

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GAYLORD A. WOOD, JR.,

Petitioner,

vs.

Case No. 17-1594F

R.C. "RICK" LUSSY,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (Division) conducted the final hearing in this matter on May 12, 2017, by video teleconference at locations in Ft. Myers, Ft. Lauderdale, and Tallahassee, Florida.

APPEARANCES

For Petitioner: John Christopher Woolsey, Esquire
Wood and Stuart, P.A.
Post Office Box 1987
Bunnell, Florida 32110

For Respondent: Richard Charles Lussy, pro se
General Manager as Owner
2840 Shore View Drive, Suite 2
Naples, Florida 34112

STATEMENT OF THE ISSUE

(A) Is the Petitioner, Gaylord A. Wood, Jr., entitled to an award of fees and costs from Respondent, R.C. "Rick" Lussy, under section 106.265(6), Florida Statutes (2016),^{1/} for filing a

complaint against Mr. Wood "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 chapter [chapter 106] or chapter 104?"

(B) If Mr. Wood is entitled to an award of fees and costs, what is the proper amount of fees and costs to be awarded?

PRELIMINARY STATEMENT

Mr. Lussy filed a "Confidential Complaint Affidavit Form" (Complaint Affidavit) against Mr. Wood with the Florida Elections Commission (Commission). By letter dated October 19, 2016, the Commission advised Mr. Lussy that his Complaint Affidavit was legally insufficient. The Commission provided Mr. Lussy an opportunity to submit additional information. He filed an amended Complaint Affidavit. By a November 15, 2016 letter, the Commission advised Mr. Lussy that his amended Complaint Affidavit was legally insufficient.

Mr. Wood petitioned for award of attorney's fees and costs. He amended the petition. The Commission issued an order finding that Mr. Wood's amended petition made a prima facie showing of entitlement to costs and attorney's fees. On March 16, 2016, the Commission referred the matter to the Division to conduct a final hearing.

The undersigned held the hearing on May 12, 2017. Mr. Wood presented his testimony and testimony from J. Christopher Woolsey and Mark Herron. Mr. Wood's Exhibits C, F, G, and I were admitted into evidence. Mr. Lussy presented his testimony and testimony of Gary Michael Siciliano. Mr. Lussy's Exhibits 4 through 6 and 26 were admitted into evidence. The parties timely filed proposed recommended orders, which have been considered.

Mr. Lussy was unable to present testimony from Douglas Sinclair and David J. Glantz because they did not appear. The record does not indicate that they were lawfully served with a subpoena. Mr. Lussy did not request any relief for their non-appearance. Mr. Lussy placed a summary of their expected testimony on the record. The testimony would not have been relevant in this proceeding.

FINDINGS OF FACT

1. On August 24, 2016, Mr. Lussy filed a Complaint Affidavit against Mr. Wood with the Commission. Mr. Lussy's Complaint Affidavit identified the person against whom the complaint was brought as "Gaylord A. Wood Jr. Esq., Florida [sic] FBN 089465, lawyer for Abraham Skinner Incumbent." The seven-page affidavit does not allege that Mr. Wood is an elected official or that he has been a candidate for elected office.

2. Mr. Wood is not an elected official. Mr. Wood has never run for elected office. He represented Abraham Skinner in Florida Elections Commission Case No. 16-245. The case arose out of a complaint by Mr. Lussy. Mr. Skinner was the elected property appraiser for Collier County. Mr. Wood was successful in that representation. The Commission dismissed Mr. Lussy's complaint.

3. Mr. Lussy is a property appraiser. He was going to be an expert witness for the plaintiff in a case where Mr. Wood represented the elected Property Appraiser for Collier County. Mr. Wood deposed Mr. Lussy. Shortly after the deposition, Mr. Lussy's client dismissed his lawsuit. Mr. Wood also filed a complaint against Mr. Lussy with the Appraisal Institute, questioning Mr. Lussy's fitness to provide property appraisals.

4. Because of these experiences, Mr. Lussy holds ill will for Mr. Wood. He acted with malice in filing his complaint. This invective and vitriol of statements in the Complaint Affidavit manifest malice. The statements include referring to "empty boasting" by Mr. Wood, stating that Mr. Wood is a "cartel representative lawyer," accusing Mr. Wood of manipulation and falsification of public records, describing a response to a public records request as malicious, describing Mr. Wood as "a classic corrupt persuader," charging Mr. Wood with obstruction

of justice, and asserting Mr. Wood participated in criminal acts. Mr. Lussy augments these claims with attacks against Mr. Wood's client accusing him of "womanizing," sexual harassment, boring public officials, wrongly denying portability of a homestead exemption, and by referring to him as "Dishonest Abe."

5. When Mr. Lussy filed the complaint against Mr. Wood, he knew that Mr. Wood was not an elected official or candidate for elected office.

6. The letter from the Commission's Executive Director advising Mr. Lussy that his amended Complaint Affidavit was legally insufficient accurately describes it. The letter states: "While almost impossible to discern, the essential allegation of this complaint, as amended, appears to be that Respondent conspired with Property Appraiser Abraham Skinner to manipulate and falsify public records and obstruct justice."

7. Mr. Lussy offered no evidence tending to prove the allegations described.

8. Mr. Lussy's Complaint Affidavit refers to sections 104.051, 104.011, and 104.091, Florida Statutes.

9. Section 104.051 imposes penalties upon any official who violates the election code, performs his or her duty fraudulently or corruptly, or attempts to influence or interfere with an elector voting a ballot.

10. Section 104.011 prohibits providing false information in connection with voting or voter registration.

11. Section 104.091 makes knowingly aiding, abetting, or advising violation of the election code an offense.

12. In this proceeding, Mr. Lussy offered no evidence indicating that he had reason to believe that Mr. Wood was an elected official or a candidate for elected office. His Complaint Affidavit demonstrates that he knew Mr. Wood served as a lawyer for Mr. Skinner.

13. Mr. Wood is not an "official" as the word is used in chapter 104.

14. Mr. Lussy offered no evidence to support the allegations of his Complaint Affidavit. He offered no evidence that Mr. Wood violated sections 104.051, 104.011, or 104.091. Mr. Lussy offered no evidence that would support a finding that he could reasonably think that Mr. Wood violated the prohibitions of those statutes. Mr. Lussy offered only his bare and assertions. Most deal with complaints about property appraisals by Mr. Skinner, responses to requests for documents under Florida's Public Records Act, and Mr. Skinner's maintenance of the property tax rolls.

15. Mr. Lussy filed his Complaint Affidavit with reckless disregard for whether the complaint contained false allegations

of fact. He also filed it with reckless disregard to the absence of allegations of violations of the election code by Mr. Wood. Mr. Lussy acted with ill will or malice.

16. The statement of attorney time spent on Mr. Wood's behalf reasonably reports time spent on routine activities such as reviewing orders and drafting motions. The time spent preparing for the hearing is also reasonable. The bulk of Mr. Lussy's filings in this proceeding and before the Commission were lengthy, difficult to read, confusing, and disorganized. This made reading and evaluating Mr. Lussy's filings time-consuming. The nature of Mr. Lussy's filings and the multiple filings related to Mr. Lussy's misuse of subpoena authority made this proceeding more time consuming than it otherwise would have been.

17. With the exception of the entries discussed below, the time recorded as expended on the tasks and activities is reasonable. The unrebutted testimony of Mark Herron, Esquire, accepted as an expert in attorneys' fees in administrative proceedings, establishes the reasonableness of the fees claimed.

March 16 - .125 - File Amended Petition to Award Fees and Costs (time should be attributed to representation before the Commission not the Division)

March 23 - .5 (reduce to .3) - Read Initial Order

March 27 - 3.5 (reduce to 1.0) - Read/Dissect Respondent's
Public filing

March 27 - 4.0 (reduce to 1.5) - Read/Dissect Counterclaim

April 3 - 6.5 (reduce to 2.0) - Read/Dissect Lussy
Emergency Answer to Scheduling Order

18. Mr. Herron testified that the .5 hours spent on April 24 to draft and file the witness and exhibit list should be increased to 1.0 hours. The proposal is not accepted. First, the witness and exhibit list was elementary and should have been simple to prepare, as apparently it was. Second, the statute provides for award of fees incurred. The proposed increase of .5 hours does not represent a fee incurred.

19. The hearing in this matter lasted four hours. The time was not included in the itemized statement filed before the hearing for obvious reasons. The time was, however, spent and is a reasonable amount of time for the hearing. Four hours are added to the time used to calculate attorney's fees.

20. Mr. Wood seeks payment for nine hours of Mr. Woolsey's time identified as "drive time." Florida's Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, III(D)1, identifies attorney travel time as a litigation cost that should not be recovered. The nine hours are not included in the hours for which attorney's fees are awarded.

21. Mr. Lussy offered no evidence about what would be a reasonable number of hours for an attorney to work to represent Mr. Wood in the proceeding before the Commission or the proceeding at the Division. He also offered no evidence about what a reasonable hourly rate for an attorney would be.

22. The reasonable hourly rate in this jurisdiction for proceedings before administrative agencies and the Division ranges between \$250.00 to \$400.00 per hour, depending on the lawyer's degree of expertise. Mr. Woolsey is an experienced lawyer. However, he has no litigation or administrative law expertise. Handling this case also did not interfere with Mr. Woolsey's ability to attract or retain other clients. The representation was not unduly time-consuming or difficult. Mr. Woolsey's normal hourly rate for public officials is \$200.00 per hour. His normal hourly rate for private clients is \$350.00. Awarding fees based on a rate of \$250.00 per hour is reasonable in this matter.

23. The reasonable time spent on proceedings before the Commission is 8.025 hours. The reasonable time spent on proceedings before the Division is 35.425 hours. The total time reasonably spent for representation of Mr. Wood in this proceeding is 43.45 hours. The total number of hours do not reconcile with the totals shown in Petitioner's Amended Itemized

Statement of Costs and Reasonable Attorney's Fees because the itemized statement contains mathematical errors.

24. Mr. Wood's Proposed Recommended Order seeks payment of costs in this matter. He, however, did not offer evidence of costs at the hearing. He only provided information about costs in a post-hearing statement filed June 16, 2017.

25. The amount of reasonable attorney's fees for Mr. Woolsey's representation of Mr. Wood in this proceeding is \$10,862.50.

CONCLUSIONS OF LAW

Jurisdiction

26. The Division has jurisdiction over the parties to and the subject matter of this matter. §§ 120.569, 120.57(1), and 120.595, Fla. Stat.; Fla. Admin. Code R. 2B-1.0045.

Basis for Recovery of Fees

27. Mr. Wood proceeds under section 106.265(6). It provides for recovery of attorney's fees and costs as follows:

In any case in which the commission determines that a person has filed a complaint against another person with a malicious intent to injure the reputation of the person complained against 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 chapter or chapter 104, the complainant shall be liable for costs and 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.

28. The First District Court of Appeal interpreted the identical language of section 112.317, Florida Statutes, in Brown v. Commission on Ethics, 969 So. 2d 553 (Fla. 1st DCA 2007). The opinion holds that the person seeking fees does not have to prove actual malice motivated the complainant.

29. As described in the Findings of Fact, Mr. Lussy filed his Complaint Affidavit against Mr. Wood with reckless disregard for whether the complaint contained false allegations of material fact. Ill will or malice motivated him. The requirements of section 106.265(6) are met.

Principles Governing Fee Awards

30. Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), as modified by Standard Guaranty Insurance Company v. Quanstrom, 555 So. 2d 828 (Fla. 1990), requires using a lodestar approach and considering the eight factors articulated in Rule 4-1.5(a), Florida Rules of Professional Conduct. Sunshine State Ins. Co. v. Davide, 117 So. 3d 1142, 1144 (Fla. 3d DCA 2013).

31. The party seeking fees must prove that the fees claimed are reasonable. See City of Miami v. Harris, 490 So. 2d 69 (Fla. 3d DCA 1985). The evidence must be sufficient to show

what services were performed. See Warner v. Warner, 692 So. 2d 266, 268 (Fla. 5th DCA 1997); Tucker v. Tucker, 513 So. 2d 733, 735 (Fla. 2d DCA 1987). Useful evidence includes invoices, records, testimony, and other information detailing services provided. Braswell v. Braswell, 4 So. 3d 4, 5 (Fla. 2d DCA 2009).

32. Records should permit a judge to feasibly and expeditiously engage in review. They must provide sufficient detail to permit appraisal of their reasonableness. ECOS, Inc. v. Brinegar, 671 F. Supp. 381, 394 (M.D.N.C. 1987); Accord Smith v. Smith, 764 So. 2d 650, 651 (Fla. 1st DCA 2000); Cf. N.D. Fla. Loc. R. 54.1(c) ("A detailed record must provide enough information to allow the Court to evaluate reasonableness; an entry like 'research' or 'conference' without a description of the subject will not do.").

33. Petitioner's Amended Itemized Statement of Costs and Reasonable Attorneys' Fees (Pet. Ex. I) records descriptions of the activities performed and the time spent on each activity. The statement provides sufficient detail to allow evaluation of the reasonableness of the activities and the time spent performing them.

34. Application of the standards articulated by Florida Patient's Compensation Fund v. Rowe and expressed in Rule 4-1.5(a), Florida Rules of Professional Conduct, to the findings

results in the conclusion that Mr. Woolsey reasonably spent 43.45 hours representing Mr. Wood before the Commission and the Division. Consideration of the factors and the findings results in a conclusion that \$250.00 per hour is a reasonable rate for Mr. Woolsey's legal services. Mr. Wood incurred reasonable attorney's fees of \$10,862.50 defending against Mr. Lussy's Complaint Affidavit to the Commission.

35. On June 16, 2017, Mr. Wood filed Petitioner's Statement of Post-Hearing Costs and Reasonable Attorneys' Fees. This is more than a month after the hearing adjourned. Consequently, there is no testimony to support a finding that the activities were performed, that the time spent on the activities was reasonable, that the costs were incurred, or that the documents evincing the costs satisfy the requirements of the Florida Evidence Code. In addition, Mr. Lussy has not had an opportunity to present evidence contesting the reasonableness of the additional fees and costs or to cross-examine any witness testifying to support them. Consequently, the record does not prove that the 11 hours or costs claimed in the post-hearing statement are reasonable.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Florida Elections Commission enter an Order awarding Petitioner Gaylord A. Wood, Jr.,

attorney's fees in the amount of \$10,862.50 against Respondent,
R.C. "Rick" Lussy.

DONE AND ENTERED this 21st day of July, 2017, in
Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of July, 2017.

ENDNOTE

^{1/} All references to the Florida Statutes are to the 2016
codification unless otherwise noted.

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.