. The RO chronicles the course of the proceedings at DOAH and is replete with references, supported extensively in the record of the proceedings, as to the ALJ's affording Weeks opportunities to be heard and participate in the proceedings.¹ Both

¹ The record shows that Weeks did not appear at the DOAH hearing.

Ericksen and Weeks were notified of the date, time, and place of the Commission's final consideration of this costs/fees matter; and both were given the opportunity to make argument during the Commission's 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, the complete record of the DOAH costs/fees proceeding, Weeks' exceptions, and Ericksen's response to Weeks' exceptions, and having heard the arguments of Ericksen and Weeks at its final consideration of this matter, the Commission on Ethics makes the following rulings, findings, conclusions, and determination:

Ruling on Weeks' Exceptions

1. Much of the content of Weeks' "exceptions,"² which were untimely filed, substantively do not amount to exceptions within the meaning of Section 120.57(1), Florida Statutes, in that the content amounts to argument and commentary concerning matters not germane to an agency's treatment of a recommended order from an administrative law judge. Nevertheless, we address, below, Weeks' untimely filing.³

² Weeks' exceptions (filed October 9, 2017), which are titled EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE RECOMMENDED ORDER AND REQUEST FOR ADDITIONAL 15 DAY EXTENTION TO FILE EXCEPTIONS DUE TO EMERGENCY HOSPITAL SITUATION IN SEPTEMBER AND OCTOBER 2017 RESULTING IN THE UNEXPECTED RECOMMENDED ORDER BEING RECEIVED MORE THAN A WEEK AFTER IT WAS MAILED LIMITING RESPONSE TIME, do not, in the main, comply with Section 120.57(1)(k), Florida Statutes, which provides that "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." Weeks' request for an extension of time to file additional exceptions is denied because it was made after the 15-day period to file exceptions had expired, and because there is no authority for such an extension.

³ Weeks' "exceptions" (filed October 9, 2017) are 11 pages (numbered 1-11), some of the content is in unnumbered paragraphs (or blocks of text), and some of it is in paragraph-like fashion

2. The first block of text on page 1 of the exceptions is rejected. It is untimely (late-filed), it does not comply with Section 120.57(1)(k), Florida Statutes, and it makes but an amorphous criticism of the RO; and the RO is based on competent substantial evidence derived from proceedings which complied with the essential requirements of law.

3. The second block of text, which begins on page 1 and ends on page 2, argues, essentially, that Ericksen is not entitled to costs and fees because, in Weeks' view, Ericksen incurred no "out-of-pocket" costs and fees due to the County having related insurance; and apparently argues that the RO is defective because Ericksen's petition did not identify the exact dollar amount he sought in recovery. This block of text is rejected. It is untimely (late-filed); it does not comply with Section 120.57(1)(k); out-of-pocket payment of costs/fees is not essential under the costs/fees statute, see Couch v. Commission on Ethics, 617 So. 2d 1119 (Fla. 5th DCA 1993); recital of the exact amount of costs/fees in a petition is an impossibility under the costs/fees statute which provides for an award to include costs/fees incurred in proving entitlement to the costs/fees incurred in defending the ethics complaint; and the award in the RO is based on competent substantial evidence derived from proceedings which complied with the essential requirements of law.

4. In paragraph 1 of the exceptions, which begins on page 2 of the exceptions, Weeks argues that she is not subject to costs/fees because she filed the ethics complaint in her capacity as Supervisor of Elections and not in her capacity as a private citizen. This exception is rejected. It is untimely (late-filed); it does not comply with Section 120.57(1)(k); and there is no legal basis

(numbered 1-48). In addressing these, this final order will refer to the page numbering, the paragraph-like numbering, or related referencing.

for her Supervisor capacity versus private capacity argument, especially in view of the punishment purpose of the costs/fees statute as recognized in Couch, supra.

5. In paragraph 2, Weeks makes the same argument as in paragraph 1, adds a claim that she is insulated from a costs/fees award due to a claim of "qualified immunity," and makes reference to matters of background in this matter or of trial-level argument or potential argument which was made or could have been made before the ALJ. This exception is rejected for the reasons paragraph 1 is rejected; and it is rejected because we are aware of no immunity available to Weeks in the context of this costs/fees matter.

6. Paragraph 3 is redundant to paragraphs 1 and 2 and is rejected for the reasons paragraphs 1 and 2 are rejected.

7. Paragraph 4 is redundant to paragraph 1 and is rejected for the reasons paragraph 1 is rejected.

8. Paragraph 5 argues that a decision of the District Court of Appeal involving ethics complainants other than Weeks should preclude a costs/fees award against Weeks; and makes "out-of-pocket" versus insurance coverage arguments similar to arguments addressed, above. Paragraph 5 is rejected for the reasons the out-of-pocket arguments are rejected, above; and the District Court of Appeal case is different from, and does not control, this matter.

9. Paragraph 6 alleges communication between the ALJ and Weeks concerning mailings of the DOAH litigation in this matter. Paragraph 6 is rejected. It is untimely (late-filed), it does not comply with Section 120.57(1)(k), and the record shows that the RO was derived from proceedings which complied with essential requirements of law and that the ALJ afforded Weeks abundant opportunity to participate in the DOAH proceedings.

10. Paragraph 7 is similar to paragraph 6 and is rejected for the reasons paragraph 6 is rejected.

11. Paragraph 8 is like paragraphs 6 and 7 and is rejected for the reasons paragraphs 6 and 7 are rejected.

12. Paragraph 9 is, again, the Supervisor versus private citizen argument. It is rejected for the reasons stated above.

13. Paragraph 10 is blank, containing nothing; apparently it is a typographical error.

14. Paragraph 11 takes issue with the location of the DOAH hearing. It is rejected. It is untimely (late-filed), it does not comply with Section 120.57(1)(k), the location of the hearing was not improper, and the record is replete with the ALJ's efforts toward fostering Weeks' participation in the DOAH litigation.

15. Paragraph 12 may be making, yet again, the Supervisor versus private citizen argument; and it states that Weeks resigned from her Supervisor position. It is rejected as to the Supervisor versus private citizen argument for the reasons stated, above; and it is rejected as to the resignation statement because it is untimely (late-filed) and does not comply with Section 120.57(1)(k), and since resignation of an ethics complainant is not germane to a costs/fees matter.

16. Paragraph 13 takes issue with the level of participation afforded ethics complainants in probable cause determinations on ethics complaints. Paragraph 13 is rejected. It is untimely (late-filed); it does not comply with Section 120.57(1)(k); and Weeks' limited participation in the probable cause determination is not germane to the DOAH costs/fees proceeding in which, as shown by the record, Weeks was given ample opportunity to participate.

17. Paragraph 14 argues that Weeks did not receive the same notice from the Commission that Ericksen received as to the Commission's consideration of whether to forward

Ericksen's costs/fees petition to DOAH for an administrative hearing, thereby disadvantaging Weeks. Paragraph 14 is rejected. It is untimely (late-filed); it does not comply with Section 120.57(1)(k); Weeks was provided notice of the consideration; and Weeks had full opportunity to present her case before the ALJ at DOAH.

18. Paragraph 15 takes issue with the preliminary investigation of the ethics complaint prior to the probable cause determination. Paragraph 15 is rejected. It is untimely (late-filed); it does not comply with Section 120.57(1)(k); and the nature of the preliminary investigation does not disturb the RO, which is based on competent substantial evidence derived from proceedings which complied with the essential requirements of law.

19. Paragraph 16 is redundant to paragraph 15. It is rejected for the reasons paragraph 15 is rejected.

20. Paragraph 17 states that the ALJ consolidated cases other than Weeks' case with Weeks' case and later severed the cases. Paragraph 17 is rejected. It is untimely (late-filed); it does not comply with Section 120.57(1)(k); the proceedings at DOAH involving Weeks complied with the essential requirements of law; and the RO is based on competent substantial evidence.

21. Paragraph 18 takes issue with scheduling and hearing location decisions of the ALJ. It is rejected for the reasons paragraph 17 is rejected.

22. Paragraph 19 is redundant or similar to paragraph 18; it is rejected for the reasons paragraph 18 is rejected.

23. Paragraph 20 refers to one of the other costs/fees cases consolidated in part with Weeks' case involving Ericksen, again makes the "out-of-pocket argument," and makes argument possibly suited to an ALJ DOAH hearing. Paragraph 20 is rejected. It is untimely (late-filed); it does not comply with Section 120.57(1)(k); the out-of-pocket argument is rejected for the reasons

set forth, above; the Commission's review under Section 120.57(1), Florida Statutes, cannot be a retrial of the case; and the RO is based on competent substantial evidence derived from proceedings which complied with the essential requirements of law.

24. Paragraph 21 takes issue with the statement in the RO that respondents in the costs/fees cases refused to participate in certain DOAH discovery and, again, makes the Supervisor versus private citizen argument. Paragraph 21 is rejected. It is untimely (late-filed); it does not comply with Section 120.57(1)(k); the record shows that discovery was not participated in; the Supervisor versus private citizen argument is rejected, as above; and the RO is sound under the applicable statutory requirements.

25. Paragraph 22 makes "out-of-pocket" versus insurance carrier arguments, as above; and it apparently takes issue with various proofs or evidence presented by Ericksen. It is rejected for the reasons stated above regarding the out-of-pocket argument; and the RO is sound under the applicable statutory requirements.

26. Paragraph 23 is a conglomeration of procedural, evidential, and "out-of-pocket" arguments made, above. It is rejected for the reasons those, or similar, arguments are rejected, above.

27. Paragraph 24 comments on records provided to the ALJ. It is rejected. The RO is sound under applicable statutory requirements (is based on competent substantial evidence derived from proceedings which complied with the essential requirements of law).

28. Paragraph 25 takes issue with the ALJ's consolidation of costs/fees cases, including Weeks', apparently based on Weeks' Supervisor versus private citizen capacity argument, above. It is rejected for the reasons stated, above.

29. Paragraph 26 makes statements or points that Weeks might have offered at the DOAH hearing, had she attended. It is rejected. It is untimely (late-filed); it does not comply with Section 120.57(1)(k); it is not germane to the Commission's review of a recommended order; and the RO is based on competent substantial evidence derived from proceedings which complied with the essential requirements of law.

30. Paragraph 27 contains various statements attacking the contents of the Commission's preliminary investigation report and concludes that the Commission was misled into dismissing the ethics complaint against Ericksen, and related complaints, for lack of probable cause. It is rejected for the reasons paragraph 26 is rejected.

31. Paragraph 28 refers to the Sunshine Law (Florida's open meetings law); and Weeks states her view of the law as to her as a Supervisor. It is rejected for the reasons paragraph 26 is rejected.

32. Paragraph 29 questions the recommendation of the Commission's Advocate that the Commission find no probable cause on the complaint Weeks filed against Ericksen. It is rejected for the reasons paragraph 26 is rejected.

33. Paragraph 30 discusses material or evidence Weeks believes is relevant to the Commission's preliminary investigation and the ALJ's decision. It is rejected for the reasons paragraph 26 is rejected.

34. Paragraph 31 states that Ericksen's attorney submitted a proposed recommended order that was accepted by the ALJ and was considered. It is rejected. Such submission and acceptance does not render the RO unsound under applicable statutory criteria.

35. Paragraph 32 takes issue with the ALJ's finding (in paragraph 18 of the RO) that Weeks knew allegations in her complaint against Ericksen were false or were filed with reckless

disregard for whether they were true or false. This exception is rejected. It is untimely (late-filed); and paragraph 18 of the RO is a valid finding based on competent substantial evidence derived from proceedings which complied with the essential requirements of law.

36. Paragraph 33 takes issue with evidential findings of the ALJ (in paragraph 20 of the RO). This exception is rejected for the reasons paragraph 32 is rejected.

37. Paragraph 34 is like paragraph 33, taking issue with evidential findings of the ALJ (in paragraph 24 of the RO). It is rejected for the reasons paragraph 32 and 33 are rejected.

38. Paragraph 35 apparently seeks to impugn evidential findings of the ALJ. It is rejected. It is untimely (late-filed); it does not comply with Section 120.57(1)(k); and it is rejected for the reasons paragraphs 32, 33, and 34 are rejected.

39. Paragraph 36 takes issue with findings of the ALJ (in paragraph 23 of the RO). It is rejected for the reasons paragraph 32, and similar paragraphs of the exceptions, are rejected.

40. Paragraph 37 apparently seeks to impugn findings of the ALJ. It is rejected for the reasons paragraph 35 is rejected.

41. To the extent paragraph 38 of the exceptions attacks the RO, it is rejected for the reasons paragraph 35 and 37 are rejected.

42. Paragraph 39 is rejected similarly to the rejection of paragraph 38.

43. Paragraph 40 takes issue with findings of the ALJ (in paragraph 28 of the RO). It is rejected for the reasons paragraph 34, and similar paragraphs of the exceptions, are rejected.

44. Paragraph 41 takes issue with paragraph 30 of the RO. It is rejected for the reasons paragraph 40 is rejected.

45. Paragraph 42 takes issue with paragraph 31 of the RO. It is rejected for the reasons paragraph 41 and similar paragraphs of the exceptions are rejected.

46. Paragraph 43 is similar to paragraph 37 and others; it is rejected for the reasons paragraph 37 and similar paragraphs of the exceptions are rejected.

47. Paragraph 44 is similar to paragraph 43 and others; it is similarly rejected.

48. Paragraph 45 is similar to paragraph 44 and others; it is similarly rejected.

49. Paragraph 46 is, similar to other paragraphs of the exceptions, an argument as to findings of the ALJ. It is rejected because, as with similar paragraphs of the exceptions, it is untimely (late-filed); it does not comply with Section 120.57(1)(k); and the RO is based upon competent substantial evidence derived from proceedings which complied with the essential requirements of law.

50. Paragraph 47 makes statements akin to a closing argument at a trial or hearing and takes issue with the ALJ's RO. It is rejected for the reasons paragraph 46 is rejected.

51. Paragraph 48 takes issue with findings of the ALJ on page 25 of the RO. This paragraph is rejected. It is untimely (late-filed); and the findings are supported by competent substantial evidence derived from proceedings which complied with the essential requirements of law.

Findings of Fact

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

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.

Determination

Accordingly, the Commission on Ethics determines that Kimberle B. Weeks filed a complaint with the Commission against Charles Ericksen, Jr., a public officer or employee, with a malicious intent to injure the reputation of Ericksen by filing the complaint with knowledge that the complaint contained one or more false allegations or with reckless disregard for whether the complaint contained one or more false allegations of fact material to a violation of Part III, Chapter 112, Florida Statutes; and finds that Weeks is liable for costs plus reasonable attorney fees incurred in defense of Ericksen, including the costs and reasonable attorney fees incurred in proving entitlement to and the amount of costs and fees, in the total amount of \$68,888.11. Further, the Commission recognizes that under Section 112.317(7), Florida Statutes, that if Weeks fails to pay such costs and fees voluntarily within 30 days of rendition of this Final Order, the Commission shall forward information of lack of voluntary payment 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.

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 8, 2017.

December 13, 2017
Date Rendered


Michelle Anchors
Chair, Florida Commission on Ethics

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. Mark Herron and Mr. Albert T. Gimbel, Attorneys for Charles Ericksen, Jr.
Ms. Kimberle B. Weeks
The Honorable Suzanne Van Wyk, Division of Administrative Hearings