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**BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS**

CONFIDENTIAL

In re: John Kinsey,

Respondent.

Complaint No.: 21-188

ADVOCATE'S RECOMMENDATION

The undersigned Advocate, after reviewing the Complaint and Report of Investigation, filed in this matter, submits this Recommendation in accordance with Rule 34-5.006(3), F.A.C.

RESPONDENT

Respondent, John Kinsey, serves as a member of the Board of Supervisors of the Creekside at Twin Creeks Community Development District and as a member of the Board of Supervisors of the Twin Creeks North Community Development District.

JURISDICTION

The Executive Director of the Commission on Ethics determined that the Complaints were legally sufficient and ordered a preliminary investigation for a probable cause determination as to whether the Respondent violated Section 112.3145(9)(c), Florida Statutes. The Commission on Ethics has jurisdiction over this matter pursuant to Section 112.322, Florida Statutes.

The Report of Investigation was released on April 15, 2022.

ALLEGATION ONE

Respondent is alleged to have violated Section 112.3145(9)(c) [formerly Section 112.3145(8)(c)], Florida Statutes, by willfully failing or refusing to file a 2018 CE Form 1, "Statement of Financial Interests."

APPLICABLE LAW

Section 112.3145(9)(c) [formerly Section 112.3145(8)(c)], Florida Statutes, provides as follows:

If a person holding public office or public employment fails or refuses to file an annual statement of financial interests for any year in which the person received notice from the Commission regarding the failure to file and has accrued the maximum automatic fine authorized under this section, regardless of whether the fine imposed was paid or collected, the commission shall initiate an investigation and conduct a public hearing without receipt of a complaint to determine whether the person's failure to file is willful. Such investigation and hearing must be conducted in accordance with s. 112.324. Except as provided in s. 112.324(4), if the commission determines that the person willfully failed to file a statement of financial interests, the commission shall enter an order recommending that the officer or employee be removed from his or her public office or public employment.

In order to establish a violation of Section 112.3145(9)(c) [formerly Section 112.3145(8)(c)], Florida Statutes, the following elements must be proved:

1. Respondent is currently a public officer or employee.
2. Respondent must have failed or refused to file an annual statement of financial interests.
3. Respondent must have received notice from the commission regarding the failure to file for the corresponding year.
4. The maximum automatic fine authorized for failing to file must have accrued.
5. Respondent's failure to file is willful.

ANALYSIS

Respondent serves as a member of the Board of Supervisors of Creekside at Twin Creeks Community Development District and as a member of the Board of Supervisors of the Twin Creeks North Community Development District, positions requiring the annual filing of a CE Form 1, "Statement of Financial Interest." (ROI 1) His term of service on both boards ends in 2024. (ROI 2, 3) Respondent failed or refused to file his 2018 and 2019 CE Form 1s. (ROI 2, 3) The threshold question is was his failure to file willful.

The Commission on Ethics' (Commission) investigator confirmed that Respondent's home address is 16772 Strasbourg Lane, Delray Beach, Florida 33446-3698, and his office telephone number is 561-289-8552.¹ (ROI 6, 13) The Commission and the Broward County Supervisor of Elections (BCSOE) used the Strasbourg Lane address for all correspondence. (ROI 8, 14)

2018 CE Form 1:

Respondent was required to file a 2018 CE Form 1 within 60 days of September 3, 2019, the date automatic fines of \$25 per day began to accrue. § 112.3145(7)(f), Fla. Stat. (ROI 2) As of November 2, 2019, Respondent accrued the maximum fine of \$1,500. (ROI 2)

The following attempts were made to contact Respondent with a reminder to timely file his 2018 Form. (ROI 6-13)

May 2019 – the BCSOE mailed Respondent an initial filing packet containing a blank 2018 Form and information regarding his obligation to file. (ROI 6)

July 30, 2019 – the BCSOE mailed Respondent a "Delinquency Notice" via certified mail. (ROI 7) The notice was signed for upon receipt; however, the signature is illegible. (ROI 7)

¹ Respondent is an attorney and a member of the Florida Bar. (ROI 13) The Commission's investigator confirmed Respondent's mailing address and office telephone number using the Florida Bar's records. (ROI 13) In addition, the investigator confirmed Respondent's homesteaded property using the Palm Beach County Property Appraiser's records. (ROI 13)

August 19, 2019 – the Commission mailed Respondent a courtesy postcard which was to remind Respondent to file his 2018 Form and advise him about the consequences of not timely filing. (ROI 8)

September 6, 2019 – the Commission mailed Respondent a "Courtesy Notice of Fines Accruing" at \$25 per day. (ROI 9, Exhibit A)

March 19, 2021 – the Commission imposed the \$1,500 fine against Respondent. (ROI 10)

July 19, 2021 – the Commission mailed Respondent a "Notice of Assessment of Automatic Fine" by certified mail informing Respondent that the \$1,500 penalty had been imposed with a notice of his right to appeal the fine. (ROI 11, Exhibit B) The mail was delivered to Respondent's residence and signed for but the signature is illegible. (ROI 11, Exhibit C)

August 16, 2021 – Respondent submitted his 2018 CE Form 1 to the Commission and paid the \$1,500 fine. (ROI 12, Exhibit C)

March 30, 2022 – after the Commission's investigator left two voicemails for Respondent and they subsequently had a telephone conversation. (ROI 13) Respondent "stated he could not answer any questions because he was in line at a security checkpoint at an airport, but indicated he would return the call the following day. (ROI 13) Respondent did not return the call the following day. (ROI 13) The investigator again called Respondent at 561-289-8552 on April 1, 2022 and April 4, 2022 and left a voicemail each time but Respondent never returned the call. (ROI 13)

2019 CE Form 1:

Respondent also was required to file a 2019 CE Form 1 within 60 days of September 1, 2020, the date automatic fines of \$25 per day began to accrue. § 112.3145(7)(f), Fla. Stat. (ROI 3) As of October 1, 2020, Respondent accrued the maximum fine of \$1,500. (ROI 3) Respondent

failed or refused to timely file his 2019 CE Form 1. (ROI 3) The following attempts were made to contact Respondent with a reminder to timely file his 2019 Form. (ROI 14-20)

May 2020 – the BCSOE mailed to Respondent an initial filing packet which contained a blank 2018 CE Form 1 and information regarding his obligation to timely file financial disclosure. (ROI 6)

July 30, 2020 – the BCSOE mailed to Respondent a "Delinquency Notice" by certified mail. (ROI 15) It appears that this mail was not successfully delivered and, therefore, it was not signed. (ROI 15)

August 20, 2020 – the Commission mailed to Respondent a courtesy postcard which was to remind Respondent to file his 2019 Form and advise him about the consequences of not timely filing. (ROI 16)

September 9, 2020 – the Commission mailed Respondent a "Courtesy Notice of Fines Accruing" at \$25 per day. (ROI 17, Exhibit E)

March 11, 2021 – the Commission imposed the \$1,500 fine against Respondent. (ROI 18)

July 20, 2021 – the Commission mailed Respondent a "Notice of Assessment of Automatic Fine" by certified mail informing Respondent that the \$1,500 penalty had been imposed with a notice of his right to appeal the fine. (ROI 19, Exhibit F) The mail was delivered to Respondent's residence on July 23, 2021 and signed for but the signature is illegible. (ROI 19, Exhibit G)

On August 16, 2021, Respondent submitted his 2019 CE Form 1 to the Commission and paid the \$1,500 fine. (ROI 20, Exhibit H)

HISTORY OF FILING

2016 CE Form 1:

Respondent was previously investigated for failure to file his 2016 CE Form 1. (ROI 21) Respondent claimed he did not timely file because he overlooked filing it as a result of medication he was taking, and he was away from his home where he received his mail from July through October 2017. (ROI 21)

On April 17, 2019, the Commission found probable cause to believe Respondent willfully failed to timely file his 2016 Form but took no further action due to the circumstances Respondent presented. (ROI 21) Subsequently, Respondent paid the \$1,500 fine on April 22, 2019 and filed his 2016 Form on March 11, 2018. (ROI 21)

2017 CE Form 1:

On October 22, 2019, the Commission issued a "Determination of Investigative Jurisdiction and Order to Investigate." (ROI 22) On November 7, 2019, the "Report of Investigation" was completed. (ROI 22) Respondent "refused to talk to the investigator when contacted about the 2017 CE Form 1." (ROI 22)

On January 24, 2020, the Commission found probable cause to believe Respondent willfully failed or refused to timely file his 2017 Form. (ROI 22)

A hearing on the matter was scheduled at the Division of Administrative Hearings (DOAH). (ROI 22) On March 2, 2020, the Commission's Advocate filed with DOAH "Advocate's Motion to Cancel Final Hearing, Relinquish Jurisdiction, and Close File" because Respondent had resigned as a member of the Board of Supervisors of Creekside at Twin Creeks Community Development District and as chairman and member of the Board of Supervisors of the Twin Creeks North Community Development District, thus, the Commission no longer had jurisdiction in the

matter. (ROI 22) On June 5, 2020, the Commission dismissed the case. (ROI 22) Respondent filed his 2017 Form on March 11, 2019 and paid the \$1,500 fine on January 13, 2022 after the matter was referred to a collection agency. (ROI 22)

Diane Gillyard is the Director of Administrative Services for Wrathell, Hunt, & Associates, LLC, and serves as the Financial Disclosure Coordinator for both Community Development Districts on which Respondent serves. (ROI 5, 23) Gillyard confirmed that Respondent tendered his resignations from both Community Development Districts on February 28, 2020, with the stipulation that they would be "effective as of the time a quorum of the remaining members of the Board of Supervisors accept it at a duly noticed meeting of the Board of Supervisors." (ROI 23, composite Exhibit I)

On May 19, 2020, both Boards of Supervisors met and voted to accept Respondent's resignations. (ROI 23) Respondent was reappointed to the Board of Supervisors for Creekside at Twin Creeks within three minutes of tendering his resignation. (ROI 23, 24, composite Exhibit J) Respondent also was reappointed to the Board of Supervisors for Twin Creeks North on May 19, 2020; however, the minutes do not reflect how much time occurred between his resignation and reappointment. (ROI 24) After his reappointment to both boards, Respondent filled out oaths of office forms. (ROI 25) Of note, Respondent listed his address as 16772 Strasbourg Lane, Delray Beach, Florida 33446 which is the address used by the BCSOE and the Commission to send all correspondence to Respondent. (ROI 6, 8, 25, Exhibit J, pages J7 and J16)

Respondent's resignation from both boards was initiated by the Commission under Section 112.3145(9)(c), Florida Statutes, to remove Respondent from both District Boards. The pertinent paragraph reads:

- (c) If a person holding public office or public employment fails or refuses to file an annual statement of financial interests for any year

in which the person received notice from the commission regarding the failure to file and has accrued the maximum automatic fine authorized under this section, regardless of whether the fine imposed was paid or collected, the commission shall initiate an investigation and conduct a public hearing without receipt of a complaint to determine whether the person's failure to file is willful. Such investigation and hearing must be conducted in accordance with s. 112.324. Except as provided in s. 112.324(4), **if the commission determines that the person willfully failed to file a statement of financial interests, the commission shall enter an order recommending that the officer or employee be removed from his or her public office or public employment.** The commission shall forward its recommendation as provided in s. 112.324. [e.s.]

The only judgment that can be entered against Respondent when his actions, or lack thereof, are found to be willful is that he be deprived of his office or employment – no more, no less. The object of the statute is clearly for the purpose only of removing officials who willfully violate the law, and that where an official resigns the office, and thus removes himself from his position, the whole purpose of the statute is accomplished.

In comparison, the commonly referred to Florida "resign-to-run" requirement found in Section 99.012(3), prevents an officer, once he/she has chosen to seek another office, from taking measures to ensure the prior position will remain available for him/her in the event of defeat. See Op. Atty. Gen. 75-34 (Feb. 17, 1975). The resignation is irrevocable. § 90.012(3)(b), Fla. Stat. Such limiting provisions are not found in Section 112.3145(9)(c) of the ethics law.

The similarity in both statutes is that the Legislature provided that nothing in either statute prohibits an appointing authority from voluntarily reappointing an officer who has resigned, just as nothing compels such reappointment. See *Id.*; *Gonzalez v. Vogel*, 616 So. 2d 473 (Fla. 2nd DCA 1993), as corrected on denial of reh'g (Mar. 31, 1993); *Ruiz v. Farias*, 43 So. 3d 124, 127 (Fla. 3d DCA 2010)("The object of the [resign to run] law is to prevent persons who are running for a new

position to have a safe haven of a current position to which the candidate can retreat in the event he/she is unsuccessful.").

In this case, the board of supervisors serves as the governing body of the district and sets public policies implemented by staff. Initially, board members are designated and appointed in the formative petition and the rule establishing the district. Thereafter, the members are elected on an at-large basis by the owners of property within the district. §§ 190.006 and 190.007, Fla. Stat.

Upon a vacancy, the remaining Board members are vested with the power to fill a vacant seat by a governing board member who was elected by the qualified electors, within 45 days of the vacancy occurring. § 191.005, Fla. Stat. The newly appointed member serves out the remainder of the unexpired term.² That's what occurred here.

Respondent's resignation from both District Boards and then immediate reinstatement to his former positions, with only a slight break in continuity, allowed him to escape the effects of a violation. However, nothing in the statute prevents such from occurring.

2020 CE Form 1:

On August 17, 2021, Respondent timely filed his 2020 CE Form 1 with the BCSOE. (ROI 26)

Was Respondent's failure to file his 2018 and 2019³ CE Form 1s "willful:"

The Commission may take action against the public official or employee if the failure or refusal to file was "willful." The BCSOE and the Commission carefully recorded all contacts, or lack thereof, with Respondent. By correspondence regarding his 2018 Form dated May 2019 and

² See § 191.005(5), which provides:

"If a vacancy occurs on the board due to the resignation, death, or removal of a board member or the failure of anyone to qualify for a board seat, the remaining members may appoint a qualified person to fill the seat until the next general election, at which time an election shall be held to fill the vacancy for the remaining term, if any. The board shall remove any member who has three consecutive, unexcused absences from regularly scheduled meetings. The board shall adopt policies by resolution defining excused and unexcused absences."

³ Failure to file his 2019 CE Form 1 is Allegation Two.

July 30, 2019 from the BCSOE and August 19, 2019 and September 6, 2019 from the Commission, Respondent had ample opportunity to timely file his 2018 form. By correspondence regarding his 2019 Form dated May 2020 from the BCSOE and August 20, 2020 and September 9, 2020 from the Commission, Respondent had ample opportunity to timely file his 2019 form.

It is reasonable to conclude Respondent was put on notice to timely file his 2018 and 2019⁴ Forms and there is no indication that Respondent did not have the ability to comply with the law. In addition, having been through the actual removal process, Respondent was well aware of the severity of the potential consequences.

ALLEGATION TWO

Respondent is alleged to have violated Section 112.3145(9)(c) [formerly Section 112.3145(8)(c)], Florida Statutes, by willfully failing or refusing to file a 2019 CE Form 1, "Statement of Financial Interests."

APPLICABLE LAW

Section 112.3145(9)(c) [formerly Section 112.3145(8)(c)], Florida Statutes, is set forth above under Allegation One.

ANALYSIS

The facts are set forth above in Allegation One. Respondent willfully failed to file his 2019 CE Form 1.

Therefore, based upon the evidence before the Commission, I recommend that the Commission find probable cause to believe that Respondent violated Section 112.3145(9)(c) [formerly Section 112.3145(8)(c)], Florida Statutes.

⁴ *Id.*

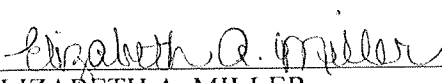
RECOMMENDATION

It is my recommendation that,

1. There is probable cause to believe that Respondent violated Section 112.3145(9)(c) [formerly Section 112.3145(8)(c)], Florida Statutes, by willfully failing or refusing to file a 2018 CE Form 1, "Statement of Financial Interests."

2. There is probable cause to believe that Respondent violated Section 112.3145(9)(c) [formerly Section 112.3145(8)(c)], Florida Statutes, by willfully failing or refusing to file a 2019 CE Form 1, "Statement of Financial Interests."

Respectfully submitted this 2nd day of May, 2022.


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