

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GLENN SINGER, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 04-0518FE  
 )  
 ROBERT NIEMAN, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on November 2, 2004, in Miami, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: James J. Birch, Esquire  
Law Office of Stuart R. Michelson  
200 Southeast 13th Street  
Fort Lauderdale, Florida 33316

For Respondent: Robert Nieman, pro se  
9731 Southwest 12th Street  
Pembroke Pines, Florida 33026

STATEMENT OF THE ISSUE

Whether the Petitioner, Glenn Singer (Petitioner or Singer) is entitled to attorney's fees and costs from the Complainant/Respondent, Robert Nieman (Respondent or Nieman), pursuant to Section 112.317(8), Florida Statutes (2004).

PRELIMINARY STATEMENT

This case began on June 10, 2002, when the Respondent executed an ethics Complaint against the Petitioner. The Complaint alleged four incidents concerning the Petitioner and alleged acts committed while Singer held a seat on the Golden Beach Town Council. More specifically, the Complaint alleged that Singer had paid a reduced amount for his building permit because the structure was under valued for building permit purposes; had constructed a brick driveway without a permit and without paying for permit fees; had assaulted a temporary security guard employed by the town, but the investigation was dropped; and had entered into a verbal agreement with the construction manager on an adjoining property to vote for a variance in exchange for allowing Singer to move his boat over five feet. After a staff attorney for the Florida Commission on Ethics (Ethics Commission) requested additional information concerning the matter, the Respondent executed a Complaint Amendment on July 19, 2002.

The Complaint Amendment included three allegations. The first allegation related to the brick driveway at Petitioner's home. The Respondent alleged that the Petitioner did not pay an appropriate building permit fee because the value of the work done was greater than the value of the permit. The second allegation claimed that a contractor was given a town job

because the same entity had given the Petitioner a reduced price on his personal driveway. The third allegation maintained that the Petitioner had assaulted a private security guard who did not press charges despite an initial report that he would press charges. The Respondent theorized that the Petitioner had somehow used his position to make the investigation "go away."

On December 6, 2002, a Determination of Investigative Jurisdiction and Order to Investigate was entered. On or about October 27, 2003, the Respondent executed a Request to Withdraw. That document stated: "I no longer wish to pursue the Complaint that was issued by myself." Nevertheless, after an investigation and on the recommendation of the Ethic Commission's Advocate, the Ethics Commission entered a Public Report on December 9, 2003. The Public Report addressed the merits of the Complaint (and the Complaint Amendment) and dismissed the matter. The Public Report found no probable cause to believe that the Petitioner had violated ethics statutes. Accordingly, the Respondent's Complaint was effectively closed.

On January 5, 2004, the Petitioner filed the Fee Petition that is the subject of the instant case against the Respondent. Petitioner maintains he is entitled to attorney's fees and costs pursuant to Section 112.317(8), Florida Statutes. The Fee Petition alleged that Respondent had filed the Complaint with the Ethics Commission with "a malicious intent to injure the

reputation of the Petitioner by filing the Complaint with knowledge that the Complaint contained one or more false allegations, or that the Complaint was filed with reckless disregard for whether the Complaint contained false allegations of fact material to a violation of the Florida Ethics Code." The case was forwarded to the Division of Administrative Hearings for formal proceedings on February 12, 2004.

At the hearing, the Petitioner testified and presented testimony from Robert Neiman, Samuel Goren, and Linda Epperson. The Petitioner's Exhibits 1 through 12 were admitted into evidence. The Respondent also testified and offered testimony from Rosemary Wascura. The Respondent's Exhibits 1 through 4, 6A, 6C, and 7 were also admitted into evidence. Respondent's Exhibit 6B was proffered for the record.

The transcript of the proceeding was filed with the Division of Administrative Hearings on February 14, 2005. The parties requested an extension of time to file proposed recommended orders. That request was granted. Both parties timely filed post-hearing proposals that have been fully considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. On June 10, 2002, the Respondent executed a Complaint that was filed with the Ethics Commission against the Petitioner. At the time of the filing, the Respondent was on

paid administrative leave or suspension from the Police Department of the Town of Golden Beach (Town). Nevertheless, the Respondent remained employed by the Town and at the time of hearing in this cause the Respondent was employed as a police sergeant.

2. Immediately prior to filing the Complaint against the Petitioner the Respondent served as the interim police chief for the Town. At all times material to this case the Petitioner was a councilman serving on the Town's governing council. As such, the Petitioner was subject to the ethics provisions governed by the Ethics Commission.

3. The Petitioner and the Respondent have known one another since childhood. Prior to the incidents complained of herein the two had considered themselves cordial acquaintances.

4. The Respondent's Complaint itemized four concerns that he believed demonstrated violations of ethics provisions. The specifics of the Complaint are set forth in Petitioner's Exhibit 1. In general, the Respondent believed that the Petitioner had used his position as a Town councilman to obtain a building permit at a lesser value than should have been reported. He based this assertion on information told to him by persons working within the Town who overheard comments made by the Petitioner and a building official.

5. The Respondent believed that Linda Epperson, who has

20-plus years of experience in the construction business, had opined that the value of the work to be performed at the Petitioner's home greatly exceeded the value set forth in the permit sought. Ms. Epperson's comments regarding the permit issue were overheard by another Town employee, Rosemary Wascura.

6. At hearing, Ms. Epperson denied making the comments. Ms. Epperson is still employed by the Town and would like to continue her employment until her retirement vests (another four years). Ms. Wascura (who is a personal friend of the Respondent's) does not work for the Town any longer. Ms. Wascura's testimony was credible and persuasive as to the incident regarding the conversation between the Petitioner and a building official. Although it is not concluded the Petitioner used his position to influence the building official and receive a reduced permit cost, it is found that the factual information upon which the Respondent relied in making such assertion was grounded in an eyewitness account of an incident and not mere speculation.

7. The second allegation of the Complaint also dealt with a subcontractor who had performed services for the Petitioner at his home. That subcontractor was subsequently awarded a Town contract for brick pavers to be installed at the entrance to the Town. The basis for the Respondent's concern regarding this allegation stemmed from unsealed bids that were submitted for

the brick paver project. According to Ms. Wascura the subcontractor who had provided a favorable job for the Petitioner was to receive the bid on the Town job. Although wrongdoing on the Petitioner's part was not substantiated, the basis for the Respondent's assertion was supported by the information he received from Ms. Wascura.

8. In as much as Ms. Wascura was privy to comments from the building officials at the time, it was reasonable for Respondent to believe that something untoward had occurred when the same subcontractor received the Town's bid, especially when the bid amount was later changed to cover a shortfall on the construction cost (the increased amount would have resulted in the subcontractor not being the lowest bidder after all).

9. As to the third assertion in the Complaint, the Respondent claimed that the Petitioner had physically assaulted a temporary security guard employed by the Town while the Police Guardhouse was being built. The Respondent based this claim on the personal observations he made when the security guard reported the incident, the pictures he took of the guard (depicting the damaged shirt), and the identification of the Petitioner as the perpetrator that the victim made from a photograph. Although the assault was never fully investigated (the security guard could not be located and the matter was dropped), the Respondent had a reasonable basis to believe some

inappropriate act had occurred and that the Petitioner could be involved.

10. Finally, the fourth claim set forth in the Respondent's Complaint alleged that the Petitioner had changed a vote on a variance request after being called aside by someone known as "Vinnie" in this record. According to eyewitnesses to the incident, the Petitioner voted against Vinnie's variance then changed his vote after Vinnie whispered something in the councilman's ear, and the two left the room briefly. When the Petitioner returned to the council table, he changed his vote to favor Vinnie's variance.

11. Although it is not concluded the Petitioner did anything improper in changing his vote, or that the variance would not have received sufficient favorable votes to pass even without the Petitioner's vote, it is clear that the Respondent thought the activity was highly unusual and suspect. The Town council meetings are videotaped. A videotape of the proceeding disproving the account of the witnesses was not provided. It is unusual to allow anyone to approach the council seats to privately discuss anything with a council member during a council session.

12. As for why the Petitioner would change his vote, the Respondent believed it had to do with a boat mooring that the Petitioner sought. Although the Petitioner did not own a boat



at the time, the gossip among Town workers had been that the Petitioner wanted to be able to moor his boat at a certain angle to avoid an impeded view of the waterway. In return, he allegedly supported Vinnie's variance. Although the rumor was unfounded, when the story was viewed in light of the Petitioner's actions with Vinnie at the council meeting, it formed a reasonable basis for Respondent's concerns.

13. On July 9, 2002, the staff attorney for the Ethics Commission sent Respondent a letter requesting additional information regarding the Complaint. The forms included with that letter constitute the Complaint Amendment that was executed by the Respondent on July 19, 2002.

14. Sometime in August 2002 the Respondent was fired from his position with the Town. He filed an appeal of the termination and ultimately won his job back. At that time he desired to drop the entire matter against the Petitioner.

15. To that end he executed and filed with the Ethics Commission a Request to Withdraw the Complaint. The Request to Withdraw was denied on December 9, 2003.

16. Also on December 9, 2003, the Ethics Commission issued a Public Report that dismissed the Respondent's complaint against the Petitioner.

17. On January 4, 2004, the Petitioner filed a Fee Petition pursuant to Section 112.317(8), Florida Statutes.

18. The Fee Petition asserts that the Respondent acted with a malicious intent to injure the reputation of the Petitioner. The Respondent's intent was to bring to light the allegations against the Petitioner because he believed the information he had been given was accurate. It proved to be inaccurate. He did not investigate each of the claims before filing the Complaint and Complaint Amendment but believed his sources to be credible Town employees. In retrospect, the Respondent believes he could have avoided the professional pitfalls that befell his employment had he not filed the Complaint. Nevertheless, based on the information he had at the time from credible Town employees, the Respondent acted to cause some investigation of the Petitioner's activities.

19. The Respondent did not know that the comments from Town employees were false or not subject to confirmation. The Respondent personally observed Vinnie's intervention at the council table. Had it not dovetailed with the rumor regarding the Petitioner's proposed boat issue, the conversation would have still appeared unusual at best. Coupled with the other unverified information, it gave the appearance of impropriety warranting investigation.

20. Similarly, none of the other allegations could be easily discredited. The Respondent relied on comments attributed to Ms. Wascura and Ms. Epperson. He had no reason to

doubt the veracity of his friend. Further, he could not foresee that Ms. Epperson would not acknowledge making statements pertaining to the permit issue. The original documents pertaining to the permits pulled for the Petitioner's property are in storage and were not available at the hearing. A computer-generated report was provided to the Ethic Commission's investigator. That report does not contain the detail and dates that might have verified the account provided by Ms. Wascura. The Respondent's efforts to obtain copies of public records were thwarted.

21. The Petitioner's efforts to paint Ms. Epperson as a gossip whose alleged statements should not have been credited is not supported by the weight of persuasive evidence. Ms. Epperson was an experienced person whose knowledge in the construction industry made her a credible source for information. She was employed in a position that made her privy to the activities of the building department. She now disavows making the comments that were the subject matter of the Complaint. Nevertheless, the Respondent believed the comments attributed to her and believed they were from a credible source.

22. If attorney's fees and costs are entered in this cause the beneficiary of an award will be the Town. The Petitioner has incurred no expenses or costs associated with the defense of

the Complaint. The Town agreed to pay and has paid all attorney's fees and costs associated with this case.

23. The Petitioner presented several invoices from the Law Offices of Stuart R. Michelson that were alleged to pertain to the instant case. One invoice dated January 6, 2004, set forth 25.00 hours had been expended by Ilene L. Michelson (partner) at the rate of \$200.00 per hour. The invoice also noted 5.50 hours had been expended by Stuart R. Michelson (senior partner) also at the rate of \$200.00 per hour. The total of the first invoice including costs was \$6,594.54. The second invoice, dated June 10, 2004, itemized time expended by James Birch (associate attorney) billed at the rate of \$125.00 per hour; Michael Torres (law clerk) billed at the rate of \$75.00 per hour; Robert J. Longchamps (law clerk 2) also billed at the rate of \$75.00 per hour; and Stuart R. Michelson (senior partner) billed at the rate of \$200.00 per hour. The total attorney's fees for this second invoice equaled \$3,232.50; with costs the second invoice was \$3,772.38. A third invoice dated September 9, 2004 documented \$1,187.50 in fees for time expended by James Birch, Michael Torres, Robert J. Longchamps, and Stuart R. Michelson. The total for fees and costs for the invoice were \$4,308.85. The costs and fees claimed in this cause are set forth in detail in Petitioner's Exhibit 8. However, bills attached to invoices identify other parties not related to the instant case. For

example, an invoice from United Reporting, Inc., references the case James Vardalis v. Robert Neiman. The Petitioner's case is not the same matter. Similarly, a second invoice from United Reporting, Inc. (dated June 16, 2004) references Michael Addicott v. Neiman. The Petitioner did not delineate which of the costs were solely attributable to this case. It is unclear whether the fees were also incurred for other cases related to this Respondent (but not the Petitioner herein).

24. The Petitioner also presented testimony from an expert witness who was to be paid by the Town. That witness, an attorney, was to be paid \$200.00 per hour for his efforts in this matter. In connection with his work in this matter and other cases the expert billed the Town a total of \$8,050.00. Exactly what portion of that amount is attributable to solely this case is unknown (see page 77 of the transcript in this case).

25. Although the Petitioner's expert testified that the hourly rates for fees applied in this cause were reasonable, there was no evidence that the time was actually expended in connection with the instant case. There is no way to know if the services were performed for the defense of the Respondent's Complaint.

#### CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has

jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2004).

27. Section 112.317(8), Florida Statutes (2004), provides:

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'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. 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.

28. The Commission on Ethics has recently determined that the standard applicable to this matter is the "actual malice" standard enunciated in New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964). See In re Michael Addicott, COE Final Order No. 05-0207 entered April 26, 2005. Accordingly, unless the construction of a statute leads to an unreasonable or a clearly erroneous result, an agency's interpretation of a statute that it is charged with enforcing is entitled to great

deference. Level 3 Communications, LLC v. Jacobs, 841 So. 2d 447, 450 (Fla. 2003); Osorio v. Board of Professional Surveyors and Mappers, 898 So. 2d 188 (Fla. 5th DCA 2005).

29. Thus, the Sullivan standard is appropriate to the issue at hand. Therefore, the Petitioner must establish that the Respondent filed the complaint with a malicious intent to injure the reputation of the Petitioner, with knowledge that the complaint contained one or more false allegations or with reckless disregard for whether it contained false allegations of fact material to a violation of the Code of Ethics. If that standard is met, then the Petitioner must establish the amount of costs and attorney's fees based upon the criteria set forth in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). If the standard is not met, the question of an amount of reasonable attorney's fee is moot.

30. In this case, the Petitioner has failed to demonstrate that the Respondent acted with a malicious intent to injure the reputation of the Petitioner. The Respondent relied on information he personally observed or was provided by persons he believed knew or should have known the accuracy of the information conveyed. Here the Respondent relied on what his experience suggested were credible sources within the Town. Although he did not investigate, he had no reason to doubt the veracity of his friend or co-worker. He personally observed the

torn shirt of the security guard. He was present when the guard identified the Petitioner as the perpetrator. He did not doubt the alleged victim's account. When the security guard did not return to press charges he attempted to locate the individual. The investigation was dropped when the complaining witness did not return.

31. Similarly, the Respondent did not file the Complaint with a reckless disregard for the truth. As outlined by Demby v. English, 667 So. 2d 350 (Fla. 1st DCA 1996):

"[T]he constitutionally protected right to discuss, comment upon, criticize, and debate, indeed, the freedom to speak on any and all matters is extended not only to the organized media but to all persons." Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984). The First Amendment privilege of fair comment is not absolute. To prevail at trial, a plaintiff must establish not only the falsity of the claimed defamation, but also demonstrate through clear and convincing evidence that the defendant knew the statements were false or recklessly disregarded the truth. New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

32. In this case the Petitioner has failed to provide clear and convincing proof that the Respondent acted with reckless disregard for the truth. To satisfy this burden, the Petitioner must demonstrate a level of evidence such that it produces in the mind of the trier of fact a firm belief or conviction without hesitancy as to the truth of the allegations



sought to be established. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). To the contrary, the weight of the credible evidence in this case established that the Respondent thought the information he provided to the Ethics Commission was accurate and would lead to an investigation that would disclose ethics violations.

33. There is no clear and convincing evidence that at the time he made the Complaint or the Complaint Amendment that the Respondent knew any statement was false. Indeed, can it be said in retrospect that he perhaps naively believed the unverified statements of his co-workers? Could it also be said that co-workers changed their minds regarding what they would state on the record? Perhaps a more thorough investigation could have been done before the filing of the Complaint; hindsight would yield different results in many instances. As to whether he knowingly made false statements regarding the Petitioner, the evidence in this cause is woefully inadequate to reach such a conclusion.

34. It is concluded that at the time he made the Complaint and Complaint Amendment all of the factual allegations were either supported by the Respondent's observations, his conversations with Town employees, or inferences reasonably drawn from observations made by himself or others. For example, what the building official and the Petitioner discussed

privately is unknown. Nonetheless, a credible witness observed the Petitioner direct the building official into an office to discuss his permit fee privately. When coupled with the allegation that the permit fee was based on an under-valued amount (an unverified report from a knowledgeable source), the Respondent believed he had a reasonable basis to raise an ethics issue. The same analysis could be applied to each and every allegation raised by the Respondent. In each instance he believed the statements of persons who reported information to him. The victim of the alleged assault identified the Petitioner, the variance vote was changed after Vinnie approached the Petitioner, and the subcontractor got the Town contract after he did the job for the Petitioner. Each of these events "partnered" with information he was given by Town employees.

35. For the reasons set forth above, it is concluded that the Petitioner is not entitled to an award of attorney's fees in this matter. The Petitioner has failed to meet the evidentiary standard applicable to this cause. As such, no conclusion is reached as to what would be an appropriate award if an award were warranted. In this case it is difficult, based on the information found in Petitioner's Exhibit 8 as well as the testimony of the Petitioner's expert, to determine what fees would be appropriate for the defense of the allegations of this

matter. Further, it would be difficult to determine what costs could be solely attributed to this case (assuming arguendo that if costs were to be awarded). Moreover, the discussion of the attorney's fees and costs found in the Recommended Order (DOAH Case No. 04-0043FE) to In re Michael Addicott, COE Final Order No. 05-0207 entered April 26, 2005, is instructive. In that matter my learned colleague suggested that the evidence was insufficient to support an award of attorney's fees in any amount. In that case, as here, the testimony did not support a finding that the billed services were actually performed, that the bills were accurate, that all of the services were reasonably necessary, or that all of the services related to the Respondent's Complaint or Complaint Amendment against the Petitioner. To the contrary, it is evident that costs reported in Petitioner's Exhibit 8, on their face, related to other matters.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered dismissing the Fee Petition in this case.

DONE AND ENTERED this 2nd day of June, 2005, in  
Tallahassee, Leon County, Florida.

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J. D. PARRISH  
Administrative Law Judge  
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Filed with the Clerk of the  
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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.