

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

In RE: DIANE V. BENDEKOVIC,)
)
 Respondent.) Case No. 11-1238FE
)
_____)

RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes¹ before Administrative Law Judge Jessica Varn of the Division of Administrative Hearings (DOAH). The hearing was held on July 25, 2011, in Fort Lauderdale, Florida.

APPEARANCES

For Respondent: Jeremy J. Kroll, Esquire
Bogenschutz, Dutko & Kroll, P.A.
Fort Lauderdale, Florida 33301

For Complainant: Robert W. Medoff
7480 Southwest 18th Street
Plantation, Florida 33317

STATEMENT OF THE ISSUE

Whether Respondent is entitled to attorney's fees pursuant to section 112.317(7), Florida Statutes, and Florida Administrative Code Rule 34-5.0291.

PRELIMINARY STATEMENT

On September 27, 2010, Robert W. Medoff (Medoff) filed an ethics complaint against Respondent, Diane V. Bendekovic (Respondent) with the Florida Commission on Ethics (Commission).

The complaint alleged that Respondent misused her public position as a member of the City Council of the City of Plantation in violation of section 112.313(6). Medoff filed an amended complaint on October 21, 2010.

The Commission undertook an investigation of the allegations in Medoff's complaints and, on December 13, 2010, issued a Report of Investigation concluding that the allegations lacked merit. On December 29, 2010, the Commission's Advocate recommended a finding of no probable cause to believe Respondent violated Florida law as alleged in the complaints. Based on the Advocate's recommendation, the Commission, on February 9, 2011, dismissed Medoff's ethics complaints.

On February 24, 2011, Respondent 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 Medoff filed the ethics complaints with malicious intent to injure her reputation, by filing the complaints with knowledge that they contained one or more false allegations, or with reckless disregard for whether the complaints contained one or more false allegations. Medoff disputed the Petition for Costs and Attorney's Fees and the matter was forwarded to DOAH for a hearing.

Pursuant to notice, the final hearing in this case was conducted on July 25, 2011. At the hearing, Respondent called

Medoff, Susan Slattery, Sharon Uria, Rico Petrocelli, and Beau Jackson as witnesses. Additionally, Respondent offered Exhibits 1-11 into evidence. Medoff called Jerry Fadgen, Daniel Keefe, Donald Lunny, and Annette Otiniano as witnesses. Medoff also offered Exhibits 1-4 into evidence.

The transcript of the proceedings was filed with DOAH on August 11, 2011. The parties timely filed Proposed Findings of Fact and Conclusions of Law, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. In September 23, 2010, Respondent was a sitting Councilwoman for the City of Plantation. Medoff has been a resident of Plantation since 1987, oftentimes following local politics. On September 22, 2010, then-sitting Mayor of Plantation, Rae Carol Armstrong, publicly announced her retirement and that she would not seek re-election.

2. On September 22, 2010, Medoff sent Respondent an email containing the subject line: "Tonights [sic] vote". The email read as follows:

Councilwoman Bendekovic:

A vote to give raises tonight is a coffin nail in your political future. By approving the flawed budget, you are explaining why you are not fit to be mayor. I ask you to vote for what is right, even knowing that

your vote has allegedly been bought already.

Warren Medoff

3. Respondent filed her Statement of Candidacy for the position of Mayor of the City of Plantation on September 23, 2010. The election for this position was to be held on March 8, 2011.

4. On or about September 23rd, according to Susan Slattery, the City Clerk for the City of Plantation, Medoff picked up a packet of paperwork for persons who intend to run for the office of Mayor.

5. On September 23, 2010, Medoff sent Respondent an email with a subject line that read: "Time to get out of politics!"

The email read as follows:

Doubleflush,

The Mayor is smart enough to know when to exit gracefully and without an indictment. Learn from the Bell, California indicted current and past elected officials. Official misconduct is a third-degree felony punishable by up to five years in the state Department of Corrections and a \$5,000 fine. Have a nice day.

Warren Meddoff

Medoff explained at the hearing that the nickname "Doubleflush" had been given to Respondent after she had championed double flush toilets as an example of her commitment to the environment.

6. On September 24, 2010, on the internet blog for The Plantation Journal, Medoff posted the following blog entry, referring to Respondent:

She suffers from battered wife syndrome, meglomania [sic] and most likely is compensating for childhood incest and forced deviant [sic] sexual behaviors as an adult. Pity her and pray for her.

7. Also on September 24, 2010, Medoff sent Respondent an email, with a subject line that read: "Nepotism, incest, consorting with criminals". The email stated:

Councilwoman Bendekovic, you are an embarrassment to the City of Plantation.

"I'm up to the challenge," Bendekovic said. She said she learned how to serve the city "like osmosis. It was part of our family. It's an asset to be my mother and father's daughter and because my father was mayor for 24 years and my mother was volunteer extraordinaire."

Nepotism, incest, deviant [sic] sex, solicitation of bribes and consorting with convicted elected officials of the school board are not qualifications for public office.

Warren Meddoff

8. On Saturday, September 25, 2010, Medoff received a phone call from Frances Petrocelli, who had been involved in politics for a long time in the City of Plantation. Mr. Petrocelli told Medoff that he had heard rumors that on Friday, September 24, 2010, Respondent had been campaigning and

soliciting support for her mayoral campaign in areas of City Hall that were restricted from access to the general public. Mr. Petrocelli told Medoff that he had learned this information from an individual who had called Mr. Petrocelli, but he did not know the identity of the caller. Mr. Petrocelli did not know whether the caller had first, second, third or fourth-hand knowledge of the alleged conduct.

9. That same day, Mr. Petrocelli and Medoff exchanged emails regarding the upcoming mayoral election. In those emails, Medoff asked Mr. Petrocelli to identify supporters of Respondent's mayoral campaign.

10. Also on September 25, 2010, Medoff called Sharon Uria, a City Councilwoman, and asked her if she had seen Respondent in City Hall on Friday, September 24, 2010. Ms. Uria replied that she had seen Respondent in the mail room on that day; however, she possessed no knowledge of Respondent's alleged inappropriate conduct.²

11. Medoff conducted no other investigation into the alleged conduct on September 24, 2010. He did not call Respondent, any other City employee, or anyone else who may have actually been in attendance when the alleged conduct took place.

12. Instead of reasonable inquiry regarding the rumor he had heard, Medoff filed a Complaint with the Florida Commission on Ethics. It stated as follows:

This complaint is filed on September 25, 2010, regarding the actions and activities of Diane Veltri Bendekovic, an elected member of the City Council of the City of Plantation, Florida.

Complaint: On Friday, September 24, 2010, during regular business hours, Diane Veltri Bendekovic misused her position of authority, in that as a Member of the City Council of the City of Plantation, Florida, she accessed areas of the City Hall and other City facilities, restricted from access by the general public, to campaign and solicit support from City employees for her campaign to be elected Mayor of the City of Plantation. This position is being vacated by sitting Mayor Rae Carol Armstrong who has announced her retirement at the end of her current term of office. This complaint is being filed in the belief that Ms. Veltri Bendekovic has misused her public position to obtain a special benefit and privilege. Additionally it is alleged that she has taken this action to coerce and intimidate city employees in an effort to obtain an advantage in the upcoming election. It is alleged that Ms. Bendekovic is in violation of 112.313 Standards of Conduct for public officers, employees of agencies, and local government attorneys.

Please note: A former elected official of the City of Plantation has provided the complainant with the statement that Ms. Veltri Bendekovic is being supported in her election bid by Plantation Mayor Armstrong, her husband, former State Representative Tom Armstrong, former State Representative Norman Ostrau, former Broward County Commissioner Scott Cowan and Plantation City Attorney Donald Lunny.

The complainant, Robert Warren Meddoff, does hereby waive his right to confidentiality and authorizes the release of the contents

of this complaint to the media and public at large.

13. Medoff admits that at the time he filed the complaints, he had no personal knowledge of the allegations. He concedes that the information he received from Mr. Petrocelli regarding the alleged events of September 24, 2010, could have been fourth, fifth, or sixth-hand comments. Up to and including the day of the final hearing in this case, he did not identify a single person who possessed first-hand knowledge of the events or conduct that allegedly occurred on September 24, 2010.

14. Medoff publicly declared his intention to run against Respondent for the office of Mayor of the City of Plantation on October 1, 2010, just four days after filing the ethics complaint.

15. On October 4, 2010, a staff attorney for the Commission on Ethics wrote Medoff a letter regarding his complaint. The letter informed Medoff that more information was needed in order to better understand whether Respondent's alleged behavior was in violation of any law. First, the Commission asked Medoff to identify a City rule, policy, or ordinance that prohibited Respondent from engaging in campaigning in the "restricted" areas. Second, the Commission asked Medoff to provide more detail as to the events that had allegedly occurred on September 24, 2010. Specifically, the

Commission asked Medoff to identify Respondent's conduct which could be considered coercive and intimidating.

16. On October 26, 2010, the Commission received Medoff's Amended Complaint. Medoff attached a copy of section 106.15, Florida Statutes, a copy of Respondent's Statement of Candidate wherein she confirms that she understands the requirements of Chapter 106, Florida Statutes, and various sections of the City of Plantation Employee Handbook. Medoff also added the following details to the complaint:

It has been stated to the complainant that, "Diane Bendekovic went to city employees and made the statement that if they did not support her and that if Councilman Jerry Fadgen was elected Mayor, that they would be fired."

The Commission should note that a criminal investigation has been instituted of the actions of Ms. Bendekovic by the Special Prosecution Unit of the Office of the State Attorney, Seventeenth Judicial Circuit of Florida.

Attached is an article from the Sun-Sentinel Newspaper dated September 24, 2010 by which she claims her nepotism as her primary qualification for office.

Attached is a video of Ms. Bendekovic admitting [*sic*] violation of the Sunshine Law. Additional information in the form of emails to and from City of Plantation Officials and Law Enforcement outlining potentially unethical actions of Ms. Bendekovic over a two year period prior to this incident is available should the Commission elect to proceed to an investigative stage.

17. Investigator Beau Jackson conducted an investigation of Medoff's complaints. During the course of his investigation, Jackson spoke with Medoff by telephone; however, Medoff does not recollect this telephone conversation. Investigator Jackson's report indicates that Medoff told him that he had no personal first-hand knowledge of the allegations he made in the complaints, and he had no additional information beyond what he had provided in the complaints. He admitted that the complaints were based on rumors, but added that the alleged inappropriate conduct had occurred in the City's Finance Department, and that perhaps those employees had direct knowledge of the alleged activity. Medoff identified Mr. Petrocelli, Ms. Uria and Ms. Slattery as people who might have knowledge of the alleged misconduct on September 24, 2010.

18. Investigator Jackson spoke with Ms. Uria and Mr. Petrocelli, who indicated that they had no personal knowledge regarding the alleged misconduct, and they were unable to identify any City employees who might have knowledge of the alleged misconduct. Jackson also canvassed City employees, to attempt to find anyone who might have had knowledge of the September 24, 2010, events. He found no eye witnesses, nor anyone with personal knowledge of the alleged misconduct.

19. None of Medoff's witnesses (Jerry Fadgen, Daniel Keefe, Donald Lunny, and Annette Otiniano) had personal

knowledge of Respondent's alleged misconduct in September 2010, and Medoff had not spoken to any of them regarding the alleged misconduct prior to filing the ethics complaint. During the time between his first complaint and his amended complaint, his efforts to gain more evidence of the alleged misconduct, by speaking to more people, only led to more rumors and second, third, or fourth-hand comments. No one with first-hand knowledge of the alleged misconduct was ever identified.

20. At hearing, Medoff explained that he never felt it was his duty to investigate the veracity of his complaints; rather, he felt that this duty fell upon the Commission on Ethics.

21. The omission of any investigation prior to filing his initial complaint constitutes reckless disregard for the truth. The offensive and disparaging emails and blog entries authored by Medoff and directed at Respondent, coupled with the fact that Medoff eventually became Respondent's opponent in the mayoral race, demonstrate his malicious intent to injure Respondent's reputation during the course of the mayoral race.

22. In order to defend herself, Respondent entered into a retainer agreement with the firm of Bogenschutz, Dutko & Kroll, P.A. As of the date of the hearing, Respondent had incurred fees in the amount of \$37,088.00, and costs in the amount of \$5,275.55. Additional fees in the amount of \$7,525.00 and \$1,570.00 in costs 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 Medoff's ethics complaint was filed with malicious intent to injure Respondent's reputation by filing complaints with reckless disregard of whether the complaints contained false allegations, Respondent is entitled to an award of attorney's fees and costs for her defense against Medoff's complaints and subsequent costs and fees associated therewith.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding, pursuant to sections 120.569 and 120.57(1), Florida Statutes.

24. Section 112.317(7), Florida Statutes, provides, in part:

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.

25. Florida Administrative Code Rule 34-5.0291 also provides as follows:

34-5.0291 Award of Attorney's Fees.

(1) 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.

* * *

(4) The respondent has the burden of proving the grounds for an award of costs and attorney's fees.

26. Respondent has the burden of proof by a preponderance of the evidence in this proceeding. Fla. Admn. Code R. 34-5.0291(4), and § 120.57(1)(j), Fla. Stat. (2010).

27. In Brown v. Fla. Comm'n on Ethics, 969 So. 2d 553, 560 (Fla. 1st DCA 2007), the complainant had filed an ethics complaint without checking into the facts, and admitted that he conducted no investigation prior to filing the ethics complaint. The court determined that the elements of a claim by a public

official for costs and attorney's fees are (1) the complaint was made with a malicious intent to injure the official's reputation; (2) the person filing the complaint knew that the statements made about the official were false or made the statements with reckless disregard for the truth; and (3) the statements were material. In examining the phrase "reckless disregard for the truth," the Brown court defined it as a conscious indifference to the truth. Id. The court also determined that the actual malice standard of New York Times Co. v. Sullivan, 376 U.S. 254, 82 S. Ct. 710, 11 L. Ed. 2d 686 (1964), does not apply to fees sought pursuant to section 112.317(7), Florida Statutes. Id. at 559. The Brown court emphasized that even without the Sullivan standard, the statute sets a high bar for recovery of fees. Ethics complaints which allege facts insufficient to prove the elements of a violation of an ethics statute will not render a complaint baseless. Moreover, an award of attorney's fees is not warranted in every situation wherein an ethics complaint is dismissed for lack of probable cause.

28. However, in this case, the evidence demonstrated that Medoff maliciously intended to injure Respondent's reputation during the course of the mayoral race. The content and tone of Medoff's emails to Respondent, and the blog entries he authored for the public at large to read, reveal a desire to impugn

Respondent's reputation. Medoff demonstrated a conscious indifference to the truth or falsity of his allegations when he failed to make any independent effort to verify any of the facts in the ethics complaints.

29. Having proven the required elements as set forth in section 112.317(7), by a preponderance of the evidence, Respondent is entitled to an award of attorney's fees and costs for her defense against Medoff's complaints and subsequent fees and costs associated therewith in the amount of \$44,613.00 in attorney's fees and \$6,845.55 in costs.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a Final Order granting the Petition for Costs and Attorney's Fees in the amounts noted above.

DONE AND ENTERED this 29th day of August, 2011, in
Tallahassee, Leon County, Florida.



JESSICA E. VARN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of August, 2011.

ENDNOTES

^{1/} Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2010).

^{2/} There was conflicting testimony as to the content of this conversation. Medoff recalls that at the time of this phone conversation, Ms. Uria had also heard the rumor about Respondent's alleged inappropriate conduct on September 24, 2010, but that she could not identify who had told her about the alleged conduct. Ms. Uria's testimony is credible and consistent with the sworn statement she gave Investigator Jackson.

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.