

John Grant  
*Chair*  
Glenton "Glen" Gilzean, Jr.  
*Vice Chair*  
Michelle Anchors  
Antonio Carvajal  
Don Gaetz  
William "Willie" N. Meggs  
Jim Waldman



Kerrie J. Stillman  
*Executive Director*

Steven J. Zuilkowski  
*Deputy Executive Director/  
General Counsel*

State of Florida  
COMMISSION ON ETHICS  
P.O. Drawer 15709  
Tallahassee, Florida 32317-5709

(850) 488-7864 Phone  
(850) 488-3077 (FAX)  
www.ethics.state.fl.us

325 John Knox Road  
Building E, Suite 200  
Tallahassee, Florida 32303

*"A Public Office is a Public Trust"*

---

July 27, 2022

The Honorable Ron DeSantis  
Governor, State of Florida  
The Capitol, 400 S. Monroe St.  
Tallahassee, Florida 32399-0001

Re: Complaint No. 20-100, In re David N. Tolces

Dear Governor DeSantis:

The Florida Commission on Ethics has completed a full and final investigation of a complaint involving David N. Tolces, the former Interim General Counsel for the Broward County Housing Authority. Pursuant to Section 112.324(8), Florida Statutes, we are reporting our findings and recommending appropriate disciplinary action to you in this case. Enclosed are copies of our final order and of our file in this matter. As we have found pursuant to a Recommended Order of an Administrative Law Judge of the Division of Administrative Hearings that Mr. Tolces violated the Code of Ethics in the manner described by our order, we recommend that you impose a civil penalty upon him in the amount of \$2,500 (two thousand five hundred dollars) and a public censure and reprimand. If we may be of any assistance to you in your deliberations, please do not hesitate to contact us. We would appreciate your informing us of the manner in which you dispose of this matter. For information regarding collection of the civil penalty, please contact the Office of the Attorney General, Ms. Elizabeth A. Miller, Assistant Attorney General.

Sincerely,

*for Steven J. Zuilkowski*  
Kerrie J. Stillman  
Executive Director

KJS/sjz

Enclosures

cc: Mr. Mark Herron, Attorney for Respondent  
Mr. Brennan Donnelly, Attorney for Respondent  
Ms. Elizabeth A. Miller, Commission Advocate  
Mr. Steven W. Zerkowitz, Complainant

BEFORE THE  
STATE OF FLORIDA  
COMMISSION ON ETHICS

In re DAVID N. TOLCES, )  
 )  
 Respondent. )  
\_\_\_\_\_ )

Complaint No. 20-100  
DOAH Case No. 21-2887EC  
Final Order No. 22-026

FINAL ORDER AND PUBLIC REPORT

This matter came before the State of Florida Commission on Ethics ("Commission"), meeting in public session on July 22, 2022, on the Recommended Order ("RO") of an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH") rendered on April 11, 2022.

Background

This matter began with the filing of an ethics complaint, along with an amendment to that complaint, by Steven W. Zelkowitz, ("Complainant") against David N. Tolces ("Respondent"). By an order filed on August 24, 2020, the Executive Director of the Commission on Ethics determined that the complaint was legally sufficient to indicate possible violation of the Code of Ethics and ordered Commission staff to investigate the complaint, resulting in a Report of Investigation dated December 7, 2020.

By order rendered February 10, 2021, the Commission found probable cause to believe the Respondent violated Section 112.313(6), Florida Statutes, by using his official position in an attempt to secure a special privilege or benefit for himself and/or his law firm, Weiss Serota Helfman Cole & Bierman.

On September 21, 2021, the matter was transmitted to DOAH for assignment of an ALJ to conduct a formal hearing and prepare a recommended order.

On January 13, 2022, the ALJ held a formal hearing, whereby the Respondent and Advocate appeared by Zoom video conference. The ALJ admitted Advocate's Exhibits 1 through 20 and the Respondent did not offer any separate exhibits. Advocate and Respondent filed proposed recommended orders with the ALJ.

On April 11, 2022, the ALJ entered his RO recommending that the Commission on Ethics enter a final order and public report recommending a finding that Respondent violated Section 112.313(6), Florida Statutes, and recommending the imposition of a civil penalty of \$2,500.

On April 14, 2022, Advocate timely submitted to the Commission an exception to the RO. On April 25, 2022, Respondent timely filed his response to Advocate's exceptions. On April 26, 2022, Respondent timely submitted his exceptions to the RO. On Saturday, May 7, 2022, Advocate submitted her response to Respondent's exceptions; pursuant to Rule 28-106.104(3), F.A.C., the document was considered filed on Monday, May 9, 2022, which was the next business day for the Commission. The filing of Advocate's response to Respondent's exceptions was technically untimely, given that Rule 28-106.217(3), F.A.C., allows a party to file a response to exceptions within 10 days of the filing of the exceptions, which would have made the due date May 6, but we allow the filing in the absence of an objection from Respondent.

In accordance with Section 120.569(2)(1), Florida Statutes, Advocate and Respondent both consented to an extension of the requirement that the Commission render a final order within 90 days of the issuance of the RO, allowing the Commission to consider the matter at its July 22, 2022 meeting and issue a final order in the matter on July 27, 2022.

Both Respondent and 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).

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.

An agency may accept a hearing officer's findings of fact and conclusions of law, yet still reject the recommended penalty and substitute an increased or decreased recommended penalty. Criminal Justice Standards and Training Comm'n v. Bradley, 596 So. 2d 661, 664 (Fla. 1992). Under Section 120.57(1)(l), Florida Statutes, an agency may reduce or increase the recommended penalty only upon a review of the complete record, stating with particularity the agency's reasons for reducing or increasing the recommended penalty, and citing to the record in support of its action.

Having reviewed the RO, the complete record of the proceeding, Advocate's exceptions, Respondent's exceptions, and responses to the exceptions from both parties, and having heard the arguments of Advocate and Respondent, the Commission on Ethics makes the following rulings, findings, conclusions, recommendation, and disposition:

#### Ruling on Respondent's Exceptions

Respondent submitted 21 distinct exceptions to the RO. We address Respondent's exceptions first. Advocate's sole exception addresses the same portion of the RO as Respondent's last exception, so we will address Advocate's exception after Respondent's exceptions.

#### Respondent's First Exception: Paragraph 26 of the RO

In his first exception, Respondent takes issue with paragraph 26 of the RO, which provides:

26. Although adherence to the cone of silence was mandatory, a penalty for a violation was discretionary with the BHCA. More to

the point, paragraph 12 of the RFP contained strict provisions regarding communications during the solicitation process lasting until a final award was made. The essential provisions of that section are summarized as follows:

a. *The directive to BHCA staff, employees, and Board members:*

**No private communication with Proposers**

b. *The directive to Proposers:*

**No communications for any reason with BHCA**

c. *When:*

**From the issue date of the RFP, until the final award was announced**

d. *Exceptions to the cone of silence:*

**Only through the RFP Point of Contact and in writing via e-mail or during the Pre-Proposal Conference**

e. *What was prohibited:*

**All contact or interaction**

f. *What was NOT prohibited:*

**Communications not related to the RFP**

[Font formatting in original.]

Respondent's exception to paragraph 26 argues that the paragraph contains erroneous findings of fact by parsing the elements of paragraph 12 of the RFP separately, thereby supporting conclusions of law later in the RO that could not otherwise be supported if paragraph 12 of the RFP had been presented and interpreted in its entirety. Respondent does not argue that the proceedings on which the findings were based did not comply with the essential requirements of the law, so the only question before us with regard to this exception to the findings of fact in paragraph 26 of the RO is whether the paragraph is supported by competent substantial evidence.

In evaluating whether the ALJ's finding is supported by competent substantial evidence, we note that the question before us is not simply whether there was more evidence in the record to make a different finding. If the ALJ's findings are supported by competent substantial

evidence, then we are not able to substitute a different finding that is also supported by competent substantial evidence. See Lantz v. Smith, 106 So. 3d 518, 521 (Fla. 1st DCA 2013) (citing Resnick v. Flagler Cnty. Sch. Bd., 46 So.3d 1110, 1112–13 (Fla. 5th DCA 2010)).

Paragraph 26 of the RO purports to be a summary of paragraph 12 of the RFP and, indeed, most of the parsed language comes directly from the text of paragraph 12 of the RFP. The finding of fact in paragraph 26 of the RO that the RFP prohibited proposers from having "communications for any reason with BHCA" is not a direct quote from paragraph 12 of the RFP, but is an inference drawn from the record by the ALJ. While there is testimony and evidence in the record to contraindicate the ALJ's inference, there is competent substantial evidence in the record to support it. For example, in addition to the text of paragraph 12 of the RFP itself, which does lend itself to the ALJ's interpretation, testimony by Ann Deibert (Transcript, pp. 94-95, 108) and Steven Zelkowitz (Transcript, p. 122) shows that some individuals familiar with the prohibitions of the RFP believed that certain communications with the BHCA were prohibited, unless they were otherwise excepted in paragraph 12 of the RFP. Deibert testified that she believed Respondent's comments to the board at the BCHA meeting were inappropriate because they concerned the RFP and were not given during the public comment portion of the meeting. Zelkowitz, as a member of another firm that made a proposal under the RFP, testified that his understanding of that RFP was that there should be "no communications at all with . . . anyone related to the solicitation, the procurement, until the award actually occurred." For these reasons, we conclude that the findings of fact in paragraph 26 are supported by competent substantial evidence.

With regard to Respondent's argument that the ALJ's parsing of paragraph 12 supports erroneous conclusions later in the RO, this is not a basis under Section 120.57(1)(l), Florida Statutes, to disturb findings of fact.

Therefore, we reject Respondent's first exception.

Respondent's Second Exception: Paragraph 29 of the RO

Footnote 6, which appears in paragraph 29 of the RO, concludes that Respondent's meetings with the evaluation committee "offered by the [Broward County Housing Authority] fully complied with section 286.0114(2), Florida Statutes (sic)." Respondent excepts to this conclusion of law because he states the BCHA board must also allow public comment under the law. In other words, he argues the conclusion of law is incorrect or is, at a minimum, incomplete.

A conclusion of law that interprets and applies Section 286.0114(2), Florida Statutes, is well outside the Commission's substantive jurisdiction. Although Section 120.57(1)(l) does afford an agency the opportunity to modify or reject conclusions of law, it limits that ability to those "over which [the agency] has substantive jurisdiction." We must reject Respondent's second exception because we do not have substantive jurisdiction over Section 286.0114.

Respondent's Third Exception: Paragraph 45 of the RO

In paragraph 45 of the RO, the ALJ concludes that Respondent was aware that paragraph 12 of the RFP "did not permit these types of comments to be made since the final award had not yet been made." In his third exception, Respondent excepts to this finding of fact, disputing whether the RFP did in fact bar such communications with the Board. As we noted in our discussion of Respondent's first exception, there is competent substantial evidence upon which the ALJ based his finding that paragraph 12 of the RFP barred communications about the RFP to



the Board. For the reasons stated in our discussion of the first exception, we reject Respondent's third exception.

*Respondent's Fourth Exception: Paragraphs 46 and 47 of the RO*

In his fourth exception, Respondent takes issue with paragraphs 46 and 47 of the RO, which state:

46. The inescapable finding and conclusion is that Respondent took advantage of his position as Board counsel on the dais and interjected himself into the ongoing and nearly complete RFP process. He sought to overturn the evaluation committee's recommendation and ultimately have the contract award instead to his firm—Weiss Serota.

47. Respondent believed he was speaking to the Board "just like any member of the public." At the public Zoom meeting, he inexplicably "imagined himself" stepping down from the dais and taking a position at the podium where members of the public speak to address the Board. However, Respondent acknowledged that his comments did not occur during the "public comment" portion of the meeting.

Respondent's argument in this exception essentially is that the ALJ mischaracterized the setting of the Board meeting to make Respondent's explanation of his conduct seem "inexplicable." As relief, he requests that the findings in paragraphs 46 and 47 of the RO be struck.

As public servants who serve on an agency governing board ourselves, we recognize that referring to someone as being "on the dais" is sometimes a figurative reference to that person being a member of a governing board, similar to how saying someone is "behind bars" is a figurative reference to that person being a prisoner. The phrase "on the dais" in paragraph 46 of the RO, in the context of the entire RO, is not ambiguous in its meaning; given the repeated mentions throughout the RO that this the context was a Zoom meeting, we find that the phrase

"on the dais" was intended figuratively, merely indicating he was a participant with an official role in a public meeting.

It is undisputed that the meeting was conducted by Zoom, that the participants were all remote, that Respondent was on the panel of the Zoom video conference among the board members, and that he had an official role at that meeting. In that context, we find the ALJ could only have meant this term—"on the dais"—figuratively. To that extent, we find there is competent substantial evidence that the figurative description of Respondent being "on the dais" was appropriate. For that reason, we reject Respondent's fourth exception.

*Respondent's Fifth Exception: Paragraph 48 of the RO*

In his fifth exception, Respondent takes issue with paragraph 48 of the RO, which states:

48. As Respondent was making his remarks about the legal services contract, a member of the public objected out loud and on the record. Instead of pausing and rethinking the propriety of his remarks, Respondent forged ahead and asked to have the person's voice muted, essentially shutting down the person's objection. (A Ex. 20).

Respondent's main argument is that there is no competent substantial evidence to show that Respondent "shut down" the person's objection (the RO refers to the person as Mr. Kozich). A review of the video admitted at the DOAH hearing as Advocate's Exhibit 20 yields that, when Mr. Kozich interrupted Respondent at the public meeting, Respondent said, "Mr. Kozich – [inaudible name], can you mute him please?" In response to that, a female voice can be heard on the video saying, "Yes." Of course, the record demonstrates that BCHA staff were not successful in muting Mr. Kozich and the meeting was abruptly adjourned, but it appears there is competent substantial evidence to support the ALJ's finding that Respondent did ask for the voice to be muted. Given that someone responded to indicate that they would attempt to mute Mr. Kozich, it appears there is competent substantial evidence for the ALJ to conclude that

Respondent's request was causally related to "essentially shutting down" Mr. Kozich's objection. For these reasons, Respondent's fifth exception is rejected.

Respondent's Sixth and Ninth Exceptions: Paragraphs 49 and 74 of the RO

Respondent's sixth exception is to paragraph 49 of the RO, which states:

49. Respondent was only allowed to continue to speak because of his longstanding public position and influence over the Board. As one Commissioner remarked, near the end of the meeting: He was permitted to speak because "He's our lawyer." (AEx. 20).

Respondent's ninth exception is to paragraph 74 of the RO, which appears in the Conclusions of Law section of the RO, but the substance of this particular paragraph is a finding of fact. It states:

74. Chair O'Laughlin allowed Respondent to speak (i.e., "Please, please.") because of his influence and official position as the Board's attorney. As evidence, Mr. Kozich, a member of the public, attempted to comment at the same time as Respondent. Respondent responded by calling for Mr. Kozich's microphone to be muted and him silenced.

Specifically, Respondent's argument in this exception is that the record does not contain competent substantial evidence as to why Respondent was allowed to speak.

We agree that a review of the record does not contain competent substantial evidence as to why the Respondent was allowed to speak; such a statement goes to the mental state of the members of the Board, but only one of them—the Chair—testified at the hearing.

Mark O'Laughlin, the Chair of the BCHA, was asked only eight questions on direct and cross examination, two of which induced his name and his title. At no point was he asked why he allowed Respondent to speak at the meeting. He stated in general that he had never refused anyone the opportunity to speak on an agenda item, even on an agenda item that was not public

comment. He also stated that he could not specifically remember allowing Respondent to speak at the public meeting in question.

Paragraph 49 of the RO references a board member saying, "He's our lawyer," which the video in Advocate's Exhibit 20 demonstrates was said in response to Mr. Kozich's objection to Respondent speaking. The statement, however, is not said by the person that made the decision to allow Respondent to speak—the person conducting the meeting—the Chair.

The record contains no competent substantial evidence about why the Chair allowed Respondent to speak. The other facts in paragraphs 49 and 74 of the RO—e.g., that Respondent was allowed to speak and that a board member did say "He's our lawyer"—are supported by competent substantial evidence.

Therefore, Respondent's sixth and ninth exceptions are granted in part; parts of paragraphs 49 and 74 shall be struck so the paragraphs now read:

49. Respondent was ~~only~~ allowed to continue to speak ~~because of his longstanding public position and influence over the Board.~~ As one Commissioner remarked, near the end of the meeting: ~~He was permitted to speak because~~ "He's our lawyer." (AEx. 20).

\* \* \*

74. Chair O'Laughlin allowed Respondent to speak (i.e., "Please, please.") ~~because of his influence and official position as the Board's attorney.~~ As evidence, Mr. Kozich, a member of the public, attempted to comment at the same time as Respondent. Respondent responded by calling for Mr. Kozich's microphone to be muted and him silenced.

Respondent's Seventh Exception: Paragraph 57 of the RO

Respondent's seventh exception concerns paragraph 57 of the RO. In paragraph 57 of the RO, the ALJ states that he found the testimony of Ann Deibert and Teisha Palmer concerning their interpretation of the RFP's cone of silence to be "largely irrelevant." In other words, the

ALJ gave little weight to their testimony on that subject, and Respondent's exception asks us to reweigh their testimony.

As we stated in the Standards of Review section of this very Final Order, we are unable to reweigh the evidence and testimony. Heifetz, at 1281. Therefore, we must reject Respondent's seventh exception.

Respondent's Eighth Exception: Paragraph 73 of the RO

In Respondent's eighth exception, Respondent argues that the conclusion of law in paragraph 73 of the RO must be struck because paragraph 12 of the RFP cannot be interpreted to prohibit the Respondent's comments to the Board about the RFP at a public meeting. As noted in our discussion of Respondent's first exception, the ALJ's finding that the communication was prohibited is supported by competent substantial evidence; the ALJ's conclusion of law in paragraph 73 is reasonable because it relies on that finding of fact. Therefore, we reject Respondent's eighth exception.

Respondent's Tenth Exception: Paragraph 75 of the RO

In his tenth exception, Respondent takes issue with paragraph 75 of the RO, which states:

75. Respondent could not lawfully step away from his role as the Board's attorney, with its attendant duties and responsibilities, and advocate on behalf of his law firm during the portion of the May 19, 2020, meeting he chose.

In support of the exception, Respondent essentially makes two arguments: (1) "This conclusion cites no law supporting it" and (2) "The Recommended Order later incorrectly asserts Respondent could not advocate for himself or his firm under section 112.313(16), Florida Statutes, failing to recognize that argument was legally rejected in Robinson v. Commission on Ethics, 242 So. 3d 467, 473 (Fla. 1st DCA 2018)."

With regard to Respondent's first argument, we are unaware of any authority to support Respondent's argument that a lack of citations supporting a legal conclusion forms a basis for invalidating that conclusion; in making his argument that a lack of citations to law supporting a conclusion should invalidate the conclusion, Respondent similarly cites no law as support. Where Respondent has failed to identify a legal basis for this argument in his exception, we decline to rule on it under authority granted to us by Section 120.57(1)(k), Florida Statutes.<sup>1</sup>

With regard to his second argument under this exception, we agree with Respondent's reading of Robinson, as discussed later in this Final Order. However, we believe the conclusion of law here is not a reference to the situation in Robinson—put another way, it was not a statement that he could not, *in general*, represent himself or his firm before his own agency—but a statement that he could not do it at the moment he chose, due to circumstances not present in Robinson: that the RFP's cone of silence was still in effect in the instant case and the "portion of the May 19, 2020, meeting he chose" was not the public comment portion. This conclusion leans on findings of fact in paragraph 26 of the RO, as we discussed in our treatment of Respondent's first exception. For this reason, we reject Respondent's tenth exception.

Respondent's Eleventh Exception: Paragraphs 76 through 78 of the RO

In his eleventh exception, Respondent excepts to paragraphs 76 through 78 of the RO, which state:

76. Respondent identified himself as "David Tolces, Board Attorney." He was permitted to speak from a position of authority on the dais only because, as one Commissioner exclaimed, "He's our lawyer." To the Board members and to the public, Respondent's comments were made as a local government attorney, and not as a private citizen.

---

<sup>1</sup> Section 120.57(1)(k) states in the relevant part, "The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception . . . that does not identify the legal basis for the exception . . . ."

77. Respondent used his official position on the dais to speak out at the meeting.

78. Therefore, the second element of a violation of section 112.313(6) was proven.

In support of his exception here, Respondent first reiterates arguments made in his sixth and ninth exceptions. For the reasons we noted in our discussion of Respondent's sixth and ninth exceptions, which we addressed together, references to the state of mind of the Chair of the BCHA and the reasons he allowed Respondent to speak are struck from paragraph 76 of the RO.

Lastly, in support of his eleventh exception, Respondent essentially argues there are other facts in the record to justify striking the conclusion that "Respondent used his official position [. . .] to speak out at the meeting." Specifically, he points to the fact that Respondent stated "he was speaking on his behalf and on behalf of his law firm." In order for us to modify or reject the conclusion of law in paragraphs 77 and 78 of the RO, we must justify that the substituted conclusion of law is "as or more reasonable than that which was rejected or modified." Section 120.57(1)(l), Florida Statutes. We conclude that the ALJ's legal conclusion is reasonable and that a review of the video in Advocate's Exhibit 20 reasonably supports the conclusion. We, therefore, reject this argument.

Having granted Respondent's eleventh exception in part, and having rejected it in part, paragraphs 76 through 78 now read as follows:

76. Respondent identified himself as "David Tolces, Board Attorney." ~~He was permitted to speak from a position of authority on the dais only because, as one Commission exelaimed, "He's our lawyer." To the Board members and to the public,~~ Respondent's comments were made as a local government attorney, and not as a private citizen.

77. Respondent used his official position on the dais to speak out at the meeting.

78. Therefore, the second element of a violation of section 112.313(6) was proven.

Respondent's Twelfth Exception: Paragraphs 79 through 82 of the RO

In his twelfth exception, Respondent excepts to paragraphs 79 through 82 of the RO, relying on his earlier arguments in exceptions that addressed redundant paragraphs in the RO. To the extent Respondent's arguments were addressed in previous exceptions, we rely on our discussion of those exceptions in rejecting the instant exception.

Respondent's Thirteenth Exception: Paragraph 84 of the RO

In his thirteenth exception, Respondent takes issue with paragraph 84 of the RO, which states:

84. Reasonable notice that his comments would be improper was afforded to Respondent, and others, by paragraph 12 of the RFP. The RFP spoke clearly and distinctly on this point. The language was clear and unambiguous. The text was bolded and underlined to draw attention to this provision. Respondent testified that he read that provision of the RFP and, by his signature, he agreed to abide by its terms.

Respondent raises several arguments in this exception.

First, Respondent again raises arguments he made in his first exception to paragraph 26 of the RO—that paragraph 12 of the RFP did not prohibit Respondent from speaking to the Board at a public meeting. To the extent those arguments were addressed in our discussion of Respondent's first exception, we rely on that discussion in rejecting the argument here.

Second, Respondent argues that there are additional facts that undercut the ALJ's finding of fact that paragraph 12 of the RFP "was clear and unambiguous." As we noted in our treatment of Respondent's first exception, "[i]f the ALJ's findings are supported by competent substantial evidence, then we are not able to substitute a different finding that is also supported by competent substantial evidence." Lantz, at 521. We believe that a review of paragraph 12 of the



RFP and the testimony of Ann Deibert (Transcript, pp. 94-95, 108) and Steven Zelkowitz (Transcript, p. 122) support the finding.

Last, Respondent argues that a conclusion of law that Respondent acted corruptly requires a showing that his conduct was, among other things, a violation of the law or the Code of Ethics.<sup>2</sup> Respondent focuses on the "violation of the law" component, noting that paragraph 12 of the RFP is neither law nor a provision of the Code of Ethics.

In Robinson, the Court noted that:

The term "corruptly" is defined to mean "done with a wrongful intent and for the purpose of obtaining ... any benefit ... which is inconsistent with the proper performance of [the respondent's] public duties." § 112.312(9), Fla. Stat.; see also Siplin v. Comm'n on Ethics, 59 So.3d 150 (Fla. 5th DCA 2011); Bennett v. Comm'n on Ethics, 871 So.2d 924, 926 (Fla. 5th DCA 2004). Case law has construed this provision to require proof that the respondent acted "with reasonable notice that [his or] her conduct was inconsistent with the proper performance of [his or] her public duties and would be a violation of law or the code of ethics." Siplin, 59 So.3d at 151–52 (quoting Blackburn, 589 So.2d at 434).

Robinson at 471. In Robinson, after a discussion of the facts of the case, the Court ultimately concludes that Robinson acted corruptly because "Robinson knew or should have known that his actions were wrong and unethical." Robinson at 472. In other words, a demonstration that Respondent's actions were wrong and unethical satisfies the requirement that it be shown that the conduct at issue "would be a violation of law or the code of ethics."

The ALJ's conclusion of law that Respondent acted corruptly is reasonable in light of the facts that paragraph 12 of the RFP was clear and unambiguous, that Respondent agreed to abide by paragraph 12 of the RFP (Advocates Exhibit 17), and that Respondent testified that he

---

<sup>2</sup> Specifically, Respondent states that it must be proven by clear and convincing evidence that "Respondent acted with 'reasonable notice' that his conduct was inconsistent with the proper performance of his public duties and would be a violation of the law or the Code of Ethics." RO at ¶83 (citing Blackburn v. State Comm'n on Ethics, 589 So. 2d 431, 434 (Fla. 1st DCA 1991) (emphasis omitted)).

intended, but failed, to make the comments during public comment (Transcript, pp. 55, 58); from this, the ALJ could infer that Respondent was aware those comments would be inappropriate if made elsewhere in the agenda. Based on these facts, at a minimum, we find it has been shown that Respondent had notice that his conduct was wrong and unethical. The conclusion of law that Respondent acted corruptly is reasonable. Therefore, the exception is rejected.

Respondent's Fourteenth Exception: Paragraph 85 of the RO

Respondent's fourteenth exception takes issue with paragraph 85 of the RO, which states:

85. Respondent had reasonable notice that a customary cone of silence was in effect and understood the reasonable scope of its terms. Nonetheless, he interrupted the meeting with prepared notes for the purpose of improperly influencing the process in an unfair manner.

Respondent's first argument in this exception is that there is no competent substantial evidence in the record to establish what a "customary" cone of silence is. Respondent is correct in noting that the word "customary" was not said once at the DOAH hearing. However, labeling the cone of silence as "customary" is supported by substantial competent evidence. On cross examination of both Teisha Palmer (Transcript, p. 83) and Ann Deibert (Transcript, p. 97), Respondent asked whether the language in paragraph 12 of the RFP was "boilerplate." In both instances, the witnesses indicated that it likely was. To that extent, we find that labeling the cone of silence as "customary" is supported by competent substantial evidence.

Respondent's second argument in support of his fourteenth exception is, as he argued in in his first and second exception, that paragraph 12 of the RFP did not prohibit communication to the Board at a public meeting and that it was consistent with Section 286.0114. We rely on our discussion of the first exception and second exception in rejecting these arguments once more.

Therefore, we reject Respondent's fourteenth exception to the RO.

Respondent's Fifteenth Exception: Paragraphs 86 through 88 of the RO

In his fifteenth exception, Respondent takes issue with paragraphs 86 through 88 of the RO.

First, Respondent argues that the conclusion of law in paragraph 86 that Respondent's "intent was corrupt in that he sought to completely waylay and undermine the work of the evaluation committee, and restart the procurement process which was nearly completed" was not supported by the finding of fact in paragraph 43 of the RO, which is a verbatim transcription of a portion of the audio from the video in Advocate's Exhibit 20. Respondent argues his words in that video do not indicate such a corrupt intent. We believe Respondent's words (Paragraph 43 of the RO), choice of timing (Advocate's Exhibit 20), and the confluence of his decision to speak about his qualifications during an agenda item where the Board was considering approving a recommendation to choose another firm for the legal services contract (Paragraph 43 of the RO, and Advocate's Exhibit 20), reasonably support the ALJ's conclusions in paragraph 86 of the RO.

Second, Respondent reiterates his arguments from his thirteenth exception about paragraph 84 of the RO. We, in turn, rely on our discussion of that exception, in particular our analysis of Lantz.

Therefore, we reject Respondent's fifteenth exception.

Respondent's Sixteenth Exception: Paragraphs 90 through 91 of the RO

In his sixteenth exception, Respondent excepts to paragraphs 90 and 91 of the RO by reiterating arguments from his first, second, and fourteenth exceptions. We, therefore, rely on our discussion the first, second, and fourteenth exceptions in rejecting these arguments once more. Respondent's sixteenth exception is rejected.

Respondent's Seventeenth and Eighteenth Exceptions: Paragraphs 94, 95-98, & 100-102 of the RO

In his seventeenth and eighteenth exceptions, addressed together here, Respondent takes issue with paragraphs 94, 95 through 98, and 100 through 102 of the RO. In these paragraphs, the ALJ made conclusions of law about whether Respondent's right to be heard was satisfied under Sections 286.0114 and 287.057(25), Florida Statutes, whether paragraph 12 of the RFP complied with those laws, and whether Respondent's arguments interpreting those laws had merit.

As we discussed when addressing Respondent's second exception, the Commission does not have authority to modify or reject conclusions of law outside its substantive jurisdiction. See Section 120.57(1)(l), Florida Statutes. Sections 286.0114 and 287.057(25), Florida Statutes, are outside the Commission's substantive jurisdiction. We must reject Respondent's seventeenth and eighteenth exceptions because we do not have substantive jurisdiction over Sections 286.0114 and 287.057(25).

Respondent's Nineteenth Exception: Paragraphs 103 through 110 of the RO

In his nineteenth exception, Respondent takes issue with paragraphs 103 through 110 of the RO. In paragraphs 103 through 109 (we will address paragraph 110 later), the ALJ undertakes an analysis of Respondent's conduct under Section 112.313(16)(c), Florida Statutes,<sup>3</sup> which the ALJ admits at the onset was not charged by the Commission in its probable cause order. After a lengthy discussion, the ALJ concluded that Section 112.313(16)(c) prohibited

---

<sup>3</sup> Section 112.313(16)(c) states:

No local government attorney or law firm in which the local government attorney is a member, partner, or employee shall represent a private individual or entity before the unit of local government to which the local government attorney provides legal services. A local government attorney whose contract with the unit of local government does not include provisions that authorize or mandate the use of the law firm of the local government attorney to complete legal services for the unit of local government shall not recommend or otherwise refer legal work to that attorney's law firm to be completed for the unit of local government.

Respondent from representing the interests of his law firm before the BCHA, the agency he represented as a local government attorney, insinuating that Respondent's conduct would have violated Section 112.313(16)(c) if it had been charged.

As Respondent correctly points out, the First District Court of Appeal in Robinson addressed this exact scenario, concluding that a local government attorney may appear before the agency he or she represents on behalf of his or her law firm. Robinson at 472-474.

The entirety of paragraphs 103 through 109 of the RO is legally incorrect. We find that it would be more reasonable to strike paragraphs 103 through 109 of the RO, and the subheading preceding paragraph 103, than to keep or amend them. With respect to paragraphs 103 through 109 of the RO, Respondent's exception is granted.

We turn now to paragraph 110 of the RO, which states:

110. The clear and convincing evidence presented at the final hearing established that Respondent violated section 112.313(6), by using his official position in an attempt to secure a special privilege or benefit for himself and/or his law firm, Weiss Serota.

We find that the conclusion of law in paragraph 110 of the RO is supported by the findings of fact and conclusions of law in the RO, as modified by this final order, and, thus, is reasonable under the circumstances. With regard to paragraph 110 of the RO, Respondent's exception is rejected.

Respondent's Twentieth Exception: Paragraphs 111 through 124 of the RO

In his twentieth exception, Respondent excepts to paragraphs 111 through 124 of the RO. These paragraphs, for the most part, draw upon some of the findings of fact and conclusions of law and compare them to the facts at issue in Robinson. Stating the obvious, no two cases are identical, but we recognize why the ALJ would compare this case with Robinson, given the similarities, and why Respondent would contrast this case with Robinson, as he does in his

exception, given the differences. While it might have been more complete for the ALJ to demonstrate the differences between Robinson and this case, their omission is not error; for that matter, Respondent's argument in the exception does not provide a legal basis for finding that their omission is error. We do not take notice of any improper or incorrect statements in the excepted paragraphs, and find keeping them unmodified to be reasonable under the circumstances. Therefore, Respondent's twentieth exception is rejected.

Respondent's Twenty-First Exception: Paragraphs 125 through 128 of the RO

In his twenty-first exception, Respondent excepts to paragraphs 125 through 128 of the RO. In these paragraphs, the ALJ determined the recommended penalty, after having earlier recommended that Respondent violated Section 112.313(6). Respondent objects to the paragraphs because, as he has argued throughout his twenty-one exceptions, Respondent's conduct did not rise to the level of a violation. Given that the ALJ concluded that a violation of the law occurred, it is reasonable that a penalty result. Therefore, Respondent's twenty-first exception is rejected.

Ruling on Advocate's Exception

Advocate submitted one exception to the RO, wherein she takes issue with paragraphs 127 and 128 of the RO and the Recommendation, requesting that the penalty be increased to include a public censure and reprimand. In paragraphs 127 and 128 of the RO, the ALJ recommended that a civil penalty of \$2,500 be imposed against Respondent without a public censure and reprimand.

The ALJ considered and rejected the notion of also recommending a public censure and reprimand in addition to the civil penalty, noting in paragraph 127 of the RO that "[t]he public

nature of this proceeding and the issuance of this Recommended Order serve as sufficient public censure of his conduct." We, however, disagree with the ALJ's reasoning.

In In Re Robert K. Robinson (Complaint No. 14-167; Final Order No. 18-052), where the respondent also used his position as a local government attorney with corrupt intent to advocate for his governing board to vote to employ him in a particular capacity, we issued public censure and reprimand in addition to a monetary civil penalty. In this case, the ALJ did find that Respondent had a corrupt intent. (RO at ¶¶ 83-91.) In the interest of issuing a penalty that is consistent with those issued in similar cases, we increase the recommended penalty to include a public censure and reprimand, in addition to the \$2,500 civil penalty recommended by the ALJ.

#### Findings of Fact

Except to the extent modified above in granting Respondent's exceptions, 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 modified above in granting Respondent's exceptions, 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 determines that Respondent violated Section 112.313(6), Florida Statutes, and recommends that the Governor impose a public censure and reprimand and a civil penalty of \$2,500 upon Respondent.

ORDERED by the State of Florida Commission on Ethics meeting in public session on  
July 22, 2022.

July 27, 2022  
Date Rendered

John Grant  
John Grant  
*Chair, Florida Commission on Ethics*

THIS ORDER CONSTITUTES FINAL AGENCY ACTION. ANY PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER HAS THE RIGHT TO SEEK JUDICIAL REVIEW UNDER SECTION 120.68, AND SECTION 112.3241, FLORIDA STATUTES, BY FILING A NOTICE OF ADMINISTRATIVE APPEAL PURSUANT TO RULE 9.110 FLORIDA RULES OF APPELLATE PROCEDURE, WITH THE CLERK OF THE COMMISSION ON ETHICS, AT EITHER 325 JOHN KNOX ROAD, BUILDING E, SUITE 200, TALLAHASSEE, FLORIDA 32303 OR P.O. DRAWER 15709, TALLAHASSEE, FLORIDA 32317-5709; AND BY FILING A COPY OF THE NOTICE OF APPEAL ATTACHED TO WHICH IS A CONFORMED COPY OF THE ORDER DESIGNATED IN THE NOTICE OF APPEAL ACCOMPANIED BY THE APPLICABLE FILING FEES WITH THE APPROPRIATE DISTRICT COURT OF APPEAL. THE NOTICE OF ADMINISTRATIVE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE DATE THIS ORDER IS RENDERED.

cc: Mr. Mark Herron, Attorney for Respondent  
Mr. Brennan Donnelly, Attorney for Respondent  
Ms. Elizabeth A. Miller, Commission Advocate  
Mr. Steven W. Zelkowitz, Complainant  
The Honorable Robert L. Kilbride, Division of Administrative Hearings