

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSE IGLESIAS,)
)
 Petitioner,)
)
 vs.) Case No. 04-1729FE
)
 ROBERT NIEMAN,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on November 1, 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, Jose Iglesias (Petitioner or Iglesias) 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 August 14, 2003, when the Respondent executed an ethics Complaint against the Petitioner and filed it with the Florida Commission on Ethics (Ethics Commission). The Complaint alleged eight incidents concerning the Petitioner and alleged acts committed while Iglesias held the office of Vice Mayor for the Golden Beach Town Council. More specifically, the Complaint alleged:

1. Vice Mayor Iglesias is constantly interfering with Police Department's day-to-day operations, and spreading false rumors about Police Department personnel. (Document #1)
2. Vice Mayor Iglesias is causing a hostile work environment with constant complaints about officers.
3. Vice Mayor Iglesias is constantly encouraging racism, pitting hispanics against white and black officers of the Department.
4. Vice Mayor Iglesias filed false police reports (verbally) constantly for his own gain and benefits.
5. Vice Mayor Iglesias's 16-year-old son works part time in Town Hall. (Nepotism)
6. Vice Mayor Iglesias improper use of his title by instructing the Town Manager to take actions on the police department, and even retaliation against the Police Chief and myself.
7. Vice Mayor Iglesias ordered public records about himself not to be released, and then when they were released he insisted

the secretary releasing the records be fired. (Document #1)

8. Mr. Iglesias is falsely using the title of M.D. and in fact used this title to gain his seat on the council and then becoming Vice Mayor. When Mr. Iglesias has been questioned on this matter by residents in the past he has stated he was a brain surgeon, a foot doctor, and a chiropractor, and could not list a hospital where he did his residency to become M.D. (Document #2)

On March 16, 2004, the Ethics Commission issued a Public Report that found no probable cause to believe that the Petitioner had violated ethics statutes. Accordingly, the Respondent's Complaint was effectively closed. The Advocate's Recommendation in this matter noted only three of the Respondent's claims had been deemed legally sufficient to require an investigation for a probable cause determination as to whether the Petitioner had violated provisions of Florida's ethics laws.

The three allegations were: whether the Petitioner had filed false police reports for his personal benefit; whether the Petitioner had attempted to prevent the release of a public record or insisted on the firing of the person who had released the record; and whether the Petitioner had caused his son to be employed by the Town of Golden Beach (the Town). As to each claim the Advocate recommended that there was no probable cause to believe the Petitioner violated the law.

On April 14, 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 May 14, 2004.

At the hearing, the Petitioner testified and presented testimony from Robert Nieman, Bonilyn Wilbanks-Free, Sheila Pirrone, and Samuel Goren. The Petitioner's Exhibits 1 through 7 were admitted into evidence. The Respondent's Composite Exhibit 1 was also admitted into evidence. Respondent's Exhibits 2-5 were 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 order.

FINDINGS OF FACT

1. On August 14, 2003, the Respondent executed a Complaint that was filed with the Ethics Commission against the Petitioner. The Complaint alleged:

1. Vice Mayor Iglesias is constantly interfering with Police Department's day-to-day operations, and spreading false rumors about Police Department personnel. (Document #1)
2. Vice Mayor Iglesias is causing a hostile work environment with constant complaints about officers.
3. Vice Mayor Iglesias is constantly encouraging racism, pitting hispanics against white and black officers of the Department.
4. Vice Mayor Iglesias filed false police reports (verbally) constantly for his own gain and benefits.
5. Vice Mayor Iglesias's 16-year-old son works part time in Town Hall. (Nepotism)
6. Vice Mayor Iglesias improper use of his title by instructing the Town Manager to take actions on the police department, and even retaliation against the Police Chief and myself.
7. Vice Mayor Iglesias ordered public records about himself not to be released, and then when they were released he insisted the secretary releasing the records be fired. (Document #1)
8. Mr. Iglesias is falsely using the title

of M.D. and in fact used this title to gain his seat on the council and then becoming Vice Mayor. When Mr. Iglesias has been questioned on this matter by residents in the past he has stated he was a brain surgeon, a foot doctor, and a chiropractor, and could not list a hospital where he did his residency to become M.D. (Document #2)

2. At all times material to this case the Petitioner was Vice Mayor serving on the Town's governing council. As such, the Petitioner was subject to the ethics provisions governed by the Ethics Commission.

3. The Respondent is a town employee and serves as a police sergeant within the police department. Mr. Nieman has been so employed for over 20 years.

4. After an investigation of three of the allegations set forth in the Complaint (only three were deemed legally sufficient to warrant investigation) and consideration of the Advocate's recommendation, the Ethics Commission entered a Public Report on March 16, 2004. The Public Report dismissed the Complaint and closed the matter.

5. On April 14, 2004, the Petitioner filed the instant Fee Petition pursuant to Section 112.317(8), Florida Statutes (2004). The Fee Petition alleged that the Complaint "is based on eight allegations, all of which are false and were known to be false by Complainant when he filed the Complaint." Additionally, the Fee Petition stated the Complaint "was filed

by the Complainant with the knowledge the Complaint contained one or more false allegations, or with reckless disregard as to whether the Complaint contained false allegations. . . ."

6. At hearing, the Petitioner presented evidence as to the three allegations of the Complaint that were investigated and deemed legally sufficient to require an ethics investigation. Those allegations were: whether the Petitioner had filed false police reports for his personal benefit; whether the Petitioner had attempted to prevent the release of a public record or insisted on the firing of the person who had released the record; and whether the Petitioner had caused his son to be employed by the Town.

7. The false police reports allegation stemmed from the Petitioner's use of public roads for rollerblading. The Petitioner is an avid rollerblader and likes to rollerblade for exercise. The Petitioner opined that rollerblading puts less stress on his back and has less impact than jogging. The Petitioner frequently rollerblades on the public road within the Town. Automobile traffic on the road must go around the Petitioner in order to pass. It is the Petitioner's position that since there is no sidewalk or shoulder suitable to rollerblade, he is entitled to use the road surface just as a pedestrian might use the road surface. The Petitioner skates toward the middle of the lane and not on the edge of the road

surface because the roadway is better there for the rollerblades. The record in this case does not clarify whether the Petitioner skates with or against the traffic.

8. In connection with the rollerblading, the Respondent believes that the Petitioner is not entitled to use the road as he does and that if the Petitioner did not use his position as a councilman for influence, he would be cited for rollerblading down the road as he does. Further, the Respondent maintains that the Petitioner has made verbal complaints against motorists who passed too close to him. The Respondent maintains that the verbal complaints are false in that the Petitioner is not entitled to use the roadway as he does and therefore cannot complain against motorists as he does.

9. The Petitioner does not deny the activity. The Respondent has observed the Petitioner rollerblading down the road. The Respondent has not issued a citation to the Petitioner because he is assigned an administrative position within the police department and he believes he is not allowed to issue such citations.

10. The Respondent based the allegation regarding this claim upon statements he has heard from police officers within the Town's police department. The Respondent did not subpoena the officers to the hearing because he did not want to involve other Town employees in the matter. The Respondent does not

have any evidence to support the allegation other than what he believed he had been told in his experience as a police officer for the Town. The record does not demonstrate any written record of either the Petitioner being cited for improper rollerblading or making a report against a vehicle.

11. As to the second allegation that was investigated, a memo purportedly from the chief of police was released to a member of the public by accident. It was included within a stack of documents that had been requested by a private citizen. The document stated in part:

SUBJECT: Ethics violations and continual interference of day-to-day police operations by the Vice Mayor Iglesias

This memorandum is to inform you [Mayor Michael Addicott] of constant harassment of police personnel and interference in daily operations by the new vice mayor.

The Petitioner admitted that he was concerned that the document had been released in error and that the person who wrongly released a document should be disciplined. The Petitioner did not know about the document before it was released. He did not attempt to prevent the release of the document. Instead, the Petitioner sought to, after-the-fact find out why the document had been released, if the document was in fact a public record subject to release, and if the employee should be disciplined for the release.

12. The document in question was a public record, was subject to public release, and the employee was not disciplined for its release. Nevertheless, the Petitioner did require a second (and arguably third opinion) regarding whether the document constituted a public record. In the meanwhile, the controversy within the Town over whether the document should have been released was widely discussed among Town employees. The Respondent filed his claim based upon several reports that the Petitioner wanted the secretary who released the report fired. One of the Respondent's sources was the Chief of Police. The Respondent did not question the veracity of the police chief.

13. At hearing, the Petitioner did not deny that discipline would have been appropriate if the release of the document were shown to be erroneous. The Petitioner acknowledged that the Town pursued a full review of the matter and that he was among those who called for the review.

14. As to the third allegation (that the Petitioner caused his son to be hired by the Town), the Respondent believed that once the Petitioner was elected as a councilman that the son was not eligible to work for the Town. The Respondent thought that rules prohibiting nepotism applied to the Petitioner's son and that as such the son could not continue to work for the Town. The Respondent based this interpretation on a general but un-

researched idea about nepotism. He also discussed this matter with another Town employee who also thought the son was not eligible to work for the Town.

15. In fact, the Petitioner's son, Joseph, started working for the Town in a part-time position prior to the Petitioner being elected to office. After the Petitioner became Vice Mayor, the son continued with his duties but was moved from an independent contractor status to part-time employee status. The son then received a raise in his hourly rate of pay when the Town employees also received a raise. The Petitioner did not supervise the son's employment and did not direct the son's work. The record is unclear as to whether the Petitioner voted on the pay raise or not.

16. At hearing the Respondent maintained that he had had numerous conversations with persons at the Ethics Commission who recommended that he add the information regarding the nepotism claim to his allegations. He admitted that he did not independently check any laws or rules that might pertain to nepotism before filing the claim.

17. Much of the Respondent's attitude and comments in connection with the Petitioner must be viewed in the context of the happenings within the Town. For unknown reasons, the Town, its employees, and the governing council were in a state of

change and confrontation. The Respondent and the Petitioner apparently do not relate well to one another personally.

18. The Respondent is suspicious of the Petitioner's medical credentials and is uncertain as to why the Petitioner holds himself out as an "M.D.", when he is not licensed nor is he eligible to be licensed as a medical doctor.

19. The Petitioner believes the Respondent holds some animosity toward him for unknown reasons. Further, because the Respondent admitted he believes the Petitioner is arrogant, that belief somehow that demonstrates malice toward the Petitioner.

20. The questions of whether the Petitioner is credentialed to be a medical doctor, whether the Petitioner attempted to interfere with the police department, or whether the Petitioner spread false rumors regarding the police department were not investigated and do not support, if true, an ethics violation.

21. 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.

22. The Petitioner presented several invoices from the Law Offices of Stuart R. Michelson that were alleged to pertain to the instant case.

23. 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.

24. 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 against the Respondent's Complaint. The expert merely opined that the invoices he reviewed were reasonable. He maintained that the Petitioner should recover \$27,455.53 in this matter.

CONCLUSIONS OF LAW

25. 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).

26. 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.

27. 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).

28. 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 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 fees is moot.

29. In this case, the Petitioner failed to establish that the Respondent filed the Complaint with a malicious intent to injure the reputation of the Petitioner. The Respondent believed that the Petitioner was not entitled to run roughshod over Town employees. Basically, the Town was in turmoil. That the Respondent believes the Petitioner to be a "pompous jerk" does not automatically render his action malicious. What if the Petitioner is, in fact, a "pompous jerk"? Is truth an absolute defense? There is no clear and convincing evidence in this cause to support the conclusion that the Respondent filed his Complaint with a malicious intent to injure the reputation of the Petitioner. Further, except for the inconvenience of defending himself through the investigation process, there is no evidence that anyone other than the Petitioner thought the Respondent was attempting to injure the Petitioner's reputation.

30. 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).

31. In this case the Petitioner 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.

32. There is no clear and convincing evidence that at the time he made the Complaint that the Respondent knew that any statement was false. As to the each allegation the Respondent

had credible sources to support the Complaint. In retrospect, he perhaps naively believed the unverified statements of his co-workers. He did not determine if nepotism prohibits a son of a councilman from being employed by the Town. He is not a lawyer and did not research the law. 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 this Petitioner, the evidence in this cause is woefully inadequate to reach such a conclusion.

33. It is concluded that at the time he made the Complaint all of the factual allegations were either supported by the Respondent's observations, his conversations with Town employees, or from reasonably drawn inferences. For example, the chief of police told the Respondent and the person who released the public document that the Petitioner wanted the employee disciplined (fired). If it had turned out that the document was not a public document, it was the Petitioner's intention to see that discipline of the employee occurred. To that end several checks were pursued to attempt to show that the document was released in error. The Respondent could reasonably infer from the Petitioner's acts that he was displeased by the release of the document and would use his position as Vice Mayor to evidence that displeasure. He was unable to do so because

every source checked supported the conclusion that the document was a public record. Similarly, the Respondent knew that the Petitioner's son worked for the Town and was made an employee of the Town during the Petitioner's tenure. He did not research the law on nepotism. He and others thought that the Petitioner's daily presence at the Town offices looked like the son was working in violation of the nepotism laws. Only through the investigation process did they come to understand that the Petitioner's son was not supervised or controlled by the Petitioner and no nepotism rules were violated. Nonetheless there was a factual basis for the Respondent's concern. Finally, as to the rollerblading issue, it is undisputed that the Petitioner rollerblades down the road. The Petitioner admits it, credible witnesses observed the behavior, and all disagree as to whether the conduct is appropriate.

34. Section 316.2065(12), Florida Statutes (2004), provides:

No person upon roller skates, or riding in or by means of any coaster, toy vehicle, or similar device, may go upon any roadway except while crossing a street on a crosswalk; and, when so crossing, such person shall be granted all rights and shall be subject to all of the duties applicable to pedestrians. [Emphasis added.]

Further, persons violating the provision are subject to the penalty set forth in Section 316.2065(20), Florida Statutes

(2004). Arguably, rollerblades are a form of roller skates. Thus the Respondent had a reasonable basis for believing the Petitioner's position as a councilman enabled him to pursue the activity. Moreover, the Respondent's allegation of the Petitioner's complaints regarding motorists who passed too close to the Petitioner were founded upon the comments overheard at the police station. That those comments were not substantiated at the hearing (and they were not) does not diminish the fact that coupled with the known activity (rollerblading), the Respondent had a basis for a credible belief that the Petitioner was using his public position to further his private exercise.

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.

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 9th day of June, 2005, in
Tallahassee, Leon County, Florida.

S

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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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.