

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

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DATE FILED

OCT 26 2011

COMMISSION ON ETHICS

In re **DIANE V. BENDEKOVIC,**)

Respondent.)

) DIVISION OF
) ADMINISTRATIVE
) HEARINGS
)
)
)

Complaint No. 10-152
DOAH Case No. 11-1238FE
COE Final Order No. 11-138

FINAL ORDER GRANTING ATTORNEY'S FEES AND COSTS

On August 29, 2011, an Administrative Law Judge ("ALJ") from the Division of Administrative Hearings ("DOAH") submitted to the Commission and all parties her Recommended Order, a copy of which is attached hereto and incorporated herein, recommending that the Commission enter a Final Order granting Diane V. Bendekovic's Petition for attorney's fees and costs. The matter is now before the Commission for final agency action.

BACKGROUND

This matter began with the filing of a complaint on September 27, 2010, by Robert W. Meddoff alleging that Diane V. Bendekovic, Councilwoman for the City of Plantation and candidate for Mayor, had violated the Code of Ethics for Public Officers and Employees. An amendment to the complaint was filed on October 26, 2010, and, after the complaint was found legally sufficient, an investigation was undertaken. On February 9, 2011, the Commission on Ethics entered an order finding no probable cause to believe that the Respondent had violated Section 112.313(6), Florida Statutes, thereby dismissing the complaint. Thereafter, Bendekovic timely filed a Fee Petition against Meddoff pursuant to Section 112.317(7), Florida Statutes, and

the matter was forwarded to DOAH for assignment of an ALJ to conduct a formal hearing and prepare a recommended order. The formal hearing was held on July 25, 2011. A transcript was filed with the ALJ and both parties timely filed proposed recommended orders. The ALJ's Recommended Order was transmitted to the Commission and to the parties on August 29, 2011, and the parties were notified of their right to file exceptions to the Recommended Order. Meddoff filed a pleading entitled "Motion to Vacate Recommended Order," which will be treated as exceptions to the Recommended Order, but Bendekovic filed neither exceptions nor a response to Meddoff's Motion.

STANDARDS FOR REVIEW

Under Section 120.57(1)(l), Florida Statutes, an agency may not reject or modify findings of fact made by the 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. Dept. 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, resolve conflicts therein, or judge the credibility of witnesses, because those are matters within the sole province of the ALJ. Heifetz v. Dept. 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 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 interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretations of administrative rules, the agency must state with particularity its reasons for rejecting or modifying such conclusions of law or interpretations of administrative rules 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.

Having reviewed the Recommended Order and the entire record of the proceeding, the pleading filed by Meddoff, and having heard the parties' arguments, the Commission makes the following findings, conclusions, rulings, and determinations.

RULINGS ON EXCEPTIONS

1. On September 8, 2011, Meddoff filed a "Motion to Vacate Recommended Order" citing "Florida Rules of Civil Procedures 154.0(b)." ¹ Fla. R. Civ. P. 1.540(b) does not apply to this proceeding. Instead, Section 120.57(1)(k), Florida Statutes, and Rule 28-106.217, Florida Administrative Code, govern the filing of exceptions after the entry of a recommended order in an administrative proceeding. Nonetheless, Meddoff's Motion to Vacate Recommended Order will be treated as exceptions even though it does not comport with the requirements of Rule 28-106.217(1), F.A.C., which provides in relevant part:

¹ Meddoff is presumably referring to Fla. R. Civ. P. 1.540(b), "Relief from Judgment, Decrees, or Orders."

Exceptions shall identify the disputed portion of the recommended order by page number and paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record.

2. In Paragraph 2, Meddoff argues that the ALJ "did restrictively not allow factors to be presented for consideration that would be necessary for justice and to ensure equity between the parties," referencing T. 17-30. This portion of the hearing transcript relates to those witnesses whom Meddoff wanted to call, and the ALJ's decision that Ethics Commission Investigator Beau Jackson could testify by telephone. There being no indication that the ALJ's decision in this matter was not within her sound discretion or did not comply with the essential requirements of law, Meddoff's exception in this regard is denied.

3. Meddoff's next exception claims that his First Amendment rights were violated in that the ALJ accepted "testimony based on and utilized protected public internet anonymous blog publications" for a basis of Finding of Fact No. 6. There is competent substantial evidence to support this finding of fact: Petitioner's Exhibit 5, page 2; R. Warren 2010-09-24-0718; Meddoff deposition 71:1-9, 73:21-25, 75:12-21. Accordingly, this exception is denied.

4. Meddoff claims that the ALJ ignored her own guidelines for facts after the date of the initial complaint in utilizing Meddoff's subsequent filing as a candidate for office as stated in Finding of Fact No. 21. Although it is not clear, Meddoff seems to be suggesting that his filing to run against Bendekovic after he filed the complaint against her should not have been considered by the ALJ in finding that Meddoff acted with a malicious intent to injure Bendekovic's reputation when he filed the complaint against her. As stated by the court in Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985):

It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence. State Beverage Department v. Ernal, Inc., 115 So. 2d 566 (Fla. 3d DCA 1959). If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other.

The ALJ properly fulfilled her function here. Therefore, Meddoff's Exception No. 4 is rejected.

5. In Exception No. 5, Meddoff's objects to the ALJ's decision to allow Ethics Investigator Beau Jackson to testify by telephone, and the resulting Findings of Fact Nos. 17 and 18. There is no indication that the ALJ's decision in this regard was improper or not within her sound discretion, or that his telephonic testimony departed from the essential requirements of law. The Findings of Fact themselves are supported by competent substantial evidence. T.191-229. Accordingly, this exception is denied.

6. Meddoff's Exception No. 6 also is directed to Mr. Jackson's testimony, where Meddoff attempts to attack his credibility. This exception is denied. Heifetz, supra.

7. In his Exception No. 7, Meddoff claims that the ALJ failed to consider Bendekovic's misconduct as testified to by the City's chief administrative officer. This exception is denied. Heifetz, supra.

8. Meddoff objects to the Finding of Fact No. 4, based on the testimony of City Clerk, Susan Slattery. There is competent substantial evidence to support this finding of fact. T.41-67. Therefore, Exception No. 8 is denied.

9. In his Exception No. 9, Meddoff objects to Findings of Fact Nos. 2, 5, and 7 concerning emails he sent Bendekovic and whether they contained false statements. Meddoff asserts that Bendekovic was required to prove that his statements in those emails were false.

Meddoff is incorrect. The truth or falsity of Meddoff's statements in the emails are not required to be proven by Bendekovic. Instead, they were offered as proof of Meddoff's animus towards Bendekovic. Therefore Exemption No. 9 is denied.

10. In his final exception, Meddoff asserts that Finding of Fact No. 21 is contrary to the standards set forth in Brown v. Fla. Commission on Ethics, 969 So. 2d 553 (Fla. 1st DCA 2007). Finding of Fact No. 21 is an ultimate finding—that Meddoff's failure to sufficiently investigate his allegations against Bendekovic prior to filing the complaint against her—constituted reckless disregard for the truth. Coupled with the finding that he decided to run against her for the office of mayor, Finding of Fact No. 21 demonstrated Meddoff's malicious intent to injure Bendekovic's reputation. There does not appear to be anything legally incorrect about Finding of Fact No. 21. Accordingly, Exception No. 10 is denied.

FINDINGS OF FACT

The Findings of Fact as set forth in the Recommended Order are approved, adopted, and incorporated herein by reference.

CONCLUSIONS OF LAW

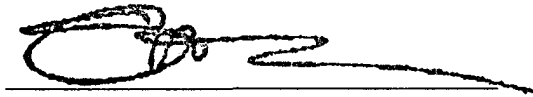
The Conclusions of Law as set forth in the Recommended Order are approved, adopted, and incorporated by reference.

DISPOSITION

Accordingly, we accept the recommendation of the ALJ and award attorney's fees and costs in favor of Diane V. Bendekovic against Robert W. Meddoff in the amount of \$51,458.55.

DONE and ORDERED by the State of Florida Commission on Ethics meeting in public session on Friday, October 21, 2011.

October 26, 2011
Date Rendered



SUSAN HOROVITZ MAURER
Vice Chair

THIS ORDER CONSTITUTES FINAL AGENCY ACTION. ANY PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER HAS THE RIGHT TO SEEK JUDICIAL REVIEW UNDER SECTIONS 112.3241 AND 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, BY U.S. MAIL AT P.O. DRAWER 15709, TALLAHASSEE, FLORIDA 32317-5709 (or by delivery to 3600 Maclay Boulevard South, Suite 201, Tallahassee, Florida 32312); AND BY FILING A COPY OF 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. Jeremy J. Kroll, Attorney for Respondent/Petitioner Diane V. Bendekovic
Mr. Robert W. Meddoff, Complainant/Respondent
The Honorable Jessica Varn, Administrative Law Judge
Division of Administrative Hearings

SHM:jcc