BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re CHERYL L. THOMAS-HUGHES, Respondent.	Complaint No. 17-088 DOAH Case No. 18-3273EC Final Order No. 18-151

FINAL ORDER AND PUBLIC REPORT

This matter came before the State of Florida Commission on Ethics ("Commission"), meeting in public session on December 7, 2018, on the Recommended Order ("RO") of an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH") rendered on October 8, 2018.

Background

This matter began with an order dated August 7, 2017, in which the Commission on Ethics' Executive Director ordered Commission staff to investigate for a probable cause determination of whether Respondent had willfully failed or refused to file her 2015 CE Form 1, Statement of Financial Interests. This yielded a Report of Investigation dated March 5, 2018.

By order rendered April 25, 2018, the Commission found probable cause to believe the Respondent violated Section 112.3145(8)(c), Florida Statutes, by willfully failing or refusing to file an annual CE Form 1 for the year 2015, required to be filed by her due to her being a Purchasing Specialist with Miami-Dade County (purchasing agent having the authority to make any purchase exceeding $20,000 on behalf of a political subdivision).

The matter was forwarded to DOAH for assignment of an ALJ to conduct a formal hearing and prepare a recommended order. A formal hearing was held before the ALJ on August 31, 2018.

The Advocate filed a proposed recommended order with the ALJ; the Respondent did not file a proposed recommended order.

On October 8, 2018, the ALJ entered his RO recommending that the Commission enter a final order dismissing the Commission's Order Finding Probable Cause and dismissing the instant Section 112.3145(8)(c), Florida Statutes, proceeding against the Respondent.

On October 23, 2018, the Advocate timely submitted to the Commission her exceptions to the RO.[1] The Respondent did not file exceptions nor a response to the Advocate's exceptions.

Both the Respondent and the Advocate were notified of the date, time, and place of the Commission's final consideration of this matter; and both were given the opportunity to make argument during the Commission's consideration.

Standards of Review

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).

[1] On October 17, 2018, the Advocate submitted a motion for extension of time to file exceptions. However, this motion was rendered moot by the Advocate's timely filing of exceptions.

The agency may not reweigh the evidence, may not resolve conflicts in the evidence, and may not judge the credibility of witnesses, because such evidential matters are within the sole province of the ALJ. Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Consequently, if the record of the DOAH proceedings discloses any competent, substantial evidence to support a finding of fact made by the ALJ, the Commission on Ethics is bound by that finding.

Under Section 120.57(1)(l), Florida Statutes, an agency may reject or modify the conclusions of law over which it has substantive jurisdiction and the interpretations of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion or interpretation and must make a finding that its substituted conclusion or interpretation is as or more reasonable than that which was rejected or modified.

Having reviewed the RO, the complete record of the DOAH proceedings, and the Advocate's exceptions, and having heard the arguments of the Advocate and the Respondent, the Commission on Ethics makes the following rulings, findings, conclusions, recommendation, and disposition:

Ruling on Advocate's Exceptions[2]

[2] The exceptions number 1-6 and the filing is 22 pages. Each exception is treated below. However, the essence of the Advocate's position is that the ALJ found, as a matter of fact, that the Respondent willfully failed to file her 2015 CE Form 1 (Statement of Financial Interests), that, as a matter of law, the ALJ's Recommended Order misinterprets statutes and makes erroneous recommendations for disposition of this matter, that the record in and law applicable to this matter support the determination that the Respondent violated Section 112.3145(8)(c), Florida Statutes, and that the Commission should find the violation and recommend that the Respondent be removed from her public position.

1. In her first exception, the Advocate takes issue with a portion of paragraph 1of the RO, requesting that the paragraph's language stating that the Respondent's Form 1 filings for years other than 2015 (the year at issue in this matter) were filed "evidently without litigation," and stating that the Respondent filed a Form for the year 2016, be stricken, arguing that the statements are not supported by competent substantial evidence. This exception is rejected. "Evidently without litigation" is not necessarily a finding of fact, and, in any event, this language does not negate the findings of fact in paragraph 1, not excepted to by the Advocate, which support the Respondent being a person required to file financial disclosure and who filed Form 1 for the years 2011-2014; and the finding that the Respondent filed for the year 2016 does not disturb the material factual findings of the RO.

2. In her second exception, the Advocate, as in her first exception as to paragraph 1 of the RO, takes issue with the statement, in paragraph 11 of the RO, that the Respondent filed a Form 1 for the year 2016; this portion of the second exception is rejected for the reasons set forth above as to the first exception.

Also, in her second exception, the Advocate takes issue with the ALJ's reasoning that a failure to file must be intentional in order to be "willful." The Advocate correctly points out that our precedent defines "willful" as "gross indifference and reckless disregard to the requirements of the law." This precedent resulted from our adoption of the Recommended Order in In re Joel Davis, Final Order No. 18-035 (Florida Commission on Ethics June 13, 2018) (available from the agency clerk)—a case with similar facts, but a different ALJ. The Advocate argues that since the term "willful" is not defined in the statute, its meaning must be derived from its context, and from its common or usual meaning. Under these circumstances, the Advocate argues the term has been defined to include the standard articulated above.

We agree, and accept the definition of "willful" articulated by the Davis ALJ and adopted by us in that case. We find this view as or more reasonable than that of the ALJ in the instant case, and accept this portion of the Advocate's second exception.

We further note that the ALJ in this case unequivocally found that the Respondent's failure to file was willful, *even under his erroneously more stringent definition of the term.* See paragraphs 11 and 18 of the RO. This is a finding of fact, supported by competent, substantial evidence, and as such it cannot be disturbed. Goin v. Commission on Ethics, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995).

3. In her third exception, the Advocate takes issue with language of paragraph 13 of the RO which purports to make observations about the content of disclosures on Forms of the Respondent, the Respondent's tearfulness at the DOAH hearing, and the Respondent's keeping of her public job and its concomitant expected pension. This exception is rejected. These observations are not material to a willful failure to file and they do not disturb the ALJ's finding that the Respondent's failure to file was willful.

4. Continuing, beginning with the second full paragraph of page 5 of her exceptions and going to nearly the bottom of page 15 (including the portion titled EXCEPTION FOUR), the Advocate takes issue with the ALJ's reasoning in the CONCLUSIONS OF LAW portion of the RO, including arguing that paragraphs 14, 19, 20, 22, 24, 25, 27, 28, 32, 33, 34, 35, and 36 of the RO should be stricken from (not incorporated in) the final order in this matter. This exception is accepted. We agree with the Advocate and find that the ALJ's reading of the law is incorrect. As stated more particularly, below, we find that our view of the law is as or more reasonable than that set forth by the ALJ.

As to paragraph 14 of the RO, the Commission has the statutory authority to proceed as it did in this matter and DOAH had the authority to conduct a hearing, even without the filing of an ethics complaint by a citizen or "third party." In fact, Section 112.3145(8)(c), Florida Statutes, requires the Commission to initiate an investigation and proceeding "without receipt of a complaint," Section 112.324(3), Florida Statutes, provides for findings of probable cause and subsequent hearing, and Sections 120.569 and 120.57(1), Florida Statutes, provide for DOAH hearings.[3] An agency's own views on where its jurisdictional bounds lie reflect a putative expertise. Florida Dept. of Ins. and Treasurer v. Bankers Ins. Co., 694 So. 2d 70 (Fla. 1st DCA 1997). Deference is accorded to an agency regarding its construction of a statute which it administers. Velez v. Commission on Ethics, 739 So. 2d 686 (Fla. 5th DCA 1999).

As to paragraph 19 of the RO, its reference to a "grace period" for filing is not, per se, incorrect. However, to the extent that its reference to "four statutory periods" is part of the ALJ's overall view of the law and his lack-of-jurisdiction argument, it is rejected as contrary to the plain meaning of the statutes concerning willful failure to file financial disclosure.

As to paragraph 20 of the RO, the references to an automatic fine and unusual circumstances are not, per se, incorrect. However, as with paragraph 19, its erroneous implications are rejected.

Paragraph 22 is rejected to the extent that it reasons that penalties under Section 112.317, Florida Statutes, or the ability of "third parties" to file ethics complaints under Section 112.324, Florida Statutes, preclude a proceeding under Section 112.3145(8)(c), Florida Statutes.

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[3] The proceedings in this matter, from the inception of the Commission's statutorily-authorized, self-initiated complaint process, through the investigation, through the probable cause determination, and through the DOAH hearing, do not show that the Respondent ever raised any argument that the Commission lacked jurisdiction in this matter.

Paragraph 24 is rejected based on the reasoning as to the rejection of paragraph 22.

Paragraph 25, similarly, is rejected as an erroneous view of the law.

Paragraph 27 is rejected because it contains the erroneous view that a late filing will preclude a finding of a willful failure to file. By concluding that a violation of the statute requires that the Respondent must have failed or refused to file her 2015 CE Form 1 *at all*, and disregarding that the Respondent's filing was not timely, which triggered the Commission's investigation into whether the failure to file was willful, the ALJ is in error. We find that the Legislature intended for the Commission to pursue violators once the maximum fine accrued, regardless of later actions by the violator. As the agency constitutionally and statutorily charged with administering Section 112.3145(8)(c), we cannot adopt as our own the ALJ's view that a filer may file months or years late, as long as he or she does so before the Commission takes final action. We do not include the ALJ's construction of the statute in our final order in this matter because the purpose of financial disclosure is to allow citizens to *timely* monitor their public officials and employees for any conflicts of interests that may arise, thereby deterring corruption and increasing the public confidence in government. The ALJ's construction of the statute thwarts this legitimate public purpose.[4] In rejecting the ALJ's construction of the statute and substituting the view suggested by the Advocate, we find, for the reasons discussed above, that the substituted view is as or more reasonable than the ALJ's view.

Paragraph 28 is rejected in accord with the rejection of paragraph 27 of the RO.

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[4] Statutes should never be construed to effect an absurd result. In the context of financial disclosure, a regimen of laws codified in the whole of Section 112.3145, Florida Statutes, whose thrust is to require accurate and *timely* disclosure of financial interests by persons such as the Respondent who are obligated to file CE Form 1, it would indeed be less than rational to allow a "filing" made at any time to trump a prosecution, or preclude a finding of a violation, under Section 112.3145(8)(c).

Paragraph 32 of the RO is rejected as contrary to our precedent and the reasoning of the ALJ in Davis, supra, our precedent in In re Kashamba Miller-Anderson, Final Order No. 18-053 (Florida Commission on Ethics August 1, 2018) (available from the agency clerk), and the Commission's logical and straightforward reasoning therein.

Paragraph 33 is rejected as inconsistent with Section 112.3145(8)(c).

Paragraph 34 is rejected for the reasons paragraph 33 is rejected.

Paragraph 35 is rejected. Its "fairness" argument is an attempt at unauthorized equity not present in the context of a legal regimen addressing willful failure to file financial disclosure; and the citation to a Commission on Ethics complaint proceeding and disposition (handled under a completely different statute than the one at issue here)[5] is inapposite to the issues at hand.

Paragraph 36 likewise is rejected as an attempt at equity and plenary power not placed in an ALJ.

5. In her fifth exception, the Advocate mirrors the arguments in her second exception as to the meaning of "willful." This exception is accepted, incorporating our response to her second exception, above.

6. In her sixth exception, followed by her Conclusion, the Advocate tracks the elements for a violation of Section 112.3145(8)(c), cites the proof of these elements from the RO, argues her view of the meaning of "willful," requests that the Commission find that the Respondent violated Section 112.3145(8)(c), Florida Statutes, and requests that the Commission recommend removal of the Respondent from public employment due to her willful failure to file her 2015 CE Form 1.

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[5] In re Robert K. Robinson, Final Order No. 18-052 (Fla. COE August 1, 2018) (available from the agency clerk).

We agree with this exception. The Advocate accurately cites the elements for a violation, accurately points to evidence underlying findings of fact of the ALJ, articulates her view of the meaning of "willful," with which we agree, and makes appropriate requests for findings and a recommendation by the Commission.

Findings of Fact

The Commission on Ethics accepts and incorporates into this Final Order and Public Report the findings of fact in the Recommended Order from the Division of Administrative Hearings.

Conclusions of Law

Except to the extent rejected or modified above, the Commission on Ethics accepts and incorporates into this Final Order and Public Report the conclusions of law in the Recommended Order from the Division of Administrative Hearings.

Disposition

Accordingly, the Commission on Ethics finds that the Respondent violated Section 112.3145(8)(c), Florida Statutes, by willfully failing to file a CE Form 1, Statement of Financial Interests, for the year 2015, and recommends to the Governor that the Respondent be removed from her public employment.[6]

[6] It is our intent by this order to accurately administer the laws enacted by the Legislature. By necessity, we must apply the law, even if that application works a hard result. Neither this Commission, nor an Administrative Law Judge, is a court of equity with plenary power to show mercy, work "fairness," rewrite statutes, or make harmonious the penalties derived from differing statutes under differing proceedings. Feelings of sympathy or empathy, no matter how strong, cannot change our proper and legal role.

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 7, 2018.

December 12, 2018
Date Rendered

Guy W. Norris
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: Ms. Cheryl L. Thomas-Hughes, Respondent
Ms. Melody A. Hadley, Commission Advocate
The Honorable Robert E. Meale, Division of Administrative Hearings