

SEP 21 2017

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STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES ERICKSEN, JR.,

Petitioner,

vs.

Case No. 16-5246FE

KIMBERLE B. WEEKS,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

A duly noticed final hearing was held in this matter on May 16, 2017, at the Division of Administrative Hearings in Tallahassee, Florida, before Administrative Law Judge Suzanne Van Wyk.

APPEARANCES

For Petitioner: Albert T. Gimbel, Esquire  
Mark Herron, Esquire  
Messer Caparello, P.A.  
2618 Centennial Place  
Post Office Box 15579  
Tallahassee, Florida 32317

Albert J. Hadeed, Esquire  
Flagler County Board of  
County Commissioners  
1769 East Moody Boulevard, Building 2  
Bunnell, Florida 32110

For Respondent: No Appearance

### STATEMENT OF THE ISSUES

Whether Petitioner is entitled to an award of costs and attorneys' fees pursuant to section 112.313(7), Florida Statutes, and Florida Administrative Code Rule 34-5.0291; and, if so, in what amount.

### PRELIMINARY STATEMENT

On September 13, 2016, the Florida Commission on Ethics ("Commission") referred five separate petitions seeking costs and attorneys' fees pursuant to section 112.313(7) and rule 34-5.0291, requesting the Division of Administrative Hearings ("Division") assign an Administrative Law Judge to conduct a formal administrative hearing and to prepare a recommended order. Upon receipt of the referrals from the Commission, the Division opened five separate cases which were referred to the undersigned. After reviewing the records forwarded by the Commission, the undersigned, sua sponte, entered an Order consolidating the five cases.<sup>1/</sup>

Counsel for Petitioners filed responses to the Initial Order on behalf of each Petitioner and suggested that the hearing be held in Tallahassee.<sup>2/</sup> Following is a procedural history of the consolidated cases.

Respondent Mark Richter, Jr. ("Richter Jr."), did not file a response to the Initial Order.<sup>3/</sup> In their response to Case Nos. 16-5244FE and 16-5246FE, counsel for Petitioners outlined

their unsuccessful attempts to contact Richter Jr. Counsel for Petitioners indicated contact was made by telephone with Richter Jr.'s father, Mark Richter, Sr. ("Richter Sr."). When asked to provide contact information for his son, Richter Sr. advised that he had none. When then asked to forward the materials to his son, as this was an important matter, Richter Sr. reiterated that he had no contact information on his son and abruptly ended the phone call.

Respondent Kimberle Weeks ("Weeks") filed a response to the Initial Order in Case Nos. 16-5246FE and 16-5247FE, in which she requested that the hearing take place in Orlando, Florida, but otherwise indicated that she would be "unavailable for any dates and times until a pending legal matter is resolved or until authorized by her legal counsel[.]"

Respondent Dennis McDonald ("McDonald") filed a response to the Initial Order in Case No. 16-5248FE, in which he suggested the hearing be held in Central Florida and that he would be available for hearing on various dates, including December 1, 2016 through December 19, 2016.

Following a telephonic status conference on October 5, 2016, at which counsel for Petitioners and McDonald participated and discussed scheduling issues, the undersigned entered a Notice of Hearing on October 6, 2016, which set the final hearing for December 12 through 16, 2016, in Tallahassee.<sup>4/</sup>

On October 27, 2016, Petitioners served initial discovery requests on Respondents. On December 2, 2016, Petitioners filed a motion to continue the hearing because Respondents failed to respond to Petitioners' discovery. Counsel for Petitioners indicated that he had been unable to contact Richter Jr., Weeks, or McDonald to determine the status of their responses to the discovery. By Order entered December 7, 2016, after finding good cause existed to continue the hearing, the undersigned cancelled the hearing scheduled for December 12 through 16, 2016, and rescheduled the final hearing for March 6 through 9, 2017.

On December 22, 2016, counsel for Petitioners filed a motion to compel responses to the unanswered interrogatories and requests to produce which were propounded on October 27, 2016. On January 6, 2017, the undersigned scheduled a telephonic hearing on Petitioners' motion to compel for January 20, 2017. Counsel for Petitioners and Respondents Weeks and McDonald participated in the telephonic hearing during which the undersigned informed the participating Respondents of the consequences and implications of failure to respond to Petitioners' discovery requests. By Order dated January 20, 2017, the undersigned granted Petitioners' motion to compel and ordered Respondents to serve answers to Petitioners' First Set of Interrogatories, and to produce documents in response to

Petitioners' First Request for Production of Documents on or before January 30, 2017.<sup>5/</sup>

Petitioners filed a second motion for continuance on February 8, 2017. The motion was based on the failure of Richter Jr. and Weeks to provide responses to Petitioners' pending discovery, despite the prior Order granting the motion to compel, and on the failure of McDonald to provide sufficient responses to the pending discovery. In that motion, Petitioners noted that they had served requests for admissions on each of the Respondents on February 2, 2017, and that they intended to depose each of the Respondents before the final hearing.<sup>6/</sup>

By Order entered February 16, 2017, the undersigned cancelled the hearing scheduled for March 6 through 9, 2017, and ordered each party to advise, in writing, no later than March 3, 2017, of all dates on which they were available for rescheduling the final hearing in April 2017. Richter Jr. filed no response. Weeks filed a response stating that because of other obligations for "April 2017 through May 27, 2017, [she] will not be available until May 28<sup>th</sup> through May 31<sup>st</sup> 2017." McDonald indicated that he was available for several days in both April and May of 2017. Petitioners likewise indicated they were available for several days in both April and May of 2017.

By Order dated March 23, 2017, the undersigned rescheduled the final hearing for May 15 through 19, 2017, noting:

On March 2, 2017, Respondent Weeks filed a response indicating her unavailability the entire month of April 2017, and through May 27, 2017. Respondent Weeks' notice of unavailability for almost two months is unacceptable. On March 3 and March 6, 2017, Petitioner and Respondent McDonald, respectively, filed notices of available dates in April and May 2017. Only one set of dates, April 4 through 7, 2017, were common to both Petitioners and Respondent McDonald.

The undersigned has made numerous attempts to reach the parties to schedule a telephone conference to coordinate a mutually-agreeable date to reschedule the hearing in this matter. Telephone messages to Respondent McDonald have not been returned, and the telephone number provided by Respondent Weeks (which was confirmed by her on a previous telephone conference), rings incessantly but remains unanswered. No voice mail or other message service is provided.

With much effort on behalf of Division staff, the undersigned has identified dates on which the Petitioners are available and which overlap with dates identified as available for Respondent McDonald.

On February 14, 2017, counsel for Petitioners informed the undersigned of the death of Petitioner Frank Meeker and moved to substitute his wife, Debra Meeker, as surviving spouse and sole beneficiary, in these proceedings. By Order entered February 28, 2017, the undersigned granted the motion and ordered that the style of this cause be amended to substitute Debra R. Meeker for Frank J. Meeker, deceased.

On March 2, 2017, McDonald filed a motion to dismiss, asserting that he was not afforded due process by the action of the Commission in its referral of the matter to the Division. By Orders entered March 7, 2017, and March 8, 2017 ("Amended Order"), the undersigned denied McDonald's motion to dismiss.

On March 27, 2017, Petitioners filed a motion to permit, post hoc, Petitioners' filing of Requests for Admission on February 2, 2017, which exceeded the number permitted by the Florida Rules of Civil Procedure, and to deem all unanswered Request for Admissions as having been admitted. In support of the motion, Petitioners stated that Requests for Admissions were served by U.S. Mail to: (1) mailing addresses that were confirmed on the record by Respondents Weeks and McDonald during prior proceedings held in this matter; (2) addresses shown and sworn to as true and correct by each of the Respondents on the original complaint filed with the Commission in this matter; and (3) via e-mail addresses confirmed by Respondents Weeks and McDonald during prior hearings in this matter. By Order dated April 11, 2017, the undersigned granted the motion, noting:

In the Motion, Petitioners request the undersigned to deem admitted the statements in Petitioners' Request for Admissions served Respondents on February 2, 2017 (Request), to which no response has been filed.

Pursuant to Florida Rule of Civil Procedure 1.370(a), Respondents were under an obligation to serve written responses or objections to the Request within 30 days of service, or by March 6, 2017. By operation of the rule, Respondents' failure to timely respond to the Request renders the statements admitted. The undersigned is mindful that Respondents are unrepresented and the penalty is harsh. However, the undersigned has previously instructed Respondents Weeks and McDonald of the duty to respond to discovery and the penalties for failure to comply. [endnote omitted]

In the Motion, Petitioners also request the undersigned approved [sic], post hoc, Request for Admissions that exceed the number set forth in the rule. The rule authorizes the undersigned to allow a party to exceed the limit on number of requests "on motion and notice and for good cause." Fla. R. Civ. P. 1.370(a). Petitioners served the motion on March 27, 2017, and Respondents have had notice of same since that date, but not filed any objection. Good cause for exceeding the limit has been established by Respondents' failure to cooperate in discovery in this matter, which has resulted in significant delays and hampered Petitioners' efforts to establish their case by other means.

On May 2, 2017, Petitioners filed a motion in limine or, alternatively, a motion for sanctions restricting Respondents from introducing testimony and evidence at trial not previously disclosed to Petitioners. In support of the motion, Petitioners set forth (1) the failure of Respondents to respond to prior discovery requests; (2) the failure of Respondents to respond to the requests for admissions; and (3) the refusal of



Respondents and others associated with them to participate in properly noticed depositions.<sup>7/</sup> By Order dated May 10, 2017, the undersigned granted the motion and ordered that:

Respondents are prohibited from presenting any testimony or documentary evidence at the final hearing which would have been disclosed, produced, discussed, or otherwise revealed in response to Petitioners' discovery requests, or which would contradict any of the Requests for Admission which have been deemed admitted by the undersigned's Order dated April 11, 2017.

On May 9, 2017, Weeks filed a motion to change venue of the final hearing from Tallahassee (Leon County) to Bunnell (Flagler County). By Order dated May 10, 2017, the undersigned denied Weeks motion to change venue.

On May 11, 2017, McDonald filed a motion to dismiss the petition against him in Case No. 16-5248FE on the basis that the issues regarding costs and attorneys' fees in this case have already been decided by the First District Court of Appeal in Hadeed et al. v. Commission on Ethics, 208 So. 3d 782 (Fla. 1st DCA 2016). By Order dated May 11, 2017, the undersigned denied McDonald's motion to dismiss.

On May 11, 2017, Weeks filed a motion to dismiss the petitions filed against her asserting "qualified immunity."<sup>8/</sup> By Order entered May 16, 2017, the undersigned denied Weeks' motion to dismiss based on "qualified immunity."

On Friday, May 12, 2017, Weeks filed a motion to appear telephonically at the hearing scheduled to commence the following Monday, May 15, 2017. By Order dated May 15, 2017, the undersigned denied Weeks motion to appear telephonically.

The final hearing commenced as scheduled. None of the Respondents appeared at the hearing. Petitioners presented the testimony of the following witnesses: Debra Meeker, the widow of former Flagler County Commissioner Frank Meeker ("Meeker") and Petitioner in Case No. 16-5245FE; Albert J. Hadeed, Flagler County Attorney and Petitioner in Case No. 16-5247FE; Charles Ericksen, Jr., Flagler County Commissioner and Petitioner in Case No. 16-5246FE; Nate McLaughlin, Flagler County Commissioner and Petitioner in Case No. 16-5244FE; and George Hanns, former Flagler County Commissioner and Petitioner in Case No. 16-5248FE. With respect to costs and attorneys' fees, Petitioners presented the testimony of Mr. Hadeed; Mark Herron, counsel for Petitioners; and Michael P. Donaldson as an expert witness on attorneys' fees. Petitioners' Exhibits P-1 through P-97 were admitted into evidence.

After the conclusion of the formal hearing, Petitioners filed a motion to re-open the record to permit submission of two additional exhibits regarding the underlying facts relative to McDonald's motion to dismiss the petition for costs and attorneys' fees in Case No. 16-5248FE. No objection or other

response was filed by McDonald. By Order dated June 1, 2017, the undersigned granted the motion to re-open the record and Petitioners' Exhibits P-98 and P-99 were admitted.

On July 31, 2017, Petitioner moved to introduce supplemental exhibits on costs and attorneys' fees incurred in pursuing this matter after conclusion of the final hearing. No objection or other response was filed by any of the Respondents. The motions were granted and Petitioner's Exhibits P-100C, P-101, and P-102 were admitted in evidence.

Counsel for Petitioners asked to submit a proposed recommended order within 30 days of the transcript being filed with the Division. A two-volume Transcript was filed with the Division on June 30, 2017. Petitioner timely filed a Proposed Recommended Order, which has been taken into consideration in preparing this Recommended Order.

Counsel for Petitioners filed, with the concurrence of the Commission, a motion on July 12, 2017, requesting that separate proposed recommended orders be filed so that separate recommended orders can be issued. By Order dated July 13, 2017, the undersigned severed these cases. Accordingly, separate Recommended Orders have been rendered in each case.

## FINDINGS OF FACT

### Ethics Complaint 14-232

1. On December 4, 2014, the Commission received a complaint against Charles Ericksen, Jr. ("Ericksen"), filed by Weeks, which alleged that Ericksen violated Florida's election laws, the Government-in-the-Sunshine Law ("Sunshine Law"), and Florida's Code of Ethics for Public Officers and Employees (the "Ethics Code").

2. Specific allegations in the complaint referenced a "whispered" conversation between County Attorney Hadeed and Ericksen, who was both a Flagler County Commissioner and an alternate Flagler County Canvassing Board ("Canvassing Board") member at the time, outside of a Canvassing Board meeting. The complaint alleged:

The actions and behaviors of some county commissioners and their staff demonstrate some have used their position for their personal gain and for the personal gain of their co-commissioners and employers. Such activities as described herein could allow voters to also believe some persons who are privy to information, change the outcome of elections when information is prematurely revealed. The public should be able to trust those who are responsible for canvassing our elections. Because the county attorney and county commissioners remain hushed on behavior that has been identified, it is unknown what else may have transpired that is unknown, and if such occurrences will happen again knowing they will be kept hidden and unaddressed. It is also unknown how many other persons the

county attorney Al Hadeed and county commissioners have told about such incidents that give the public opinion that the Supervisor of Elections condones this type of activity, and such activity is common. It is believed candidates may receive support when it is known if they are elected and serve on the canvassing board that such occurrences will continue to take place to manipulate elections.

3. The complaint also alleged that:

On October 17th, 2014, it was requested that alternate canvassing board member Charles Ericksen Jr. step down as an alternate canvassing board member because it became known he contributed \$50 to the re-election campaign of county commissioner Frank Meeker and in doing so, could allow the appearance of impropriety. However, he refused to do so at that time, and he failed to reveal he also attended a fund raising event for candidate, fellow County Commissioner Frank Meeker. It was not known by the supervisor of elections when Commissioner Ericksen was asked to step down from the canvassing board on October 17th, 2014, that he attended a fundraiser for candidate Meeker, which would have in itself disqualified him from serving as a canvassing board as an alternate. Charles Ericksen Jr. should have been transparent and forthcoming with his involvement in Commissioner Frank Meeker's re-election campaign, and he should not have served on the canvassing board when he wasn't eligible. He also should have relied on his training materials provided to him at the state workshop he attended, which it appears he failed to do. County attorney Hadeed should have advised this county commissioner he was not eligible to serve on the canvassing board and instead he stated financially contributing to a candidate's campaign does not disqualify a canvassing board member from serving. Even after that was stated, county attorney Hadeed did not

encourage commissioner [sic] Ericksen to step down to avoid the appearance of impropriety.

4. The complaint further alleged:

Therefore, it is believed they knowingly and willingly violated the provisions of the law. In fact, Commissioner Charles Ericksen Jr. was asked to step down from the canvassing board because he contributed \$50 to the campaign of candidate Frank Meeker. Neither Charles Ericksen Jr. nor anyone else revealed the fact that he also attended a fund raising event; the supervisor of elections revealed that fact at a later canvassing board meeting.

And:

Though Charles Ericksen Jr. refused to step down as an alternate from the county canvassing board during the scheduled October 17, 2014 canvassing board meeting when it was requested that he do so, he did resign as alternate canvassing board member at the October 20, 2014 Board of County Commission meeting.

5. The complaint was reviewed by the Executive Director of the Commission who found the complaint to be legally sufficient to warrant investigation:

The complaint alleges that [Ericksen] engaged in a "whispering" exchange at a canvassing board meeting or otherwise was involved in discussions which may not have been in compliance with the Sunshine Law, that he had an unlawful connection as a canvassing board member to a candidate in the 2014 election, that the County Attorney may have been placed as attorney for the canvassing board, and that he was involved in other or related conduct, and that this may have been for the purpose of benefiting

particular candidates or others. This indicates possible violation of Section 112.313(6), Florida Statutes.

6. As a result, the complaint was determined to be legally sufficient and the investigative staff of the Commission was directed to "conduct a preliminary investigation of this complaint for a probable cause determination of whether [Ericksen] has violated section 112.313(6), Florida Statutes, as set forth above."

#### The Commission's Investigation

7. The complaint was investigated by Commission Investigator K. Travis Wade. On February 19, 2016, the Commission issued its Report of Investigation, which found, as follows:

a. Florida law provides that a county canvassing board shall be comprised of the Supervisor of Elections, a County Court Judge, and the Chair of the County Commission. Additionally, an alternate member must be appointed by the Chair of the County Commission. The Canvassing Board for the 2014 Election was made up of Judge Melissa Moore-Stens, County Commission Chairman George Hanns ("Commissioner Hanns"), and then-Supervisor of Elections Weeks. Initially, Ericksen was the alternate member of the Canvassing Board.

b. Minutes from the October 20, 2014 Flagler County Commission ("County Commission") meeting indicate that during

the "Commission Reports/Comments" portion of the meeting there was a discussion regarding who had the authority to appoint the Canvassing Board attorney, but no official action was taken at that time.

c. The only members of the Canvassing Board present at the October 20, 2014 meeting of the County Commission were Commissioner Hanns and Ericksen.

d. Weeks claimed that Ericksen refused to resign his position as an alternate member of the Canvassing Board at its October 17, 2014 meeting when it was discovered that he contributed to Meeker's reelection campaign.

e. Minutes from the October 17, 2014 Canvassing Board meeting reflect that Ericksen did not attend that meeting.

f. Minutes from the October 20, 2014 County Commission meeting reflect a discussion regarding Ericksen's contribution to Meeker's campaign and that Ericksen resigned as an alternate member of the Canvassing Board at that time. The Commission then voted to appoint Commissioner Barbara Revels as the alternate Canvassing Board member.

g. All discussions by the County Commission regarding the Flagler County Canvassing Board took place during the "Commissioner Reports/Comments" or "Commission Action" portion of duly-noticed County Commission meetings.



h. When asked about her allegation that Ericksen was involved in other or related conduct, apparently for the benefit of particular candidates or others, Weeks indicated that she had no information regarding that allegation.

Commission on Ethics Advocate's Recommendation

8. On March 7, 2016, Commission Advocate Elizabeth L. Miller recommended that there was "no probable cause" to believe that Ericksen violated section 112.313(6), by participating in discussions which may have been in violation of the Sunshine Law or other related conduct to place the County Attorney as the attorney for the Canvassing Board against the wishes of the Supervisor of Elections, by having an unlawful connection as a Canvassing Board member to a candidate during the election, or by participating in other or related conduct for the benefit of particular candidates or others.

9. On April 20, 2016, the Commission issued its Public Report dismissing Weeks' complaint against Ericksen for lack of probable cause.

Weeks' Knowledge of the Falsity of Her Sworn Allegations

10. Weeks filed a sworn complaint against Ericksen. When signing the complaint, Weeks executed an oath that "the facts set forth in the complaint were true and correct . . . ."

11. When she filed her complaint against Ericksen, Weeks had access to the video of the County Commission meeting of

September 15, 2014, posted on the County's website and the published minutes of that meeting, also available online or by request. Similarly, Weeks had access to the minutes of the Canvassing Board of which she was a member. Weeks was present at both the September 12, 2014 and the October 17, 2014 meetings of the Canvassing Board.

12. Video of the 2014 meetings of the County Commission are archived for public viewing on the Flagler County website. Minutes of all County Commission meetings are public record available to the public on the Flagler Clerk of Court's website and upon request. Weeks is familiar with the process of obtaining minutes of County Commission meetings by request as evidenced by her public record requests made during the pendency of this proceeding before the Division.

13. Neither the posted video nor the minutes of the September 15, 2014 meeting of the County Commission indicate that any action was taken by consensus vote or by any other vote regarding who had the authority to appoint the attorney for the Canvassing Board.

14. No vote was taken by the County Commission to designate the County Attorney as the attorney for the Canvassing Board.

15. To the contrary, the County Commission determined that it was a matter for the Canvassing Board to select its own attorney.

16. Contrary to Weeks' allegation that Ericksen refused to resign his position as an alternate member of the Canvassing Board at its October 17, 2014 meeting, the official minutes of that meeting indicate that Ericksen was not even present at that meeting.

17. When asked by the Commission's investigator whether Ericksen was involved in other or related conduct, for the benefit of particular candidates or others, Weeks indicated that she had no information regarding that allegation.

18. The allegations in Weeks' complaint against Ericksen, which the Commission found material to investigate, were known by Weeks to be false, or filed by Weeks with reckless disregard for whether they were true or false.

#### Malicious Intent to Injure Reputation

19. Whether the claims against public officials were "motivated by the desire to [impugn character and injure reputation]," is a question of fact. Brown v. State, Comm'n on Ethics, 969 So. 2d 553, 555 (Fla. 1st DCA 2007).

20. The evidence adduced at the hearing established that Weeks worked in concert with other individuals to maliciously injure the reputation of Ericksen by filing complaints

containing false allegations material to the Ethics Code with the Commission and other agencies.

21. It is also noteworthy that evidence established that Weeks targeted Ericksen with an animus to humiliate him during a public Canvassing Board meeting at which a sizable number of the public were in attendance. She embarrassed him by loudly instructing one of her female staff members to accompany him to the restroom during the canvassing of the absentee ballots. All action stopped as the public watched Ericksen proceed to the restroom with the staff person walking along side of him. Upon his exit and return to the canvassing activities, all eyes were fixed on his return and Weeks explained to the public that she feared he was going to illegally access ballots in a room further down the hall that contained canvassed ballots in a locked vault.

22. Moreover, one of Weeks' supporters, John Ruffalo ("Ruffalo"), who had also filed complaints against Flagler County officials, touched absentee ballots just before Weeks had her staff member escort Ericksen to the restroom. Ruffalo was not a member of the Canvassing Board or a Supervisor of Elections staffer. It was unlawful for Ruffalo to handle the ballots, but Weeks did not admonish him although she demonstrably accused Ericksen publicly of possibly having corrupt motives.

23. Ruffalo was a member of a group, formed in 2009 or 2010, formally known as the Ronald Regan Republican Association, informally as the "Triple Rs." Members of the group included Ruffalo and his wife, Carole Ruffalo; Dennis McDonald; Mark Richter Sr.; Ray Stephens; William McGuire; Bob Hamby; and Dan Bozza.

24. The Triple Rs were trying to influence the outcome of elections in Flagler County. They did this by fielding candidates against incumbent members of the County Commission. In 2014, Richter Sr. ran against and lost to Commissioner McLaughlin. Dennis McDonald ran against, and lost to, Meeker in 2012 and 2014. The Triple Rs also tried to influence the results of the elections by filing complaints against Flagler County officials with multiple agencies.

25. Weeks was not a member of the Triple Rs; however, Dennis McDonald, the de facto spokesperson of the Triple Rs, frequently visited Weeks' office, particularly in the period between the 2014 primary and general election. Weeks' interaction with McDonald and other Triple Rs during this timeframe was so pervasive that Weeks' husband expressed concern to McLaughlin about McDonald's influence over Weeks.

26. This group filed 25 complaints against Flagler County officials, individually and collectively, including complaints against Ericksen and all other members of the 2014 County

Commission, the County Attorney, and the County Administrator. The complaints were filed with the Commission on Ethics, the Florida Elections Commission, The Florida Bar, and the State Attorney for the Seventh Judicial Circuit. Certain members of the Triple Rs formed a limited liability company--the "Flagler Palm Coast Watchdogs"--and also filed suit against the County Commission to block renovation of the old Flagler Hospital into the Sheriff's Operation Center, alleging violations of the Ethics Code.

27. At least 12 of the complaints filed by the group specifically alleged or referenced the false allegations which are at issue in this case: that members of the County Commission discussed Canvassing Board matters in violation of the Sunshine Law with the goal of manipulating elections, improperly selecting the Canvassing Board attorney, and advancing a hidden agenda.

28. In addition to alleging that Ericksen violated the Ethics Code and Sunshine Law, the complaint filed with the Commission alleged that Ericksen conspired to cover up felonious conduct by a member of the County Commission and that Ericksen violated Florida's elections laws, specifically chapter 106, Florida Statutes (the "Campaign Finance law"), in several respects.

29. Weeks also filed a complaint against Ericksen with the Florida Elections Commission. That complaint essentially tracks Ethics Complaint 14-232 and includes allegations that Ericksen violated the Ethics Code, the Sunshine Law, and that he conspired to cover up a felony. The Director of the Florida Elections Commission dismissed the complaint as legally insufficient.

30. The allegations that Ericksen discussed Canvassing Board matters in violation of the Sunshine Law, had an unlawful connection to a candidate, improperly selected the Canvassing Board attorney, and engaged in other conduct to benefit particular candidates in the 2014 Election were crucial to the ethics complaint which Weeks filed against Ericksen. These allegations formed the basis for the Commission's finding that the complaint was legally sufficient and ordered that it be investigated.

31. Had Ericksen been found to have violated Florida law, it would have damaged his reputation in the community.

32. The evidence also shows a concerted effort by Weeks and the Triple Rs to continue filing new complaints after dismissal orders in order to keep Flagler County officials under constant investigation by various agencies, which kept them under a cloud of suspicion with the public.

33. The totality of these findings, including the number of complaints, the collaboration among the various complainants, and the inclusion of similarly false allegations in complaints filed by different complainants with different agencies, lead to no reasonable conclusion other than Ethics Complaint 14-232 was filed with a "malicious intent" to injure the reputation of Ericksen and create political gain for the Triple Rs and Weeks.

34. The totality of these findings constitutes clear and convincing evidence that Weeks' complaint was filed with knowledge that, or with a conscious intent to ignore whether, it contained one or more false allegations of fact material to a violation of the Ethics Code.

35. The totality of these findings constitutes clear and convincing evidence that Weeks showed "reckless disregard" for whether her sworn complaint contained false allegations of fact material to a violation of the Ethics Code.

36. The totality of these findings constitutes clear and convincing evidence that the true motivation behind the underlying complaint was the political damage the complaint would cause Ericksen, with the corresponding benefit to the Triple Rs and Weeks, rather than any effort to expose any wrongdoing by Ericksen.



### Attorneys' Fees and Costs

37. Upon receipt and review of the complaints filed against Ericksen and others in late 2014, Flagler County informed its liability insurance carrier and requested that counsel experienced in ethics and elections law be retained to defend against those complaints. At the specific request of the County, Mark Herron of the Messer Caparello law firm was retained to defend these complaints. Mr. Herron is an experienced lawyer whose practice focuses almost exclusively on ethics and elections related matters.

38. Mr. Herron was retained by Flagler County on the understanding that the Messer Caparello firm would be compensated by the County's liability insurance carrier at a rate of \$180 per hour and that the County would make up the difference between the \$180 per hour that the insurance carrier was willing to pay and the reasonable hourly rate.

39. The rate of \$180 per hour paid by the County's liability insurance carrier to the Messer Caparello firm is an unreasonably low hourly rate for an experienced practitioner in ethics and election matters. Expert testimony adduced at the hearing indicated that a reasonable hourly rate would range from \$250 to \$450 per hour. Accordingly, a reasonable hourly rate to compensate the Messer Caparello firm in this proceeding is \$350 per hour.

40. The total hours spent on this case by Messer Caparello attorneys is reasonable. The billable hourly records of the Messer Caparello law firm through May 14, 2017, indicate that a total of 103.39 hours were spent in defending the underlying complaint filed with the Commission and in seeking costs and fees in this proceeding.

41. The record remained open for submission of Messer Caparello costs and attorneys' fees records after May 14, 2017, through the date of submission of the Proposed Recommended Order. These additional records of the Messer Caparello law firm indicate that a total of 49.93 hours were spent in seeking costs and fees for that defense at the formal hearing and in preparing the Proposed Recommended Order.

42. The total hours spent by the Messer Caparello law firm in defense of the Complaint against Petitioner, and in seeking costs and fees for that defense, is 153.32. The total hours spent on this case by the Messer Caparello law firm is reasonable.

43. Costs of \$1,814.12 incurred by the Messer Caparello law firm through May 14, 2017, are reasonable. Costs of \$957.44 incurred by the Messer Caparello law firm after May 14, 2017, are reasonable.

44. The total hours spent on this case by the Flagler County Attorney's Office is reasonable. Time records of the

Flagler County Attorney's Office through May 15, 2017, indicate that a total of 12.40 hours for attorney time were spent in assisting in the defense of the underlying complaint with the Commission and in seeking costs and fees in this proceeding. Time records of the Flagler County Attorney's Office through May 15, 2017, indicate that a total of 24.75 hours for paralegal time were spent in assisting in the defense of the underlying complaint filed with the Commission and in seeking costs and fees in this proceeding.

45. The record remained open for submission of costs and attorneys' fees records after May 15, 2017, through the date of submission of the Proposed Recommended Order. These additional records of the Flagler County Attorney's Office indicate that a total of 6.60 hours of attorney time, and that a total of 14.30 hours of paralegal time were spent in seeking costs and fees for that defense at the formal hearing in this cause and in preparation and submission of the Proposed Recommended Order.

46. Costs of \$168.93 incurred by the Flagler County Attorney's Office through May 15, 2017, are reasonable. Costs of \$292.99 incurred by the Flagler County Attorney's Office after May 15, 2017, are reasonable.

47. A reasonable hourly rate for the time of Flagler County Attorney in connection with this matter is \$325 per hour.

48. A reasonable hourly rate for the time of the paralegal in the Flagler County Attorney's Office in connection with this matter is \$150 per hour.

49. Based on the findings herein, Ericksen has established that he incurred: (i) reasonable costs in the amount of \$2,731.69, and reasonable attorneys' fees in the amount of \$53,662.00 for the services of the Messer Caparello law firm in defending against the underlying complaint filed with the Commission and in seeking costs and fees in this proceeding; and (ii) reasonable costs in the amount of \$461.92 and attorneys' fees in the amount of \$12,032.50 for the services of the Flagler County Attorney's Office in defending against the underlying complaint filed with the Commission and in seeking costs and fees in this proceeding.

#### CONCLUSIONS OF LAW

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

51. Section 112.313(7) provides for an award of attorney's fees and costs in the following circumstances:

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 fees incurred in the defense of the person complained against, including the costs and reasonable attorney 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.

52. Rule 34-5.0291(3) provides for the Commission to review a petition seeking costs and attorneys' fees and:

If the Commission determines that the facts and grounds are sufficient, the Chair after considering the Commission's workload, shall direct that the hearing of the petition be held before the Division of Administrative Hearings, the full Commission, or a single Commission member serving as hearing officer. Commission hearing officers shall be appointed by the Chair. The hearing shall be a formal proceeding under Chapter 120, F.S., and the Uniform Rules of the Administration Commission, Chapter 28-106, F.A.C. All discovery and hearing procedures shall be governed by the applicable provisions of Chapter 120, F.S. and Chapter 28-106, F.A.C. The parties to the hearing shall be the petitioner (i.e., the public

officer or employee who was the respondent in the complaint proceeding) and the complainant(s), who may be represented by legal counsel.

53. Further, rule 34-5.0291(1) provides:

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.

54. During the course of this proceeding, Weeks moved to dismiss Commissioner Ericksen's petition seeking costs and attorneys' fees, pursuant to section 112.313(7), asserting that she is entitled to "qualified immunity" because she filed the complaint as the "Supervisor of Elections" and not as a private citizen.

55. As explained by the Florida Supreme Court in Tucker v. Resha, 648 So. 2d 1187, 1189 (Fla. 1994):

Under the qualified immunity doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or

constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818, 102 S.Ct. at 2738. "The central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.'" Elder v. Holloway, 114 S.Ct. 1019, 1022, 127 L.Ed.2d 344 (1994) (quoting Harlow, 457 U.S. at 806).

56. In analyzing a claim of "qualified immunity," the courts have stated:

[T]here are two steps in evaluating the qualified immunity defense. The defendants must first demonstrate that they acted within their discretionary governmental duties. Once that is established, the plaintiff must show that the defendants' conduct violated his clearly established statutory or constitutional rights.

Bd. of Regents v. Snyder, 826 So. 2d 382, 390 (Fla. 2d DCA 2002).

57. Weeks' claim of qualified immunity fails for two reasons. First, the award of attorneys' fees pursuant to section 112.317(7) is not a claim for civil damages. Second, as the Supervisor of Elections, Weeks had no discretionary duty to report alleged violations of the Ethics Code to the Commission. Weeks cannot claim immunity, qualified or absolute, in the context of filing an ethics complaint against Ericksen when she acted with a malicious intent to injure his reputation and with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint

contained false allegations of fact material to a violation of the Ethics Code. Weeks' claim of qualified immunity is rejected.

58. Ericksen has the burden of proving the grounds for an award of costs and attorneys' fees pursuant to section 112.317(7). See Fla. Admin. Code R. 34-5.0291(4). As the party seeking entitlement, Ericksen has the burden to prove "by clear and convincing evidence" that the award of costs and attorneys' fees is appropriate pursuant to section 112.317(7), and rule 34-5.0291(1). 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). Ericksen has proven "by clear and convincing evidence" that the award of costs and attorneys' fees is appropriate in this case.

59. In Brown v. Florida Commission on Ethics, 969 So. 2d 553, 560 (Fla. 1st DCA 2007), the court established the following elements of a claim by a public official for costs and attorneys' fees: (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 to a violation of the Code of Ethics.



60. Section 112.317(7) does not require a public official, who was falsely accused of ethics violations in complaints submitted to the Florida Commission on Ethics, to prove "actual malice" when attempting to prove malicious intent to injure the official's reputation. Brown, 969 So. 2d at 554. By employing a textual analysis of the statute, the Court in Brown found that section 112.317(7) is satisfied by the "ordinary sense of malice," i.e. feelings of ill will. Id. at 557.

61. "Such proof may be established indirectly, i.e., 'by proving a series of acts which, in their context or in light of the totality of surrounding circumstances, are inconsistent with the premise of a reasonable man pursuing a lawful objective, but rather indicate a plan or course of conduct motivated by spite, ill-will, or other bad motive.'" McCurdy v. Collins, 508 So. 2d 380, 382 (Fla. 1st DCA 1987) (quoting S. Bell Tel. & Tel. Co. v. Roper, 482 So. 2d 538, 539 (Fla. 3d DCA 1986)).

62. In this case, the evidence, by a clear and convincing margin, indicated that Weeks maliciously filed Ethics Complaint 14-230 against Ericksen in order to damage Ericksen's reputation and to advance the political aims of herself and the Triple Rs. In addition, the evidence showed that, despite stating under oath that "the facts set forth in the complaint were true and correct," Weeks either knew the matters alleged in the complaint were false, or she was consciously indifferent to the truth or

falsity of her allegations when she failed to review the public records which would have indicated that her allegations were false. Finally, the false statements in her complaint were material to violations of the Ethics Code, in that they formed the basis for the Commission's investigation of the complaint.

63. Ericksen is entitled to a total award of \$56,393.69 in costs and attorneys' fees in connection with legal services provided by Messer Caparello in this matter.

64. Ericksen is entitled to a total award of costs and attorneys' fees in the amount of \$12,494.42 in connection with legal services provided the by Flagler County Attorney's Office in this matter.

#### RECOMMENDATION

Based on the forgoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Commission enter a final order granting Ericksen's Petition for Costs and Attorneys' Fees relating to Complaint 14-230 in the total amount of \$68,888.11.

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

*Suzanne Van Wyk*

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of September, 2017.

ENDNOTES

<sup>1/</sup> The cases referred and consolidated by the undersigned were Nate McLaughlin v. Mark Richter, DOAH Case No. 16-5244FE; Frank J. Meeker v. Mark Richter, DOAH Case No. 16-5245FE; Charles Ericksen, Jr. v. Kimberle Weeks, DOAH Case No. 16-5246FE; Albert J. Hadeed v. Kimberle Weeks, DOAH Case No. 16-5247FE; and George Hanns v. Dennis McDonald, Case No. 16-5248FE.

<sup>2/</sup> Although, for reasons set forth herein, the consolidated cases have been severed and, therefore, subject to separate recommended orders, each applicable to a particular Petitioner, the facts applicable to each are substantially similar. Despite this Order applying only to a single Petitioner, the plural term "Petitioners" will be used, for the purposes of this and the other consolidated cases, unless the context indicates otherwise.

<sup>3/</sup> The record reflects that Richter Jr. has refused to participate in this case, has avoided service, and has ignored all efforts by both the Division and Petitioners to contact him.

<sup>4/</sup> On December 6, 2016, Weeks filed a letter with the undersigned stating that she was unable to attend the October 5 status conference because she did not receive notice of the status conference until after it occurred.

<sup>5/</sup> After the ruling on the motion to compel, and on the day her discovery responses were due, Weeks, on January 30, 2017, moved to dismiss the motion to compel against her based on what appeared to be a claim of "qualified immunity."

<sup>6/</sup> On February 17, 2017, Weeks filed a motion to strike Petitioners' Second Motion for Continuance, essentially alleging that it was filed for purposes of delay. By Order dated February 28, 2017, the undersigned denied Weeks' motion to strike Petitioners' Second Motion for Continuance. The record revealed that requests for continuances were necessitated by the failure of Respondents to respond to discovery.

<sup>7/</sup> On April 11, 2017, pursuant to properly served Notices of Depositions, Petitioners attempted to depose Richter Jr., Weeks, and McDonald. Richter Jr. did not appear. Weeks did not answer any questions and asserted her right against self-incrimination because of her pending criminal matter. McDonald refused to answer on the ground that his testimony might impact Weeks' pending criminal proceeding. On April 18, 2017, Petitioners attempted to depose John Ruffalo, who was disclosed as a potential witness by Respondent McDonald. Mr. Ruffalo made a brief appearance and announced that he was also going to refuse to answer any questions.

<sup>8/</sup> On January 30, 2017, Weeks filed a motion to dismiss the petitions filed against her asserting "qualified immunity." At that same time, as noted herein, she moved to dismiss the motion to compel against her based on what appears to be a claim of "qualified immunity."

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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.