

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALBERT J. HADEED,

Petitioner,

vs.

Case No. 16-5247FE

KIMBERLE B. WEEKS,

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.
Post Office Box 15579
2618 Centennial Place
Tallahassee, FL 32317

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 16-52475E, 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 re-scheduled 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 re-scheduling 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 re-schedule 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, Case Nos. 1D16-724 & 1D16-725 (Fla. 1st DCA Feb. 2, 2017). 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 attorney's 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-100D, 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 can 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 14-233

1. On December 4, 2014, the Commission received a complaint against Hadeed filed by Weeks which alleged that Hadeed violated Florida's election laws, the Sunshine Law, and the Code of Ethics.

2. Specific allegations in the complaint referenced a "whispered" conversation between Albert Hadeed ("Hadeed"), the County Attorney, and alternate Canvassing Board member and

County Commissioner Ericksen, Jr. ("Erickson"), outside of a Canvassing Board meeting. The complaint alleged:

The actions and behaviors of some county commissioners and their staff demonstrate some may have used their position for their personal gain and for the personal gain of their co-commissioners and employers. Such activities as described herein could allow voters to also believe some persons who are privy to information, change the outcome of elections when information is prematurely revealed, and that attorney Hadeed is the canvassing board attorney because he allows the laws to be bent or broken. As Supervisor of Elections I oppose and have objected to the county attorney being the canvassing board attorney. The public should be able to trust those who are responsible for canvassing our elections and at no time should how a voter voted be released, and never should election results be release [sic] prior to 7 p.m. election night. Because attorney Hadeed and county commissioners remained hushed on behavior that has been identified, it is unknown what else may have transpired that has been kept hushed, and if such occurrences will happen again knowing they will be kept hidden and unaddressed. It is also unknown how many other people attorney Hadeed and county commissioners have told about such incidents which may give the public opinion that the Supervisor of Elections condones this type of activity, and that such activity is common. It is believed candidates may receive voter's support if it is expected that when they serve on the canvassing board they will continue such practices to allow elections to be manipulated and give some candidates an advantage.

3. The complaint also alleged that:

On October 17th, 2014, I requested that alternate canvassing board member Charles

Ericksen Jr step down as an alternate canvassing board member because it became known he contributed \$50 to the re-election campaign of county commissioner Frank Meeker. Ericksen refused to do so at that time, but did resign on October 20th, 2014 at a Board of County Commission meeting. It was at that time alternate canvassing board member Barbara Revels was chosen to replace Ericksen. Though commissioner Revels has been under an ethics investigation for the past several months, it did not make her ineligible to serve as an alternate canvassing board member.

Attorney Hadeed was responsible for representing the canvassing board and the board of county commission [sic] and failed to provide advice indicating what should be done to prevent the appearance of impropriety when serving as a canvassing board member, and what would disqualify one from being eligible to serve on the canvassing board. He therefore knowingly and willingly allowed Ericksen to remain as an alternate canvassing board member without providing any guidance to prevent the appearance of impropriety or possible violation of Florida election code.

4. The complaint also alleged:

Attorney Hadeed also failed to guide commissioner Ericksen and encourage him to step down from the canvassing board on October 17, 2014 due to his involvement in fellow Commissioner Frank Meeker's re-election campaign. Attorney Hadeed also failed to seek and disclose to the canvassing board the degree of commissioner Ericksen's involvement in fellow commissioner/candidate Frank Meeker's campaign before or after the issues was [sic] raised before the board. Attorney Hadeed had a responsibility to ethically and legally guide the canvassing board and county commissioners to prevent one from

violating the Florida election code. Attorney Hadeed did nothing to prevent or stop commissioner Ericksen's involvement on the canvassing board after it was learned of his involvement in candidate Meeker's campaign. Therefore he failed those he was representing, and did not protect the integrity of the electoral process.

5. The complaint further alleged that:

The board of county commissioners is the employer of county attorney Hadeed. It is believed to be a conflict of interest for attorney Hadeed to represent both the board of county commissioner [sic] and the canvassing board. By representing both of these boards, attorney Hadeed may provide advice and guidance to his employers who are responsible for canvassing elections, and additional employers are on the ballot. The composition of the canvassing board/alternate normally consists of at least two of the county attorney's employers (county commissioners). It may have been in attorney Hadeed's best interest for commissioner Ericksen to remain as a canvassing board alternate when it was believed he was ineligible.

6. The complaint further alleged that:

County commissioner/canvassing board member George Hanns was also asked to step down from the canvassing board on November 3, 2014 because he too was involved in a fellow commissioner Frank Meeker's re-election campaign and he too refused. Attorney Hadeed did nothing again to protect the integrity of the electoral process and ensure election code was not violated. He was made aware, if he didn't already know, that an advertisement was released by fellow county commissioner Frank Meeker stating he was endorsed by county commissioner/canvassing board member George Hanns. George Hanns stated it was not an

endorsement because he didn't put it in writing. Attorney Hadeed again failed to encourage commissioner Hanns to voluntarily step down from his position on the canvassing board after the endorsement was exposed and made public on November 3, 2014. Again, attorney Hadeed failed to properly represent the canvassing board.

On November 4, 2014 Commissioner George Hanns was again asked to stop [sic] down from the canvassing board for the same reason, and he again refused. Attorney Hadeed still did not encourage the commissioner to voluntarily step down, and he did not provide anything on the matter to support why he should not be required to step down. Attorney Roberta Walton produced an opinion on the matter to support why he should step down. It was at that time when attorney Hadeed attempted to discredit attorney Walton's findings, but again produced nothing to prove otherwise. The county judge (canvassing board chair) reviewed the opinion attorney Walton provided and it was then when she supported the motion made by the supervisor of elections to remove commissioner George Hanns from the county canvassing board. Again, attorney Hadeed made no attempt to uphold the law, and again failed to properly represent the canvassing board and county commissioners as he failed to provide proper guidance. Guidance that would have spared tension on the canvassing board, prevented embarrassment to a county commissioner and preserved the integrity of the electoral process.

7. The complaint also alleged:

Per Florida Statute 102.141(6) the resignation of canvassing board member Charles Ericksen Jr was reflected in the Conduct of Election Report that is filed with the Florida Division of Elections following the certification of the election,

as was the removal of the Chairman of the Board of County Commissioners, George Hanns. Commissioner/alternate canvassing board member Barbara Revels (Charles Ericksen's replacement) refused to sign the required Conduct of Election Report because it reflected the fact that 1 county commissioner was removed from the Canvassing Board. In fact, commissioner Revels wrote on the report "Refused to sign: Barbara Revels". Commissioner Revels stated she did not feel it was necessary that such information be reflected on the report; Supervisor Weeks disagreed as she found the matter to be material to the conduct of election. Two of the three canvassing board members (the Supervisor of Elections and County Judge) signed the report willingly. County/canvassing board attorney Hadeed failed to advise canvassing board member/county commissioner Barbara Revels on completing the required report by placing her signature in the required area. Attorney Hadeed also failed to say whether the report would be considered incomplete due to the absence of a canvassing board members signature, and if the report lacking a signature would put the canvassing board at risk of being in violation of Florida election code. Because attorney Hadeed failed to properly guide the canvassing board members with prior issues, as well as with the issues of commissioner Revels resistance, it appeared he and county commissioners are in collusion. He never seems to address or provide guidance in areas as have been referenced, but quite often weighs in on influencing canvassing board members decisions and inserts his comments and opinions. Again, attorney Hadeed did not properly represent the canvassing board. Attorney Hadeed should have ensured and encouraged that the requirements of the canvassing board were being met. However, he spoke up on another matter regarding a voter's registration complaint and weighed in on that matter

being noted on the conduct of election report. Perhaps attorney Hadeed spoke up at this time because Dennis and Janet McDonald whom the complaint was filed on are quite vocal and critical of attorney Hadeed, and his job performance.

8. Finally, the complaint alleged:

Attorney Hadeed demonstrated the same poor judgment in 2010 when he violated the Sunshine Law by being a conduit between some canvassing board members. He was successful in creating the same type of hostile environment at that time as he did in 2014 when he made great efforts to change meeting minutes from the August 6, 2010 canvassing board meeting by verbally communicating with canvassing board members, and then distributed e-mails to carry out his plan. Those meeting minutes reflected when he incorrectly advised the canvassing board as to whom the chair of the canvassing board shall by Florida Statue [sic] be when an alternate for the canvassing board chair is required to serve. Attorney Hadeed wanted the language that existed in the first paragraph of the meeting minutes to be replaced with new language; which would then remove language that reflected the incorrect advice he gave the board.

9. 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 [Hadeed] engaged in a "whispering" exchange at a canvassing board meeting or otherwise was involved in discussions which may not have been in compliance with the Sunshine Law, that he allowed an ineligible person to remain on the canvassing board or did not provide proper advice or legal service regarding the person's being on the canvassing board, that

he failed to report a crime, that he was involved in other or related conduct, and that this may have been for the purpose of benefiting himself, particular candidates, or others. This indicates possible violation of Section 112.313(6), Florida Statutes.

10. 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 [Hadeed] has violated section 112.313(6) as set forth above."

The Commission's Investigation

11. 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 for the 2014 Election was made up of Judge Melissa Moore-Stens, County Commission Chairman George Hanns (Commissioner Hanns), and then-Supervisor of Elections Kimberle Weeks. Initially, the alternate member of the Canvassing Board was County Commission member Charles Ericksen, Jr.

b. Weeks alleged that Hadeed used his position as the Canvassing Board Attorney to manipulate the process to benefit Commissioner Meeker's candidacy by failing to advise Commissioner Ericksen to resign from the Canvassing Board. Weeks alleged that Hadeed failed to advise Commissioner Hanns to resign from the Canvassing Board after a political advertisement was distributed which contained an endorsement of Commissioner Meeker by Commissioner Hanns.

c. Minutes from the October 17, 2014 Canvassing Board meeting confirm that Weeks mentioned that Commissioner Ericksen made a contribution to Commissioner Meeker's campaign and that the Department of State, Division of Elections, had advised her that the contribution was not considered to be "active participation" in a campaign. The minutes also confirm that Commissioner Ericksen was not present at the meeting.

d. Hadeed learned from Commissioner Ericksen on the morning of October 20, 2014, prior to a scheduled County Commission meeting, that Commissioner Ericksen attended a fundraiser for Commissioner Meeker. It was at that time that Hadeed advised Commissioner Ericksen to resign as a member of the Canvassing Board. Commissioner Ericksen confirmed that he met with Hadeed on the morning of October 20, 2014, before the County Commission meeting, and that Hadeed advised him that his attendance at Commissioner Meeker's fundraiser would disqualify

him from serving on the Canvassing Board. Commissioner Ericksen stated that during this consultation Hadeed advised him to resign from the Canvassing Board.

e. 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 (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.

f. Weeks further alleged that Hadeed failed to provide proper legal advice when he failed to advise County Commission Chairman Hanns to resign his position on the Canvassing Board after a political advertisement was distributed by Commissioner Meeker's campaign, which included an endorsement by Commissioner Hanns. Weeks advised that she asked Commissioner Hanns to step down from the Canvassing Board at its November 3, 2014 meeting because of the endorsement, and that he refused to do so. Weeks stated that Hadeed was present and did not provide advice regarding the situation.

g. Hadeed related that he did not advise Commissioner Hanns to resign from the Canvassing Board because Commissioner Hanns stated that he did not endorse Commissioner Meeker's campaign. Commissioner Hanns stated that a campaign mailer was

mistakenly sent to voters by Commissioner Meeker's campaign, including an endorsement attributed to Commissioner Hanns. Commissioner Meeker's campaign, Hadeed said, distributed another mailer correcting the error and notifying each of the recipients of the original mailer that Commissioner Hanns had not endorsed Commissioner Meeker's campaign. Hadeed stated that he discussed the issue at the November 4, 2014 Canvassing Board meeting and that the Division of Elections' interpretation of the statutes involving disqualification of Canvassing Board members requires intentional, rather than perceived, action. However, Hadeed said, Weeks made a motion to remove Commissioner Hanns from the Canvassing Board, and that motion was seconded by County Judge Melissa Moore-Stens (the third member of the Canvassing Board).

h. Minutes from the November 4, 2014 Canvassing Board meeting confirm that Commissioner Hanns stated that he did not give permission for his photo or endorsement to be used in the advertisement by Commissioner Meeker's campaign and that he did not endorse Commissioner Meeker. The minutes also confirm that Weeks made a motion to remove Commissioner Hanns from the Canvassing Board and that Judge Moore-Stens seconded that motion. The vote on the motion was two to one with Commissioner Hanns voting against it.

i. Commissioner Hanns stated that he contacted Hadeed at the time of the mistaken endorsement, who advised him that he

had done nothing wrong and was not required to resign. During the November 4, 2014 Canvassing Board meeting both Hadeed and Roberta Walton, the attorney hired by Weeks to represent her office, agreed Commissioner Hanns was not required to resign. Their opinions were informed, in part, by written opinions from the Division of Elections. Commissioner Hanns provided an October 26, 2015 Division of Elections opinion which directly addressed Weeks' desire for Commissioner Hanns to resign. The opinion stands for the proposition that mistakenly being a part of an endorsement in a political advertisement is not considered "active participation" which would require replacement of the canvassing board member.

j. When asked about her allegation that Hadeed was involved in other or related conduct, apparently for the benefit of particular candidates or others, Weeks indicated that she had no information regarding that allegation.

Commission on Ethics Advocate's Recommendation

12. On March 7, 2016, Commission Advocate Elizabeth L. Miller recommended that there was "no probable cause" to believe that Hadeed violated section 112.313(6) by participating in discussions which may have been in violation of the Sunshine Law, allowing an ineligible person to remain on the Canvassing Board by not providing proper legal services to the Canvassing

Board, or by being involved in other or related conduct for the benefit of himself, particular candidates, or others.

13. On April 20, 2016, the Commission issued its Public Report dismissing Weeks' complaint for lack of probable cause. Weeks' Knowledge of the Falsity of Her Sworn Allegations

14. Weeks filed a sworn complaint against Hadeed. When signing the complaint, Weeks executed an oath that "the facts set forth in the complaint were true and correct"

15. Weeks served as a member of the Canvassing Board during the 2014 Election Cycle. Weeks was present at both the September 12, 2014 and the October 17, 2014 meetings of the Flagler County Canvassing Board.

16. The Flagler County Canvassing Board makes the minutes of its meetings available to the public. Weeks had access to the minutes of the Flagler County Canvassing Board of which she was a member.

17. Prior to filing her complaint against Hadeed, Weeks 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.

18. Video of the 2014 meetings of the Flagler County Commission is archived for public viewing on the Flagler County website. Minutes of all Flagler County Commission meetings are

public record available to the public on the Flagler Clerk of Court's website and upon request. Weeks is familiar with the process of obtaining minutes of County Commission meetings by request as evidenced by her public record requests made during the pendency of this proceeding before the Division.

19. The minutes of the September 15, 2014 meeting of the Flagler County Commission reflect the County Commission discussed whether the Canvassing Board could select its own attorney, and, ultimately, suggested the Canvassing Board affirm selection of its attorney by vote at a future meeting.^{9/}

20. Neither the posted video nor the minutes of the September 15, 2014 meeting of the Flagler 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.

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

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

23. Contrary to Weeks' allegation that Commissioner Ericksen refused to resign his position as an alternate member of the Canvassing Board at its October 17, 2014 meeting, the

official minutes of that meeting indicate that Commissioner Ericksen did not attend that meeting.

24. Weeks' allegations that Hadeed had a conflict of interest in serving as both the County Attorney and the Canvassing Board attorney were false, and were known by Weeks to be false, or were made with reckless disregard of whether they were false.

25. Contrary to Weeks' allegations that Hadeed failed to give proper legal advice when he failed to advise Commissioner Hanns to resign his position on the Canvassing Board after the political advertisement was distributed by Commissioner Meeker's campaign, which included an endorsement by Commissioner Hanns, the record revealed that Hadeed's advice was correct and proper, notwithstanding the Canvassing Board's ultra vires action in removing Commissioner Hanns from the Canvassing Board.

26. When this issue was discussed at the November 4, 2014 meeting of the Canvassing Board, Roberta Walton, the attorney hired by Weeks to represent her office, agreed with the advice given by Hadeed that Commissioner Hanns was not required to resign.

27. When asked by the Commission's investigator whether Hadeed was involved in other or related conduct, for the benefit of particular candidates or others, Weeks indicated that she had no information regarding that allegation.

28. The allegations in Weeks' complaint against Hadeed, which the Commission found material to investigate, were known by Weeks to be false or were filed by Weeks with reckless disregard for whether they were true or false.

Malicious Intent to Injure Reputation

29. 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).

30. The evidence adduced at the hearing established that Weeks worked in concert with other individuals to maliciously injure the reputation of Hadeed by filing complaints containing false allegations material to the Code of Ethics with the Commission on Ethics and other agencies.^{10/}

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

32. 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 Flagler 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.

33. 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 election. 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.

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

35. This group filed 25 complaints against Flagler County officials, individually and collectively, including complaints against 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 Code of Ethics.

36. 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.

37. In addition to alleging that Hadeed violated Florida's ethics laws and the Sunshine Law, Weeks' complaint alleged that Hadeed conspired to cover up felonious conduct by a member of the County Commission and that Hadeed violated Florida's elections laws, specifically chapter 106, Florida Statutes, in several respects.

38. Weeks also filed a complaint against Hadeed with The Florida Bar. That complaint tracked Ethics Complaint 14-233 in many respects and included allegations that Hadeed violated Florida's ethics laws and the Sunshine Law, improperly altered public records, and conspired to cover up a felony.

39. The allegations that Hadeed participated in discussions that violated the Sunshine Law, acted to allow an illegible person to serve on the Canvassing Board, altered the minutes of the Canvassing Board, gave improper legal advice, and

engaged in other conduct to benefit particular candidates in the 2014 Election, were crucial to the ethics complaint which Weeks filed against Hadeed. These allegations formed the basis for the Commission's finding that the complaint was legally sufficient and ordered that it be investigated.

40. Had Hadeed been found to have violated Florida law, it would have damaged his reputation in the community and would have jeopardized his ability to practice law.

41. The evidence also shows a concerted effort by Weeks and the Triple Rs to continue filing new complaints after dismissal orders in order to keep Flagler County officials under constant investigation by various agencies, which kept them under a cloud of suspicion with the public.

42. The totality of these findings, including the number of complaints, the false complaints to The Florida Bar and the Elections Commission, 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 14-233 was filed with a "malicious intent" to injure the reputation of Hadeed and create political gain for the Triple Rs and Weeks.

43. The totality of these findings constitutes clear and convincing evidence that Weeks' complaint was filed with

knowledge that, or with reckless disregard for whether, it contained one or more false allegations of fact material to a violation of the Code of Ethics.

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

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

Attorney's Fees and Costs

46. Upon receipt and review of the complaints filed against Hadeed 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.

47. 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.

48. 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.

49. The total hours spent on this case by Messer Caparello attorneys is reasonable. The billable hour records of the Messer Caparello law firm through May 14, 2017, indicate that a total of 115.69 hours were spent in defending the underlying complaint filed with the Commission and in seeking costs and fees in this proceeding.

50. 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 records of the Messer Caparello law firm indicate

that an additional 28.80 hours were spent in seeking costs and fees for that defense at the formal hearing and in preparing the Proposed Recommended Order.

51. The total hours spent by the Messer Caparello law firm in defense of the Complaint against Petitioner, and in seeking costs and fees for that defense, is 144.49. The total hours spent on this case by the Messer Caparello law firm is reasonable.

52. Costs of \$1,785.03 incurred by the Messer Caparello law firm through May 14, 2017, are reasonable. Costs of \$1,012.44 incurred by the Messer Caparello law firm after May 14, 2017, are reasonable.

53. The total hours spent on this case by the Flagler County Attorney's Office is reasonable. Hadeed has not sought fees for his time as the County Attorney in the defense of this complaint against him. Time records of the Flagler County Attorney's Office through May 15, 2017, indicate that a total of 30.85 hours for paralegal time were spent in assisting in the defense of the underlying complaint filed with the Commission and in seeking costs and fees in this proceeding.

54. 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 17.10 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.

55. Costs of \$168.93 incurred by the Flagler County Attorney's Office before May 15, 2017, are reasonable. After May 15, 2017, no additional costs were charged by the Flagler County Attorney's Office.

56. A reasonable hourly rate for the time of the paralegal in the Flagler County Attorney's Office in connection with this matter is \$150 per hour.

57. Based on the findings herein, Hadeed has established that he incurred: (i) costs in the amount of \$2,797.47 and attorneys' fees in the amount of \$50,571.50 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) costs in the amount of \$168.93 and \$7,144.50 for paralegal services incurred by the Flagler County Attorney's Office in defending the underlying complaint filed with the Commission and in seeking costs and fees in this proceeding.

CONCLUSIONS OF LAW

58. 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.

59. 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.

60. 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.

61. 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.

62. During the course of this proceeding, Weeks moved to dismiss Hadeed's petition seeking costs and attorneys' fees pursuant to section 112.313(7), asserting that she is entitled to "qualified immunity" because she filed the complaint as the "Supervisor of Elections" and not as a private citizen.

63. As explained by the Florida Supreme Court in Tucker v. Resha, 648 So. 2d 1187, 1189 (Fla. 1994):

Under the qualified immunity doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818, 102 S.Ct. at 2738. "The central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.'" Elder v. Holloway, 114 S.Ct. 1019, 1022, 127 L.Ed. 2d 344 (1994) (quoting Harlow, 457 U.S. at 806).

64. In analyzing a claim of "qualified immunity," the courts have stated:

[T]here are two steps in evaluating the qualified immunity defense. The defendants must first demonstrate that they acted within their discretionary governmental duties. Once that is established, the plaintiff must show that the defendants' conduct violated his clearly established statutory or constitutional rights.

Bd. of Regents v. Snyder, 826 So. 2d 382, 390 (Fla. 2d DCA 2002).

65. Weeks' claim of qualified immunity fails for two reasons. First, the award of attorneys' fees pursuant to section 112.317(7) is not a claim for civil damages. Second, as the Supervisor of Elections, Weeks had no discretionary duty to report alleged violations of the Code of Ethics to the

Commission. Weeks cannot claim immunity, qualified or absolute, in the context of filing an ethics complaint against Hadeed when she acted with a malicious intent to injure his reputation and 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 ethics code. Weeks' claim of qualified immunity is rejected.

66. Hadeed 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 seeking entitlement, Hadeed 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). Hadeed has proven "by clear and convincing evidence" that the award of costs and attorneys' fees is appropriate in this case.

67. 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 Code of Ethics.

68. 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.

69. "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 Southern Bell Telephone & Telegraph Co. v. Roper, 482 So. 2d 538, 539 (Fla. 3d DCA 1986)).

70. In this case, the evidence, by a clear and convincing margin, indicates that Weeks maliciously filed Ethics Complaint 14-233 against Hadeed in order to damage Hadeed's reputation and to advance the political aims of herself and the

Triple Rs. In addition, the evidence showed that, despite stating under oath that "the facts set forth in the complaint were true and correct," Weeks either knew the matters alleged in the complaint were false, or she was consciously indifferent to the truth or falsity of her allegations when she failed to review the public records which would have indicated that her allegations were false. Finally, the false statements in her complaint were material to violations of the Code of Ethics for Public Officers and Employees, in that they formed the basis for the Commission's investigation of the complaint.

71. Hadeed is entitled to a total award of \$53,368.97 in costs and attorneys' fees in connection with legal services provided by Messer Caparello in this matter.

72. Hadeed is entitled to a total award of \$7,313.43 in costs and paralegal fees in connection with legal services provided by the Flagler County Attorneys' 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 Hadeed's Petition for Costs and Attorneys' Fees relating to Complaint 14-233 in the total amount of \$60,682.40.

DONE AND ENTERED this 31st day of August, 2017, in
Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of August, 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 the 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."

^{9/} Whether this discussion violated the Sunshine Law is a legal conclusion that was not addressed by the Commission on Ethics.

^{10/} Weeks also filed a complaint with The Florida Bar seeking to have Hadeed disciplined or prosecuted. The Bar's grievance committee dismissed the complaint, after investigation, as lacking in probable cause.

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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.