

FILED

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**
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BARBARA A. WIEDENBETH
CLERK OF COMMON PLEAS
CLERMONT COUNTY, OH

IN RE: COUNSEL FOR LINDA L. FRALEY, CLERMONT COUNTY AUDITOR : **CASE NO. 2019 MISC 00017**
: **Judge Jerry R. McBride**
: **DECISION/ENTRY**

On the 28th day of May 2019, a joint application was filed by the Clermont County Board of Commissioners and D. Vincent Faris, Clermont County Prosecuting Attorney, requesting that the court authorize the Board of County Commissioners to employ legal counsel Strauss Troy Co., L.P.A. to represent Linda L. Fraley, Clermont County Auditor, in various matters referred to as "the Hicks Litigation."

The court scheduled and held a hearing on the joint application on June 21, 2019. At the conclusion of the hearing, the court took the issues raised by the joint application under advisement.

Upon consideration of the joint application, the evidence presented for the court's consideration on the application, the written and oral arguments made with respect to the application, the record of the proceeding, and the applicable law, the court now renders this written decision.

PROCEDURAL BACKGROUND

A private citizen, Christopher Hicks, initiated litigation against Linda Fraley, Clermont County Auditor, by filing a probable cause affidavit alleging that Fraley committed criminal acts in her capacity as County Auditor.

Upon her receipt of the affidavit and complaint filed by Hicks on March 20, 2018, Fraley asked the Prosecuting Attorney's office to represent her. According to Fraley, she was told that the Prosecuting Attorney's office had a conflict and could not represent her, and she was given no further guidance as to how to obtain representation in the case brought by Hicks. Subsequently, she contacted the law firm of Strauss Troy Co., L.P.A. (hereinafter referred to as "Strauss Troy"), and Christopher R. McDowell, an attorney in Strauss Troy's Litigation Department, in order to have them represent her in the litigation initiated by Hicks.

On April 5, 2018, Judge J. Howard Sundermann, who was assigned to hear the case, dismissed Hicks' complaint. That matter was appealed, and on December 28, 2018, the case was remanded back to the Municipal Court for the assigned judge to refer the matter to the prosecuting attorney for his review. Because D. Vincent Faris, the Prosecuting Attorney, had recused himself, Judge Sundermann referred the case to the Assistant Attorney General assigned to the case for further investigation and to take whatever action was necessary.

In late November or early December 2018, Fraley communicated to Ernie Ramos, Chief of the Civil Division in the Prosecuting Attorney's Office, that she was requesting the payment of her legal fees incurred in representing her in the legal proceedings initiated

by Hicks. On December 5, 2018 and December 12, 2018, the Prosecuting Attorney signed an application for authorization to employ legal counsel for Fraley, but for whatever reason, the Board of County Commissioners did not join in either of the applications.

On March 18, 2019, Brad L. Tammara, Senior Assistant Attorney General, and also Special Prosecuting Attorney, filed a notice of compliance indicating that he had completed the investigation as referred to him in the Municipal Court, that he found no probable cause for any further action, and that the matter was closed.

In late May 2019, the Board of County Commissioners and the Prosecuting Attorney both signed a joint application for authorization to employ outside counsel, and the joint application was filed with the court on May 28, 2019. The only difference in the initial applications forwarded by Faris to the Board of County Commissioners, and the joint application signed by both Faris and the Board of County Commissioners relates to the hourly rates for the representation of outside counsel and the inclusion in the joint application of the total fees charged by Strauss Troy for representation of Fraley.

The joint application includes the following statement pertaining to the request for authorization of outside counsel to represent Fraley:

"Accordingly, the Board of County Commissioners and the Prosecutor are of the opinion that because Linda L. Fraley, the Clermont County Auditor, has needed and will need legal counsel to represent her on the Hicks Litigation claims against her, for actions taken in her official capacity, it is reasonable, appropriate and in the best interests of all parties for the Court to authorize the Board of County Commissioners to employ legal counsel, Strauss Troy Co., LPA, to represent Linda L. Fraley in the Hicks Litigation, wherein compensation for that legal representation will be payment of fees due as of April 30, 2019 in the amount of \$34,768.11; and compensation from May 1, 2019 forward at the range of \$135.00 per hour to \$350.00 per hour with a total amount for all compensation not to exceed \$55,000.00."

In their joint application, "the Hicks Litigation," and litigation related thereto, is described as follows:

"A private citizen, Christopher Hicks, initiated litigation against Fraley by filing a probable cause affidavit alleging that Fraley committed criminal acts in her capacity as Clermont County Auditor. The litigation, State of Ohio vs Linda L. Fraley ('Hicks Litigation'), was initiated in the Clermont County Municipal Court, Case No. 2018 PC 00002. The Judge assigned to the Municipal Court case found that there was no probable cause that Fraley had committed a crime and dismissed the probable cause affidavit. Christopher Hicks then appealed the decision of the Municipal Court to the Twelfth District Court of Appeals, Case No. 2018 CA 04 022. The Judges in the 12th District Court of Appeals recused themselves from the case. Judges from the Tenth District Court of Appeals remanded the case to the Clermont County Municipal Court for the Judge to refer the case to the prosecutor, which in this matter is the Ohio Attorney General.

The case was referred to the Ohio Attorney General's office. The Attorney General's office subsequently filed a Notice of Compliance with the Court's order indicating there was no probable cause for further action and closing the case. Additional motions, applications and appeals were filed by the parties following the filing of the Notice of Compliance.

There are currently two pending appeals related to this matter. The first appeal, identified by Case No. 2019 CA 02 017 filed by Christopher Hicks related to the denial of his motions for unrestricted access for all exhibits, to schedule a hearing to hold the special prosecutor in contempt, and for appointment of a new special prosecutor. The second appeal, identified by Case No. 2019 CA 04 036 related to the denial of her application to seal her criminal record. Both appeals are currently pending."

The pending appeals referenced above within the description of "the Hicks litigation" are still ongoing matters pending in the Court of Appeals and are related to the initial case that was filed by Christopher Hicks in the Clermont County Municipal Court.

LEGAL ANALYSIS

1. AUTHORITY FOR JOINT APPLICATION

R.C. 309.09 provides in pertinent part:

“(A) The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, all other county officers and boards, and all tax-supported public libraries, and any of them may require written opinions or instructions from the prosecuting attorney in matters connected with their official duties. The prosecuting attorney shall prosecute and defend all suits and actions that any such officer, board, or tax-supported public library directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code.”

Accordingly, under Section 309.09 of the Ohio Revised Code, Faris, as the Prosecuting Attorney, and his office are responsible for prosecuting or defending actions where a county board or board officer is a party. Additionally, R.C. 309.09 prohibits a county officer from employing any attorney other than the county prosecuting attorney, stating, “no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code.”

R.C. 305.14, which is referenced in R.C. 309.09, provides in pertinent part:

(A) The court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity.”

R.C. 305.14 provides that, upon application of the prosecuting attorney and the board of county commissioners, the court of common pleas may authorize "the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity."

As a result, it appears that the joint application filed by the Prosecuting Attorney and the Board of County Commissioners is a proper exercise of their authority under R.C. 305.14 to make application for the employment of outside counsel to represent Fraley as the County Auditor.

2. CONFLICT OF INTEREST

In the within case, D. Vincent Faris, Clermont County Prosecuting Attorney, is one of the joint applicants for the appointment of outside counsel to represent the County Auditor, and Faris asserts that he has a conflict of interest.¹

With regard to the claim of a conflict of interest, Faris, as Prosecuting Attorney, has the general responsibility of prosecuting criminal offenses committed within Clermont County. Faris has taken the position that he can neither prosecute the County Auditor, because he is her attorney as a matter of law, nor defend the County Auditor, because

¹ Of note, "a conflict of interest is not a prerequisite to the appointment of outside counsel." *In re Retaining Vorys, Sater, Seymour & Pease, L.L.P., as Special Counsel*, 192 Ohio App.3d 357, 2011-Ohio-640, 949 N.E.2d 84, ¶ 48 (7th Dist.).

he is not a defense attorney and his office may not engage in criminal defense work. Indeed, the Ohio Supreme Court has observed that “[w]here the prosecuting attorney brings an action against such county board or officer in his official capacity, it is ordinarily in the best interests of the county that separate, independent counsel be appointed to defend such county officer or board in order to assure that there be no conflict of interests and that the county receive proper representation on both sides of the issue involved.”²

In any case, it is not this court’s responsibility to determine whether Faris and his office have a conflict of interest. Instead, the court recognizes that the Prosecuting Attorney’s claim of a conflict of interest in this matter appears to be reasonable.

Generally, where a prosecuting attorney has a conflict of interest, the prosecutor’s approval is not required in addition to that of the county commissioners.³ However, since a duty exists for the county officer to be provided counsel, there is no limitation on the ability of the prosecuting attorney to join in the application under R.C. 305.14.

Additionally, Faris has stated that in his opinion his office has a duty to make such an application for a county officer, who would otherwise be entitled to a defense by the prosecuting attorney, where his office cannot provide such representation due to a conflict.

Where either the prosecuting attorney or the board of county commissioners refuses to afford counsel to a county officer in defense of an action pending against the officer, mandamus would be an appropriate remedy to compel the prosecuting attorney and the board to make application to the common pleas court, because failure to do so

² *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 465, 423 N.E.2d 105 (1981).

³ *State ex rel. Hamilton Cty. Bd. of Commrs. v. Hamilton Cty. Court of Common Pleas*, 126 Ohio St.3d 111, 2010-Ohio-2467, 931 N.E.2d 98; see also, *State v. Yavorcik*, 2018-Ohio-1824, 113 N.E.3d 100, fn. 3 (8th Dist.).

constitutes an abuse of discretion.⁴ As a result, the court finds support for Faris' position that he was required to bring this application.

3. ENTITLEMENT TO REPRESENTATION FOR THE COUNTY AUDITOR

The prosecuting attorney must determine whether the representation is in connection with the "official duties" of the person who is seeking representation.⁵ There is a certain amount of discretion involved in this determination.

Based on the description above of the litigation involving the County Auditor, it appears beyond question that the allegations brought against the County Auditor relate to actions taken by Ms. Fraley in her official capacity as County Auditor and in furtherance of the public functions of her office. The issues raised by Christopher Hicks pertain to whether certain actions taken by Ms. Fraley in her capacity as County Auditor are authorized under the law and whether they are lawful.

The judicial determination of whether a particular expenditure authorized by the County Auditor is within her power to authorize constitutes official business, and expenses incurred in the litigation over whether her actions were authorized are reasonably necessary expenses.

Regardless as to how these issues are ultimately determined, it appears to be beyond dispute that Ms. Fraley was acting as the County Auditor with respect to the decisions that she made.

⁴ *Seminatore*, 66 Ohio St.2d at 463-64.

⁵ *Abdalla v. Olexia*, 7th Dist. Jefferson No. 97-JE-43, 1999 WL 803592, *12 (Oct. 6, 1999).

4. SELECTION OF ATTORNEY

In their joint application, the Prosecuting Attorney and the Board of County Commissioners have requested that the court authorize the employment of legal counsel to represent the County Auditor in the Hicks litigation, and they have requested that the court authorize the employment of Strauss Troy.

Hicks, as an interested party, argues that the County Auditor should not be able to select her own counsel, that the Prosecuting Attorney's office from another county could represent the County Auditor at minimal cost, and that less expensive counsel could and should be authorized in lieu of Strauss Troy.

With regard to the first of these arguments, Faris has stated that the Prosecuting Attorney's Office in another county would have the same conflict that he has in terms of acting as a defense attorney for the County Auditor. The court finds Faris' position in this regard to be reasonable.

With regard to the second of the arguments, Hicks is correct that the County Auditor is not entitled to pick her own outside counsel.⁶ However, the Prosecuting Attorney does not believe, given his conflict of interest, that it is appropriate for him to recommend counsel, and he is therefore acceding in Fraley's request for employment as outside counsel of the law firm which is currently representing her. The Board of County Commissioners, which has no conflict of interest, is likewise requesting the approval for outside employment of this law firm. Under these circumstances, the court cannot find cause to disapprove the joint application simply because Faris and the Board of County

⁶ See *State ex rel. Madison Cty. Engineer v. Madison Cty. Commrs.*, 12th Dist. Butler No. CA2016-01-003, 2016-Ohio-7191, ¶ 16.

Commissioners are requesting authorization to employ the same law firm that had previously been picked by the County Auditor.

As to the third argument, which relates to the high hourly rates charged by Strauss Troy and the extent of their services, the County Auditor Fraley, when faced with Hicks' allegations of ethical violations and criminal wrongdoing, and with the possible consequence of her removal from office or imprisonment, has picked a law firm with an excellent reputation in the legal community and with a record of achieving results in court. Beyond that, the Board of County Commissioners, which has the ultimate fiscal responsibility in this matter, has agreed with the County Auditor and has requested that the court authorize the employment of Strauss Troy. Ultimately, it is the responsibility of the Board of County Commissioners to decide whether the expense is reasonable, and it has determined that it is.

Accordingly, for good cause shown, the court hereby authorizes the employment of Strauss Troy Co., L.P.A. to represent the defendant in the so-called Hicks litigation.

5. COMPENSATION OF OUTSIDE COUNSEL

R.C. 305.17 states in pertinent part:

"The board of county commissioners shall fix the compensation of all persons appointed or employed under sections 305.13 to 305.16, inclusive, of the Revised Code, which, with their reasonable expenses, shall be paid from the county treasury upon the allowance of the board."

Fixing the compensation of outside counsel authorized to be employed pursuant to R.C. 305.14 is included within the scope of the authority vested in the Board of County Commissioners under R.C. 305.17.


Accordingly, this court does not have the authority either to fix the compensation to be paid to the law firm that is appointed or to fix the services for which the attorney may be compensated.⁷ These are matters that, as a matter of law, are reserved for the Board of County Commissioners to decide.

CONCLUSION

For the foregoing reasons, the court authorizes, pursuant to Section 305.14 of the Revised Code, the Clermont County Board of Commissioners to employ Strauss Troy Co., LPA to represent Linda L. Fraley in the litigation herein referenced and described as the Hicks Litigation.

IT IS SO ORDERED.

DATED: 7-17-17

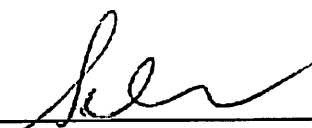


Judge Jerry R. McBride

⁷ *State ex rel. Simmons v. Geauga Cty. Prosecuting Attorney's Office*, 11th Dist. Geauga No. 97-G-2078, 1997 WL 772948, *2 (Dec. 5, 1997).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent on this 17th day of July 2019 by e-mail to D. Vincent Faris, Clermont County Prosecuting Attorney, at vfaris@clermontcountyohio.gov, to Ernie Ramos, Chief, Civil Division, Clermont County Prosecuting Attorney's Office, at eramos@clermontcountyohio.gov, to David L. Painter, President, Clermont County Board of Commissioners, at dpainter@clermontcountyohio.gov, to Edwin H. Humphrey, Member, Clermont County Board of Commissioners, at ehumphrey@clermontcountyohio.gov, to Claire Corcoran, Member, Clermont County Board of Commissioners, at ccorcoran@clermontcountyohio.gov, to Linda L. Fraley, Clermont County Auditor, at lfraley@clermontcountyohio.gov, to Christopher R. McDowell, Attorney for Linda L. Fraley, at crmcdowell@strausstroy.com, and to Christopher Hicks, Interested Person, at chris@hickspub.com.



Judicial Assistant to Judge McBride