

After a telephone conference on the motion and on other pending matters, Respondents were directed to file an amended petition alleging the costs and fees they incurred. The motion to dismiss was denied.

The final hearing, after several continuances for good cause, proceeded on an amended petition filed on May 1, 1992.

At the commencement of the hearing, Timothy Holmes, through counsel, presented a renewed motion to strike or dismiss the petition and a separate motion to strike the petition of L. Dennis Whitt. Those motions were taken under advisement, and are addressed now in this recommended order.

The following witnesses were presented by the respondents (petitioners for fees in this proceeding): Melvin Tooks, Ronetta Taylor, Timothy Holmes, Daniel Reyes, Mary E. Allen, Helen L. Miller, Ollie B. Kelley, Robert B. Ingram, L. Dennis Whitt, and Scott Schrader. The following exhibits were received in evidence (designated as "Petitioners' Exhibits "for purpose of this proceeding): #1-4, #6-9, #11-13. Exhibit #5, identified as a transcript made from a tape of a City Commission meeting, was rejected for lack of authentication; and exhibit #14, a transcript of an unemployment compensation hearing, was rejected as irrelevant after the parties stipulated to the material date. No. exhibit #10 was presented, that is, the number was skipped in the process of marking exhibits.

Timothy Holmes testified again in his own behalf and presented the additional testimony of Steven Barrett, Richard Venditti, Ronetta Taylor and John B. Riley. Six exhibits were received in evidence on behalf of Mr. Holmes, identified and marked as "Respondents' Exhibits" #1-6.

A two-volume transcript of the hearing was filed at the Division of Administrative Hearings, and on August 5 and August 11, 1992 the parties filed proposed recommended orders. These have been considered, and any proposed findings of fact are specifically addressed in the attached appendix, as provided in Section 120.59(2), Florida Statutes.

FINDINGS OF FACT

The Town and The Parties

1. The City of Opa Locka is an incorporated municipality within Dade County, Florida. It is approximately 4.5 square miles, with a population of approximately 14,000, and some 5,000 registered voters.

If this case is a valid example, citizens of Opa Locka actively and enthusiastically are involved in the local political process. The process can become lusty and raw with acrimony.

2. Timothy Holmes, a citizen of Opa Locka and full-time community activist, receives disability income and is otherwise unemployed. From time to time he has provided various services or errands for attorney, James Greason, and at one time he had cards printed identifying himself as an investigator for Greason. His primary activities in recent years have been related to non-compensated membership on several municipal boards and committees.

3. From approximately 1982, until its abolition in December 1988, Timothy Homes was on the Opa Locka Code Enforcement Board. He was then appointed to the Zoning Board of Appeals.

He was on that board in 1989 when he decided to run for the city commission in the 1990 elections, for the seat occupied by Ollie B. Kelley. He did not formally file for the election until early 1990, and it is unclear when his intent was made known, but he had previously endorsed candidates in opposition to seated board members.

4. Ollie B. Kelley is employed as a baker for the Dade County School Board. She is currently vice-mayor of Opa Locka and has served on the commission since 1986.

5. Robert Ingram is a visiting professor at Florida Memorial College and is mayor of the City of Opa Locka, having served in that elected office for approximately 5 years. He previously served as Opa Locka police chief from 1980 to 1985.

6. For the past three years, L. Dennis Whitt has been city manager for the City of Opa Locka.

7. Daniel Reyes was employed as assistant to the city manager, L. Dennis Whitt, from November 28, 1989 until November 30, 1990, when he was terminated for various alleged wrongdoings.

Holmes' Removal From The Board

8. When Dennis Whitt came to the city in the middle of June 1989, he was made aware of Timothy Holmes' activities. Holmes exhibited behavior which Whitt considered inappropriate for an official of the city. Whitt received complaints and questions about Holmes as to perceived conflicts between his function as a board member and his services to Attorney Greason, who was representing parties in litigation against or involving the city. Holmes also was alleged to have gained access to city facilities based on his public office, but in furtherance of outside interests.

Holmes wrote letters to the newspaper criticizing the city commission and was heard berating the commission in their meetings, calling them "Papa Doc, Mama Doc and Baby Doc", in an unflattering reference to former Haitian dictators.

9. This latter incident was particularly irritating to Commissioner Kelley. She approached Whitt and asked whether something could be done.

In response, Whitt researched the city charter for the procedure for removal of board members; he drafted an affidavit of charges based on his conversations with Commissioner Kelley and his own personal observations. He met with Commissioner Kelley on September 27, 1989 and gave her the affidavit.

Although Dennis Whitt understood that board members could be removed for cause, the existing procedures applied to employees of the city, so he developed the language of the affidavit from the city's personnel rules, citing violations of a "standard of conduct", "insubordination" and "disgraceful conduct", "antagonism", interference with the proper "cooperation of employees", and use of his official capacity to solicit attorneys in litigation with the city and to conduct a private investigation of a city employee. (Petitioner's Exhibit #7)

10. Commissioner Kelley signed the affidavit; it was presented to the full commission at the September 27th meeting; and the commission unanimously voted

(with Kelley abstaining, because she brought the charges) to suspend Timothy Holmes from the Zoning Board of Appeals. The action, reflected in Resolution No. 5138, also set a public hearing on removal for November 8, 1989.

11. At Holmes' request the hearing was continued to a later meeting, January 10, 1990. In the meantime, Dennis Whitt was instructed to conduct an investigation and bring together witnesses and evidence for the hearing.

12. The hearing on removal of Timothy Holmes commenced at 7:00 p.m. on January 10th and proceeded into the early hours of the morning of January 11th.

Timothy Holmes was represented by counsel, James H. Greason. The city was represented by its city attorney, Teretha Lundy-Thomas.

Ms. Kelley testified, and did not participate as a voting member of the commission. Two law enforcement officers also testified. Three members of the public, including former mayor John Riley, testified on behalf of Timothy Holmes.

The Commission voted to sustain the allegations regarding general insubordination and similar charges, but the last two charges regarding misuse of office failed for lack of majority vote.

13. After votes on the separate charges, Dennis Whitt informed the commission that Holmes' removal from the board would need to be finalized with a resolution. The meeting was recessed to allow the city attorney and city manager to prepare the resolution. When the commission reconvened, the resolution removing Timothy Holmes passed 4-0, again with Commissioner Kelley abstaining.

Holmes' Complaint To The Ethics Commission

14. Holmes was convinced that his removal was a political vendetta. At some point after the public hearing he was in Attorney Greason's office and met Daniel Reyes.

Reyes mentioned that he was with the city when the hearing took place and in Reyes' opinion, the removal in January 1990 was wrong. Reyes had heard Holmes and others referred to as "V.C." or "Viet Cong" - political enemies to be eliminated.

Holmes was delighted to get information which he felt confirmed his own suspicions.

Reyes executed an affidavit, dated June 11, 1991, stating among other matters, that "In January, 1990, Affiant, while so employed [as assistant to the city manager] witnessed City Manager L. Dennis Whitt and Mayor Robert Ingram conspire together to formulate changes which were used to remove Timothy Holmes as a member of the Opa-Locka Zoning Board" (Petitioner's exhibit #3)

15. That affidavit and an affidavit executed by Timothy Holmes were attached to a Commission on Ethics complaint form executed by Timothy Holmes on October 23, 1991.

The affidavits and complaint to the Ethics Commission were prepared with the assistance of James Greason. At some point the above-referenced date on

Reyes' affidavit, "January 1990", was struck through, and "September 1989" was substituted. Reyes initialed the change.

16. The "corrected" date on Reyes' affidavit made the affidavit false, since Reyes was obviously not employed by the City in September 1989. He initialed the change at Greason's direction and never really looked at the date or considered it. Reyes was employed at the time of the removal hearing, but not when the process was first initiated. He was present when the resolution for removal was drafted during the January meeting's recess, but admittedly had no personal knowledge of the drafting of the initial affidavit by Whitt or the suspension resolution.

17. The substance of Timothy Holmes' complaint to the Commission in Ethics was that Kelley, Ingram and Whitt conspired to remove him for actions protected by the First Amendment and for the purpose of discrediting him and politically damaging him in the November 1990 municipal election.

He based the complaint on his own perception of the political climate and on what he understood were specific first-hand observations by Whitt's former assistant, Daniel Reyes.

18. On January 29, 1992, the Commission issued its public report and order dismissing complaint:

. . .

On Friday, January 24, 1992, the Commission on Ethics met in executive session and considered this complaint for legal sufficiency pursuant to Commission Rule 34-5.002, F.A.C. The Commission's review was limited to questions of jurisdiction of the Commission and of the adequacy of the details of the complaint to allege a violation of the Code of Ethics for Public Officers and Employees. No factual investigation preceded the review, and therefore the Commission's conclusions do not reflect on the accuracy of the allegations of the complaint.

The Commission voted to adopt the legal sufficiency analysis of its Executive Director, a copy of which is attached. Accordingly, this complaint is dismissed for failure to constitute a legally sufficient complaint with the issuance of this public report, which shall include the complaint and all documents related to the complaint.

. . .

The Petition for Fees and Costs

19. Richard Venditti has handled legal matters for the City of Opa Locka and its officials in the past. He served as special master on contract with the City and also represented a couple of commissioners who were being investigated on charges by a private citizen. He represented Dennis Whitt in an action

brought by Daniel Reyes for punitive damages related to his employment termination.

When Whitt, Kelley and Ingram were served with Timothy Holmes' complaint to the Ethics Commission, they consulted individually with Richard Venditti.

No papers or responsive pleadings were filed by or on behalf of respondents prior to the Ethics Commission's dismissal of the complaint. However each respondent was reasonably concerned and sought their attorney's advice.

20. Petitions for costs and attorney's fees were filed with the Commission on Ethics on behalf of respondents, Kelley, Whitt and Ingram on February 28, 1992.

Richard Venditti and L. Dennis Whitt drafted the petitions with information supplied primarily by Whitt.

21. On March 11, 1992, Richard Venditti submitted individual bills to Whitt, Kelley and Ingram in the respective amounts of \$1,665.00, \$690.00 and \$690.00. Most of the time reflected on the bills' itemization relates to the recovery of fees.

22. The bills have not been paid, and the respondents are each unclear as to whether the city will pay the bills for them. They understand that they are personally responsible if the city does not pay the bills.

Summary of findings

23. Timothy Holmes filed his complaint with the advice and active assistance of an attorney. He was convinced that since his removal did not relate to specific misdeeds as a Zoning Board member, the removal was politically motivated and was in retaliation for zealous exercise of his rights as a citizen.

He relied on those personal convictions and on statements by Daniel Reyes, whom he chanced to meet in his attorney's office and who gave him what appeared to be reliable inside information.

Further investigation would have required his confronting the very persons he believed had conspired against him.

24. The handwritten, "corrected" date on Reyes' affidavit was an error, but not Holmes' error. It apparently was an effort by someone other than Holmes to conform the statement to the date the process was initiated.

25. Reyes, himself, explained that the "conspiracy" he witnessed was at the time of the removal hearing. This explanation is consistent with Whitt's testimony regarding the temporary recess required to draft the removal resolution. Reyes, and not Holmes, was negligent in checking the date on his affidavit before he initialled the change.

Reyes presence when Dennis Whitt and the City Attorney drafted the removal resolution during the hearing recess makes it easy to understand why he felt the resolution was a foregone conclusion: it was. Each charge against Timothy Holmes had just been voted up or down, and the resolution, according to the city manager, was a necessary final step in the process. For good reason, the vote for removal was then beyond any doubt.

26. The claim that Ollie Kelley had no knowledge of the facts in the affidavit of charges was based on Ms. Kelley's unfamiliarity with some of the terms used by Dennis Whitt in the draft. She was required to read the charges both at the meeting when suspension was voted and at the removal hearing. She stumbled over words such as "antagonistic". These were terms from the city's personnel manual and, although they may not have been part of Ms. Kelley's vocabulary, when explained to her they adequately expressed her personal concerns about Holmes' activities.

27. It is neither necessary nor appropriate here to unravel the tangled web of political intrigue woven by the allegations and counter-allegations of the parties in this proceeding.

Like Commissioner Kelley who was ignorant as to how to proceed but instinctively felt that something was wrong, Timothy Holmes reasonably relied on the advice of others in pursuing a remedy for relief.

Timothy Holmes was misguided, but was not, himself, malicious.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction in this case pursuant to Section 120.57(1), F.S. and Rule 34-5.029(2), F.A.C.

29. Section 112.317, F.S. provides, in pertinent part:

(8) 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 and in which such complaint is found to be frivolous and without basis in law or fact, the complainant shall be liable for costs plus reasonable attorney's fees incurred by the person complaint against. . . .

This rule of the Commission provides guidance in the implementation of the above statute:

34-5.029 Award of Attorney's Fees

(3) The respondent has the burden of proving the grounds for an award of costs and attorney's fees by a preponderance of the evidence presented at the hearing.

"Malicious intent to injure the reputation" may be proven by evidence showing ill will or hostility as well as by evidence showing that the complainant intended to bring discredit upon the name or character of the respondent by filing such complaint with knowledge that the complaint contained one or more false allegations or with reckless disregard for whether the complaint contained false allegations of fact material to a violation

of the Code of Ethics for Public Officers and Employees. Such reckless disregard exists where the complainant entertained serious doubts as to the truth or falsity of the allegations, where the complainant imagined or fabricated the allegations, or where the complainant filed an unverified anonymous tip or where there are obvious reasons to doubt the veracity of the information or that of the source of the information.

30. The discourse is not ended simply with the Commission's dismissal of Timothy Holmes' complaint for lack of legal sufficiency; the intent of the complainant must be exposed and scrutinized. *Taunton v. Tapper* 396 So.2d 843 (Fla. 1st DCA 1981), *Malfregeot v. Mobile Home Park Owners and Dealers of Martin County, Inc.*, 388 So.2d 341 (Fla. 4th DCA 1980).

31. Nor is it dispositive that the petitioners for fees have not paid out of pocket for representation by counsel, or that no responsible pleadings were required because of the dismissal. In the recent case, *In re: Linda Chapin*, DOAH Case #91-7002EC, Final Order #COE92-13 entered 7/22/92, the Commission adopted the hearing officer's recommended findings with regard to the reasonableness of representation, notwithstanding dismissal by the Commission; and specifically rejected the hearing officer's conclusion that fees were not contemplated where the individual was represented by the Orange County Attorney and paid no fees herself.

32. It is still concluded, however, that fees should not be awarded here. As provided in the findings of fact, above, Timothy Holmes acted on the advice of counsel in filing his complaint, counsel who was thoroughly knowledgeable about the circumstances by virtue of his representation of Holmes in the Opa Locka proceeding to remove him from the Zoning Board. The error in Daniel Reyes' affidavit as to his date of employment was credibly explained as an oversight by Reyes, and was not material to Holmes' perception of the events surrounding his removal.

Holmes had no doubts about the truth of his allegations. The petitioners for fees failed to meet their burden of proof; the greater weight of evidence compels the conclusion that Holmes was motivated, not by malice or hostility, but a misdirected desire to vindicate himself.

33. Vindication is not the purpose of the instant proceeding and a determination of whether Timothy Holmes was wrongfully removed from the City Zoning Board must be made elsewhere. It is also unnecessary and inappropriate in this proceeding to consider charges by the fees petitioners that Attorney Greason violated Chapter 117, F.S. by notarizing Holmes' complaint or should otherwise be referred to the Florida Bar.

34. The recommendation here, based on a finding of no malice, makes it unnecessary to consider Holmes' motion to dismiss the fees requested by L. Dennis Whitt based on that party's alleged threats to witness, Daniel Reyes.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is RECOMMENDED that the Commission enter its Final Order denying fees and costs to Robert B. Ingram, Ollie B. Kelley and L. Dennis Whitt.

DONE and RECOMMENDED this 11th day of September, 1992 in Tallahassee, Leon County, Florida.

MARY CLARK
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of September, 1992.

APPENDIX

The following are rulings made pursuant to Section 120.59(2) F.S. the parties proposed findings of fact.

Findings of Fact Proposed by Ingram, Kelley and Whitt:

1. Adopted in substance in paragraph 7.
2. and 3. Rejected as unnecessary or immaterial.
4. Adopted in part in paragraph 2, otherwise rejected as unnecessary or immaterial.
5. Adopted in part in paragraph 3, otherwise rejected as immaterial.
6. and 7. Adopted in substance in paragraph 14.
8. - 13. Rejected as immaterial, since Holmes' reliance on Reyes was reasonable and consistent with his own perception of the events leading to his removal.
14. - 19. Rejected as unnecessary or immaterial.
20. Adopted in substance in paragraphs 4 and 9.
21. Adopted in part in paragraphs 10 and 26.
22. Adopted in substance in paragraph 5.
23. - 25. Rejected as unnecessary.
26. Adopted in paragraph 19.
27. Rejected as unnecessary.
28. Adopted in paragraphs 6 and 7.

29. Adopted in paragraph 9.
30. Adopted in paragraphs 10 and 11.
31. Adopted in paragraph 13.
32. - 34. Rejected as unnecessary.
35. Adopted in substance in paragraph 19.
36. - 40. Rejected as unnecessary.

Findings of Fact Proposed by Holmes

1. - 3. Rejected as unnecessary.
4. Addressed in conclusions of law.
5. Adopted in paragraph 18. The legal argument is rejected as contrary to prior ruling by the Commission.
6. - 7. Legal argument rejected as provided in paragraph 5, above.
8. The conclusion is adopted generally in paragraphs 23-27.
9. Adopted in "Recommendation".

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.