

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BOBBIE METZ,)
)
Petitioner,)
)
vs.) Case No. 11-0011FE
)
SHAUN MEYERS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held before Diane Cleavinger, a designated Administrative Law Judge with the Division of Administrative Hearings, on April 18, 2011, in Destin, Florida.

APPEARANCES

For Petitioner: Glenn T. Burhans, Jr., Esquire
Greenburg Traurig, P. A.
101 East College Avenue
Tallahassee, Florida 32301

For Respondent: Jennifer H. Copus, Esquire
Copus & Copus, P. A.
1817 Lewis Turner Boulevard, Suite E
Fort Walton Beach, Florida 32547

STATEMENT OF THE ISSUE

The issue in this proceeding is whether Petitioner is entitled to attorney's fees pursuant to Section 112.317(7), Florida Statutes (2009), and Florida Administrative Code Rule 34-5.0291.

PRELIMINARY STATEMENT

On April 7, 2010, Respondent, Shaun Meyers (Respondent or Meyers) filed an ethics complaint against Petitioner, Bobbie Metz (Petitioner or Metz) with the State of Florida Commission on Ethics (Commission). The complaint alleged that Petitioner misused her public position as a fire commissioner in violation of section 112.313(6). Respondent filed an amendment to the complaint on April 30, 2010.

The Commission undertook a full investigation of the allegations of Meyers' amended complaint and, on September 1, 2010, issued a final Report of Investigation, concluding that Meyers' allegations against Metz lacked merit. On September 17, 2010, the Commission's Advocate recommended that there was no probable cause to believe Metz violated Florida law as alleged in the Complaint. Based on the Advocate's recommendation, the Commission, on October 27, 2010, dismissed Meyers' ethics Complaint.

Thereafter, Metz filed a Petition for Costs and Attorney's Fees pursuant to section 112.317(7) and Florida Administrative Code Rule 34-5.0291. The Petition alleged that Meyers filed the ethics Complaint with malicious intent to injure her reputation, by filing the Complaint with knowledge that it contained one or more false allegations, or with reckless disregard for whether the Complaint contained one or more false allegations.

Respondent disputed the Petition for Fees and the matter was forwarded to the Division of Administrative Hearings (DOAH) for formal hearing.

At the hearing, Petitioner testified on her own behalf and called Mark Baugh as a witness. Additionally, Petitioner offered 15 exhibits into evidence. Respondent testified on his own behalf, but did not offer any exhibits into evidence. After the hearing, both parties filed Proposed Recommended Orders on May 6, 2011.

FINDINGS OF FACT

1. Respondent has been employed as a firefighter with Destin Fire Control District (DFCD) since 2002. Currently, he is a Lieutenant and paramedic with DFCD. In 2005 and early 2006, he was a firefighter in the main fire station where all the DFCD administrative offices are located. Additionally, during the same period he served as the Union President for the local firefighters. As such, he knew that Commission meetings were recorded.

2. Petitioner is licensed as a Certified Public Accountant (CPA). Her primary background is in the area of public finance. From January 2004, until January 2005, Petitioner served as an Administrative Assistant to then Fire Chief, Milner "Tuffy" Dixon (Dixon). She left that position for full-time employment at a CPA firm.

3. While maintaining her employment as a CPA, Petitioner was appointed as a Fire Commissioner for DFCD on March 14, 2005. The principle reason for Ms. Metz's appointment to DFCD was her extensive background as a certified public accountant and the growing annual budget of DFCD.

4. At DFCD Commission meetings held on June 13, 2005; September 12, 2005; October 11, 2005; and December 12, 2005, Ms. Metz identified portions of the financial reports prepared by then Financial Administrator Wanda Martin (Martin) that did not comply with Generally Accepted Accounting Principles (GAAP). Specifically, the financial statements prepared by Wanda Martin did not properly accrue expenses; did not always correctly reconcile bank accounts; did not properly record fund balances, receivables and liabilities, and misspelled account names. DFCD's outside auditor Bruce Nunnally, who is also a CPA, agreed with Ms. Metz's observations. Ms. Metz, along with the Commission, wanted the financial statements corrected and to conform with GAAP. However, because Ms. Martin had no formal accounting education, Mr. Nunnally offered to help Ms. Martin make the corrections noted by Ms. Metz and had at least one meeting with her and Ms. Metz to achieve that purpose. After several months, Ms. Martin did not adopt the changes requested by Ms. Metz and the financial reports remained essentially the same.

5. Since Ms. Martin failed to make these corrections, at the December 2005 DFCD Commission meeting, Ms. Metz initially stated that, due to her CPA training, she could not in good faith approve a financial statement she knew to be incorrect. After further discussion amongst the DFCD Commissioners, Ms. Metz accepted the financial statement prepared by Ms. Martin with the condition that the corrections would be made in the future.

6. As indicated, all of these commission meetings were recorded. Although some of the recordings were of poor quality, the tapes showed that Petitioner was always polite to Ms. Martin. They contained no evidence that Ms. Metz ever bullied or harassed Ms. Martin.

7. Importantly, throughout this time period the gossip in the fire station, which stations tend to be rampant with, was that Ms. Metz was being extremely hard on Ms. Martin and getting on to her. Other gossip was that Ms. Metz was being extremely hard on Ms. Martin because she wanted her job. However, neither during the unfolding of these events nor shortly after, did Respondent feel it was necessary to inquire into the activities of Ms. Metz or Ms. Martin. Similarly, Respondent did not feel it was necessary to file an ethics complaint against Ms. Metz.

8. On January 9, 2006, Wanda Martin resigned from her position of Financial Administrator with DFCD.

9. After learning of Ms. Martin's resignation, Petitioner resigned from the Fire Commission on January 12, 2006, in order to apply for the Financial Administrator position vacated by Ms. Martin. The evidence did not demonstrate when Ms. Metz submitted her application for the Financial Administrator position.

10. Sometime in January, either upon or after her resignation, Ms. Metz spoke with former Chief Dixon regarding turning in her job application. She told him she felt she had a good chance to get the job because she thought she was the best qualified. She did not threaten or pressure former Chief Dixon to hire her for the Financial Administrator position.

11. Former Chief Dixon told her that he had to advertise the job according to the rules and that Ms. Metz could put her application in "like anyone else."

12. The position was advertised during the month of January and about 30 applications, including Petitioner's application, were received by DFCD. At no time did Petitioner solicit any Commissioner's support. Petitioner was subsequently, hired as Financial Administrator by Chief Dixon on January 30, 2006.

13. Ms. Metz was not a DFCD Commissioner and did not hold any public office at the time she applied for the DFCD Financial Administrator position. In fact, Ms. Metz remained employed

full-time as a CPA with the accounting firm she had been working for, receiving a compensation package similar to that offered for the DFCD Administrator position. She left her employment with the CPA firm when she was hired as the DFCD Financial Administrator.

14. Former Chief Dixon denied that he was pressured to hire Ms. Metz for the position. Rather, the ethics investigation revealed that Chief Dixon thought that out of approximately 30 applicants for the Financial Administrator position, Ms. Metz was the best qualified applicant because she was a CPA and had previous employment history with DFCD.

15. The ethics investigation further revealed that Chief Dixon stated he felt "uncomfortable" when Ms. Metz said that she was only resigning from the DFCD Commission because she thought she was the most qualified for the DFCD Financial Administrator position. However, he also did not feel pressured by Ms. Metz because she was tendering her resignation from the Commission at the time that she made the comment and no longer had any influence over his position as the Chief of the Fire District. At hearing, Respondent claimed that Chief Dixon may have been untruthful during the ethics investigation, but offered no credible proof of his assertion. Chief Dixon did not testify at the hearing in this matter and Respondent's assertion about Chief Dixon's untruthfulness is not credible or material since

Respondent never inquired whether Chief Dixon was pressured by Ms. Metz.

16. In 2005 and 2006, gossip among the firefighters was rampant about the hiring of Ms. Metz and Respondent was aware of this gossip. However, he again did not feel compelled to inquire into any of these events or file an ethics complaint against Ms. Metz.

17. In March 2009, Chief Dixon retired from DFCD after 19 years of service to DFCD as Fire Chief. Assistant Chief Sasser became the Fire Chief.

18. By 2010, due to a variety of incidents, the atmosphere in the fire district was poisonous because of some actions taken by Ms. Metz and some actions taken against her son, who had been employed by DFCD as a lifeguard. For example, by letter dated March 10, 2010, Ms. Metz provided notice to the DFCD Board of Commissioners that DFCD Chief Sasser had allegedly violated the Sunshine Law and created a hostile work environment. By this same letter, Ms. Metz sought whistleblower protection under chapter 122, Florida Statutes, stating, "I am very concerned about retaliation after you receive this letter." On the other hand, some of the incidents involved the termination of Ms. Metz's son by Chief Sasser. Rumors and innuendos were flying around the fire station both in conversation and in blogs. Some of the problems were appearing in the local news.

19. Respondent, who described Chief Sasser as a friend, mentor, and superior, was upset that Ms. Metz exposed Chief Sasser's alleged Sunshine Law violations. Mr. Myers felt that, by calling attention to Chief Sasser's misconduct, Ms. Metz cast the department and Chief Sasser in a "bad light." Mr. Myers testified: "I was upset that we were getting drug in the paper every week." He wanted the coverage to stop.

20. In this atmosphere, many of the old rumors about Ms. Metz were resurfacing. Respondent was told by another firefighter, that in January 2006, Ms. Metz had gone to Chief Dixon with her resignation in one hand and her application in the other and informed Chief Dixon that she was applying for Ms. Martin's old job. Although all of these rumors were around in January 2006, Respondent claims that, over 4 years later, he was now troubled by them and went to Chief Dixon to inquire about what he had been told. Importantly, Respondent had no direct knowledge of any of the alleged events that occurred in 2005 and 2006.

21. Chief Dixon told Respondent that he had met with Ms. Metz, but that he could not remember whether she had her resignation and application with her at the time. Essentially the conversation was as outlined above. In addition, Chief Dixon discussed the alignment of the Commission on the issue of hiring Ms. Metz that he thought was prevalent in January 2006.

Importantly, Respondent never asked Chief Dixon whether he was pressured by Ms. Metz to hire her for the position. If he had, Chief Dixon would have denied such pressure as he has consistently done during the investigation of this matter by the Ethics Commission. The omission of this question demonstrates that Respondent's belated interest in Ms. Metz's hiring and Ms. Martin's resignation was motivated not because he was a concerned citizen but more by a desire to strike out at Ms. Metz in order to stop her from disparaging the fire department. The deliberate omission of this question was also in reckless disregard of the truth of his allegation that the Chief was pressured by Ms. Metz.

22. Respondent also spoke with Ms. Martin who was known for being overly dramatic and sensitive and who remains bitter about Ms. Metz. She felt Ms. Metz was overly hard on her. She cited no specifics and the evidence did not show any such specifics, other than the alleged harassment occurred in commission meetings. She, also specifically mentioned the November commission meeting when she felt harassed by Ms. Metz because she did not have the financial reports for the meeting completed due to the time off she had taken to help her mother who was ill.

23. Other than these two individuals, Respondent made no inquiry of anyone with direct knowledge of these events. More

importantly, he did not listen to the tapes of the meetings at which such harassment allegedly occurred. If he had he would have learned that Ms. Metz was not rude or hostile to Ms. Martin during these commission meetings. He would have learned that Ms. Metz did not harass Ms. Martin during these commission meetings, but performed her duty to inquire about financial reports that to a CPA were done incorrectly. He would have learned that the District's auditor agreed with Ms. Metz and that Ms. Martin repeatedly failed over several months to incorporate the corrections that Ms. Metz desired and the commission had instructed her to do. In short, Petitioner would have learned that his belief that Ms. Metz harassed Ms. Martin until she resigned was not true. Such a failure to investigate the facts to determine their validity constitutes reckless disregard for the truth especially given Respondent's knowledge that such tapes existed and the length of time that had passed since Ms. Martin's resignation and Ms. Metz's hiring, as well as, the ulterior motive of Respondent to silence Ms. Metz in 2010.

24. Instead of reasonable inquiry regarding his beliefs, on April 7, 2010, Respondent filed an ethics complaint against Petitioner alleging that Petitioner had violated section 112.313(6)(Misuse of Public Office) for actions that had allegedly occurred in 2005 and January 2006 regarding

Ms. Martin's resignation and Ms. Metz employment as Financial Administrator by DFCD. The Complaint alleged that Ms. Metz had used her position as a fire commissioner to harass and belittle Ms. Martin at DFCD commission meetings in order to force her to resign and then used that same position to pressure Chief Dixon to hire her for that same position.

25. To support his allegation, the initial complaint, contained factual allegations confined primarily to the following facts that are not in dispute: (i) Ms. Metz was a Fire Commissioner with the DFCD in 2005; (ii) Wanda Martin was the Financial Administrator for DFCD at that time; (iii) Ms. Metz questioned Ms. Martin about the financial statements at four Fire Commission meetings in the fall of 2005; (iv) Ms. Martin resigned in January of 2006; (v) Ms. Metz subsequently resigned as a Fire Commissioner; and (vi) Ms. Metz was hired as the new DFCD Financial Administrator. Based on these bare facts, Respondent concluded that Ms. Metz "used her position to push Ms. Martin out so that she could step into the job."

26. However, the Commission on Ethics' investigator determined that these allegations were legally insufficient for investigation and told Respondent that the Complaint would be dismissed unless he provided additional information.

27. Respondent called Chief Dixon again; Chief Dixon gave him the same information he had given him before. Importantly,

Respondent, again, failed to inquire about whether Chief Dixon was pressured by Ms. Metz. No other investigation or inquiry was made by Respondent regarding his beliefs. Again, this failure to inquire into essential facts was in reckless disregard of the truth.

28. Instead, Respondent filed an amendment to the complaint on April 30, 2010. Specifically, Respondent again alleged that in 2005 and 2006, some four and a half years prior to his complaint, Petitioner misused her public position as a Fire Commissioner to (a) create a hostile work environment for Ms. Martin thereby forcing Martin to resign as Financial Administrator, and pressured former Chief Dixon to hire Petitioner. Given this timing and his motivation, Respondent's explanation that he did not think it was not his "job" to investigate this matter before he filed his ethics complaint is not credible.

29. After amendment, the Executive Director of the Commission on Ethics found the complaint against Petitioner to be legally sufficient and ordered a preliminary investigation to determine if Petitioner's actions were violative of section 112.313(6).

30. In order to defend herself, Ms. Metz entered into a retainer agreement with the firm of Greenburg Traurig, P.A. on September 14, 2010. Ms. Metz intends to fully pay the bill.

31. As of April 14, 2011, Ms. Metz incurred fees in the amount of \$25,356.76, and costs in the amount of \$1,158.22. Additional fees in the amount of \$17,277.50, and costs in the amount of \$1,418.31 have since been incurred. The parties have stipulated to the reasonableness of the hourly rates, hours expended, and total fees and costs incurred. Given that Respondent's ethics complaint was filed in reckless disregard of whether the complaint contains false allegations, Petitioner is entitled to an award of costs and attorney's fees for her defense against Respondent's complaint and subsequent costs and fees associated therewith in the amounts outlined above.

CONCLUSIONS OF LAW

32. 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. (2009).

33. Section 112.317 provides for an award of attorney's fees and costs in certain ethics actions. Section 112.317(7) provides, in part:

In any case which the commission determines that a person has filed a complaint against a public officer or employees 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 violation of this part, the complainant shall be liable for costs plus

reasonable attorneys' fees incurred in the defense of the person complained against, including costs and reasonable attorneys' fees incurred in proving entitlement to and the amount of costs and fees.

34. As the party asserting entitlement, Petitioner has the burden to prove that an award of attorney's fees and costs is appropriate pursuant to section 112.317(7) and Florida Administrative Code Rule 34-5.0291. 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., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

35. In Brown v. Fla. Comm'n on Ethics, 969 So. 2d 553, 560 (Fla. 1st DCA 2007), the court determined that the elements of a claim by a public official for attorney's fees are (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. The court, also, determined that the actual malice standard of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) does not apply to fees sought pursuant to section 112.317. Id. at 559. The Brown court emphasized that even without the Sullivan standard, "[t]he statute sets a very high bar for recovery of fees." Id. at 560. However, that bar is

met where, as here, the person filing an ethics complaint acts with conscious indifference to the truth of that complaint. Id.

36. Under Brown, it is clear that ethics complaints which allege facts insufficient to prove the elements of a violation of an ethics statute will not automatically render a complaint baseless or wholly untenable. Moreover, it is clear that an award of attorney's fees is not warranted in every situation wherein an ethics complaint is dismissed for lack of probable.

37. However, in this case, the evidence demonstrated that Respondent maliciously filed the complaint in order to silence Petitioner. Additionally, Respondent maintained a conscious indifference to the truth or falsity of his allegations when he failed to reasonably investigate or inquire about the events which occurred in 2005 and 2006. Given the timing of Respondent's complaint and Respondent's failure to inquire, the fact that Respondent provided the names and contact information for potential witnesses, regardless of whether their testimony would be in favor of the allegations, and informed the Ethics Commission about the tapes does not demonstrate that Respondent was concerned with the truth or falsity of his allegations. Therefore, Petitioner is entitled to an award of costs and attorney's fees for her defense against Respondent's complaint and subsequent costs and fees associated therewith in the amount of \$42,634.26 in attorney's fees and \$2,576.53 in costs.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

Recommended that the Commission enter a Final order granting the Petition for Fees and awarding attorney's fees and costs in the amounts noted above.

DONE AND ENTERED this 6th day of July, 2011, in Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
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.