

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

BREVARD COUNTY TAX
COLLECTOR,

Charging Party,

v.

COASTAL FLORIDA PUBLIC
EMPLOYEES ASSOCIATION,

Respondent.

Case No. CB-2006-017

FINAL ORDER

Order Number: 07U-131

Date Issued: July 5, 2007

Michael K. Grogan and Michael G. Prendergast, Jacksonville, attorneys for charging party.

Mary Jill Hanson, West Palm Beach, attorney for respondent.

On November 1, 2006, the Brevard County Tax Collector (Tax Collector) filed an unfair labor practice charge alleging that the Coastal Florida Public Employees Association (PEA) violated Section 447.501(2)(a), Florida Statutes (2006),¹ by using the Tax Collector's managerial and confidential employees to solicit and coerce employees to sign authorization cards, overtly demonstrate support for the PEA, and threaten retaliatory measures if employees did not support the PEA. The General Counsel found the charge sufficient, and on February 22 and 23, 2007, a hearing was held before a Commission-appointed hearing officer in Titusville.

¹Except as otherwise provided, all statutory references are to the 2006 edition of the Florida Statutes.

On May 10, 2007, the hearing officer issued his recommended order. He concluded that the charge was timely filed. He also concluded that two of the Tax Collector's managerial employees and one confidential employee actively supported the PEA's organizational drive; however, he determined that at the time the employees were actively supporting the PEA, they had not been determined to be managerial or confidential employees. He also concluded that there was no agency relationship between the PEA and the employees; thus, the PEA did not violate Section 447.501(2)(a), Florida Statutes. Finally, the hearing officer concluded that neither party was entitled to an award of attorney's fees. Both parties filed exceptions to the recommended order, and the Tax Collector filed a response to the PEA's exceptions.² A transcript of the hearing was filed.

On May 18 and June 26, 2006, prior to the instant unfair labor practice charge being filed, the PEA filed representation-certification petitions seeking to become the bargaining agent for two units of Tax Collector employees, a unit of non-supervisory,

²Although the Tax Collector titles his May 24 filing, "Charging Party Brevard County Tax Collector's Request for Clarification and/or Reconsideration and Exceptions to the Hearing Officer's Recommended Order" it does not provide authority for a request for clarification and/or reconsideration. It cites only Florida Administrative Code Rule 28-106.217, which provides for the filing of exceptions and responses to exceptions and Section 120.57(3), Florida Statutes, which is not applicable in this case. Accordingly, the Tax Collector's request for clarification and/or reconsideration is denied as unauthorized.

non-professional employees and a unit of supervisory employees.³ The two representation-certification cases were consolidated for hearing; however, the hearing officer issued separate recommended orders defining units appropriate for the purpose of collective bargaining. Subsequently, the Commission issued orders directing elections in the units determined to be appropriate by the hearing officer. Coastal Florida Public Employees Association v. Brevard County Tax Collector, 32 FPER ¶ 199 (2006) (defining a non-supervisory bargaining unit and ordering an election) and Coastal Florida Public Employees Association v. Brevard County Tax Collector, 32 FPER ¶ 219 (2006) (defining a supervisory bargaining unit and ordering an election). The elections have been stayed pending the resolution of the instant unfair labor practice charge. Coastal Florida Public Employees Association v. Brevard County Tax Collector, 32 FPER ¶ 227 (2006).

The following are the facts as found by the hearing officer: Lisa Cullen, who has been determined to be a managerial employee, attended a meeting with PEA representative Rich Clements and two of Cullen's subordinate supervisors to learn about the PEA. At that meeting, Clements handed out union authorization cards and union bulletins for distribution. Because of Cullen's job duties, Clements did not believe that Cullen would be eligible to participate in a union campaign.

³The union authorization cards supporting the petition for the non-supervisory unit accompanied a petition filed on May 3 by the PEA in Case No. RC-2006-028. That petition was dismissed and the cards were transferred to the petition filed on May 16.

Subsequently, Cullen and others organized a meeting held at Manager Evelyn Keller's home to discuss union organization. At that meeting, Cullen criticized the Tax Collector's employment and pay practices and stated that the PEA could obtain pay increases to correct pay inequities. Also at that meeting, some of the PEA's union authorization cards were signed and others were given to supervisors for distribution to the various Tax Collector offices.

After the meeting at the Keller home, Cullen restricted her involvement in the organizational efforts by not attending further organizational meetings. However, she was involved with obtaining signatures on authorization cards and discussing the merits of obtaining representation. In addition, she supported the PEA by acting as an advisor to the PEA's attorney, Adam Alvarez, who represented the PEA during the representation process. Alvarez used Cullen as a resource for stipulations concerning bargaining unit composition.

Marsha Sands, an assistant manager who reported to Cullen, also attended the meeting at the Keller home. Marsha Sands is Director Harry Sands' wife. Harry Sands has also been determined to be a managerial employee. Even though both Marsha and Harry Sands knew that Harry Sands could not be directly involved in the union's organizational campaign because of his managerial role, Marsha Sands stated at the meeting that Harry Sands supported the union's organizational campaign. Subsequently,

Harry Sands signed a union authorization card that his wife gave him and confided in Employee Benefits Specialist Karen Hirschmiller that he had done so.

Hirschmiller reports directly to Harry Sands and has been determined to be a confidential employee. Hirschmiller attended the meeting at the Keller home and at some point signed a union authorization card. She has access to the Tax Collector's employees' home addresses; however, she did not provide employee addresses to the PEA.

After the meeting at the Keller home, supervisors and assistant supervisors solicited cards from their subordinates. The subordinates were told that the purpose of signing a card was only to obtain information about the PEA's organizational efforts and that Cullen, Harry Sands, and Hirschmiller all supported the organizational effort. Because of Cullen's active role in the organizational campaign and her authority as a director, at least one employee held a reasonable belief that employees were required to support the PEA.

All of the PEA's authorization cards, including those signed by Cullen, Harry Sands, and Hirschmiller, were reviewed by Clements only to ensure that they were individually signed and dated. Thus, he did not know who signed the cards. Moreover, neither he nor any other PEA representative knew the extent of Cullen's participation beyond the initial meeting with Clements.

The hearing officer found no evidence that the Tax Collector knew of the involvement of managerial and confidential employees in the PEA's organizational effort until after the authorization cards were submitted on May 3, 2006, with the initial representation-certification petition. Thereafter, the Tax Collector became aware of possible managerial and confidential involvement and confronted Cullen in May and June about her efforts on the PEA's behalf. Although Cullen initially denied any involvement, she admitted to her activities in December during her exit interview after she resigned from employment with the Tax Collector.

The hearing officer concluded that, although Cullen, Harry Sands, and Hirschmiller supported the PEA's organizational effort, they did so prior to their managerial and confidential status being resolved. Moreover, he concluded that the PEA did not empower any of the three employees to act on its behalf. Rather, the hearing officer determined that neither Clements nor the PEA knew the extent of Cullen's involvement, did not know that Harry Sands or Hirschmiller was involved, and did not give any of them actual or apparent authority in its organizational campaign. Thus, he concluded that there was insufficient evidence that the PEA attempted to use either managerial or confidential employees as its agents in an effort to obtain signatures on authorization cards or other support for the PEA's organizational efforts in violation of Section 447.501(2)(a), Florida Statutes.

The PEA filed ten numbered exceptions to the hearing officer's findings of fact.⁴ We identified two additional unnumbered exceptions within the argument section of the PEA's exceptions. The first of these we number as the PEA's exception eleven. In it the PEA asserts that the hearing officer's findings 7, 11, and 15 are unnecessary and should be stricken. In the second unnumbered exception, the PEA's exception twelve, the PEA asserts that all of the allegations against Hirschmiller should be dismissed because she is a confidential employee and not a managerial employee.

In exception one, the PEA challenges finding 6, where the hearing officer found, "Specifically, concerning Cullen, Clements indicated that he did not believe that she would be eligible to participate in a union campaign because of her job duties." The PEA asserts that this finding is incomplete and misleading without also finding that Clements believed at the time that, based on the facts he had heard, there was a possibility Cullen would be placed in the bargaining unit.

It is the hearing officer's primary function to consider all the evidence presented, resolve conflicts, determine credibility, weigh evidence, and make findings of fact. See Heifetz v. Department of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985).

⁴The PEA mistakenly refers to the hearing officer's findings as proposed findings. Parties are permitted to offer proposed findings which the hearing officer must consider. However, the hearing officer is the fact finder and his findings may not be rejected unless they are not based on competent substantial evidence or the proceedings on which the findings were based did not comply with essential requirements of law. § 120.57(1)(k) and (l), Fla. Stat.

The Commission must accept the hearing officer's findings unless they are not supported by competent substantial evidence. See Holmes v. Turlington, 487 So. 2d 150 (Fla. 1st DCA 1985). Moreover, the evidence relied upon to sustain findings must be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. See State Beverage Department v. Ernal, Inc., 115 So. 2d 566 (Fla. 3d DCA 1959), quoting DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). The hearing officer found that Clements did not believe that Cullen would be eligible to participate in a union campaign because of her job duties. There is competent substantial evidence for this finding. See T 61-62, 68-70. Furthermore, a case will be remanded to a hearing officer for additional fact finding only when a fact that is allegedly omitted is material to the ultimate determination, and the fact appears to have been overlooked by the hearing officer. See, e.g., Professional Association of City Employees, Inc. v. City of Jacksonville, 31 FPER ¶ 11 at 26 (2005); United Faculty of Florida v. Florida Atlantic University, Board of Trustees, 29 FPER ¶ 286 (2003). That is not the case here. Therefore, exception one is denied.

In exception two, the PEA asserts that there is no record support for the word "private" in the portion of finding 7 which states, "Cullen ... implied that she had private information that the Tax Collector did not want known." We agree and grant this exception. Accordingly, the word "private" is deleted from finding 7. However, granting this exception has no effect on the disposition of this case.

In exception three, the PEA asserts that finding 8 is misleading and incomplete because it fails to state who told the supervisors to tell employees that the reason for signing showing of interest cards was to get more information. There is competent substantial evidence that Assistant Supervisor Pamela Smith and Supervisor Barbara Miller were told that the signing of cards was to obtain additional information and they were to tell other employees that was the purpose of the cards. (T 94-95, 133) As we stated in resolving PEA's exception one, the proposed finding is immaterial to the ultimate determination of the issues. Accordingly, exception three is denied.

In exceptions four and five, the PEA objects to finding 9. In exception four, the PEA asserts that the portion of that finding which states, "Marsha Sands ... stated that her husband, Harry Sands, supported the union's organization drive" is supported solely by hearsay evidence. In addition, exception four asserts the hearing officer erred by stating that Marsha Sands denied making the statement. The PEA argues that many people testified as to what Marsha Sands said regarding her husband and that these witnesses had varying versions of what was said. Thus, the PEA claims that it is more likely than not that what Marsha Sands said is that her husband supported 100% the employees' right to choose a union, and some present construed that to mean that he supported the union.

In reviewing the hearing officer's findings of fact, the Commission is without authority to reject the hearing officer's credibility determinations or findings if they are supported by competent substantial evidence and the proceeding complied with the essential requirements of law. See Strickland v. Florida A&M University, 799 So. 2d 276 (Fla. 1st DCA 2001). Moreover, the weighing of evidence and judging the credibility of witnesses are solely the prerogatives of the hearing officer. Id.; see also Boyd v. Department of Revenue, 682 So. 2d 1117 (Fla. 4th DCA 1996); Holmes v. Turlington, 480 So. 2d 150 (Fla. 1st DCA 1985).

There is record evidence that Marsha Sands denied making the statement that Harry Sands supported the PEA's organization drive. (T 471) However, the hearing officer discredited this denial. Moreover, numerous witnesses were present at the meeting held at the Keller home, heard Marsha Sands' statements, and testified as to what they heard Marsha Sands say regarding her husband. Because these witnesses testified to what Marsha Sands said and not about whether Harry Sands supported the union, their statements are not hearsay. § 90.801(1), Fla. Stat. Such testimony supports the finding. (T 91, 140-41, 471, 736-37) Accordingly, the PEA's exception four is denied.

In exception five, the PEA asserts that the portion of finding 9 that states Harry Sands signed a union authorization card is incomplete without also finding that Harry Sands was just home from having back surgery and was under the influence of strong

narcotic medication when he signed it. The fact proposed is not material to the resolution of the issues presented. (T 417; Ch. Party Exh. 9) Accordingly, exception five is denied.

In exception six, the PEA claims that portions of finding 11 are vague and not supported by the record. The PEA first asserts that there is no record support that Karen Hirschmiller took part in card solicitation. We agree. Accordingly, we grant this portion of exception six and delete, "Confidential employee Hirschmiller also took part in the card solicitation" from finding 11. However, granting this portion of exception six has no effect on the disposition of this case.

In the second portion of exception six, the PEA claims that there is no record support for the second sentence of finding 11 and that the sentence is vague. We disagree that the sentence is vague. Moreover, we agree that there is competent substantial evidence for the second sentence of the finding. (T 94-95, 143-44, 152, 159-60, 228, 245-50, 253-54, 266) Accordingly, the second portion of exception six is denied.

In exception seven, the PEA complains that finding 12 could raise the inference that Clements or the PEA was aware of involvement by Harry Sands in the union's organizational efforts. We do not read the finding as raising the inference attributed to it by the PEA. Moreover, in the analysis portion of the recommended order the hearing officer determined that Clements could not "know that Harry Sands and Hirschmiller

would be involved in the union campaign, much less have given them actual or apparent authority in a union campaign.” See Hearing Officer’s Recommended Order at 15. Finally, he credited Clements’ testimony that Clements did not check the authorization cards except to see if each card was signed and dated. See Hearing Officer’s Recommended Order at n. 14. Thus, because the hearing officer found that Clements did not have direct knowledge that Cullen, Harry Sands, and Hirschmiller signed authorization cards, he concluded that there was neither direct evidence nor sufficient circumstantial evidence to support an inference that Clements or any other PEA agent knew of, or authorized, Cullen’s, Harry Sands’, and Hirschmiller’s solicitation of Tax Collector employees to support the PEA. Accordingly, exception seven is denied.

In a portion of exception eight, the PEA asserts that the portion of finding 13 stating, “Alvarez used Cullen as a resource in submitting stipulations concerning bargaining unit composition during the Commission’s hearing process” is not supported by the record. We disagree. Because there is support for this finding, this portion of exception eight is denied. (T 168, 170, 172, 500-01, 566-67; Ch. Party Exh. 3 and Ch. Party Exh. 5 at 5-6, 11-12)

In the remaining portion of exception eight and in exception nine, the PEA claims that finding 13 could raise an inference that Cullen continued to support the organizational efforts of the PEA after May, 2006, when she had several meetings with the Tax Collector’s labor attorney, Michael Grogan, and that finding 14 is incomplete

without a statement that Cullen ceased all activities on behalf of the PEA after May, 2006. As we stated above, a case will be remanded to a hearing officer for additional fact finding only when a fact that is allegedly omitted is material to the ultimate determination, and the fact appears to have been overlooked by the hearing officer. See, e.g., Professional Association of City Employees, Inc. v. City of Jacksonville, 31 FPER ¶ 11 at 26 (2005); United Faculty of Florida v. Florida Atlantic University, Board of Trustees, 29 FPER ¶ 286 (2003). We conclude that findings 13 and 14 are supported by competent substantial evidence and that the hearing officer's facts provide a sufficient basis for resolving the issues presented. Accordingly, the remaining portions of exception eight and exception nine are denied.

In exception ten, the PEA objects to the hearing officer's failure to make thirty-three findings proposed by the PEA in its post-hearing documents. It claims that these proposed facts are fully supported by the record. Our review reveals that these additional proposed findings would not affect the outcome of the case. We are not required to consider proposed findings when, as here, they are subordinate, cumulative, immaterial, or unnecessary. See, e.g., Professional Association of City Employees, Inc. v. City of Jacksonville, 31 FPER ¶ 11 at 26 (2005); United Faculty of Florida v. Florida Atlantic University, Board of Trustees, 29 FPER ¶ 286 (2003). Accordingly, exception ten is denied.

The PEA asserts in exception eleven that findings 7, 11, and 15 are unnecessary and should be stricken. While materiality provides a basis for rejecting facts proposed by the parties, it is not a criterion upon which we review the hearing officer's facts. If an exception is filed to one of the hearing officer's findings, we are required to determine whether the finding is supported by competent substantial evidence, not whether the fact is necessary to the resolution of this issue. See § 120.57(1)(l), Fla. Stat. Such review would unduly burden the Commission's adjudicatory process without a concomitant benefit. See Professional Association of City Employees, Inc. v. City of Jacksonville, 31 FPER ¶ 11 (2005); Dade County School Administrators' Association, Local 77, AFSA, AFL-CIO v. School Board of Miami-Dade County, Florida, 27 FPER ¶ 32151 (2001). Thus, the PEA's exception eleven is denied.

In exception twelve, the PEA asserts that all allegations pertaining to Hirschmiller should be dismissed. Because all such allegations were dismissed, this exception is dismissed as moot.

The Tax Collector filed two numbered exceptions to the hearing officer's findings of fact and in a second section of exceptions to the hearing officer's findings asserts that the hearing officer failed to properly consider twenty-seven of its proposed findings. In its first and second exceptions, the Tax Collector asserts that there is no competent substantial evidence for portions of findings 6 and 12. Upon review of the record, we find

evidence competent to support the portions of both findings to which the Tax Collector objects. (T 50, 52-53, 311-12, 490) Thus, exceptions one and two are denied.

The Tax Collector also claims that the hearing officer failed to acknowledge or address several material and relevant proposed findings of fact. The Tax Collector cites Forrester v. Career Service Commission, 361 So. 2d 220 (Fla. 1st DCA 1978), cert. den'd, 368 So. 2d 1366 (Fla. 1979), in claiming that a party has a right to receive a ruling on each proposed finding and asserts that the hearing officer's statement that "post-hearing submissions [have been] duly considered" is not sufficient to afford fundamental due process.⁵

The Tax Collector's reliance on Forrester is misplaced. Forrester was decided prior to the 1996 amendment to Section 120.59(2), Florida Statutes (1995), deleting the requirement that a hearing officer explain his or her reasons for rejecting proposed findings of fact. See § 120.569, Fla. Stat. (Supp. 1996); Ch. 96-158, § 24, at 194, Laws of Fla. A hearing officer is required to consider the proposed findings, but he is no longer required to specifically reject them. See Life Care Centers of America, Inc. v. Sawgrass Care Center, Inc., 683 So. 2d 609 (Fla. 1st DCA 1996). Thus, the hearing officer properly considered the Tax Collector's proposed findings.

⁵The Tax Collector also cites Strickland v. Florida A&M University, 799 So. 2d 276 (Fla. 1st DCA 2001). As we have previously stated, the decision in Strickland requires that we do not disregard the hearing officer's findings if they are based on competent substantial evidence; it does not require us to give the same deference to proposed findings submitted by a party.

Notwithstanding the foregoing, we have reviewed the twenty-seven restated or partially restated proposed findings of fact from the Tax Collector's post-hearing document. The Tax Collector claims that these are material and based upon competent substantial evidence. Our review reveals that these additional proposed findings would not affect the outcome of the case. As previously stated, we are not required to consider proposed findings when, as here, they are subordinate, cumulative, immaterial, or unnecessary. See, e.g., Professional Association of City Employees, Inc. v. City of Jacksonville, 31 FPER ¶ 11 at 26 (2005); United Faculty of Florida v. Florida Atlantic University, Board of Trustees, 29 FPER ¶ 286 (2003). Accordingly, this exception is denied, and none of the twenty-seven additional proposed findings are adopted.

Our review of the recommended order, the exceptions, and the complete record reveals that, with the modifications noted above, the hearing officer's findings are supported by competent substantial evidence received in a proceeding which satisfies the essential requirements of law. The hearing officer's findings, as modified above, are adopted as the Commission's findings. § 120.57(1)(l), Fla. Stat. In addition, we agree with the hearing officer's analysis of the dispositive legal issues, his conclusions of law, and his recommendations. Thus, the hearing officer's recommended order, as modified herein, is incorporated within this order, and the Tax Collector's unfair labor practice charge against the PEA is DISMISSED. § 120.57(1)(l), Fla. Stat.

This order may be appealed to the appropriate district court of appeal. A notice of appeal must be received by the Commission and the district court of appeal within **thirty** days from the date of this order. Except in cases of indigency, the court will require a filing fee and the Commission will require payment for preparing the record on appeal. Further explanation of the right to appeal is provided in Sections 120.68 and 447.504, Florida Statutes (2006), and the Florida Rules of Appellate Procedure.

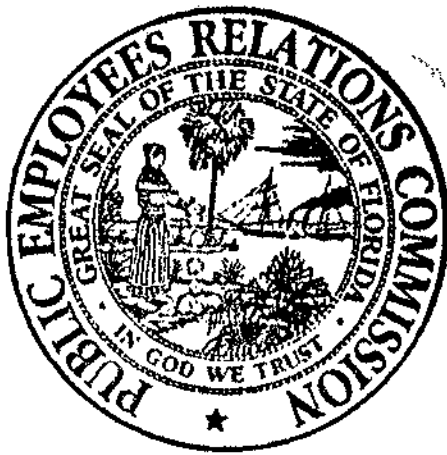
It is so ordered.

POOLE, Chair, KOSSUTH, JR., and VARN, Commissioners, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on July 5, 2007.

BY: James M. Samuel
Clerk

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