

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re **DAVID RIVERA,**

Respondent.

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Complaint Nos. 10-157 and
10-182, cons.
DOAH Case No. 13-1043EC
COE Final Order No. 15-011

FINAL ORDER AND PUBLIC REPORT

This matter comes before the Commission on Ethics, meeting in public session on April 17, 2015, pursuant to the Amended Recommended Order After Remand of the Division of Administrative Hearings' Administrative Law Judge rendered in this matter on March 5, 2015. The Amended Recommended Order After Remand (a copy of which is attached and incorporated herein by reference), recommends that the Commission enter a final order finding that David Rivera violated:

1. Section 112.313(6), Florida Statutes, by requesting and/or accepting State reimbursement for travel expenses that were paid by campaign fund accounts and/or State office expense accounts;
2. Article II, Section 8, Florida Constitution, by failing to or not properly reporting income; and/or stocks and bonds; and/or secondary source income on his 2005 CE Form 6, Full and Public Disclosure of Financial Interests;
3. Article II, Section 8, Florida Constitution, by failing to or not properly reporting income; and/or stocks and bonds; and/or bank accounts; and/or real property; and/or secondary source income on his 2006 CE Form 6, Full and Public Disclosure of Financial Interests;
4. Article II, Section 8, Florida Constitution, by failing to or not properly reporting income; and/or stocks and bonds; and/or bank accounts; and/or real property; and/or secondary source income on his 2007 CE Form 6, Full and Public Disclosure of Financial Interests;

5. Article II, Section 8, Florida Constitution, by failing to or not properly reporting income; and/or stocks and bonds; and/or bank accounts; and/or real property; and/or secondary source income on his 2008 CE Form 6, Full and Public Disclosure of Financial Interests;

6. Article II, Section 8, Florida Constitution, by failing to or not properly reporting income; and/or stocks and bonds; and/or bank accounts; and/or real property; and/or secondary source income on his 2009 CE Form 6, Full and Public Disclosure of Financial Interests;

7. Section 112.3144, Florida Statutes, by failing to file a CE Form 6F, "Final Full and Public Disclosure of Financial Interests," within 60 days of leaving his position with the Florida House of Representatives.

The Amended Recommended Order After Remand further recommends that the Commission recommend a total of \$16,500 in civil penalties and \$41,321.96 restitution, as well as public censure and reprimand.

BACKGROUND

This matter began with the filing of two ethics complaints in 2010. The allegations were found to be legally sufficient and Commission staff undertook a preliminary investigation to aid in the determination of probable cause. The Report of Investigation was filed July 23, 2012, and the Advocate filed her Recommendation with the Commission on August 6, 2012.

The probable cause determination was set for September 7, 2012. Upon request of the Respondent, the matter was continued to the October 19 meeting. On October 24, 2012, the Commission rendered its Order Finding Probable Cause.

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. The matter was set for hearing on June 11 and 12, 2013. It was continued three times at the joint request of the parties, and was ultimately held February 12 and 20, 2014.

In the course of the proceedings, the Advocate abandoned four of the allegations on which the Commission had found probable cause.

The formal evidentiary hearing was held before the ALJ and was conducted in two parts. On February 12, 2014, the hearing was conducted via video teleconference with locations in Tallahassee and Miami. The second and final day of hearing was held on February 20, 2014, in Tallahassee. 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 June 10, 2014, and the parties were notified of their right to file Exceptions to the Recommended Order. Thereafter, the Respondent filed seven Exceptions to the ALJ's Recommended Order, to which the Advocate timely filed a response. The Advocate filed one Exception, to which the Respondent did not respond.

The ALJ did not recommend a penalty for the violations found. Section 112.324(8)(e), Florida Statutes, states that it is the duty of the Commission to recommend appropriate action to the President of the Senate or Speaker of the House of Representatives, whichever is applicable, in any case concerning a former member of the Legislature who has violated a provision applicable to former members or whose violation occurred while a member of the Legislature. The parties were asked to brief this issue, and timely responded—this issue was also the subject of the Advocate's single Exception. The matter was set to be heard by the Commission on July 25, 2014, but was continued to September 12, 2014, on joint motion of the parties. On June 27, 2014, the parties were noticed that the matter would be heard September 12, 2014, at 8:30 a.m. Two of the Respondent's attorneys withdrew on July 28, 2014. The third withdrew August 20, 2014.

Late on September 11, 2014, the Commission received, via email, a Notice of Appearance and Motion for Continuance from attorney Leonard Collins. At 7 p.m. that same day the Respondent emailed a Memorandum of Law in Opposition to Entering Order of Remand. On September 12, 2014, at 8:36 a.m., the Respondent emailed an Amended Memorandum.

At the Commission's meeting on September 12, 2014, neither the Respondent nor his counsel appeared when the matter was taken up. The Commission denied the Motion for Continuance and remanded the matter to the Administrative Law Judge for a recommendation as to penalty. The ALJ heard argument of the Advocate and counsel for the Respondent as to acceptance and scope of the remand, and accepted the remand. The ALJ heard argument of the Advocate and counsel for the Respondent as to penalty, and on March 5, 2015, entered his Amended Recommended Order After Remand, annotated "Amended as to Penalty Recommendation Only." Each of the Findings of Fact and Conclusions of Law in the Amended Recommended Order After Remand is identical to those contained in the original Recommended Order; the only change is the addition of the penalty recommendation.

The Respondent added five Exceptions to the seven he filed to the original Recommended Order, and appended 30 exhibits. The Advocate, having filed one exception to the original Recommended Order, filed no Exceptions to the Amended Recommended Order After Remand, but timely responded to those filed by the Respondent, appending three exhibits.

STANDARDS FOR REVIEW

Pursuant to Section 120.57(1)(k), Florida Statutes, 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.

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. 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.

Having reviewed the Amended Recommended Order After Remand, the record of the proceedings, and the Exceptions, the Commission makes the following findings, conclusions, rulings, and determinations:

RECORD

As a preliminary matter, the Advocate argues that various of the 30 exhibits filed by the Respondent with his Exceptions are not part of the record pursuant to Section 120.57(1)(f), Florida Statutes, and should not be considered in ruling on the Exceptions. Section 120.57 governs the record in a matter involving disputed issues of material fact. It states:

The record in a case governed by this subsection shall consist only of:

1. All notices, pleadings, motions, and intermediate rulings.
2. Evidence admitted.
3. Those matters officially recognized.
4. Proffers of proof and objections and rulings thereon.
5. Proposed findings and exceptions.
6. Any decision, opinion, order, or report by the presiding officer.
7. All staff memoranda or data submitted to the presiding officer during the hearing or prior to its disposition, after notice of the submission to all parties, except communications by advisory staff as permitted under s. 120.66(1), if such communications are public records.
8. All matters placed on the record after an ex parte communication.
9. The official transcript.

The Advocate argues that the Commission should not consider Respondent's exhibits 6-7, 9-17, 20-21, 23, and 29-30, or "the material referenced by website addresses in footnotes 12 and 17 [of the Respondent's Exceptions]. Exhibits 10-13 fall within the category of "notices,

pleadings, motions, and intermediate rulings," and are within the record. To the extent that other of the exhibits are notices, pleadings, motions, and intermediate rulings, or are otherwise a part of pleadings or proffers made to the ALJ, they are also properly a part of the record. Documents or other materials not within the record have not been considered.

With respect to the Advocate's arguments that "extra-record unsworn 'factual' statements of counsel," should not be considered, it is self-evident that representations by counsel which are not supported by the record will not constitute a sufficient basis on which to take any action.

RULINGS ON EXCEPTIONS

Exception 1

The Respondent here objects to any penalty recommendation whatsoever.

Though titled an "Exception," the Respondent's argument does not identify any portion of the Amended Recommended Order After Remand by page number or paragraph. Accordingly, the Commission is not required to rule on the Exception. Section 120.57(1)(k), Florida Statutes.

However, to the extent the Exception could be construed as meeting the requirements of the Administrative Procedure Act, we agree with the reasoning of the Advocate in her Response, and the Exception is denied.

Exception 2

Here, the Respondent argues that his due process rights were violated by the Commission's remand of this case to the ALJ for recommendation as to penalty.

Again, though denominated an "Exception," the Respondent's argument does not identify any portion of the Amended Recommended Order After Remand by page number or paragraph. Accordingly, the Commission is not required to rule on the Exception. Section 120.57(1)(k),

Florida Statutes.

However, to the extent the Exception could be construed as meeting the requirements of the Administrative Procedure Act, we agree with the reasoning of the Advocate in her Response, and the Exception is denied.

Exception 3

The Respondent's third Exception speaks to the ALJ's finding of fact in paragraph 14, which states:

The Advocate established by clear and convincing evidence that Respondent received State of Florida reimbursement for travel and related expenses that were in fact paid for by one of his campaign accounts. Thus, Respondent was reimbursed for tens of thousands of dollars of expenses which he did not "incur." The evidence also clearly and convincingly established that this double-reimbursement was knowing and intentional, since Respondent himself authorized the travel-related credit card charges, and then subsequently personally drafted the campaign account checks used to pay off the credit card balances. He also personally signed and submitted the State of Florida reimbursement requests.

We agree with the Advocate that the finding is supported by competent, substantial evidence, and therefore deny the Exception.¹

Exception 4

The Respondent's next Exception is to the finding of fact in Paragraph 15, which states:

¹ We note that even were we to grant Exceptions 3-4 and 6-9, such action would not change the ALJ's ultimate finding that the Respondent violated Article II, Section 8, Florida Constitution, by failing to or not properly reporting income; and/or stocks and bonds; and/or secondary source income on his 2005 CE Form 6, Full and Public Disclosure of Financial Interests, and violated Article II, Section 8, Florida Constitution, by failing to or not properly reporting income; and/or stocks and bonds; and/or bank accounts; and/or real property; and/or secondary source income on his 2006-2009 CE Form 6, Full and Public Disclosures of Financial Interests. The ALJ makes a number of findings of fact detailing the Respondent's deficiencies in reporting assets and income other than the "double-reimbursement" of his travel expenses (see paragraphs 41-53 and conclusions of law 86-91), none of which are challenged by the Respondent.

We also note that the Respondent has filed no Exceptions to any of the findings relating to the ALJ's ultimate finding that the Respondent violated Section 112.3144, Florida Statutes, by failing to file a CE Form 6F, "Final Full and Public Disclosure of Financial Interests," within 60 days of leaving his position with the Florida House of Representatives.

The amounts reimbursed by the State of Florida for travel-related expenses that were paid by Respondent's campaign accounts represent income to Respondent.

The Respondent contends that this finding is actually an incorrect conclusion of law. To the extent the finding is one of fact, it is supported by competent, substantial evidence. To the extent it is a conclusion of law, we are in agreement with the conclusion.

Exception 5

The Respondent's fifth Exception is to Paragraph 55 of the Recommended Order, which states:

The significant difference between a CE Form 6 and a CE Form 6X is that the CE Form 6 asks for the financial information as of December 31, or a more current date. The CE Form 6X asks for financial information as of the date the discloser left office.

The Respondent observes, and the Advocate agrees, that the ALJ made an apparent scrivener's error in the form names, citing "CE Form 6X" instead of "CE Form 6F." It is clear from the context that it was the CE Form 6F—Final Full and Public Disclosure of Financial Interests—to which the ALJ referred, and this Exception is granted.

Exception 6

The Respondent's next Exception is to the Conclusion of Law in paragraph 72, that states:

Regardless of which campaign paid for Respondent's travel expenses, Respondent did not incur the expenses himself. When Respondent requested and received deposits to his personal bank account for travel expenses from the State of Florida he accepted money that he was not due from the State of Florida.

The conclusion is supported by competent, substantial evidence, and correctly applies the law. We therefore deny the Exception.

Exception 7

The Respondent states he excepts to the last sentence of the Conclusion of Law found in paragraph 76. This paragraph states:

Respondent personally authorized the travel expenses which were charged to his credit cards. He also personally signed and submitted the travel reimbursement requests to the State of Florida. Finally, Respondent also personally signed the campaign account checks used to pay off his credit card balances. Respondent individually, and without the participation of anyone else, personally orchestrated this sequence of events. Thus, Respondent knowingly and intentionally received travel reimbursements from the State of Florida to which he was not entitled. Thus, the required mens rea element of section 112.312(9) (corrupt intent) has been met.

The conclusion is supported by competent, substantial evidence, and correctly applies the law. We therefore deny the Exception.

Exception 8

In this Exception the Respondent challenges the Conclusion of Law in paragraph 77, which reads:

At the time of the state travel payments, Respondent was a public official. The Advocate established by clear and convincing evidence that Respondent used his official position to request and receive state travel reimbursement for travel expenses that he did not personally incur. These actions gave Respondent a special benefit, additional income. Such acts were inconsistent with the proper performance of Respondent's public duties, and therefore constitute a violation of section 112.313(6).

The conclusion is supported by competent, substantial evidence, and correctly applies the law. We therefore deny the Exception.

Exception 9

In his ninth Exception, the Respondent challenges the Conclusion of Law in paragraph

85. It states:

Respondent did not disclose the income he received from State of Florida travel reimbursements. Since Respondent did not personally pay for the travel expenses he was reimbursed for, the payments he received represented income to Respondent. Accordingly this income, totaling tens of thousands of dollars, should have been, but was not, reported on CE Form 6's for 2005, 2006, 2007, 2008, and 2009.

We agree with the Advocate that the conclusion is appropriate, and therefore deny the Exception.

Exception 10

Here the Respondent asserts that the recommended penalty is out of line with others recommended in cases involving former members of the Legislature.

Again, though denominated an "Exception," the Respondent's argument does not identify any portion of the recommended order by page number or paragraph. Accordingly, the Commission is not required to rule on the Exception. Section 120.57(1)(k), Florida Statutes.

However, to the extent the Exception could be construed as meeting the requirements of the Administrative Procedure Act, the Exception is denied.

Exception 11

Here the Respondent argues the ALJ abused his discretion in denying the Respondent's Motion to Relinquish Jurisdiction upon failure of the Advocate to timely reply to the Respondent's Request for Admissions.

Again, though denominated an "Exception," the Respondent's argument here does not

identify any portion of the Amended Recommended Order After Remand by page number or paragraph. Accordingly, the Commission is not required to rule on the Exception. Section 120.57(1)(k), Florida Statutes.

However, to the extent the Exception could be construed as meeting the requirements of the Administrative Procedure Act, we agree with the reasoning of the Advocate in her Response, and the Exception is denied.

Exception 12

The Respondent argues here that Section 112.324(8)(e), Florida Statutes², is unconstitutional.

Again, though denominated an "Exception," the Respondent's argument does not identify any portion of the Amended Recommended Order After Remand by page number or paragraph. Accordingly, the Commission is not required to rule on the Exception. Section 120.57(1)(k), Florida Statutes.

However, to the extent the Exception could be construed as meeting the requirements of the Administrative Procedure Act, we agree with the reasoning of the Advocate in her Response, and the Exception is denied.

ADVOCATE'S EXCEPTION

The Advocate's single Exception goes to the issue of penalty, and asks the Commission to remand the matter to the ALJ for a recommendation as to penalty. The Respondent did not respond to this Exception, and, as the Commission has already taken that action, this issue is moot.

² The Exception's reference to Section 124.324(8)(e), Florida Statutes, appears to be a scrivener's error.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

Respondent's Exception 5, addressing the scrivener's error in paragraph 55 is granted. The rest of the Conclusions of Law as set forth in the Amended Recommended Order After Remand are approved, adopted, and incorporated herein by reference.

PENALTY

Accordingly, the Commission on Ethics, via rendition of this Final Order and Public Report, accepts the recommendation of the Administrative Law Judge that it enter a final order and public report finding that the respondent, David Rivera, violated Sections 112.313(6) and 112.3144, Florida Statutes, and Article II, Section 8, Florida Constitution, and that it recommend public censure and reprimand and civil penalties totaling \$16,500 and restitution in the amount of \$41,321.96, as set forth in the Amended Recommended Order After Remand

DONE and ORDERED by the State of Florida Commission on Ethics meeting in public session on Friday, April 17, 2015.

April 17, 2015
Date Rendered

Linda M. Robison
LINDA MCKEE ROBISON
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, 325 JOHN KNOX ROAD, SUITE 200, TALLAHASSEE, FLORIDA, 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. Leonard Collins, Attorney for Respondent
Ms. Lisa Raleigh, Commission Advocate
Mr. William Barzee, Complainant
Mr. Jackson Rip Holmes, Complainant
The Honorable W. David Watkins, Administrative Law Judge
Division of Administrative Hearings