



FEC Case Number 16-357 : Respondent's Exception to Recommended Order

J. Christopher Woolsey

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08/01/2017 12:14 PM

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1 Attachment



Respondent_s_Exceptions_to_DOAH_Recommended_Order_FEC_Case_16-357.pdf

Good Afternoon,

Enclosed please find Respondent's Exception to the Recommended Order. I will keep the original physically signed document for the duration of the proceeding, any subsequent appeal or subsequent proceeding in that cause; and will produce it upon the request of another party.

Thank you,

J. Christopher Woolsey

Wood & Stuart, P.A.

P.O. Box 1987

Bunnell, FL 32110

STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION

FEC Case No: 16-357
DOAH Case No. 17-1594F

IN RE: Gaylord A. Wood, Jr.
Respondent

RESPONDENT'S EXCEPTION TO RECOMMENDED ORDER

Respondent, GAYLORD A. WOOD, JR., pursuant to Section 120. 57(1)(k), Florida Statutes, respectfully takes exception to the following paragraph of the Recommended Order in this cause:

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. (emphasis supplied)

1. The Administrative Law Judge (ALJ) conducted the hearing in this case on Friday, May 12, 2017. It was necessary to have a transcript of the testimony in order

to make proper reference thereto in the proposed Recommended Orders and so this agency would have a complete record of the proceedings sufficient to enter its Order. The ALJ asked several times whether Respondent intended to have a transcript of the hearing prepared. (Transcript- pages 10, 137) In his Notice of Filing Transcript dated June 7, 2017, the Administrative Law Judge set the date of June 16, 2017, for the parties to file Proposed Recommended Orders. Petitioner and Respondent both filed their Recommended Orders on that date. Respondent waives the additional attorneys' fees relating to the time expended by his counsel after the hearing.

THE ALJ SHOULD HAVE TAXED THE COST OF THE TRANSCRIPT

2. On June 16, 2017, Respondent filed a statement of post-hearing costs and reasonable attorneys' fees, copy attached. Attached to the statement of post-hearing costs was the invoice to Wood & Stuart, P.A. from the court reporter, Martina Reporting Services, Fort Myers, dated June 1, 2017 in the amount of \$813.75 for the original and one copy of the 155 page transcript of the hearing. The original Transcript was filed with the Clerk of DOAH for the use of the Administrative Law Judge and this Commission. The reporter's invoice is proof of the cost incurred. There is no way that Respondent could have known of the amount of the court reporter's bill and presented testimony to that effect at the May 12 hearing until the transcript was prepared, because the reporter bills by the page.

3. Because of the necessity of referencing the testimony in the proposed Order to the transcript of testimony, it was reasonably necessary for Respondent to submit the transcript. An invoice from a court reporter is a business record that is clearly admissible under the Florida Evidence Code, §90.803(6), Florida Statutes. This amount is \$5.25 per page, well within the acceptable range for court reporters. Petitioner did not object to any of the amounts in the court reporter's statement. The burden of proving that the court reporter's charges were unreasonable is on the Petitioner, Mr. Lussy, who did not object to the charge or the amount thereof.

**THE ALJ SHOULD HAVE TAXED THE FEES OF RESPONDENT'S
EXPERT AS COSTS**

4. Also attached to Respondent's statement of post-hearing costs was the invoice from Respondent's expert witness as to fees, Mark Herron, Esquire, who charged respondent \$2,400 for 8 hours of professional service at \$300 per hour. The Commission is well aware of the qualifications, experience and billing of Mr. Herron, who has been admitted to the Florida Bar for forty-two years and practices extensively before this Commission.

5. There is no way that Respondent could have known the amount Mr. Herron would have charged on the day of the hearing before the Division of Administrative Hearings so it would have not been possible to present a bill from Mr. Herron at that

time.

6. If Mr. Lussy wished to challenge Mr. Herron's fees, it was incumbent upon him to object to the same and ask the ALJ for a hearing on the matter, which he did not do. What the ALJ in effect is saying is that it was the responsibility of Respondent to present yet another expert as to the reasonableness of Mr. Herron's fees, and then still another expert as to the reasonableness of that expert's fees, and so on.

7. It is clear beyond cavil that the fees of an expert testifying as to the reasonableness of attorneys' fees in this case is taxable as costs. Section 92.23(2), Florida Statutes:

Any expert or skilled witness who shall have testified in any cause shall be allowed a witness fee including the cost of any exhibits used by such witness in an amount agreed to by the parties, and the same shall be taxed as costs.

See also, *Travieso v. Travieso*, 474 So.2d 1184, 1186 (Fla. 1985).¹ A fee for an attorney who appears as an expert witness as to the amount of reasonable attorneys' fees - which was Mr. Herron's mandate - is considered a cost, not an attorneys' fee.

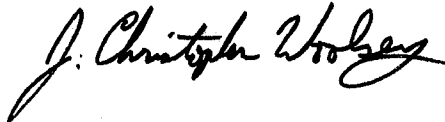
¹ "We hold that pursuant to section 92.231, expert witness fees, at the discretion of the trial court, may be taxed as costs for a lawyer who testifies as an expert as to reasonable attorney's fees."

CONCLUSION

The Commission should disapprove Paragraph 35 of the ALJ's Recommended Order and either remand the matter to the Division of Administrative Hearings with instructions for the ALJ to tax costs of the transcript and the costs of Mark Herron's testimony as to the amount of reasonable attorneys' fees, or simply tax those costs itself unless Petitioner Lussy timely objects to the reasonableness of the costs for the transcript and Mr. Herron's fees and provides an Affidavit of a Florida attorney to the effect that Mr. Herron's fees are not reasonable.

Dated this 1st. day of August, 2017.

Respectfully submitted,



J. CHRISTOPHER WOOLSEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Exception to Recommended Order has been furnished via US Mail and E-mail this 1st. day of August, 2017 to:

Richard Charles "Rick" Lussy
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email: ricklussy@yahoo.com

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