

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GEORGE HANNS,

Petitioner,

vs.

Case No. 19-0426FE

DENNIS MCDONALD,

Respondent.

_____ /

RECOMMENDED ORDER

A duly noticed final hearing was held in this matter on April 12, 2019, 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
Summer Denay Brown, Esquire
Messer Caparello, P.A.
2618 Centennial Place
Tallahassee, Florida 32308-0572

For Respondent: no appearance

STATEMENT OF THE ISSUE

The amount of reasonable attorneys' fees to be awarded to Petitioner, George Hanns, for defending the appeal filed by Respondent, Dennis McDonald, in the Florida First District Court of Appeal ("District Court"). By Order dated November 19, 2018,

in Case No. 1D18-0205, the First District Court of Appeal determined that Petitioner was entitled to such fees.

PRELIMINARY STATEMENT

On October 15, 2018, Petitioner filed a Motion for Attorneys' Fees with the District Court in Case No. 1D18-0205. That appeal stemmed from Division of Administrative Hearings ("the Division") Case No. 16-5248FE, which involved both Petitioner and Respondent herein, and was heard by the Division on May 16, 2017. By Order dated November 19, 2018, the First District Court of Appeal granted Petitioner's motion for attorneys' fees and remanded the case to the Florida Commission on Ethics ("the Commission") for a determination of the amount of such fees. On January 23, 2019, the Commission referred this matter to the Division requesting assignment of an Administrative Law Judge to conduct a final hearing on the amount of fees to be awarded.

The Division issued its Initial Order on January 23, 2019, and issued an Amended Initial Order on January 25, 2019, to serve Respondent by certified mail, return receipt requested. Petitioner timely responded to the Amended Initial Order and subsequently timely filed a Witness and Exhibit List as directed in the Order of Pre-hearing Instructions. The undersigned issued a Notice of Hearing scheduling the final hearing in Tallahassee, Florida, on Friday, April 12, 2019.

The Division delivered all preliminary orders in this case to Respondent at the address provided in correspondence from Respondent to Petitioner's counsel dated January 14, 2019, as the best evidence of Respondent's address. Respondent did not respond to the Amended Initial Order, or any other notice or order entered in this case. All Division correspondence to Respondent was returned by the post office as unclaimed.

The final hearing commenced as scheduled. Petitioner presented the testimony of its counsel, Mark Herron; Albert J. Hadeed, Flagler County Attorney^{1/}; and Michael P. Donaldson, accepted as an expert in attorneys' fees. Petitioner offered Exhibits P1 through P7, which were admitted into evidence.

Respondent did not appear at the final hearing.

The one-volume Transcript of the hearing was filed with the Division on May 9, 2019. Petitioner timely filed a Proposed Recommended Order, which has been taken into consideration in preparing this Recommended Order.

FINDINGS OF FACT

1. Mark Herron is an experienced lawyer practicing with the firm of Messer Caparello, P.A. ("Messer Firm"). Mr. Herron has been a member of the Florida Bar since 1975. His practice focuses almost exclusively on ethics and elections-related matters, and he is widely recognized as an expert in ethics and election matters.

2. Mr. Herron was retained to represent Flagler County ("the County") in an ethics complaint filed by Respondent against Petitioner, in which Petitioner prevailed. Respondent appealed the Commission's Final Order in favor of Petitioner to the District Court. After dismissing Respondent's appeal, the District Court granted Petitioner's Motion for Attorneys' Fees and remanded the case to the Commission for a determination of the amount of fees and costs owed.

3. The County entered into an arrangement with the Messer Firm whereby it agreed to compensate the Messer Firm at the County's liability insurance carrier's rate of \$180 per hour, and "make up the difference" between the \$180 per hour rate and a "reasonable hourly rate" from its budget.

4. The Messer Firm has a longstanding relationship with the County, having represented Petitioner in the underlying ethics complaint filed in August 2015, and other County officials in a series of complaints filed in 2014 and 2015.

5. Expert testimony adduced at the hearing indicated that the rate of \$180 per hour paid by the County's liability insurance carrier to the Messer Firm is an unreasonably low hourly rate.

6. Petitioner introduced the testimony of Michael Donaldson, an attorney accepted as an expert in attorneys' fees. Mr. Donaldson testified, credibly, that a reasonable hourly rate

in the geographic area for the type of ethics challenge involved would range from \$250 to \$475 per hour.

7. The hourly rate of \$350 per hour is a reasonable rate to compensate the Messer Firm for its defense of the appeal.

8. The Messer Firm kept detailed records of the amount of time spent by its members working in defense of the appeal. The firm spent a total of 27.75 hours of attorney time defending the appeal through March 31, 2019.

9. The total number of attorney hours expended by the Messer Firm in conjunction with this appeal was reasonable.

10. The Messer Firm incurred total costs of \$6.67 in defense of the appeal through March 31, 2019. The costs were for postage and are reasonable.

11. The County Attorney's office kept detailed timesheets and other records of the time spent working in defense of the appeal.

12. The County Attorney's Office spent a total of 7.15 hours of attorney time assisting in the defense of the appeal.^{2/} The total attorney hours the County Attorney's Office spent working in defense of the appeal is reasonable.

13. The rate of \$200 per hour is a reasonable rate to compensate the County's Assistant County Attorney for his time billed in defense of the appeal.

14. Based on the findings herein, Petitioner has established that he incurred: (i) reasonable costs in the amount of \$6.67 and reasonable attorneys' fees in the amount of \$9,712.50 for the services of the Messer Firm in defending the appeal; and (ii) reasonable attorneys' fees in the amount of \$1,430.00 for the services of the County Attorney's Office in defending this appeal.

CONCLUSIONS OF LAW

15. 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), Florida Statutes.

16. Petitioner has the burden to prove the reasonableness of the attorneys' fees and costs sought by a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.

17. In determining the reasonableness of attorneys' fees, Florida has adopted the federal "lodestar" approach. See Fla. Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). Among the factors to be considered under the lodestar approach are (1) the skill requisite to perform the legal service; (2) the customary fee or rate charged in the locality for comparable legal services; (3) the nature and length of the professional relationship with the client; and (4) the experience, reputation, diligence, and ability of the lawyers

performing the service. See Rowe, 472 So. 2d at 1151; R. Regulating Fla. Bar 4-1.5.

18. In the case at hand, Petitioner retained Mr. Herron, who is widely recognized as an expert in ethics and elections challenges and practices almost exclusively in those matters. Mr. Herron has the skill, knowledge, and abilities to perform the legal services required of the County and Petitioner in the underlying appeal. Mr. Herron and the Messer Firm have a longstanding professional relationship with the County and have represented Petitioner and other County officials in ethics challenges dating back to 2014. Finally, the preponderance of the evidence demonstrated that \$180 per hour is not reasonable for the subject legal market and the type of matter handled. The expert testimony revealed that \$350 was reasonable for the type of legal matter in the subject legal market.

19. Petitioner has met the burden of proof.

20. Petitioner is entitled to a total award of \$9,719.17 in costs and attorneys' fees in connection with legal services provided by the Messer Firm in the appeal.

21. Petitioner is also entitled to a total award of \$1,430.00 in attorneys' fees in connection with legal services provided by the Flagler County Attorney's Office in the appeal.

RECOMMENDATION

Based on the forgoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Commission on Ethics enter a final order awarding Petitioner, George Hanns, a total of \$11,149.17 for costs and attorneys' fees incurred in Complaint No. 15-174.

DONE AND ENTERED this 7th day of June, 2019, 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 7th day of June, 2019.

ENDNOTES

^{1/} Mr. Hadeed testified by telephone pursuant to the undersigned's Order Allowing Testimony by Telephone entered on April 8, 2019.

^{2/} Both the County Attorney and Assistant County Attorney expended time in conjunction with the appeal, but Petitioner is only seeking fees for the hours expended by the Assistant County Attorney, Sean Moylan. Petitioner has waived recovery of all time expended by Mr. Hadeed.

COPIES FURNISHED:

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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.