BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

DATE FILED

SEP 12 2012

COMMISSION ON ETHICS

In re **RENEE LEE,**

Respondent.

Complaint No. 09-115
DOAH Case No. 11-6063EC
COE Final Order No. 12-177

FINAL ORDER

This matter comes before the Commission on Ethics, meeting in public session on September 7, 2012, pursuant to the Recommended Order of the Division of Administrative Hearings' Administrative Law Judge rendered in this matter on July 11, 2012. The Recommended Order (a copy of which is attached and incorporated herein by reference), recommends that the Commission enter a final order finding that Renee Lee violated Section 112.313(6), Florida Statutes, by drafting a legal opinion that justified a 1% raise in salary for herself and others without the need for approval from the Hillsborough Board of County Commissioners.

BACKGROUND

This matter began with the filing of an ethics complaint in 2009, alleging that in 2007 the Respondent's salary, and any changes thereto, had to be approved by the Board of County Commissioners of Hillsborough County, that a report of the Hillsborough County Internal Performance Auditor revealed that in 2007 the Respondent received a one-percent pay raise without the knowledge or consent of the Board of County Commissioners, and that the Respondent had provided a legal opinion indicating the increase was a "benefit" all employees

could receive, and thus no Board approval was required.

The allegations were found to be legally sufficient and Commission staff undertook a preliminary investigation to aid in the determination of probable cause. On September 14, 2011, the Commission on Ethics issued an order finding probable cause to believe the Respondent had violated Section 112.313(6), Florida Statutes, by drafting a legal opinion that justified a one-percent raise in salary for herself and others without the need for approval from the Hillsborough Board of County Commissioners. The matter was then forwarded to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge (ALJ) to conduct the formal hearing and prepare a recommended order. Prior to the hearing the Advocate and the Respondent submitted a joint prehearing stipulation. A formal evidentiary hearing was held before the ALJ on May 9, 2012. A transcript was filed with the ALJ and the parties timely filed proposed recommended orders. The ALJ's Recommended Order was transmitted to the Commission, the Respondent, and the Advocate on July 11, 2012, and the parties were notified of their right to file exceptions to the Recommended Order. Thereafter, the Respondent filed 14 exceptions to the ALJ's Recommended Order, to which the Advocate timely filed a response. No exceptions were filed by the Advocate.

Having reviewed the Recommended Order, the record of the proceedings, the Respondent's Exceptions, and the Advocate's Response to the Exceptions, the Commission makes the following rulings, findings, conclusions, determinations, and recommendations:

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 conclusions of law and interpretations 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. An agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action.

RULINGS ON EXCEPTIONS

Exception 1

The Respondent's first exception speaks to the ALJ's Finding of Fact in paragraph number 20, which states:

> 20. Contrary to Respondent's testimony, one of the few things that Ms. Novak recalled clearly about the events in this time period was that it was Respondent who asked Ms. Novak to get Respondent's contract and that Ms.. Novak was not asked her opinion on that contract, nor did she recall offering her opinion. Ms. Novak's version of the events is accepted as more credible than Respondent's version. It is not credible that Ms. Novak, a non-lawyer, would spontaneously offer advice to Respondent regarding the interpretation of Respondent's Agreement, much less that a "very skeptical" Respondent would be convinced by this non-lawyer's legal opinion. Instead, the implication of the credible testimony is that Respondent wanted to attribute the suggestion and rationale that she could accept a financial award to someone other than herself.

The Respondent testified that she was very skeptical about receiving an award, but that Ms. Novak told her. "oh yeah, you have that provision in your contract," then spontaneously retrieved the contract so the Respondent could see the provision that would allow her to receive the money. (T 23-24)[1] This interaction was, according to the Respondent, sufficiently persuasive to the Respondent that she sent an email to Ms. Bean and Mr. Hill thanking them for the award. (T 24-25) Although, as the ALJ recognizes, Ms. Novak did not recall many of the events of that day, when asked whether the Respondent asked for her opinion, she testified, without equivocation, "no." (T 41-42) She also testified, "I do remember that she asked me to get a copy of the contract." (T 41)

The ALJ in this instance simply assessed the credibility of the witnesses. She found the

[1] References to the transcript of the evidentiary hearing at DOAH will be by "T," followed by the page number.

Respondent's testimony that despite her skepticism about her ability to accept the award, she was persuaded otherwise by a non-lawyer's advice, to lack credibility. In fact, the ALJ repeatedly found, in Findings of Fact *not* challenged by the Respondent, that the Respondent lacked credibility. See, Recommended Order paragraph 25 ("Respondent's feeling that she may have been asked to expedite the legal opinion is rejected as not credible and contradicted by Ms. Swanson's clear recollection that no time frame was given"); paragraph 31 ("Respondent's testimony was not credible and was inconsistent with other testimony of both Ms. Swanson and Respondent, herself"); and paragraph 32 ("Respondent's testimony that she did not understand that she was addressing a one-percent salary increase award is belied by her use of the phrase '1% salary award' in the legal opinion and by her own expressed certainty that this was not a productivity award (which would have been the only type of award providing a one-time cash payment)"). The Recommended Order makes very clear that the ALJ found the Respondent's testimony to lack credibility, and believed Ms. Novak as to this particular point. As issues of credibility are for the trier of fact, this exception is accordingly denied.

Exception 2

The Respondent challenges the ALJ's Finding of Fact in paragraph 28, which states:

> 28. In her legal opinion, Respondent represents that she has quoted Section XVI, subsection E, of her Agreement in its entirety by stating that the provision "reads as follows[.]" Contrary to that representation, Respondent only selectively quoted from the cited subsection, omitting the following sentence that comes after the sentence quoted in the legal opinion:
>
> > These benefits will include, but not be limited to cafeteria plan options and contributions to the Florida Retirement System, holidays, and any other benefits for specified sick leave accrual as are provided for Hillsborough employees.

> The omitted language would have reasonably suggested analysis, or at least consideration of, the legal principles of contract interpretation set forth in Florida cases by which the meaning of a general term (such as "but not be limited to") is determined by reference to the specific terms with which it is grouped. Application of this sort of analysis could reasonably lead one to conclude that this subsection has application to employee benefits provided across-the-board to all county employees by virtue of their status as county employees, because that appears to be the nature of the specific benefits mentioned. Respondent's legal opinion, by selectively quoting from the subsection of her Agreement that she chose to address, omitted the legal analysis that would follow from the omitted contract language.

In her memorandum, (Joint Exhibit 6) the Respondent said that Section XVI, subsection E, of her Agreement "reads as follows[.]," but then quotes only a portion of that contractual provision. That she omitted language is a pure finding of evidential fact for which there is indisputable evidence. The ALJ then finds that omission of this language (which even the Respondent acknowledges, at page 9 of her exceptions, provides "partial clarification") supports an inference of corrupt intent.

It is the ALJ's responsibility to draw permissible inferences from the evidence. Heifetz, supra, and the exception is denied.

Exception 3

The Respondent excepts to the last two sentences in paragraph 29, and the last sentence of paragraph 30, (both of which are underlined below, to distinguish them from the portions of the paragraph to which the Respondent does not object) which state:

> 29. Respondent's legal opinion separately sets forth certain language from Ms. Bean's contract and from Respondent's Agreement, without any discussion or analysis of the significance of differences in the quoted language. For example, the provision relied on to support a one-percent salary award to Ms. Bean refers to benefits "as they would [apply] to other managerial employees of the County." In contrast, the quoted language from

> Respondent's Agreement refers to benefits "for other employees of Hillsborough County." Respondent's legal opinion does not discuss the significance of this difference, despite the fact that the issue as framed in the legal opinion is the eligibility for a one-percent salary award granted to "management staff" in connection with their budget efficiency proposals. Any analysis of the different contract terms could have led Respondent to conclude that this award was only available to managerial employees, and not to all employees of the county.
>
> 30. In this regard, Respondent's framing of the issue is itself inconsistent with the facts, which were that this one-percent salary increase award was only available to certain managerial employees, i.e., those who served as department directors. For example, Ms. Novak, the Office administrator, was a managerial employee, but she was not the department director. So too, the managing attorneys of each of the Office's legal sections were managerial employees, but not department directors. Therefore, had Respondent assessed the significance of the "managerial employees" language in Ms. Bean's contract, she might have concluded that this award was not available to all other managerial employees of the county.

The Respondent's opinion, and the construction of her employment contract that it contained, was the essential feature of the proceedings, and was in fact the basis of the allegation. The employment contracts of both Ms. Bean and the Respondent were admitted without objection, and the ALJ was entitled to consider the significance of the language of each in analyzing the opinion written by the Respondent. It is the sole province of the ALJ to weigh the evidence and resolve conflicts therein (Heifetz, supra) and the Respondent's exception is essentially argument in defense of her opinion, which this Commission cannot adopt.

Accordingly, the exception is denied.

Exception 4

The Respondent here challenges the ALJ's Finding of Fact in paragraph 33, which states:

> 33. Respondent also attempted to blame Ms. Swanson for the confusion and uncertainty about the nature of the award on which

> she opined. Respondent testified that Ms. Swanson did not appear to know very much about the award at issue. Inconsistently, Respondent also testified that Ms. Swanson actually read to her a description of the award from the consultant's study that created the award program, which is how Respondent was led to believe it was a one-time cash payment, with caps. Ms. Swanson denied reading from the consultant's study, testifying credibly that she did not have that study at the time.

This paragraph must be read in context with the two preceding it, neither of which is challenged by the Respondent. In these paragraphs, the ALJ discusses the genesis of the Respondent's asserted misunderstanding as to what kind of award she was being asked to opine on. In paragraph 31, the ALJ finds, "Respondent testified that she misunderstood the nature of the award she was being asked to opine on and that her confusion was caused, in part, by Ms. Swanson reading to her a description of a one-time cash award program that was not a salary increase." In paragraph 32, the ALJ states:

> Respondent testified that she believed the award was a $1,000 one-time cash award.
>
> ***
>
> Respondent also testified that she was concerned that the award was a productivity award and that she pointedly asked Ms. Novak and was reassured that it was not a productivity award. There were only two types of financial awards—if the award was not a productivity award, then it had to be a special one-percent salary increase award.

In paragraph 33—the paragraph objected to by the Respondent, the ALJ finds "Respondent also testified that Ms. Swanson actually read to her a description of the award from the consultant's study that created the award program, which is how Respondent was lead to believe it was a one-time cash payment, with caps."

In these three paragraphs, the ALJ outlines the Respondent's own testimony, in which the Respondent attributes her understanding as to the nature of the award at issue to the information

she claims she was supplied by Ms. Novak and Ms. Swanson. (T 26-28) The Respondent objects to the ALJ's characterizing this as "blame," at least as respects Ms. Swanson, but a definition of "blame," is "to place responsibility for (something) on a person." American Heritage Dictionary, Second College Edition, 1982. The ALJ's Finding of Fact reflects the evidence.

The Respondent also objects to the ALJ's reference to purported "confusion" by the Respondent at the time. But this, too, is a reflection of the Respondent's own testimony. The Respondent's testimony and the Findings of Fact which she has not challenged support a view that the Respondent sought to convey that rather than intentionally making misrepresentations in her opinion, she instead was operating with less than a clear understanding of the facts. Her testimony indicates that the causes of her lack of understanding were Ms. Novak and Ms. Swanson.

The finding is a view of the evidence which the ALJ was entitled to take, and exception 4 is therefore rejected.

Exception 5

This exception challenges the ALJ's Finding of Fact in paragraph 34, and the last two sentences of paragraph 35 (underlined below so as to distinguish it from the un-objected-to portion of the paragraph). They state:

> 34. If Respondent was actually confused or unclear about the facts, it was incumbent on her, in the proper performance of her professional duties, to make inquiry so as to be clear about the facts on which she offered a legal opinion. That is a very basic obligation of any lawyer asked to give a legal opinion to a client. Yet Respondent admitted that she made no such inquiries. Had Respondent asked Ms. Swanson to direct her to the person with information about the award, Respondent would have been directed to Ms. Bean, Mr. Hill, and/or Mr. Johnson, who could

> have explained their failure to gain approval to use the productivity award program and that the financial award at issue was a special one-percent salary increase award that would result in a one-percent salary raise to the recipients. Had Respondent inquired, she could have been given the "recognition of efficiency" February 1, 2007, memo provided to other department directors, which specifically described the award.
>
> 35. Respondent attempted to justify her failure to make these inquiries by testifying to her belief that issuance of her opinion was urgently needed—testimony previously found not credible. However, if Respondent truly was confused about the facts on which she was opining on February 2, 2007, or lacked sufficient time to properly analyze the contract language in accordance with Florida law on contract interpretation, it was incumbent on Respondent to express these limitations on her ability to render a legal opinion based on a complete understanding of the facts and application of the law to those facts. Moreover, Respondent's claim of urgency would not explain why Respondent did not conduct any factual inquiry or legal analysis before issuing a second legal opinion six days later, which extended her legal opinion to include Dr. Garrity after she obtained his contract.

In her exception, the Respondent asserts that "any testimony concerning any confusion on the Respondent's part was not germane," that she "did not testify that she was so confused or unclear about the facts to require further inquiry before rendering a legal opinion," and that therefore the ALJ's findings as to her responsibilities in preparing the opinion are unsupported by the evidence.

Section 112.313(6), Florida Statutes, requires corrupt intent, rendering a finding as to the Respondent's state of mind not only germane but essential, and confusion or misunderstanding regarding the issue on which she was asked to render an opinion was her defense. The ALJ was entitled to determine from the Respondent's testimony that the Respondent's position was that she was confused, and the both the record and the Findings of Fact to which the Respondent makes no objection, support such a determination. The Respondent testified Ms. Novak assured

her this was not the Productivity Award, which was the only award that was a flat monetary bonus (T 23, Finding of Fact 18, Finding of Fact 32), the Respondent testified that when she talked to Ms. Swanson, she [the Respondent] was not sure whether the award was a $1,000 flat sum or a percentage of salary, (T 27) but then later the Respondent also testified that even up to the day the auditor pointed out the issue, she believed that all she had received was a $1,000 bonus. (T 31-32)

The ALJ believed that either the Respondent knew what she was doing, or that if she had any doubts she employed those doubts to her own advantage. The ALJ's findings explain her reasoning: if the Respondent had anything less than a clear understanding regarding the facts, she had a duty to either clarify them or acknowledge that limitation in her opinion letter.

The ALJ, in these paragraphs, is explaining why she rejected the Respondent's version of events, and the facts underlying that explanation are supported by competent, substantial, evidence. Accordingly, the exception is rejected.

Exception 6

The Respondent excepts to the Findings of Fact in paragraph 36, which paragraph states:

> 36. The point is not whether Respondent's legal opinion was right or wrong; the point is that Respondent's legal opinions failed to set forth a complete recitation of the facts or a discussion of the legal conclusions that follow from a complete recitation of the facts. Respondent claims confusion about the facts, but no such confusion was expressed in her legal opinion. Respondent claims she was rushed, but that claim was not credible and, significantly, no such limitation was expressed in her legal opinion. If it was not possible for Respondent to obtain a clear understanding of the complete facts and to discuss the legal conclusions that flow from the complete facts, it was incumbent on Respondent to specify the limitations of her opinion. The proper performance of Respondent's professional duties as Hillsborough County attorney required nothing less.

The Respondent states that her "alleged 'confusion' did not affect her ability to properly opine on eligibility for an 'award.'" (Exceptions, p. 17) She largely relies on the same arguments made in her previous exceptions 4 and 5, and focuses on the part of the finding which states, "Respondent's legal opinions failed to set forth a complete recitation of the facts or a discussion of the legal conclusions that follow from a complete recitation of the facts."

That the opinion failed to set forth the complete facts is a finding supported by Ms. Swanson's testimony that the Respondent was asked to opine on a 1% salary *increase* (T 67) and from the Respondent's own admission that her opinion answered a question different from the question being asked. At page 33 of the transcript, the Respondent is asked why she ultimately returned her salary increase to the County, and responds: "If it [the salary increase] was not what I intended to opine on, then I didn't want to keep it." Even if the Respondent's own testimony were to be believed, she did not understand the question, and thus would have been incapable of reciting the law and facts applicable thereto.

The Respondent also objects to the ALJ's finding that the proper performance of Respondent's professional duties as Hillsborough County Attorney required either a complete recitation of the facts and discussion of the legal conclusions that follow therefrom, or the acknowledgement of any limitations under which she suffered in preparing the opinion. As the ALJ recognizes, those are no more than basic requirements of any lawyer, preparing any opinion.

The allegation in this case is that the Respondent, with corrupt intent, wrote an opinion that enabled her to achieve a personal benefit, i.e., a salary increase. In order to assess intent, it is necessary to look to the existence of standards that would put the official on notice that she was doing something wrong. Blackburn v. State, Commission on Ethics, 589 So. 2d 423, 434

(Fla. 1st DCA 1991). Such standards may be internal, such as an office policy, or external, such as a county charter, caselaw, statute, or, as the ALJ observes in paragraph 56 of the Recommended Order, the Rules Regulating the Florida Bar.

That the Respondent had a standard of duty with which she was compelled to comply is a finding underpinning the determination of corrupt intent, and her failure to comply with that standard is a factual finding that the ALJ was entitled to make, and that is supported by the record evidence.

The exception is denied.

Exception 7

This exception challenges the ALJ's Finding of Fact, paragraph 37, which states:

> 37. Instead of properly performing her professional duties by providing her client with the requisite independent professional judgment based on a complete recitation of facts and analysis of the law applicable to those facts, Respondent's legal opinion on February 2, 2007, was a self-interested advocacy piece. Other than adding language from Ms. Bean's contract, the February 2, 2007, product was nothing more than a repackaging of Respondent's February 1, 2007, email to Ms. Bean and Mr. Hill that purported to describe a non-lawyer's opinion of Respondent's Agreement.

In this Finding of Fact, the ALJ determines that the Respondent's failure, in the opinion she authored, to include and properly analyze the relevant facts and law was not the result of confusion, misunderstanding, or error, but rather was an attempt to promote her own self-interest. The exception essentially repeats the Respondent's objections to the ALJ's findings that the Respondent's opinion should have identified the relevant facts and analysis, but failed to do so. As such, it has been addressed in our rulings as to exceptions 2, 3, and 6.

The Respondent here also argues that this Finding of Fact is contrary to a "duty,"

imposed on her under Section 112.313(5), Florida Statutes.

Section 112.313(5) states, "[n]o local government attorney shall be prevented from considering any matter affecting his or her salary, expenses, or other compensation as the local government attorney, as provided by law." It *allows* local government attorneys to opine on "salary, expenses, or other compensation, as provided by law." However, it does not *require* them to do so. Nor does Section 112.313(5) provide complete immunity for any and all actions a local government attorney might take, so long as those actions relate to his or her own salary.

Furthermore, the Respondent testified that she did not view herself as opining on her "salary," (T 33) and as the ALJ observes in paragraph 63, the Respondent's omission in her opinion of any mention of the part of her contract headed "SECTION III – COMPENSATION" indicates that the Respondent also did not view the subject of her opinion as "compensation." Thus, Section 112.313(5) did not operate to compel the Respondent to write the opinion she did.

The Respondent here merely repeats the arguments she made to the ALJ. The ALJ rejected them, pointing out in paragraph 59 that caselaw provides that creating a false basis for a legal opinion not only prevents that opinion from being used as a defense, but is affirmative evidence of culpability.

The exception is therefore rejected.

Exception 8

Respondent excepts from the first two sentences of paragraph 39 of the Findings of Fact which state:

> Respondent attempted to suggest that the facts underlying her legal opinions were incomplete or confused because there was great confusion at the time with regard to the various award programs. That suggestion was not borne out by the credible evidence.

This exception is a restatement of arguments made in Exception 4 and 5, and for the same reasons, is rejected.

Exception 9

This exception challenges paragraph 44 of the Findings of Fact, which states:

> 44. Implicit in Respondent's explanation is that if she had realized that the one-percent salary "award" was a one-percent salary "increase," she would not have been able to opine that she was eligible to receive it without approval by the HBCC, because her Agreement required HBCC approval of salary increases. Yet, assuming Respondent was really confused about this, any appropriate inquiry by Respondent would have confirmed that the only award she could have been opining on was a one-percent salary increase. Whether her zeal to advocate for a financial reward for herself and others caused her to purposely mischaracterize her legal opinion after the fact or whether her zeal simply caused her, at the time, to ignore the process mandated by an attorney properly carrying out her duties to a client in rendering a legal opinion, the result is the same. The undersigned finds as a matter of ultimate fact that Respondent acted with wrongful intent by placing her own self-interest in securing the special financial benefit she coveted above her professional obligations to her client, the HBCC. Respondent did not properly perform her professional duties when she issued first one, and then another, legal opinion to justify a one-percent salary increase for herself and others without the approval of the HBCC.

The "explanation" referred to by the ALJ in the first sentence is the Respondent's testimony that she returned the funds improperly paid her because "If it [a salary increase] was not what I intended to opine on, then I didn't want to keep it." (T 33) The ALJ, in her previous findings, illustrates a number of ways in which the Respondent might have discovered, and thereby fully analyzed, what it was she was being asked. In finding the Respondent lacking in credibility, the ALJ cites to numerous instances in which the Respondent's testimony is inconsistent with that of others, and even internally inconsistent with her own testimony. The

Respondent's testimony suggests a defense of confusion or misunderstanding, and the ALJ was entitled to find that such defense lacked credibility. Her ultimate finding is that the Respondent acted "corruptly,"—with wrongful intent and inconsistent with the proper performance of her public duties—when she rendered an opinion which justified her salary increase. "The question of whether the facts, as found in the recommended order, constitute a violation of a rule or statute, is a question of ultimate fact which the agency may not reject without adequate explanation." Goin v. Commission on Ethics, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995). The findings here are supported by competent, substantial evidence, and the exception is denied.

Exception 10

The Respondent states that she "excepts from those portions of the Conclusions of Law (whether they be deemed conclusions of law or findings of fact) which conclude that Respondent sought to secure 'a special privilege, benefit or exemption for herself or another.'" However, the only finding actually identified by the Respondent in this exception is paragraph 54, which states:

> 54. Based on the facts found above, the Advocate proved that Respondent used, or attempted to use, her official position and performed her official duties as Hillsborough County attorney to secure a special privilege, benefit, or exemption for herself (and others), namely, the one-percent salary award. Respondent was specifically asked to provide a written legal opinion addressing whether a one-percent salary award was authorized by the terms of her contract and by the terms of the contracts of two other contract employees. Thus, Respondent was on notice that her solicited written legal opinion would be relied on and that her legal opinion confirming that she could be given the one-percent salary award under the terms of the contact (and that the other two contract employees could be given one-percent salary awards under their contracts) would facilitate her (and others') receipt of that one-percent salary increase.

The Respondent first argues that she had a "duty" to render this opinion. This argument has already been addressed under Respondent's exception 7, herein.

The Respondent next asserts that she did not have the power to give herself a salary increase, and therefore could not have "used or attempted to use" her position. The Respondent's use of position was the writing of the opinion, which she was aware was necessary for, and would be relied upon to, allow the award to go forward. This is supported in the record by the Respondent's testimony that Ms. Swanson "contacted me and said that she needed an opinion that we were eligible for the awards" (T 26) It is also supported by Ms. Swanson's testimony, in the transcript at page 68, and the ALJ's Finding of Fact at paragraph 24 (which is not objected to by the Respondent). Ms. Swanson told the Respondent that she understood that the Respondent had asked to be eligible "for the one-percent merit increase" and that three others were in a similar position to the Respondent, and asked her to provide "an opinion in writing as to whether these employees were eligible for the increase."

That in issuing the opinion, the Respondent used her position is well-supported by the record. That she expected to benefit from that use is supported by her own testimony "[Ms. Swanson] said that she needed an opinion that we were eligible for the awards." (T 26) As discussed in the rulings on the previous exceptions, the record evidence firmly supports the ALJs determinations, and the exception is denied.

Exception 11

The Respondent states that she "excepts from those portions of the Conclusions of Law (whether they be deemed conclusions of law or findings of fact) which conclude that Respondent acted with 'corrupt intent.'" However, the only finding she actually identifies is in paragraph 55,

which states:

> 55. Finally, based on the facts found above, the credible evidence established clearly and convincingly that Respondent acted with wrongful intent and for the purpose of benefitting herself and others by issuing a so-called legal opinion that was not prepared in a manner consistent with the proper performance of her public duties as Hillsborough County attorney. As such, the Advocate proved that Respondent acted "corruptly," as that term is statutorily defined.

The Respondent's argument, in essence, is that the ALJ should have arrived at a different conclusion as to her corrupt intent. Intent is a matter for the trier of fact. See, Kinney v. Dept. of State, Division of Licensing, 501 So. 2d 129 (Fla. 5th DCA 1987). Further, this Commission cannot reweigh the evidence or resolve conflicts in favor of the Respondent; under Heifetz, those matters are the exclusive province of the ALJ. That the Respondent acted corruptly is supported by, among other things, the evidence that Ms. Swanson told her that her opinion was being requested as to a "salary increase" (T 68) and yet the Respondent, according to her own testimony, gave an opinion on a one-time salary award (T 33) and that she failed to clarify the facts or fully analyze the applicable law, with the ALJ finding, in paragraphs not challenged by the Respondent, that the Respondent's explanations for this failure lacked credibility. (Findings of Fact paragraphs 25, 31, 32) The ALJ, as the finder of fact and the determiner of ultimate fact, acted within her province in making findings as to wrongful intent and benefit, and accordingly, this exception is denied.

Exception 12

Respondent states that she "excepts from those portions of the Conclusions of Law (paragraphs 56, 57, 58, 59 and 61) that provide the basis for the ALJ's conclusion that the Respondent failed to act within her professional duties as an attorney when she rendered her

legal opinion."

Section 120.57(1)(k), Florida Statutes, states, "The final order shall include an explicit ruling on each exception, but 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." The Respondent here makes sweeping reference to "portions" of five of the ALJ's Conclusions of Law, but does not specify the "portions" of those Conclusions to which she refers, and the exception could be denied solely on that basis.

Nevertheless, to the extent the exception could be considered as proper, it cannot be accepted here. The Respondent asserts that the ALJ's findings, which speak to the preparation of the legal opinion which lead to the Respondent's raise, are actually findings of fact. She next asserts that in making these findings, the ALJ departed from the essential requirements of law.[2]

As the Respondent recognizes, "departure from the essential requirements of law" is something far more than legal error. The Respondent quotes Justice Boyd's special concurrence in Jones v. State, 477 So. 2d 566, 569 (Fla. 1985):

> It means an inherent illegality or irregularity, and abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice.

The Respondent presents two rationales for her argument, the first being that the issue had never before been raised. This is not accurate. The Respondent was on notice that deficiencies in her opinion were at issue from at least the issuance of the Advocate's Recommendation, in which the Advocate states, at page 7, "the proper performance of her [the Respondent's] office required her to give an opinion on the correct issue." The Respondent

[2] A standard only applicable to findings of fact, pursuant to Section 120.57(1)(l), Florida Statutes.

recognized and addressed the Advocate's position at page 5 of her Response to the Advocate's Recommendation. Beyond that, the steps the Respondent took in arriving at her opinion—what she did and who she spoke with—were the very subject matter of the hearing.

The Respondent's second ground for asserting that the findings were contrary to the essential requirements of law is that the ALJ referenced materials such as the Restatement of the Law (Third) – the Law Governing Lawyers, and the Rules Regulating the Florida Bar in analyzing whether the Respondent made appropriate inquiry into, and analysis of, the applicable facts and law prior to rendering her opinion, and thus whether she acted inconsistent with the proper performance of her duties. The Rules Regulating the Florida Bar are rules of the Florida Supreme Court having statewide application, and as such courts are required to take judicial notice of them. Section 90.201(2), Florida Statutes. As to any other authorities referenced, the Respondent does not cite any rule or law prohibiting a judge from referencing legal authorities in the course of his or her analysis. Such practice is not uncommon, and is in fact illustrated in one of the cases on which the Respondent relies: in her exception 11, the Respondent quotes at length a segment from Latham v. Florida Commission on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997) which cites "The Holy Scriptures, Ecclesiastes, 7:1 (Jewish Publication Society, 1985)."

Accordingly, this exception is denied.

Exception 13

Respondent excepts from the ALJ's Conclusion of Law in paragraph 63, which states:

> 63. In this case, it is particularly ironic that Respondent relies on the language in section 112.313(5). Respondent now apparently accepts as a given, and implicitly asks the undersigned to accept without hesitation, that the subject matter of her legal opinion was "salaries . . . or other compensation." If that subject matter classification were as clear to Respondent as she now argues, one is at a loss to explain how any objective, professional

> legal opinion could have been properly issued without any mention, much less discussion, of Article III ("Compensation") in Respondent's Agreement, which includes the requirement for HBCC approval of any increases in salaries of benefits.

The Respondent asserts that the ALJ's "legal conclusion is incorrect and departs from the essential requirements of law, for the same reasons stated with respect to Exception 12."

This conclusion merely observes that the Respondent's assertion that she was entitled by Section 112.313(5) to opine on her own salary and compensation is inconsistent with her failure to discuss the section of her contract specifically labeled "Compensation." The Respondent does not explain how this observation perpetrates a "judicial tyranny" resulting in a "miscarriage of justice," and this exception is denied.

Exception 14

The Respondent's final exception goes to the recommended penalty of $5,000 and public censure and reprimand. As we have not granted any of the exceptions, we decline to amend the recommended penalty.

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 herein by reference.

DISPOSITION

Accordingly, the Commission on Ethics determines that the Respondent, Renee Lee, as

Hillsborough County Attorney, violated Section 112.313(6), Florida Statutes, by misusing her position by drafting a legal opinion that justified a one-percent raise in salary for herself and others without the need for approval from the Hillsborough Board of County Commissioners.

For the violation, the Commission on Ethics recommends imposition of a public censure and reprimand, and a civil penalty of $5,000.

DONE and ORDERED by the State of Florida Commission on Ethics meeting in public session on Friday, September 7, 2012.

September 12, 2012
Date Rendered

SUSAN HOROWITZ MAURER
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, 3600 MACLAY BOULEVARD SOUTH, SUITE 201, 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. Brennan J. Donnelly, Attorney for Respondent
Ms. Melody Hadley, Commission Advocate
Mr. George Niemann, Complainant
The Honorable Elizabeth W. McArthur, Administrative Law Judge
Division of Administrative Hearings