

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LINDA YATES,

Petitioner,

vs.

Case No. 17-1593F

KATHY SCHURE,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in Sarasota and Tallahassee, Florida, on June 14, 2017, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Linda M. Yates, pro se
6475 Munsing Avenue
North Port, Florida 34291

For Respondent: Kathy Schure, pro se
3720 West Price Boulevard
North Port, Florida 34286

STATEMENT OF THE ISSUE

Whether Petitioner is entitled to costs and reasonable attorney's fees pursuant to section 106.265(6), Florida Statutes (2016),^{1/} and Florida Administrative Code Rule 2B-1.0045.

PRELIMINARY STATEMENT

On August 22, 2016, Kathy Schure filed a complaint (Complaint) with the Florida Elections Commission (Elections Commission) against Linda M. Yates, who serves as an elected member of the North Port, Florida, city commission. The Complaint alleges that Ms. Yates committed "Sunshine Law and Ethics Violations." The Elections Commission dismissed the Complaint on the grounds that the Complaint alleges matters that are not within the jurisdiction of the Elections Commission. Following dismissal of the Complaint, Ms. Yates filed with the Elections Commission a Petition for Costs and Attorney's Fees wherein, pursuant to section 106.265 and rule 2B-1.0045(1), she seeks reimbursement of her expenses from Ms. Schure. Ms. Schure disputed the Petition for Costs and Attorney's Fees and the matter was forwarded to DOAH for formal hearing.

At the hearing, Ms. Yates testified and presented the testimony of six witnesses (including the testimony of Ms. Schure). Ms. Schure testified on her own behalf and called no other witnesses. Ms. Yates' Exhibits 2 through 4, 6, 7, 9, 10, 12 through 15, and 17 through 19 were admitted into evidence. Ms. Schure's Exhibits A through F, and I were admitted into evidence.

A Transcript of the formal hearing was filed on July 10, 2017. Ms. Yates filed a Proposed Recommended Order on July 20,

2017, and Ms. Schure filed what is titled "Final Argument" on July 17, 2017.

FINDINGS OF FACT

1. Linda Yates is an elected member of the city commission for North Port, Florida. Ms. Yates was first elected to the North Port city commission in 2010, and was re-elected to the same office in 2014.

2. On August 22, 2016, Kathy Schure, who at all times relevant hereto was a resident of the City of North Port, filed a Complaint with the Elections Commission alleging, in material part, the following:

Sunshine Law and Ethics Violations by City of North Port Commissioner Linda M. Yates covering the period June 1, 2012 to July 20, 2016.

* * *

This writing is to bring a formal complaint and a request for investigation into illegal and unethical activity of Commissioner Linda M. Yates through the use [of] personal email servers, Tor Browsers, relay internet list servers, and intermediaries to knowingly violate FL 286 - Open Meetings Law and FL 119 - Florida Public Records Law. Additionally, Commissioner Jacqueline Moore appears to have participated in "secret meetings and communications" with Commissioner Yates as recipient of emails and texts directly and through intermediaries.

3. On the complaint form, Ms. Schure identified Ms. Yates as a "candidate" for the city commission for the City of North

Port. Although Ms. Yates was a member of the city commission on August 22, 2016, she was not a candidate for this office as noted by Ms. Schure in the Complaint.

4. The complaint form used by Ms. Schure to assert her allegations against Ms. Yates directs the complainant (Ms. Schure) to “[p]lease list the provisions The Florida Elections Code that you believe the person named above may have violated [and that] [t]he Commission has jurisdiction only to investigation [sic] . . . **Chapter 104, Chapter 106, and Section 105.071, Florida Statutes.**”

5. The Complaint filed by Ms. Schure makes no reference to chapter 104, chapter 106 or section 105.071. The Complaint does, however, reference chapters 286 and 119, Florida Statutes, and case law dealing with Florida’s open government laws.^{2/}

6. By correspondence dated August 25, 2016, the Elections Commission informed Ms. Yates that Ms. Schure filed a complaint against her and that she had “14 days after receipt of the complaint to file an initial response,” and that the Elections Commission would “not determine the legal sufficiency of the complaint” until expiration of the referenced 14-day response period.

7. On August 28, 2016, Ms. Yates hired Douglas A. Daniels, Esquire, an attorney in good standing with The Florida Bar, to represent her before the Elections Commission. Mr. Daniels

charged Ms. Yates \$400.00 per hour for work related to the Complaint filed by Ms. Schure.

8. By correspondence dated October 20, 2016, the Elections Commission informed Ms. Schure of the following:

The Florida Elections Commission has received your complaint alleging violations of Florida's election laws. I have reviewed your complaint and find it to be legally insufficient.

This complaint was received by the Florida Elections Commission on August 22, 2016. The cover page, which was an FEC complaint form, named Linda Yates as the Respondent. Attached to the complaint form was [a] second complaint form indicating a different Respondent (Jacqueline Moore), as well as a narrative of the allegations against Ms. Yates. You did not indicate anywhere in the documents that you intended to file two complaints, so the Commission accepted the entire document as a complaint against Respondent Linda Yates.

The essential allegations of your complaint are that Respondent violated Florida's open meetings and public records laws, Chapter 286 and 119, Florida Statutes, respectively. The jurisdiction of the Florida Elections Commission is limited to alleged violations of Chapter 104 and 106, Florida Statutes. As such, I find your complaint to be legally insufficient.

If you have additional information to correct the stated grounds(s) of insufficiency, please submit it within 14 days of the date of this letter. If we do not receive additional information that corrects the stated grounds of insufficiency, this case will be closed. For your convenience, enclosed is a form for your use in submitting additional information. If you submit an

additional statement containing facts, you must sign the statement and have your signature notarized. In addition, any additional facts you submit to the Commission must be based on either personal information or information other than hearsay.

9. Ms. Schure offered no additional information in support of her allegations and the Elections Commission, by correspondence dated December 30, 2016, informed Ms. Yates that the Complaint was dismissed due to legal insufficiency.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

11. As the party asserting entitlement, Petitioner has the burden to prove "by clear and convincing evidence" that an award of attorney's fees and costs is appropriate pursuant to section 106.265(6). See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996); Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

12. Section 106.265(6) and rule 2B-1.0045 provide for an award of attorney's fees and costs in certain actions brought before the Elections Commission. Section 106.265(6) provides, in part, 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.

13. Further, rule 2B-1.0045(1) provides:

(1) If the Commission determines that a complainant has filed a complaint against a respondent with a malicious intent to injure the reputation of such respondent 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 chapter 104 or 106, F.S., the complainant shall be liable for costs and reasonable attorney's fees incurred in the defense of the complaint, including the costs and reasonable attorney's fees incurred in proving entitlement to and the amount of costs and fees.

14. In Brown v. Commission on Ethics, 969 So. 2d 553 (Fla. 1st DCA 2007), the court interpreted section 112.317(8), Florida Statutes (current version at section 112.317(7)), which contains language that is in material part identical to that found in section 106.265(6). As an initial matter, the opinion holds that the person seeking attorney's fees does not have to prove that the complainant acted with actual malice when filing the

complainant. Next, the court established that the elements of a claim by a public official for attorney's fees are: (a) the complaint was made with a malicious intent to injure the official's reputation; (b) the person filing the complaint knew that the statements about the official were false or made the statements about the official with reckless disregard for the truth; and (c) the statements were material.

15. In Hadeed v. State, 208 So. 3d 782 (Fla. 1st DCA 2016), Al Hadeed, in his capacity as attorney for the Flagler County Board of County Commissioners, and Dennis McDonald, in his capacity as a Flagler County commissioner, each sought costs and attorney's fees under section 112.317(7) after the Ethics Commission dismissed as "legally insufficient" complaints filed against them by concerned citizens. Specifically, the Ethics Commission rejected the complaints as legally insufficient because "neither established grounds for an ethics violation." Id. at 783. On appeal, the court affirmed the dismissal of the claim for costs and attorney's fees, in part, on the grounds that recovery is not allowed "where knowingly false allegations are maliciously made to injure a public official's reputation on matters *immaterial* to an ethics violation." Id. at 785. In other words, section 112.313(7) "requires that the false allegations be 'material' to an ethics violation to be actionable for costs and fees." As the court noted, "[f]alsely calling

someone a terrorist or child abuser is of no moment under section 112.317(7) unless the false allegation is 'material' to violation of Florida's Code of Ethics." Id. at 784. Hadeed is persuasive, if not controlling, in resolving the instant dispute.

16. In correspondence dated October 20, 2016, from the Elections Commission to Ms. Schure, the Elections Commission noted that,

The essential allegations of [the] complaint are that [Ms. Yates] violated Florida's open meetings and public records laws, Chapter 286 and 119, Florida Statutes, respectively. The jurisdiction of the Florida Elections Commission is limited to alleged violations of Chapter 104 and 106, Florida Statutes. As such, I find your complaint to be legally insufficient."

17. Having reviewed the allegations of the underlying Complaint that Ms. Schure filed against Ms. Yates with the Elections Commission, it is not necessary to address the veracity of the allegations because they are framed exclusively within the context of chapters 119 and 286, neither of which falls within the jurisdiction of the Elections Commission.^{3/} Ms. Schure's allegations that Ms. Yates violated chapters 286 and 119 are immaterial to whether Ms. Yates violated chapters 104 and 106, which respectively deal with elections requirements and matters related to campaign finance. Therefore, in accordance with Hadeed, Ms. Yates is not entitled to recover her fees and costs

because Ms. Schure's allegations against her are immaterial to any purported violation of either chapter 104 or 106.^{4/}

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Elections Commission enter a final order denying the Petition for Costs and Attorney's Fees.

DONE AND ENTERED this 7th day of August, 2017, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of August, 2017.

ENDNOTES

^{1/} All statutory references are to 2016 Florida Statutes, unless otherwise indicated.

^{2/} The Complaint includes the following paragraph:

The complaint also relies on a significant body of Florida case law that has firmly established that "The clear policy the legislature has established for Florida is

simple to understand: to have the public's business carried out in public." City of Fort Myers v. News-Press Publishing Co., Inc., 514 So. 2d 408 (Fla. 2nd DCA 1987). The case law also establishes that "The sunshine law is to be construed liberally in favor of open government to assure openness in and access to government.["] Krause v. Reno, 366 So. 2d 1244, 1250 (Fla. 1979), see also Zore v. City of Vero Beach, 722 So. 2d 891 (Fla. 4th DCA 1998); and the law is directed to: "frustrate all evasive devices["] Toen of Palm Beach v. Gradison, 296 So. 2d 473, 477 (Fla. 1974). And in part, "Remedial measures taken after lawsuit seeking declaratory judgment is filed do not moot a claim." Gangloff v. Taylor, 758 So. 2d 1159 (Fla. 4th DCA 2000).

^{3/} The court in Hadeed noted that the Ethics Commission found three allegations in the "hundreds of pages of inflammatory, disparaging, and conclusory allegations in the complaints" that "were material to possible ethics violations." Because of these material allegations, it was necessary for the court to determine "whether these factual allegations—stripped of the tacked-on hyperbolic legal conclusions that accompany them in the complaints—are false." No such analysis is necessary in the instant case because the complaint filed by Ms. Schure contains no factual allegations that are material to a possible violation of matters within the jurisdiction of the Elections Commission.

^{4/} Ms. Yates argues that because Ms. Schure erroneously identified her on the complaint form as a "candidate," that this constitutes a material allegation with respect to either chapter 104 or 106. This assertion is not persuasive given that the substance of Ms. Schure's Complaint, as set forth in the "alleged violations" portion of the Complaint, clearly indicates that Ms. Schure is complaining about "Sunshine Law and Ethics Violations by City of North Port Commissioner Linda M. Yates covering the period June 1, 2012, to July 20, 2016." The fact that Ms. Schure erroneously identified Ms. Yates as a "candidate" for city commission is insufficient, in itself, to convert what is clearly a complaint about alleged "secret meetings and communication" into a complaint about violations of chapters 104 and 106.

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.