

SEP 21 2017

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NATE MCLAUGHLIN,

Petitioner,

vs.

Case No. 16-5244FE

MARK RICHTER,

Respondent.

_____ /

RECOMMENDED ORDER

A duly noticed final hearing was held in this matter on May 16, 2017, at the Division of Administrative Hearings in Tallahassee, Florida, before Administrative Law Judge Suzanne Van Wyk.

APPEARANCES

For Petitioner: Albert T. Gimbel, Esquire
Mark Herron, Esquire
Messer Caparello, P.A.
2618 Centennial Place
Post Office Box 15579
Tallahassee, Florida 32317

Albert J. Hadeed, Esquire
Flagler County Board of
County Commissioners
1769 Moody Boulevard, Building 2
Bunnell, Florida 32110

For Respondent: No Appearance

STATEMENT OF THE ISSUES

Whether Petitioner is entitled to an award of costs and attorneys' fees pursuant to section 112.313(7), Florida Statutes, and Florida Administrative Code Rule 34-5.0291; and, if so, in what amount.

PRELIMINARY STATEMENT

On September 13, 2016, the Florida Commission on Ethics ("Commission") referred five separate petitions seeking costs and attorneys' fees pursuant to section 112.313(7) and rule 34-5.0291, requesting the Division of Administrative Hearings ("Division") assign an Administrative Law Judge to conduct a formal administrative hearing and to prepare a recommended order. Upon receipt of the referrals from the Commission, the Division opened five separate cases which were referred to the undersigned. After reviewing the records forwarded by the Commission, the undersigned, sua sponte, entered an Order consolidating the five cases.^{1/}

Counsel for Petitioners filed responses to the Initial Order on behalf of each Petitioner and suggested that the hearing be held in Tallahassee.^{2/} Following is a procedural history of the consolidated cases.

Respondent Mark Richter, Jr. ("Richter Jr."), did not file a response to the Initial Order.^{3/} In their response to Case Nos. 16-5244FE and 16-5246FE, counsel for Petitioners outlined

their unsuccessful attempts to contact Richter Jr. Counsel for Petitioners indicated contact was made by telephone with Richter Jr.'s father, Mark Richter, Sr. ("Richter Sr."). When asked to provide contact information for his son, Richter Sr. advised that he had none. When then asked to forward the materials to his son, as this was an important matter, Richter Sr. reiterated that he had no contact information on his son and abruptly ended the phone call.

Respondent Kimberle Weeks ("Weeks") filed a response to the Initial Order in Case Nos. 16-5246FE and 16-5247FE, in which she requested that the hearing take place in Orlando, Florida, but otherwise indicated that she would be "unavailable for any dates and times until a pending legal matter is resolved or until authorized by her legal counsel[.]"

Respondent Dennis McDonald ("McDonald") filed a response to the Initial Order in Case No. 16-5248FE, in which he suggested the hearing be held in Central Florida and that he would be available for hearing on various dates, including December 1, 2016 through December 19, 2016.

Following a telephonic status conference on October 5, 2016, at which counsel for Petitioners and McDonald participated and discussed scheduling issues, the undersigned entered a Notice of Hearing on October 6, 2016, which set the final hearing for December 12 through 16, 2016, in Tallahassee.^{4/}

On October 27, 2016, Petitioners served initial discovery requests on Respondents. On December 2, 2016, Petitioners filed a motion to continue the hearing because Respondents failed to respond to Petitioners' discovery. Counsel for Petitioners indicated that he had been unable to contact Richter Jr., Weeks, or McDonald to determine the status of their responses to the discovery. By Order entered December 7, 2016, after finding good cause existed to continue the hearing, the undersigned cancelled the hearing scheduled for December 12 through 16, 2016, and rescheduled the final hearing for March 6 through 9, 2017.

On December 22, 2016, counsel for Petitioners filed a motion to compel responses to the unanswered interrogatories and requests to produce which were propounded on October 27, 2016. On January 6, 2017, the undersigned scheduled a telephonic hearing on Petitioners' motion to compel for January 20, 2017. Counsel for Petitioners and Respondents Weeks and McDonald participated in the telephonic hearing during which the undersigned informed the participating Respondents of the consequences and implications of failure to respond to Petitioners' discovery requests. By Order dated January 20, 2017, the undersigned granted Petitioners' motion to compel and ordered Respondents to serve answers to Petitioners' First Set of Interrogatories, and to produce documents in response to

Petitioners' First Request for Production of Documents on or before January 30, 2017.^{5/}

Petitioners filed a second motion for continuance on February 8, 2017. The motion was based on the failure of Richter Jr. and Weeks to provide responses to Petitioners' pending discovery, despite the prior Order granting the motion to compel, and on the failure of McDonald to provide sufficient responses to the pending discovery. In that motion, Petitioners noted that they had served requests for admissions on each of the Respondents on February 2, 2017, and that they intended to depose each of the Respondents before the final hearing.^{6/}

By Order entered February 16, 2017, the undersigned cancelled the hearing scheduled for March 6 through 9, 2017, and ordered each party to advise, in writing, no later than March 3, 2017, of all dates on which they were available for rescheduling the final hearing in April 2017. Richter Jr. filed no response. Weeks filed a response stating that because of other obligations for "April 2017 through May 27, 2017, [she] will not be available until May 28th through May 31st 2017." McDonald indicated that he was available for several days in both April and May of 2017. Petitioners likewise indicated they were available for several days in both April and May of 2017.

By Order dated March 23, 2017, the undersigned rescheduled the final hearing for May 15 through 19, 2017, noting:

On March 2, 2017, Respondent Weeks filed a response indicating her unavailability the entire month of April 2017, and through May 27, 2017. Respondent Weeks' notice of unavailability for almost two months is unacceptable. On March 3 and March 6, 2017, Petitioner and Respondent McDonald, respectively, filed notices of available dates in April and May 2017. Only one set of dates, April 4 through 7, 2017, were common to both Petitioners and Respondent McDonald.

The undersigned has made numerous attempts to reach the parties to schedule a telephone conference to coordinate a mutually-agreeable date to reschedule the hearing in this matter. Telephone messages to Respondent McDonald have not been returned, and the telephone number provided by Respondent Weeks (which was confirmed by her on a previous telephone conference), rings incessantly but remains unanswered. No voice mail or other message service is provided.

With much effort on behalf of Division staff, the undersigned has identified dates on which the Petitioners are available and which overlap with dates identified as available for Respondent McDonald.

On February 14, 2017, counsel for Petitioners informed the undersigned of the death of Petitioner Frank Meeker and moved to substitute his wife, Debra Meeker, as surviving spouse and sole beneficiary, in these proceedings. By Order entered February 28, 2017, the undersigned granted the motion and ordered that the style of this cause be amended to substitute Debra R. Meeker for Frank J. Meeker, deceased.

On March 2, 2017, McDonald filed a motion to dismiss, asserting that he was not afforded due process by the action of the Commission in its referral of the matter to the Division. By Orders entered March 7, 2017, and March 8, 2017 ("Amended Order"), the undersigned denied McDonald's motion to dismiss.

On March 27, 2017, Petitioners filed a motion to permit, post hoc, Petitioners' filing of Requests for Admission on February 2, 2017, which exceeded the number permitted by the Florida Rules of Civil Procedure, and to deem all unanswered Request for Admissions as having been admitted. In support of the motion, Petitioners stated that Requests for Admissions were served by U.S. Mail to: (1) mailing addresses that were confirmed on the record by Respondents Weeks and McDonald during prior proceedings held in this matter; (2) addresses shown and sworn to as true and correct by each of the Respondents on the original complaint filed with the Commission in this matter; and (3) via e-mail addresses confirmed by Respondents Weeks and McDonald during prior hearings in this matter. By Order dated April 11, 2017, the undersigned granted the motion, noting:

In the Motion, Petitioners request the undersigned to deem admitted the statements in Petitioners' Request for Admissions served Respondents on February 2, 2017 (Request), to which no response has been filed.

Pursuant to Florida Rule of Civil Procedure 1.370(a), Respondents were under an obligation to serve written responses or objections to the Request within 30 days of service, or by March 6, 2017. By operation of the rule, Respondents' failure to timely respond to the Request renders the statements admitted. The undersigned is mindful that Respondents are unrepresented and the penalty is harsh. However, the undersigned has previously instructed Respondents Weeks and McDonald of the duty to respond to discovery and the penalties for failure to comply. [endnote omitted]

In the Motion, Petitioners also request the undersigned approved [sic], post hoc, Request for Admissions that exceed the number set forth in the rule. The rule authorizes the undersigned to allow a party to exceed the limit on number of requests "on motion and notice and for good cause." Fla. R. Civ. P. 1.370(a). Petitioners served the motion on March 27, 2017, and Respondents have had notice of same since that date, but not filed any objection. Good cause for exceeding the limit has been established by Respondents' failure to cooperate in discovery in this matter, which has resulted in significant delays and hampered Petitioners' efforts to establish their case by other means.

On May 2, 2017, Petitioners filed a motion in limine or, alternatively, a motion for sanctions restricting Respondents from introducing testimony and evidence at trial not previously disclosed to Petitioners. In support of the motion, Petitioners set forth (1) the failure of Respondents to respond to prior discovery requests; (2) the failure of Respondents to respond to the requests for admissions; and (3) the refusal of

Respondents and others associated with them to participate in properly noticed depositions.^{7/} By Order dated May 10, 2017, the undersigned granted the motion and ordered that:

Respondents are prohibited from presenting any testimony or documentary evidence at the final hearing which would have been disclosed, produced, discussed, or otherwise revealed in response to Petitioners' discovery requests, or which would contradict any of the Requests for Admission which have been deemed admitted by the undersigned's Order dated April 11, 2017.

On May 9, 2017, Weeks filed a motion to change venue of the final hearing from Tallahassee (Leon County) to Bunnell (Flagler County). By Order dated May 10, 2017, the undersigned denied Weeks motion to change venue.

On May 11, 2017, McDonald filed a motion to dismiss the petition against him in Case No. 16-5248FE on the basis that the issues regarding costs and attorneys' fees in this case have already been decided by the First District Court of Appeal in Hadeed et al. v. Commission on Ethics, 208 So. 3d 782 (Fla. 1st DCA 2016). By Order dated May 11, 2017, the undersigned denied McDonald's motion to dismiss.

On May 11, 2017, Weeks filed a motion to dismiss the petitions filed against her asserting "qualified immunity."^{8/} By Order entered May 16, 2017, the undersigned denied Weeks' motion to dismiss based on "qualified immunity."

On Friday, May 12, 2017, Weeks filed a motion to appear telephonically at the hearing scheduled to commence the following Monday, May 15, 2017. By Order dated May 15, 2017, the undersigned denied Weeks motion to appear telephonically.

The final hearing commenced as scheduled. None of the Respondents appeared at the hearing. Petitioners presented the testimony of the following witnesses: Debra Meeker, the widow of former Flagler County Commissioner Frank Meeker and Petitioner in Case No. 16-5245FE; Albert J. Hadeed, Flagler County Attorney and Petitioner in Case No. 16-5247FE; Charles Ericksen, Jr., Flagler County Commissioner and Petitioner in Case No. 16-5246FE; Nate McLaughlin, Flagler County Commissioner and Petitioner in Case No. 16-5244FE; and George Hanns, former Flagler County Commissioner and Petitioner in Case No. 16-5248FE. With respect to costs and attorneys' fees, Petitioners presented the testimony of Mr. Hadeed; Mark Herron, counsel for Petitioners; and Michael P. Donaldson as an expert witness on attorneys' fees. Petitioners' Exhibits P-1 through P-97 were admitted into evidence.

After the conclusion of the formal hearing, Petitioners filed a motion to re-open the record to permit submission of two additional exhibits regarding the underlying facts relative to McDonald's motion to dismiss the petition for costs and attorneys' fees in Case No. 16-5248FE. No objection or other

response was filed by McDonald. By Order dated June 1, 2017, the undersigned granted the motion to re-open the record and Petitioners' Exhibits P-98 and P-99 were admitted.

On July 31, 2017, Petitioner moved to introduce supplemental exhibits on costs and attorneys' fees incurred in pursuing this matter after conclusion of the final hearing. No objection or other response was filed by any of the Respondents. The motions were granted and Petitioner's Exhibits P-100A, P-101, and P-102 were admitted in evidence.

Counsel for Petitioners asked to submit a proposed recommended order within 30 days of the transcript being filed with the Division. A two-volume Transcript was filed with the Division on June 30, 2017. Petitioner timely filed a Proposed Recommended Order, which has been taken into consideration in preparing this Recommended Order.

Counsel for Petitioners filed, with the concurrence of the Commission, a motion on July 12, 2017, requesting that separate proposed recommended orders be filed so that separate recommended orders could be issued. By Order dated July 13, 2017, the undersigned severed these cases. Accordingly, separate Recommended Orders have been rendered in each case.

FINDINGS OF FACT

Ethics Complaint 14-230

1. On December 4, 2014, the Commission received a complaint against Nate McLaughlin ("McLaughlin"), filed by Richter Jr., which alleged that McLaughlin, as a member of the Flagler County Commission, violated Florida's election laws, the Government-in-the-Sunshine Law ("Sunshine Law"), and Florida's Code of Ethics for Public Officers and Employees ("Ethics Code").

2. Specific allegations in the complaint included that:

County Commissioner Nate McLaughlin and Current County Commissioner Frank Meeker along with other county commissioners (including canvassing Board member County Commissioner George Hanns and alternate canvassing board member County Commissioner Charles Ericksen) were involved in discussion outside a scheduled canvassing board meeting but during an advertised board of county commissioner meeting, which public notice was not given by the canvassing board members, the Supervisor of Elections or her staff. The discussion pertained to canvassing board activity. Action, by consensus vote, was taken by the board of county commissioners which pertained to the canvassing board selecting a canvassing board attorney, and to request the state oversee the 2014 general election; all of which is believed to be a Sunshine Law violation.

3. The complaint also alleged that:

It is believed others such as the county administrator, other county commissioners and the county attorney were being a conduit

to canvassing board members, and canvassing Board member George Hanns and alternate canvassing board member County Commissioner Charles Ericksen, Jr. are also believed to have violated the sunshine law by contributing to the discussions, which was believed to have been done to advance manipulation to the canvassing board members who were present so they could carry out a planned agenda.

4. The complaint further alleged that:

Discussions regarding the canvassing board took place at least twice at board of county commissioner [sic] meetings following the September 12, 2014 special canvassing board meeting and again on October 20, 2014. It is believed that both times canvassing board member [sic] and others have violated the Sunshine Law, and it is believed that those involved that are not canvassing board members or alternates were being a conduit to certain canvassing board members who were present.

5. The complaint was reviewed by the Executive Director of the Commission who found the complaint to be legally sufficient to warrant an investigation:

The complaint alleges that [McLaughlin] and other members of the Board [of County Commissioners] or members of the canvassing board were involved in discussions which may not have been in compliance with the Sunshine Law, in order to carry out a planned agenda, that discussions occurred regarding placement of the County Attorney as attorney for the canvassing board (a placement objected to by the Supervisor of Elections), and that the Respondent was involved in other or related conduct, apparently for the benefit of particular candidates or others. This indicates

possible violation of section 112.313(6),
Florida Statutes.

6. As a result, the complaint was determined to be legally sufficient and the investigative staff of the Commission was directed to "conduct a preliminary investigation of this complaint for a probable cause determination of whether [McLaughlin] has violated section 112.313(6), Florida Statutes, as set forth above."

The Commission's Investigation

7. The complaint was investigated by Commission Investigator K. Travis Wade. On February 19, 2016, the Commission issued its Report of Investigation, which found as follows:

a. Florida law provides that a county canvassing board shall be comprised of the Supervisor of Elections, a County Court Judge, and the Chair of the County Commission. Additionally, an alternate member must be appointed by the Chair of the County Commission. The Flagler County Canvassing Board ("Canvassing Board") for the 2014 Election was composed of Judge Melissa Moore-Stens, County Commission Chairman George Hanns (Commissioner Hanns), and then-Supervisor of Elections Weeks. Initially, the alternate member of the Canvassing Board was County Commission member Charles Ericksen, Jr.

b. McLaughlin was a member of the Flagler County Commission; he was not a member of the Canvassing Board during the 2014 election cycle.

c. Minutes from the September 15, 2014 County Commission meeting indicate that during the "Commission Reports/Comments" portion of the meeting, there was a discussion regarding who had the authority to appoint the Canvassing Board attorney, but no official action was taken at that time.

d. Minutes from the October 20, 2014 County Commission meeting indicate that there was a discussion regarding Commissioner Ericksen's contribution to another candidate with opposition in the election (Commissioner Frank Meeker) and that Commissioner Ericksen resigned as an alternate member of the Canvassing Board at that time. The Commission then voted to appoint Commissioner Barbara Revels as the alternate Canvassing Board member.

e. All discussions by the County Commission regarding the Canvassing Board took place during the "Commissioner Reports/Comments" or "Commission Action" portion of duly noticed County Commission meetings.

f. The only members of the Canvassing Board present at the October 20, 2014 County Commission meeting were Hanns and alternate member Commissioner Ericksen.

g. When asked about his allegation that McLaughlin was involved in other or related conduct, apparently for the benefit of particular candidates or others, Richter Jr. indicated that he had no information regarding that allegation.

Commission on Ethics Advocate's Recommendation

8. On March 7, 2016, Commission Advocate Elizabeth L. Miller recommended that there was "no probable cause" to believe that McLaughlin violated section 112.313(6) by participating in discussions which may have been in violation of the Sunshine Law, or other related conduct regarding appointment of the County Attorney as attorney for the Canvassing Board in order to manipulate Canvassing Board members or to carry out a planned agenda for the benefit of particular candidates or others.

9. On April 20, 2016, the Commission issued its Public Report dismissing Richter Jr.'s complaint against McLaughlin for lack of probable cause.

Richter Jr.'s Knowledge of the Falsity of His Sworn Allegations

10. Richter Jr. filed a sworn complaint against McLaughlin. When signing the complaint, Richter Jr. executed an oath that "the facts set forth in the complaint were true and correct"

11. When he filed his complaint against McLaughlin, Richter Jr. had access to the video of the County Commission meeting of September 15, 2014, posted on the County's website

and the published minutes of that meeting, also available online or by request.

12. Video of the 2014 meetings of the County Commission are archived for public viewing on the County website. Minutes of all County Commission meetings are public record available to the public on the Clerk of Court's website and upon request.

13. Neither the posted video nor the minutes of the September 15, 2014 meeting of the County Commission indicate that any discussion regarding the selection of the Canvassing Board attorney occurred in violation of the Sunshine Law.

14. Neither the posted video nor the minutes of the September 15, 2014 meeting of the County Commission indicate that any action was taken by consensus vote or by any other vote regarding who had the authority to appoint the attorney for the Canvassing Board.

15. No vote was taken by the County Commission to designate the County Attorney as the attorney for the Canvassing Board.

16. To the contrary, the County Commission determined that it was a matter for the Canvassing Board to select its own attorney.

17. When asked by the Commission investigator whether McLaughlin was involved in other or related conduct, for the

benefit of particular candidates or others, Richter Jr. indicated he had no information regarding that allegation.

18. The allegations in Richter Jr.'s complaint against McLaughlin, which the Commission found material to investigate, were known by Richter Jr. to be false, or filed by Richter Jr. with reckless disregard for whether they were true or false.

Malicious Intent to Injure McLaughlin's Reputation

19. Whether the claims against public officials were "motivated by the desire to [impugn character and injure reputation]," is a question of fact. Brown v. State, Comm'n on Ethics, 969 So. 2d 553, 555 (Fla. 1st DCA 2007).

20. The evidence adduced at the hearing established that Richter Jr. worked in concert with other individuals to maliciously injure the reputation of McLaughlin by filing complaints containing false allegations material to the Code of Ethics with the Commission and other agencies.

21. This group, formed in 2009 or 2010, was known formally as the Ronald Regan Republican Association, informally as the "Triple Rs." Members of the group included Richter Sr., Dennis McDonald, John Ruffalo, Carole Ruffalo, Ray Stephens, William McGuire, Bob Hamby, and Dan Bozza.

22. The Triple Rs were trying to influence the outcome of elections in Flagler County. They did this by fielding candidates against incumbent members of the County Commission.

In 2014, Richter Sr. ran against, and lost to, Commissioner McLaughlin. Dennis McDonald ran against and lost to Commissioner Frank Meeker in 2012 and 2014. The Triple Rs also tried to influence the results of the elections by filing complaints with multiple agencies against various elected and appointed Flagler County officials.

23. Weeks was not a member of the Triple Rs; however, Dennis McDonald, the de facto spokesperson of the Triple Rs, frequently visited Weeks' office, particularly in the period between the 2014 primary and general elections. Weeks' interaction with McDonald and other Triple Rs during this timeframe was so pervasive that Weeks' husband expressed concern to McLaughlin about McDonald's influence over Weeks.

24. Weeks filed six complaints against various Flagler County officials, many of the same officials about whom the Triple Rs also filed complaints.

25. This group filed 25 complaints against County officials, individually and collectively, including complaints against McLaughlin, County Attorney Hadeed, all members of the 2014 County Commission, and the County Administrator. The complaints were filed with the Commission on Ethics, the Florida Elections Commission, The Florida Bar, and the State Attorney for the Seventh Judicial Circuit. Certain members of the Triple Rs formed a limited liability company--the "Flagler

Palm Coast Watchdogs"--and also filed suit against the County Commission to block renovation of the old Flagler Hospital into the Sheriff's Operation Center, alleging violations of the Ethics Code.

26. At least 12 of the complaints filed by the group specifically alleged or referenced the false allegations which are at issue in this case: that members of the County Commission discussed Canvassing Board matters in violation of the Sunshine Law with the goal of manipulating elections, improperly selecting the Canvassing Board attorney, and advancing a hidden agenda.

27. In addition to alleging that McLaughlin violated Florida's ethics laws and Sunshine Law, the complaint filed with the Commission alleged that McLaughlin violated Florida's elections laws, specifically chapter 106, Florida Statutes (the "Campaign Finance Law"), in several respects.

28. Richter Jr. also filed a complaint against McLaughlin with the Florida Elections Commission. In that complaint, he included allegations that McLaughlin discussed Canvassing Board matters in violation of the Sunshine Law with the goal of manipulating elections, selecting the Canvassing Board attorney, and advancing a hidden agenda.

29. The allegations that McLaughlin discussed Canvassing Board matters in violation of the Sunshine Law with the goal of

manipulating elections, selecting the Canvassing Board attorney, and advancing a hidden agenda, were crucial to the ethics complaint which Richter Jr. filed against McLaughlin. These allegations formed the basis for the Commission's finding that the complaint was legally sufficient in order that it be investigated.

30. Likewise, inclusion of the allegations that McLaughlin violated Florida's elections laws was an important part of Richter Jr.'s complaint against McLaughlin.

31. Had McLaughlin been found to have violated either Florida ethics or elections law, it would have damaged his reputation in the community.

32. The totality of these findings, including the number of complaints, the collaboration among the various complainants, and the inclusion of similarly false allegations in complaints filed by different complainants with different agencies, lead to no reasonable conclusion other than Ethics Complaint 14-230 was filed with a "malicious intent" to injure the reputation of McLaughlin and create political gain for the Triple Rs and Weeks.

33. The totality of these findings constitutes clear and convincing evidence that Richter Jr.'s complaint was filed with knowledge that, or with a conscious intent to ignore whether,

it contained one or more false allegations of fact material to a violation of the Ethics Code.

34. The totality of these findings constitutes clear and convincing evidence that Richter Jr. showed "reckless disregard" for whether his sworn complaint contained false allegations of fact material to a violation of the Ethics Code.

35. The totality of these findings constitutes clear and convincing evidence that the true motivation behind the underlying complaint was the political damage the complaint would cause McLaughlin, with the corresponding benefit to the Triple Rs and Weeks, rather than any effort to expose any wrongdoing by McLaughlin.

Attorneys' Fees and Costs

36. Upon receipt and review of the complaints filed against McLaughlin and others in late 2014, Flagler County informed its liability insurance carrier and requested that counsel experienced in ethics and elections law be retained to defend against those complaints. At the specific request of the County, Mark Herron of the Messer Caparello law firm was retained to defend these complaints. Mr. Herron is an experienced lawyer whose practice focuses almost exclusively on ethics and elections related matters.

37. Mr. Herron was retained by Flagler County on the understanding that the Messer Caparello firm would be

compensated by the County's liability insurance carrier at the rate of \$180 per hour and that the County would make up the difference between the \$180 per hour that the insurance carrier was willing to pay and the reasonable hourly rate.

38. The rate of \$180 per hour paid by the County's liability insurance carrier to the Messer Caparello firm is an unreasonably low hourly rate for an experienced practitioner in ethics and election matters. Expert testimony adduced at the hearing indicated that a reasonable hourly rate would range from \$250 to \$450 per hour. Accordingly, a reasonable hourly rate to compensate the Messer Caparello firm in this proceeding is \$350 per hour.

39. The total hours spent on this case by Messer Caparello attorneys is reasonable. The billable hourly records of the Messer Caparello law firm through May 14, 2017, indicate that a total of 96.64 hours were spent in defending the underlying complaint filed with the Commission and in seeking costs and fees in this proceeding.

40. The record remained open for submission of Messer Caparello costs and attorneys' fees records after May 14, 2017, through the date of submission of the Proposed Recommended Order. These additional records of the Messer Caparello law firm indicate that a total of 46.78 hours were spent in seeking costs and fees for that defense at the formal hearing in this

cause and in preparation and submission of the Proposed Recommended Order.

41. Costs of \$1,749.18 incurred by the Messer Caparello law firm through May 14, 2017 are reasonable. Costs of \$982.51 incurred by the Messer Caparello law firm after May 14, 2017, are reasonable.

42. The total hours spent on this case by the Flagler County Attorney's Office is reasonable. Time records of the Flagler County Attorney's Office through May 15, 2017, indicate that a total of 11.70 hours of attorney time were spent assisting in the defense of the underlying complaint filed with the Commission and in seeking costs and fees in this proceeding. Time records of the Flagler County Attorney's Office through May 15, 2017, indicate that a total of 23.05 hours of paralegal time were spent assisting in the defense of the underlying complaint filed with the Commission and in seeking costs and fees in this proceeding.

43. The record remained open for submission of costs and attorneys' fees records after May 15, 2017, through the date of submission of the Proposed Recommended Order. These additional records of the Flagler County Attorney's Office indicate that a total of 6.60 hours of attorney time, and a total of 2.10 hours of paralegal time, were spent in seeking costs and fees for

that defense at the formal hearing in this cause and in preparation and submission of the Proposed Recommended Order.

44. Costs of \$168.93 incurred by the Flagler County Attorney's Office through May 15, 2017, are reasonable. Costs of \$292.99 incurred by the Flagler County Attorney's Office after May 15, 2017, are reasonable.

45. A reasonable hourly rate to compensate the Flagler County Attorney's Office in this proceeding for attorney time is \$325 per hour and for paralegal time is \$150 per hour.

46. Based on the findings herein, McLaughlin established that he incurred: (i) reasonable costs in the amount of \$2,731.69 and reasonable attorneys' fees in the amount of \$50,197.00 for the services of the Messer Caparello law firm in defending against the underlying complaint filed with the Commission and in seeking costs and fees in this proceeding; and (ii) reasonable costs in the amount of \$461.92 and reasonable attorneys' fees, including paralegal time, in the amount of \$9,720.00 for the services of the Flagler County Attorney's Office in defending against the underlying complaint filed with the Commission and in seeking costs and fees in this proceeding.

CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. See §§ 120.569 and 120.57(1), Fla. Stat.

48. Section 112.313(7) provides for an award of attorney's fees and costs in the following circumstances:

In any case in which the commission determines that a person has filed a complaint against a public officer or employee with a malicious intent to injure the reputation of such officer or employee by filing the complaint with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint contains false allegations of fact material to a violation of this part, the complainant shall be liable for costs plus reasonable attorney fees incurred in the defense of the person complained against, including the costs and reasonable attorney fees incurred in proving entitlement to and the amount of costs and fees. If the complainant fails to pay such costs and fees voluntarily within 30 days following such finding by the commission, the commission shall forward such information to the Department of Legal Affairs, which shall bring a civil action in a court of competent jurisdiction to recover the amount of such costs and fees awarded by the commission.

49. Rule 34-5.0291(3) provides for the Commission to review a petition seeking costs and attorneys' fees and:

If the Commission determines that the facts and grounds are sufficient, the Chair after considering the Commission's workload, shall direct that the hearing of the petition be held before the Division of Administrative Hearings, the full Commission, or a single Commission member serving as hearing officer. Commission hearing officers shall be appointed by the Chair. The hearing shall be a formal proceeding under Chapter 120, F.S., and the Uniform Rules of the Administration Commission, Chapter 28-106, F.A.C. All discovery and hearing procedures

shall be governed by the applicable provisions of Chapter 120, F.S. and Chapter 28-106, F.A.C. The parties to the hearing shall be the petitioner (i.e., the public officer or employee who was the respondent in the complaint proceeding) and the complainant(s), who may be represented by legal counsel.

50. Further, rule 34-5.0291(1) provides:

If the Commission determines that a person has filed a complaint against a public officer or employee with a malicious intent to injure the reputation of such officer or employee by filing the complaint with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint contains false allegations of fact material to a violation of the Code of Ethics, the complainant shall be liable for costs plus reasonable attorney's fees incurred in the defense of the person complained against, including the costs and reasonable attorney's fees incurred in proving entitlement to and the amount of costs and fees.

51. McLaughlin has the burden of proving the grounds for an award of costs and attorneys' fees pursuant to section 112.317(7). See Fla. Admin. Code R. 34-5.0291(4). As the party seeking entitlement, McLaughlin has the burden to prove "by clear and convincing evidence" that the award of costs and attorneys' fees is appropriate pursuant to section 112.317(7) and rule 34-5.0291(1). See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996); Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

McLaughlin has proven "by clear and convincing evidence" that the award of costs and attorneys' fees is appropriate in this case.

52. In Brown v. Florida Commission on Ethics, 969 So. 2d 553, 560 (Fla. 1st DCA 2007), the court established the following elements of a claim by a public official for costs and attorneys' fees: (a) the complaint was made with a malicious intent to injure the official's reputation; (b) the person filing the complaint knew that the statements about the official were false or made the statements about the official with reckless disregard for the truth; and (c) the statements were material to a violation of the Ethics Code.

53. Section 112.317(7) does not require a public official, who was falsely accused of ethics violations in complaints submitted to the Florida Commission on Ethics, to prove "actual malice" when attempting to prove malicious intent to injure the official's reputation. Brown, 969 So. 2d at 554. By employing a textual analysis of the statute, the Court in Brown found that section 112.317(7) is satisfied by the "ordinary sense of malice," i.e. feelings of ill will. Id. at 557.

54. "Such proof may be established indirectly, i.e., 'by proving a series of acts which, in their context or in light of the totality of surrounding circumstances, are inconsistent with the premise of a reasonable man pursuing a lawful objective, but

rather indicate a plan or course of conduct motivated by spite, ill-will, or other bad motive.'" McCurdy v. Collins, 508 So. 2d 380, 382 (Fla. 1st DCA 1987) (quoting S. Bell Tel. & Tel. Co. v. Roper, 482 So. 2d 538, 539 (Fla. 3d DCA 1986)).

55. In this case, the evidence, by a clear and convincing margin, indicates that Richter Jr. maliciously filed Ethics Complaint 14-230 against McLaughlin in order to damage McLaughlin's reputation and to advance the political aims of the Triple Rs and Weeks. In addition, the evidence showed that, despite stating under oath that "the facts set forth in the complaint were true and correct," Richter Jr. either knew the matters alleged in the complaint were false, or he was consciously indifferent to the truth or falsity of his allegations, when he failed to review the public records which would have indicated that his allegations were false. Finally, the false statements in his complaint were material to violations of the Ethics Code, in that they formed the basis for the Commission's investigation of the complaint.

56. McLaughlin is entitled to a total award of \$52,928.69 for costs and attorneys' fees in connection with legal services provided by Messer Caparello in this matter.

57. McLaughlin is entitled to a total award of costs and attorneys' fees of \$10,181.92 in connection with legal services provided by the Flagler County Attorney's Office in this matter.

RECOMMENDATION

Based on the forgoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Commission enter a final order granting McLaughlin's Petition for Costs and Attorneys' Fees relating to Complaint 14-230 in the total amount of \$63,110.61.

DONE AND ENTERED this 21st day of September, 2017, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of September, 2017.

ENDNOTES

^{1/} The cases referred and consolidated by the undersigned were Nate McLaughlin v. Mark Richter, DOAH Case No. 16-5244FE; Frank J. Meeker v. Mark Richter, DOAH Case No. 16-5245FE; Charles Ericksen, Jr. v. Kimberle Weeks, DOAH Case No. 16-5246FE; Albert J. Hadeed v. Kimberle Weeks, DOAH Case No. 16-5247FE; and George Hanns v. Dennis McDonald, Case No. 16-5248FE.

^{2/} Although, for reasons set forth herein, the consolidated cases have been severed and, therefore, subject to separate recommended orders, each applicable to a particular Petitioner, the facts applicable to each are substantially similar. Despite this Order applying only to a single Petitioner, the plural term

"Petitioners" will be used, for the purposes of this and the other consolidated cases, unless the context indicates otherwise.

^{3/} The record reflects that Richter Jr. has refused to participate in this case, has avoided service, and has ignored all efforts by both the Division and Petitioners to contact him.

^{4/} On December 6, 2016, Weeks filed a letter with the undersigned stating that she was unable to attend the October 5 status conference because she did not receive notice of the status conference until after it occurred.

^{5/} After the ruling on the motion to compel, and on the day her discovery responses were due, Weeks, on January 30, 2017, moved to dismiss the motion to compel against her based on what appeared to be a claim of "qualified immunity."

^{6/} On February 17, 2017, Weeks filed a motion to strike Petitioners' Second Motion for Continuance, essentially alleging that it was filed for purposes of delay. By Order dated February 28, 2017, the undersigned denied Weeks' motion to strike Petitioners' Second Motion for Continuance. The record revealed that requests for continuances were necessitated by the failure of Respondents to respond to discovery.

^{7/} On April 11, 2017, pursuant to properly served Notices of Depositions, Petitioners attempted to depose Richter Jr., Weeks, and McDonald. Richter Jr. did not appear. Weeks did not answer any questions and asserted her right against self-incrimination because of her pending criminal matter. McDonald refused to answer on the ground that his testimony might impact Weeks' pending criminal proceeding. On April 18, 2017, Petitioners attempted to depose John Ruffalo, who was disclosed as a potential witness by Respondent McDonald. Mr. Ruffalo made a brief appearance and announced that he was also going to refuse to answer any questions.

^{8/} On January 30, 2017, Weeks filed a motion to dismiss the petitions filed against her asserting "qualified immunity." At that same time, as noted herein, she moved to dismiss the motion to compel against her based on what appears to be a claim of "qualified immunity."

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.