



## Legislation Details (With Text)

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**Final action:** 6/18/2019  
**Title:** DISCUSSION OF LEGAL DEFENSE EXPENSES THAT WERE INCURRED BY COMMISSIONER SARAH HEARD IN CASE NO. 2017-MM-3744  
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**Indexes:**  
**Code sections:**  
**Attachments:** 1. Ltr to Co atty encl invoice.pdf

Date	Ver.	Action By	Action	Result
6/18/2019	1	Board of County Commissioners	approved	Pass

**PLACEMENT:** Departmental

### TITLE:

**DISCUSSION OF LEGAL DEFENSE EXPENSES THAT WERE INCURRED BY COMMISSIONER SARAH HEARD IN CASE NO. 2017-MM-3744**

### EXECUTIVE SUMMARY:

Commissioner Sarah Heard faced criminal charges for alleged violations of Florida's public records laws in connection with the performance of her duties as a County Commissioner. Commissioner Heard was acquitted of all charges on April 12, 2019. Commissioner Heard has requested an item for the Board of County Commissioners to discuss reimbursement of her legal defense expenditures.

**DEPARTMENT:** Administration

**PREPARED BY:** **Name:** Taryn G. Kryzda and Krista Storey  
**Title:** County Administrator and County Attorney

**REQUESTED BY:** Sarah Heard, Martin County Commissioner District Four

**PRESET:** **1:30 PM**

**PROCEDURES:** None

### BACKGROUND/RELATED STRATEGIC GOAL:

In 2017 Commissioner Heard faced criminal charges for an alleged violation of Florida's public records laws in connection with the performance of her duties as a County Commissioner. The case went to a jury trial in early April 2019 and Commissioner Heard was acquitted of all charges. Commissioner Heard retained attorneys to defend her in the case.

Once the case concluded, and Commissioner Heard was acquitted, staff began evaluating what obligation if any, the County had to assume responsibility for Commissioner Heard's legal expenses incurred in her defense. The County's Fiscal Policies for reimbursement of legal costs provides language whereby the Board may reimburse legal expenses in excess of \$7,500 that a Commissioner incurs when they have been charged and found not-guilty for something that is deemed within their normal scope of responsibility. The policy also states that the determination of the amount of attorney's fees will be based upon a reasonable hourly rate for the jurisdiction in which the claim or matter arose times a reasonable number of hours actually devoted to the defense of the claim or matter but will not include any multiplier or other contingency-based modification. In addition to the County's fiscal policies, Florida law provides that prevailing public officials are entitled to reimbursement of reasonable and necessary legal fees in either a civil or criminal proceeding when the litigation arises out of the performance of their official duties and serves a public purpose. County's legal staff also reached out to the County's insurance agent to see if this potential claim would be covered by the County's Professional Liability Insurance policy.

Commissioner Heard subsequently confirmed to staff that she would be making a claim for reimbursement and that her attorneys were preparing their final bill. The County Attorney reached out to her attorneys, the Kibbey-Wagner law firm, to provide them with the format for the submittal of their bills. Since the County has a fiduciary duty to make sure public funds are expended properly, the County's standard fee agreement for outside counsel includes a detailed billing provision. The County received a demand for payment of Commissioner Heard's attorneys' fees and costs from Kibbey-Wagner on May 14, 2019. The amount of the bill was \$450,363.57.

Upon receipt County staff submitted the claim to our insurance carrier for review and consideration. Since the insurance carrier initially indicated that the claim may not be covered, staff then began researching options for evaluation of the claim should insurance deny coverage of the claim.

The invoice that the County received from Kibbey-Wagner did not meet the County's specifications previously provided to Kibbey-Wagner. Many of the time entries are vague and generic and lacked the details needed to evaluate whether a reasonable amount of time was dedicated to a particular task. Given the lack of detail, staff became concerned at the ability to ascertain if the legal fees charged are reasonable and necessary. Since the legal fees are being paid with public funds, staff believes the County is obligated evaluate the charges to ensure the County only pays the reasonable and necessary legal fees, just as we do with other invoices received for payment. Since the invoice submitted lacked the necessary detail, staff requested from Kibbey-Wagner the documentation to support the list of expenditures and a more detailed itemized bill for the attorney time entries. The County has not received the requested documentation to date. Below are a just few of the examples of insufficient bulk billing and lack of detail on the invoice:

- Receipt and review of State's Initial Discovery (7,070 pages); billing 35.4 hours (two separate entries for both attorneys)
- Week of March 12: Met with Brad and Anthony regarding hard drive issues and PRR responses done by Barbara Clowdus, and conversations with County and State regarding same; billing 19.9 hours
- 922 emails drafted, received and reviewed; billing 92.2 hours
- 1443 emails drafted, received and reviewed; billing 144.3 hours
- Week of Feb 18<sup>th</sup>: Review of file and preparation for upcoming trial; billing 37.7 hours
- Week of March 18<sup>th</sup>: preparation for trial; billing 22.4 hours

In addition, upon further review of the invoice the County received from Kibbey-Wagner, there seems to be discrepancies in the billing. The following are just a few of the inconsistencies staff noticed in the section titled Time Entries:

- Commissioner Heard signed three retainers. The most recent retainer was for \$25,000. The retainer agrees to pay an hourly rate for attorney work at \$400.00 per hour and paralegal work at \$100.00. The letter dated May 14, 2019 references associate attorney time to be billed at \$250.00 per hour, yet that was not referenced or agreed upon in the retainer. It appears the Associate Attorney initials are JRA, and the first expenditure reflected for that individual is on 6/25/2019 at the rate of \$250.00, but the next entry on 7/5/2018 is at a rate of \$300.00 per hour.
- The retainer indicates that work by the attorneys would be billed at \$400.00. There are numerous entries that are made on the same date for the very same reason with the same amount of time for both attorneys with initials BW and JW, charging \$400.00 per hour for each one. On 5/9/2018 there are two entries for a Court Hearing for the same number of hours for each attorney, but one attorney is charging at a rate of \$800.00 and the other is at the agreed upon \$400.00.
- On 2/25/2018 Ms. Wagner billed 1.3 hours for a “45-minute phone conference with investigator re PRR requests and discovery.”

In addition to some discrepancies on the time entries, there is a section of the invoice listing the actual expenses incurred. County staff requested the backup documentation to support the expenses, but Kibbey-Wagner has not provided the requested information. Accordingly, the County cannot verify the actual costs. The County requires invoices for transcription fees, depositions, attendance of experts, process servers, investigators and expert fees to verify the actual costs. This ensures that there is no inclusion of a multiplier or other overhead cost that should not be included for reimbursement per the County’s policy and Florida law.

There are also many instances of double billing by the attorneys working on the case for the same work. These issues have raised concern with staff and led to the determination that an audit of the invoice needed to be conducted to ensure public funds are properly expended in this instance.

If it is determined that the County has to pay for any legal fees, based on the submitted bill, the County will face a hurdle in determining what portion of the bill was paid by Commissioner Heard requiring reimbursement directly to her and what portion remains unpaid requiring payment directly to Kibbey-Wagner. County staff reached out to Kibbey-Wagner to obtain clarification, and the firm refused to provide the requested information. For example, in the section titled Flat Fees, there is a charge reflected on 11/27/2017 for \$5,000.00 as a flat fee paid to prior counsel, Robert Watson. Without any detail, the County is unable to ascertain whether this amount was paid in 2017 as a retainer fee by Commissioner Heard or was it paid by the Kibbey-Wagner firm?

Given the circumstances, County staff determined that having an independent review and audit of the reasonable and necessary legal fees would be beneficial to all of the parties involved. As a result, staff contacted the Clerk of the Circuit Court and Comptroller (Clerk) since it is the responsibility of that constitutional office to oversee the County’s expenditure of public funds under the *Florida Constitution*. Ms. Timmann, as the County’s Comptroller always ensures that when public funds are expended, they are reasonable and necessary. Ms. Timmann agreed to review and audit the invoice

received for the legal fees demanded by Kibbey-Wagner. The level of oversight and scrutiny the Clerk performs on day-to-day requests for payments from the County, requires very detailed back-up documentation from vendors prior to being paid. The invoice submitted by Kibbey-Wagner needs to equally comply with this standard. It was staff's expectation that similar detail and back-up would be provided to the County for Commissioner Heard's legal fees and was requested by the County Attorney's office prior to receiving the invoice from Kibbey-Wagner.

When the County has needed assistance in additional scrutiny in the past, it has asked the Clerk to assist, as she in her role of Comptroller, has an independent Internal Auditor position. When the County spoke with the Clerk on the issue, the County and Clerk determined that hiring outside legal counsel was necessary to evaluate the invoice. The Clerk has contacted an attorney with expertise in the legal issues involved in Commissioner Heard's case that could assist the Clerk.

The Board has a fiduciary responsibility, as does the Clerk, to treat taxpayer's money as a public trust. Therefore, the Board would be derelict in their fiduciary responsibilities to pay an invoice without any detail or verification of the expenditures. As previously stated, the County goes through this 'audit' exercise for each request that is made for a payment to a vendor. All requests for payments, and in particular those that are of a significant dollar amount, are reviewed and approved by a process involving more than just one county staff and department. Then, the expenditure is also subject to the Clerk's staff review and determination of appropriateness prior to being placed into the system for payment.

If the County's Professional Liability Insurance Carrier does determine that it will cover the claim, representatives have expressed a concern about the lack of detail with the invoice. The insurance carrier indicated it will also require an audit of the invoice to determine if the charges are reasonable and necessary before reimbursement. The insurance agent encouraged hiring the Clerk to assist with this task. There may be monetary cap on the claim, so if the insurance company was to consider it for payment, and if the amount being requested was determined to be reasonable and necessary, there could still be a balance that would be paid by the County. Because of the expectation that the County would be responsible for something related to this matter, County staff is recommending to the Board to authorize the Clerk to proceed hiring the law firm that she has contacted to begin their review, so the issue can be on a 'dual-track', thus reducing possible delays.

Commissioner Heard's attorney was quoted in a recent article that since Commissioner Heard was acquitted, "she is no longer responsible for the fees and the county now is". The County recognizes its potential responsibility but only for costs that are reasonable and necessary. Accordingly, staff believes the approach outlined in this Agenda item will provide the best mechanism to ensure the appropriate expenditure of public funds.

## **ISSUES:**

Ensure public funds are properly expended pursuant to Florida law for reasonable and necessary legal fees incurred in defense of a public official in a criminal proceeding that arose out of the performance of official duties and served the public interest.

## **LEGAL SUFFICIENCY REVIEW:**

Under Florida law, public officials are entitled to legal representation at the public's expense for litigation that arises out of the performance of the public official's duties while serving a public

purpose. See *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914 (Fla. 1990). The public has a primary interest in such a controversy and should pay the reasonable and necessary legal fees incurred by the public officer in successfully defending against unfounded allegations of misconduct. *Ellison v. Reid*, 397 So. 2d 352 (Fla. 1<sup>st</sup> DCA 1981).

The Clerk of Court and Comptroller is authorized under Florida law to oversee proper expenditure of public funds in response to Kibbey-Wagner's demand for payment of Commissioner Heard's legal fees. Pursuant to Article VIII, section 1(d) of the *Florida Constitution*, "When not otherwise provided by county charter or special law approved by vote of the electors, the clerk of the circuit court shall be *ex officio* clerk of the board of county commissioners, auditor, recorder and custodian of all county funds." In *Alachua County v. Powers*, 351 So. 2d 32 (Fla. 1<sup>st</sup> DCA 1977), the Supreme Court of Florida held that clerk of court has the authority and responsibility to perform auditing functions as an arm of board of county commission in auditing records of constitutional officers, and as watchdog of the board in pre-auditing accounts of the board in determining the legality of expenditures. In addition, "the auditing function of the clerk of court includes more than the arithmetical determination as to the amount of the claim being presented for payment, the clerk has a duty to determine the legality of the expenditure before dispensing public funds." Op. Att'y Gen. Fla. 58-236.

## **RECOMMENDED ACTION:**

### **RECOMMENDATION**

Move that the Board direct the Clerk of Court to proceed with the evaluation of Kibbey-Wagner's demand for payment of Commissioner Heard's legal fees and audit of the invoice submitted to determine the reasonable and necessary legal expenses.

### **ALTERNATIVE RECOMMENDATIONS**

None

## **FISCAL IMPACT:**

### **RECOMMENDATION**

Depending upon the outcome of the audit, any fees to be paid by the County will have to be allocated from General Fund Reserves

### **ALTERNATIVE RECOMMENDATIONS**

None

## **DOCUMENT(S) REQUIRING ACTION:**

- |  |                                       |   |
|--|---------------------------------------|---|
| <input type="checkbox"/> Budget Transfer / Amendment | <input type="checkbox"/> Chair Letter | <input type="checkbox"/> Contract / Agreement |
| <input type="checkbox"/> Grant / Application         | <input type="checkbox"/> Notice       | <input type="checkbox"/> Ordinance            |
| <input type="checkbox"/> Resolution                  |                                       |   |
| <input type="checkbox"/> Other:                      |                                       |   |

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