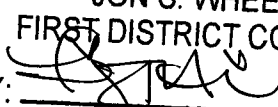
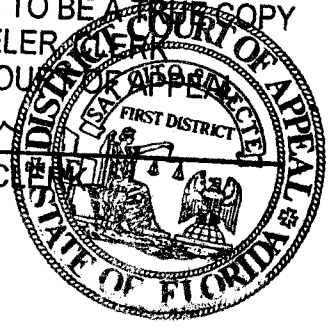


RECEIVED 9/8/16 FLORIDA SUPREME COURT
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JON S. WHEELER
FIRST DISTRICT COURT OF APPEAL
BY:  DEPUTY CLERK



IN THE DISTRICT COURT OF APPEAL
THE STATE OF FLORIDA, FIRST DISTRICT

DAVID RIVERA,

Appellant,

vs.

CASE NO. 1D15-2428
DOAH CASE NO. 13-1043EC
FCOE CASE NO. 10-182, 10-187

FLORIDA COMMISSION ON ETHICS,

Appellee.

**APPELLANT'S NOTICE TO INVOKE DISCRETIONARY JURISDICTION OF THE
SUPREME COURT**

NOTICE IS GIVEN that Appellant, David Rivera, invokes the discretionary jurisdiction of the Supreme Court to review the July 6, 2016 the opinion issued by the First District Court of Appeal rendered July 6, 2016, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(i), Fla. R. App. P. 9.030(a)(2)(A)(iv) and Fla. R. App. P. 9.120.

The nature of the order in question is an opinion rendered in the above entitled matter by the First District Court of Appeal (a copy of the Final Order being appealed is attached hereto). The 1st DCA opined that the question of whether the Final Order of the Florida Commission on Ethics recommending that the the Speaker of the Florida House of Representatives issue a financial penalty

against the Appellant¹ is not ripe for review until the Speaker of the House formally issues a financial penalty. The Appellant contends that the attached opinion directly conflicts with *Bowen v. Florida Dept. of Environmental Regulation*, 448 So.2d 566 (Fla. 2nd DCA 1984).

In *Bowen*, the court ruled "Final agency action" and "exhaustion of administrative remedies" are not synonymous terms" and that a recommendation by an agency was ripe for review without exhaustion of all administrative remedies. In the instant matter, the Court found that even though the agency action is final, it was not ripe until administrative remedies were exhausted. This opinion conflicts with Florida Statute §112.3241, "final action by the commission taken pursuant to this part shall be subject to review in a district court of appeal upon the petition of the party against whom an adverse opinion, finding, or **recommendation** is made" (emphasis added). The Court declined to rule upon the constitutionality of the recommendation contained in the final order despite the ruling in *Bowen* and the clear entitlement to the same under the statute. The Florida Supreme Court has jurisdiction to consider and overturn the ruling rendered herein.

¹ The Appellant argues that any issuance of a financial penalty by the Speaker of the Florida House constitutes either a violation the separation of powers (to the extent that the action is judicial or quasi-judicial in nature) or constitutes an unconstitutional bill of attainder (to the extent that the action is legislative in nature).

Respectfully submitted,

Dated: September 8, 2016

BROAD AND CASSEL

/s Leonard M. Collins

LEONARD M. COLLINS

FBN 423210

lcollins@broadandcassel.com

BROAD AND CASSEL

215 S. Monroe Street, Suite 400

(32301)

P. O. Drawer 11300

Tallahassee, FL 32302

Tel 850-681-6810; Fax 850-521-1446

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished via

E-mail to counsel listed below, this 8th day of September, 2016.

ELIZABETH MILLER

Office of the Attorney General

The Capitol, PL-01

Tallahassee, FL 32399-1050

Elizabeth.Miller@myfloridalegal.com

Teresa.Mussetto@myfloridalegal.com

s/ Leonard M. Collins

ATTORNEY

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DAVID RIVERA,

Appellant,

v.

NOT FINAL UNTIL TIME EXPIRES TO
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Opinion filed July 6, 2016.

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and Melody A. Hadley, Assistant Attorneys General, Tallahassee, for Appellee.

PER CURIAM.

David Rivera appeals the Final Order and Public Report in which the Florida Commission on Ethics recommended a public censure, reprimand, civil penalties, and restitution for the ethical violations Rivera committed while he was serving as

ATTACHMENT

a member of the Florida House of Representatives. On appeal, Rivera does not challenge the violations found by the Commission, but rather contends that his due process rights were violated when the Commission remanded this case to the administrative law judge (ALJ) to recommend a penalty. Additionally, Rivera challenges the constitutionality of section 112.324(8)(e), Florida Statutes, which designates the Speaker of the House as the official authorized to impose the penalties recommended by the Commission.¹ We summarily reject Rivera's due process claims, and we decline to address his constitutional challenge because it is not yet ripe. Accordingly, we affirm the Final Order and Public Report.

Factual and Procedural Background

Rivera was a member of the House from 2002 to November 2010. In that capacity, Rivera was subject to the ethical requirements in article II, section 8 of the Florida Constitution and the Code of Ethics for Public Officers and Employees codified in part III of chapter 112, Florida Statutes.

In late 2010, the Commission received two complaints alleging that Rivera committed various ethical violations while he was serving as a member of the House. The Commission investigated the complaints and found probable cause to

¹ Specifically, Rivera argues that the statute is unconstitutional because the Speaker and the House lack jurisdiction over former members and the Speaker's imposition of a penalty on a former member would amount to a bill of attainder to the extent the Speaker's action is legislative in nature and it would violate separation of powers to the extent that the action is judicial or quasi-judicial in nature.

believe that Rivera committed the alleged ethical violations, as well as several additional violations that came to light in a separate criminal investigation of Rivera by the Florida Department of Law Enforcement.² Thereafter, the Commission referred this matter to the Division of Administrative Hearings for an evidentiary hearing before an ALJ.

After the hearing, the ALJ issued a recommended order finding that Rivera committed multiple ethical violations. The recommended order did not contain a penalty recommendation, and based on that omission, the Commission remanded the case to the ALJ to recommend a penalty. The ALJ accepted the remand over Rivera's objection and thereafter entered an amended recommended order recommending a public censure, reprimand, civil penalties totaling \$16,500, and restitution in excess of \$41,000. The Commission adopted the amended recommended order in full in the Final Order and Public Report.

This timely appeal followed.

Analysis

The Commission is responsible for "conduct[ing] investigations and mak[ing] public reports on all complaints concerning breach of public trust by public officers or employees not within the jurisdiction of the judicial qualifications commission." Art. II, § 8(f), Fla. Const.; see also § 112.324(1), Fla.

² The criminal investigation was closed in April 2012 without the filing of any charges against Rivera.

Stat. (“The commission shall investigate an alleged violation of [the Code of Ethics] or other alleged breach of the public trust”); Fla. Comm’n on Ethics v. Plante, 369 So. 2d 332, 336-37 (Fla. 1979) (explaining that the Commission’s authority to issue “public reports” requires that the Commission reach some conclusion at the end of an investigation and necessarily includes the authority to decide what is a breach of the public trust). However, the Commission does not have the power to impose penalties. See § 112.324(3), Fla. Stat. (“Penalties shall be imposed only by the appropriate disciplinary authority as designated in this section.”); Comm’n on Ethics v. Sullivan, 489 So. 2d 10, 12-13 (Fla. 1986) (holding that the Commission is part of the legislative branch based, in part, on its “inability . . . to take any kind of enforcement action based on its investigations”).

If the Commission finds based on its investigation that the public officer or employee has violated article II, section 8 or the Code of Ethics, “it is the duty of the commission to report its findings and recommend appropriate action to the proper disciplinary official or body . . . , and such official or body has the power to invoke the penalty provisions of this part” § 112.324(8), Fla. Stat. In the case of a former House member such as Rivera who is found to have committed an ethical violation while serving as a member of the House, the proper disciplinary official is the Speaker of the House. See § 112.324(8)(e), Fla. Stat.

Although the Commission's final report of its findings and recommendations is subject to judicial review, see § 112.3241, Fla. Stat., the disciplinary process in this case will not be complete until the Speaker acts on the Commission's recommendation. Section 112.324(8) gives the Speaker the power to impose penalties, but no statute requires the Speaker to accept or otherwise act on the Commission's recommendation. See Plante, 369 So. 2d at 338 (holding that "any conclusion reached by the Commission on Ethics is not binding upon any other official body or officer"). And, here, there is no indication in the record that the Speaker intends to take disciplinary action against Rivera since he is no longer a member of the House. As a result, any ruling that we might provide at this stage of the proceeding on the constitutional challenge raised by Rivera would amount to an improper advisory opinion. See Santa Rosa Cty. v. Admin. Comm'n, 661 So. 2d 1190, 1193 (Fla. 1995); Apthorp v. Detzner, 162 So. 3d 236 (Fla. 1st DCA 2015).

We recognize that if the Speaker adopts the Commission's recommended penalty, the Attorney General is required to bring a civil action to recover any civil penalty or restitution awarded, and in that proceeding, "[n]o defense may be raised . . . that could have been raised by judicial review of the administrative findings and recommendation by the commission" § 112.317(2), Fla. Stat.; see also DeBusk v. Smith, 390 So. 2d 327, 328 (Fla. 1980) (explaining that section

112.317(2) is “a codification of the estoppel rule”); Latham v. Fla. Comm’n on Ethics, 694 So. 2d 83, 87 (Fla. 1st DCA 1997) (noting that, under section 112.317(2), “all defenses to [the Commission’s] orders must be raised before the Commission or the district court or they will be lost when the attorney general moves to enforce a penalty”). However, we do not interpret this statute to foreclose Rivera’s constitutional challenge to section 112.324(8)(e) in a subsequent proceeding because that challenge is separate and distinct from the issues that are properly subject to judicial review in this appeal, i.e., the merits of the findings and recommendations of the Commission and alleged deficiencies in the process that resulted in those findings and recommendations. Cf. Albrecht v. State, 444 So. 2d 8, 11-12 (Fla. 1984) (explaining that the petitioner’s ability to challenge the constitutionality of the agency’s action on direct appeal did not preclude the petitioner from bringing the challenge in circuit court where the constitutional challenge is separate and distinct from the issue determined on appeal).

Indeed, under the plain language of section 112.317(2), a challenge to the disciplinary official’s action (or the constitutionality of the statute authorizing that action) would not be foreclosed in a subsequent proceeding where, as here, the disciplinary action had not been taken before the appeal of the Commission’s final report and recommendation was filed. This is because the statute only precludes the public official from raising defenses that “could have been raised” on appeal,

and if the disciplinary official has not yet taken action, there would be nothing for the public official to raise – or for the court to review – on appeal.³ See J. Walters Constr., Inc. v. Gilman Paper Co., 620 So. 2d 219, 221-22 (Fla. 1st DCA 1993) (finding claim raised by appellant to be not yet ripe for appellate review where the record contained no final ruling on the issue); Philip J. Padovano, Fla. Appellate Practice § 8.7 (2011-12 ed.) (“The function of the appellate courts is to review the decisions of the lower tribunals, and not to make abstract determinations on matters that have not been presented to, or ruled upon, by the lower tribunals.”).

In reaching this conclusion, we have not overlooked Key Haven Associated Enterprises, Inc., v. Board of Trustees of the Internal Improvement Trust Fund, 427 So. 2d 153 (Fla. 1982), relied on by Rivera for the proposition that he properly raised his constitutional challenge to section 112.324(8)(e) in this appeal. Key Haven held that an “aggrieved party could complete the administrative process and then challenge the statute's facial constitutionality in the district court on the direct

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review to which the party is entitled under section 120.68.” Id. at 157 (emphasis added). However, that principle is not applicable here because, although the Commission’s final report and recommendation is subject to judicial review, the administrative process is technically not “complete” until the disciplinary official takes action on the recommendation. Additionally, Key Haven contemplated that the facial constitutional challenge that would be raised on direct appeal would be to the statute on which the agency’s final action was based, and here, Rivera is not challenging the statutes on which the Commission’s findings and recommendations were based. Cf. Goin v. Comm’n on Ethics, 658 So. 2d 1131 (Fla. 1st DCA 1995) (considering but rejecting public employee’s challenge to the facial constitutionality of the ethics statute he was found to have violated in the final order and public report); Barker v. Comm’n on Ethics, 654 So. 2d 646 (Fla. 3d DCA 1995) (reversing Commission’s final order and public report because the statute that the report found the public official to have violated was facially unconstitutional), remanded, 677 So. 2d 254 (Fla. 1996). Instead, Rivera is challenging the constitutionality of the statute pursuant to which the Speaker of the House may or may not take action on the Commission’s recommendation at some point in the future, which as discussed above, is a separate and distinct issue.

Conclusion

In sum, we affirm the Final Order and Public Report because Rivera did not challenge the ethical violations found by the Commission and we find no merit in the due process claims he raised on appeal. However, for the reasons stated above, this disposition is without prejudice to Rivera raising his constitutional challenge to section 112.324(8)(e) in a declaratory action in the circuit court if the Speaker takes action on the Commission's recommendation or in defense of an enforcement action brought by the Attorney General under section 112.317(2).

AFFIRMED.

WOLF, WETHERELL, and JAY, JJ., CONCUR.

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Opinion filed July 6, 2016.

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AFFIRMED.

WOLF, WETHERELL, and JAY, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

August 10, 2016

CASE NO.: 1D15-2428
L.T. No.: 10-182 FCOE
10-187 FCOE
13-1043EC

David Rivera

v.

Florida Commission on Ethics

Appellant / Petitioner(s),

Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion filed July 20, 2016, for rehearing or, in the alternative, for certification of a conflict and/or for certification of a question of great public importance is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Hon. Pamela Jo Bondi, A. G.
Melody A. Hadley, A. A. G.

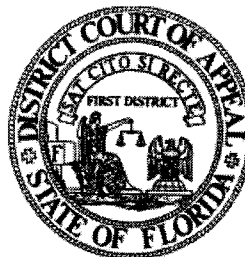
Lisa Raleigh, A. A. G.
Elizabeth Ann Miller

Teresa L. Mussetto, A. A. G.
Leonard M. Collins

kr



JON S. WHEELER, CLERK





DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA
2000 DRAYTON DRIVE
TALLAHASSEE, FLORIDA 32399-0950
(850) 488-6151

JON S. WHEELER
CLERK OF THE COURT

KAREN ROBERTS
CHIEF DEPUTY CLERK

September 8 2016

Re: David Rivera
Appeal No.: 1D15-2428
Trial Court No.: 13-1043EC
Trial Court Judge: Linda McKee Robinson

Dear Mr. Tomasino:

Attached is a certified copy of the Notice Invoking the Discretionary Jurisdiction of the Supreme Court, pursuant to Rule 9.120, Florida Rules of Appellate Procedure. Attached also is this Court's opinion or decision relevant to this case.

The filing fee prescribed by Section 25.241(3), Florida Statutes, was received by this court and is attached.

The filing fee prescribed by Section 25.241(3), Florida Statutes, was not received by this court.

Petitioner/Appellant has previously been determined insolvent by the circuit court or our court in the underlying case.

Petitioner/Appellant has already filed, and this court has granted, petitioner/appellant's motion to proceed without payment of costs in this case.

No filing fee was required in the underlying case in this court because it was:

- A summary Appeal, pursuant to Rule 9.141
- From the Unemployment Appeals Commission
- A Habeas Corpus proceeding
- A Juvenile case
- Other _____

If there are any questions regarding this matter, please do not hesitate to contact this Office. **A motion postponing rendition pursuant to Florida Rule of Appellate Procedure 9.020(i) is or is NOT pending in the lower tribunal at the time of filing this notice of appeal.**

Sincerely yours,

Jon S. Wheeler
Clerk of the Court

By:
Deputy Clerk