

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re ALBERT J. HADEED,)
)
 Respondent.)
)
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)
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Complaint No. 14-233
DOAH Case No. 16-5247FE

Final Order No. 17-127

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 August 31, 2017.

Background

The RO resulted from litigation at DOAH pursuant to the Commission's transmittal to DOAH of Albert J. Hadeed's (the respondent in Complaint No. 14-233 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 (Hadeed and Weeks) had 15 days to file with the Commission exceptions to the RO. Weeks untimely filed exceptions (on September 18, 2017), made a second untimely filing of exceptions on October 2, 2017, Hadeed filed no exceptions, and Hadeed 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 Hadeed 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.

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

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, Hadeed's response to Weeks' exceptions, and Weeks' additional untimely exceptions, and having heard the arguments of Hadeed 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 September 18, 2017), which are titled PARTIAL SUBMISSION OF EXCEPTIONS AND REQUEST FOR EXTENSION TO FILE ADDITIONAL EXCEPTIONS DUE TO HURRICANE IRMA, 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.

2. On page 1, and continuing through the middle of page 2, of her exceptions, Weeks argues that no attorney fees and costs were incurred in defense of Hadeed because the ethics complaint was submitted to Flagler County's insurance carrier, thus eliminating the need for Hadeed to pay costs and fees in his defense "out of pocket"; that the petition for costs and fees did not state the exact dollar amount of costs and fees that were sought; and that an attorney for Hadeed may have provided services for the insurance carrier at a rate less than that he charges others. This exception is rejected. It is untimely (late-filed), it does not clearly identify the disputed portion of the RO by page number or paragraph under Section 120.57(1)(k), and it does not include appropriate or specific citations to the record under Section 120.57(1)(k). Also, an entitlement to costs and attorney fees under the provision in the Code of Ethics, currently codified in Section 112.317(7), Florida Statutes, does not require that the public official have paid fees from his or her own pocket; rather, a purpose of the statute is to punish those who file malicious complaints. Couch v. Commission on Ethics, 617 So. 2d 1119 (Fla. 5th DCA 1993). In addition, the petition contains specifics as to the incurrence of and amount of costs and fees; and Section 112.317(7) provides for "costs plus reasonable attorney fees incurred in the defense of the person complained against, including the costs and reasonable attorney fees incurred in proving entitlement to and the amount of costs and fees." Further, the record shows that the RO is based on competent substantial evidence supporting determinations by the ALJ that the requirements of Section 112.317(7) were met, and the record shows that the proceedings on which the findings are based complied with the essential requirements of law, irrespective of Weeks' speculation as to what fee amounts one of

³ Weeks' "exceptions" (filed September 18, 2017) are 12 pages (numbered 1-12 in the bottom left corner), some of the content is in unnumbered paragraphs (or blocks of text), and some of it is in paragraph-like fashion (numbered 1-17). In addressing these, this final order will refer to the bottom left corner numbering, the paragraph-like numbering, or related referencing.

Hadeed's attorneys might or might not have charged others versus what he might or might not have charged regarding the County's insurance carrier.

3. In paragraphs 1, 2, 3, and 4 (on pages 2 and 3) of her exceptions, Weeks apparently argues that she is not subject to costs and fees because she filed the complaint in her capacity as Flagler County Supervisor of Elections and not in her capacity as a private citizen; that she is not subject to costs and fees because she, like other complainants in Commission proceedings, is not and was not permitted to participate in Commission probable cause hearings held on ethics complaints they file; and that she is not subject to costs and fees because, in her view, the report of investigation of the ethics complaint prepared by the Commission's investigator was incomplete, biased, or based on inaccurate or incomplete information. This exception is rejected. It is untimely (late-filed), it does not clearly identify the disputed portion of the RO by page number or paragraph under Section 120.57(1)(k), and it does not include appropriate or specific citations to the record under Section 120.57(1)(k). Further, assuming in argument that the exception identifies a legal basis for the exception under Section 120.57(1)(k) [her argument that she is not subject to costs and fees as Kimberle Weeks, individual, as opposed to Kimberly Weeks, Supervisor of Elections], we see no legal basis for her position, especially in view of the punishment purpose of the statute as recognized in Couch, supra. The arguments taking issue with Commission processes concerning the handling of ethics complaints against public officers and a complainant's limited participation in that process are not germane to the costs/fees proceeding involving Weeks which resulted in the RO, a proceeding in which, as abundantly demonstrated by the record, Weeks was given ample opportunity to participate. Weeks' view as to the report of investigation in the ethics complaint against Hadeed is not germane to the findings and conclusions of the RO; and the RO

is supported by competent substantial evidence and is based on proceedings which complied with the essential requirements of law.

4. In paragraphs 5 and 6 (on page 3) of her exceptions, Weeks appears to argue that the RO assigns to her costs and fees incurred in defense of ethics complaint respondents other than Hadeed; recites in an unfocused manner claims or information apparently related to some of the contents of the ethics complaint she filed against Hadeed; and mentions previous discussions in a public meeting of the Commission related to participation by complainants in Commission proceedings. This exception is rejected. It is untimely (late-filed), it does not clearly identify the disputed portion of the RO by page number or paragraph under Section 120.57(1)(k), and it does not include appropriate or specific citations to the record under Section 120.57(1)(k). Further, there is competent substantial evidence in the record of the DOAH proceedings in this matter to support the recommendation of the costs/fees award against Weeks for costs/fees incurred in defending against the ethics complaint she filed against Hadeed and in proving entitlement of, and the amount of, those costs and fees, as authorized by Section 112.317(7). Additionally, the recommended award against Weeks is based on proceedings which complied with essential requirements of law. The unfocused content of paragraph 5 does not effectively impugn the RO; and paragraph 6's mention of a previous Commission public session discussion item is not relevant to review of the RO under Section 120.57(1)(l).

5. In paragraphs 7, 8, 9, 11, 13, 14 (pages 3, 4, and 5) of her exceptions, Weeks takes issue with the ALJ's selection of the venue for the costs/fees hearing, Week's participation (or lack of participation) in discovery and other aspects of the costs/fees litigation, and related matters concerning the trial of this matter at DOAH. This exception is rejected. It is untimely (late-filed), it does not comprehensively identify the disputed portion of the RO by page number or paragraph

under Section 120.57(1)(k), and it does not include appropriate or specific citations to the record under Section 120.57(1)(k). Additionally, the record of this matter is replete with material supporting the ALJ's constant attempts to foster Weeks' participation in the litigation; and supporting Weeks' refusal to make use of the abundant due process offered to her by the ALJ. Further, the record demonstrates that the holding of the costs/fees DOAH hearing in this matter, as to location and manner, as well as the conduct of the balance of the proceedings, did not depart from the essential requirements of law. To the extent, if any, that this portion of Weeks' exceptions takes issue with any findings of fact of the RO, such are supported by competent substantial evidence.

6. In paragraph 10 (page 4) of her exceptions, Weeks again seeks to distinguish between herself as a natural person and her office-holding as a Supervisor of Elections, arguing that this purported distinction means that she cannot be the subject of a costs/fees award. This exception is rejected. It is untimely (late filed); and it is rejected for the reasons set forth, above, in paragraph 3 of this Final Order.

7. In paragraph 12 (page 4) of her exceptions, Weeks mentions DOAH occurrences related to a fees petition against her by another Flagler County official which was, for a time, consolidated at DOAH with the handling of Hadeed's petition. This exception is rejected. It is untimely (late-filed), it is not germane to Hadeed's petition, and its content as to the Weeks (natural person), versus Weeks (Supervisor), argument and the "pay out-of-pocket fees" argument are rejected, for the reasons discussed, above, in this Final Order. Further, to the extent, if any, this portion of Weeks' exceptions challenges the findings of the RO, such findings are supported by competent substantial evidence derived from proceedings which complied with the essential requirements of law.

8. In paragraphs 13 and 14 (page 5) of her exceptions, Weeks again takes issue with the ALJ's conducting of the litigation and Weeks' participation, or lack thereof, in discovery and other aspects of the litigation. This exception is rejected. It is untimely (late-filed); and it is rejected for the reasons set forth in paragraph 5, above, of this Final Order.

9. In paragraph 15 (page 5) of her exceptions, Weeks references a motion made by another costs/fees respondent in a DOAH matter similar to hers. This exception is rejected. It is untimely (late-filed). In addition, it does not comply with the requirements of Section 120.57(1)(k). Further, denial of the other respondent's motion does not disturb the competent substantial evidence and proceedings which complied with the essential requirements of law which underlie the findings of the ALJ in Weeks' matter.

10. In paragraph 16 (page 5) of her exceptions, Weeks argues that expert testimony introduced by Hadeed regarding attorney fees should not be relied upon because, in Weeks' view, the expert did not represent the County's insurance carrier, the carrier did not request fees, and Hadeed did not pay "out-of-pocket" costs and fees. This exception is rejected. It is untimely (late-filed). In addition, its "out-of-pocket" component is rejected for the reasons discussed, above, in this Final Order, citing Couch, supra. Further, the expert's testimony is part of the competent substantial evidence underlying the findings of the RO; and the proceedings producing the findings complied with the essential requirements of law.

11. In paragraph 17 (pages 5 and 6) of her exceptions, Weeks takes issue with the ALJ allowing Hadeed to submit supplement exhibits relative to costs and fees incurred after the DOAH hearing, arguing that the exhibits were "unexpected" by her and arguing that the contents of the exhibits should have been disclosed in the petition for costs/fees. This exception is rejected. It is untimely (late-filed). Further, additional costs/fees incurred after a DOAH hearing cannot be

known with specificity until after the hearing; and such additional costs/fees are provided for under the costs/fees statute. Milanick v. Osborne, 6 So. 3d 729 (Fla. 5th DCA 2009); Kaminsky v. Lieberman, 675 So. 2d 261 (Fla. 4th DCA 1996). Again, the "out-of-pocket" argument is rejected, as stated, above, in this Final Order; Couch, supra. All findings of the RO are supported by competent substantial evidence, the proceedings complied with the essential requirements of law, and the costs/fees statute and caselaw provide for costs/fees incurred before, during, and after a DOAH costs/fees hearing.

12. In her exception (beginning on page 6, under the heading EXCEPTIONS ON FINDING OF FACT, and going through the first block of text on page 7, Weeks again makes the Weeks, individual, versus Weeks, Supervisor, argument; apparently argues that because the Commission, not a complainant, has the authority to legally conclude whether a public official ethics complaint respondent violated an ethics law, that a complainant, especially a non-lawyer complainant (e.g., herself) cannot be held liable for costs/fees under Section 112.317(7); argues that awarding costs/fees for officials accused in ethics complaints deters citizens from holding officials accountable; restates contents of her ethics complaint against Hadeed and the Commission's Report of Investigation of her complaint; and gives her view of the contents of her complaint versus the contents of the Report. This exception is rejected. It is untimely (late-filed); and it does not comply with Section 120.57(1)(k). In addition, the Weeks, individual, versus Weeks, Supervisor, argument is dealt with, above, in this Final Order; the Commission's responsibility to make the ultimate legal determination of violation/no violation as to the ethics laws is not controlling as to whether an ethics complaint (filed up-front, at the beginning of the process) contains false or reckless allegations of *fact* within the meaning of Section 112.317(7); the focus of the statute is, indeed, on deterrence of malicious filings, via punishment of such a filer

(Couch, supra); and Weeks' recital of contents, or her view, of her complaint and the Commission's Report of Investigation does not disturb the competent substantial evidence which underlies the RO, which resulted from proceedings which complied with the essential requirements of law.

13. In her exception (beginning with the second block of text on page 7, through the second block of text on page 9), Weeks apparently takes issue with findings of fact in the RO, when compared to contents of her ethics complaint or her view of what the ALJ should have found, or argues that the ALJ should have made findings of fact in addition to the findings of the RO. This exception is rejected. It is untimely (late-filed). In addition, the ALJ's findings in the RO are supported by competent substantial evidence; and the proceedings yielding the RO complied with the essential requirements of law. Further, as stated at the beginning of this Final Order, factual determinations are the province of the administrative law judge. In essence, this exception amounts to trial-level argument that Weeks had the opportunity to make, but did not make, before the ALJ; its content is not germane to the Commission's review of the RO under Section 120.57(1)(l).⁴

14. In her exception (beginning with the third block of text on page 9 and continuing through the first block of text on page 10), Weeks argues that the Commission's Report of Investigation on the underlying complaint against Hadeed and the Commission Advocate's recommendation on the probable cause issue on the complaint were based on what she views as incomplete information. Therefore, Weeks argues, the Commission and the ALJ were misled. This exception is rejected. It is untimely (late-filed) and it does not meet the requirements of Section 120.57(1)(k). Further, to the extent, if any, that it takes exception to findings of fact of the

⁴ The RO and the transcript of the DOAH hearing reflect that Weeks did not appear at the hearing.

ALJ in the RO, said findings are based on competent substantial evidence from proceedings which complied with the essential requirements of law.

15. In her exception (in the second and third blocks of text on page 10, under the heading: Addressing the section of the Recommended Order Titled "Weeks' Knowledge of the falsity of Her Sworn Allegation"), Weeks takes issue with findings of fact 16 and 27 of the RO, arguing that the findings are "misleading" or arguing as to their content. This exception is rejected. It is untimely (late-filed). Further, the findings are based on competent substantial evidence derived from proceedings which complied with the essential requirements of law.

16. In her exception (in the last block of text on page 10), Weeks argues that finding of fact 28 of the RO is incorrect. In that finding, the ALJ determined that the allegations in Weeks' complaint against Hadeed were known by Weeks to be false or were filed by Weeks with reckless disregard for whether they were true or false. This exception is rejected. It is untimely (late-filed). Further, the finding of the ALJ is based on competent substantial evidence resulting from proceedings which complied with the essential requirements of law. In addition, to the extent the finding is one of ultimate fact, such also is the province of the trier of fact (hearing officer/ALJ); Goin v. Commission on Ethics, 658 So. 2d 1131 (Fla. 1st DCA 1995).

17. In her exception (in the first three blocks of text on page 11, under the heading: Addressing the Malicious Intent to Injure Reputation Claim), Weeks apparently takes issue with paragraph 29 of the RO, which states: Whether the claims against public officials were "motivated by the desire to [impugn character and injure reputation]," is a question of fact And, in this exception, Weeks goes on to make various arguments suited to trial offerings of evidence, final argument to the ALJ, or a proposed recommended order to the ALJ. This exception is rejected. It is untimely (late-filed) and it does not comply with Section 120.57(1)(k). In addition, paragraph

29 is a correct statement of the law; see Brown v. State, Commission on Ethics, 969 So. 2d 553 (Fla. 1st DCA 2007), cited in paragraph 29. Further, the proceedings underlying paragraph 29 (which, in substance, is a conclusion of law) complied with the essential requirements of law.

18. In her exception in the last block of text on page 11, Weeks takes issue with a portion (relating to Weeks' husband's concern about influence of another person on Weeks) of finding of fact 33 of the RO. This exception is rejected. It is untimely (late-filed) and finding of fact 33 is supported by competent substantial evidence resulting from proceedings which complied with the essential requirements of law.

19. In her exception in the first block of text on page 12, Weeks makes argument suited to a DOAH proceeding and which is not relevant to the Commission's review of the RO under Section 120.57(1)(l); for this reason, it is rejected. It also is rejected because it is untimely (late-filed) and because it does not comply with Section 120.57(1)(k). To the extent, if any, this exception goes to findings of fact in the RO, the same are supported by competent substantial evidence derived from proceedings complying with the essential requirements of law.

20. In her exception in the second block of text on page 12, Weeks takes issue with the portion of paragraph 37 of the RO, which found that Weeks complaint alleged that Hadeed conspired to cover up felonious conduct by a member of the County Commission; and she makes various evidential/factual assertions or conclusions. This exception is rejected. It is untimely (late-filed). Further, paragraph 37 is supported by competent substantial evidence derived from proceedings which complied with the essential requirements of law. To the extent this exception argues that the ALJ ignored evidence or should have made other or additional findings of fact, it is rejected on the basis that evidential determinations are the province of the ALJ.

21. In her last exception (near the bottom of page 12), Weeks takes issue with the evidence underlying the RO and the conduct of the proceedings underlying the RO. This exception is rejected. It is untimely (late-filed) and it does not comply with Section 120.57(1)(k). In addition, the findings of fact of the RO are based on competent substantial evidence, the RO's legal conclusions are sound, and the RO was derived from proceedings which complied with the essential requirements of law.

Ruling on Weeks' Second Filing of Exceptions

1. Weeks' second filing of exceptions (late-filed on October 2, 2017), titled PARTIAL SUBMISSION OF EXCEPTIONS AND 2ND REQUEST FOR EXTENSION TO FILE ADDITIONAL EXCEPTIONS DUE TO MEDICAL EMERGENCY⁵ is rejected. It is untimely (late-filed); it does not comply with Section 120.57(1)(k), Florida Statutes; it is redundant to her exceptions late-filed on September 18, 2017, or do not raise any points or issues that are materially different from the September 18 exceptions, and, thus, also is rejected for the reasons her September 18 exceptions are rejected; and, to the extent, if any, the October 2 exceptions raise any point or issue materially different from the September 18 exceptions, we find that it does not disturb the RO, which is based on competent substantial evidence derived from proceedings which complied with the essential requirements of law.⁶

⁵ Consisting of 4 pages without page numbering, a fax cover sheet, a copy of a District Court of Appeal decision, and a one-page DOAH docket screen shot.

⁶ Weeks' request for additional time to file yet more 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.

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.

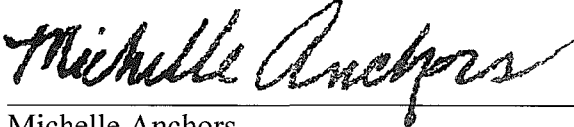
Determination

Accordingly, the Commission on Ethics determines that Kimberle B. Weeks filed a complaint with the Commission against Albert J. Hadeed, a public officer or employee, with a malicious intent to injure the reputation of Hadeed 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 Hadeed, including the costs and reasonable attorney fees incurred in proving entitlement to and the amount of costs and fees, in the total amount of \$60,682.40. 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 Albert J. Hadeed
Ms. Kimberle B. Weeks
The Honorable Suzanne Van Wyk, Division of Administrative Hearings