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IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

FILED

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DIVISION OF
ADMINISTRATIVE
HEARINGS

DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,

Petitioner,

v.

BROWARD COUNTY, CITY OF
POMPANO BEACH, CITY OF
PLANTATION, MIAMI-DADE
COUNTY, CITY OF CORAL
SPRINGS, TOWN OF DAVIE, CITY
OF DELRAY BEACH, CITY OF FORT
LAUDERDALE, CITY OF BOCA
RATON, JOHN M. and PATRICIA
HAIRE, LAZ and ELLEN
SCHNEIDER, CHESTER M. HIMEL,
ALEXANDER CHRISTOPHER and
MARECELL CASTIN,

Respondents.

CASE NO. 1D02-
DOAH CASE No. 01-4519 RP

JVL

PETITION FOR WRIT OF PROHIBITION

The petitioner, Department of Agriculture and Consumer Services ("the Department"), the respondent in the administrative rule challenge below, petitions the Court on an expedited basis for a writ of prohibition pursuant to Rule 9.100 of the Florida Rules of Appellate Procedure. The Department seeks the issuance of a writ of prohibition to disqualify the Honorable John G. Van Laningham, an Administrative Law Judge ("ALJ") in the Division of Administrative Hearings ("DOAH"), from continuing to preside over the action below.

The Department moved to disqualify Judge Van Laningham on January 3, 2002, contending that he engaged in an *ex parte* communication with an intervenor. A copy of the motion is attached as Appendix ("A") 1. The intervenor memorialized that *ex parte* communication in a letter to Judge Van Laningham in which she expressed her appreciation for the judge's "time this morning" and for his stated "interest[] in doing something about" the Department's Citrus Canker Eradication Program ("the Program"). *Id.* at Exhibit ("Ex.") 1. The Department contended that the undeniable occurrence of this *ex parte* communication and its substance as memorialized by the intervenor in her follow-up correspondence to Judge Van Laningham, causes it reasonably to fear that it will not receive a fair and impartial final hearing in this administrative proceeding, in which the issue is whether the proposed rule amendments implementing the Program constitute a valid exercise of delegated legislative authority. Judge Van Laningham denied the Department's motion on January 7, 2002. (A.2).

INTRODUCTION

This petition for writ of prohibition originates from an administrative proceeding in which local governments and individual property owners, many of whom have for the past several years endeavored to derail the Program, are challenging the validity of the Department's proposed amendments to Rule 5B-58.001 and existing Rule 5B-58.001(16), which rule implements the Program. (A.4). The Department published the proposed rule amendments consistent with and pursuant to the order entered by the ALJ in an earlier administrative proceeding, which proceeding resulted in a final administrative order declaring invalid substantial provisions of the rule and the Department's 1900-foot removal

policy.¹ That order presently is pending on appeal before the Court in Case No. 1D01-3197.²

The Department seeks an expedited disposition of this petition for writ of prohibition because of the agricultural emergency presently facing Florida's citrus industry as a result of the rapidly spreading canker bacteria, the eradication of which is being interrupted as a result of the administrative rule challenge. The Department cannot countenance further delay in the underlying administrative proceeding, the effect of which may prevent the proceedings from being concluded in time to recommence the Program before the onset of the rainy season. Respondents have conceded below that the risk of disease migration is greatest during that time period. (A.5 at ¶6). An expedited disposition therefore is necessary to prevent further delays of the underlying administrative rule challenge which could jeopardize the Department's timely recommencement of the Program to effectively eradicate citrus canker.

JURISDICTION

The Court has jurisdiction to issue writs of prohibition under Article V, Section 4(b)(3), of the Florida Constitution. Prohibition is the proper remedy to

¹ The same ALJ is currently presiding over this subsequent administrative challenge.

² The appeal has been fully briefed and awaits oral argument or disposition. The Department requests that the Court take judicial notice of the record and briefs in the pending appeal, which involves common issues pertaining to the validity of the Program and the ongoing efforts by local governments and individual property owners to interdict the Department's eradication efforts. *See, e.g., Buckley v. City of Miami Beach*, 559 So. 2d 310, 313 n.1 (Fla. 3d DCA 1990) (appellate court is authorized to take judicial notice of its own files). For convenience, the Department has attached a copy of the ALJ's order on appeal as Appendix 3 hereto.

test the validity of the denial of a motion for disqualification of an ALJ and to prevent an ALJ from exercising jurisdiction after the improper denial of a motion for disqualification. *Indian River Colony Club, Inc., v. Jones*, 626 So. 2d 988, 988-89 (Fla. 1st DCA 1993); *Florida Dep't of Cmty. Affairs v. Escambia County*, 582 So. 2d 1237, 1238-39 (Fla. 1st DCA 1991).

STATEMENT OF THE CASE AND FACTS

1. The Underlying Administrative Proceeding.

The respondents, local governments and individual property owners, many of whom have for the past several years embarked on a campaign to derail the Program through judicial and administrative challenges,³ initiated the underlying rule challenge proceeding on November 21, 2001, by filing a petition challenging the validity of the Department's proposed amendments to Rule 5B-58.001 and existing Rule 5B-58.001(16), of the Florida Administrative Code. (A.4 at 1 &

³ In November 2000, many of these local governments and individual property owners challenged the Program in the Broward County Circuit Court seeking injunctive relief and inverse condemnation damages. *Department of Agric. & Consumer Serv. v. City of Pompano Beach*, 792 So. 2d 539 (Fla. 4th DCA 2001). Following a three-day hearing, while upholding the science underlying the Program, the circuit court enjoined the cutting of citrus trees in Broward County. *Id.* at 543. The Fourth District Court of Appeal reversed the injunction on appeal, holding that the plaintiffs had failed to exhaust their administrative remedies. *Id.* at 548. At the same time, many of the local governments and individual property owners involved in the circuit court challenge filed a petition with DOAH which resulted in a final order declaring invalid substantial provisions of Rule 5B-58.001, Florida Administrative Code, and the Department's 1900-foot removal policy. (A.3). That order is pending before the Court for review in Case No. 1D01-3197. See n.2, *supra*.

Ex. A).⁴ The proposed amendments to Rule 5B-58.001 accomplished the following: (i) the risk assessment group provision and the definition of "exposed," which had been set forth in Rule 5B-58.001(1)(e) and (h), respectively, were eliminated; (ii) the 1900-foot radius was added as the removal criteria to replace the risk assessment procedure; and (iii) revised immediate final order forms were adopted and incorporated into the rule. (A.4 & Ex. A). These proposed amendments addressed what the ALJ had determined in an earlier administrative proceeding to be deficiencies in the existing rule. (A.3). The existing provision being challenged requires property owners or occupants of land on which canker is known or suspected to exist to permit entry of authorized Department representatives for the purposes of inspection, collection of data, treatment or control measures. Rule 5B-58.001(16), Fla. Admin. Code.

The ALJ granted leave for approximately 75 individuals and entities to intervene, allowing them limited participation in pre-hearing discovery and at the final hearing. (A.7). One of those intervenors is Rebecca Anne Piel. *Id.* at A-2.

The final hearing in the underlying administrative rule challenge proceeding presently is scheduled to commence on April 16, 2002, on the ALJ's order granting the respondents a *three-month* continuance, over the Department's strenuous objection. (A.8). That ruling presently is before the Court for review in Case No. 1D02-145. See n. 3, *supra*.

⁴ On an agreed motion, the ALJ granted leave for the respondents to file an amended petition to include allegations pertaining to the Department's rejection of written proposals for allegedly lower cost regulatory alternatives. (A.6).

2. The Department's Initial Motion to Disqualify Judge Van Laningham.

The Department previously moved to disqualify Judge Van Laningham on November 29, 2001, because Judge Van Laningham contacted the parties for a hearing and began presiding over this case before it formally was assigned to him by DOAH's chief judge. (A.9). The Department asserted that, by injecting himself into the proceedings before a formal assignment, Judge Van Laningham was attempting to reach out in aid of the respondents and that this caused the Department reasonably to fear that it would not receive a fair and impartial final hearing. In sum, in support of its stated fear and its reasonable belief that Judge Van Laningham harbors prejudice and bias, the Department asserted: (i) that Judge Van Laningham effectively began presiding over this case before it was assigned to him, (ii) that Judge Van Laningham prematurely injected himself into this case as a result of his personal interest in the outcome of the citrus canker litigation, and (iii) that Judge Van Laningham's personal interest in the outcome is based on his predetermination of the issues. *Id.* The Department averred also that its fear of prejudice and bias was supported by gratuitous comments by Judge Van Laningham in the earlier citrus canker proceeding, in which he: (i) characterized the Program as "breathtaking in scope"; (ii) commented on the "magnitude" of the 1900-foot removal policy (A.3 at ¶28); and (iii) predetermined that the Department has "hidden" its factual and policy premises for the Program and employed Immediate Final Orders (giving notice of intent to remove trees) to shield itself from adequate appellate review (*Id.* at ¶94). (A.9 at 2).

The ALJ denied the Department's motion on December 3, 2001. (A.9).

3. The ALJ's Adverse Rulings Currently Before the Court on the Department's Petition for Review.⁵

a. Granting the respondents' motions for a three-month continuance.

In the underlying administrative rule challenge, and demonstrating the respondents' strategy of delay specifically designed to achieve the Program's effective demise — without having to bear the burden of an evidentiary hearing — the respondents sought and were granted a continuance (for a hearing which already has been delayed pursuant to an agreed hearing schedule) to a date five months after the filing of the petition. (A.5 and A.8). The Department objected to the continuance and in its petition for non-final review currently pending before the Court, argued that the continuance directly contravenes the legislative mandate in Section 120.56(1)(c), Florida Statutes (2000), that a final hearing shall be conducted within 30 days from the filing of the petition, and that no good cause exists in the record for such a gross deviation from that standard. See Petition for Review of Non-Final Agency Action, Case No. 1D02-145.

b. Denying the Department's motion for protective order.

The ALJ furthermore ruled adversely to the Department in the underlying proceeding by denying its motion for protective order regarding the deposition of the Department's Commissioner Charles Bronson, in sharp contrast to well-settled law that agency heads and similar high-ranking agency executives cannot be compelled to testify without a showing that the testimony to be elicited is

⁵ Presently pending before the Court is the Department's petition for non-final administrative review filed on January 11, 2002, in Case No. 1D02-145. The Court issued an order to show cause on January 14, 2002. The Court respectfully is requested to exercise its authority to take judicial notice of its own files. *Buckley*, 559 So. 2d at 313 n.1.

necessary, relevant, and unavailable from a lesser ranking official. Petition for Review of Non-Final Agency Action, Case No. 1D02-145. In its petition for review, the Department demonstrates that no such showing was made by the Respondents and, in fact, the Department has made available Deputy Commissioner Craig Meyer, to whom the Commissioner has delegated supervisory authority over the Program and from whom the respondents can obtain the information they seek, to the extent it is relevant. *Id.*

4. The Ex Parte Communication.

On January 1, 2002, the intervenor Rebecca Anne Piel and Judge Van Laningham engaged in an *ex parte* discussion regarding the Program, and Ms. Piel memorialized that discussion in a follow-up correspondence addressed to Judge Van Laningham and dated that same day, in pertinent part, as follows:

Thank you for your time this morning. I am glad that you are interested in doing something about this Citrus Eradication program.

Id. Following these introductory sentences, Ms. Piel recapitulated for the Judge her stated position regarding the Program, expressing her “resent[ment]” for the Department and the Program and suggesting without any foundation that “the Citrus Industry” is the driving influence. *Id.* Ms. Piel forwarded to the Department’s counsel and counsel for Broward County a copy of the correspondence. *Id.*

5. The Disqualification Motion.

On January 3, 2002, the Department filed a motion to disqualify Judge Van Laningham based on the *ex parte* conversation with Ms. Piel. (A.1). Based on Ms. Piel’s follow-up letter to the judge, the Department asserted that it reasonably concluded: (i) that Judge Van Laningham engaged in an *ex parte* conversation on New Years Day with the intervenor Piel; and (ii) that Judge Van Laningham,

before hearing any evidence in this case, had indicated to Ms. Piel that he would “do something” about the [Program] through his rulings in this proceeding which will prevent the Department from continuing with its [Program].” *Id.* at ¶¶1-2. The Department furthermore asserted that it reasonably feared that Judge Van Laningham may have engaged in similar *ex parte* communications with other intervenors. *Id.* Finally, the Department contended that Judge Van Laningham’s *ex parte* communication with Ms. Piel and her expression of appreciation for his willingness to “do something” about the Program should be considered in the context of the facts previously alleged in support of its initial motion to disqualify and Judge Van Laningham’s rulings (e.g., granting respondents’ request for a three-month continuance of the final hearing in the face of a statutory mandate that the final hearing shall be conducted within 30 days of the filing of the petition, and denying the Department’s motion for protective order regarding the deposition of the Commissioner Bronson in direct violation of established precedent barring agency head depositions under the circumstances). *Id.* at ¶4.

The respondents countered that the Department’s motion was legally insufficient and introduced an affidavit by Ms. Piel which presented a countervailing interpretation of her letter to Judge Van Laningham. (A.11 & Ex. 1). In her affidavit Ms. Piel offered that the introductory sentences in her correspondence to Judge Van Laningham intended to thank him “in advance” for reviewing her correspondence and that it was not intended to “confirm[] any earlier communication.” (A.11 at 3). The respondents contended that the Department’s interpretation of the letter “reads far too much into” Ms. Piel’s statements – and her expression of gratitude to the judge for his interest and stated intent to “do something” – and suggested that she merely was stating her satisfaction that the Program finally would be objectively evaluated by a judge. *Id.* Finally, the respondents furthermore suggested that any fear of bias or prejudice is negated by

the fact that a copy of the correspondence was forwarded to the Department's counsel and that Section 120.66(2), Florida Statutes (2001), contemplates that the ALJ will receive *ex parte* correspondence. *Id.*

The Department challenged the relevance and admissibility of Ms. Piel's affidavit, the clear and improper purpose which was to infuse a factual dispute into the disqualification issue. (A.12). Indeed, "[t]o consider Ms. Piel's affidavit as grounds for denying the Department's motion would in effect improperly pass on the truth of the Department's factual allegations." *Id.* at ¶4. The Department questioned the credibility of Ms. Piel's affidavit in any event, asserting that it was an inherently unreliable, "after-the-fact reconstruction" of the events which does not alleviate the Department's fear of prejudice and bias. (A.12). To the contrary, the Department asserted that the affidavit "is neither reasonable nor credible" (*id.* at ¶¶1-2), as follows:

[T]he date-stamp on the letter reflecting that it was faxed and received during the afternoon of January 2 (not during the morning in which her affidavit claims she expected him to be "considering the letter"), coupled with the unexplained second sentence of the letter which unambiguously reflects the result of a communication with the judge, is inconsistent with Ms. Piel's subsequent assertion that she "meant nothing more than to thank the judge in advance for considering my letter."

Id. at ¶3. Indeed, the Department contended that the "unexplained inconsistencies . . . reinforce its allegation that such an *ex parte* communication occurred, and its fear of prejudice." *Id.* (original emphasis).

The Department attached to its reply the supplemental affidavit of Deputy Commissioner Meyer,⁶ in which he attests on behalf of the Department that Ms.

⁶ The Department filed the supplemental affidavit out of an abundance of caution and to be considered only in the event that the ALJ considered Ms.
(continued . . .)

Piel's affidavit and the respondents' response do not alter the Department's conclusion that the *ex parte* discussion occurred or its reasonable fear of prejudice because, "the only unguarded and uncoached characterization of what transpired is contained in the January 1 letter, not the Piel Affidavit," and because of the inconsistencies between the affidavit and the letter. (A.12 at ¶2 & Ex. 1 at ¶¶2-4). Deputy Commissioner Meyer attested that "the Department . . . alleges that there was an *ex parte* communication between Judge Van Laningham and Ms. Piel, and that as a result of that communication Ms. Piel felt 'glad that you are interested in doing something about the Citrus Eradication program' as she stated in her January 1, 2002 letter." (A.12 & Ex. 1 at ¶5).

Finally, the Department contended that Section 120.66, Florida Statute (2001), and its disclosure requirement does not preclude disqualification under Section 38.10, Florida Statute (2001), based on a reasonable fear of prejudice and bias. *Id.* at ¶¶9-10.

6. The Order Denying the Department's Disqualification Motion.

The ALJ denied the Department's motion to disqualify on January 7, 2002. (A.1). Stating that the Department's motion was "based largely upon its interpretation of statements made in a letter" addressed to the judge from the intervenor Piel (*id.* at 2), and without ever referencing the occurrence of the *ex parte* discussion or its nature and substance, the ALJ found that the facts alleged in the motion were legally insufficient to require disqualification. *Id.* at 4.⁷

(... continued)

Piel's affidavit. (A.12 at 2). The ALJ clearly did not consider Ms. Piel's affidavit, however, having expressly accepted the factual allegations in the Department's motion as true. (A.2 at 4); (A.12 & Ex. 1 at ¶5).

⁷ The ALJ stated that Ms. Piel's letter is available for review online through DOAH's website.

The ALJ, finding that the Department has the right to seek disqualification (A.1 at 2), stated that under the governing standard he was precluded from passing on the truth of the facts alleged in the motion and from “articulating his . . . legal reasoning” for denying the disqualification motion. *Id.* at 3. He thus concluded that, “accept[ing] as true the objective facts set forth in the motion” and viewing such facts “in a light most favorable to the Department,” the Department’s motion stated legally insufficient grounds to require disqualification. *Id.* at 4.⁸

NATURE OF RELIEF SOUGHT

The Department seeks a writ prohibiting the ALJ from exercising further jurisdiction over the underlying administrative proceeding.

ARGUMENT

1. The Governing Standard.

“The test for determining the legal sufficiency of a motion for disqualification is whether the facts alleged (which must be taken as true) would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial.” *Brofman v. Florida Hearing Care Center, Inc.*, 703 So. 2d 1191,

⁸ On January 7, 2002, the ALJ also entered an order on intervenors’ correspondence, in which he acknowledged receipt of 14 letters from intervenors supporting the respondents’ rule-challenge. (A.13). The ALJ treated these letters as motions for leave to offer evidence at the final hearing, consistent with the order granting petitions to appear as intervenors, in which order the intervenors were directed to submit such motions on or before January 2, 2002. *Id.* at 1-2. The ALJ furthermore stated in his January 7, 2002 order that, to the extent any of these letters “might be deemed to constitute *ex parte* communications, notice is hereby given that all of the correspondence have been placed on the record” and that “each letter is available for review online through DOAH’s website.” *Id.* at 2.

1192 (Fla. 4th DCA 1997); accord, *Michaud-Berger v. Hurley*, 607 So. 2d 441, 446 (Fla. 4th DCA 1992) (a party seeking to disqualify a judge need only show a "well-founded fear of prejudice on the part of the trial judge"). In other words, it is not a question of how the judge actually feels, but rather "what feeling resides in the affiant's mind and the basis for such feeling." *Wargo v. Wargo*, 669 So. 2d 1123, 1124 (Fla. 4th DCA 1996) (citing *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983)). Indeed, a superficially innocuous comment by a judge can require disqualification, even if the judge did not intend his remark to reflect on the merit of the parties' positions, because, "the standard is the reasonable effect on the party seeking disqualification, not the subjective intent of the judge." *Brofman*, 703 So. 2d at 1192).

Moreover, in reviewing a motion to disqualify, the trial judge "cannot pass upon the truth of the allegations of fact." *Hayslip v. Douglas*, 400 So. 2d 553, 556 (Fla. 4th DCA 1981). See *Cave v. State*, 660 So. 2d 705, 708 (Fla. 1995) (holding that a judge cannot entertain evidence "in rebuttal of the factual allegations contained" in the motion to disqualify).

Rule 2.160 of the Florida Rules of Judicial Administration provides that

[t]he judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency for the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.

Fla. R. Jud. Admin. 2.160(f). In the end, it is sufficient that the allegations are neither frivolous nor fanciful. *Hayslip*, 400 So. 2d at 556; accord, *Barnett v.*

Barnett, 721 So. 2d 311, 312 (Fla. 2d DCA 1999) (holding that if a judge's comment could "reasonably be interpreted" to reflect a bias or prejudice against a party, disqualification is mandatory); *Sholtz v Hauser*, 657 So. 2d 950, 951 (Fla. 5th DCA 1995) (circumstantial evidence of prejudice or bias is sufficient to require disqualification, even if there is an equally cogent contrary explanation).

Here, the Department's motion for disqualification, while a second motion seeking to disqualify Judge Van Laningham, does not require application of a more stringent standard, because the motion is not directed at a *successor* judge. *See, e.g., J & J Industries, Inc. v. Carpet Showcase of Tampa Bay, Inc.*, 722 So. 2d 281, 283 (Fla. 2d DCA 1998) (holding that "[t]he freedom granted to trial judges to pass on the truth of the allegations is confined . . . to successor judges, and does not apply to mere successive motions").

2. The Undeniable *Ex Parte* Discussion and Judge Van Laningham's Suggestion That He Will "Do Something" About the Program Supports Disqualification.

Ms. Piel unambiguously admitted in her follow-up letter to Judge Van Laningham that they had an *ex parte* discussion about the Department's Program and that during that discussion Judge Van Laningham indicated that he would "do something about" the Program. Indeed, the *ex parte* discussion was sufficiently partial to cause Ms. Piel to convey her appreciation for the time and the assurances given to her. These undeniable facts, which the ALJ was required to accept as true, and which, here, he expressly did accept as true, sufficiently advance a basis for the Department to reasonably fear that it will not receive a fair or impartial final hearing before Judge Van Laningham and to mandate his disqualification.

a. **The Ex Parte Communication.**

That the *ex parte* discussion occurred on New Years Day, and that during that discussion Judge Van Laningham conveyed to Ms. Piel that he would take some action favorable to her position, as expressed in her follow-up letter to the judge, are not subject to dispute and must be accepted as true for purposes of consideration of the legal sufficiency for the Department's allegations. *Brofman*, 703 So. 2d at 1192; *Michaud-Berger*, 607 So. 2d at 446; *Hayslip*, 400 So. 2d 553, 556 (Fla. 4th DCA 1981). Indeed, countervailing evidence was not even admissible under the Supreme Court's mandate in *Cave*. 600 So. 2d at 608. The ALJ, here, was painstakingly careful not to pass on the truth of the allegations so much so that the facts of the *ex parte* communication are not even recited in the order. The only issue for the Court, therefore, is whether such an *ex parte* communication constitutes a legally sufficient basis for the judge's disqualification.

In *Brake v. Murphy*, 693 So. 2d 663, 665 (Fla. 3d DCA 1997), an attorney time sheet record which unambiguously indicated there had been a "conference" with the court on two occasions shortly before the court ruled adversely to the party seeking disqualification, *required* the trial judge to disqualify himself because of the "record evidence" of an *ex parte* communication. The Third District there held that "[n]othing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and litigant." *Id.*; *accord*, *Rollins v. Baker*, 683 So. 2d 1138, 1139 (Fla. 5th DCA 1996) (holding that the *ex parte* communications together with certain comments made by the judge were sufficient to require recusal and noting that "the most insidious result of *ex parte* communications is their effect on the appearance of the impartiality of the tribunal").

Here, the Department filed a sworn affidavit, executed by Deputy Commissioner Meyer, the designated representative in this action, stating that, as a result of the *ex parte* conversation, the substance and nature of which was unambiguously memorialized in Ms. Piel's correspondence, the Department reasonably fears that it will not receive a fair final hearing in this case. The Department's fear that Judge Van Laningham harbors prejudice and bias toward the Department and the Program is furthermore evidenced by the adverse rulings he has entered in direct contravention of established precedent causing the Department's ability to carry out its delegated legislative authority to eradicate citrus canker to be severely jeopardized.

b. Prejudging the validity of the Program.

In her January 1, 2002, correspondence to Judge Van Laningham, Ms. Piel thanks the judge for his time earlier that morning (on New Years Day) and expresses her appreciation for the assurance he apparently gave to her that he would "do something" about the Program. The Department interpreted these introductory statements in Ms. Piel's letter reasonably to be a confirmation of the occurrence of such a conversation on New Years Day and its substance. Indeed, the Department's interpretation of the events, which events were described by Ms. Piel in her correspondence without any ambiguity, need only be predicated upon "a modicum of reason." *Scholz v. Hauser*, 657 So. 2d 950, 951 (Fla. 5th DCA 1995); *accord, Wargo*, 669 So. 2d at 1124 (holding that disqualification of trial judge was required because of gratuitous remarks which were disparaging of husband's position prior to hearing any evidence, and thus, signaled a predisposition, rather than an impression formed after reviewing evidence). Clearly and undeniably, Judge Van Laningham communicated to Ms. Piel a position on the merits of the case which was favorable to her, and before any evidentiary presentation.

The respondent's suggestion below that the correspondence reasonably could be interpreted another way, and the Piel affidavit which presents an after-the-fact reconstruction of the events, simply are irrelevant under the governing standard. Such an evidentiary submission has no place in the context of disqualification because it would require the judge against whom disqualification is being sought to make rulings on the credibility of the evidence and thus improperly pass on the truth of the factual allegations. *Cave*, 660 So. 2d at 708. The ALJ, acknowledging the governing standard (A.1 at 3), expressly refrained from making any evidentiary ruling on the motion to disqualify, stating that he "accept[ed] as true" the factual allegations set forth by the Department in its motion. *Id.* at 4.⁹

Ms. Piel's expression of pleasure with the outcome of her *ex parte* communication leads reasonably to the conclusion that there was, if only implicitly stated, some assurance that the "something" Judge Van Laningham intended to do was adverse to the Department and the Program. Any attempt to introduce evidence contradicting these factual allegations in the Department's motion (*e.g.*,

⁹ The respondents' anticipated reliance on the Third District's self-described *dictum* in *Brake v. Swan*, 767 So. 2d 500 (Fla. 3d DCA 2000), for the proposition that the conduct by Judge Van Laningham is "merely assumed" (A.11 at 5) and that the circumstantial evidence upon which the Department's motion to disqualify is based can be explained away by Ms. Piel's self-serving, subsequently-introduced affidavit (*id.* at 7), is misguided. In light of the well-established principle that judges are prohibited from passing on the truth of allegations underlying a motion to disqualify, *Cave*, 660 So. 2d at 708, the Third District's cautionary note in *Brake v. Swan* must necessarily be limited to the type of disqualification issue addressed in that case, *i.e.*, ambiguous time sheet entries which can be elucidated by an uncontested, sworn statement of the attorney/officer of the court. *Brake v. Swan*, 767 So. 2d at 503.

the Piel affidavit) would require the judge to pass on the truth of the allegations in violation of the Supreme Court's mandate in *Cave*, 660 So. 2d at 708. Here, the ALJ clearly did *not* pass on the truth of the allegations in the Department's motion. Indeed, having expressly acknowledged that he was precluded from doing so (A.2 at 3), the ALJ announced that he "accept[ed] as true the objective facts set forth in the motion" and would view such facts "in a light most favorable to the Department." *Id.* at 4. The Piel affidavit was not considered by the ALJ below and should not be considered by the Court in its disposition of this petition for writ of prohibition because it is inconsistent with the Department's factual allegations. (A.12 & Ex. 1 at ¶5).¹⁰

The Department's reasonable fear of prejudice based on the undeniable *ex parte* discussion is further bolstered when viewed in conjunction with the facts which had prompted the Department's first disqualification motion (A.9) followed by Judge Van Laningham's adverse, and highly questionable, rulings which currently are before the Court for review. *See Brake v. Murphy*, 693 So. 2d at 665-66 (holding that "highly questionable" rulings by the judge reinforced the litigant's reasonable belief that an *ex parte* communication had occurred).

Judge Van Laningham granted the respondents' request for a *three-month* continuance for the final hearing to a date *five months* after the filing of the petition, in direct contravention of the legislative mandate in Section 120.56(1)(c), Florida Statutes (2000), that a final hearing shall be conducted within 30 days from the date on which the petition is assigned to the ALJ, and resulting in a delay

¹⁰ Of course, if the Piel affidavit and the Department's supplemental affidavit had been considered by the ALJ, he would have improperly passed on the truth of the Department's allegations, which itself would require his disqualification. *Cave*, 660 So. 2d at 708.

which may jeopardize the Department's ability to timely recommence the Program to effectively eradicate citrus canker. No showing of good cause exists in the record. See Petition for Review of Non-Final Agency Action, Case No. 1D02-145. Judge Van Laningham also denied the department's motion for a protective order regarding the deposition of Commissioner Bronson, in sharp contrast to well-settled law that agency heads and similar high-ranking agency executives cannot be compelled to testify without a showing that the testimony to be elicited is necessary, relevant, and unavailable from a lesser ranking official. No such showing here was required, much less made. *Id.* Under the principle recognized by the Third District in *Brake v. Murphy*, these "highly questionable" rulings by Judge Van Laningham, coupled with his premature injection of himself into this case and his prior gratuitous, disparaging comments about the Department and the Program (A.9), further demonstrate a prejudicial motive.

Here, the Department has alleged in a sworn affidavit that an *ex parte* communication occurred in which the judge conveyed, to the satisfaction of the party with whom he communicated *ex parte*, that he would "do something" about the Program. That sworn allegation, particularly when properly viewed in conjunction with other circumstances (i.e., the "highly questionable" adverse rulings currently before the Court and on which the Court has already issued an order to show cause) and in a light most favorable to the Department, renders the Department's stated fear that it will not receive a fair and impartial final hearing entirely reasonable and establishes legally sufficient grounds to support disqualification.

CONCLUSION

The Department submits that its motion to disqualify Judge Van Laningham from continuing to preside over the citrus canker administrative rule challenge is legally sufficient. The Department therefore respectfully requests the Court to expeditiously issue the writ of prohibition, prohibiting Judge Van Laningham from continuing to hear matters in that administrative proceeding, and to grant such other relief as the Court shall deem appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for writ of prohibition was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.



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