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MEMORANDUM

TO: Members, Florida Commission on Ethics
FROM: Steven J. Zuilkowski, Deputy Director and General Counsel
SUBJECT: Attorney Fees Petition, Complaint Nos. 21-001 and 21-178 (consolidated)
DATE: November 17, 2022

Accompanying this memorandum please find a draft Order Dismissing Petition For Attorney's Fees and Costs. The draft is for your use in disposition of the attorney's fees and costs petition filed in Complaint Nos. 21-001 and 21-178, In re Cara Higgins.

The draft is intended to assist you and to serve as a working document for your use as you consider (at your public meeting on December 2, 2022) whether to dismiss the petition based on the petition, the Commission's proceedings on the underlying complaint, and argument, if any, which you allow to be presented by the Respondent or the Complainants (Thomas Walker and Jolynn Reynolds). No Commission member has participated in drafting this recommendation or otherwise expressed an opinion on its contents, and you are not bound by my recommendation.

cc (with draft order): Mr. Wayne L. Helsby, Attorney for Respondent
Mr. John J.K. Keller, Attorney for Respondent
Mr. Mark E. Levitt, Attorney for Respondent
Mr. Howard M. Waldman, Attorney for Respondent
Mr. Mark Herron, Attorney for Complainants

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re CARA HIGGINS,	)	
	)	Complaint Nos. 21-001 and 21-178
Respondent.	)	(consolidated)
	)	

ORDER DISMISSING PETITION
FOR COSTS AND ATTORNEY FEES

On Friday, December 2, 2022, the Commission on Ethics met in public session and considered the Petition for Attorney's Fees and Costs (hereinafter "petition") filed by Cara Higgins (the respondent in the original ethics complaints proceeding herein and the petitioner regarding the petition for costs and fees, hereinafter "Higgins") against Thomas Walker and Jolynn Reynolds (the complainants in the original ethics complaints proceeding herein and the respondents regarding the petition for costs and fees, hereinafter "Walker" and "Reynolds").

Higgins, Walker, and Reynolds were provided notice of the place, date, and time of the Commission's public session consideration referenced above.

The petition addresses particular allegations from two separate complaints—one made by Walker, and one made by Reynolds. The complaint by Walker alleges that Higgins, as a member of the Florida Keys Aqueduct Authority (FKAA) Board of Directors, used her position to benefit Jim Reynolds and his engineering firm, All Aspects Inspection Services. The complaint by Reynolds, who is the ex-wife of Mr. Reynolds, similarly alleges that Higgins used her position as a member of the FKAA Board of Directors to benefit Mr. Reynolds and his firm. Further, the complaint alleged that Higgins and Mr. Reynolds were engaged in a personal relationship during the time relevant to these complaints, and that the personal trips that Higgins and Mr. Reynolds took together were in violation of Florida's gifts laws.

The Commission voted to dismiss the petition because the facts and grounds alleged in the petition are not sufficient to state a claim for costs and reasonable attorney's fees, based on the following analysis:

1. Section 112.317(7), Florida Statutes, provides:

> In any case in which the commission determines that a person has filed a complaint against a public officer or employee with a malicious intent to injure the reputation of such officer or employee by filing the complaint with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint contains false allegations of fact material to a violation of this part, the complainant shall be liable for costs plus reasonable attorney's fees incurred in the defense of the person complained against, including the costs and reasonable attorney's fees incurred in proving entitlement to and the amount of costs and fees. If the complainant fails to pay such costs and fees voluntarily within 30 days following such finding by the commission, the commission shall forward such information to the Department of Legal Affairs, which shall bring a civil action in a court of competent jurisdiction to recover the amount of such costs and fees awarded by the commission.

2. Commission Rule 34-5.0291, Florida Administrative Code, provides in pertinent part:

> (2) The Commission shall make such a determination only upon a petition for costs and attorney's fees filed with the Commission by the public officer or employee complained against within 30 days following a dismissal of the complaint. <u>Such petition shall state with particularity the facts and grounds which would prove entitlement to costs and attorney's fees.</u> Staff shall forward a copy of said petition to the complainant by certified mail, return receipt requested.
> (3) If the facts and grounds alleged in the [petition] are not sufficient to state a claim for costs and reasonable attorney's fees, the Commission shall dismiss the petition after an informal proceeding. . . . [Emphasis supplied.]

3. The statute sets a very high bar for the recovery of fees. <u>Brown v. Comm'n on Ethics</u>, 969 So. 2d 553, 560 (Fla. 1st DCA 2007). The elements of a valid claim for costs and attorney fees under Section 112.317(7) are that the ethics complaint was made with a malicious intent to injure the public official's reputation, that the person filing the complaint knew that the statements made about the official were false or made the statements about the official with

reckless disregard for the truth, and that the statements were material. Brown, at 560. This standard for recovery is not a "prevailing party" standard.

Walker

4. Walker filed an ethics complaint against Higgins on January 4, 2021. The allegation of Walker's complaint ostensibly material to a violation of the Code of Ethics is that Higgins used her official position as a member of the FKAA Board of Directors for the benefit of persons connected to her in a private capacity in violation of Section 112.313(6), Florida Statutes. Specifically, the complaint alleges that Higgins orchestrated a process that resulted in a contract being unfairly awarded to Mr. Reynolds and his firm. Notwithstanding Higgins's use of conclusory terms in the petition, such as "false," "reckless," and "misrepresentations," the fees petition in question here fails to substantively allege that the above allegation was known by Walker to be false or was made with reckless disregard for the truth. The petition does not allege that Walker had access to information that directly contradicted this allegation or that he could have discovered where to access such information. Rather, Higgins supports her contention that Walker knew the allegation was false by citing to the findings of the Commission Advocate and the Investigator—findings discernable only after the lawful processes of the Commission had concluded. Walker was entitled to invoke the investigatory processes of the Commission on Ethics to determine whether Higgins's actions as a public officer had resulted in a benefit for Mr. Reynolds (on its face, a situation worthy of inquiry under Section 112.313(6), Florida Statutes) was violative of the statute. Under the costs/fees statute, it is not the responsibility of a complainant to predict the Commission's ultimate disposition of the complaint.

5. Higgins attempts to point to details of the allegation that she alleges are incorrect, but these details are simply that–details–and are not material to a violation of the Code of Ethics,

as required by Section 112.317(7). Black's Law Dictionary, 11th Edition (2019), defines a "material allegation," as "an assertion that is essential to the claim, charge, or defense." See Hadeed v. Comm'n on Ethics, 208 So. 3d 782, 785 (Fla. 1st DCA 2016) (stating Section 112.317 does not permit recovery, even if false allegations are maliciously made, when claims are "immaterial to an ethics violation").

6. The details cited by the petition as being incorrect are that the Project's architect received an unsolicited price proposal from Mr. Reynolds's firm for providing the inspection services work; that Higgins made a last-minute request for documents prior to a relevant board meeting; that the Attorney General found no problems with the FKAA procurement procedure; and that Higgins would not proceed with the selection of the current firm for reasons other than those alleged in the complaint. The petition then rebuts each of these allegations in turn. The specifics of the processes and procedures that Higgins engaged in prior to the award of the contract to Mr. Reynolds's firm, while relevant to the analysis, are not material; it is only material that Higgins was alleged to have taken actions in her official capacity as a public officer to provide a benefit to another. In support of her contention that the allegations above are material, Higgins makes a conclusory statement that because the complaint necessitated an investigation, the allegations are material. This is not the correct standard for determining whether an allegation is material, as the statements above are not essential to the allegation that Higgins used her position to provide a benefit to Mr. Reynolds.

Reynolds

8. Reynolds filed a complaint against Higgins on October 5, 2021. The first ostensibly material allegation regarding a violation of 112.313(6), Florida Statutes, is again that Higgins used her official position as a member of the FKAA Board of Directors for the benefit of persons

connected to her in a private capacity. Specifically, the complaint alleges that Higgins's actions in and around an October 28, 2020 board meeting resulted in the award of an FKAA contract to Mr. Reynolds and his firm. The petition continues to utilize conclusory terms such as "false," "reckless," and "misrepresentations," and does not substantively allege that this allegation was known by Reynolds to be false or was made with reckless disregard for the truth. The petition again does not allege that Reynolds had access to information that directly contradicted her allegation or could have discovered where to access such information.

9. The only other allegations that are material to a violation of the Code of Ethics are those pertaining to the gifts laws. Reynolds's complaint alleges that Higgins violated Sections 112.3148(4) and 112.3148(8), Florida Statutes, by taking trips with Mr. Reynolds and incurring travel, hotel, and dining expenses. The complaint further alleges that these trips were used by Mr. Reynolds to influence the official decision making capacity of FKAA and/or its board to select his firm for the FKAA contract in violation of Sections 112.313(2) and 112.313(4), Florida Statutes. Higgins alleges in the petition that Reynolds filed the complaint without investigating the matter beforehand. A lack of investigation by a complainant is one factor that a court can look to under Section 112.317, as explained in Brown. Brown, at 557. However, upon looking at the complaint, it is clear that Reynolds investigated the financial affairs of Mr. Reynolds to the best of her ability. Reynolds had access to Mr. Reynolds's financial information from their divorce proceeding, and was able to discover that the trips were occurring in the first place from social media. (Complaint No. 21-178, pg. A3 of Amended Complaint). The petition touches on "Ms. Reynold's failure to conduct even the most basic research or investigation into Ms. Higgins's own expenses," but fails to elaborate on if or how Reynolds would have obtained Higgins's private, financial information. Accordingly, Reynolds did not fail to investigate, and the petition does not substantively allege

that Reynolds made the allegations knowing that they were false or with reckless disregard for their truth.

10. Higgins again attempts to point to details of the allegation that she alleges are incorrect, but these details are not material to a violation of the Code of Ethics. The details cited by the petition as being incorrect state that the Project's architect initiated contact to perform the project; that Higgins's actions prematurely pushed FKAA into the bidding phase for the project; and that the contract's prices differed. The petition then rebuts each of these allegations in turn. As previously stated, the specifics of the processes and procedures that Higgins engaged in prior to the award of the contract to Mr. Reynolds's firm, while relevant to the analysis, are not material. It is only material that Higgins was alleged to have taken actions in her official capacity as a public officer to provide a benefit to another.

Conclusion

11. In sum, the petition does not substantively allege that the allegations of fact in the complaint were material to a violation of the Code of Ethics, and the petition does not substantively allege that the allegations were known, when made in the complaints by both Walker and by Reynolds, to be false, or that Walker or Reynolds exhibited reckless disregard for their truth or falsity when made in the complaint.

12. Thus, the petition does not state a claim for costs and fees under Section 112.317(7) as explained in Brown.

Accordingly, the petition is hereby dismissed.

ORDERED by the State of Florida Commission on Ethics meeting in public session on Friday, December 2, 2022.

_____
Date Rendered

_____
John Grant
Chair, Florida Commission on Ethics

THIS ORDER CONSTITUTES FINAL AGENCY ACTION. ANY PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER HAS THE RIGHT TO SEEK JUDICIAL REVIEW UNDER SECTION 120.68, FLORIDA STATUTES, BY FILING A NOTICE OF ADMINISTRATIVE APPEAL PURSUANT TO RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, WITH THE CLERK OF THE COMMISSION ON ETHICS, P.O. DRAWER 15709, TALLAHASSEE, FLORIDA 32317-5709 (PHYSICAL ADDRESS AT 3600 MACLAY BLVD., SOUTH, SUITE 201, TALLAHASSEE, FLORIDA); AND BY FILING A COPY OF THE NOTICE OF APPEAL ATTACHED TO WHICH IS A CONFORMED COPY OF THE ORDER DESIGNATED IN THE NOTICE OF APPEAL ACCOMPANIED BY THE APPLICABLE FILING FEES WITH THE APPROPRIATE DISTRICT COURT OF APPEAL. THE NOTICE OF ADMINISTRATIVE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE DATE THIS ORDER IS RENDERED.