The Florida Bar
Inquiry/Complaint Form

PART ONE (See Page 1, PART ONE – Complainant Information.):

Your Name: Richard Stephen Gardner
Organization:
Address: [redacted]
City, State, Zip Code: [redacted]
Telephone: ([redacted]
E-mail: [redacted]
ACAP Reference No.:
Have you ever filed a complaint against a member of The Florida Bar: Yes ☐ No ☒
If yes, how many complaints have you filed?
Does this complaint pertain to a matter currently in litigation? Yes ☐ No ☒

PART TWO (See Page 1, PART TWO – Attorney Information.):

Attorney's Name: Nancye Rogers Jones
Address: Volusia County Attorney's Office 123 West Indiana Avenue
City, State, Zip Code: Deland, FL 32720
Telephone: (386) 736-2700

PART THREE (See Page 1, PART THREE – Facts/Allegations.): The specific thing or things I am complaining about are: (attach additional sheets as necessary)

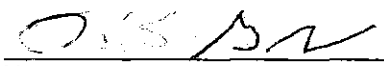
Please See Attached

PART FOUR (See Page 1, PART FOUR – Witnesses.): The witnesses in support of my allegations are: [see attached sheet].

PART FIVE (See Page 1, PART FIVE – Signature.): Under penalties of perjury, I declare that the foregoing facts are true, correct and complete.

Richard S. Gardner

Print Name



Signature

10/25/13

Date

Witness List

Honorable Judge Robert K. Rouse, Jr.
Division 02
101 N. Alabama Avenue
DeLand, FL 32724
Phone (386) 626-6590
Fax (386) 943-7076

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Brenda Thompson (Personnel Board Member)
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Kimberly Bandorf (Witness)
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[redacted]

October 25, 2013

The Florida Bar
Attorney/Consumer Assistance Program (ACAP)
651 East Jefferson Street
Tallahassee, Florida 32399-2300

Dear Bar Counsel:

Please note that I am a former sworn law enforcement officer; as such, pursuant to Florida Statute 119.071(4)(d) 1. and 2.a., my home address, telephone numbers and other personal contact/identifying information are exempt from the public record requirements of Florida Statute 119.07(1). Please take the appropriate steps to ensure this information is not publicly disclosed.

My name is Richard S. Gardner, and I am providing the following information along with the inquiry/complaint form regarding Attorney Nancye Rogers Jones, who was admitted to the Florida Bar on June 18, 1980 and whose Florida Bar Number is 298905. My complaint arises out of an employment disciplinary action initiated by Volusia County by way of a Notice of Intent to terminate my employment as a Captain of the Volusia County Beach Patrol, after a 28 year career with no prior disciplinary history, and ended with a unanimous recommendation by the Volusia County Personnel Board for reinstatement. After reinstatement, I have since retired from the Volusia County Beach Patrol; nevertheless, Ms. Jones' conduct during the matter was so shocking and inconsistent with my expectations and experience with other attorneys, I felt compelled to bring this matter to your attention. Therefore, I am requesting that the Florida Bar investigate Ms. Jones for violations which may include, but are not limited to, the following rules governing the Florida Bar:

1. **RULE 4-3.3 CANDOR TOWARD THE TRIBUNAL;**
2. **RULE 4-4.1 RULE 4-4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS;**
3. **RULE 4-8.4(c)MISCONDUCT: INVOLVING DISHONESTY, FRAUD, DECEIT, OR MISREPRESENTATION;**
4. **RULE 3-4.3 MISCONDUCT AND MINOR MISCONDUCT.**

At issue is Ms. Jones' conduct at two hearings, a meeting she initiated with one of my witnesses who had been subpoenaed to appear at one of those hearings, and from a memo she authored regarding the procedures applicable to one of those hearings. The first hearing was an emergency hearing on my Petition for Temporary and Permanent Injunction before the Honorable Robert K. Rouse, Jr. on January 20, 2012 (Rouse hearing). The meeting was with my witness, Internal Affairs Investigator Captain Nikki Dofflemyer, and occurred on or about April 05, 2012 (Dofflemyer meeting). The memo at issue, dated April 09, 2012, was authored by Ms. Jones and sent to the Personnel Board (the memo). The second hearing was before the Volusia County Personnel Board on April 12-13, 2012 (P.B. hearing). Pursuant to the instructions by the Florida Bar, my complaint is organized chronologically with Part I addressing the Rouse hearing; Part II, the Dofflemyer meeting; Part III, the memo; and Part IV, the P.B. hearing.

Portions of the hearings containing the relevant statements have been carefully transcribed, although not by a court reporter, and appear in italics in this complaint; moreover, both proceedings were also video

recorded.[1] To aid Bar Counsel in efficiently locating the relevant portions of both hearings, an approximate video running time has been included in brackets following each included statement or series of statements to roughly correspond to the beginning of the statement(s) in the videos. The videos are also available online at www.volusiaexposed.com; however, the video running times included below might vary from those of the online videos.

The following is a brief outline of the major actions of misconduct to serve as an overview; however, numerous additional acts of misconduct will be apparent in the more detailed discussion that follows. All references to "the Rules" refer to the Rules Regulating the Florida Bar.

OUTLINE

PART I: Rouse hearing:

A. Ms. Jones assured Judge Rouse that I could raise the Law Enforcement Officers' Bill of Rights issues at the subsequent P.B. hearing and, in her capacity as an officer of the court, she represented to Judge Rouse that she would not object when I did so;
B. At no time following the Rouse hearing did Ms. Jones take remedial measures to fulfill her obligation under the Rules to inform Judge Rouse and/or opposing counsel that she had misled the tribunal.

PART II: Captain Dofflemyer meeting:

A. Prior to the P.B. hearing, Ms. Jones, Volusia County Attorney, directed Volusia County employee Internal Affairs Investigator Captain Dofflemyer to Ms. Jones' office to discuss the P.B. hearing. Captain Dofflemyer was a witness who had been subpoenaed to appear at the P.B. hearing on my behalf to testify to, among other matters, the Law Enforcement Officers' Bill of Rights violations committed by Volusia County. At that meeting, Ms. Jones advised Captain Dofflemyer that she did not need to attend my P.B. hearing. Although on duty and available, Captain Dofflemyer did not appear at my P.B. hearing.

PART III: The memo:

A. Without taking remedial measures with Judge Rouse, Ms. Jones, as a Volusia County attorney and just three days prior to the P.B. hearing, advised the Volusia County Personnel Board that the hearing must be confined to the charges contained in the statement of adverse action (necessarily precluding consideration of the Law Enforcement Officers' Bill of Rights issues).

PART IV: P.B. hearing:

A. Ms. Jones remained silent when the Personnel Board inquired whether the subpoenaed witness, Captain Dofflemyer, would be attending the hearing, when it was Ms. Jones herself who had told Captain Dofflemyer that she did not need to appear before the Board;
B. Later, during her speaking objection, Ms. Jones provided false, misleading, and incomplete information regarding the absence of Captain Dofflemyer;

[1] Copies of the video recordings are available to the Florida Bar upon request.

C. Ms. Jones remained silent about her representation to Judge Rouse, as an officer of the court, that she would not object to the Personnel Board considering the Law Enforcement Officers' Bill of Rights issues;
D. Again, without taking remedial measures with Judge Rouse, Ms. Jones objected to the Law Enforcement Officers' Bill of Rights issues being considered, despite her previous representations at the Rouse hearing that she would not object;
E. Ms. Jones represented to the Personnel Board that my allegations of the Law Enforcement Officers' Bill of Rights violations had been substantively addressed by Judge Rouse when they had not;
F. Ms. Jones falsely stated to the Personnel Board that my request for a Compliance Review hearing was untimely and that Judge Rouse made such a finding;
G. Ms. Jones falsely stated to the Personnel Board that the reason she did not supply me with the final investigative report or summary, authored by Assistant County Attorney Larry Smith, was that she did not know I did not already have that report; however, she was previously put on notice on two separate occasions that I was neither in possession of nor even had knowledge of the existence of a final report when my attorney Abe McKinnon stated that there is no final investigative report and that the only investigative report in existence is the report authored by Captain Dofflemyer. Furthermore, Ms. Jones' first explanation for not providing the Smith report was that I did not ask for it.
H. Through her line of questioning, Ms. Jones implied to the Personnel Board that my exercise of my statutory right to request the interview of me be ceased was wrongful/evidence of guilt.

PART V: Analysis of Rule Violation

PART VI: Conclusion

PART VII: Nancye Jones' Statement Juxtaposition Table

PART I: JANUARY 20, 2012 JUDGE ROUSE HEARING

On January 20, 2012, the Honorable Robert K. Rouse, Jr. presided over an emergency hearing on my Petition for Temporary and Permanent Injunction in Richard S. Gardner v. Volusia County, Florida and George Recktenwald, case number 2012-10167-CIDL, in the Seventh Judicial Circuit, Volusia County, Florida.[2] I sought an order enjoining the Respondents to conduct a Compliance Review hearing, pursuant to Section 112.534 Florida Statutes, for the purpose of determining whether there had been violations of my Law Enforcement Officers' Bill of Rights (LEOBOR). Present at the hearing on my behalf were Attorneys Abraham McKinnon and Jonathan D. Kaney III. Appearing on behalf of Volusia County were Assistant County Attorneys Nancye Rogers Jones and J. Giffin Chumley. Ostensibly, Mr. Chumley was lead counsel at the hearing; however, the much more experienced Ms. Jones can be seen at various times throughout the hearing whispering to Mr. Chumley, supplying him with his responses to Judge Rouse's questions, and giving nonverbal responses to the Judge. Ms. Jones also spoke and made argument during the hearing. Not surprisingly, as she is a longtime attorney for Volusia County, it was also clear that Judge Rouse was familiar with Ms. Jones:

Judge Rouse: You're here, Ms. Jones, representing both defendants?

[2] A copy of my Petition for Temporary and Permanent Injunction is available to the Florida Bar upon request.

Jones: Uh actually, yes Judge, Mr. Chumley is lead counsel and I'm uh second chair.

Judge Rouse: I just assumed.

Chumley: I'm a new face Your Honor. [12:51 Disc 1 of 2 Rouse hearing; file Gardner 1 of 3]

By way of background, Part VI of Chapter 112, Florida Statutes, commonly referred to as "The Police Officers' Bill of Rights" or "Law Enforcement Officers' Bill of Rights," is designed to ensure certain rights for law enforcement and correctional officers. I followed the statutory procedure in asserting numerous intentional violations of my LEOBOR by Volusia County and in requesting a Compliance Review hearing; however, instead of providing a Compliance Review panel to make determinations regarding the violations of my rights which I had alleged, I received from the County a Notice of Dismissal, which itself constituted yet another violation of my rights under the statute. The gist of my argument at the hearing before Judge Rouse was that I was entitled to a Compliance Review hearing as provided for by the plain meaning of the statute. [See Chapter 112, Part VI in general and specifically 112.534].

Furthermore, Section 112.534(1) instructs: "If any law enforcement agency . . . including investigators in its internal affairs . . . division, or an assigned investigating supervisor, intentionally fails to comply with the requirements ***of this part***, the following procedures apply . . . ." (emphasis added). The language "of this part" refers to Part VI of Chapter 112. Section 112.534 then sets out the procedure for the impaneling of the Compliance Review board. Also contained within Part VI of Chapter 112 is, for example, Section 112.532(4)(a)which reads: "NOTICE OF DISCIPLINARY ACTION.-A ***dismissal***, demotion, transfer, reassignment, or other personnel action that might result in loss of pay or benefits . . . may not be taken against any law enforcement officer . . . unless the law enforcement officer . . . is notified of the action and the reason or reasons for the action before the effective date of the action." (emphasis added). Similarly, 112.532(4)(b), 112.534(5) and 112.524(6) all include "dismissal" or "discharged" language; therefore, by specifying the procedure for impaneling a Compliance Review board for intentional violations of Part VI of Section 112 and including within Part VI the notice and other requirements pertaining to the dismissal of law enforcement officers, it is clear that the Florida Legislature contemplated that an officer who has been dismissed in violation of the LEOBOR has the right to a Compliance Review hearing even though s/he has already been dismissed. Indeed, any other interpretation would violate a basic principle of statutory construction: that statutory language is not to be construed as mere surplusage and that courts should give effect, if possible, to every clause and word of a statute, while avoiding any construction which implies that the legislature was ignorant of the meaning of the language it used.

My attorneys made this plain meaning argument as well as case law arguments to Judge Rouse. Despite the aforementioned statutory language, Judge Rouse accepted the County's position that terminated law enforcement officers are not entitled to a Compliance Review hearing; thus, since I had been terminated within days of the injunction hearing, Volusia County's denial of my request for a Compliance Review hearing had become, according to the County's prevailing argument, a moot issue at the time of the injunction hearing.

Significantly, however, throughout the hearing, Judge Rouse repeatedly expressed concern that my allegations of various intentional violations of my LEOBOR would remain unaddressed if he did not order the impaneling of the Compliance Review Board:

Judge Rouse: Let me stop you there for a moment. Petitioner's counsel seem to argue or suggest that if this Compliance Review panel has never been impaneled, never set up pursuant to the ***appropriate***

demand at the time he was still employed, *that they're just stuck with whatever findings. They can never challenge those findings of that investigator. No one will ever review those findings. There is no meaningful opportunity or fair process for the terminated officer to say wait a minute, that's not true – that person was – the investigator that made that determination or factual finding, they were biased and if you had set up the Compliance Review panel that would've been determined, but you refused to do it and now I'm somehow prohibited from in any way challenging these grounds for my termination. Is that the case?*

Chumley: No, Uh your Honor. The County's Merit System allows him to appeal within 10 days of the action so they can present a de novo hearing to the County's Personnel Board. [:23 Disc 1 of 2 Rouse hearing; file Gardner 2 of 3]

It is also important to note that Judge Rouse was quite candid about his lack of experience in matters pertaining to the LEOBOR and the Personnel Board and what issues the Personnel Board would consider. It was also clear that Judge Rouse was looking to the County for assurance that the issue of the LEOBOR violations would be heard by the Personnel Board:

Kaney: The case law is clear Your Honor: You get the Compliance Review hearing upon written notice – three working days written notice of any violation of that Part - that includes the three violations that came to light Tuesday morning, same day I filed the Petition.

Judge Rouse: But I'm still struggling. You have to forgive me and bear with me a little bit.

Kaney: I understand.

Judge Rouse: In my previous life, I did not represent officers in these matters nor did I represent the County in these matters or any other governmental entity so this is not something that I dealt with day to day. Is the idea of this Statute 112.534 to make sure that there is not some kind of biased investigator who is intentionally violating the officer's rights?

Kaney: That's part of it. Of course it doesn't have to be biased investigator. It affords procedural due process to law enforcement officers and correctional officers.

Judge Rouse: But with respect, specifically this part of it, with respect to the investigator who is investigating the officer, is that it?

Kaney: It's not just the investigator, no. If you read the statute Your Honor, it speaks to the agency as well. Investigators and the agency. [22:56 Disc 1 of 2 Rouse hearing; file Gardner 1 of 3]

. . .

Judge Rouse: I don't know why you can't challenge that. I don't understand why you couldn't in a subsequent proceeding to determine whether or not this was a valid and appropriate and proper and legal determination you couldn't go back and show the bias and all the rest of it.

McKinnon: Because the Personnel Board is not charged with making those determinations. The Compliance Review Committee is the only entity that is charged with making those determinations. They are specifically proscribed in the statute to make those findings. Personnel Board, we're talking about other issues. They don't have the authority to make those findings *so we only have one party and it's a very limited review board and it's a very specific request who can hear these matters and*

adjudicate those issues and make determinations and remove investigators if they deem it appropriate. [39:52 Disc 1 of 2 Rouse hearing; file Gardner 1 of 3]

. . .

Judge Rouse: My concern here, as I have said, I conceded I did not walk into this hearing educated in this matter, but I wanted to make sure that I neither misunderstood the argument or that you just disagree with it and you're going to ***reassure me*** *that in this case, Richard S. Gardner has ample opportunity to challenge every basis upon which he was terminated even if no Compliance Review panel was ever or is ever established. Is that the case? [Jones can be seen telling Chumley to answer yes and as Jones is nodding, Chumley responds: Yeah. Yes, Your Honor]*

Judge Rouse: So that is the case unequivocally? And they can do that at what proceeding?

Chumley: The Compliance Review [Jones corrects 'him] - the Personnel Review Board [sic]-under the merit system under Chapter 86.

Judge Rouse: He has that available to him right now? Everybody is telling me - Mr. McKinnon agreed that he had been dismissed. You say he's been dismissed. And now he gets to go to the personnel review board [sic] and challenge that dismissal.

Chumley: Yes. [3:50 Disc 1 of 2 Rouse hearing; file Gardner 2 of 3]

. . .

Judge Rouse: Or not, but in any event, he's been dismissed no matter how good or bad the investigation was uh, he has been dismissed and if he wants to challenge the grounds for the dismissal he can do so before the personnel review board [sic] and he'll have plenty of procedural and substantive due process in connection with that proceeding?

Chumley: Exactly Your Honor.

Judge Rouse: Because I'm not really conversant with, in the way that I would prefer to be, with what goes on in personnel review boards [sic]. I've never represented anyone involved in that for either side so I'm not truly all that conversant with what that entails. So but you're telling me Richard Gardner has opportunity to challenge this dismissal at that Personnel Review Board [sic] proceeding [Jones nodding to Judge Rouse throughout]. He doesn't need the Compliance Review Panel in order to arm himself?

Chumley: Yes.

Judge Rouse: Is that what you're telling me?

Jones: Yes, Your Honor. [8:10 Disc 1 of 2 Rouse hearing; file Gardner 2 of 3]

Moreover, please note from the above dialogue, that at the hearing before Judge Rouse, it was my attorneys who tried to explain to the judge why the allegations of the LEOBOR violations should be addressed by the Compliance Review panel, rather than the Personnel Board; while the below exchange shows that it was Ms. Jones who told Judge Rouse not only that the Personnel Board would hear the LEOBOR violations, but that it could hear such allegations, as the Board was not limited to a

consideration of the information contained in the Internal Affairs report and that it would make determinations based on what the parties presented to the Board at the hearing.

Finally, Nancye Jones, not only a familiar face, but an officer of the court and the only person in the room with extensive experience with Personnel Board hearings, allays Judge Rouse's concerns by assuring him that my allegations of LEOBOR violations would indeed be heard by the Personnel Board when she unequivocally stated that the Personnel Board considers anything and, as an officer of the court, she absolutely would not object when I raise the issue of the violations in front of the Board:

Jones: No Sir. It's a separate vehicle really. I mean the disciplinary process that's beginning for Mr. Gardner, he has to file a Notice of Appeal within 10 days. The Personnel Board hearing will be convened and as ***as the person for the County who has done more probably Personnel Board hearings in the last twenty years than anyone else in this room for sure, um I can tell you that the Board will consider anything. If they want to bring in that his rights were violated, that is absolutely something they can bring to the Board's attention*** *to try to say well this evidence was tainted because the investigator did A B or C.*

Judge Rouse: And you're representing, as an officer of the Court right here as one who has done that and might be involved in doing it in this case, that you wouldn't even object on that ground?

Jones: Absolutely Judge. Absolutely*. . . . Um so if I could just you know summarize, I made a couple notes. Um, the purpose of this is to protect the rights during the course of an investigation. This distinction of McQuade is that and the Court points out that under the statute,* ***prior to 2008, injunction was the only remedy for an ahegation of a Bill of Rights violation. That's no longer the case.*** *Mr. Gardner can sue us in civil court if he wants to for wrongful termination and bring up these allegations.* ***There seems to be a great concern that he doesn't have any other remedies, but he does in fact judge, including the Personnel Board****. . . . [25:15 Disc 2 of 2 Rouse hearing; file Gardner 3 of 3]*

Please note in the above exchange that, not only did Ms. Jones represent to Judge Rouse that she would not object when I raise the issue of the LEOBOR violations to the Personnel Board, but, after she sensed Judge Rouse's concern that there would be no remedy for the LEOBOR violations if Judge Rouse did not order a Compliance Review hearing, she then specifically reassured him that I had a **remedy** for the LEOBOR violations in the Personnel Board.

Similarly, through a discussion of various LEOBOR violation hypotheticals, Ms. Jones again assured Judge Rouse that the LEOBOR violations could be determined by the Personnel Board as it is not bound solely by what is in the Internal Affairs investigation:

Judge Rouse: For example, going back to my hypothetical about two people questioning, let's change it from that and say . . . if someone were, hypothetically now, tricked into signing something uh they were told they were signing this and it turned out they were signing a quote confession close quote some wrongdoing that would in fact be prejudice, in other words, that could result, obviously, in if that's the basis or a significant, substantial contributing basis for the dismissal, obviously, that could be ground for reinstatement.

Jones: ***Yes, Sir. The Personnel Board is not bound solely by what is in that internal affairs investigation. They make their determination based on what the parties present to them at that hearing.*** [29:03 Disc 2 of 2 Rouse hearing; file Gardner 3 of 3]

Below, Judge Rouse again turns to Ms. Jones to respond to the concern that I need the Compliance Review hearing to make determinations of LEOBOR violations, and yet again, Ms. Jones assured Judge Rouse that I did not need the Compliance Review hearing in order to raise the LEOBOR violations to the Personnel Board; in fact, she even goes as far as telling Judge Rouse I have a "right" to have the Personnel Board consider evidence of the LEOBOR violations. Crucially, she also told Judge Rouse that she assumed that I would be raising the LEOBOR violations to the Personnel Board; i.e., she anticipated, even at the time of the hearing before Judge Rouse, that I would raise the LEOBOR violations with the Personnel Board:

Judge Rouse: But Mr. McKinnon seems to be suggesting, and perhaps he didn't mean to do this but I just took it this way but that this would be very helpful to his client if we did, if this court did order the impaneling or the uh Compliance Review panel to be constituted and undertake action here that perhaps they would find many of these allegations to be well-founded and that a record could be made of that and this could be very helpful to his client down the line to have this more independent review of this matter and could be very beneficial to uh to his client so what do you think about that?

Jones: Well, ***I don't think he needs that in order to to preserve his rights to make the argument or make the presentation to the Personnel Board. He can bring in whatever evidence he wants that his rights were violated during the course of the investigation*** *and and hopefully would be able to show how those violations impacted the result of the investigation and* ***that's what I assume that they uh would try to get to. But that would be for the Personnel Board to consider.*** *Uh the Compliance Review board, like I said judge, if you ordered one to be convened immediately, it's not gonna change that path of his, of his disciplinary action and the administrative review of that is a totally separate vehicle.* [29:03 Disc 2 of 2 Rouse hearing; file Gardner 3 of 3]

PART II: CAPTAIN DOFFLEMEYER MEETING

The investigation against me began with an anonymous letter alleging misconduct by several Volusia County Beach Patrol employees. Captain Nikki Dofflemyer was a critical witness in my case as she was the Internal Affairs investigator assigned to investigate the allegations. Captain Dofflemyer completed her investigation and prepared an investigative report regarding the allegations against me, including her findings that many of the allegations were unsubstantiated. She would have also been able to testify to many of the LEOBOR violations. Captain Dofflemyer was served with a "Subpoena For Personnel Board Appeal Hearing" to appear as my witness at the P.B. hearing. At the behest of Volusia County Attorney Nancye Jones, Volusia County employee Captain Dofflemyer met with Ms. Jones in Ms. Jones' office for the purpose of discussing the subpoena for my P.B. hearing. At that meeting, Ms. Jones advised Captain Dofflemyer that she did not need to attend my P.B. hearing. Although on duty and available, Captain Dofflemyer did not appear at my P.B. hearing. Captain Dofflemyer has provided a sworn affidavit describing the meeting she had with Ms. Jones with a copy of her subpoena attached[3].

Please note in Captain Dofflemyer's affidavit the sworn statement: "I told Ms. Jones that I understood the 'Subpoena for Personnel Board Appeal Hearing' issued by Mr. Motes to be 'non-binding.' Ms. Jones confirmed the subpoena to be 'non-binding.'" The subpoena at issue was issued by Human Resource Director Tom Motes on behalf of Volusia County to Volusia County employee Captain Dofflemyer, and although such subpoena would have no binding effect on an individual not in the employ of Volusia County, on an employee like Captain Dofflemyer, it was a directive from her employer to appear at my P.B hearing at the designated time and place and failure to

[3] The Dofflemyer affidavit with attached subpoena is attached as Exhibit A.

appear would constitute an act of insubordination and grounds for discipline; therefore, Ms. Jones falsely confirmed the non-binding effect of the Volusia County subpoena on its employee Captain Dofflemyer. Furthermore, please note the language in the attached subpoena which directs that the subpoenaed person can only be released from the subpoena by Tom Motes, Human Resource Director. Attorney Jones certainly knew that she had no authority to release Captain Dofflemyer, a witness subpoenaed on my behalf, when she told Captain Dofflemyer she did not need to attend the hearing.

PART III: JONES' APRIL 09, 2012 MEMO TO PERSONNEL BOARD

The duplicitous intent behind Ms. Jones' representations to Judge Rouse is revealed by her memo to the Personnel Board dated April 9, 2012.[4] After representing to Judge Rouse that, as an officer of the court, she would not object to the introduction of evidence of LEOBOR violations at the Personnel Board hearing, referring to my ability to do so as my "right," explaining to Judge Rouse that I could present whatever evidence of LEOBOR violations I wanted to the Board and that the Board is not solely bound by the contents of the Internal Affairs investigation (or, by implication, statement of adverse action which is based on that Internal Affairs investigation), and that the Board would make its determination based on the evidence presented by the parties, Ms. Jones then sent a memo to the individual Board members within days of the start of the hearing before the Board which contained her explicitly stated intention to object to the presentation to the Board of anything outside the statement of adverse action, which, necessarily, would include the LEOBOR violations committed by the County, because of course the County did not include its numerous violations of my LEOBOR in the statement of adverse action. Ms. Jones sent this memo without taking remedial measures with Judge Rouse. To add insult to injury, she had the audacity to couch the memo's purpose in language of fairness: **"In the interest of the efficiency of this process and fairness to the Board members, parties and witnesses, I am providing this pre-hearing information for your consideration so that you can be prepared for the County's objection to the presentation of any witnesses or issues which are outside the scope of the Board's authority."**

Of course, Ms. Jones wrote this memo anticipating that I would seek to have the Personnel Board hear the LEOBOR violations, since, again, she told Judge Rouse she assumed I would raise the LEOBOR violations to the Personnel Board and she told the Personnel Board that she suspected I would do so. Ms. Jones sent this memo three days before the Personnel Board hearing and it is clear that, despite her assurances to Judge Rouse to the contrary, her purpose in doing so was to prevent the Personnel Board from hearing my allegations of LEOBOR violations and other evidence which would have been unfavorable to the County. It is clear that Ms. Jones wrote the memo to groom the Board members to rule in her favor after her planned objection to my introduction of evidence of LEOBOR violations.

In a complete reversal of the aforementioned representations to Judge Rouse and before me and my attorneys who relied upon those representations, Ms. Jones' memo instructed the Personnel Board: "Pursuant to the Personnel Board Hearing Procedures, section IV.B, the powers of the Board include, among other things, regulating the course of the hearing and disposing of procedural requests or similar matters. Further, this section provides that '**The hearing must be confined to the charges contained in the statement of adverse action given to the employee at the time the action was taken**... ." Her memo further instructed the Board: "If the appointing authority's decision to terminate is unchanged by the response of the employee, the final letter of termination or dismissal is then issued. It is this final letter which determines the issues which shall be presented for the Board's consideration and action pursuant to the above referenced section of the Board's procedures. **The scope of the evidence presented at the**

[4] A copy of Ms. Jones' memo to the Personnel Board is attached hereto as Exhibit B.

hearing is limited to that which will either support or refute the action taken as set forth in the final letter."

Of course, being, as she touted to Judge Rouse, the person for the County who had done more Personnel Board hearings in the last twenty years than anyone else in that courtroom, Ms. Jones would have been well aware of this basic rule governing the Personnel Board hearing procedures that the hearing must be confined to the charges contained in the statement of adverse action given to the employee at the time the action was taken, and she would have been aware of the existence of this basic rule at the time of her representations to Judge Rouse that the LEOBOR violations were for the Personnel Board to consider and that the Board would and could consider such allegations and that I could bring in whatever evidence of the violations I wanted to the Board; in fact, please see the below language (from Part IV P.B. hearing) in which Jones herself made it clear for the record that the Personnel Board's authority is "well-established" by Volusia County's Charter, the merit rules, and the Board's own procedures. Clearly, after more than twenty years of Personnel Board experience, Ms. Jones would have had the knowledge of the "well-established" Personnel Board's authority at the time she told Judge Rouse I had a remedy for my LEOBOR allegations in the Personnel Board.

Recall that at the Rouse hearing, it was my attorney, Abe McKinnon, who argued to Judge Rouse that the Compliance Review Panel should be ordered because it is the only entity charged with making determinations of LEOBOR violations and that the Personnel Board did not have the authority to make such determinations; meanwhile, Nancye Jones, after trumpeting her Personnel Board experience, argued the very opposite and ultimately convinced Judge Rouse the Compliance Review hearing was not necessary because the Personnel Board would provide a remedy for any LEOBOR violations: *as the person for the County who has done more probably Personnel Board hearings in the last twenty years than anyone else in this room for sure, um I can tell you that the Board will consider anything. If they want to bring in that his rights were violated, that is absolutely something they can bring to the Board's attention* . . . . Roughly 2 ½ months later, in her memo to the Personnel Board, Nancye Jones pulled a shocking switcheroo and adopted Abe McKinnon's argument before Judge Rouse that the Personnel Board has limited authority - the very argument Nancye Jones successfully defeated at the Rouse hearing.

PART IV: APRIL 12-13, 2012 PERSONNEL BOARD HEARING

On the morning of April 12, 2012, the P.B. hearing began with my attorney Abraham McKinnon's motion to continue due to the unexplained absence of Captain Nikki Dofflemyer, the Internal Affairs investigator who had been served with a subpoena for her attendance as my witness at the hearing. In reliance on Ms. Jones' representations as an officer of the court that she would not be objecting to the LEOBOR violations being raised at the P.B. hearing, and as evidenced by Mr. McKinnon's statements below, my attorneys had prepared to do just that and Nikki Dofflemyer was a key witness to establish many of the LEOBOR violations as well as other misconduct by Volusia County officials during the course of the investigation against me. In response to Mr. McKinnon's efforts to have the hearing continued for the purpose of securing the presence of Captain Dofflemyer, a Personnel Board member inquired into Captain Dofflemyer's absence and whether Mr. McKinnon had some indication that Captain Dofflemyer was not going to appear. Please note that this exchange provided the perfect opportunity for Ms. Jones to be forthcoming regarding her meeting with Captain Dofflemyer; however, she elected to not disclose the meeting or her statement to Captain Dofflemyer that she need not attend. Furthermore, when, on that same morning of April 12, 2012, Ms. Jones did address Captain Dofflemyer's absence, she again failed to mention their meeting and instead stammered through a series of incomplete, false, and

misleading statements which served to disassociate Ms. Jones from Captain Dofflemyer's absence when, in fact, it was Ms. Jones herself who provoked/sanctioned that very absence. Ms. Jones knew Captain Dofflemyer was at work as a County employee at the time of her statements claiming ignorance of this knowledge. Only the week before, at the meeting initiated by Ms. Jones for the very purpose of discussing Captain Dofflemyer's testimony and subpoena to appear on April 12-13, 2012, Captain Dofflemyer advised Ms. Jones that she would be retiring Friday the 13th of April, 2012;[5] therefore, Ms. Jones made a false statement when she told the Personnel Board that she was not sure when Captain Dofflemyer was retiring.

Then, incredibly, in complete contradiction to her representation as an officer of the court to Judge Rouse that she would not object to my raising the LEOBOR violations at the P.B. hearing, Ms. Jones did indeed repeatedly so object. Furthermore, in stark contrast to her representations to Judge Rouse that it was for the Personnel Board to determine the LEOBOR violations and that I indeed had the "right" to present the LEOBOR violations to the Board, Ms. Jones told the Personnel Board that the LEOBOR violations were not for its consideration and she instructed the Board that it is not the proper venue to hear LEOBOR violations as it lacked authority to do so under Volusia County's Charter. Moreover, although, before Judge Rouse, she allayed his concerns that the allegations of my LEOBOR violations would be unheard should the Compliance Review hearing not be ordered, and despite her assurances to Judge Rouse that I in fact had a remedy for the alleged violations in the Personnel Board, Ms. Jones, the Volusia County attorney, then turned right around and instructed the Volusia County Personnel Board that, whether or not the County violated my LEOBOR, the statute did not provide a remedy for me with the Personnel Board and that the LEOBOR violations are handled through the courts.

In addition, Ms. Jones' careful choice of words to the Personnel Board implied that Judge Rouse actually heard and considered the substance of the alleged LEOBOR violations, when in fact the issue before Judge Rouse was limited to whether, given the mere allegations of intentional LEOBOR violations, a terminated police officer who follows the statutory procedure has a right to a Compliance Review panel which would, in turn, make determinations regarding the substance of the allegations of LEOBOR violations. The actual substance of the violations themselves was never addressed by Judge Rouse; in fact, it was Judge Rouse's very concern that the substance of the allegations of violations would remain unaddressed should he not order the Compliance Review hearing.

Should Ms. Jones claim to somehow not recall her representation to Judge Rouse that she would not object to the LEOBOR allegations being raised at the P.B. hearing, please note below how, in what is perhaps the most brazen part of her reneging on her word as an officer of the court, my attorney, Abe McKinnon, actually repeated the substance of her representation as well as the fact that she made that representation as an officer of the court. Tellingly, upon hearing Mr. McKinnon's recital to the Board of her representation to Judge Rouse, Ms. Jones remained perfectly silent with regard to her representation. She was not forthcoming with the Board; she did not inform the Board that she previously gave her word to Judge Rouse as an officer of the court that she would not object to the Board hearing the LEOBOR violations. In fact, after Mr. McKinnon told the Board about Ms. Jones' representations to Judge Rouse, a Board member asked Ms. Jones if she wanted to comment on Mr. McKinnon's statements regarding her representations to Judge Rouse and instead of responding directly to Mr. McKinnon's statements about her representations, she diverted the Board members attention by presenting to them a red herring which swam right around the issue of her representations to Judge Rouse as her only response was: ***The only thing I want to be clear for the record*** *is that this Board's authority is is well-established by the Charter by the merit rules and by your own procedures.* Well, **that** certainly was true: The only thing Ms. Jones wanted the record and the Board to be clear about was that the Board lacked the authority to hear and consider my LEOBOR violations; she did not, however, want it to be made clear for the Board that she

[5] See Exhibit A.

previously convinced Judge Rouse that he need not order the compliance review panel because I could have the Board hear the LEOBOR violations, that she referred to my ability to do so as my "right," and that she would not object when I raised the violations to the Board. Also, in order to believe that Ms. Jones did not act extremely unethically before Judge Rouse, one would have to accept that the experienced Ms. Jones was so incompetent that she either completely forgot or else never knew about the Personnel Board's "well-established" authority; a proposition made even more dubious by the fact that it was what she was most clear about and what she wanted the Board to be clear about at the P.B. hearing.

It is important to note that after Ms. Jones already objected to the LEOBOR violations being raised before the Board, and Mr. McKinnon's subsequent offer to play for the Board a clip of Ms. Jones telling Judge Rouse that she would not object to the LEOBOR issues being presented to the Board, Ms. Jones then made a hollow and deceptive offer in an obvious attempt to protect herself by stating in reference to the LEOBOR violations: . . . *while they're welcome to raise it here* . . . ; however, there was no substance behind that offer, because Ms. Jones actually continued to object when Mr. McKinnon attempted to raise the violations and the County's denial of my proper request for a Compliance Review hearing, which was itself another violation of my LEOBOR.

Now, contrast Ms. Jones' representations and assurances to Judge Rouse with her statements below at the P.B. hearing:

McKinnon: [indecipherable] served, in accordance with this, we've served subpoenas for this hearing today and one of those that we served was to the Internal Affairs investigator for the appointing authority. She is the investigator which was responsible for creating an investigative report. Part of this case, and ***I think that we're going to argue throughout the case is that they avoided, intentionally, if you will, disregarded that very investigative process.*** *She is a critical witness, because she is the one who is supposed to do the investigation for which you all are here today for which will be evidence to use to terminate Captain Gardner. Very critical witness in our case. We had her served. She is the employee of the appointing authority. She is the only Internal Affairs investigator employed by the appointing authority that was involved in this case so she is the linchpin. A very important witness for our client in this case. We had her served and what I have here is an affidavit of service. So we know, we understand, she's been served and she is the employee of the appointing authority. We think without her, I don't know why she's not here today, uh, being an employee of the appointing authority we think that they would certainly understand that we she's necessary but we need her in order to give a fair and impartial and an opportunity for you the board to make a decision and hear the evidence that she's going to present.*

Board member: I feel a motion coming or something.

. . .

Board member: Have you had some indication she's not coming? [interrupted]

McKinnon: I [interrupted]

Board member: Maybe she's just not here yet [interrupted]

McKinnon: Well, I've been told, and again I don't want to say, by, by other witnesses that are here, that she will not be coming. She, you know, I [interrupted]

Board member: So what's the point of continuing it is she's not going to come anyway?

McKinnon: Well, if that is, you understand, if, if if we have a right to a subpoena and she is an employee of the appointing authority, she is their employee, she's not going to appear, that is detrimental to our ability to confront the witness and and that's a that's a critical point for us to be able to bring out in this case: What was done to investigate and what wasn't done to investigate? Without her here, you all won't have that opportunity and it and it severely limits us and our ability to present that evidence. So, I don't know that she won't come, but certainly being an employee of the appointing authority, you would think that there would be some ability to have her here.

Board member: She's definitely not here now?

McKinnon: She is not here this morning.

Board member: [Indecipherable]

Jones: If I could be heard on this issue. Um, Captain Dofflemyer did the initial Internal Affairs investigation. As you all know from from doing uh this job as Board members for a long time, the internal investigation in, whether it's the Sheriff's Office or any other department of public protection, leads to uh or requires the investigator to do interviews of witnesses and to ultimately present the internal investigation to the appointing authority for a decision. The Internal Affairs investigator as you may recall rarely testifies when the live witnesses who were interviewed for the investigation are available to testify. And I've I've I've mentioned to Mr. McKinnon that I believe all the witnesses that were interviewed in this, both the initial Internal Affairs investigation which was conducted by Captain Dofflemyer as well as the reopened investigation that was conducted by Mr. Smith from the County Attorney's Office, ***all of those witnesses I believe are here or expected to be here uh some time during these two days.*** *It's our position that Nikki Dofflemyer has no direct evidence, no relevant evidence to um the termination of Mr. Gardner.* ***If you look at um your procedural rules, and as you know I provided you with a document earlier this week regarding that,*** *um, this is a little bit of an unusual case and I I'm not trying to get off the subject of Captain Dofflemyer but uh in this case you were provided copies of the Notice of Intent to Terminate as well as the final letter. Um, it's our position that the Notice of Intent letter is really not relevant to your determination of the final decision because* ***your rules provide that you will be bound by the, and I'm quoting from the rule that I had in the memo to you: The hearing must be confined to the charges contained in the statement of adverse action given to the employee at the time the action is taken. So in this case, the letter that was given to Captain Gardner that terminated his employment was the final letter um authored by um Acting Director Mr. Recktenwald.*** *Uh and and again Captain Dofflemyer's testimony would not she wouldn't have any uh first hand testimony regarding what any of these witnesses that that uh testified in this case have to say. The witnesses are available so any questions that they may have about Captain um Gardner's actions can be asked of those witnesses so we don't believe that um her* ***whether she's going to be here or not as you know these subpoenas are non-binding um I have no idea what Cap- I, I know Captain Dofflemyer is scheduled to retire I don't know when so um she may already be retired so um we don't have any way to force someone to be here.***

Board member: Ok.

McKinnon: Yeah, if I may just respond just briefly. Uh Captain Dofflemyer is a key witness with personal knowledge. This is a termination of a police officer. A police officer has very specific policy, investigative process, due process. They also have a statutory right under the Policemans' Bill of Rights. Captain Dofflemyer was in her own capacity has personal knowledge about how the process was done. Our case, as you will hear throughout the case, is that the decision was made long before Mr. Recktenwald was

appointed just recently in this case. The decision was made way back in October of last year. And the decision was set in stone. And you will see through the testimony of Captain Dofflemyer that the investigative process that she began was terminated. The investigative process was terminated and that ***there is only one investigative report, only one in this entire case and it's the one she authored****. That's it. There is no other investigative process. That process was abandoned and it's through her testimony that we'll be able to show this Board how those violations of that policy, those Policemans' Bill of Rights and the merit rules were violations and that's how we got here. So she is a very critical witness for us. Again, we're talking about an employee of the appointing authority, the Internal Affairs investigator in this case and so we believe that's critical for us to be able to prove that.*

Board member: And so I am correct in understanding that you want to continue this?

McKinnon: That is correct Sir.

Jones: I I think it's probably a good time since Mr. McKinnon brought up the Police Officers' Bill of Rights, ***the Law Enforcement Officers' Bill of Rights, as I suspected that issue would come up today*** *and I think it's probably a good time for me to address that. Um, a law enforcement officers' Bill of Rights are rights that are statutory and they're provided for a law enforcement officer who is under investigation for um actions that may result in adverse action to them. Um, it is something that provides for a due process during that investigative procedure.* ***Um, Mr. McKinnon has actually already raised this in circuit court with Judge Rouse - the Bill of Rights, allegations of the Bill of Rights violations um and actually his decision is currently on appeal to the Fifth District Court of Appeals. Um, it's the County's position that based again on your procedures, and the merit rules that give you authority, that whether or not Mr. Gardner's rights were violated during the investigative process is not an issue for your consideration today. It's not, the statute doesn't provide that you have any remedy to give him um and it's something that is handled through the courts*** *and is actually in the courts so um, it's our position that the Bill of Rights issue is not relevant to you and not admissible which if that's the primary motivation for Captain Dofflemyer's testimony, we would object to that anyway. . . .*

McKinnon: ***I want to add something and in fact I've got a clip here that I'll play for you and what it is is it's actually Mrs. Jones, she's at the hearing for the temporary injunction and what she's telling Judge Rouse and you'll hear him she says as an officer of the court if this issue, Policemans' Bill of Rights, comes up in front of this Board as an officer of the court he would expect her not to object and she says, that is correct****. . . . The Policemans' Bill of Rights is an investigative process by statute which the County and the Department of Public Protection, the Department of Beach Safety have integrated into- and have to by statute- the investigative process so by failure for those to be considered, you've eliminated the due process rights by those employees, a substantial amount of it so you can't hear just part of it. I know that they would enjoy doing that because they've avoided and violated many of those but you can't hear all the evidence and understand it and understand whether this investigation was done and again that's the critical issue with Captain Dofflemyer.*

Board member: Any comment on that?

McKinnon: I mean, we can play the clip for you if you [interrupted]

Board member: Hang on before you do that.

Jones: The <u>only thing</u> I want to be clear for the record *is that* ***<u>this Board's authority is is well-established</u> by the Charter by the merit rules and by your own procedures****. The Law Enforcement Officers' Bill of Rights um are provided by or provided for statutorily and, and these attorneys know that*

Judge Rouse's ruling had to do with the fact that they are to be raised or allegations of violations of the Bill of Rights are to be raised during the process of the internal investigation because it provides for things like the officer has to be allowed to have counsel if he wants to have counsel and so they're procedural due process rights that occur during the investigation during the internal investigation and and it's our position that this board, while they're welcome to raise it here, it's not relevant to a decision whether or not his rights were violated. He has another course of action that he is currently pursuing in court to address what he alleges are violations. I maintain on the record that there were no violations of the Law Enforcement Officers' Bill of Rights but that's something that we're not going to bring up obviously.[0:00 of disc 1 P.B. hearing; file M2U00024]

While there is much that is wrong about the above statements of Ms. Jones, two major points warrant further discussion: the first point pertains to her representation to Judge Rouse as an officer of the court. I, along with others who witnessed both the Rouse hearing and the P.B. hearing, am steadfast in the belief that at the very time she was assuring Judge Rouse that she "absolutely" would not object to the introduction of LEOBOR violations at the P.B. hearing, Ms. Jones had every intention to do exactly that. It is my contention that Ms. Jones intentionally lied to a circuit court judge and did so in her capacity as an officer of the court, thereby violating her ethical duty of candor to the court and to promote justice and the effective operation of the judicial system. My contention is supported by the diametrically opposed positions advanced by Ms. Jones: At the Rouse hearing, she strongly refuted Abe McKinnon's argument that the Personnel Board would be without authority to consider the LEOBOR violations; then, in both the memo and at the P.B. hearing, she adopted Mr. McKinnon's position. Further supporting my contention is Ms. Jones' own claim of extensive experience with P.B. hearings (she referred to herself as *. . . the person for the County who has done more probably Personnel Board hearings in the last twenty years than anyone else in this room for sure . . .*), her own characterization of the scope of the Personnel Board's authority as "well-established," as well as what can only be described as her pattern of unethical behavior throughout my entire case (see PART VII: Nancye Jones' Statement Juxtaposition Table).

However, assuming, arguendo, that, despite at least twenty years of experience with P.B. hearings, Ms. Jones' level of incompetence was to such an extreme degree that she truly did not grasp the "well-established" authority of the Personnel Board at the time of the Rouse hearing on January 20, 2012, when she clearly and repeatedly advised Judge Rouse that the Personnel Board would have the opportunity to consider and act upon my LEOBOR violations and that she would not object when I introduced evidence of such violations before the Personnel Board, certainly, at the time of the writing of the April 09, 2012 Memo, she had obviously arrived at a contrary conclusion. Faced with this ethical dilemma of having affirmatively advised a circuit court judge on legal issues with which the judge acknowledged unfamiliarity and then later coming to a legal conclusion contrary to the one she previously convinced the circuit court of, Ms. Jones failed to act ethically. She sent the memo without taking any remedial measures with Judge Rouse.

Similarly, when Ms. Jones appeared at the P.B. hearing, it seems there were two courses of action that she could have taken that would have satisfied her ethical obligation as an attorney: (1) She could have elected to abide by her word as an officer of the court to Judge Rouse and allowed me to raise the LEOBOR violations before the Personnel Board. She could have chosen to be honest with the Personnel Board and candidly admit to her representation to Judge Rouse that she would not object to the Board hearing the LEOBOR violations. If her representations to Judge Rouse about the power of the Personnel Board and her intention to not object had been merely erroneous, rather than dishonest, at the time of their making, she could have chosen to explain to the Personnel Board that, although she subsequently arrived at a contrary legal conclusion, because she inadvertently misled Judge Rouse and my attorneys, she would keep her word and not object to the LEOBOR violations being raised and the Board could assign whatever weight it deemed appropriate to that testimony AND that she would immediately go back to Judge Rouse and inform him that she had misstated the law to him; (2) Alternatively, she could have

advised the Personnel Board that she had previously assured Judge Rouse that the Board could consider my LEOBOR violations and that she affirmed in circuit court that she would not object to the violations being heard by the Personnel Board, but she now felt that position was not legally permissible AND that, although she felt she must object to the Board hearing the LEOBOR issues, she would immediately go back to Judge Rouse and inform him that she had misstated the law to him. Either course of action would have allowed Judge Rouse, newly equipped with the knowledge that the Personnel Board did not/could not fully address and make findings regarding the LEOBOR violations, the opportunity to order a Compliance Review hearing. After all, it was Judge Rouse who repeatedly expressed concern that the LEOBOR violations would go unaddressed should he not order the Compliance Review hearing and he repeatedly expressed this concern to the County attorneys only to be reassured by both that I had a remedy for the LEOBOR violations in the Personnel Board. One can only assume that when Judge Rouse understood that the Personnel Board did not address the LEOBOR violations, he would fulfill his judicial duty and give effect to the plain meaning of the LEOBOR statutes, because, crucially, Judge Rouse acknowledged that the plain meaning of the LEOBOR statutes entitled me to a Compliance Review hearing and he recognized that I timely requested the hearing and that my request was denied. At the Rouse hearing, Mr. McKinnon made an argument for the plain meaning of the LEOBOR statute and Judge Rouse responded:

Rouse: Well the plain language says they're supposed to appoint one of these uh Compliance Review panels and there's apparently no dispute that he asked for that and they didn't do it – the County didn't do it.

Abe: Correct. [19:59 Disc 2 of 2 Rouse hearing; file Gardner 3 of 3]

Ms. Jones played a game of legal bait and switch and I am now left to speculate as to what might have happened had Judge Rouse not swallowed, hook, line, and sinker, the bait Nancye Jones repeatedly dangled before him; and for that alone, Ms. Jones did a great amount of harm – a great injustice - to me. Ms. Jones provided to Judge Rouse an easy alternative to ordering the Compliance Review hearing by convincing him that the P.B. hearing was the functional equivalent of the Compliance Review hearing for purposes of addressing the LEOBOR violations and, thus, the Compliance Review hearing was not necessary as the P.B. hearing could provide a remedy for the violations. Instead of fulfilling her ethical obligations, Ms. Jones did not honor her word given in open court and as an officer of the court, nor did she even acknowledge to the Personnel Board that she had previously made these statements upon which I had relied. She also never again communicated to Judge Rouse that she had misinformed him on these issues of law. She effectively eliminated my opportunity to have the LEOBOR violations addressed by assuring Judge Rouse that they would be heard later by the Personnel Board and then telling the Personnel Board they cannot address the violations and besides Judge Rouse already considered those issues. My opportunity to have the LEOBOR violations considered was foreclosed in any forum when Ms. Jones controlled the game. Like the pea in a shell game, it was my legal rights that vanished.

The second point of discussion involves Ms. Jones' failure to disclose the Dofflemyer meeting as well as her utterance of the following statements:

And I've I've I've mentioned to Mr. McKinnon that I believe all the witnesses that were interviewed in this, both the initial Internal Affairs investigation which was conducted by Captain Dofflemyer as well as the reopened investigation that was conducted by Mr. Smith from the County Attorney's Office, ***all of those witnesses I believe are here or expected to be here uh some time during these two days. . . .*** *Uh and and again Captain Dofflemyer's testimony would not she wouldn't have any uh first hand testimony regarding what any of these witnesses that that uh testified in this case have to say. The witnesses are available so any questions that they may have about Captain Gardner's actions can be asked of those*

witnesses so we don't believe that um her ***whether she's going to be here or not as you know these subpoenas are non-binding um I have no idea what Cap- I, I know Captain Dofflemyer is scheduled to retire I don't know when so um she may already be retired so um we don't have any way to force someone to be here.***

Nancye Jones employed the use of feigned ignorance when, in reference to Captain Dofflemyer's presence at the P.B. hearing, she used the words *whether she's going to be here or not* and . . . *I know Captain Dofflemyer is scheduled to retire I don't know when so um she may already be retired* . . . ; With those words, Ms. Jones was deceiving the Personnel Board, because she knew full well Captain Dofflemyer would not appear and she knew when Captain Dofflemyer would retire. When considering the intent behind Ms. Jones' representations and actions, whether affirmative or by way of omission, I implore Bar Counsel to view each not in isolation, but as a whole; for it is when they are taken together that one truly appreciates the deceptive intent behind each; e.g., in response to questioning about her statement regarding the whereabouts of Captain Dofflemyer perhaps Ms. Jones will claim that she could not recall Captain Dofflemyer's retirement date; however, in addition to a sworn statement from Captain Dofflemyer that only the week before Ms. Jones made that statement she advised Ms. Jones that her retirement date was Friday, April 13, 2012 and that she so advised Ms. Jones within the context of a meeting at the behest of Ms. Jones for the very purpose of discussing Captain Dofflemyer's subpoena to appear on April 12-13, 2012 at the P.B. hearing to testify on my behalf, consider also that of all the witnesses interviewed by Captain Dofflemyer in the course of the Internal Affairs investigation, Ms. Jones was aware of which witnesses were present at the time of the above statement and she had a schedule for those not present but who would appear over the course of the two-day P.B. hearing, yet when it came to Captain Dofflemyer, the Internal Affairs investigator herself, Ms. Jones seemed to be mystified as to her whereabouts and her employment status; consider such a claim in conjunction with the fact that she also conveniently failed to inform the Personnel Board that she even had a meeting with Captain Dofflemyer only the week before; consider that Captain Dofflemyer advised Ms. Jones that if I called her to testify, she intended to testify truthfully; consider that Ms. Jones advised Captain Dofflemyer she did not need to attend the P.B. hearing; consider that when she was objecting to the P.B. hearing my claims of LEOBOR violations, Ms. Jones failed to advise the Personnel Board that she gave her word as an officer of the court before Judge Rouse that she "absolutely" would not object to the same; and consider all of her representations in the "Nancye Jones' Statement Juxtaposition Table."

The facts are that Captain Dofflemyer was a County employee on April 12 and 13, 2012, that she was at her work station and available to attend the P.B. hearing, that Ms. Jones had several phone numbers and email that she could use to reach Captain Dofflemyer, that Captain Dofflemyer previously attended P.B. hearings without the necessity of a subpoena, but simply at the request of the County, that Ms. Jones knew that my attorney had requested Captain Dofflemyer be subpoenaed for the P.B. hearing and that a subpoena had been properly served on her to appear, that Ms. Jones knew she was without authority to release a subpoenaed witness, that Ms. Jones met with Captain Dofflemyer days before the P.B. hearing for the purpose of discussing the subpoena and at that meeting Ms. Jones advised Captain Dofflemyer that she need not attend the P.B. hearing.[6] Then, by both failing to mention the Dofflemyer meeting to the Personnel Board and uttering a statement of ignorance as to Captain Dofflemyer's whereabouts which served to disassociate herself from Captain Dofflemyer's absence at the hearing, Ms. Jones implied to the

[6] See Exhibit A.

Board that Captain Dofflemyer had, independently of Ms. Jones, gone rogue. These representations and omissions were false and misleading and that was Ms. Jones' very intent.

Moreover, and lest one think it commonplace for the Internal Affairs investigator to not appear and testify in P.B. hearings, see the following Personnel Board deliberation and ponder the members' reactions had they known at the time of their deliberations that Volusia County Attorney Nancye Jones failed to inform them about the occurrence and content of her meeting with Captain Dofflemyer only the week before.[7] The P.B. hearing concluded with deliberation among the Personnel Board members. Of the five-member Board, Mr. Lewis, Mr. Winter, and Mr. Reaves all explicitly expressed serious concern that Captain Dofflemyer did not attend the hearing. Note that, contrary to Ms. Jones' implausible assertion that the County cannot force someone to attend the hearing, Mr. Lewis correctly points out that as one of its employees, the County could have, and should have, ensured Captain Dofflemyer's attendance at the hearing. Furthermore, Mr. Reaves described the absence of the Internal Affairs investigator as unprecedented; he believed that my case was the only one in which the person who conducted the Internal Affairs investigation did not appear at the P.B. hearing. Ms. Thompson implicitly concurred by supplying the name of the previous Internal Affairs investigator when Mr. Reaves was struggling to recall his name, and by stating that he understood and agreed with the majority of Mr. Reaves' statements, Mr. Lane also implicitly concurred with the unprecedented absence of the Internal Affairs investigator and/or that she should have attended, especially since he made no statement to the contrary. Therefore, whether explicitly or implicitly, the entire five-member Personnel Board acknowledged that Captain Dofflemyer's absence from the P.B. hearing was either highly unusual or deeply troublesome or both.

MR. LEWIS: I have some real concerns about this case with the internal investigator not being here. I think that -- that omission really stands out with me. I made a comment about it yesterday. I can't understand when you have this large a case and you do an internal investigation, and it's like Mr. McKinnon has said, why wouldn't we have her here? ***She's one of our employees. We could have had her here. She should have been here.*** *Then she could either stand behind what she put out there, and she could be questioned, and I think that gives him the ability to face his accused, so I really have a problem with that. [p. 6 of Deliberations]*

MR. WINTER: Yes. This initial investigation was predicated on receipt of an anonymous letter. Now, I think we -- or the county determined that they knew who addressed the envelope, but they don't know who wrote the letter. That's how they burned witches in Salem. I think that Captain Gardner might have got caught up in, and I hate to say witch hunt, but because of what was going on in the press, and what was going on in beach service, I think he looked like a convenient fall guy. And another thing, on the -- the internal affairs investigation, in past cases we have talked about these subpoenas, non-binding subpoenas, and county employees not showing up to testify when the appellant is relying on these people's testimony. And when they don't show up, I have to go along with what Dwight said yesterday, ***that does not smell good. It doesn't smell right****, [pp. 10-11 of Deliberations]*

MR. REAVES: ***In every -- in every – I believe that in every internal affairs investigation, <u>except this one</u>, I believe the person who did the investigation sat in that chair****. I think it's an older guy who had been here 30 plus years or something that I always remember seeing.*

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[7] A transcript of the Volusia county Personnel Board Deliberations is attached hereto as Exhibit C.

MS. THOMPSON: Chief Lee.
MR. REAVES: I can't remember his name.
MS. THOMPSON: Chief Lee.
MR. REAVES: Is that who it was?
MS. THOMPSON: Um-hum.
MR. REAVES: And it got to the point that I thought maybe internal affairs meant you want to fire this guy. Chief, go out there and find something and find something so we can. This is the only time that I can recall that -- that the person who did the investigation wasn't in that chair. Now, I may be wrong, but I believe it's the only time since I've been here. . . So I don't know how I'm going to vote to uphold this. I'm really struggling with this. I understand that looking at what's here, and the way that the county attorney has phrased it, and I understand our position, I understand we're supposed to look at the facts and determine whether or not they presented a case that was -- that would include -- that would end in firing this person. I understand all of that. In my mind I can't get there because it was bad from the beginning. I mean, they had a case -- and I think they brought this up yesterday. How can you send a letter of intent, reopen a case, and then fire somebody, and don't start all over again? It just makes no sense. It makes no sense. ***And you've even got a change of guard. The person who started it is not here, nobody called him [sic]. He's [sic] still with the county, nobody called him [sic]. The person who did the investigation is not here. It's -- I come to a conclusion with that.***
MR. LANE: Well, we're going to have a chance to talk about them individually, and I understand what you're saying and I agree with the majority of it. [pp. 12-15 of Deliberations]

Next, in what can only be described as a flagrant lie, while my attorney, Mr. McKinnon, was attempting to question Assistant County Attorney Larry Smith about the County's denial of my request for a Compliance Review hearing, Ms. Jones objected and told the Board that the LEOBOR is applicable only during ongoing investigations and falsely stated that I did not request the Compliance Review hearing until after the disciplinary action was taken. Her duplicity then became even more egregious when she followed-up that falsehood with yet another: Nancye Jones told the Personnel Board that Judge Rouse actually made a finding that my Compliance Review hearing request was not made until after the disciplinary action was taken. The entire hearing before Judge Rouse is completely devoid of such a finding. Judge Rouse could not have so found, because I repeatedly requested the Compliance Review hearing prior to my dismissal:

- On December 21, 2011, I provided to Volusia County my written notice of intentional violations of my LEOBOR and my request for a Compliance Review hearing;[8]
- On December 23, 2011, I sent a letter reminding the County of my written notice of violations and request for a Compliance Review hearing;[9]
- **In a letter dated December 23, 2011, County Attorney Daniel D. Eckert acknowledged my December 21, 2011 request for a Compliance Review hearing and denied said request;[10]**
- **On January 17, 2012, I received a Notice of Dismissal dated January 13, 2012 and signed by George Recktenwald.[11]**

Significantly, during her objection to Mr. McKinnon's questioning of County Attorney Larry Smith regarding my request for a Compliance Review hearing, Ms. Jones herself made reference to the December 23, 2011 letter from Mr. Eckert which itself referenced my earlier Compliance Review hearing

[8] A copy of my December 21, 2011 written notice of intentional violations of my LEOBOR and my request for a Compliance Review hearing is attached hereto as Exhibit D.
[9] A copy of this letter is available to the Florida Bar upon request.
[10] A copy of the December 23, 2011 letter from Mr. Eckert is attached hereto as Exhibit E.
[11] A copy of this letter is available to the Florida Bar upon request.

request, and both of which preceded my Notice of Dismissal. Since my Notice of Dismissal was not received until January 17, 2012 and purportedly written on January 13, 2012, Ms. Jones' statement to the Board that I did not request the Compliance Review hearing until after the disciplinary action was taken is patently untrue. Similarly, her assertion that Judge Rouse made that finding that my request was untimely is also patently untrue; moreover, Ms. Jones would have been aware of the falsity of her statements at the time of their utterance as evidenced by both her own reference to the December 23, 2011 letter as well as the fact that she was the Assistant County Attorney handling my case and, as such, she would have been well aware of information as basic as whether my Compliance Review hearing request predated the date of my Notice of Dismissal.

Furthermore, even the very sequence of Ms. Jones' statements reveals the truth that she was fully equipped with the knowledge that my Compliance Review hearing request was timely made: Ms. Jones necessarily knew her statements that I did not request a Compliance Review hearing until after the disciplinary action was taken and that Judge Rouse made that finding were false because she made those statements after her previous statement about Mr. Eckert's December 23, 2011 letter which, on its face, contained the truth that my Complianee Review hearing request predated the Notice of my Dismissal and Ms. Jones was clearly familiar with the letter's content as she explained to the Personnel Board that it contained Mr. Eckert's denial of my Compliance Review hearing request.

. . .

Jones: Can I respond to your - cause I raised an objection.

Abe: Yeah.

Jones: ***The Compliance Review, he just asked Mr. Smith if there was one and he knows that there wasn't one because there's a letter that they put into evidence from Mr. Eckert saying there will be no Compliance Review hearing*** *so um nonetheless um the Compliance Review issue was raised with the circuit judge and so it's not something for your Board's consideration so that's why I'm saying it's beyond the scope of the relevant information you need.*

Board member: Well I do sort of get the feeling that it's being claimed for other reasons beyond the scope of this hearing.

. . .

Board member: Before I let him [indecipherable] I'm not going to let him answer that right now before we deal with the objection. Would you please state your objection please?

Jones: ***Yes Sir. My objection is the requirements of Chapter 112, the Police Officers' Bill of Rights, deal with the time period that the investigation is ongoing. . . . The request for a Compliance Review hearing was not made until after the action was taken, the disciplinary action was taken which is what the finding of Judge Rouse was.*** *Judge Rouse considered this exact question as to the Compliance Review hearing and that is on appeal to the fifth district court of appeal and that is the venue or some other circuit court.* ***This Board is not the venue to determine whether his Bill of Rights were violated by this investigation. That is not part of your authority under the Charter.***

Board member: I certainly, I agree with that.

Jones: ***So that's why I'm objecting to him asking questions about something that wasn't done and whether or why it wasn't done, I don't think it's relevant to your decision.*** *[26:30 Disc 5 of P.B. hearing; file M2U00032]*

Not only is the entire hearing before Judge Rouse completely devoid of a finding that my Compliance Review hearing request was made after the disciplinary action, the aforementioned statements by Judge Rouse (from Part I of this complaint) bear repeating as they show the judge understood my request was timely: *Let me stop you there for a moment. Petitioner's counsel seem to argue or suggest that if this Compliance Review panel has never been impaneled, never set up* ***pursuant to the appropriate demand at the time he was still employed****, that they're just stuck with whatever findings; they can never challenge those findings of that investigator. No one will ever review those findings.* [:23 Disc 1 of 2 Rouse hearing; file Gardner 2 of 3]

In fact, Ms. Jones' own statements to Judge Rouse reveal her knowledge that I was still in the employ of Volusia County and still the subject of an ongoing investigation when I requested the Compliance Review hearing on December 16, 2011:

Jones: . . . *some of the allegations of violations occurred well before the point where Mr. Gardner was going to be interviewed at the conclusion of the investigation, because as you see from reading the Bill of Rights that's the last thing that's done in an investigation. The officer's interview is the last thing that's to be done to finish an internal investigation so it's our position judge that at any point on that line, before* ***December 16th when there was an attempt made to interview him****, he could have filed a request for a Compliance Review and an allegation that his rights had been violated and and I think arguably judge at that point we would have had to stop and convene such a board to look into that unless we felt like it was cured in some other way um but* ***there was no*** *allegation of a violation of the Bill of Rights made until or a* ***request for a Compliance Review until the point where that interview was getting ready to take place.****[31:55 disc 2 of 2 Rouse hearing; file Gardner 3 of 3]*

Therefore, it is obvious Nancye Jones knowingly made a false statement to the Personnel Board at the April 12-13, 2012 P.B. hearing when she stated that I did not request the Compliance Review hearing until after the disciplinary action was taken, since she had previously told Judge Rouse at the earlier January 20, 2012 hearing that I requested the Compliance Review hearing at the December 16, 2011 second interview and the Notice of Dismissal was dated January 13, 2012 and received by me on January 17, 2012.

Next, after first telling Judge Rouse that the matter of my LEOBOR violations was for the Personnel Board to consider, that I have a remedy in the Personnel Board, that I can bring in whatever evidence we want of those violations at the Personnel Board hearing, and after assuring the judge as an officer of the court she absolutely would not object when I proceed to do so, and then proceeding to tell the Personnel Board that the statute does not provide a remedy for the board to give me for LEOBOR violations, that it is not for the Board to consider those violations, that it is something handled through the courts, and then actually having the audacity to object to evidence of LEOBOR violations and persist in her objection after being reminded by Mr. McKinnon of her representation to Judge Rouse, Ms. Jones then takes the deceit to a whole new, tertiary, level. It was not enough that she ensured I had no venue to address Volusia County's many violations of my LEOBOR; she then had the unmitigated gall to attempt to twist even my exercise of my rights under the LEOBOR into something wrongful and imply to the Board, through her line of questioning, that my assertion of my statutory rights was evidence of guilt and/or an act of insubordination.

Fla. Stat. § 112.534(1)(a) and (b) provide that after the proper procedure is followed and an officer requests the agency head or a designee be informed of the alleged intentional LEOBOR violations, the interview of the officer shall cease, and the officer's refusal to respond to further investigative questions does not constitute insubordination or any similar type of policy violation. After the County unlawfully reopened its investigation of me, Investigator Smith scheduled a second interview of me to take place on December 16, 2011, at which time I properly exercised, through counsel, my right to refuse to answer further questions. Yet another violation by the County of my LEOBOR, Inv. Smith continued to interrogate me.[12] On December 20, 2011, Deputy Director Joseph Pozzo then sent me an inter-office memo stating that I was guilty of insubordination due to the invocation of my LEOBOR at the December 16, 2011 second interview as well as my refusal to comply with his unlawful order to produce my personal cell phone records.[13] Subsequently, in a letter from County Attorney Daniel D. Eckert dated December 23, 2011, I was informed by Volusia County that my "declination to be interviewed will not be considered insubordination and a ground for discipline."[14] Even with this abbreviated background information, one can appreciate how unscrupulous Ms. Jones was when, through her line of questioning of me, she attempted to paint a picture for the Board of my guilt/insubordination for simply invoking my LEOBOR, after having ensured that neither the Board nor a Compliance Review panel would hear about Volusia County's violations of those same rights. Also, after instructing the Board that it lacked the authority to consider LEOBOR violations, Ms. Jones distorted the picture even further by implying that the County satisfied the requirements of the LEOBOR simply by providing my attorneys and me a box of documents *pursuant to the Police Officers' Bill of Rights*. Please note below how Ms. Jones made very obvious and repeated attempts to prevent me from completing my statements as I try to explain to the Board that the reason I did not give a statement was that I was invoking my rights under the LEOBOR. Ms. Jones only wanted the Board to hear that I did not give a statement; she did not want the Board to hear why:

Jones: Correct? And when that investigation was reopened at the uh at the point where Mr. Smith had concluded interviewing the witnesses, you were given an opportunity to appear and give an interview, weren't you?

Gardner: On December sixteenth?

Jones: Correct.

Gardner: Yes.

Jones: You were invited to come and answer questions, weren't you?

Gardner: Uh, I was uh, it was my second investigative [quote gesture] "reopened" interview [interrupted]

Jones: Answer. Yes or no. Were you invited to come and answer questions by Mr. Smith?

Gardner: Yes.

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[12] A copy of the December 16, 2011 transcript is available to the Florida Bar upon request.
[13] A copy of Pozzo's December 20, 2011 memo is available to the Florida bar upon request.
[14] See Exhibit D.

Jones: Were you asked to come and answer questions? And did you appear at the beach headquarters department with your attorneys?

Gardner: I did.

. . .

Jones: And and didn't you sit with your attorneys uh in the room I don't know what you were doing in the room but you sat in the room with that box of doc - things that you were given for a number of hours and with the plan being that you would be interviewed after you had a chance [interrupted]

Gardner: Yes ma'am.

Jones: ***pursuant to the Police Officers' Bill of Rights***

Gardner: Yes ma'am.

Jones: to review all of those

Gardner: Yes ma'am.

Jones: Ok and then at the time when Mr. Smith came in with the court reporter to interview you about so you could respond to the allegations being made you declined to be interviewed, or through your attorney, you didn't get interviewed, did you?

Gardner: We uh we [interrupted]

Jones: Did you get interviewed? Did you give a statement?

Gardner: We asserted our our our Policemans' Bill of Rights and [interrupted]

Jones: Did you give a statement?

Gardner: requested that the interview be ceased [interrupted]

Jones: Did you give a statement?

Gardner: I did not.

Jones: Yes or no?

Gardner: I did not.

Jones: So you were given the opportunity to give a statement and you chose not to or you did not.

McKinnon: I'm gonna

Jones: Let's just say you did not.

McKinnon: I'm going to object, because that's a legal right. Now this [interrupted]

Jones: That's all I have.

McKinnon: Board has been very very strict about keeping this Policemans' Bill of Rights and using this, they're trying to use the inference that exercising his rights should be used against him and that's something that's . . . if we're going to go down that road, that's fine, but we got a, we got a Policemans' Bill of Rights argument all day long about that. He, he gave a sworn statement [interrupted]

Jones: That is not what I was trying to do. I was trying to establish whether or not he answered he answered questions that day period.

Board member: And nar should you assume that we're going to hold that against him. Go ahead.

Jones: I have nothing further. Thank you. [4:08 Disc 8 P.B. hearing; file M2U00039]

Finally, Per Florida Statute Section 112.533(1)(a):

" . . . When law enforcement or correctional agency personnel assigned the responsibility of investigating the complaint prepare an **investigative report or summary**, regardless of form, the person preparing the report shall, at the time the report is completed:

1. Verify pursuant to s. 92.525 that the contents of the report are true and accurate based upon the person's personal knowledge, information, and belief.

2. Include the following statement, sworn and subscribed to pursuant to s. 92.525:

'I, the undersigned, do hereby swear, under penalty of perjury, that, to the best of my personal knowledge, information, and belief, I have not knowingly or willfully deprived, or allowed another to deprive, the subject of the investigation of any of the rights contained in ss. 112.532 and 112.533, Florida Statutes.'

The requirements of subparagraphs 1. and 2. shall be completed prior to the determination as to whether to proceed with disciplinary action or to file disciplinary charges. . . ." (emphasis added).

After Internal Affairs investigator Captain Dofflemyer completed her investigation and prepared her investigative report, which included her findings that many of the allegations against me were unsubstantiated, Volusia County then reopened the investigation of me in violation of my LEOBOR, specifically Florida Statute Section 112.532(6)(b):

"An investigation against a law enforcement officer . . . may be reopened . . .if:

1. Significant new evidence has been discovered that is likely to affect the outcome of the investigation.
2. The evidence could not have reasonably been discovered in the normal course of investigation or the evidence resulted from the predisciplinary response of the officer."

Despite the fact that none of the above statutory grounds were present at the time Volusia County reopened the investigation against me, the County then assigned the investigation to Assistant County Attorney Larry Smith. Ultimately, and only late into the P.B. hearing, I learned that Mr. Smith did prepare an investigative report or summary.[15] It is obvious Mr. Smith was aware of the requirements of Florida Statute Section 112.533(1)(a), as his report contained its required sworn statement; thus, Mr. Smith would have also been aware of the requirement in that same Section that the sworn statement shall be completed prior to the determination as to whether to proceed with disciplinary action or to file disciplinary charges. On January 17, 2012, I received a Notice of Dismissal dated January 13, 2012 and signed by George Recktenwald; therefore, Mr. Smith was statutorily required to have prepared his investigative report or summary on or before January 13, 2012. As early as the January 20, 2012 Rouse hearing, Nancye Jones was aware that I was neither in possession of or aware of the existence of the Smith Report when my attorney Abe McKinnon made the following statement at the Rouse hearing:

McKinnon: Your Honor [interrupted by Kaney handing him case law]

McKinnon: I'll allow him to argue that in a minute but Your Honor, first of all, ***there's been no final investigative report****. . . . [15:38 Disc 1 of 2 Rouse hearing; file Gardner 2 of 3*

Note that in response to Mr. McKinnon's statement at the Rouse hearing that no final investigative report had been prepared, Ms. Jones remained silent. Note also that at the P.B. hearing Ms. Jones stated: *I maintain on the record that there were no violations of the Law Enforcement Officers' Bill of Rights;* therefore, if that was a true statement by Ms. Jones, then, as required by the LEOBOR, the Smith Report had already been prepared at the time of the Rouse hearing, as that hearing was after the determination as to whether to proceed with disciplinary action or to file disciplinary charges against me had been made. If the Smith Report existed at the time of the Rouse hearing, why did Ms. Jones not say so when Mr. McKinnon stated at that hearing that there was no final investigative report? If the Smith Report did not exist at the time of the Rouse hearing, why did Ms. Jones tell the Personnel Board that she maintains on the record that there were no violations of my LEOBOR? In addition, even if Ms. Jones would claim that Larry Smith violated the statutory requirements and that his report was not yet written at the time of the Rouse hearing, she was still put on notice as early as January 20, 2012, that I was not in possession of the Smith report or any final investigative report and that I and my attorneys were of the belief that no final report was in existence, so why did she tell the Personnel Board that she did not know I did not have the Smith Report (see below)?

Next, Nancye Jones again stood silent when, at the very start of the P.B. hearing, she was once again put on notice that I was not in possession of or aware of the existence of the Smith report when, in the course of my Motion to Continue due to Captain Dofflemyer's absence, Mr. McKinnon stated: ***. . . there is only one investigative report, only one in this entire case and it's the one she authored. That's it. . . .****[0:00 of disc 1 P.B. hearing; file M2U00024]*

Incredibly, Nancye Jones continued to maintain her silence as to the existence of the Smith report when she was yet again put on notice that I was not in possession of or aware of the existence of the Smith report when my attorney Abe McKinnon made the following statements during his opening argument at the P.B. hearing:

. . . it's important I think for you to understand with respect to Mr Recktenwald all, and you'll see under the policies, he didn't go back and have a investigative report created. ***There's no investigative report,***

[15] A copy of Assistant County Attorney Larry Smith's "Report of Investigation Continuation of IA 2011-090297" is available to the Florida Bar upon request.

other than the one we're talking about [motions to Captain Dofflemyer report] Captain Dofflemyer's, *and you'll see under the policies that is a requirement, it's a due process requirement before you charge anyone with any crimes, you've got to have an investigative report and there's none, other than the one I just told you which disputes the findings in his his his basis for dismissal . . . . [15:55 P.B. hearing disc 1; file M2U00025]*

Finally, much later in the P.B. hearing, I and my attorneys became aware for the first time of the existence of the Smith report:

McKinnon: This is the only investigative report.

Jones: No it's not.

McKinnon: You never provided us one.

Jones: ***You never requested it.*** *[audience reacts]*

McKinnon: The law requires it.

Jones: No it doesn't. Yeah, it's right here. [36:03 disc 4 of P.B. hearing; file M2U00030]

I request that Bar Counsel watch that portion of the video from the P.B. hearing and pay close attention to the audience's reaction when Nancye Jones stated that the reason she did not provide me with the Smith Report was that I never requested it. Of course, Ms. Jones also heard the reaction of the audience, so at the conclusion of the P.B. hearing, she tried to explain:

And I want I want to assure the Board that ***I did not know, until he said they didn't have it, that they didn't have it****. This was not an intent to blindside them. They had every statement. Mr. Smith made no findings, no conclusions in his report. It was simply his summary of what the statements said so um because I wasn't going to admit it into evidence was another reason . . . ." [46:38 Disc 5 P.B. hearing; file M2U00041]*

I do not know when the Smith Report was written, because, curiously, Attorney Smith elected to leave the report undated; however, I do know that the truth has but one version, yet Ms. Jones offered two. Ms. Jones first explained that the reason she did not provide me with the Smith Report was because I/my attorneys did not ask for it. After she heard the audience's shocked/disgusted reaction to her explanation, she then changed the explanation and said that the reason she did not give me the Smith Report was that she did not know I did not already have the report, an obvious falsity since she was thrice put on notice that I was neither in possession of nor had knowledge of the existence of the Smith report: She knew as early as the January 20, 2012 Rouse hearing that I did not have a final investigative report; at the start of the P.B. hearing she heard Mr. McKinnon state that I wanted a continuance to secure the presence of Captain Dofflemyer, the author of the only investigative report in my entire case; and again during his opening argument Mr. McKinnon stated that there is no investigative report other than Captain Dofflemyer's.

PART V: ANALYSIS OF RULE VIOLATIONS

While making determinations of violations of the Rules Regulating the Florida Bar is the province of Bar Counsel, it seems Ms. Jones violated at least the following Bar Rules:

1. **RULE 4-3.3 CANDOR TOWARD THE TRIBUNAL**
2. **RULE 4-4.1 RULE 4-4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS**
3. **RULE 4-8.4(c)MISCONDUCT: INVOLVING DISHONESTY, FRAUD, DECEIT, OR MISREPRESENTATION**
4. **RULE 3-4.3 MISCONDUCT AND MINOR MISCONDUCT**

In violation of Rule 4-3.3(a)(1), Nancye Jones knowingly made a false statement of material fact or law to a tribunal when she made the following statement to Judge Rouse: . . . *as the person for the County who has done more probably Personnel Board hearings in the last twenty years than anyone else in this room for sure, um I can tell you that the board will consider anything. If they want to bring in that his rights were violated, that is absolutely something they can bring to the board's attention* . . . .

Her knowledge of the falsity of this statement at the time of its utterance is evidenced by her own words shortly thereafter in both her April 9, 2012 memo to the Personnel Board members and her statements to the Personnel Board at the April 12-13, 2012 hearing that, pursuant to the Personnel Board hearing Procedures: "The hearing must be confined to the charges contained in the statement of adverse action given to the employee at the time the action was taken." In addition, the "Personnel Board Hearing Procedures" document is neither lengthy nor complex.[16] It is only a 15 page document (excluding the index) and this limitation on the scope of the Personnel Board hearings is contained in section IV.B., titled: "Powers of the Board," which consists of only four very short paragraphs. That she knowingly made this false statement to Judge Rouse is further evidenced by the fact that at the time of its utterance, Ms. Jones had, as she touted, at least twenty years of experience with the Personnel Board hearings. It would simply be unreasonable to believe that Ms. Jones would be unaware of the Personnel Board's limited scope after all those years of experience, especially in light of her own statement to the Personnel Board made to support her argument that the Board did not have the authority to consider LEOBOR violations: . . . *this Board's authority is well-established by the Charter by the merit rules and by your own procedures.*

Alternatively, assuming, arguendo, that, despite her extensive Personnel Board experience, Ms. Jones was unaware that the Personnel Board hearing was to be limited to the charges contained in the final statement of adverse action, she then knowingly failed to correct a false statement of material fact or law previously made to the tribunal, which is also a violation of Rule 4-3.3(a)(1). Furthermore, as 4-3.3(d) instructs: The duties stated in Rule 4-3.3 continue beyond the conclusion of the proceeding. Certainly, at the time she wrote the memo to the Personnel Board members, Ms. Jones was aware of the Board's limited scope; yet she never corrected any of the false/misleading statements she made to Judge Rouse, although she had an ongoing duty to do so, including her false representations as an "officer of the court:"

Jones: If they want to bring in that his rights were violated, that is absolutely something they can bring to the Board's attention . . .

Judge Rouse: And you're representing, as an officer of the Court right here as one who has done that and might be involved in doing it in this case, that you wouldn't even object on that ground?

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[16] A copy of the "Personnel Board Hearing Procedures" is available to the Florida Bar upon request.

Jones: Absolutely Judge. Absolutely.

Again, since it is reasonable to believe that Ms. Jones was aware, all along, of the limited scope of the Personnel Board hearing, I submit that she knowingly made a false statement of material fact or law to a tribunal when she represented to Judge Rouse that she "absolutely" would not object to the Board hearing my allegations of LEOBOR violations.

Alternatively, Ms. Jones knowingly failed to correct a false statement of material fact or law previously made to the tribunal when, at the time of the writing of her memo to the Personnel Board, she stated her intention to object to anything beyond the hearing's limited scope:

I am providing this pre-hearing information for your consideration so that you can be prepared for the County's objection to the presentation of any witnesses or issues which are outside the scope of the Board's authority.

Thus, if Ms. Jones would claim ignorance of the sparse procedures governing Volusia County's Personnel Board hearings, she was certainly well aware of them and her intention to object when she wrote her memo. At that point, she had an ongoing duty to communicate to Judge Rouse that she made several false statements of law at the hearing before him regarding the matters that the Personnel Board could hear and that she did in fact intend to object to anything beyond the charges contained in the final statement of adverse action. She had a duty to advise Judge Rouse that she intended to object at the P.B. hearing to the consideration of LEOBOR violations.

It is reasonable to believe that Ms. Jones knowingly made several other false statements of material fact or law to Judge Rouse or, in the alternative, knowingly failed to correct a false statement of material fact or law previously made to him; for example:

- Her statement to Judge Rouse that the Personnel Board is not bound solely by what is in the Internal Affairs investigation (which the statement of adverse action is based on);
- Her statement to Judge Rouse that I have the right to present to the Personnel Board whatever evidence I want of my LEOBOR violations and that such violations are for the Personnel Board to consider;
- Her statement to Judge Rouse that I had a remedy for the allegations of LEOBOR violations in the Personnel Board.

In violation of Rule 4-4.1(a), Nancye Jones knowingly made a false statement of material fact, or law or in the alternative engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 4-8.4(c), when she told the Personnel Board that I did not request a Compliance Review hearing until after the disciplinary action against me had been taken.

In violation of Rule 4-4.1(a), Nancye Jones knowingly made a false statement of material fact or law to members of the Volusia County Personnel Board or, in the alternative, knowingly engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 4-8.4(c), when she stood silent after my attorney Mr. McKinnon stated at the Personnel Board hearing that Ms. Jones told Judge Rouse that, as an officer of the court she would not object when the issue of the LEOBOR was raised to the Board. As the comment to Rule 4-4.1 instructs: "Misrepresentations can also occur by . . . omissions that are the equivalent of affirmative false statements." It is my contention that Ms. Jones' silence before the Board regarding her representation to Judge Rouse was dishonest; she should have informed the

Board that she did indeed tell Judge Rouse she would not object to the Board hearing the LEOBOR issues.

In violation of Rule 4-8.4(c), Ms. Jones knowingly engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation when, despite her word to Judge Rouse as an officer of the court that she would not object to the Personnel Board hearing the LEOBOR violations, she then both sent a memo to the Board members grooming them for her intended objection and then actually did object to the Board hearing the same violations at the Board hearing.

In violation of Rule 4-4.1(a), Nancye Jones knowingly made a false statement of material fact or law to members of the Volusia County Personnel Board or, in the alternative, knowingly engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 4-8.4(c), when she advised the Personnel Board that I raised the substance of the LEOBOR violations in circuit court and implied that the Court ruled against me and that I appealed that decision to the 5th DCA. In fact, at the time she made that representation to the Personnel Board Ms. Jones knew that to be false. Ms. Jones knew that the issue before Judge Rouse was limited to whether I was entitled to a Compliance Review panel which would, in turn, make findings regarding the substance of the LEOBOR violations. She knew Judge Rouse never heard the subsunce of the LEOBOR violations themselves or made any findings with regard thereto.

Also in violation of Rule 4-8.4(c), Ms. Jones knowingly engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation when, after convincing Judge Rouse that I did not need the Compliance Review panel to hear my allegations of LEOBOR violations because they would be heard by the Personnel Board, and then ensuring that the Personnel Board did not hear of those violations by objecting when my attorney tried to introduce evidence of such violations and instructing the Board that they lacked the authority to hear the violations, Ms. Jones then further trampled on what was left of my LEOBOR by twisting my lawful exercise of my rights under Fla. Stat. § 112.534(1)(a) and (b) into something wrongful. Althongh, under the statute, the interview of me was to cease and my refusal to respond to further investigative questions did not constitute insubordination, and while Ms. Jones would have been aware that I was informed by letter from the County Attorney that my declination to be interviewed will not be considered insubordination, she implied to the Board through her line of questioning that I did something wrongful by invoking my rights.

In violation of Rule 4-4.1(a), Nancye Jones knowingly made a false statement of material fact or law to members of the Volusia County Personnel Board or, in the alternative, knowingly engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 4-8.4(c), when she stood silent after a Personnel Board member asked my attorney Abe McKinnon about Captain Dofflemyer's absence and whether Mr. McKinnon had some indication that Captain Dofflemyer was not going to appear. As the comment to Rule 4-4.1 instructs: "Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." It is my contention that Ms. Jones' silence before the Board was dishonest; at that point, she should have spoken up and candidly informed the Personnel Board about her directive to Captain Dofflemyer to meet in Ms. Jones' office only the week before the P.B. hearing for the purpose of discussing Captain Dofflemyer's testimony and subpoena to appear at the P.B. hearing. Furthermore, she should have informed the Personnel Board that during that meeting she told Captain Dofflemyer that she did not need to attend the P.B. hearing.

In violation of Rule 4-4.1(a), Nancye Jones knowingly made a false statement of material fact or law to members of the Volusia County Personnel Board or, in the alternative, knowingly engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 4-8.4(c), when, in reference

to Captain Dofflemyer's absence at the P.B. hearing, Ms. Jones stated: . . . ***whether she's going to be here or not as you know these subpoenas are non-binding um I have no idea what Cap- I, I know Captain Dofflemyer is scheduled to retire I don't know when so um she may already be retired so um we don't have any way to force someone to be here.*** As the comment to Rule 4-4.1 instructs: "Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." It is my contention that Ms. Jones' statement was incomplete, false, and misleading. Again, she should have been completely honest and candidly informed the Personnel Board about her directive to Captain Dofflemyer to meet in Ms. Jones' office only the week before the P.B. hearing for the purpose of discussing Captain Dofflemyer's testimony and subpoena to appear at the P.B. hearing. Furthermore, she should have informed the Personnel Board that during that meeting she told Captain Dofflemyer that she did not need to attend the P.B. hearing and that she knew Captain Dofflemyer was still an active Volusia County employee as Captain Dofflemyer advised Ms. Jones of her retirement date at that same meeting.

In violation of Rule 4-4.1(a), Nancye Jones knowingly made a false statement of material fact or law to Captain Dofflemyer or, in the alternative, knowingly engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 4-8.4(c), or in the alternative committed an act that is unlawful or contrary to honesty and justice in violation of Rule 3-4.3 when she told Captain Dofflemyer, my witness who had been properly served with a subpoena to appear at the P.B. hearing on my behalf, that she did not need to attend the P.B. hearing and that the properly served subpoena was not binding on Captain Dofflemyer. Nancye Jones had no authority to release this witness. Ms. Jones knew that the subpoena issued by Human Resource Director Tom Motes on behalf of Volusia County to Volusia County employee Captain Dofflemyer was indeed binding on Captain Dofflemyer and failure to attend at the designated time and place would constitute an act of insubordination and grounds for discipline; therefore, Ms. Jones gave false confirmation of the non-binding effect of the Volusia County subpoena to its employee Captain Dofflemyer. Furthermore, please note the language in the attached subpoena which directs that the subpoenaed person can only be released from the subpoena by Tom Motes, Human Resource Director. Attorney Jones certainly knew that she had no authority to release Captain Dofflemyer, a witness subpoenaed on my behalf, when she told Captain Dofflemyer she did not need to attend the hearing.

In violation of Rule 4-4.1(a), Nancye Jones knowingly made a false statement of material fact or law to members of the Volusia County Personnel Board or, in the alternative, knowingly engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 4-8.4(c), when she falsely stated to the Personnel Board that the reason she did not supply me with the final investigative report or summary, authored by Assistant County Attorney Larry Smith, was that she did not know I did not already have that report. Ms. Jones was previously put on notice on three separate occasions that I was neither in possession of nor even had knowledge of the existence of a final report when my attorney Abe McKinnon stated at the Rouse hearing that there is no final investigative report and during both his Motion to Continue and his opening statement, Mr. McKinnon stated that Captain Dofflemyer's is the only investigative report in existence. Furthermore, Ms. Jones' first explanation for not providing the Smith report was that I did not ask for it.

Also, because it seems that all of the aforementioned suggested Rule violations also constitute engaging in conduct that is contrary to honesty and justice, Ms. Jones would also be violation of Rule 3-4.3 for each.

Finally, as to the existence of aggravating factors, Ms. Jones has substantial experience in the practice of law, approximately 33 years, and she deliberately put the weight of that experience behind her statements to Judge Rouse and the Personnel Board. Furthermore, she went far beyond knowingly making one false

or misleading statement or knowingly failing to correct one such statement; she engaged in what can only be described as a pattern of misconduct by violating several rules during the course of two separate legal proceedings, a meeting with my subpoenaed witness, and with her submission of a legal memorandum to the Personnel Board members. The obvious motive behind this deliberate pattern of conduct was a dishonest/selfish one: she wanted to win at all costs.

PART VI: CONCLUSION

Courts remain ultimately dependent on the information presented to them. When Seminole County Circuit Judge Kenneth Lester Jr. revoked the bond for George Zimmerman after his wife falsely represented to the court that the Zimmerman's were indigent, Judge Lester appeared angry that the court had not been told about the $135,000 the Zimmerman's had access to: "Does your client get to sit there like a potted palm and let you lead me down the primrose path?" Judge Lester asked Zimmerman's lawyer. "That's the issue."

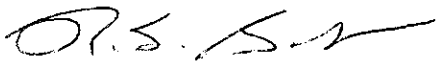
I contend that it is even more outrageous, then, when the one leading the judge or the Personnel Board down the garden path is the attorney, the officer of the court, whose word should be her bond, yet that is precisely what Nancye Jones did. Ms. Jones, however, was no potted palm; rather, she actively conducted her own legal shell game: Before Judge Rouse, Nancye Jones pointed in the direction of the Personnel Board, telling him I had a remedy for the LEOBOR violations in the Board. She used her word as an officer of the court in conjunction with her more than twenty years of Personnel Board experience and Judge Rouse's lack of experience with Personnel Boards, to boost her credibility and allay Judge Rouse's concern that my allegations of LEOBOR violations by Volusia County would never be heard if he did not order a Compliance Review hearing.

Then, the week before the P.B. hearing, she initiated a meeting with my subpoenaed witness Nikki Dofflemyer and, after being informed by Captain Dofflemyer that, if called to testify at the P.B. hearing, she intended to testify truthfully, Nancye Jones told Captain Dofflemyer that she need not attend the P.B. hearing. She then had the Personnel Board primed by sending, within days of the start of the P.B. hearing, a memo authored by her which instructed the Board how it should rule on her premeditated objection to any evidence not related to the statement of adverse action. She never communicated her knowledge of the Board's limited authority or her intention to object to Judge Rouse. Of course, after she provoked/sanctioned Captain Dofflemyer's absence at my P.B. hearing, when I moved for a continuance of the P.B. hearing for the purpose of securing Captain Dofflemyer's appearance so that she could testify to the LEOBOR violations and other matters, Nancye Jones spoke up and objected to the Motion to Continue and objected to the Board hearing evidence of the LEOBOR violations, yet she stood silent as to her conversation, only the week before, with Captain Dofflemyer during which she told Captain Dofflemyer she need not attend. Similarly, she remained silent after Mr. McKinnon relayed to the Board her representation to Judge Rouse that she would not object to the LEOBOR evidence at the P.B. hearing. These convenient omissions are dishonest and misleading; they are tantamount to affirmative false statements. Before the Personnel Board, Nancye Jones then pointed back to the court, instructing the Board that whether or not my LEOBOR was violated during the investigative process is not for the

Board's consideration as the Board had no remedy for me and she implied to the Board that Judge Rouse considered the substance of the LEOBOR allegations and ruled in the County's favor.

Thus, through subterfuge, and with the sleight of hand of a skilled triekster, Nancye Jones effectively cut off my path to any venue which would hear the substance of Volusia County's numerous violations of my LEOBOR; and poof! Nancye Jones made my legal rights disappear. Nancye Jones was brazen enough to bamboozle a circuit court judge and the Volusia County Personnel Board. Such dishonest conduct by an attorney by both affirmative act and omission reflects very poorly on the legal profession. I implore the Florida Bar to impose significant disciplinary sanctions for such conduct.

Respectfully,



Richard S. Gardner

PART VII: NANCYE JONES' STATEMENT JUXTAPOSITION TABLE

JANUARY 20, 2012 JUDGE ROUSE HEARING	JONES APRIL 9, 2012 MEMO TO PERSONNEL BOARD	APRIL 12-13, 2012 PERSONNEL BOARD HEARING
Jones: The Personnel Board hearing will be convened and as **as the person for the County who has done more probably Personnel Board hearings in the last twenty years than anyone else in this room for sure, um I can tell you that the board will consider anything. If they want to bring in that his rights were violated, that is absolutely something they can bring to the board's attention** . . . **Judge Rouse: And you're representing, as an officer of the Court right here as one who has done that and might be involved in doing it in this case, that you wouldn't even object on that ground?** **Jones: Absolutely Judge. Absolutely**.	Pursuant to the Personnel Board Hearing Procedures, section IV.B, the **powers of the Board** include, among other things, regulating the course of the hearing and disposing of procedural requests or similar matters. Further, this section provides that '**The hearing must be confined to the charges contained in the statement of adverse action given to the employee at the time the action was taken... .** In the interest of the efficiency of this process and fairness to the Board members, parties and witnesses, **I am providing this pre-hearing information for your consideration so that you can be prepared for the County's objection to the presentation of any witnesses or issues which are outside the scope of the Board's authority.** If the appointing authority's decision to terminate is unchanged by the response of the employee, the final letter of termination or dismissal is then issued. **It is this final letter which determines the issues which shall be presented for the Board's consideration and action pursuant to the above referenced section of the Board's procedures. The scope of the evidence presented at the hearing is limited to that which will either support or refute the action taken as set forth in the final letter.**	Jones: I...I think it's probably a good time since Mr. McKinnon brought up **the Police Officer's Bill of Rights, the Law Enforcement Officer's Bill of Rights, as I suspected that issue would come up today** and I think it's probably a good time for me to address that. . . . Um, Mr. McKinnon has actually already raised this in circuit court with Judge Rouse - the Bill of Rights, allegations of the Bill of Rights violations um and actually his decision is currently on appeal to the Fifth District Court of Appeals. Um, **it's the County's position that based again on your procedures, and the merit rules that give you authority, that whether or not Mr. Gardner's rights were violated during the investigative process is not an issue for your consideration today**. It's not, the statute doesn't provide that you have any remedy to give him um and it's something that is handled through the courts and is actually in the courts so um, it's our position that the Bill of Rights issue is not relevant to you and **not admissible** which if that's the primary motivation for Captain Dofflemyer's testimony, we would object to that anyway. Jones: Yes Sir. **My objection** is the requirements of Chapter 112, the Police Officer's Bill of Rights, deal with the time period that the investigation is ongoing. . . . **This board is not the venue to determine whether his bill of rights were violated by this investigation. That is not part of your authority under the Charter.** Jones: So that's why **I'm objecting** to him asking questions about something that wasn't done and whether or why it wasn't done, I don't think it's relevant to your

		decision.
Jones: **The Personnel Board is <u>not bound</u>** solely by what is in that internal affairs investigation. They make their determination based on what the parties present to them at that hearing.	**The hearing must be confined to the charges contained in the statement of adverse action given to the employee at the time the action was taken... .**	If you look at um your procedural rules, and as you know I provided you with a document earlier this week regarding that, um, this is a little bit of an untsual case and I I'm not trying to get off the subject of Captain Dofflemyer but uh in this case you were provided copies of the Notice of Intent to Terminate as well as the final letter. Um, it's our position that the Notice of Intent letter is really not relevant to your determination of the final decision because your rules provide that **<u>you will be bound</u>** by the, and I'm quoting from the rule that I had in the memo to you: The hearing must be confined **to the charges contained in the statement of adverse action given to the employee at the time the action is taken.** So in this case, the letter that was given to Captain Gardner that terminated his employment was the final letter um authored by um Acting Director Mr. Recktenwald.

JANUARY 20, 2012 JUDGE ROUSE HEARING	**April 12-13, 2012 PERSONNEL BOARD HEARING**
Judge Rouse: But Mr. McKinnon seems to be suggesting, and perhaps he didn't mean to do this but I just took it this way but that this would be very helpful to his client if we did, if this court did order the impaneling or the uh Compliance Review panel to be constituted and undertake action here that perhaps they would find many of these allegations to be well-founded and that a record could be made of that and this could be very helpful to his client down the line to have this more independent review of this matter and could be very beneficial to uh to his client so what do you think about that?	
Jones: Well, I don't think he needs that in order to **to preserve his <u>rights</u> to make the argument or make the presentation to the Personnel Board. He can bring in whatever evidence he wants that his rights were violated during the course of the investigation** and and hopefully would be able to show how those violations impacted the result of the investigation and that's what I assume that they uh would try to get to. **<u>But that would be for the personnel board to consider</u>**.	**<u>This board is not the venue to determine whether his bill of rights were violated by this investigation</u>**. That is not part of your authority under the Charter. **... whether or not Mr. Gardner's rights were violated during the investigative process is not an issue for your consideration today**. . . . It's not, the

	statute doesn't provide that you have any remedy to give him um and **it's something that is handled through the courts** . . .
Jones: . . . prior to 2008, injunction was the only **remedy for** an allegation of a **Bill of Rights violation.** That's no longer the case. . . . There seems to be a great concern that he doesn't have any other **remedies,** but he does in fact judge, **including the Personnel Board** . . .	Um, **it's the County's position that based again on your procedures, and the merit rules that give you authority, that whether or not Mr. Gardner's rights were violated during the investigative process is not an issue for your consideration today.** It's not, **the statute doesn't provide that you have any remedy to give him** um and it's something that is handled through the courts and is actually in the courts so um, it's our position that the Bill of Rights issue is not relevant to you and **not admissible . . .**
[Since Judge Rouse never made any finding that my request for a Compliance Review hearing was not made until after the disciplinary action was taken, one can only note the absence in the record of such a finding as well as the following statements by both Nancye Jones and Judge Rouse which show both of them understood I was still employed by Volusia County when I made the LEOBOR violations allegations and request for a Compliance Review hearing:] **Jones**: . . .some of the allegations of violations occurred well before the point where Mr. Gardner was going to be interviewed at the conclusion of the investigation, because as you see from reading the bill of rights that's the last thing that's done in an investigation. The officer's interview is the last thing that's to be done to finish an internal investigation so it's our position judge that at any point on that line, before **December 16th when there was an attempt made to interview him**, he could have filed a request for a Compliance Review and an allegation that his rights had been violated and I think arguably judge at that point we would have had to stop and convene such a board to look into that unless we felt like it was cured in some other way um but **there was no** allegation of a violation of the bill of rights made until or a **request for a Compliance Review until the point where that interview was getting ready to take place.** Judge Rouse: Let me stop you there for a moment. Petitioner's counsel seem to argue or suggest that if this Compliance Review panel has never been impaneled, never set up pursuant to the **appropriate demand at the time he was still employed,** that they're just stuck with whatever findings. They can never challenge those findings of that investigator. No one will ever review those findings. There is no meaningful opportunity or fair process for the terminated officer to say wait a minute, that's not true – that person was – the investigator that made that determination or factual finding, they were biased and if you had set up the Compliance Review panel that would've been	The request for a Compliance Review hearing was not made until **after the action was taken, the disciplinary action was taken which is what the finding of Judge Rouse was.**

determined, but you refused to do it and now I'm somehow prohibited from in any way challenging these grounds for my termination. Is that the case?	

JANUARY 20, 2012 JUDGE ROUSE HEARING	**April 12-13, 2012 PERSONNEL BOARD HEARING**	**April 12-13, 2012 PERSONNEL BOARD HEARING**	**April 12-13, 2012 PERSONNEL BOARD HEARING**	**April 12-13, 2012 PERSONNEL BOARD HEARING**
Nancye Jones' silence in response to my attorney Abe McKinnon's statement: *Your Honor, first of all,* ***there's been no final investigative report. . . .***	Nancye Jones' silence in response to my attorney Abe McKinnon's statement in reference to Captain Dofflemyer: . . . ***there is only one investigative report, only one in this entire case and it's the one she authored. That's it .*** . . .	Nancye Jones' silence in response to my attorney Abe McKinnon's statement during closing argument: ... *it's important I think for you to understand with respect to Mr Recktenwald all, and you'll see under the policies, he didn't go back and have a investigative report created.* ***There's no investigative report, other than the one we're talking about [motions to Captain Dofflemyer report] Captain Dofflemyer's,***	Nancye Jones' explanation #1 to my attorney for not providing me the Smith Report: ***You never requested it.*** *[audience reacts]*	Nancye Jones' explanation #2 to Personnel Board for not providing me the Smith Report: *And I want I want to assure the Board that* ***I did not know, until he said they didn't have it, that they didn't have it. .*** . .

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF VOLUSIA

BEFORE ME, the undersigned authority, personally appeared Nikki Annette Dofflemyer, who, after being duly sworn, and being of sound mind, deposes and says that she has personal knowledge of the following facts and that they are true and correct.

1. I am over the age of eighteen (18) years.

2. I am a retired Captain and retired Internal Affairs investigator with the Division of Corrections, Volusia County Department of Public Protection in Volusia County, Florida. I was the Internal Affairs investigator in the Internal Affairs investigation, IA Number: 2011-09297, in re: Captain Richard Gardner.

3. I received a "Subpoena For Personnel Board Appeal Hearing," signed by Volusia County Personnel Director Tom Motes, to appear on behalf of the claimant, Richard Gardner, before the Volusia County Personnel Board on Thursday, April 12, 2012 at 9:30 a.m. and Friday, April 13, 2012 at 9:30 a.m. to testify in the matter of Captain Richard Gardner. A copy of the Subpoena is attached hereto.

4. On or about April 5, 2012, and upon the request of Ms. Nancye Jones, Assistant County Attorney for Volusia County, I appeared at the office of Ms. Jones to discuss the "Subpoena For Personnel Board Appeal Hearing" for Richard S. Gardner.

5. At the meeting, Ms. Jones and I discussed my attendance at the Personnel Board Appeal Hearing for Richard S. Gardner and I told her that, if called to testify by Captain Richard Gardner, I would be required to testify truthfully in the matter.

6. I told Ms. Jones that I understood the "Subpoena For Personnel Board Appeal Hearing" issued by Mr. Motes to be "non-binding." Ms. Jones confirmed the subpoena was "non-binding."

7. Ms. Jones stated that she had no intention of calling me as a witness. During the conversation, Ms. Jones advised me that I did not need to attend the Personnel Board hearing.

8. I understood from my discussion with Ms. Jones that my attendance before the Volusia County Personnel Board on Thursday, April 12, 2012 at 9:30 a.m. and Friday, April 13, 2012 at 9:30 a.m. was neither expected nor intended by Volusia County.

9. On April 12, 2012 during normal assigned hours and the morning of April 13, 2012, I was on duty and present in the Internal Affairs Unit Office and could be reached by county extension, county cellular phone, or personal cellular phone. All contact numbers were made available to Ms. Jones and the County Legal Department. At no point subsequent to the meeting on or about April 5, 2012 with Ms.

Exhibit A

Jones, did Ms. Jones or any other person with the County of Volusia direct my attendance at Richard Gardner's Volusia County Personnel Board hearing.

10. Previously, in cases unrelated to Mr. Gardner's case, I have appeared to testify at Personnel Board hearings in my capacity as an Internal Affairs investigator without the necessity of a subpoena, but simply at the direction of my employer.

11. After my meeting with Ms. Jones, I understood that there would be no repercussions from my employer, Volusia County, should I not appear at Mr. Gardner's Personnel Board hearing.

12. Throughout the Internal Affairs investigation, IA Number: 2011-09297, in re: Captain Richard Gardner, I was an active employee of Volusia County and remained as such until I retired on April 13, 2012.

13. During the meeting on or about April 5, 2012, I advised Ms. Jones of my retirement date of Friday, April 13, 2012.

FURTHER AFFIANT SAYETH NAUGHT.

Nikki Annette Dofflemyer

STATE OF FLORIDA
COUNTY OF VOLUSIA

The foregoing instrument was SUBSCRIBED AND ACKNOWLEDGED before me this 22 day of August, 2013, by Nikki Annette Dofflemyer, the affiant, who:

[ ] is personally known to me, or

[X] has produced [redacted] as identification and who did (did not) take an oath.

JULIE M. CANADA
MY COMMISSION # FF 020121
EXPIRES: August 25, 2017
Bonded Thru Notary Public Underwriters

Julie M. Canada

Julie M. Canada
Notary Public
State of Florida at Large
My commission expires:

JULIE M. CANADA
MY COMMISSION # FF 020121
EXPIRES: August 25, 2017
Bonded Thru Notary Public Underwriters

Volusia County
FLORIDA

PERSONNEL DIVISION
VOLUSIA COUNTY PERSONNEL BOARD
IN AND FOR VOLUSIA COUNTY, FLORIDA

SUBPOENA FOR PERSONNEL BOARD APPEAL HEARING

In the matter of: RICHARD GARDNER

TO: Nikki Dofflemyer, IA Investigator
Department of Public Protection
Internal Affairs Unit
125 West New York Avenue
DeLand, FL 32720

YOU ARE HEREBY REQUESTED on behalf of the claimant to appear before the Volusia County Personnel Board at the Volusia County Courthouse, 101 North Alabama Avenue, 1st Floor, Room C153, Deland, on **Thursday, April 12th and Friday, April 13th, 2012**, at 9:30 a.m. to testify in the above styled cause.

You are subpoenaed by the following individual, and unless excused from this subpoena by this individual, you shall respond to this subpoena as directed.

BY: _____
Tom Motes
Human Resources Director

DATE: April 2, 2012

cc. Nancye Jones, Esquire
County of Volusia – Legal Dept.
123 West Indiana Ave.
Deland, Florida 32720
386-736-5950

Volusia County
FLORIDA

Legal Department

April 9, 2012

Personnel Board Members:
Patrick Lane, Chair
Brenda Thompson
Ezell Reaves
Dwight Lewis
Joseph Winter

Re: Richard Gardner Appeal Hearing

Dear Members of the Board,

As you know, the above referenced appeal hearing is scheduled for April 12 and 13, 2012. This purpose of this letter is to provide you with information as to the County's position regarding the conduct of this hearing.

Pursuant to the Personnel Board Hearing Procedures, section IV.B, the powers of the Board include, among other things, regulating the course of the hearing and disposing of procedural requests or similar matters. Further, this section provides that "The hearing must be confined to the charges contained in the statement of adverse action given to the employee at the time the action was taken..."

The Volusia County Merit Rules and Regulations provide for the procedure to be followed when an employee is the subject of adverse action, including dismissal, and this includes providing the employee with the reasons for the dismissal in writing "specifically and fully stated" and allowing the employee to respond to the charges "before the dismissal is effected." (Sec. 86-455(f)(2). This is what is commonly referred to as the notice of intent to terminate. If the appointing authority's decision to terminate is unchanged by the response of the employee, the final letter of termination or dismissal is then issued. It is this final letter which determines the issues which shall be presented for the Board's consideration and action pursuant to the above referenced section of the Board's procedures. The scope of the evidence presented at the hearing is limited to that which will either support or refute the action taken as set forth in the **final** letter.

Nevertheless, in this case, in an effort to provide full disclosure of the pretermination proceedings, Mr. Motes' office initially provided you with a copy of the notice of **intent** to terminate (emphasis added) and a copy of the final letter of termination. At the request of Mr. Gardner's attorney, Jake Kaney, and with the agreement of the undersigned, you were subsequently provided with Mr. Kaney's rebuttal to the notice of intent to terminate.

123 West Indiana Avenue • DeLand, FL 32720-4613
Tel: 386-736-5950 • FAX: 386-736-5990
www.volusia.org

Exhibit B

The purpose of this letter is to advise you that Mr. Kaney has asked for the issuance of 37 subpoenas for witnesses he intends to call at this hearing and it is the County's position that many of those listed witnesses have no personal knowledge or relevant testimony to the charges for which Mr. Gardner was ultimately dismissed. In the interest of the efficiency of this process and fairness to the Board members, parties and witnesses, I am providing this pre-hearing information for your consideration so that you can be prepared for the County's objection to the presentation of any witnesses or issues which are outside the scope of the Board's authority. The issues for your consideration, as set forth in the Notice of Dismissal, will be whether Mr. Gardner exhibited an unacceptable failure of judgment in light of his position as a senior supervisor with the Division of Beach Services by: (1) engaging in two inappropriate intimate relationships with female employees, one who was a probationary trainee ([redacted] and the other a line level law enforcement officer ([redacted] while at times acting in a supervisory capacity over them; (2) showing or creating the perception that he was showing favoritism to [redacted] (3) failing to document or to report to his supervisor when he confiscated the weapons (both department and personal) of [redacted] when he knew she had been treated for depression and was exhibiting outward signs of emotional distress; (4) returning [redacted] weapons to her without ensuring her fitness for duty or reporting the situation to any supervisor; (5) failing to obey a direct order to produce telephone records; (6) disregarding directives cautioning against unprofessional conduct in the workplace in light of recent high profile events involving members of the Beach Patrol and (7) failing to disclose or misrepresenting the nature of the relationship with [redacted] when questioned about it by Director Sweat. While this list is somewhat general, the evidence presented by the County and on which you should direct your decision will be limited to these and only these issues.

Respectfully Submitted,

Nancye R. Jones
Assistant County Attorney

cc: Tom Motes, Personnel Director
Jonathan Kaney, via email: jake@kaneyolivari.com

VOLUSIA COUNTY PERSONNEL BOARD

APPEAL HEARING

IN RE: RICHARD GARDNER

(EXCERPT OF HEARING - DELIBERATIONS)

* *

DATE TAKEN: APRIL 13, 2012

PLACE: DeLAND COURTHOUSE
101 NORTH ALABAMA AVENUE
1ST FLOOR, ROOM C-153
DeLAND, FLORIDA

REPORTED BY: SHANNON GREEN, RPR

* *

RELIABLE REPORTING COURT REPORTERS
381 APACHE TRAIL
ORMOND BEACH, FLORIDA 32174
(386) 615-3828

Exhibit C

APPEARANCES:

JONATHAN D. KANEY, III, ESQUIRE
Kaney & Olivari, P.L.
55 Seton Trail
Ormond Beach, Florida 32176
Attorney on Behalf of Richard Gardner

ABRAHAM MCKINNON, ESQUIRE
595 West Granada Boulevard, Suite A
Ormond Beach, Florida 32174
Attorney on Behalf of Richard Gardner

NANCYE JONES, ESQUIRE
MARY JOLLEY, ESQUIRE
123 West Indiana Avenue
DeLand, Florida 32720
Attorneys on Behalf of the County of Volusia

PERSONNEL BOARD MEMBERS PRESENT:

Patrick Lane, Chair
Brenda Thompson
Ezell Reaves
Dwight Lewis
Joseph Winter

P R O C E E D I N G S

MR. LANE: All right. We have reached a point in the appeal that we're going to bring to a close the fact finding process here, proceed to deliberations if you're ready to do so. And I think everybody understands this is more complicated than some we've had in the past. Before we get into the specific violations as alleged in the dismissal notice, I would like to -- if we would like to just comment generally on the things we've heard in the last two days in terms of possible policy failures or witnesses. Just the way that this investigation proceeded over the length of time that it did. Anybody like to comment on that before we get -- we might want to do that twice, once in the beginning and once in the end. It may come down to that, so some of those things we can just point out as we proceed, and again for the record. And we might have some recommendations, but we still need to come down to voting on the individual things. I want to sort of break it up into two sections, if I could.

Anybody want to start and just lay some general impressions.

MS. THOMSPON: Well, speaking of breaking it up in two parts, it's -- it seems like what I've heard the last two days is two stories, two cases. The county did not seem like, to me, that they treated him as an equal like everyone else had been treated. They -- it seemed like, to me, that they purposely picked him out and said, you're going to be the one that gets punished for whatever has been going on around here for years because nobody else got punished for that.

And then it comes down to this went on for two years with him, so I can understand Mr. Recktenwald's contention that he was -- he was arrogant enough not to have one incident, have it investigated, get an admonishment, and then be over with, get it filed away in the personnel file. He kept on for two years with the affairs, the lying, not telling anybody so that, you know, that's -- in my mind, that's against him. And then we have all of this judicial stuff that I don't think I'm comfortable with making any decisions on.

If I had to make a decision right this second, I think I would have to go with

Mr. Recktenwald. His explanation of what he did, and what he considered, and what he did not consider, I don't think Mr. Gardner's been treated fairly in this, but I'd like to see something different than a termination. Mr. Recktenwald had a lot of evidence there, the County's put it in the evidence, is very clear to me, but you don't take a 27 year employee and throw him away for something that no one else has ever been terminated for, or even disciplined for that, you know, it's an acceptable practice. And I -- and I've been in those situations and I understand them. It's accepted. Don't stir the pot, we won't bother you type thing. If you want a motion --

MR. LANE: No, I don't want a motion yet. Let's just talk in general terms for a second --

MS. THOMSPON: Okay.

MR. LANE: -- because I think it's important.

MS. THOMSPON: That's all I want to say.

MR. LANE: I think it's important that we sort of collectively synthesize what we've heard over the last couple of days. Anybody want to go next?

MR. LEWIS: I have some real concerns about this case with the internal investigator not being here. I think that -- that omission really stands out with me. I made a comment about it yesterday. I can't understand when you have this large a case and you do an internal investigation, and it's like Mr. McKinnon has said, why wouldn't we have her here? She's one of our employees. We could have had her here. She should have been here. Then she could either stand behind what she put out there, and she could be questioned, and I think that gives him the ability to face his accused, so I really have a problem with that.

And then I have another problem with the fact that we opened and reopened the case, they didn't get the paperwork, and they were told, well, you didn't ask for it. I have a problem with that. It doesn't work good with me. I think we need to have a transparency, as was said, that when we bring somebody here, everything is put on the table and we don't take and do it and work like that. I have a problem with that right there.

And I'd like to ask a question. Did we

make any kind of a deal with [redacted] to get her phone records and separation agreement? Did she get a -- some kind of a deal to get that?

MR. MCKINNON: Yes, sure did. She sure did. I've got a copy of that separation agreement sitting here.

MR. WINTER: I don't need to see it, but that's --

MS. JONES: You can't reopen the evidence.

MR. WINTER: No, I'm not reopening, but that's --

MS. JONES: She was --

MR. WINTER: It bothers me, too.

MS. JONES: They could have called her, and they said they were going to call her back.

MR. LANE: Let me just re-focus what we're doing right now. We're deliberating amongst ourselves. We're really not supposed to ask for any --

MR. WINTER: Well, I'm just saying that bothers me.

MR. LANE: Nor are we supposed to address the attorneys or the appellants. They're really just -- it's a -- it's a --

MR. WINTER: That bothers me.

MR. LANE: It's a family discussion. It's a board discussion. I hear you.

MR. LEWIS: Okay, Dad. But I also know that you can't have a policy for everything. And then when you reach the level that you reached, you're expected to make good decisions. And there isn't going to be a policy for everything, and I think you made a couple of real bad mistakes. I think when Mr. Sweat asked you about your affair, you said, not today. Well, somebody might ask, are you beating your wife? Well, not today. I think that's -- you had the opportunity to do something there, and I know hindsight's 20/20, but I think that that's a problem that we didn't get the answer -- the right answer there. And I think to cover himself when he went to pick up those guns, he probably the next morning should have told Kevin Sweat that -- what had taken place. I think with those kind of things, we wouldn't be sitting here today. Fairly simple, but just an error in judgment at that point in time.

On the other hand, we've got Mr. Gardner here after 27 years, and I have heard, and I know, and I know through reputation there's

probably not a better person on that beach than Mr. Gardner. And he's given a long time and a lot of his life's work and everything. This is difficult today.

MR. LANE: Well, if I may comment. In light of the -- this Drury case, or whatever it was, that blew up and got litigated and it was very public, I'm really surprised that they didn't take careful pains to correct their policies and institute a non-fraternization policy because of the fact that when you fraternize, whether it's with a subordinate, in which this case I think it was, this exactly points out the problems that can crop up as a result of that.

We have situations here that he responded to her home with the gun. Could have been some assignments -- preferences in assignments, but his judgment, I believe, was affected by the fact that he was having relations with these people, and this is why we enact policies against them. This was not done, and should have been, and I hope it will be in the future because it's a can of worms.

MR. LEWIS: Yes, it is.

MR. LANE: And that's to a large extent -- you can't have policies against everything, and what you said about having common sense and trusting your senior -- senior officers, and senior people within your departments, to have good discretion and make good decisions is absolutely important. You cannot write down every policy. You can write down the main ones, and I don't think we had a good framework in place, but I also think some good decisions were not made along the road here which we'll discuss individually as we get down to the violations on paper here.

Want to weigh in anybody? Next?

MR. WINTER: Yes. This initial investigation was predicated on receipt of an anonymous letter. Now, I think we -- or the county determined that they knew who addressed the envelope, but they don't know who wrote the letter. That's how they burned witches in Salem. I think that Captain Gardner might have got caught up in, and I hate to say witch hunt, but because of what was going on in the press, and what was going on in beach service, I think he looked like a convenient fall guy.

And another thing, on the -- the internal affairs investigation, in past cases we have talked about these subpoenas, non-binding subpoenas, and county employees not showing up to testify when the appellant is relying on these people's testimony. And when they don't show up, I have to go along with what Dwight said yesterday, that does not smell good. It doesn't smell right.

Third thing, all due respect to the director, he wasn't here. I asked Director Sweat yesterday pretty pointed questions. Based on these charges that -- and with the exception of the first one, Director Sweat couldn't give me an answer, or a reasonable answer, why the captain should be discharged. That's all I have to say about that, and we can go through these other things, but I -- I want to make those things -- I -- I -- I have a hard time for a man being investigated that's been working for the county for 27 years, out there risking his life, and I know he risked his life on that beach, the county has spent probably hundreds of thousands of dollars on training him, and throwing him away like an old shoe. I have a problem with

that based on an anonymous letter.

MR. LANE: Okay.

MR. REAVES: My turn?

MR. LANE: Please.

MR. REAVES: In every -- in every -- I believe that in every internal affairs investigation, except this one, I believe the person who did the investigation sat in that chair. I think it's an older guy who had been here 30 plus years or something that I always remember seeing.

MS. THOMSPON: Chief Lee.

MR. REAVES: I can't remember his name.

MS. THOMSPON: Chief Lee.

MR. REAVES: Is that who it was?

MS. THOMSPON: Um-hum.

MR. REAVES: And it got to the point that I thought maybe internal affairs meant you want to fire this guy. Chief, go out there and find something and find something so we can. This is the only time that I can recall that -- that the person who did the investigation wasn't in that chair. Now, I may be wrong, but I believe it's the only time since I've been here. The other thing is that going back as it relates to the

bill of rights for firemen and policemen, it used to confuse me to death when I first got on this -- on this commission because they were always referred to one of the reasons for firing was because of this that happened and he is a sworn -- he or she is a sworn police officer, and then you had this merit system. So I know that they're aware of it because they confused the hell out of me for two years, so I know it's there, okay?

And we've had it in our deliberations, and I have asked questions about it because I thought it was a two-prong thing that they were doing to people who where -- that they were talking about. But now all of a sudden it disappeared, so -- and that -- also, I'm really concerned because this is a very large corporation, and we don't have a policy that covers messing around? I mean -- and then you go and try and manufacture something? That's very disturbing to me, so I don't know how in the world I am going to vote to uphold something that's based on no policy and different -- and veering from the procedure that I have become accustomed to when there is an internal affairs

investigation.

I don't know how I'm going to vote to uphold something that's the result of this investigation because, to me, you haven't proved anything except that, yes, this person went out and did something, but there's no policy for it. And you fire him on these catchall policies that, hell, I couldn't even -- I don't even work for you and I'd be guilty of them. So it really doesn't make any -- that's no disrespect to you because I think you just got thrown into the fire. I mean, they handed this off to you and told you to run with it and you did the best you could. And it's really no disrespect to you because I've gained respect for you over the years because you've been here a lot of times, and you are always right to the point, and you know exactly what you're talking about. But this time I just -- I just don't understand a lot of stuff, so I can't vote to agree with you on firing him. And especially since -- since Captain Sweat, who in my mind should be the person disciplining him anyway, couldn't even say that he would fire him for what's happened.

So I don't know how I'm going to vote to

uphold this. I'm really struggling with this. I understand that looking at what's here, and the way that the county attorney has phrased it, and I understand our position, I understand we're supposed to look at the facts and determine whether or not they presented a case that was -- that would include -- that would end in firing this person. I understand all of that. In my mind I can't get there because it was bad from the beginning. I mean, they had a case -- and I think they brought this up yesterday. How can you send a letter of intent, reopen a case, and then fire somebody, and don't start all over again? It just makes no sense. It makes no sense. And you've even got a change of guard. The person who started it is not here, nobody called him. He's still with the county, nobody called him. The person who did the investigation is not here. It's -- I can't come to a conclusion with that.

MR. LANE: Well, we're going to have a chance to talk about them individually, and I understand what you're saying and I agree with the majority of it. What we're -- I mentioned at one point I'm going to quote policy from time

to time. What we are charged with doing is going through these things one at a time and putting forth our opinion whether or not the county has proven their case --

MR. REAVES: Correct.

MR. LANE: -- on each one of these individually.

MR. REAVES: I understand that.

MR. LEWIS: Not to place ourselves on whether we would have done this, but whether they were justified in doing that. And then at the end of the day, we'll vote on each one of these individually, and then we have an opportunity to recommend whether or not the county manager follows through with the termination or whether we want to substitute some other suggestion.

MR. REAVES: I am not condoning an extramarital -- extramarital affair. That's a moral thing. I mean, you're supposed to leave that at home when you come to work anyway. I mean, but you are supposed to follow the policies of the organization, and I think that that's what we're here to figure out. All I'm saying is that the policies that this man was

terminated under, in my opinion, are fabricated. I'm sorry.

MR. LANE: No, I agree with your thought process there, and I think we're going to have a chance to describe each one individually is what I'm saying. I'm not disagreeing with you, I'm just quoting policy.

Anything else? Any other thoughts before we delve into that?

MR. WINTER: Just this: I kind of feel that we're trying to hold Captain Gardner to a standard that -- a higher standard than a former president of the United States.

MR. LEWIS: Let me see if I can figure out which one that might be.

MR. WINTER: Which one that might be. And when he was censured, was censured for perjury. He was not censured for his act, he was censured for perjury, and nobody has accused Captain Gardner of perjury, so -- but it sure feels like that's what's happening. I think he's probably a fine man, but I don't think we should hold him to a higher standard than the president and that the congress did.

MS. THOMSPON: It sounds like we're all

about on the same mindset, that, you know, there have been some test cases and something needs to be done about it. I think all of us are in agreement there doesn't need to be a termination.

MR. LEWIS: We could go through these different lists right here and handle those, and they yea or nay, or sustain them or don't, and then at the end not sustain the dismissal and then they'll go back and they'll do what they feel is appropriate.

MR. LANE: That's what I want -- that's what I want to do. And I guess it's -- that's what I want to do. Let's go ahead and start doing that unless we have other general remarks. And, again, I'll certainly entertain those after the vote if anything else comes to mind. With respects to Section 86-453, subsection 5, violation of any reasonable or official order. He will carry out lawful -- lawful and reasonable directions given by a supervisor. Other acts of insubordination, these phone records. And how do we -- how do you feel about that one?

MR. LEWIS: I think that what you're

talking about there is the phone records, and I'm not convinced from either side that it's legal that they -- that he has to turn them over. And I -- I actually heard from both sides that they're not -- well, they're not very sure, and they were sure that you shouldn't, so I can't -- I can't sustain that because I -- I believe that your personal records are your personal records. That's the way I feel about it. They can debate the law, and I didn't hear anything that made me think that it was -- that he needed to give those up.

MR. LANE: As we go through these, you're welcome to make a motion at any time, and I'll just open it for a continuing discussion until we reach a point where we want to vote on it because I have something I want to add to that.

MR. LEWIS: Okay. Well, do you want me to put a motion on the table?

MR. LANE: If you're ready to do so.

MR. LEWIS: I move that we do not sustain section 86-453, number 5.

MR. REAVES: Second.

MR. LANE: Okay. Further discussion on this. I would like to say again, it points out

to me some sort of a policy needs to be developed and implemented. If you don't want people turn over their records, then don't let them use those phones for county business. I don't know how you'd enforce that. Everybody carries their cell phone. So I'm going to let them figure out -- that's not why we're here. I -- but I would point that out. I think we have a policy issue that needs to be addressed and I would agree with the motion. Any discussion on this?

MR. WINTER: I feel like it's an unreasonable search. I -- when I asked Mr. Pozzo this morning, I was told -- given one case -- one piece of case law, which I haven't had the opportunity to read the brief on, and it sure feels that -- it feels to me like an unreasonable search. I will have to agree with Dwight's motion.

MS. THOMSPON: I'm retired, and I don't have a lot on my cell phone, I don't use it much, but I don't want the government or anybody else coming in and asking for my phone and wants to know what's on it. I agree that we shouldn't uphold this one.

MR. LANE: Yeah, I don't even like Google knowing where I'm at.

Any further discussion on that one? Hearing none, all those in favor of the motion say aye. Opposed like sign. Motion carries unanimously.

Same section, subsection 8, other contact -- conduct which interferes with the effective job performance or has an adverse effect on the efficiency of county service.

MR. REAVES: I -- I haven't seen anything that said that he was ineffective in his job performance. I'm sorry. I don't know -- I haven't seen any if there was.

MS. THOMSPON: Even the county admits he's been exemplary.

MR. REAVES: So I don't know how we -- how we got that. Sorry.

MR. LANE: Well, the only thing I would add to that would be the issue of not reporting the gun issue. And, again, there's not a clear policy.

MR. REAVES: Policy.

MR. LANE: It's discretionary.

MR. REAVES: I mean, he might have --

should have been told that he should have used better judgment, but I don't -- I don't think that's -- I don't think that interfered with anything that the county was going to do. I'm sorry. They weren't going to do anything because they didn't know about it.

MS. THOMSPON: Again, their policy was to do nothing. Close your eyes and make it go away.

MR. LANE: If you don't do -- do this or don't do this, we're going to fire you. Oops, we just did.

MS. THOMSPON: Yeah.

MR. WINTER: I don't think that -- as a sworn officer, he has the ability to Baker Act somebody. I mean, he didn't have to kick it upstairs, he didn't have to take her to a psychologist, didn't have to take her to a superior. He has the right and the power to Baker Act somebody. He obviously observed her and didn't feel that it needed to be done.

MR. LANE: There's so much of this that is a game day decision, and that was his game day. He was there. We aren't. It's very hard for us to stand and, you know, put forth an opinion

that's going to be more valid than his.

Do I hear a motion regarding this subsection?

MR. LEWIS: I believe we do not section 8 -- 86-453, number 8.

MS. THOMSPON: Second.

MR. LANE: Under further discussion, I'd just like to share some opinions on this. I do feel that regarding -- I think also under this subsection is included the decision or -- allow yourself to get embroiled in an affair with a subordinate or somebody else in your department, falls under that, and falls under it rather clearly. It shouldn't be condoned, nor should -- it shouldn't be unreasonable for him to -- for us to expect him to know better than that, but he did it anyway. It's a case of gotcha again where the policies aren't in place, but I do think it falls under that at least loosely. And it's an unwritten policy. It's unfortunate.

MR. LEWIS: I agree with you, but I can tell you all of the testimony that I heard about his ability to do his job with the detective from Daytona, the detective from the Shores,

internal affairs investigator, that I didn't hear one person that said that he didn't do a fantastic job or that he didn't act right while on duty, or did anything while he was at work. The only thing I heard about is what a good job he did.

MR. REAVES: Even the County's witnesses.

MR. LEWIS: And they say that they agreed.

MR. REAVES: They agreed to his performance, so I don't know --

MR. LANE: Well, so many of these things sort of overlap each other, so a lot of them are going to be included in more than one. My -- my comments about the problematic nature of the relationships with people, we did have people say that they felt there was some preferential treatment going on, that they didn't get a fair shake getting assigned to certain investigations. It wasn't major. I mean, it's a matter of who shows up and wants to be involved. There was a perception there, at least among a couple of people, not the majority, just a couple, that this was a problem from their standpoint.

MR. LEWIS: Common sense kind of makes you

want to feel that if there's something going on that's -- that he considers inappropriate while on the job, and then you follow afterward doing that, then surely it must affect you some on the job, but I didn't hear that through testimony. I mean, it just --

MR. WINTER: When I asked that of Director Sweat and he could not say anything.

MR. LANE: Ready for a vote on that one? Any other discussion.

MS. THOMSPON: We've got a motion and a second.

MR. LANE: Motion is to not uphold subsection 8. All in favor of that motion say aye. Opposed like sign. Motion carries unanimously.

Subsection 10. Unsatisfactory performance of duties. Could it be any more broad? No, it could not. This again -- pointedly they referred to -- what they were including under this, were the guns taken from the house being not reported and not being allowed -- or being allowed to take possession of those guns again the second -- the next day.

MR. REAVES: We're here -- I'm sorry.

MR. LANE: My comments stand from before. It's the same issue.

MR. REAVES: It's discretionary, so there's no policy that says -- I mean, a lot of things happen off duty a lot of times. People always say something. I mean, I've been in management. Off duty I heard people say all the time, I hate this job. Well, they said they hate it, but I'm not going to go to work the next morning and fire them because they said they hated it, or turn them in because they said they hated it. I used to say it every day. It's just -- I mean --

MR. LANE: Do I hear a motion?

MS. THOMSPON: I make a motion that we do not uphold section 86-453, number 10.

MR. LEWIS: Second.

MR. LANE: Second. I hear second. Further discussion on this one? Hearing none, all those in favor of the motion say aye. Opposed like sign. Being none, the motion to carry is unanimous.

Subsection 12. We're about half done. Knowingly giving false statements to supervisors. And specifically I would construe

that this involves this investigation about whether he was having an affair or an inappropriate association.

MS. THOMSPON: I think -- I think I'm looking to uphold this because the problem I had was the consistency over two years of telling lies, not coming forth with the actual truth and -- and continuing to do it.

MR. LEWIS: I think the question says giving false statements to supervisors, and if I heard things right that we were talking about, he was only asked one time during that two years, and it's pretty pervasive that they all bade off and on, and that they have their parties, and do this, and there's two people in two offices that are next to each other downtown that go with each other, and there's several ones all over. So knowingly giving false statements to supervisors, whether it went on for two years or whatever, he was only asked the one time. And I think, for me, I have to decide whether I think his answer was by omission of false statement, or did he give a false statement. And, for me, I don't know if he did or didn't.

MR. LANE: Well, I would like to opine on that. I believe that I would like to agree with Director Recktenwald's statement that he had a duty to disclose there whether or not he was asked specifically. You know, you can answer the question technically correct, but if you stand up there and say, I did not have relations with that beach officer, you know, busted. Yeah, you did, and you did again. Might not be doing it right now, but I think he had affirmative duty to disclose that and he did. He answered the question truthfully to the letter of the law, but it bugs me. I think there's got to be some trust here, and I don't think he was forthcoming with his answer.

MS. THOMSPON: Yeah, you might expect that of some junior beach patrol officer, and not even an officer, just a lifeguard, but not from a man that's been there 27 years and knows what's going on. So I make a motion that we do uphold section 86.453, number 12.

MR. LANE: Do I hear a second? I can't second it from the chair, I don't think.

MR. REAVES: Oh, second. I'm sorry. Excuse me. I was trying to decide how I was

going to vote.

MR. LANE: Yeah, yeah, yeah. I was going to add something else. I forgot what it was.

MR. REAVES: I'm going back to the Director Sweat. Director Sweat accepted his answer and that's -- that's where I am. Director Sweat accepted his answer. Now, we can all guess whether or not -- I don't know whether the affair was going on then or not, but he would be the person that knows and I don't know that anybody asked the other person involved whether or not that was the case, so, I mean --

MR. LANE: I remember what I was going to add. If that policy had been there, I believe Mr. Gardner when he says that he would have taken that into consideration and been more careful about his conduct. So it points to the lack of a policy and the need for one, in my opinion. Further discussion on that motion?

MR. WINTER: Director Sweat said -- told us that he could not say that he thought that the captain gave him a false statement.

MR. REAVES: And Director Recktenwald didn't have a chance to ask that question because he didn't even talk to him, you know.

He fired him, but he didn't even talk to him, so --

MR. LANE: Further discussion on that motion? I want to give everybody an opportunity to weigh in if you have more to say. Motion was to uphold that one, correct?

MS. THOMSPON: Yes, uphold number 12.

MR. LANE: All right. All those in favor of that motion say aye. Opposed like sign. Let the record show that that motion fails to pass two to three. Am I correct in that?

MR. WINTER: (Nods head affirmatively.)

MR. LANE: Okay.

MR. LEWIS: You need another motion then. I move that we do not sustain 86.453, 12.

MR. WINTER: I'll second that --

MR. LANE: Which one are we voting on?

MR. LEWIS: The same one. We just voted it down, the motion. We need a motion.

MR. LANE: All right. So we have a motion to second. Okay. All right. All those in favor of that motion respond to aye, please. I'm going to withhold my vote on that and declare the motion -- pass it four to one.

All right. Number 13, any conduct on or

off duty that reflects unfavorably on the county as an employer, and something else. That's all it says on that page. Again, very broad, catchall language.

MS. THOMSPON: Miss Jones even admitted to these catchall ones, any conduct on or off duty. Any conduct or action. She said that she admitted that was a catchall. So what specifically was he accused of?

MR. LANE: Well, I believe this again refers specifically to having the affairs with --

MS. THOMSPON: Yeah.

MR. LANE: And my opinion is the same on this. I believe he shouldn't have acted that way, and he should have known he shouldn't act this way, but there wasn't a specific policy in place. I believe that this -- I believe that by actively getting into those relationships, not just one, not just one time, over a period of time, long period of time with one and a shorter period of time with one, at least one or both may have been probationary employees at least part of that time.

MS. THOMSPON: One was.

MR. LANE: One was definitely, and I believe we heard testimony that the other one was in the beginning, too. But I do believe that if people knew about it, and again, we don't know who knows what, but I think that would reflect unfavorably on the county, not because -- not because it violated some policy, because it's not the right thing to do. If you've gone through any kind of sexual harassment education, and I think most of us have at some point in our -- they're going to talk about this sort of thing. We didn't get into the specifics of what we discussed that day, but I cannot imagine a presentation along those lines that does not include that sort of information.

MR. REAVES: You know what hangs me up on that is in their own, they all admit that stuff like this goes on. I mean, if he's guilty of it, then half the department is guilty of it, so --

MS. THOMSPON: They had, like, an internal policy of no policy.

MR. REAVES: Right. So why would we think that that conduct from him is detrimental?

MR. LANE: I hear you. It seems like selective enforcement.

MR. REAVES: And they set there and say, well, this one goes with this one, and this one goes with this one. I mean, it's not only him, it's half of the beach patrol.

MR. LANE: They need to put somebody in charge about every 15 minutes. They pop out and said, cut that out.

MR. LEWIS: I don't think that -- the question isn't about what all the rest of them are doing. Two wrongs don't make a right, and it doesn't talk about policy. It says it reflects unfavorably on the county as an employer, and I think that it did myself.

MR. REAVES: I -- well, I think that -- I disagree with that.

MR. LANE: Well, I go back to the discussion that was brought up of people who are hired in these departments who this may be their first job that they've ever had, they could be 16 years old, coming into this type of environment. And I don't know that it's half the people, but if it's a couple of people and everybody knows about it and sweeps it under the

rug, or just doesn't -- agrees not to talk about it, I think there is an understanding that there's a problem there, and I don't like it, I don't think it's good for the department, I don't think it's good for the county. I think they need to be firmly, by virtue of policy, opposed to it. But, in theory, they should have known better.

MR. LEWIS: I think that they will, and I think you're going to see a change in the operation down there. They're got a different person in charge of it, and I think you will see those changes made for the betterment of the department and the betterment of the employees. But there is not right now, but it's coming.

MR. LANE: That leaves us with a specific violation that's been alleged by the county. What do we do with it?

MR. WINTER: Let me ask you your --

MR. LANE: Please.

MR. WINTER: Are we discussing morality here? Are we discussing morality? I'm just not catching it right.

MR. LANE: Well --

MS. THOMSPON: By the way the County's got

it worded, it's any conduct.

MR. LANE: Well, I'm not talking about morality, I'm talking about the political savvy within an organization like this for a senior officer to go out with a probationary employee.

MR. WINTER: I know that it doesn't -- it usually doesn't bode well, but there's no policy, is there?

MR. LANE: That's a good question. And if it's difficult to point to one, that's illustrative.

MR. WINTER: I know it doesn't bode well, and to me it doesn't -- it doesn't make sense for it to occur. But if there is no hard and fast rule, you know, on the idea of him dating a -- someone below him in the chain of command, I mean, are we making a moral decision there, you know what I mean?

MR. LANE: I tell you where I'm coming down on it, it's a huge exposure --

MR. WINTER: Exposure to liability.

MR. LANE: Absolutely. There's no ambiguity there. It's hanging your laundry out to dry pretty importantly in that regard.

MR. LEWIS: They don't have a policy

against robbing a bank, but I wouldn't think it would be right if he went out and robbed a bank. I just don't think it's -- I don't think it is favorable.

MR. WINTER: But that's illegal.

MR. LANE: And immoral.

MR. WINTER: It depends on if you're imposing your Christian beliefs on whether it's immoral. But what we're -- I mean --

MR. LANE: Number 13.

MR. WINTER: That's the matter that we're discussing is --

MR. LANE: We've got to be able to come to some pointed decisions on this one.

MR. LEWIS: We're going to make a motion and we'll make a vote.

MS. THOMSPON: Yeah.

MR. LANE: Do it.

MR. LEWIS: I move on item 13 that we sustain item 13 under section 86-453.

MR. LANE: Hear a second?

MS. THOMSPON: Second.

MR. REAVES: I second. Go ahead.

MR. LANE: Any further discussion on this motion? Those in favor of the motion say aye.

Opposed like sign.

MR. REAVES: No.

MR. LANE: Prepare that motion to pass three to two. Is that correct? Everybody else get that same count?

MR. LEWIS: I think that's what it was, three/two, yeah.

MS. THOMSPON: Um-hum.

MR. LANE: All right. Number 21. Subsection 21. Any other conduct or actions -- just when you can't get more vague, it does. Any other conduct or action -- conduct or action of such seriousness that disciplinary action is considered warranted.

MR. REAVES: That's another one of those things that if you didn't cover it up there, you've got it right here. I don't know.

MR. LEWIS: I believe that we not sustain item 21, section 86-453. I don't know of any other conduct that was seriousness that this --

MS. THOMSPON: I second.

MR. LANE: Any discussion under this subsection 21? All of our thoughts apply to a lot of these, so I understand the lack of discussion. Hearing no discussion, all of those

in favor for the motion say aye. Opposed like sign. Motion passes unanimously.

Section 86-25, subsection A, code of conduct. I'm going to read it anyway. Employees of the county government are employed to provide services to the citizens of the county and the public in general are expected to conduct themselves in a manner that will reflect credit on the county government, public officials, fellow employees, and themselves. Employees must avoid any action which might result in or create the impression of using public office for private gain, giving preferential treatment to any person, or losing impartiality in conducting public business.

There is some specificity there, which is a relief in one respect. I believe that -- that there was a loss of impartiality, at least in the perception of a couple of people. I don't believe it rose to the point of being a poor employee overall in terms of the public performance of his job. But, there again, the impartiality may have clouded that judgment, the way he handled this gun issue and reporting that, or not reporting it. I don't know. It

seems like it did. He may have acted the same way with somebody he had no relationship with, but that's not the case. He did have a relationship.

MS. THOMSPON: He did give preferential treatment to her.

MR. LANE: He said he didn't want to embarrass her. He might not have wanted to embarrass anybody. I don't know.

MR. WINTER: Everything that I heard about the captain I think reflected credit on the county government. Everybody that we -- that came in here said what a fine job the man did.

MR. LANE: Well, I would disagree in saying that, again, I don't believe that letting yourself become embroiled with junior employees is good judgment or good performance.

MS. THOMSPON: It seemed like, here again, everybody kind of knew about it, was suspicious about it, but, again, sweep it under the rug, don't look at it, don't acknowledge it, this will go away, no problem.

MR. LANE: So to me it falls under the category of not violating a specific policy but being poor judgment.

MS. THOMSPON: Yeah.

MR. LANE: Which is a difficult thing to judge quantitatively like this.

MS. THOMSPON: Yeah.

MR. REAVES: It might have been poor judgment, but I don't see where anybody was, except him, was harmed. He was harmed.

MR. WINTER: Can I ask a question? What would a -- what would a prudent person decide on who was harmed? I mean, the basis on a lot of -- a lot of civil suits are that you can't seek a remedy for something that nobody was harmed from. Somebody has to be harmed. Who was -- who was harmed? I -- I don't recall hearing anybody being harmed except the captain.

MR. LANE: Well, the fact that they're put at risk I would argue is a -- at least a partial damage. The fact that you're placed at risk even though you're not -- it didn't come to fruition that there was a lawsuit or whatever. If you're out driving drunk and you don't hit anybody, did you create a crime -- commit a crime? Yeah, you did. Was anybody hurt? No.

MR. WINTER: Who was harmed?

MR. LANE: Well, everybody is at risk,

that's why they have the law.

MR. WINTER: Absolutely. And I understand that, but typically someone needs to be harmed or hurt.

MR. LANE: Yeah, and every time I throw out an analogy like that, they don't line up directly. I'm not equating the two actions. I'm really not.

Is there a motion?

MR. REAVES: I'll make a motion that we do not sustain -- I lost my page. That we do not sustain section 86-45, A.

MR. LANE: Is there a second?

MS. THOMSPON: Second.

MR. WINTER: I'll second.

MR. LANE: The motion to not to uphold that subsection. Any further discussion? Hearing none, all that's in favor of the motion say aye. Opposed like sign. Aye. Motion carries four to one. Last but not least are, Division of Beach Safety. 11.01.05. Neglect of duty offenees include any act, failure to act, or instance wherein an employee ignored, paid no attention to, disregarded, failed to care for, give proper attention to, or carry out the duties and

responsibilities of their position whether through carelessness, oversight or neglect. I believe this points to the gun issue.

MR. REAVES: This is the gun again.

MR. LANE: The gun issue. Correct.

MR. REAVES: Well --

MR. LANE: We may all be opinionated out by now.

MR. REAVES: I make a motion not to sustain this because -- well, I make a motion not to sustain 11.01.05.

MR. LEWIS: I'll second that.

MR. LANE: Thank you. I'm trying to think if I have any further discussion on this one. Hang on a second.

MR. LEWIS: You know, some things a person when he's in that capacity has to make a decision, and we may not agree with his decision, but they -- there is no policy to guide that. That was his opinion and thoughts at the time. And even though I said earlier that you have to make sure that you make good decisions, I think that's a decision that should have some sort of a policy to it that doesn't. And when you ask him to serve in that capacity,

you give him the authority to make certain decisions that later you may not agree with, and maybe there should be some discussion afterwards that when he gets back, him or whoever it's about, you know, sit down and talk to him. Say, listen, I think you made a -- you made an error here, you should have reported that. If it happens again, I want you to report it. So they you're training them to do the right thing.

MR. LANE: Take a day off to think about it, even.

MR. LEWIS: You could. But at the point and time a person makes that kind of decision, they -- you know, you've already empowered them to lead and be a -- in charge, so you can't put them in there and then try to take it away from them and expect them to make any other kind of decisions. That was a decision he made, I think it was the wrong one, and I said that to start with. But I think you could bring him in and talk to him as more of a training for me.

MS. THOMSPON: Well, the first few words, neglect of duty offenses. Everybody swore that he acted remarkably well as a enforcement officer. He did not neglect anything. He

possibly neglected to use good judgment on more than one occasion, but neglect his duties, I don't see that.

MR. LANE: Well, I've said this before, I probably would have done this differently, but that's not what we're here for so I'll let the motion and the second stand. Any further discussion? Hearing none, the motion is to not uphold this subsection. All those in favor of that motion say aye. Opposed like sign. Motion carries unanimously.

I believe that gets us through all of the specific allegations and brings us to the point where we need to recommend to the county -- counsel for the county manager whether or not to uphold dismissal, or whether or not we want to suggest that she considers something else.

MS. THOMSPON: I definitely do not want to uphold dismissal. I'll make a motion.

MR. LANE: Do you want to take it to two separate sections and maybe come up with some language or suggestions after the fact? I think that might be good. It might get complicated if you're trying to include a recommendation.

MS. THOMSPON: Tell me how to word it and

I'll word it.

MR. LANE: I'm just suggesting that we may want to vote whether or not to uphold dismissal, and then get into the recommendations.

MS. THOMSPON: Yeah, that's what my motion was, that we do not uphold the dismissal.

MR. LEWIS: Second.

MR. LANE: Further discussion on that? All that -- in favor of motion say aye. Oppose like sign. Motion carries unanimously.

MR. LEWIS: I'd like to make a comment on the second part you asked us to make recommendations. I don't know that it's our place, and you can correct me, to make recommendations of discipline. I think that lies in the hands of the county manager and however he sees it. I don't think we can say give him six months, give him one month. I mean, I don't think that's our place.

MR. LANE: I would concur with that. My thoughts would be that they would consider something -- some lesser form of disciplinary or corrective action.

MS. THOMSPON: Can we say something mild that, yes, that some sort of discipline needs to

be done here but not termination.

MR. LANE: We can say anything we want.

MS. JONES: I think you have done that in the past, but you're not required to.

MS. THOMSPON: I remember saying it in one instance. I'd like to say that they can -- they can do what they want to as far as management is concerned. This board is telling them that they do not want termination.

MR. LANE: Is that --

MS. THOMSPON: Do we even say anything about --

MR. LEWIS: I don't think we need to.

MR. WINTER: I don't think we --

MR. LEWIS: We've already said that he didn't uphold --

MR. WINTER: I don't think we probably know enough, but we do know that the merit rules call for requests of discipline, so there should be maybe some discipline.

MR. LANE: When appropriate. Obviously there are things --

MR. REAVES: I really don't think the county manager --

MR. LANE: Cares.

MR. REAVES: I'm not going to say -- I've got the director of -- we've got the director of human resources here. He's heard our deliberations, and if anything is to be done, I think that -- I just have to rely on the human resources director to pass that message. I don't want to get a letter saying -- you know, telling me how to do my job.

MR. LANE: I believe we've made our point.

MR. REAVES: We've done what we're supposed to do.

MR. LANE: Let me ask for one more motion.

MR. LEWIS: To adjourn?

MR. LANE: Please.

MR. LEWIS: Vote to adjourn.

MR. LANE: It passes without second, without a vote. Thank you. Appreciate everybody's time. This was not easy.

(This ends the requested excerpt.)

C E R T I F I C A T E O F R E P O R T E R

STATE OF FLORIDA)

COUNTY OF VOLUSIA)

I, Shannon Green, Registered Professional Reporter, DO HEREBY CERTIFY that I was authorized to and did stenographically report the foregoing proceedings; and that this requested excerpt of the transcript is a true record of my stenographic notes.

I further certify that I am not a relative employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 17th day of April, 2012.

_____

Shannon Green, RPR
Registered Professional Reporter

Volusia County
FLORIDA

Legal Department

December 23, 2011

Via: electronic mail and U.S. Mail

Jonathan D. Kaney, III, Esq.
55 Seton Trail
Ormond Beach, FL 32174

Dear Mr. Kaney,

I respond to your December 21, 2011, request for a compliance review board under section 112.534, Florida Statutes. Captain Gardner chose not to be interviewed by Mr. Smith on December 16, 2011, after he was afforded the opportunity with counsel present to review all investigative materials. He will not be interviewed prior to the imposition of any disciplinary action which may be taken in this matter. Captain Gardner's declination to be interviewed will not be considered insubordination and a ground for discipline. In view of the foregoing, the provisions of section 112.534 do not apply and a compliance review board is neither required or appropriate.

Your October 24, 2011, pre-disciplinary response letter and the investigation resulting from it will be considered by George Recktenwald, the acting public protection department director as part of his disciplinary decision. Adverse actions are subject to appeal as provided by the county code.

Sincerely,

Daniel D. Eckert
County Attorney

DDE:lc

cc: Mary Anne Connors, Deputy County Manager
George Recktenwald, Acting Public Protection Director

Exhibit D

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December 21, 2011

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Re: Written Notice of Intentional Violations of Capt. Gardner's Rights Under the Police Officer's Bill of Rights

Dear Mr. Recktenwald, Ms. Connors and Mr. Eckert:

This firm represents Captain Richard S. Gardner. This letter is Captain Gardner's written notice of violations and request for compliance review hearing pursuant to Section 112.534(1)(c)&(d), Florida Statutes.

1. **Violation of Section 112.532(1)(d), Florida Statutes**

On October 18, 2011, Mike Coffin, as Director of the Department of Public Protection, served Captain Gardner with a Notice of Intent to Dismiss ("NOI"). The NOI began by stating that, "as a result" of Captain Gardner's "actions documented in IA 2011-09297", Mr. Coffin intended to dismiss him "from employment with the County of Volusia." On October 24, 2011, Captain Gardner, through counsel, responded in writing to the NOI.

Among other things, the NOI accused Captain Gardner of making two false statements. First, it states: "During the time that you were involved with [redacted] you were asked by a supervisor whether you were having an inappropriate relationship with her, which you denied." That is false. As I stated in my response to the NOI, although Director Sweat asked Captain Gardner about a year ago if he was involved in a relationship with [redacted] Director Sweat asked that question after Captain Gardner and [redacted] had broken up. Accordingly, Captain Gardner replied, "No." Captain Gardner's response was true. As I also mentioned, the relationship subsequently resumed, but Director Sweat did not thereafter ask again. Director

Exhibit D

Sweat confirmed these facts in his December 13, 2011 Sworn Statement. (Direct Sweat 12/13/11 Sworn Statement, pp. 26-28). Captain Gardner incorporates that sworn statement, in its entirety, as evidence in support of this written notice of intentional violations and request for compliance review hearing.

Second, Mr. Coffin's NOI states: "More recently, I asked you whether there was anything in your background which could cause embarrassment to the Division and you said, 'No.'" As stated in my response to the NOI, that statement is false. Mr. Coffin never asked Captain Gardner that quastion either within or without the internal affairs investigation.

As stated in my NOI response, the conversation that Mr. Coffin referred to was a meeting that included Coffin, Director Sweat and Captain Gardner concerning Coffin's offer to promote Captain Gardner to Deputy Chief earlier this year. Contrary to as falsely alleged in his NOI, the question that Coffin really asked Captain Gardner was: "Obviously, we're in the midst of a lawsuit here. You realize you're going to be the new head of the beach. You have to understand this is a business so don't take this the wrong way. If you are appointed to Deputy Chief, are we going to find out that you had knowledge of the Simmons and Tameris allegations prior to it being reported?" Captain Gardner's answer to that question was no—he did not learn of those allegations until the internal investigations were revealed.

Director Sweat confirmed in his sworn statement that Coffin never asked Captain Gardner the broad question contained in his NOI. (Sweat, pp.32-33,71-72). Also, Director Sweat and Deputy Director Petersohn both confirmed under oath that Coffin did not ask Petersohn that general question when Coffin interviewed him for the same position. That is, both Sweat and Petersohn testified that Coffin's question to Petersohn was also directly related to the Simmons and Tameris case and that Coffin never asked the general question he falsely alleges in his NOI. (Sweat, pp.32-33,71-72; Deputy Director Petersohn 12/6/11 Sworn Statement, pp.13-14).

As explained in my response to the NOI, what Coffin did was replace a question he did ask with a question that he did not ask in order to make it look like Captain Gardner gave a false answer. In other words, Coffin manufactured evidence in order to harm Captain Gardner. That conduct is not only grounds for his dismissal, but is, in fact, also grounds for his prosecution since, among other things, his conduct constitutes "Official misconduct" proscribed by criminal statute Section 838.022, which provides, in relevant part, that: "It is unlawful for a public servant, with corrupt intent . . . to cause harm to another, to: [ ] Falsify, or cause another person to falsify, any official record or official document; . . .". That Coffin's sworn testimony to the contrary in his December 13, 2011 "sworn statement"[1] is false, is evidenced by the sworn testimony of Captain Gardner, Director Sweat and Deputy Director Petersohn. Coffin stands alone here. It is because he lied.[2] That is additional grounds for his dismissal and prosecution.[3]

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[1]This was an obvious whitewash. This is further evidence of the bad faith nature of the County's "re-opened" investigation into Captain Gardner.

[2]Coffin's interview was conducted at the same time as Director Sweat's interview. Thus, Coffin did not know at the time he gave false sworn testimony that Director Sweat had not lied for him.

More importantly, for purposes of this Written Notice of Violations pursuant to Section 112.534(1), Coffin's inclusion of these false allegations in the NOI is not only wrongful because they are false, but is also wrongful because it violated Section 112.532(1)(d) of the Law Enforcement Officers' Bill of Rights, which provides that before the investigative interview, the officer must be provided all statements and other evidence to be used against him. Specifically, Section 112.532(1)(d) provides:

> The law enforcement officer . . . under investigation must be informed of the nature of the investigation before any interrogation begins, and he or she must be informed of the names of all complainants. All identifiable witnesses shall be interviewed, whenever possible, prior to the beginning of the investigative interview of the accused officer. The complaint, all witness statements, including all other existing subject officer statements, and all other existing evidence, including, but not limited to, incident reports, GPS locator information, and audio or video recordings relating to the incident under investigation, must be provided to each officer who is the subject of the complaint before the beginning of any investigative interview of that officer. . . .

Captain Gardner requested this information in writing and received only the three witness interviews. No one provided him the manufactured evidence that Coffin included in his NOI.

It is obvious that these violations were intentional. First of all, Coffin lied.[4] That is intentional conduct. Second, the conversations that Coffin twisted and then injected in his NOI were not part of the IA investigation. Nor were they part of the final IA report. That Coffin went out of his way to include these false allegations in his NOI since there was not enough evidence in the IA report to justify his self-serving decision to turn Captain Gardner into a scapegoat for the "anonymous" letter and other pressures Coffin and the County are under, is evidence of intent.[5] People do not unintentionally manufacture evidence to bolster an otherwise unsupportable decision. Simply put, Coffin made up and injected additional "evidence" after the investigation was over. It is obvious that this was done with the ***intent*** to harm Captain Gardner. I also note that the NOI draft dated 10/17/11 does not contain the allegation of making a false

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[3]Worse, his "interview" makes it perfectly clear that the County is sweeping Coffin's serious misconduct under the rug. Unfortunately, that is typical behavior of County government, which is, ultimately, the fault of its leadership (or lack thereof).

[4]Coffin also lied when he denied stating that he was motivated by self-preservation due to his political ambitions. In fact, he made that statement in the presence of Jim Ryan and every Captain (excluding Gardner) on the beach. In keeping with the whitewash, the County's "investigators" did not follow up on this.

[5]Further evidence of intent is found in the various ways Coffin manipulated the evidence in his NOI as addressed in Captain Gardner's October 24th response thereto.

statement. That Coffin, after seeking input from the County Attorney's office, decided to add more "evidence" is, itself, further evidence of intent.

Captain Gardner asserted these intentional violations in his response to the NOI, but the County has dene nothing to cure them. Pursuant to Section 112.534(1), Captain Gardner hereby demands a compliance review board hearing concerning these intentional violations of his rights.

2. <u>Violations of Section 112.532(4)(a) and Section 112.533(1)(a), Florida Statutes</u>

Section 112.532(4)(a) provides:

> (4)(a) Notice of disciplinary action.--A dismissal, demotion, transfer, reassignment, or other personnel action that might result in loss of pay or benefits or that might otherwise be considered a punitive measure may not be taken against any law enforcement officer or correctional officer unless the law enforcement officer or correctional officer is notified of the action and the reason or reasons for tha action before the effective date of the action.

Section 112.533(1)(a) provides, in relevant part:

> (1)(a) Every law enforcement agency and correctional agency shall establish and put into operation a system for the receipt, investigation, anri determination of complaints received by such agency from any person, which shall be the procedure for investigating a complaint agatnst a law enforcement und correctional officer and for determining whether to proceed with disciplinary action or to file disciplinary charges, notwithstanding any other law or ordinance to the contrary. When law enforcement or correctional agency personnel assigned the responsibility of investigating the complaint prepare an investigative report or summary, regardless of form, the person preparing the report shall, at the time the report is completed:
> 1. Verify pursuant to s. 92.525 that the contents of the report are true and accurate based upon the person's personal knowledge, information, and belief.
> 2. Include the following statement, sworn and subscribed to pursuant to s. 92.525:
> "I, the undersigned, do hereby swear, under penalty of perjury, that, to the best of my personal knowledge, information, and belief, I have not knowingly or willfully deprived, or allowed another to deprive, the subject of the investigation of any of the rights contained in ss. 112.532 and 112.533, Florida Statutes."
> ***The requirements of subparagraphs 1. and 2. shall be completed prior to the determination as to whether to proceed with disciplinary action or to file disciplinary charges.*** . . . (e.s.).

Mr. Coffin intentionally violated these laws when he told Director Sweat to tell Captain Gardner on October 13, 2011 that Captain Gardner would be fired on October 14, 2011 at 5:00 pm if he did not resign beforehand. Coffin admitted he gave that order[6], even though the NOI was not finalized until October 18, 2011 and even though he had not "notified [Gardner] of the action and the reason or reasons for the action before the effective date of the action" per Section 112.532(4)(a) and had not complied with any of the requirements of Section 112.533(1)(a).[7] This was a violation of law.

Pursuant to Coffin's order, on October 13, Director Sweat summoned Captain Gardner to his office. Director Sweat was clearly upset when Captain Gardner entered his office. Director Sweat informed Captain Gardner that: "They told me that they intend to dismiss you" and that they said Captain Gardner had until 5:00 Friday, October 14, and not one minute later, to resign or be fired. When Captain Gardner asked "Who's they?", Director Sweat said that when he asked Coffin who made the decision, Coffin told him "You don't need to know...it's done." When Captain Gardner asked what policy he violated, Sweat said he did not know.[8] (Sweat, p.74).

Thus, in addition to the violations of law, as set forth above, Coffin's conduct also violated numerous sections of County code. In addition to those cited above and in response to the NOI, Coffin's conduct also violated Merit Rule 86-427, Merit Rule 86-451, and Departmental Standard Directive 27.01.24. Moreover, Mr. Coffin and the County violated the due process policies in place by usurping Director Sweat's authority to make this decision. This constitutes a violation of Departmental Standards Directive 27.01.33. As Director of the Division of Beach Safety and Captain Gardner's immediate supervisor, it was Director Sweat's decision as to what adverse employment action to take, if any, assuming just cause. Indeed, the IA report's cover letter from Deputy Director Jim Ryan to Coffin stated: "By copy of this memorandum, the Director of the Beach Safety Division is directed to review and initiate appropriate disciplinary action."

The fact that Mr. Coffin violated numerous sections of County code in his trumped up, self-serving effort to fire Captain Gardner is further evidence that the Police Officer's Bill of

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[6](Coffin 12/13/11 Sworn Statement, p.15).

[7]Coffin admitted under oath that he decided to dismiss Captain Gardner during a "meeting" on October 10, 2011, that included Coffin Jim Ryan, and Director Sweat. (Coffin, p.14). Capt. Dofflemyer's IA report was not finalized until 10/12/11, at the soonest. Thus, Coffin decided to fire Captain Gardner before the IA report was finalized. Coffin also testified that Director Sweat agreed with Coffin's decision, but Director Sweat's testimony refutes that. Director Sweat was clear that the decision was Coffin's and that Coffin was taking his recommendation all the way to the County Manager. (Sweat, pp.77-78). This constitutes a violation of Departmental Standards Directive 27.01.31 for adjudicating the allegations of misconduct by a person other than the Director of the Beach Safety Division.

[8]That was a violation of Departmental Standards Directive 27.01.24.

Rights violations set forth above were intentional. As the Director of the Department of Public Protection, Coffin was fully aware of these code sections as he violated them.

Captain Gardner asserted these intentional violations in his response to the NOI, but the County has done nothing to cure them. Pursuant to Section 112.534(1), Captain Gardner hereby demands a compliance review board hearing concerning these intentional violations of his rights.

3. **Violation of Section 112.532(6)(b), Florida Statutes**

Indeed, rather than cure the violations of Captain Gardner's rights under the Police Officer's Bill of Rights, the County allowed Mike Coffin, the subject of those very complaints, to re-open the investigation into Captain Gardner. Specifically, after the investigation into Captain Gardner had concluded and the IA report had been finalized and after Coffin issued the NOI, to which Captain Gardner responded on October 24, 2011, Mike Coffin notified the undersigned by letter dated October 25, 2011 that he was re-opening the investigation into Captain Gardner.

Mr. Coffin's letter expressly stated that he was re-opening the investigation because Captain Gardner's October 24, 2011 response to his NOI brought forward information which he believed "merits further review for purposes of due process". Coffin elaborated in his sworn interview by stating that it was his decision to reopen the investigation and the intent was to "give Capt. Gardner a full, fair, and complete investigation of the charges against him." (Coffin, p.6). Coffin added that he wanted to reopen the investigation "because Kaney had alleged Official Misconduct." (Coffin, p.7). These were the only reasons given.

None of these "reasons" constitute lawful grounds upon which to open a closed internal affairs investigation. Section 112.532(6)(b) provides in pertinent part:

> (b) An investigation against a law enforcement officer or correctional officer may be reopened . . . if:
>
> 1. Significant new evidence has been discovered that is likely to affect the outcome of the investigation.
>
> 2. The evidence could not have reasonably been discovered in the normal course of investigation or the evidence resulted from the predisciplinary response of the officer.

Again none of the statutory grounds are present here. Coffin's October 25, 2011 letter re-opening the investigation into Captain Gardner did not point to any "significant new evidence" that had "been discovered" since the investigation closed, nor did it point to any evidence that "could not have reasonably been discovered in the normal course of [the] investigation" or evidence that resulted from Captain Gardner's response to the NOI. In fact, his letter did not refer to any evidence at all. There is good reason for that—no such qualifying evidence exists. This is obviously a pretense.

Captain Gardner's response to Coffin's NOI did not constitute "new evidence". Nothing in that response was new, except as to the wrongful conduct of Coffin and others. That, obviously, does not constitute grounds to re-open an already closed investigation into Captain Gardner. Re-opening the investigation into Captain Gardner, then, is obviously an act of bad faith on the part of Coffin and the County.

Indeed, Coffin's confession that he wanted to reopen the investigation "because Kaney had alleged Official Misconduct" is an admission that his re-opening of his investigation into Captain Gardner was not pursuant to the statute but, rather, was an act self-preservation and unlawful retaliation. That is, he re-opened the investigation in an attempt to clear himself and, also, since the first investigation did not yield sufficient grounds to terminate Captain Gardner, to get new evidence against him so that Coffin and/or the County could terminate him.

Nothing in the evidence accumulated since Coffin unlawfully re-opened the investigation is new as to Captain Gardner. The only "new" line of questioning was into on-duty calls and texts with [redacted] on their personal cell phones.[9] However, the investigators could have attempted to discover this evidence the first time around. Indeed, the first investigation included a review of their county cell phone records. Everything in that stack of documents produced on December 16th that pertained to Captain Gardner was either not new or could have been asked for during the investigation before it was unlawfully re-opened.

The investigators in the "re-opened" investigation[10] have also revisited the prior IA finding that Captain Gardner did not supervise Officer [redacted] in an effort to change that finding. They are also, obviously, trying to establish that Captain Gardner supervised C[redacted] even though that line of inquiry was explored the first time around and the IA report did not find this to be true. That is, it is plainly evident from the post-NOI interviews that the

[9]*See* post-NOI witness interviews and Smith's December 13, 2011 letter.

[10]In addition to Smith representing the County and Jones, the Sheriff's lawyer, representing Coffin, they are both also serving as investigators. Larry Smith confirmed this in his December 13, 2011 letter wherein he wrote: "The continuation of [Captain Gardner's] investigation is now being conducted by me, Nancye Jones, and Captain Nikki Dofflemyer." *See also* December 9, 2011, Sworn Statement of [redacted] pages 5 and 6, where Smith states: "[O]n most days I'm the deputy county attorney in charge of litigation. . . . Today my job is to continue the investigation into some allegations which were made about Captain Gardner. Now the reason I'm repeating all that is, is that I'm not here to prosecute anybody today. My job is to investigate." *See also* December 9th Sworn Statement of Tamara Marris, page 5, where Smith states: "Obviously, you've been advised that normally I don't do these. I'm here because this is an important matter to the County. My job is to conduct as thorough an investigation as I can." *See also* November 22nd Sworn Statement of Mindy Greene, page 5, where Capt. Dofflemyer states in the presence of Smith: "Mr. Larry Smith is also present. He will be the lead investigator for this portion of the interview."

investigators are trying to alter the IA report.[11] That constitutes a violation of Section 838.022(1), Florida Statutes, which prohibits officials from falsify any official document, or causing another to alter any official document.

Accordingly, for any or all of the reasons set forth above, the re-opening of the investigation was unlawful. This violation, obviously, has nof been cured. Pursuant to Section 112.534(1), Captain Gardner hereby demands a compliance review board hearing concerning these intentional violations of his rights.

4. **Violation of Section 112.532(5), Florida Statutes**

As stated above, Coffin's reopening of the investigation constitutes unlawful retaliation against Captain Gardner for his response to Coffin's NOI. That constitutes an intentional violation of Section 112.532(5): "No law enforcement officer or correctional officer shall be discharged; disciplined; demoted; denied promotion, transfer, or reassignment; or otherwise discriminated against in regard to his or her employment or appointment, or be threatened with any such treatment, by reason of his or her exercise of the rights granted by this part."

This violation, obviously, has not been cured. Pursuant to Section 112.534(1), Captain Gardner hereby demands a compliance review board hearing concerning these intentional violations of his rights.

5. **Violation of Section 112.532(g)&(i), Florida Statutes**

On December 7, 2011, Deputy Director Joseph Pozzo, expressly as part of the internal affairs investigation of Captain Gardner, issued an unlawful order to Captain Gardner that purported to require him to produce personal cell phone records. On December 12, 2011, Captain Gardner, through counsel, responded to Pozzo's unlawful order by asserting that the order was unlawful and requesting that Pozzo explain the authority that he believes justifies his unlawful order.

On December 13, 2011, investigator Larry Smith sent a question-begging and otherwise non-responsive response to that letter. Of particular import, however, Smith's letter threatened disciplinary action up to dismissal if Captain Gardner did not produce his personal cell phone records in response to Pozzo's order, the unlawfulness of which had already been asserted by Captain Gardner. Also on December 13, 2011, and notwithstanding that Pozzo had already received Captain Gardner's December 12th response, through counsel, to his unlawful order, *Mr. Coffin's* secretary called Captain Gardner and told him that Pozzo wanted Captain Gardner in Pozzo's office at 9:00 the next morning and that Captain Gardner was to have his personal cell phone records with him.

The next morning, Captain Gardner was informed that the meeting with Pozzo was postponed until 2:00 that afternoon. At 10:14 am, the undersigned emailed Pozzo a copy of

[11]Director Sweat, in his sworn statement, confirmed that Captain Gardner did not supervise either [redacted] or [redacted] (Sweat pp. 12-14; 41-42).

Captain Gardner's December 14th response, through counsel, to Pozzo's unlawful order.[12] Then, Captain Gardner went to Pozzo's office at 2:00 pm, as ordered, and produced certain personal phone records that his December 14th response to Pozzo's unlawful order (which Pozzo had received over three and one-half hours earlier) said would be produced. Notwithstanding that Pozzo had already received Captain Gardner's written responses to his unlawful order to produce personal cell phone records, Pozzo then proceeded to interrogate Captain Gardner about the records he did not produce as well as Captain Gardner's understanding of Pozzo's unlawful order. Evidently finding the truth inconvenient, Pozzo intentionally mischaracterized the facts by characterizing the records that Captain Gardner produced as the full extent of Captain Gardner's response to his unlawful order. Meanwhile, by that time, Captain Gardner had already responded to Pozzo's unlawful order through counsel twice.

Captain Gardner repeatedly invoked his right to counsel during this interview, but Pozzo kept asking questions anyway. This constitutes an intentional and uncured violation of Section 112.532(i), Florida Statutes, which provides: "At the request of any law enforcement officer or correctional officer under investigation, he or she has the right to be represented by counsel or any other representative of his or her choice, who shall be present at all times during the interrogation whenever the interrogation relates to the officer's continued fitness for law enforcement or correctional service." Moreover, Pozzo's interview was not recorded in intentional violation of Section 112.532(g), Florida Statutes. This violation is incurable.

Pursuant to Section 112.534(1), Captain Gardner hereby demands a compliance review board hearing concerning these intentional and uncured violations of his rights.

6. **Violation of Section 112.534(1)(b), Florida Statutes**

Investigator Smith scheduled a second interview of Captain Gardner, this time as part of the "re-opened" investigation, for December 16, 2011. After reviewing the evidence produced before the inspection, Captain Gardner, through counsel asserted the uncured violations of his rights provided by the Police Officer's Bill of Rights addressed above and requested that the agency head be notified. Investigator Smith nevertheless proceeded to interrogate Captain Gardner. This constituted a blatant and intentional violation of Captain Gardner's rights provided by Section 112.534(1)(b), Florida Statutes, which provides: "If the investigator fails to cure the violation or continues the violation after being notified by the law enforcement officer or correctional officer, the officer shall request the agency head or his or her designee be informed of the alleged intentional violation. ***Once this request is made, the interview of the officer shall cease***, and the officer's refusal to respond to further investigative questions does not constitute insubordination or any similar type of policy violation." (e.s.) This time, Captain Gardner's counsel was present and, despite protests by investigator Smith, was able to stop his intentional violation of Captain Gardner's rights before it continued.

Pursuant to Section 112.534(1), Captain Gardner hereby demands a compliance review board hearing concerning this uncured, intentional violation of his rights.

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[12]Even if Pozzo's order were not spawned from the unlawfully and maliciously re-opened investigation, it would still be unlawful for the reasons set forth in the December 14th letter.

7. **Violation of Section 112.534(1)(b), Florida Statutes**

On December 20, 2011, Pozzo sent Captain Gardner an inter-office memorandum wherein he states that Captain Gardner is guilty of insubordination due to: (1) his refusal to comply with Pozzo's unlawful order to produce personal cell phone records; and (2) his assertion of his rights under the Police Officer's Bill of Rights at the outset of this "second" interview on December 16, 2011. This constitutes an intentional and uncured violation of Section 112.534(1)(b), Florida Statutes, which provides: ""If the investigator fails to cure the violation or continues the violation after being notified by the law enforcement officer or correctional officer, the officer shall request the agency head or his or her designee be informed of the alleged intentional violation. Once this request is made, the interview of the officer shall cease, ***and the officer's refusal to respond to further investigative questions does not constitute insubordination or any similar type of policy violation.***" (e.s.) These statutes are not secrets and the violations of them are not unintentional.

Pursuant to Section 112.534(1), Captain Gardner hereby demands a compliance review board hearing concerning this uncured, intentional violation of his rights.

8. **Violation of Section 112.534(1), Florida Statutes**

On December 20, 2011, Larry Smith sent Captain Gardner a letter wherein he advised Captain Gardner that his claims of violations of his rights under the Police Officer's Bill of Rights are "unfounded". Specifically, Smith wrote: "We have determined that these claims are unfounded." This constitutes a uncured, intentional violation of Section 112.534, Florida Statutes, which requires that such claims be adjudicated in a compliance review hearing before a compliance review panel within ten (10) working days.

Smith's December 20th letter also advises Captain Gardner that he has "decided to submit the additional witness statements and documentary evidence to the appointing authority for a final disciplinary action." He fails to mention just who the "appointing authority" is. Of more significance, however, is the fact that this constitutes a continued violation of Section 112.532(6)(b) since the "re-opened" investigation is unlawful.

Conclusion

Captain Gardner hereby demands a compliance review hearing to address the violations set forth above within the statutory deadline of ten (10) working days. Section 112.534(1)(d), Florida Statutes. Pursuant to the same section, Captain Gardner selects Detective Sergeant Michael Fowler, Daytona Beach Shores Department of Public Safety, to serve as a member of the compliance review panel. Detective Fowler has agreed to serve as Captain Gardner's selection to the panel and has gained permission to do so from his Chief of Police, Chief Stephan Dembinsky. Please advise as soon as possible who the County selects so that those two panel members can choose a third pursuant to the statute.

December 21, 2011

Copies of the documents referenced herein will be attached to the original of this letter that will be mailed. Meanwhile, the letter itself is served by facsimile and/or email today.

Sincerely,

Jonathan D. Kaney III
Telephone (386) 675-0691
jake@kaneyolivari.com

JDK:rk
Enclosures

Volusia County
FLORIDA

Legal Department

December 23, 2011

Via: electronic mail and U.S. Mail

Jonathan D. Kaney, III, Esq.
55 Seton Trail
Ormond Beach, FL 32174

Dear Mr. Kaney,

I respond to your December 21, 2011, request for a compliance review board under section 112.534, Florida Statutes. Captain Gardner chose not to be interviewed by Mr. Smith on December 16, 2011, after he was afforded the opportunity with counsel present to review all investigative materials. He will not be interviewed prior to the imposition of any disciplinary action which may be taken in this matter. Captain Gardner's declination to be interviewed will not be considered insubordination and a ground for discipline. In view of the foregoing, the provisions of section 112.534 do not apply and a compliance review board is neither required or appropriate.

Your October 24, 2011, pre-disciplinary response letter and the investigation resulting from it will be considered by George Recktenwald, the acting public protection department director as part of his disciplinary decision. Adverse actions are subject to appeal as provided by the county code.

Sincerely,

Daniel D. Eckert
County Attorney

DDE:lc

cc: Mary Anne Connors, Deputy County Manager
George Recktenwald, Acting Public Protection Director

Exhibit E

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JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

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WWW.FLORIDABAR.ORG

November 6, 2013

Ms. Nancye Rogers Jones
County of Volusia
123 W Indiana Ave
Deland, FL 32720-4615

Re: Complaint by Richard Stephen Gardner against Nancye Rogers Jones
The Florida Bar File No. 2014-30,428 (7A)

Dear Ms. Jones:

Enclosed is a copy of an inquiry/complaint and any supporting documents submitted by the above referenced complainant(s). Your response to this complaint is required under the provisions of Rule 4-8.4(g), Rules of Professional Conduct of the Rules Regulating The Florida Bar, and is due in our office by **November 20, 2013**. Responses should not exceed 25 pages and may refer to any additional documents or exhibits that are available on request. Failure to provide a written response to this complaint is in itself a violation of Rule 4-8.4(g). Please note that any correspondence must be sent through the U.S. mail; we cannot accept faxed material. **You are further required to furnish the complainant with a complete copy of your written response, including any documents submitted therewith.**

Please note that pursuant to Rule 3-7.1(b), Rules of Discipline, any reports, correspondence, papers, recordings and/or transcripts of hearings received from either you or the complainant(s) shall become a part of the public record in this matter and thus accessible to the public upon a disposition of this file. It should be noted that The Florida Bar is required to acknowledge the status of proceedings during the pendency of an investigation, if a specific inquiry is made and the matter is deemed to be in the public domain. Pursuant to Rule 3-7.1(f), Rules of Discipline, you are further required to complete and return the enclosed Certificate of Disclosure form. Further, please notify this office, in writing, of any pending civil, criminal, or administrative litigation which pertains to this grievance. Please note that this is a continuing obligation should new litigation develop during the pendency of this matter.

Finally, the filing of this complaint does not preclude communication between the attorney and the complainant(s). Please review the enclosed Notice for information on submitting your response.

Sincerely,

Maura Canter, Bar Counsel
Attorney Consumer Assistance Program
ACAP Hotline 866-352-0707

Enclosures (Certificate of Disclosure, Notice of Grievance Procedures, Copy of Complaint, Notice - Mailing Instructions)

cc: Mr. Richard Stephen Gardner

Pursuant to Rule 3-7.1(f), Rules of Discipline, you must execute the appropriate disclosure paragraph below and return the form to this office by **November 20, 2013**. The rule provides that the nature of the charges be stated in the notice to your firm; however, we suggest that you attach a copy of the complaint.

CERTIFICATE OF DISCLOSURE

I HEREBY CERTIFY that on this _____ day of _____, 201___, a true copy of the foregoing disclosure was furnished to _____, a member of my present law firm of _____, and, if different, to _____, a member of the law firm of _____, with which I was associated at the time of the act(s) giving rise to the complaint in The Florida Bar File No. 2014-30,428 (7A).

_____
Nancye Rogers Jones

CERTIFICATE OF DISCLOSURE
(Corporate/Government Employment)

I HEREBY CERTIFY that on this _____ day of _____, 201___, a true copy of the foregoing disclosure was furnished to _____, my supervisor at _____ (name of agency), with which I was associated at the time of the act(s) giving rise to the complaint in The Florida Bar File No. 2014-30,428 (7A).

_____
Nancye Rogers Jones

CERTIFICATE OF NON-LAW FIRM AFFILIATION
(Sole Practitioner)

I HEREBY CERTIFY to The Florida Bar on this _____ day of _____, 201___, that I am not presently affiliated with a law firm and was not affiliated with a law firm at the time of the act(s) giving rise to the complaint in The Florida Bar File No. 2014-30,428 (7A).

_____
Nancye Rogers Jones

NOTICE OF GRIEVANCE PROCEDURES

1. The enclosed letter is an informal inquiry. Your response is required under the provisions of The Rules Regulating The Florida Bar 4-8.4(g), Rules of Professional Conduct. Failure to provide a written response to this complaint is in itself a violation of Rule 4-8.4(g). If you do not respond, the matter will be forwarded to the grievance committee for disposition in accordance with Rule 3-7.3 of the Rules of Discipline.

2. Many complaints considered first by staff counsel are not forwarded to a grievance committee, as they do not involve violations of the Rules of Professional Conduct justifying disciplinary action.

3. "Pursuant to Rule 3-7.1(a), Rules of Discipline, any response by you in these proceedings shall become part of the public record of this matter and thereby become accessible to the public upon the closure of the case by Bar counsel or upon a finding of no probable cause, probable cause, minor misconduct, or recommendation of diversion. Disclosure during the pendency of an investigation may be made only as to status if a specific inquiry concerning this case is made and if this matter is generally known to be in the public domain."

4. The grievance committee is the Bar's "grand jury." Its function and procedure are set forth in Rule 3-7.4. Proceedings before the grievance committee, for the most part, are non-adversarial in nature. However, you should carefully review Chapter 3 of the Rules Regulating The Florida Bar.

5. If the grievance committee finds probable cause, formal adversarial proceedings, which ordinarily lead to disposition by the Supreme Court of Florida, will be commenced under 3-7.6, unless a plea is submitted under Rule 3-7.9

THE FLORIDA BAR

651 EAST JEFFERSON STREET
TALLAHASSEE, FL 32399-2300

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

850/561-5600
WWW.FLORIDABAR.ORG

November 6, 2013

Mr. Richard Stephen Gardner

Re: Nancye Rogers Jones; The Florida Bar File No. 2014-30,428 (7A)

Dear Mr. Gardner:

Enclosed is a copy of our letter to Ms. Jones which requires a response to your complaint.

Once you receive Ms. Jones's response, you have 10 days to file a rebuttal if you so desire. **If you decide to file a rebuttal, you must send a copy to Ms. Jones**. Rebuttals should not exceed 25 pages and may refer to any additional documents or exhibits that are available on request. Please address any and all correspondence to me. Please note that any correspondence must be sent through the U.S. mail; we cannot accept faxed material.

Please be advised that as an arm of the Supreme Court of Florida, The Florida Bar can investigate allegations of misconduct against attorneys, and where appropriate, request that the attorney be disciplined. The Florida Bar cannot render legal advice nor can The Florida Bar represent individuals or intervene on their behalf in any civil or criminal matter. Further, please notify this office, in writing, of any pending civil, criminal, or administrative litigation which pertains to this grievance. Please note that this is a continuing obligation should new litigation develop during the pendency of this matter.

Please review the enclosed Notice on mailing instructions for information on submitting your rebuttal.

Sincerely,

Maura Canter, Bar Counsel
Attorney Consumer Assistance Program
ACAP Hotline 866-352-0707

Enclosures (Notice of Grievance Procedures, Copy of Letter to Ms. Jones; Notice - Mailing Instructions)

cc: Ms. Nancye Rogers Jones

NOTICE OF GRIEVANCE PROCEDURES

1. The enclosed letter is an informal inquiry. Your response is required under the provisions of The Rules Regulating The Florida Bar 4 8.4(g), Rules of Professional Conduct. Failure to provide a written response to this complaint is in itself a violation of Rule 4 8.4(g). If you do not respond, the matter will be forwarded to the grievance committee for disposition in accordance with Rule 3-7.3 of the Rules of Discipline.

2. Many complaints considered first by staff counsel are not forwarded to a grievance committee, as they do not involve violations of the Rules of Professional Conduct justifying disciplinary action.

3. "Pursuant to Rule 3-7.1(a), Rules of Discipline, any response by you in these proceedings shall become part of the public record of this matter and thereby become accessible to the public upon the closure of the case by Bar counsel or upon a finding of no probable cause, probable cause, minor misconduct, or recommendation of diversion. Disclosure during the pendency of an investigation may be made only as to status if a specific inquiry concerning this case is made and if this matter is generally known to be in the public domain."

4. The grievance committee is the Bar's "grand jury." Its function and procedure are set forth in Rule 3-7.4. Proceedings before the grievance committee, for the most part, are non-adversarial in nature. However, you should carefully review Chapter 3 of the Rules Regulating The Florida Bar.

5. If the grievance committee finds probable cause, formal adversarial proceedings, which ordinarily lead to disposition by the Supreme Court of Florida, will be commenced under 3-7.6, unless a plea is submitted under Rule 3-7.

PERSONAL - REPLY REQUESTED

Ms. Nancye Rogers Jones
County of Volusia
123 W Indiana Ave
Deland, FL 32720-4615

Mr. Richard Stephen Gardner

THE FLORIDA BAR

651 EAST JEFFERSON STREET
TALLAHASSEE, FL 32399-2300

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

850/561-5600
WWW.FLORIDABAR.ORG

December 3, 2013

Ms. Nancye Rogers Jones
County of Volusia
123 W. Indiana Ave.
Deland, FL 32720-4615

Re: Complaint by Richard Stephen Gardner against Nancye Rogers Jones
The Florida Bar File No. 2014-30,428 (7A)

Dear Ms. Jones:

This is to confirm that The Florida Bar received the enclosed information from Mr. Gardner. Although he does state that he sent you a copy, in an abundance of caution I am also forwarding it to you. If you see that it contains additional information that needs to be addressed in your response, and this would cause you to need more time to respond, please contact our office. All parties are given the professional courtesy of a two week extension.

Sincerely,

Maura Canter, Bar Counsel
Attorney Consumer Assistance Program
ACAP Hotline 866-352-0707

Enclosure (1)

cc: Mr. Richard Stephen Gardner (without enclosure)

PERSONAL - FOR ADDRESSEE ONLY

Ms. Nancye Rogers Jones
County of Volusia
123 W. Indiana Ave.
Deland, FL 32720-4615

Mr. Richard Stephen Gardner

Volusia County
FLORIDA

Legal Department

December 31, 2014

Ms. Maura Canter, Esq.
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

Re: File No. 2014-30,428 (7A)

Dear Ms. Canter,

I respond to your letter of November 6, 2013, regarding the above referenced complaint. I deny the allegations in this complaint and provide the following and enclosures for your consideration.

I. BACKGROUND

I have been a member of the Florida Bar for 33 years. For the last 23 years, I have been employed as an assistant county attorney for Volusia County and my duties and responsibilities have included: acting as the legal advisor to the sheriff, handling civil litigation and workers' compensation cases and representing the county in administrative appeals of adverse disciplinary action taken against employees. Prior to my employment with the county, I held positions as an assistant state attorney, an appellate assistant public defender and legal counsel to the Daytona Beach Police Department. The allegations in the instant complaint center around my defense of the county in the administrative appeal of adverse disciplinary action taken against the complainant, Richard Gardner.

On January 17, 2012, Mr. Gardner, a sworn law enforcement officer holding the rank of captain in the county's beach safety division, was terminated from employment for violating certain county merit rules and regulations and division policies and procedures. His termination resulted from an internal affairs investigation conducted in accordance with §§112.532-112.534, Fla. Stat. [the law enforcement officer's bill of rights]. Mr. Gardner's complaint is premised on his belief that his law enforcement officer's rights were violated during the internal affairs investigation and that he was unable to seek redress of these violations either before or after his termination because of actions he attributes to me. In

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order to fully respond to the allegations in this complaint, it is necessary to discuss the statutory requirements of §§112.532-112.534 and to provide factual background regarding Mr. Gardner's termination.

A. Law Enforcement Officer's Bill of Rights

Florida Statutes sections 112.532-112.534 establish procedures for the handling of complaints received by an agency against law enforcement and correctional officers. Section 112.532(1), which is entitled "Rights of law enforcement officers and correctional officers while under investigation," enumerates required procedures which must be followed "whenever a law enforcement officer or correctional officer is under investigation and subject to interrogation by members of his or her agency for any reason that could lead to disciplinary action, demotion or dismissal. Specifically, subsections (a)-(j) set forth conditions under which a law enforcement officer may be interrogated in the course of an internal investigation, including, where and when the interrogation must take place, how long an interrogation can last, the information which must be provided to the subject officer prior to the beginning of the interview and the right to representation.

The remaining sections of §112.532 provide for "complaint review boards;"[1] civil suits by officers under certain circumstances, including for the filing of false complaints; notice requirements for disciplinary action as a result of an internal investigation; limitations periods for disciplinary actions after receipt of a complaint and a prohibition against retaliatory actions against an officer for exercising the rights set forth in the statute.

Section 112.533 requires law enforcement and corrections agencies to establish a procedure for the receipt and investigation of complaints received by such agency and for determining whether disciplinary action is warranted. It contains confidentiality provisions pending the conclusion of the investigation and requires an investigating officer who prepares an investigative report or summary to include an oath of accuracy and an assertion that the investigator has not knowingly or willfully deprived the subject officer of the rights contained in §§112.532 and 112.533.

Mr. Gardner's complaint stems mostly from the fact that he was not provided a compliance review panel pursuant to §112.534. This statute provides procedures for an officer who is under investigation to assert that the investigating officer [or agency] has intentionally violated his or her rights[2] and requires the investigator or the agency to cure

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[1] This board is not to be confused with the "compliance review panel" discussed by Mr. Gardner, which is provided for in §112.534, Fla. Stat.

[2] The statute is primarily intended to protect subordinate officers from "third degree" tactics by superior officers. **AGO** 2001-61. It is designed to address and cure

the alleged violation if it determines one has occurred. Thereafter, if the subject officer maintains that the violation is still occurring, he or she may seek further relief by requesting a compliance review hearing, in writing, which shall be conducted as set forth in the statute. Even if such a hearing is requested, the agency still has the opportunity to remedy the alleged violation and, if it does so, no compliance review hearing is required.

The plain language of the statute, the legislative history of the amendment, [Laws 2009, c. 2009-200], and case law make clear that the right to request a compliance review hearing applies only during the course of the internal investigation. See McQuade v. Fla. Dept. of Corrections, 51 So.3d 489 (Fla. 1st DCA 2010).[3]

B. Factual background[4]

In August 2011, Public Protection Director Mike Coffin received an anonymous complaint which included allegations of misconduct against several beach division employees, including Mr. Gardner. Mr. Coffin directed his internal affairs investigator, Captain Nikki Dofflemyer, to look into all of the allegations in this letter, including those against Mr. Gardner, at the time the third ranking supervisor in the beach division.

Following standard procedures, Ms. Dofflemyer took sworn statements from relevant witnesses, including Mr. Gardner. She concluded her investigation on October 12, 2011. Her final report of investigation, based in part on Mr. Gardner's own admissions, concluded that he had violated certain county and beach division policies. Based on the conclusions of the report, the serious nature of the misconduct and his own determination as to sustained violations,[5] Mr. Coffin served Mr. Gardner with a notice of intent to terminate his

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defects as they occur during the investigative process and does not provide for after-the-fact relief. See Migliore v. City of Lauderhill, 415 So. 2d 62,65 (Fla. 4th DCA 1982)(noting that section "operates only to immediately restrain violation of rights of officers by compelling" compliance with §§112.531-112.533, Fla. Stat.).

[3] As will be discussed more fully below, Mr. Gardner's petition for injunction seeking to compel the county to provide a compliance review hearing, the subject of the January 20, 2012 hearing before Judge Rouse from which Mr. Gardner quotes throughout his complaint, was untimely. His internal investigation had been concluded and he had already been terminated from employment before the petition was filed.

[4] All documents, including official transcripts of hearings referred to herein which are not attached are available upon request.

[5] In the public protection department, the internal affairs investigator makes findings as to which violations, if any, are sustained by the evidence gathered in the investigation. The appointing authority then reviews the entire investigation, including

employment. The notice included an opportunity to respond to the charges prior to imposition of the final disciplinary action, pursuant to merit rule 86-455 (f)(2),[6] and also satisfied the notice requirements of §112.532(4)(a) and (6)(a), Fla. Stat.

On October 24, 2011, Mr. Gardner's attorney, Jonathan ("Jake") Kaney, III, provided a 30 page response to the notice of intent to terminate, which included a 17 page attachment. Based on information asserted in Mr. Kaney's letter, Mr. Coffin notified Mr. Gardner in writing that he was re-opening the internal affairs investigation[7] for "further review for purposes of due process." Due to the complexity of Mr. Kaney's claims, Mr. Coffin decided that Ms. Dofflemyer was not capable of handling the reopened investigation.[8] At Mr. Coffin's request, County Attorney Daniel Eckert tasked Deputy County Attorney Larry Smith with reviewing the additional information provided by Mr. Kaney and with conducting additional interviews, as needed, as part of the re-opened investigation. Ms. Dofflemeyer was directed to assist Mr. Smith to ensure compliance with the law enforcement officers' bill of rights due to her experience with internal affairs investigations of sworn law enforcement officers. Mr. Smith requested my assistance due to the volume of information which required review.

After concluding all relevant interviews, Mr. Smith scheduled a follow-up interview of Mr. Gardner for December 16, 2011 to address the additional findings of the re-opened investigation. Mr. Gardner appeared with Mr. Kaney and attorney Abraham McKinnon and, as required by §112.532(1)(d), they were provided with all documentary evidence to review prior to the interview. After several hours of review, on advice of counsel, Mr. Gardner elected not to provide a sworn statement, verbally asserting that his law enforcement officer's rights had been violated.

On December 20, 2011, Mr. Smith notified Mr. Gardner in writing that his claims of

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the investigator's report, and makes his/her own findings regarding sustained violations. It is on the basis of these findings that disciplinary action is taken, if warranted.

[6] Volusia County's Code of Ordinances can be located at www.municode.com.

[7] §112.532(6)(b), Fla. Stat. allows for the reopening of an internal affairs investigation if new evidence is discovered "that is likely to affect the outcome of the investigation."

[8] Ms. Dofflemyer was an inexperienced investigator. Prior to January 2010, her assignment had been to conduct background investigations for newly hired public protection employees, assisting in some internal investigations. She assumed the duties of lead internal affairs investigator in January 2010 after the retirement of long term investigator Ken Modzelewski but had received no formal training in how to conduct internal affairs investigations.

rights violations were determined to be unfounded. He gave Mr. Gardner until close of business on December 22, 2011 to provide any additional factual matters he wanted the appointing authority to consider prior to making the final disciplinary decision. In response, Mr. Kaney sent a 10 page letter asserting that a number of Mr. Gardner's law enforcement officers' rights had been violated and made his first request for a compliance review hearing pursuant to §112.534(1)(c) and (d), Fla. Stat. After review of the allegations, County Attorney Eckert notified Mr. Kaney that Mr. Gardner would not be interviewed prior to any final disciplinary action being taken and that his declination to be interviewed on December 16 "would not be considered insubordination and a ground for discipline." Mr. Eckert determined that, "In view of the foregoing, the provisions of section112. 534 do not apply and a compliance review board is neither required or appropriate." See Exhibit E to complaint.

On January 17, 2012 at 9:00 A.M., Mr. Gardner was served with a notice of dismissal from newly appointed Public Protection Director, George Recktenwald.[9] Later that day, Mr. Gardner's attorneys filed a petition for injunction asking the court to compel the county to convene a compliance review hearing to hear alleged violations of his law enforcement officer's rights. Assistant County Attorney J. Giffin Chumley filed a motion for protective order in response to the petition and appeared as counsel of record at the January 20, 2012 hearing before Seventh Judicial Circuit Judge Robert Rouse. At the request of Mr. Eckert, I also attended the hearing, as Mr. Chumley was relatively new to the county attorney's office. Judge Rouse subsequently entered an order denying the petition, finding that a compliance review hearing after Mr. Gardner had been terminated was an inappropriate remedy, stating "it is not proper, appropriate, or lawful for the Court to enjoin the Defendants to form a compliance review panel to conduct a compliance review hearing after the County of Volusia dismissed Richard Gardner from his employment with the County." (emphasis added). Mr. Gardner filed a notice of appeal of this order in the Fifth District Court of Appeal on February 23, 2012.[10]

On January 27, 2012, Mr. Kaney appealed Mr. Gardner's dismissal to the Volusia County personnel board.[11] The hearing was scheduled for April 12 and 13, 2012.

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[9] Mr. Coffin accepted a position as chief deputy for the sheriff s office during the reopened investigation and was replaced as the public protection director by George Recktenwald in early January 2012. Mr. Recktenwald reviewed the initial and reopened investigations in making his own findings of sustained violations, determining independently that dismissal was the appropriate penalty.

[10] The appeal was voluntarily dismissed on May 23, 2012.

[11] The personnel board was established pursuant to Volusia County's Charter in 1970 to hear appeals of adverse disciplinary actions. It consists of 5 members appointed by the Volusia County Council, appointed to serve for six year terms. Merit

Assistant County Attorney Mary Jolley and I were tasked with presenting the county's case. In March 2012, Mr. Kaney requested 37 witness subpoenas from County Human Resources Director Tom Motes, the board secretary. The request included a number of administrative staff members and other employees, including me, who appeared to be unrelated to the violations of policy for which Mr. Gardner was terminated. Mr. Motes provided the subpoenas[12] and, noting that it appeared Mr. Kaney intended to offer evidence at the hearing that was not relevant to the termination, advised Mr. Kaney in writing of the scope of the board's authority and powers, as set forth in its hearing procedures. [Exh. A]

Personnel Board Hearing Procedures, section IV.B. provides that the "hearing must be confined to the charges contained in the statement of adverse action given to the employee at the time the action was taken..." Accordingly, Mr. Motes routinely provides the personnel board members with the final notice of disciplinary action prior to any hearing. In this case, he also provided the board with the initial notice of intent to dismiss authored by Mr. Coffin, Mr. Kaney's rebuttal letter, as well as the final notice of dismissal authored by Mr. Recktenwald. As a follow up to Mr. Motes' letter to Mr. Kaney, I provided the April 9, 2012 letter about which Mr. Gardner complains to the board, copying Mr. Gardner's counsel.

Between March 28 and April 3, 2012, my paralegal sent appointments for witness preparation meetings via the county's computer system to all potential witnesses for the county. [Exh. B] Both Ms. Dofflemyer and Mr. Smith, the internal affairs investigators, were listed as potential witnesses.[13] Ms. Dofflemyer's appointment to meet with Mrs. Jolley and

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Rules, Sec. 86-485 sets forth the powers of the board and procedures for appeals. The board makes findings of fact whether the evidence presented sustained the violations with which an employee was charged and an advisory recommendation to the county manager as to the appropriateness of the discipline imposed by the appointing authority. The county manager has final authority for the disciplinary decision.

[12] The form of these subpoenas had been recently changed by Mr. Motes to reflect which party was requesting the attendance of the witness. The subpoenas in this case noted they were "on behalf of claimant" (Mr. Gardner) but then incorrectly stated that Mr. Motes subpoenaed the individual "and unless excused from this subpoena by this individual, you shall respond to this subpoena as directed."

[13] I routinely list the internal affairs investigator as a potential witness in case a witness is unavailable, unable or unwilling to attend the hearing. However, it has been my practice not to call the investigator as a witness if the witness or witnesses who were interviewed during the investigation are present to testify. Although hearsay is admissible in these administrative proceedings, it is preferable to present the actual declarant, who is then subject to cross-examination, rather than to call an investigator to

me was set about 2 days before Ms. Dofflemyer was served with Mr. Gardner's subpoena. [Exh. C]. After confirming that all relevant witnesses for the county would be available to testify, we told Ms. Dofflemyer that we did not plan to call her as a witness but that this was subject to change. Ms. Dofflemyer advised that her scheduled retirement date was Friday, April 13, 2012 and that she would be in and out of her office during that week,[14] cleaning out her personal effects and taking care of last minute matters. Noting that she had been subpoenaed by Mr. Gardner, she indicated that if "they" wanted her to testify, it better be before noon on the 13th as she was going to be celebrating her retirement with friends thereafter.

On April 10, 2013, I met with Mr. Coffin for witness preparation. Ms. Dofflemyer stopped by my office during that meeting. Mr. Coffin recalls that Ms. Dofflemyer expressed at that time and in other conversations with him about the case that she did not want to testify and was very anxious about the possibility that she might be called as a witness. I was aware of Ms. Dofflemyer's angst about testifying, having handled prior cases in which she was involved.

Patricia Sinuk was the witness coordinator for the beach division in April 2012. Mr. Gardner's witness subpoenas for all beach employees were delivered to Ms. Sinuk for service by Mr. Gardner or someone on his behalf. Ms. Sinuk was unfamiliar with these types of subpoenas and contacted me.[15] I advised her to serve the subpoenas in the same manner she normally served other subpoenas, i.e. by email or delivery to the employee's mailbox. I told her that those with questions about the subpoena, should be directed to contact Mr. Kaney[16] and I provided her with his telephone number. I gave Ms. Sinuk the same advice in an email dated April 9, 2012 when she received additional subpoenas for

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testify to what the declarant said. Mr. Gardner's reference to discussions amongst the personnel board members about the internal investigator testifying in every case [Compl. p 18-19] actually refers to former Sheriff's Office Chief Deputy Bill Lee who testified as department representative at every sheriff's office personnel board hearing.

[14] Mr. Coffin recalls seeing Ms. Dofflemyer parked outside his office building that week. He spoke with her and noted that she was in her personal vehicle, in plain clothes and that she was not working at that time.

[15] I had previously worked with Ms. Sinuk in the sheriff's office when I was the sheriff's legal counsel. She called me because I was copied on the bottom of Mr. Gardner's subpoenas.

[16] It has been my career practice to advise any witness subpoenaed by opposing counsel to contact the attorney who issued the subpoena if they had any questions.

service, including one for herself. [Exh. D].[17]

The personnel board convened on April 12 and 13, 2012. Mr. Gardner was represented by both Mr. Kaney and Mr. McKinnon at the hearing. At the outset, Mr. McKinnon stated that Ms. Dofflemyer, "a critical witness" for Mr. Gardner, was not present,[18] he did not know if she would be coming and he moved to continue the hearing. Chairman Patrick Lane denied the motion. He noted that there was no guarantee that she would come if the case was rescheduled and "I feel like we're going to get the most of the information we need from the other witnesses. And if he has an objection to the process of this, that can be entered into the record and we'll certainly take that into consideration at the end of the day..." [Personnel Board Hearing (PBH) p. 20, 23].

On day two of the hearing, Mr. McKinnon asked Mr. Recktenwald on cross-examination if he had attempted to call Ms. Dofflemyer the day before to ask her to come to the hearing to testify. Mr. Recktenwald said he had not and was asked whether there was any reason she would not come had he called her. Mr. Recktenwald advised that, depending on the time, she was officially retiring that day but he knew of no reason why she would not have appeared. [PBH p.454-455]. Other than this exchange, the hearing transcript reveals that neither I nor any other County representative, including Mr. Motes who was present throughout the entire hearing, was asked to try to reach Ms. Dofflemyer to appear at the hearing.[19]

The personnel board sustained only one of the charged violations, Merit Rule 86-453(13), which prohibits any conduct, on or off duty, that reflects unfavorably on the county as an employer[20] and recommended that some penalty less than termination be imposed. On May 3, 2012, County Manager James Dinneen accepted the board's recommendation. Based on the totality of the evidence, Mr. Gardner's lack of contrition and his admissions demonstrating his inability to continue as a supervisor, Mr. Dinneen demoted and transferred him to another division within public protection. He was also ordered to complete training in ethics, sexual harassment and hostile work environment. Rather than

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[17] I do not independently recall giving Ms. Dofflemyer this advice; however, it is likely I did so, based on my career practice.

[18] Of the 37 witnesses subpoenaed by Mr. Gardner, there were a number not present when the hearing began.

[19] I knew that Mr. Gardner had Ms. Dofflemyer's contact information and the ability to reach her. Exh. E. I did not know whether he or his attorneys had spoken with her before the hearing.

[20] The evidence of Mr. Gardner's misconduct supporting this finding was undisputed.

report to his new position, Mr. Gardner elected to resign. My last interaction with him was in May 2012 when I assisted in having his DROP benefits reinstated after they were terminated in error when he was dismissed in January 2012.

II. ALLEGATIONS OF RICHARD GARDNER

Mr. Gardner has accused me of engaging in a deliberate pattern of misconduct solely because I "wanted to win at all costs." Mr. Gardner's claims are based on unsupported inferences and faulty premises built from generalizations and misinterpretations. I deny his allegations. My response is organized by alleged rule violation, with factual assertions as to each addressed individually.

A. Rule 4-3.3(a)(1) - Candor toward the tribunal.

This rule provides that "a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Mr. Gardner asserts that I violated this rule by telling Judge Rouse during the January 20, 2012 hearing that allegations of violations of his bill of rights could be raised at the personnel board hearing without objection [and then objecting] and by not correcting this statement when I sent the April 9, 2012 memorandum to the personnel board.[21] I made no false statements of material fact, law or otherwise to Judge Rouse. There was nothing material to the issue before Judge Rouse. The April memo did not contain statements contrary to my assertions to Judge Rouse on January 20, thus, there was no obligation to correct them.

1. January 20, 2012 hearing before Judge Rouse

Mr. Gardner has transcribed isolated portions of the January 20, 2012 hearing to support his assertions.[22] Many quotes from the hearing are inaccurate, incomplete, misleading or taken out of context and several unquoted comments attributed to me are not supported by the record. [23] When read in totality, the 110 page transcript establishes

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[21] Mr. Gardner claims I sent this memo "anticipating" that he would seek to have the board hear the rights violations...and "to groom the Board members to rule in her favor after her planned objection to my introduction of evidence of LEOBOR violations." [Compl. p. 9]. His assertion that this memo also violated Rule 4-8.4(c) will be addressed below.

[22] Mr. Gardner's transcribed from videotapes made by Volusia Exposed, an online website established by a disgruntled former county employee whose disciplinary case was handled by the undersigned.

[23] For example: "Ms. Jones...told Judge Rouse not only that the Personnel Board would hear LEOBOR violations, but that it could hear such allegations," "she then specifically reassured him that I had a remedy for the LEOBOR violations in the

that Judge Rouse was not "bamboozled" by my statements regarding Mr. Gardner's ability to raise his claims of rights violations to the personnel board. My comments, consisting of 12 pages, read in context and in their entirety, clearly show my position: Mr. Gardner could argue to the personnel board that evidence gleaned as a result of charged rights violations was tainted and should not be relied upon by the board. Judge Rouse clearly understood my intent, recognizing that a compliance review hearing would determine only whether the internal investigator had intentionally violated the officer's rights, not whether the substantive evidence gathered in the investigation had been tainted.[24] Judge Rouse noted that §112.534 (e) establishes that a panel does not examine the evidence in the case that "exists or doesn't exist to support termination" but only the allegation of the rights violation. He stated that removal of an investigator who commits an intentional violation of an officer's rights during an interrogation was not like "fruit of the poisonous tree in criminal law..." [RHT pp. 86-91].

The context of my remarks to Judge Rouse, is also shown clearly by my objections at the personnel board hearing to Mr. Gardner's attorneys attempts to have the board make findings of rights violations.[25] As I argued repeatedly, this was beyond the scope of the board's authority, which is well-established. There is no evidence to support Mr. Gardner's assertions that I told Judge Rouse that the Board could determine rights violations or that he had a remedy for the violations in the personnel board.

My comments were not false or misleading and were not material to the issue [the compliance review hearing request] before Judge Rouse. The county's position at the

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Personnel Board," she "assured Judge Rouse that the ...violations could be determined by the Personnel Board" and she told the Judge that Mr Gardner had "the right to present to the Personnel Board whatever evidence I want of my LEOBOR violations and that such violations are for the Personnel Board to consider." [Compl. pp.6-7, 28].

[24] I stated that if Mr. Gardner's lawyers were to "bring in that his rights were violated, that is absolutely something they can bring to the board's attention to try to say, Well, this evidence was tainted because the investigator did A, B, or C." [emphasis supplied] [Rouse Hearing Transcript (RHT). pp. 91-92]. As to the import of the findings of intentional violations by a compliance review panel, I said, "... I don't think he needs that in order to preserve his rights to make the presentation to the personnel board. He can bring in whatever evidence he wants that his rights were violated during the course of the investigation. And hopefully would be able to show how those violations impacted the result of the investigation. ...that's what I assume that they would try to get to. But that would be for the personnel board to consider. [emphasis added] [RHT pp.94-97].

[25] The 765 page transcript reveals that Mr. Gardner's attorneys spoke repeatedly and at length about alleged violations of his rights during the internal investigation, including during opening statement, without objection.

hearing, supported by case law, was that a compliance review hearing was required only if requested [and determined to be necessary] during the course of an internal investigation. Since Mr. Gardner's petition was filed after his investigation had been concluded[26] and disciplinary action had been taken, it was untimely. Judge Rouse's order denying the petition was based on Mr. Gardner's untimely request and had nothing to do with my statements, which were immaterial to this issue.

There are numerous other misleading or unsupported statements regarding this issue in the complaint. Those relevant to other alleged rule violations will be discussed below. For the remainder, I defer to the official transcript.

2. April 9, 2012 memorandum to personnel board

Mr. Gardner alleges that my April 9, 2012 memorandum [his Exhibit B] was a violation of both Rule 4-3.3(a)(1) and Rule 4-8.4(c) which prohibits conduct involving dishonesty, fraud, deceit or misrepresentation. [Compl. p. 9-10,29]. He asserts that I sent this memo to further my ulterior motive of precluding him from introducing evidence of his bill of right's violations to the personnel board despite having told Judge Rouse on January 20 that I would not object to same.

The content of the April 9 memo is plain on its face and not subject to interpretation. Its purpose was to remind the personnel board that the hearings must be "confined to the charges contained in the statement of adverse action given to the employee at the time the action was taken." As noted above and as clearly stated in the memo, it was the county's position that Mr. Kaney's numerous subpoena requests indicated that he may intend to offer testimony unrelated to the charges for which Mr. Gardner was terminated. I sent the memo simply to remind the board of their authority and to prepare them for objections to irrelevant and unrelated testimony.

Mr. Gardner again misconstrues the context of my discussion with Judge Rouse as to what he could present to the board without objection.[27] [See discussion above]. The nuance, which Mr. Gardner either misunderstands or misrepresents, is that I had no

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[26] It is undisputed that Mr. Gardner had first requested a compliance review hearing on December 21, 2012 before his internal investigation was concluded. It was denied by County Attorney Dan Eckert, who had the authority to do so. Once this request was denied, whether Mr. Gardner's attorneys agreed with Mr. Eckert's decision or not, it was a moot point.

[27] He again alleges, without support in the record, that I told Judge Rouse that "the LEOBOR violations were for the... Board to consider," that he had "a remedy for the...allegations in the...Board" and that I "convinced Judge Rouse the Compliance Review hearing was not necessary because the...Board would provide a remedy for any LEOBOR violations." [Compl. p. 10].

objection to him telling the board that the evidence upon which his dismissal was based was unreliable because his bill of rights had been violated during the investigation. I did not agree, however, to allow him to ask the board to make findings of such violations. They have no authority to do so. Mr. Gardner's opinion that sending this memo was intended to prevent him from seeking redress for his perceived rights violations does not make it true and certainly does not establish that I engaged in conduct that was dishonest, fraudulent, deceitful or misrepresentative.

B. Rule 4-4.1(a) - Truthfulness in statements to others and
Rule 4-8.4(c) - Misconduct
Rule 3-4.3 - Misconduct and minor misconduct

Rule 4-4.1(a) provides: "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person. Rule 4-8.4(c), in pertinent part, states that "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation..." Rule 3-4.3, designed to address acts of misconduct not specifically set forth in the rules, provides in pertinent part that the "commission of any act that is...or contrary to honesty and justice,...may constitute cause for discipline."[28] Mr. Gardner's allegations as to these rules are interspersed among specific events. I address these allegations in the context of those events and deny each.

1. Meeting with Ms. Dofflemyer

The crux of this allegation is that I improperly released Ms. Dofflemyer from Mr. Gardner's subpoena when I met with her on April 5, 2012 for the "very purpose of discussing the subpoena" and told her that the subpoena was non-binding and that she "did not need to attend the P.B. hearing." [Compl. p. 8, 17, 30]. Mr. Gardner attached an affidavit from his friend, Ms. Dofflemyer, in support of these assertions. The affidavit is accurate in part but incomplete, rendering it misleading. Mr. Gardner unjustifiably infers from the omitted information to support his claims.

Mr. Gardner asserts that he subpoenaed Ms. Dofflemyer to appear on his behalf so that she could testify about her unsustained findings from her initial internal investigation[29] and about "many of the LEOBOR violations."[30] Such testimony would have been

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[28] Mr. Gardner asserts that "all of the...suggested Rule violations" in his complaint violate this rule as well as the others specifically noted.

[29] Notwithstanding the immateriality of her testimony, Ms. Dofflemyer's final report, which included her sustained and unsustained findings, was admitted into evidence for the board's review.

[30] There was no proffer of her testimony given at the personnel board hearing and, although the board's rules allow for depositions to be taken, Mr. Gardner did not avail himself of this. Also, Mr. Smith, who gathered much of the evidence used to

immaterial. Mr. Gardner was not terminated for any of Ms. Dofflemyer's unsustained findings and alleged rights violations were not within the scope of the board's consideration. In addition, at no time while she was conducting the initial investigation or during the re-opened portion with which she assisted, did Ms. Dofflemyer suggest that Mr. Gardner's rights had been violated or that anything improper had occurred. Instead, she evinced support of the investigation by reiterating that, although she was "work friends"[31] with Mr. Gardner, he had clearly "screwed up" by his actions. Since no proffer was made, it is impossible to determine if anything Ms. Dofflemyer would have testified to was material.

I made no false statements of material fact or law. I told Ms. Dofflemyer only that I did not plan to call her to testify. I did not tell her that she did not have to attend the hearing. Her testimony was not material and I had no reason to believe that her testimony would be damaging to the county's case against Mr. Gardner. There was no motive for me to keep her away from the hearing.

Ms. Dofflemyer's assertion that the April 5 meeting with me was to discuss her subpoena is not correct, as evidenced by the fact that the subpoena had not even been served at the time the appointment was set.[32] The appointment was to prepare her as a witness should she be called to testify. My calendar for that month, Exh. B, shows numerous such meetings with all county employees who had been interviewed in the internal investigation and who I either expected to call in my case or who were listed by Mr. Gardner as potential witnesses. Knowing that all relevant witnesses interviewed by Ms. Dofflemyer would be present to testify, Mrs. Jolley and I advised her that we did not intend to call her as a witness in our case. Her affidavit is accurate as to this point but incomplete and misleading as it does not include that we also advised her that this decision may change as the hearing progressed. It further misleads by stating that I told her that she did not need to attend the hearing when the truth is that I told her she did not need to attend on behalf of the county.

Mr. Gardner asserts that I improperly released Ms. Dofflemyer from his subpoena by telling her that I did not expect or intend to call her in my case and by confirming that

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support Mr. Gardner's termination, was called to testify.

[31] She worked closely with Mr. Gardner in his position as investigator for the beach division in background investigations of beach officers and in his capacity as the agency's FDLE contact for reporting officer separations due to misconduct identified in internal investigations.

[32] I knew that Mr. Gardner had requested a subpoena for Ms. Dofflemyer but was not aware that she had been served until she arrived at my office on April 5 advising that she had been served earlier that day.

the subpoenas were non-binding[33] when I knew that failure to attend would subject her to an insubordination charge and disciplinary action. [Dofflemyer aff. ¶ 7].[34] This interpretation of Ms. Dofflemyer's affidavit and the assertion that the failure to comply with a personnel board subpoena is an act is of insubordination and grounds for discipline unsupported by any evidence. This is not a position Mr. Motes or I have ever taken with any county employee witness. In my years of handling personnel hearings, there has never been discipline taken against a subpoenaed county employee who failed to attend a personnel board hearing.

Interwoven with this allegation is Mr. Gardner's assertion that I violated these rules by remaining silent at the personnel board hearing when his attorney questioned the whereabouts of Ms. Dofflemyer. [Compl. p.10-11,12-13, 29]. He states that I was dishonest by not telling the board that I had met with Ms. Dofflemyer the week before and "told her that she did not need to attend" the hearing. As explained above, while I did meet with Ms. Dofflemyer, an immaterial witness in my view, I did not tell her she did not need to attend the hearing, only that I did not intend to call her as a witness. Clearly, I could not tell the board something that was not true.

He further asserts that I violated one or the other of the rules by telling the board that I did not know when Ms. Dofflemyer was scheduled to retire. The exchange he cites in support of this allegation occurred when Mr. Gardner's attorney moved for a continuance due to Ms. Dofflemyer's absence. In pointing out the immateriality of her testimony, I told the board that I did not know if she was in the workplace because she had told me that her attendance her last week of work would be intermittent. I knew what her final official day was but was inarticulate in my comments to the board because I did not know where she was at that time. Again, these comments were not knowingly false and were not material to any issue before the personnel board.

Ms. Dofflemyer was under subpoena by Mr. Gardner. She was not a material witness in my case, I did not need her and I was not going to call her as a witness. I did not know where she was and, even though Mr. Gardner moved for a continuance based on her absence, he never asked me or any other county representative to try to reach her. He had equal ability to contact Ms. Dofflemyer,[35] rendering my actions immaterial.

2. Personnel Board Hearing

Mr. Gardner's complaint includes several allegations of violations of these rules

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[33] I do not recall discussing the non-binding effect of the administrative subpoenas with Ms. Dofflemyer; however, this has been my stated position for the past 20 plus years.

[35] See Exh. E. Mr. Gardner had called her during his internal investigation.

during the personnel board hearing. I made no false statements of material fact or law to the board, none of the issues he asserts as violations were material to the issues before them, and I did not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

a. Mr. Gardner accuses me of a "flagrant lie," claiming that I "falsely stated" to the board that he did not request the compliance review hearing until after he was terminated.[36] He further states that I lied when I told the board that Judge Rouse had made such a finding. Mr. Gardner asserts that the entire January 20th hearing is "completely devoid" of any finding that his request was made after he was terminated. [Compl. p.19-21]. The transcripts of both hearings belie these claims.

At the personnel board hearing, Mr. Gardner's counsel asked Mr. Smith if he was aware that a compliance review hearing had been requested. I objected to this line of questioning, noting that this issue had been raised with Judge Rouse and was not something for the board's consideration because it was "beyond the scope of the relevant information you need." [PBH p.325-326]. I explained that Mr. Gardner's request [by way of the petition for injunction], which resulted in the hearing with Judge Rouse, was not filed until after the discipline was taken. I then advised that this was the basis for Judge Rouse's ruling, which was on appeal, and, consistent with my comments throughout the entire process, concluded with "This board is not the venue to determine whether his Bill of Rights were violated. That is not part of your authority under the charter." [emphasis added] [PBH p. 329].[37] My comments were not false, dishonest or material.

b. Mr. Gardner asserts I violated one or the other of the rules "when she advised the Personnel Board" that he had raised the substance of the rights violations in circuit court and "implied that the Court ruled against" him. [Compl. p. 11, 29]. There is no support in the record for these claims. My only remarks to the personnel board about the circuit court proceeding was that noted immediately above and one other similar comment at the beginning of the hearing.[38] My remarks clearly say nothing that could be

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[36] Judge Rouse pointedly asked what day Mr. Gardner was dismissed. Hearing that it was the same day the petition was filed, he queried and was told that Mr. Gardner was fired before the petition was filed. [RHT p. 16]. It is this request to which I was referring.

[37] This allegation ties into the assertion that Judge Rouse recognized that Mr. Gardner's request for a compliance hearing was timely. [Comp. p. 16]. Again, this is an isolated comment taken out of context. A review of the context of the Judge's comments contradicts Mr. Gardner's interpretation. [Rouse Hearing p. 86].

[38] "...whether or not Mr. Gardner's rights were violated during the investigative process is not an issue for you consideration...the statute doesn't provide that you have any remedy to give him, and it's something that is handled through the court and is

construed as a comment on the substance of the violations. More importantly, these comments were not material, knowingly false or dishonest.

c. He further asserts that Rule 4-4.1(a) was violated when I "stood silent after" his attorney told the personnel board that I told Judge Rouse I would not object "when the issue of the LEOBOR was raised to the Board." [Compl. p. 11, 28]. Mr. Gardner states that my failure to tell the board that I "did indeed tell Judge Rouse" I "would not object to the board hearing the LEOBOR issues was misrepresentation by omission and dishonest. In response, please see discussion II.A. above.

d. Mr. Gardner asserts that my comment to the board that I did not provide a copy of Mr. Smith's final internal affairs investigative report to him because I did not know he did not have it was false. [Compl. p. 24-26, 30]. He relies on comments made by his attorney to Judge Rouse and during the board hearing about the lack of a final report or the existence of only Ms. Dofflemyer's final report of investigation as evidence that my statement was false. My statement was not false or dishonest and was not material.

I do not dispute that Mr. McKinnon made remarks about the investigative reports. However, despite these comments, I did not realize that Mr. Gardner's attorney did not have Mr. Smith's final report[39] until Mr. McKinnon was examining a witness using Ms. Dofflemyer's report and, upon my objection that her findings had not been relied upon to terminate Mr. Gardner, Mr. McKinnon stated that hers was the only investigative report. I realized then that they were apparently never given a copy of Mr. Smith's report, which was not completed until some time in January, after Mr. Gardner's attorneys had been given all substantive evidence in his case. My immediate concern upon this realization was whether I had inadvertently violated a requirement of the bill of rights.[40] However, when I quickly reviewed the statute and saw that there was no requirement to provide the report unless it was requested by the subject officer,[41] I responded that they had never asked for it. [PBH p. 283-284]. Perhaps this was a terse reaction but it was not a false or dishonest statement and the issue of whether I knew that they had not received the report was not

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actually in the court." [PBH p. 13].

[39] There is no exchange of discovery in personnel board cases. Unlike Ms. Dofflemyer's report, Mr. Smith made no findings sustaining violations but only summarized the testimony of each witness he had interviewed.

[40] Not having been previously personally involved in conducting an internal affairs investigation, I was not familiar with the procedural requirements regarding the final report.

[41] Mr. Gardner's attorneys admitted that they had not requested the Smith report but claimed it had been requested through a public records request made by a representative of Volusia Exposed. I was unaware of this request as I do not routinely handle public records requests.

material.

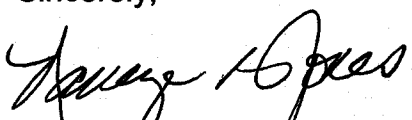
Maintaining my position that internal investigative reports were not relevant to the board's decision making, I later advised them that I was not aware that Mr. Gardner did not have the Smith report prior to the hearing and that I did not intend to deprive or mislead them. [PBH p. 347-348].

e. Mr. Gardner asserts that I foreclosed his ability to address his alleged rights violations by objecting to evidence of rights violations being presented to the board and then implying to the board during cross-examination that assertion of his rights was evidence of guilt or insubordination. [Compl. p. 21, 29]. Mr. Gardner's attorney introduced Mr. Eckert's letter of December 21, 2011 to the board and made them aware that Mr. Gardner had elected not to be interviewed. Later, during Mr. Gardner's testimony, he discussed that he had requested but been denied an opportunity to talk to Mr. Coffin after he received the notice of intent to terminate. The colloquy quoted in his complaint [Compl. pp. 22-24] on which he relies in support of this allegation is my cross-examination in response to his implication on direct that he was refused an opportunity to address the allegations against him. My intent was to call into question his claim that he had not had an opportunity to address the allegations against him. This was not a material issue and in doing so, I did not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

III. CONCLUSION

The totality of the evidence establishes that my actions in handling Mr. Gardner's termination did not violate any Florida Bar Rule. I appreciate the opportunity to respond to this complaint. Please let me know if any additional information is needed. I urge you to contact Judge Rouse, or any of the other witnesses referred to herein, as I am confident that my responses to these allegations will be confirmed.

Sincerely,



Nancye R. Jones,
Fla. Bar. No. 298905
Assistant County Attorney

cc: Richard Gardner

March 30, 2012

Volusia County
FLORIDA
PERSONNEL DIVISION

Jonathan D. Kaney, III, Esquire
Kaney & Olivari, P.A.
55 Seton Trail
Ormond Beach, FL 32176

Re: Richard Gardner

Dear Mr. Kaney,

I am in receipt of your subpoena list. The list is quite extensive. Please be advised that the Personnel Board Hearing Procedures, section IV, Authority and Powers of the Board, sub-section B, Powers of the Board, states:

"The hearing must be confined to the charges contained in the statement of adverse action given to the employee at the time the action was taken or the complaint stated by the employee, if an appeal of a classification, examination, or alleged discrimination action, and evidence appertaining thereto."

The Personnel Board does allow latitude in the hearing; however, they do adhere to confining the hearing to the charges contained in the statement of adverse action give to the employee at the time the final action was taken.

From your list it appears you may be requesting subpoenas for witnesses who do not pertain to or have direct knowledge of the charges contained in the statement of adverse action given to the employee at the time the final action was taken. I only advise you of this so you are aware of the limits on the authority of the personnel board and procedures for the proceeding in advance of the hearing.

Sincerely,

Tom Motes
Human Resources Director

TM/gh

cc: Nancye Jones, Assistant County Attorney

250 N. Woodland Blvd., Suite 262 • DeLand, FL 32720-4607
Tel: 386-736-5951 (West Volusia) • 386-257-6029 (Daytona Beach) • 386-425-3300 (New Smyrna Beach) • Fax: 386-740-5149
www.volusia.org

EXHIBIT "A"

April 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1	2	3 (11:30 AM - 12:00 PM) Hearing on Motion in Limine and Plaintiff's Motion to Dimiss (Benedetto v. COV)	4 (2:00 PM - 3:00 PM) Witness Preparation with George Recktenwald and Joseph Pozzo (3:00 PM - 4:00 PM) (New Time)	5 (8:00 AM - 8:05 AM) County Council Meeting (9:00 AM - 10:00 AM) Personnel Board Hearing - Witness Prep with Nikki	6 (8:00 AM - 4:00 PM) GOOD FRIDAY - OFFICE CLOSED	7
8	9 (10:00 AM - 11:00 AM) Witness Preparation with [redacted] (2:00 PM - 3:00 PM) Benedetto trial prep	10 (9:30 AM - 10:30 AM) CLAIMS COMMITTEE MEETING (11:00 AM - 12:00 PM) Workers'	11 (8:00 AM - 4:00 PM) DO NOT SCHEDULE - PREPARING FOR PERSONNEL BOARD HEARING (8:30 AM - 9:30 AM) Witness	12 (8:00 AM - 4:00 PM) Personnel Board Hearing - Richard Gardner (9:30 AM - 5:00 PM) Personnel Board	13 (8:00 AM - 4:00 PM) Personnel Board Hearing - Richard Gardner (8:30 AM - 9:30 AM) Litigation Group	14
15	16	17 (3:00 PM - 4:00 PM) Meeting to discuss personnel issue	18 (9:15 AM - 9:30 AM) Ehrbar - motion to continue hearing (9:30 AM - 10:30 AM) Sheriff's Staff Meeting	19 (8:00 AM - 8:05 AM) County Council Meeting	20	21
22	23 (2:00 PM - 2:30 PM) Meeting to discuss upcoming personnel board hearings	24	25	26 (11:45 AM - 12:45 PM) Lunch	27 (8:00 AM - 8:30 AM) Ask for Claims Listings and draft agenda - EV. QUARTER GET RESERVES (8:30 AM - 9:30 AM)	28
29	30 (8:00 AM - 8:10 AM) Teacher Duty Day - No School					

Tuesday, April 03, 2012
(11:45 AM - 12:00 PM) Hearing on Plaintiff's Motion to Dismiss Affirmative Defenses & Disqualify Dr. Reinholtz (Benedetto v. COV)
(1:30 PM - 2:00 PM) Witness Preparation with Tammy Marris
(2:15 PM - 2:45 PM) Witness Preparation with Andrew Ethridge
(2:30 PM - 3:30 PM) Witness Preparation with [redacted]
(3:00 PM - 3:30 PM) Witness Preparation with Tom McGibney
(3:45 PM - 4:15 PM) Witness Preparation with Mindy Greene
(4:30 PM - 5:00 PM) Witness Preparation with Julie Anderson
Wednesday, April 04, 2012
Workers' Compensation Excess Coverage w/Expert
(5:30 PM - 7:30 PM) Deposition of Dr. Weber
Thursday, April 05, 2012
Dofflemyer
(2:00 PM - 3:00 PM) Training on Real Time with Volusia Reporting
(3:30 PM - 4:00 PM) Vagnier v. COV - Lack of Prosecution
(4:00 PM - 5:00 PM) Video Deposition of Dr. Villalobos
Monday, April 09, 2012
Tuesday, April 10, 2012
Compensation Excess Coverage
(1:00 PM - 2:00 PM) Witness Preparation with Mike Coffin
(2:00 PM - 3:00 PM) Sheriff's Staff Meeting
(4:00 PM - 5:00 PM) Witness preparation with Kyle McDaniel
Wednesday, April 11, 2012
Prep Gardner[redacted]
Thursday, April 12, 2012
Hearing - Richard Gardner
(9:30 AM - 5:30 PM) Personnel Board Hearing - Richard Gardner
Friday, April 13, 2012
Meeting - County Council Conference Room
(9:30 AM - 5:00 PM) Personnel Board Hearing - Richard Gardner
(9:30 AM - 5:30 PM) Personnel Board Hearing - Richard Gardner
Wednesday, April 18, 2012
(11:15 AM - 12:15 PM) Amy out of office
Friday, April 27, 2012
Litigation Group Meeting - County Council Conference Room
(10:15 AM - 11:15 AM) Personnel
(2:00 PM - 6:00 PM) WC Henry - State Mediation

Message Id: 4F7AC1DE.DA0 : 65 : 55817
Subject: Personnel Board Hearing - Witness Prep with Nikki Dofflemyer
Created By: mefird@co.volusia.fl.us
Scheduled Date: 4/5/2012 9:00 AM
Creation Date: 4/3/2012 9:24 AM
From: Mary Amy Efird

Recipients

Recipient	Action	Date & Time	Comment
VCDELPO1.VCGDeland	Pending		
CC: Amber Ryan (ARyan@co.volusia.fl.us)			
To: Mary Amy Efird (MEfird@co.volusia.fl.us)			
To: Mary Jolley (MJolley@co.volusia.fl.us)			
To: Nancye Jones (NJones@co.volusia.fl.us)			
VCGPWPO.VCGDeland	Pending		
To: Nikki Dofflemyer (NDofflemyer@co.volusia.fl.us)			

Post Offices

Post Office	Delivered	Route
VCDELPO1.VCGDeland		co.volusia.fl.us
VCGPWPO.VCGDeland		co.volusia.fl.us

Files

File	Size	Date & Time
MESSAGE	608	4/3/2012 9:24 AM

Options

Concealed Subject:	No
Expiration Date:	None
Priority:	Standard
Reply requested by	None
Security:	Standard
Send Receipt/Notify	when Opened
Send Receipt/Notify	when Accepted
Send Receipt/Notify	when Deleted
To Be Delivered:	Immediate

Junk Mail Handling Evaluation Results

Message is not eligible for Junk Mail handling
Message is from an internal sender

Junk Mail settings when this message was delivered

Junk Mail handling disabled by User
Junk Mail handling disabled by Administrator
Junk List is not enabled
Junk Mail using personal address books is not enabled
Junk iCat Mail using personal address books is not enabled
Block List is not enabled

Record Id

Record Id: 4F7AC1DE.VCGDeland.VCDELPO1.100.1653477.1.35372.1
Common Record Id: 4F7AC1DE.VCGDeland.VCDELPO1.200.2000041.1.2F194.1

EXHIBIT "C"

From: Nancye Jones
To: Sinuk, Patricia
CC: Efird, Mary Amy
Date: 4/9/2012 10:57 AM
Subject: Re: Gardner Subpoena's

Pat,

i just met with Officer [redacted] and she said she would stop by to pick her subpoena up. She is a witness for the County so there is no need to tell her to check in with Mr. Kaney.
On Capt. Wise, when you email his subpoena to him, please tell him that he is not being subpoenaed by the County so if he has any questions about the subpoena he should contact the office of Mr. Jake Kaney, 386-672-7003. Thanks and give a call if you have any questions. Please keep me informed of any other subpoenas you receive.
Also, feel free to call Mr. Kaney about your subpoena as well since you are not being called by the County.

Nancye R. Jones
Assistant County Attorney
County of Volusia
123 W. Indiana Avenue
DeLand, Fl 32720
(386) 736-5950

>>> Patricia Sinuk 4/9/2012 10:19 AM >>>
Nancye,

I received two more subpoena's on Friday, one for Capt Wise and one for Officer [redacted] As per your request I have not sent them out. Please advise me as to when I can release them and with the information you wanted forwarded with them.

Thanks

Patricia Sinuk
Evidence Technician
Volusia County Beach Patrol
515 S. Atlantic Ave.
Daytona Beach, FL 32118
Phone: (386) 239-6414 Ext 225
psinuk@co.vclusia.fl.us

EXHIBIT "D"

Volusia County
FLORIDA

DEPARTMENT OF PUBLIC PROTECTION
Beach Safety Division

October 3, 2011

Capt. Dofflemeyer,

I am writing to thank you for returning my call and for answering my questions on the interview process. Pursuant to our previous discussion, I would like to take the opportunity that you suggested and review certain items before my interview in this matter.

When convenient, would you please provide the complaint, all witness statements, including all other existing subject officer statements, and all other existing evidence, including, but not limited to, incident reports, GPS locator information, and audio or video recordings relating to the incident under investigation.

I appreciate your professionalism during this process and look forward to providing my full cooperation in completing this investigation.

Thank you,

Richard S. Gardner

RSG
10/3/11

515 South Atlantic Avenue • Daytona Beach, Florida 32116
Tel: 386-239-SURF • Fax: 386-239-6620
www.volusia.org

Volusia County Legal Department
123 West Indiana Avenue
DeLand, FL 32720-4613

www.volusia.org

Ms. Maura Canter, Esq.
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300

Re: 2014-30,428
Richard S. Gardner to: MCanter 02/05/2014 12:31 PM

Ms. Canter,

Thank you for your response. I understand your reasons for not calling back...I'm sorry to hear of your injury.

I just want to say that there's nobody that wants this done and over with more than me. I had hopes that February 21st would be ample time, but the delay in the PRR is no fluke, I assure you. I will need additional time depending on when the County of Volusia fulfills the request, what the volume of the requested items will be, and what they will contain.

I am eager to have this rebuttal done and submitted as soon as possible, But I also want to have a chance to write a fair rebuttal. Right now it is Nancye Jones and the County of Volusia, the parties who wronged me, that are in possession and control of the very items that I need to review in order to write a meaningful rebuttal. I would request another week (February 28th) at this point, but this is of course a blind guess because I'm unaware of how long the County of Volusia is going to continue to stall. I would ask that you take the county's lack of cooperation into consideration for additional time should they not fulfill the PRR in a timely fashion.

I appreciate your consideration and professionalism during this process.

Sincerely,
Richard S. Gardner
[redacted]

-----Original Message-----
From: Maura Canter <MCanter@flabar.org>
To: Richard S. Gardner [redacted]
Sent: Wed, Feb 5, 2014 11:40 am
Subject: Re: 2014-30,428

Dear Mr. Gardner,

I certainly hope my notes in the file were correct or that she was not aware of the extent of your public records request. The records custodian is the person you have to deal with or the agency/entity head if you think it is unreasonable. The definition of unreasonable varies, as it is a function of the amount of records, staff time required, and I'm sure you have been told you will have to pay.

I did not call you back because I have been out of the office with an injury and have to leave at 12:30 today. Can you give me some idea of when you think you will be ready to file?

Please be aware that I can ask for more information after you send in what you have -- and the page limit is 25 pages. You do not have to provide voluminous exhibits to support your allegations.

Thank you very much.

Sincerely,

Maura Canter

Maura Canter, Bar Counsel
Attorney Consumer Assistance Program
Lawyer Regulation
The Florida Bar
651 East Jefferson St.
Tallahassee, Fl 32399-2300
Tel: 866-352-0707

From: "Richard S. Gardner" [redacted]
To: mcanter@flabar.org
Date: 02/05/2014 11:34 AM
Subject: 2014-30,428

Ms. Canter,

I received your voicemail on Friday in reference to your recent conversation with the subject attorney in this case, Ms. Jones. I just want to clarify a few things Ms. Jones apparently told you during your phone call with her.

I made a public record request on January 10th, 2014 (PRR-011314) for certain documents relating to this complaint. A representative with the County of Volusia responded to that request on January 13th. 2014 and assigned it a number.

On January 17th, 2014 I made a separate PRR for additional items. I received a response from the county that same day confirming the PRR and noted a separate PRR number was assigned. (PRR-011714)

From January 17th. 2014, 2014 to January 28th, 2014 I received no correspondence or communication from the County of Volusia or any representative of the County of Volusia.

On January 24th, 2014 after not having received anything from the County of Volusia, I sent two emails reminding the county that PRRs must be completed reasonably and promptly. I also asked when I could expect completion of PRR-011314 and PRR-011714. I received no response.

On January 28th, 2014, I received an email from Bernice Wendland, PRR Assistant for the County of Volusia. The email simply stated, "Could you please give me a call at 822-5062 regarding your record request. Thank you." I responded to that email and advised that I would prefer not to call and wished to keep everything in writing via email. Later on the same day (January 28th) I received another email from Ms. Wendland advising that only a portion of PRR-011314 was ready for pickup and and inquiry was made on whether I agreed to pay the amount for the request.

Also, on January 28th, 2014 at 2:42 p.m., I requested the avalable documents be sent to the east side of the county for pick up as I know this to be a common practice. I received no response. On January 29th, 2014 at 8:40 a.m., I sent an additional request to have the partially completed documents sent to the east side of the county. I received no response. On January 29th, 2014 at 4:25p.m., I sent a third request to have the partially completed items sent to the east side of the county. It wasn't until January 31st at 2:59 p.m. did I receive a response from the County of Volusia that only portions of PRR-011314 were avaialble for pick up. Of course, as we discussed, I left town that morning for vacation until today, February 5th.

If Ms. Jones made any representation to you during your phone conversation with her that "they had everything on a disc and were sending it to you on or about January 19th", is completely false and is what I've learned to be Jones' modus operandi. She will cry foul when confronted with this information and blame it on Ms. Wendland or some other employee with the county. "Oh, I didn't know that when we spoke on the phone" , she will say.

It should be noted that it is now February 5th, 2014 and I have been advised by the County of Volusia that ONLY PORTIONS of PRR-011314 are available for pickup.

Please see the attached emails.

Thank you.

Richard S. Gardner
[redacted]

[attachment "Public Records Request January 10th.pdf" deleted by Maura Canter/The Florida Bar] [attachment "Email from Wendland Jan 28.pdf" deleted by Maura Canter/The Florida Bar] [attachment "1st request for east side.pdf" deleted by Maura Canter/The Florida Bar] [attachment "2nd request for east side.pdf" deleted by Maura Canter/The Florida Bar] [attachment "3rd request for east side.pdf" deleted by Maura Canter/The Florida Bar] [attachment "Reminder 1.pdf" deleted by Maura Canter/The Florida Bar] [attachment "Reminder 2.pdf" deleted by Maura Canter/The Florida Bar] [attachment "Wendland January 31st.pdf" deleted by Maura Canter/The Florida Bar]

February 15th, 2014

Maura Canter, Bar Counsel
Attorney Consumer Assistance Program
651 East Jefferson Street
Tallahassee, FL 32399-2300

FEB 2 1 2014

Re: Florida Bar File No. 2014-30,428(7A)

Dear Ms. Canter,

This letter is to confirm the telephone conversation and extension granted for my rebuttal to Ms. Jones' response to my complaint to the Florida Bar.

On Friday February 14, 2014, I called the Florida Bar and spoke to your assistant, Liz. I requested an extension to rebut Ms. Jones' response to my complaint, based on the County of Volusia's delayed response to my request for public records. I also referenced the email I sent to you on February 10, 2014, requesting an extension until March 14, 2014. After being put on a brief hold, Liz returned and advised that you had granted the request for the extension to March 14, 2014. Liz also asked that I confirm our conversation in writing to you and also provide a copy to Ms. Jones. Please consider this correspondence my confirmation and acknowledgement that my rebuttal to Ms. Jones' response must now be postmarked by March 14, 2014. Please contact me if you have any questions.

Sincerely,

Richard S. Gardner

cc: Nancye Jones

Richard S Gardner

[redacted]

CERTIFIED MAIL™

7013 1710 0001 7990 6905

Maura Canter, Bar Counsel
Attorney Consumer Assistanoe Program
651 East Jefferson Street
Tallahassee, FL 32399-2300

32399230099

[redacted]

ENT'D MAR 2 0 2014

March 14, 2014

RECEIVED
MAR 19 2014
The Florida Bar - ACAP
Tallahassee, Florida

Maura Canter, Bar Counsel
The Florida Bar
Attorney/Consumer Assistance Program (ACAP)
651 East Jefferson Street
Tallahassee, Florida 32399-2300

Re: File No. 2014-30,428 (7A)

Dear Ms. Canter:

Please note that I am a sworn law enforcement officer; as such, pursuant to Florida Statute §119.071(4)(d) 1. and 2.a., my home address, telephone numbers and other personal contact/identifying information are exempt from the public record requirements of Florida Statute 119.07(1). Please take the appropriate steps to ensure this information is not publicly disclosed.

Nancye Jones' response was postmarked December 31, 2013, and I received the response on January 02, 2014. The following is my rebuttal to her response.

I begin by imploring the Florida Bar to keep the focus where it belongs: on Nancye Jones' conduct. Although I was very clear in my complaint that it was Ms. Jones' conduct, through both her articulated and omitted statements, which prompted my complaint, Ms. Jones incorrectly asserts in her response that my complaint against her stems mostly from the fact that I was not provided a Compliance Review panel pursuant to Florida Statute §112.534.[1] Ms. Jones' statement is incorrect, because had Ms. Jones acted professionally and ethically, yet I was still denied a compliance review panel, there would be no complaint against Ms. Jones.

Next, in Ms. Jones' response, she repeatedly defends her conduct by stating that any misrepresentations which she may have made were not "material." I respond by pointing out that only a few of the Florida Bar Rules require the misrepresentations be material. Rules 4-8.4(c) and 3-4.3 and part of Rule 4-3.3(a)(1) do not limit a member of the Bar's professional representations to be truthful only as to material representations; for example, in Rule 4-3.3(a)(1), materiality is only included in the second part of the rule regarding going back to a tribunal and correcting a misrepresentation of fact or law. The first part of the Rule simply requires a member of the Bar to not make false representations to the tribunal; it does not provide that one may tell falsehoods to the tribunal, just so long as they are not material.

Additionally, many of the footnotes Ms. Jones includes in her response seem to be irrelevant attempts to divert attention from her behavior; e.g., Ms. Jones writes: "Mr. Gardner's [*sic*] transcribed from videotapes made by Volusia Exposed, an online website established by a disgruntled former county employee whose disciplinary case was handled by the undersigned;"[2] yet Ms. Jones does not contend there is anything false or misleading about the video footage of the hearings at issue, so what is her purpose in including this footnote and her characterization of the videographer? The source of the videos

[1] See Page 2 of 17 of Nancye. Jones' response.
[2] See Footnote 22 on Page 9 of 17 of Nancye Jones' response

has nothing to do with the factual issue of whether or not Nancye Jones violated the Rules regulating the Florida Bar (the Rules).

Perhaps more importantly, her footnote comment appears to be intentionally misleading to the Florida Bar, because it implies there is something untrustworthy in my complaint as it is partially based on statements transcribed from Volusia Exposed's videos, and further implies that her response contains statements from a more reliable source. However, the transcript of the Personnel Board hearing (P.B. hearing) relied upon by Ms. Jones in her response, and what she would make available to the Florida Bar upon request, was not completed by Shannon Green, the Registered Professional Reporter actually present at that hearing, from her stenographic notes taken during the hearing; i.e.; what most people would consider to be the "official transcript" in this case. Instead, Ms. Jones had the transcript completed by a reporter who was not present at the P.B. hearing from a mere audio recording of the hearing. Therefore, although Ms. Jones dubs the transcripts in her possession as the "official transcripts of hearings" in her response, her transcript is not more reliable than the video recordings of the proceedings as the videos provide the Florida Bar the timing of the statements, the tone of voice of the speakers, and they show body language and the level of attention of the videoed individuals.[3] In my complaint as well as this rebuttal, I included the corresponding video time to assist the Florida Bar in locating the statements pertaining to the allegations against Ms. Jones, and I urge the Florida Bar to view at least the relevant portions, as the truth is revealed in the videos in ways that transcripts cannot capture.

In this rebuttal, I will respond to each section of Ms. Jones' December 31, 2013 response. Therefore, the structure of this rebuttal will follow the structure of Ms. Jones' response. As an additional section I am providing in rebuttal, I have also included III. Nancye Jones' Violations of Rule 4-8.1: Bar Admission and Disciplinary Matters.

I. BACKGROUND

Obviously, Ms. Jones' professional background is no defense to the allegations of violations of the Rules regulating the Florida Bar contained in my complaint; on the contrary, the only relevance of her background information and the number of years she has been a member of the Florida Bar is that her substantial experience in the practice of law may be considered an aggravating factor in the determination of the appropriate level of discipline to be imposed if her conduct is deemed to violate the Rules.

A. Law Enforcement Officers' Bill of Rights

In her response, Ms. Jones asserts that my complaint is premised on my belief that the Law Enforcement Officers' Bill of Rights (LEOBOR) was violated during the investigation of my conduct and that I was unable to seek redress for those violations because of Ms. Jones' conduct. Her characterization of my complaint misses the point of my complaint. While I do indeed contend that my LEOBOR was violated, this is not the basis of my complaint against Ms. Jones. My complaint addresses only Ms. Jones' unethical and unprofessional conduct during the course of those proceedings, not the outcome of those proceedings.

I also take exception to Ms. Jones' statement that my "termination resulted from an Internal Affairs investigation conducted in accordance with Florida Statutes §§112-532-112.534, Fla. Stat." (the LEOBOR);[4] however, that issue is not in any way a part of my complaint to the Bar. The issue is neither

[3] See Footnote 4 on Page 3 of 17 and see also Page 11 of 17 of Nancye Jones' response.
[4] See Page 1 of 17 of Ms. Jones' response.

whether Volusia County violated my LEOBOR nor whether I was entitled to a Compliance Review hearing; rather, the issue before the Florida Bar is whether Ms. Jones' conduct violated the Rules.

Again, focusing on Ms. Jones' continuing conduct, I will point out that in the discussion of the LEOBOR included in her response, Ms. Jones makes several significant misrepresentations to the Florida Bar; for example, in her response, Ms. Jones asserts the plain language of the LEOBOR statute, the legislative history of the amendment and case law all support that the right to request a Compliance Review hearing applies only during the course of the internal investigation; however, this is a false assertion. A reading of Florida Statutes Sections 112.532-112.534, collectively referred to as the Law Enforcement Officers' Bill of Rights, will reveal the complete absence of any language restricting the rights contained therein to the course of the Internal Investigation and there is clearly no plain language to that effect. In fact, the plain language makes it clear that the LEOBOR extends beyond both the investigation and even the termination of a subject officer. Florida Statute Section 112.534 sets forth the procedure that a subject officer must follow in order to obtain a Compliance Review hearing after asserting the intentional violation of any of the requirements "***of this part***," meaning Part VI of Chapter 112. Throughout Part VI, the words "dismissal" or "discharged" can be found in the various sections' requirements and prohibitions regarding the termination of the subject officer [See, for example, Sections 112.532(4)(a) 112.532(4)(b), 112.534(5) and 112.524(6)].

Section 112.532(5), for example, prohibits retaliation against the subject officer for exercising his/her rights granted by Part VI and reads in pertinent part: "No law enforcement officer . . . shall be discharged . . . by reason of his or her exercise of the rights granted by this part." [emphasis added]. Thus, a law enforcement officer who alleges s/he was discharged due to the intentional violation of Section 112.532(5) of Part VI is entitled to a Compliance Review hearing provided the procedure specified in Section 112.534 is followed. In her effort to persuade that the LEOBOR only protects officers during the course of an Internal Affairs investigation, Ms. Jones points out that Section 112.532(1) is entitled "Rights of Law Enforcement Officers and Correctional Officers While Under Investigation;" however, this is but one section of the LEOBOR and the fact that this section is so titled and specifically deals with the rights of officers while under investigation only emphasizes that the remainder of the LEOBOR is not so restricted and instead specifies prohibitions and grants rights beyond the investigation.

Moreover, the case law cited by Ms. Jones also supports the plain language of the LEOBOR that dismissed officers still have rights under the statute(s). According to Florida's Fourth District Court of Appeal, in reference to Florida Statute Section 112.534: "This section operates only to immediately restrain violation of the rights of police officers by compelling performance of the duties imposed by Sections 112.531 to 112.533. Thus, . . . if an officer is dismissed without notice, the agency can be compelled to provide the proper notice . . . ."[5] [emphasis added]. Clearly, then both the plain meaning of the LEOBOR and case law indicate that dismissed officers can still enforce their statutory rights. A review of the legislative history of the amendment similarly reveals no language which restricts the rights granted by the LEOBOR to the period of the investigation or employment.[6] Thus, Ms. Jones misleads the Florida Bar by asserting that the right to request a Compliance Review hearing applies only during the course of the internal investigation.

However, the uncontroverted fact is that I did request a Compliance Review hearing during the course of the internal investigation, and, in this regard, Ms. Jones is also misleading. Following her assertion that the plain language of the LEOBOR statute, the legislative history, and the case law make clear that the right to request a Compliance Review hearing applies only during the internal investigation, Ms. Jones places footnote marker #3 and in the talking footnote advises that my Petition for Injunction was

[5] See Migliore v. City of Lauderhill, 415 So.2d 62, 65 (4th DCA 1982).
[6] See 2009 Fla. Sess. Law Serv. Ch. 2009-200.

untimely. In this manner, Ms. Jones intentionally misleads the Florida Bar. There is no dispute that my request to the agency head for a Compliance Review hearing was properly and timely made. Ms. Jones acknowledges that my written request for a Compliance Review hearing, made on December 21, 2011[7] was timely, and was made prior to the conclusion of the Internal Affairs investigation and prior to my receipt of the Notice of Termination on January 17, 2012. Whether a Petition for Injunction to Circuit Court is timely made is not discussed in the LEOBOR statute, legislative history, or case law that Ms. Jones references; yet in her talking footnote, Ms. Jones makes reference not to my timely request to the agency head for a Compliance Review hearing, but instead shifts the footnote remarks to the timeliness of my Petition for Injunction in Circuit Court. By intentionally shifting the discussion in the footnote to the Circuit Court pleading, when that was not the topic in the body of her response, she attempts to confound and mislead an inattentive reader to believe that my request to the agency head for a Compliance Review hearing was untimely, a statement which she knows is untrue.

Through these attempts to confound and misrepresent the facts and the law to the Florida Bar, Ms. Jones continues her pattern of lack of candor and thwarting of fairness.

B. Factual Background

The "factual" background described by Ms. Jones contains numerous representations which I dispute, though some of them have no bearing on the issues I originally raised in my complaint: that being Ms. Jones' unethical and unprofessional conduct. Rather than spend a significant amount of time and energy pointing out all the matters in contention, I will provide a few examples of my disagreement with Ms. Jones' characterization of the Factual Background and thereafter confine my rebuttal to only those matters that were raised in my complaint to the Florida Bar.

First, Nancye Jones writes in her response: "Mr. Coffin served Mr. Gardner with a notice of intent to terminate his employment. The notice included an opportunity to respond to the charges prior to imposition of the final disciplinary action, pursuant to merit rule 86-455 (f)(2), and also satisfied the notice requirements of §112.532(4)(a) and (6)(a), Fla. Stat."[8][emphasis added]. Nancye Jones knows this is a misleading statement, because she knows that after Volusia County reopened its investigation of me in an effort to try to obtain more evidence to justify terminating my employment, they added an additional charge against me that was not in the Notice of Intent written by Mr. Coffin. As evidenced both by her number of years as an Assistant County Attorney for Volusia County and her response to the Florida Bar[9] which makes reference to it, Nancye Jones is aware of Volusia County Merit Rule 86-455(f)(2) which states:

> "A dismissal shall be effective only after the appointing authority has obtained the concurrence of the legal department and the personnel director, and has presented the employee with the reasons for the dismissal in writing specifically and fully stated, at least three calendar days in advance of the proposed effective date. The employee shall have not less than three calendar days to respond to the charges before the dismissal is effected." [emphasis added].

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[7] My first written request for a Compliance Review hearing was made on December 21, 2011 and was attached to my Complaint as Exhibit D. Although in Footnote 26 on Page 11 of 17 of her response, Ms. Jones writes that I first requested the Compliance Review hearing on December 21, 2012, it is clear she wrote the incorrect year.

[8] See Pages 3 of 17 and 4 of 7 of Nancye Jones' response.

[9] Ms. Jones discusses Volusia County Merit Rule 86-455(f)(2) on Pages. 3-4 of her response and provides the online location for this Rule in Footnote 7 of her response.

Nancye Jones knows the notice served on me on January 17, 2012 contained a charge of violation of Volusia County Merit Rules and Regulations Section 86-453(5) which was not contained in writing in the October 18, 2011 Notice of Intent written by Mr. Coffin. Under Volusia County's own Merit Rules, the County was required to present this new charge to me in writing and allow at least three calendar days for me to respond before my dismissal would go into effect. Since Volusia County failed to serve me with a second Notice of Intent which included this additional charge, the first time I received notice in writing from the appointing authority (i.e., Mr. Recktenwald) of this new charge was on January 17, 2012 at 9:00 a.m. when I was served with a purported "Notice of Dismissal." Ms. Jones knows that the January 17, 2012 notice did not include notice of a right to respond to the charges prior to imposition of the final disciplinary action as required by Merit Rule 86-455(f)(2) or that would satisfy the LEOBOR.

Significantly, then, applying Volusia County's own rules requiring written notice and a three-day period to respond, at the time of the hearing before Judge Rouse, which started in the morning of January 20, 2012, my dismissal was not yet in effect. [10] Ms. Jones, however, intentionally leaves all of this out of her so-called factual background and instead falsely represents to the Florida Bar that the Notice of Intent, which did not contain all the charges against me that would be presented at the P.B. hearing, satisfied both Volusia County Merit Rule and Florida Statute. A reading of both Merit Rule 86-455(f)(2) (*supra*) and Florida Statute §112.532(4)(a) here below prove the falsity of her representation.

> "NOTICE OF DISCIPLINARY ACTION – A dismissal . . . may not be taken against any law enforcement officer . . . unless the law enforcement officer . . . is notified of the action and the reason or reasons for the action before the effective date of the action." [emphasis added].

Moreover, assuming arguendo, that the January 17, 2012 notice did properly notify me of my right to respond to the charges, pursuant to Volusia County's rules, my termination would go into effect at the end of the third day following the January 17, 2012 notice from Mr. Recktenwald; however, my Notice of Appeal of Mr. Recktenwald's decision converted the purported termination into non-final agency action. It was Volusia County's opinion that I remained in continuous employment with Volusia County through the Personnel Board's hearing and the County Manager's action based on the Personnel Board's recommendation. The County Manager accepted the Personnel Board's recommendation that termination not be imposed and I was directed to report to work in a different division. In several places throughout her response, however, Ms. Jones incorrectly states that my employment with Volusia County was terminated in January 2012. It is clear from the attached copy of the Personnel Action Form[11] that from January 16, 2012, I was an employee of Volusia County on a status of Leave Without Pay. My employment with Volusia County actually ended in May of 2012. After that reassignment, I left the employ of Volusia County, in part due to my understanding that my Florida Retirement Service benefits would be adversely affected if I accepted the new position. My point being that at the time of Ms. Jones' response to my Florida Bar complaint, Ms. Jones clearly knew that my employment with Volusia County did not conclude until May of 2012 when I resigned. Yet in several places in her response she continues to incorrectly state that my employment was terminated in January 2012. Examples of her incorrect description occur on page 1, in the first and second sentences of her Background section and continue to appear in text through to the Conclusion on Page 17 of 17 where Ms. Jones again refers to my termination. These false assertion to the Florida Bar would also constitute a new violation of Rule 4-8.1 (See Section III. below).

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[10] See "*Computation of Time*" in Volusia County's Code of Ordinances, Part II, Chapter 1, Sec. 1-2.

[11] Please see Personnel Action Form attached as Exhibit A.

Also, Ms. Jones' "factual" background section is both incorrect and internally inconsistent with regard to Captain Dofflemyer's experience. Ms. Jones writes: "Ms. [*sic*] Dofflemyer was directed to assist Mr. Smith to ensure compliance with the law enforcement officers [*sic*] bill of rights due to her experience with internal affairs investigations of sworn law enforcement officers;" yet elsewhere in her response Ms. Jones asserts "Ms. [*sic*] Dofflemyer was an inexperienced investigator. . . . She . . . received no formal training in how to conduct internal affairs investigations."[12] In fact, Captain Dofflemyer was trained to conduct Internal Affairs investigations and Officer Discipline cases by the Florida Criminal Justice Executive Institute. She conducted approximately fifteen Internal Affairs investigations either as the assigned investigator or in an assistive capacity and she attended continuing education workshops relating to Officer Discipline

Additionally, Ms. Jones writes that Mr. Smith, Volusia County attorney-*cum*-Internal Affairs investigator, notified me in writing that my claims of rights violations were determined to be unfounded and that Mr. Eckerd, after a review of the allegations of violations of my LEOBOR, notified my attorney that "a compliance review board is neither required or [*sic*] appropriate."[13] What Ms. Jones does not include in her response is the fact that neither Mr. Smith nor Mr. Eckert had the legal authority to usurp the role of the Compliance Review board under Florida Statute Section 112.534; on the contrary, Ms. Jones asserts that Mr. Eckerd had the authority to deny my timely written request for a Compliance Review hearing.[14]Ms. Jones supplies no statutory authority or case law which would allow for the offending Internal Affairs investigator/agency/County officials to preliminarily determine whether I was entitled to a Compliance Review hearing to determine whether they did violate my rights and Ms. Jones provides no legal support for her false assertion to the Florida Bar. I alleged intentional, uncured violations of my LEOBOR and followed the proper statutory procedure in requesting a Compliance Review hearing and was entitled to one under the LEOBOR.

The inclusion of these false and misleading statements in her response reveals Ms. Jones' practice of carefully choosing her words to intentionally confound the issues and mislead the reader. Due to page and time constraints, I will not further address the factual misrepresentations; however, please be aware that my lack of a response to other factual misrepresentations does not constitute my concurrence with Ms. Jones' characterization of the events.

II. ALLEGATIONS OF RICHARD GARDNER

Ms. Jones asserts that my claims against her are "based on unsupported inferences and faulty premises built from generalizations and misinterpretations;" however, this assertion is incorrect, as my claims against her are supported by proof of her own statements, a witness affidavit, and documents that are part of the record in my case.

A. Rule 4-3.3(a)(1) – Candor Toward the Tribunal

Ms. Jones does not deny knowingly making false statements of fact or law to Judge Rouse; she denies only making false statements of material fact or law to Judge Rouse.[15] Of course, Rule 4-3.3(a)(1) does not contain a materiality requirement for false statements of fact or law to a tribunal. Thus, even if Ms. Jones' false statements to Judge Rouse are not considered to be material, she would still be in violation of Rule 4-3.3(a)(1).

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[12] See both the body of Page 4 of 17 and Footnote 8 of Nancye Jones' response.
[13] See Pages 4 of 17 and 5 of 17 of Nancye Jones' response.
[14] See Footnote 26 on Page 11 of 17 of Nancye Jones' response.
[15] See Page 9 of 17 of Nancye Jones' response.

However, even though Rule 4-3.3(a)(1) does not require materiality when an attorney knowingly makes a false statement of fact or law to a tribunal, it is my contention that Ms. Jones did make false statements of material fact and law to Judge Rouse:

1) Nancye Jones falsely represented to Judge Rouse that my employment with Volusia County had already been terminated and failed to disclose the fact that my dismissal was not yet in effect in order to correct Judge Rouse's misapprehension regarding the status of my employment when he specifically inquired into whether or not I was still employed by Volusia County at the time of the hearing before him (the Rouse hearing). Obviously, nothing could have been more material to the Rouse hearing then whether I remained in the employ of Volusia County at the time of that hearing as Judge Rouse's Order denying my Petition for Injunction, which was prepared by Volusia County, reads: "It is not proper, appropriate, or lawful for the Court to enjoin the Defendants to form a compliance review panel to conduct a compliance review hearing after the County of Volusia dismissed Richard Gardner from his employment with the County."[16]

   As noted in Section I. B. of this rebuttal, Nancye Jones knew that due to the requirements of Volusia County Merit Rule 86-455(f)(2), if my dismissal contained the proper notice of my right to respond to the charges, the dismissal would not be in effect until the end of the day on Friday, January 20, 2012, at the earliest; yet throughout the Rouse hearing, she failed to dispel Judge Rouse's misapprehension that my dismissal was already in effect. Moreover, Ms. Jones affirmatively drew a false analogy between my employment situation and the officer involved in the case law she was discussing: " . . . because the officer did not seek an injunction from the circuit court before he was dismissed and...well, that's what we're talking about."[17] [emphasis added].

2) Ms. Jones knowingly omitted the truth when she maintained her silence when Judge Rouse inquired whether my Petition for Injunction was filed before or after the termination of my employment. Ms. Jones also knew both when I was served with the notice by George Recktenwald as well as when my attorney filed the Petition for Injunction, as she includes the following statement in her response: "On January 17, 2012 at 9:00 A.M., Mr. Gardner was served with a notice of dismissal from newly appointed Public Protection Director, George Recktenwald. Later that day, Mr. Gardner's attorneys filed a petition for injunction asking the court to compel the county to convene a compliance review hearing to hear alleged violations of his law enforcement officer's [*sic*] rights."[18] Under Volusia County's Rules, if, on January 17, 2012, I had been served with a proper notification of the charges against me and the required opportunity to respond, my dismissal would not have become effective until the end of the day on January 20, 2012, three calendar days after receipt of the notice. Nancye Jones knew my Petition for Injunction was filed prior to the time when a dismissal would go into effect and she knew my employment status was a material issue before Judge Rouse. In fact, in her response, Ms. Jones writes: "Judge Rouse pointedly asked what day Mr. Gardner was dismissed. Hearing that it was the same day the petition was filed, he queried and was told that Mr. Gardner was fired before the petition was filed [RHT p.16];"[19] yet Ms. Jones remained strategically silent during the following query by Judge Rouse even though it was obvious that it was important to Judge Rouse to know whether I was still in the employ of Volusia County both at the time of the filing of the Petition for Injunction and the time of the hearing before him:

   Judge Rouse to Kaney: Does he remain employed with the County of Volusia as we speak?

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[16] Ms. Jones discusses the reason for Judge Rouse's denial of my Petition for Injunction on Page 5 of 17 of her response.
[17] See Page 95 of the Rouse Hearing Transcript.
[18] See Page 5 of 17 of Nancye Jones' response.
[19] See Footnote 36 on Page 15 of 17 of Nancye Jones' response.

Kaney: That remains to be seen Your Honor. We have seven days left under Volusia County Merit System Rules and Regulations to provide an appeal of the Notice of Dismissal that was issued on Tuesday. We didn't see that coming, because under the law, they were first required, before they do that, this is section 112.532, after they reopened their investigation which is evidenced by a letter and their own admissions, but evidenced by a letter from Mike Coffin dated October 25th, it's one of the exhibits, they reopened the investigation. After they concluded it, they did an IA report, they had a notice of dismissal on Oct 18th, that we responded to on October 24th and then on October 25th, he reopens the investigation, they conduct a whole bunch of other interviews and other stuff and so what they were required to do under section 112.532 at the conclusion of the reopened investigation was to issue an internal affairs report that set forth the additional evidence and findings of this reopened investigation and THEN issue also pursuant to Florida law, clear rights, clear procedure under Florida law ...issue a new notice of intent to dismiss. That's what we expected when they called our client in Tuesday to go in and meet them, we figured they'd follow at least that part of the law because they did that the first time, they did give us a notice of intent the first time and the notice of intent should have had attached to it the Internal Affairs report that they were clearly required to prepare under Florida Law...but instead what they did Your Honor was they skipped that required step, they skipped the second Internal Affairs report and went straight to a Notice of Dismissal. So what they're obviously trying to do is to avoid the unpleasantness of having to go through a compliance review hearing to consider, for that panel to consider the multitude of violations of my client's rights that have been going on all along...and they obviously did that so they could come in here and argue to Your Honor these 3 new wrongs somehow make the multitude of wrongs set forth in the 12/21 written notice of violations, right.

Judge Rouse: What day did they purport to dismiss him?

Kaney: Tuesday, the same day I filed this Petition.

Judge Rouse: Was it after you filed it or before?

Kaney: I think they gave it to him at 9 o'clock in the morning.

Judge Rouse: And what time did you file the Petition?

Kaney: After I got done updating the Petition with the paragraphs immediately preceding Count 1 that took into account the new violations that were evidenced by the Notice of Dismissal at nine o'clock earlier that day.

Judge Rouse: Had you filed this action before they called him in and purported to dismiss him?
Kaney: No. Like I said, I had to revise, update, the complaint. After they fired him to take into account there's 3 additional new violations of law.

Judge Rouse: Alright.

Kaney: The case law is clear Your Honor: You get the compliance review hearing upon written notice – 3 working days written notice-of any violation of that part (on their part)- that includes the 3 violations that came to light Tuesday morning, same day I filed the Petition.[20]

Yet Nancye Jones contends in her response to the Florida Bar that she made no false statements of material fact to Judge Rouse. Nancye Jones knew my employment with Volusia County was not terminated at the time of the Rouse hearing, yet she affirmatively represented to Judge Rouse that my employment had been terminated. Her silence at the Rouse hearing is also a misrepresentation to Judge Rouse. As the comment to Rule 4-3.3 makes clear: " . . . an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." Clearly, Nancye Jones' silence as to whether my Petition for Injunction was filed after my dismissal is one of those circumstances that is tantamount to an affirmative misrepresentation and is certainly material as this formed the basis of Judge Rouse's order.

1. <u>January 20, 2012 hearing before Judge Rouse</u>

Although Ms. Jones claims that many of her statements from the Rouse hearing contained in my complaint are unreliable, her claim is unsupported as she does not go beyond asserting a mere claim to actually demonstrate such unreliability. Ms. Jones simply claims such statements are unreliable in that they are inaccurate, incomplete, misleading, taken out of context, or not supported by the record and then includes footnote 23 in an attempt to support her claim. Significantly, Ms. Jones does not show how any of the statements she includes in footnote 23 are unreliable or inaccurate; whereas in my complaint, I either clearly quote her direct language (shown in Italics) or I summarize her representations; either way, I provide the video time for where the relevant statements can be found in the videos; e.g., One of the statements Ms. Jones complains of in her footnote 23 is: "she then specifically reassured him that I had a remedy for the LEOBOR violations in the Personnel Board;" yet Ms. Jones does not show how that statement is false or inaccurate or misleading; nor can she. I again include the following statements of Ms. Jones from my complaint as well as the corresponding video time so that the Bar may verify their accuracy:

Jones: Absolutely Judge. Absolutely. *. . . Um so if I could just you know summarize, I made a couple notes. Um, the purpose of this is to protect the rights during the course of an investigation. This distinction of McQuade is that and the Court points out that under the statute, prior to **2008**, injunction was the only remedy for an allegation of a **Bill of Rights** violation. That's no longer the case. Mr. Gardner can sue us in civil court if he wants to for wrongful termination and bring up these allegations. There seems to be a great concern that he doesn't have any other remedies, but he does in fact judge, including the Personnel Board. . . .* [21]

With the above statements, Ms. Jones was referring to remedies for alleged LEOBOR violations. She explained to Judge Rouse that prior to 2008, injunction was the only remedy for an alleged LEOBOR violation and she went on to explain that more remedies became available for alleged LEOBOR

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[20] See Rouse hearing video; 19:12 Disc 1 of 2 Rouse hearing; file Gardner 1 of 3.

[21] See Rouse hearing video; 25:15 Disc 2 of 2 Rouse hearing; file Gardner 3 of 3.

violations after 2008 such as a civil suit for Wrongful Termination. Then, still referencing the available remedies for alleged LEOBOR violations while addressing the concern that I would be without a remedy for the LEOBOR violations should Judge Rouse not grant the Petition for Injunction, Nancye Jones clearly told Judge Rouse that one of my remedies for my allegations of LEOBOR violations included the Personnel Board. I also included the video time which roughly corresponds to the beginning of this series of statements in support of my allegations. Thus, Ms. Jones absolutely did, in fact, assure Judge Rouse that I had a remedy for the LEOBOR violations in the Personnel Board and Ms. Jones has not demonstrated otherwise; yet in her response, Ms. Jones boldly, yet falsely, asserts to the Florida Bar that there is no evidence to support my assertion that she told Judge Rouse I had a remedy for the LEOBOR violations in the Personnel Board.[22] This new false assertion to the Florida Bar would also constitute a new violation of Rule 4-8.1 (See Section III. below).

Again, please see my complaint and the corresponding video times provided for support for all of the statements I attribute to Ms. Jones in both the Rouse hearing and the P.B. hearing to verify they are reliable and supported by the record. They also were not taken out of context; on the contrary, statements made by Ms. Jones and/or others before and/or after Jones' offending statements were included for the specific purpose of providing to Bar counsel the greater context in which Ms. Jones' statements were made. Moreover, one need not take my word for it; the videos of the Rouse hearing and the Personnel Board hearing speak for themselves and are available for your review. I would have submitted the videos with the complaint if doing so were permissible; instead, per the Florida Bar's instructions, I included a statement in my complaint that the videos are available to the Florida Bar upon request and I implore Bar counsel to review the videos themselves.

Next, Ms. Jones asserts that Judge Rouse was not "bamboozled" by her statements regarding my ability to raise my claims of LEOBOR violations to the Personnel Board and that her comments clearly showed that she took the following position: "Mr. Gardner could argue to the personnel board that evidence gleaned as a result of charged rights violations was tainted and should not be relied upon by the board;" i.e., Ms. Jones contends that it was clear that the representations made by her as an officer of the court to Judge Rouse that she would not object to my allegations of LEOBOR violations being raised at the P.B. hearing were not absolute in nature, but were conditional in that I must demonstrate to the Personnel Board a nexus between the alleged LEOBOR violations and the evidence used against me at the P. B. hearing.

To support her assertion to the Florida Bar that Judge Rouse understood her nuanced position regarding my ability to have the LEOBOR violations considered by the Personnel Board, Ms. Jones asserts that the record is clear that Judge Rouse understood the limited role of a Compliance Review panel. Judge Rouse may very well have properly understood the limited role of a Compliance Review panel. Of course, Judge Rouse's understanding of the role of the Compliance Review panel has no bearing on his understanding of the supposed conditional nature of Ms. Jones' representations to him that she would not object to LEOBOR violations being heard by the Personnel Board. It simply does not follow that because Judge Rouse understood the role of the Compliance Review panel that he also understood the conditional nature of Nancye Jones' assurances that she would not object at the P.B. hearing when I raised allegations of LEOBOR violations.

Incredibly, Nancye Jones next asserts that the context of her remarks to Judge Rouse is also shown clearly by her objections at the P.B. hearing to my attorney's attempts to have the Personnel Board make findings of rights violations. To the contrary, Ms. Jones' objections at the P.B. hearing to any mention of the LEOBOR violations reveal the misleading intent behind her representations to Judge Rouse. This assertion of Ms. Jones to the Florida Bar truly goes to the crux of her misrepresentations and lack of

[22] See both Footnote 23 and Page 10 of 17 in Nancye Jones' response.

candor in both hearings; she misrepresents and lacks candor still. Her assertion to the Florida Bar is knowingly false for several reasons:

First, my attorneys never attempted to have the Personnel Board make any findings regarding the violations of my LEOBOR and Nancye Jones provides no record support of such alleged attempts. Ms. Jones does include Footnote 25 which reads: "The 765 page transcript reveals that Mr. Gardner's attorneys spoke repeatedly and at length about alleged violations of his rights during the internal investigation, including during opening statement, without objection;" however, merely repeating the title of the rights collectively known as the "Law Enforcement Officers' Bill of Rights" or "Police Officers' Bill of Rights" or some variation thereof is far from attempting to have the Personnel Board make findings of the violations of those rights. Of course, Ms. Jones does not provide even one specific example of my attorneys attempting to have the Personnel Board make such a finding.

In fact, it is clear from the excerpt from the P.B. hearing below that my attorney, Abe McKinnon, specifically told the Personnel Board that we were not seeking any determinations or findings of violations of particular provisions of the LEOBOR; rather, he told the Personnel Board it should hear about the LEOBOR violations for their impact on the investigation itself. This is what Nancye Jones claims her position was before Judge Rouse; yet she would continue to tell the Personnel Board that it lacked authority to consider the LEOBOR violations:

Mr. McKinnon: "One of the things that I think you all will need to consider is violations of due process. That's very critical in our case, is that we can show -- throughout this process there was an -- there was an active intent to avoid the policies that relate to the investigative process and those Policemen's Bill of Rights. Now, she's correct. You all don't determine "You violated Chapter 112.533, you violated this." But it's the hearing and the understanding of those violations that are important so that you can understand this isn't an accident, it's not an oversight. They had very knowledgeable attorneys and administrators involved. This isn't something that went by them. And these are critical for understanding the investigative process."[23]

1) Next, and similarly, my attorneys did not speak repeatedly and at length about the alleged violations themselves at the P.B. hearing. Again, simply repeating the title of the rights is not speaking repeatedly and at length about the violations. Of course, Ms. Jones also does not provide even one specific example of my attorneys speaking repeatedly and at length about my LEOBOR violations. While my attorney Abe McKinnon used the common title(s) of my rights, he never delved into the substance of the rights themselves or the manner in which Volusia County violated those rights of mine and, again, he most certainly never requested that the Personnel Board make a finding regarding such violations.

   The following excerpt from my complaint bears repeating as it is illustrative of how my attorney did not get beyond using the language of the title of my rights to speak "repeatedly and at length about alleged violations" themselves or seek a finding by the Personnel Board as to an alleged violation as stated by Nancye Jones in her response. It is my contention that a video or transcript review of the entire P.B. hearing will reveal neither greater depth in discussion of the LEOBOR than that contained in the excerpt below nor an attempt to have the Personnel Board make any findings as to LEOBOR violations. Note the below excerpt contains Mr. McKinnon's repeated general references to the LEOBOR title while attempting to explain to the Personnel Board the need for a continuance due to Captain Dofflemyer's absence. This excerpt also shows that Nancye Jones was quick to address and object to even a mere reference to the LEOBOR title by Mr. McKinnon. Nancye Jones effectively prevented my attorney from going beyond a general reference to the LEOBOR title through her

[23] See Pages 21-22 of the P.B. hearing Transcript.

repeated objections and admonishments to the Personnel Board that it lacked the authority to even consider whether or not my rights were violated during the investigative process.

McKinnon: Yeah, if I may just respond just briefly. Uh Captain Dofflemyer is a key witness with personal knowledge. This is a termination of a police officer. A police officer has very specific policy, investigative process, due process. They also have a statutory right under the Policemans' Bill of Rights. Captain Dofflemyer was in her own capacity has personal knowledge about how the process was done. Our case, as you will hear throughout the case, is that the decision was made long before Mr. Recktenwald was appointed just recently in this case. The decision was made way back in October of last year. And the decision was set in stone. And you will see through the testimony of Captain Dofflemyer that the investigative process that she began was terminated. The investigative process was terminated and that there is only one investigative report, only one in this entire case and it's the one she authored. That's it. There is no other investigative process. That process was abandoned and it's through her testimony that we'll be able to show this Board how those violations of that policy, those Policemans' Bill of Rights and the merit rules were violations and that's how we got here. So she is a very critical witness for us. Again, we're talking about an employee of the appointing authority, the Internal Affairs investigator in this case and so we believe that's critical for us to be able to prove that.

Board member: And so I am correct in understanding that you want to continue this?

McKinnon: That is correct Sir.

Jones: I I think it's probably a good time since Mr. McKinnon brought up the Police Officers' Bill of Rights, the Law Enforcement Officers' Bill of Rights, as I suspected that issue would come up today and I think it's probably a good time for me to address that. Um, a law enforcement officers' Bill of Rights are rights that are statutory and they're provided for a law enforcement officer who is under investigation for um actions that may result in adverse action to them. Um, it is something that provides for a due process during that investigative procedure. Um, Mr. McKinnon has actually already raised this in circuit court with Judge Rouse - the Bill of Rights, allegations of the Bill of Rights violations um and actually his decision is currently on appeal to the Fifth District Court of Appeals. Um, it's the County's position that based again on your procedures, and the merit rules that give you authority, that whether or not Mr. Gardner's rights were violated during the investigative process is not an issue for your consideration today. It's not, the statute doesn't provide that you have any remedy to give him um and it's something that is handled through the courts and is actually in the courts so um, it's our position that the Bill of Rights issue is not relevant to you and not admissible which if that's the primary motivation for Captain Dofflemyer's testimony, we would object to that anyway. . . .

McKinnon: I want to add something and in fact I've got a clip here that I'll play for you and what it is is it's actually Mrs. Jones, she's at the hearing for the temporary injunction and what she's telling Judge Rouse and you'll hear him she says as an officer of the court if this issue, Policemans' Bill of Rights, comes up in front of this Board as an officer of the court he would expect her not to object and she says, that is correct. . . . The Policemans' Bill of Rights is an investigative process by statute which the County and the Department of Public Protection, the Department of Beach Safety have integrated into- and have to by statute- the investigative process so by failure for those to be considered, you've eliminated the due process rights by those employees, a substantial amount of it so you can't hear just part of it. I know that they would enjoy doing that because they've avoided and violated many of those but you can't hear all the evidence and understand it and understand whether this investigation was done and again that's the critical issue with Captain Dofflemyer.

Note that while there is a bare reference to the "Policeman's' Bill of Rights" title, clearly, the above excerpt contains no discussion, and certainly not an at length discussion, of any alleged violation of my LEOBOR rights and no attempt at obtaining such a finding.

2) Most importantly, in her response to the Florida Bar, Ms. Jones asserts she did not violate Rule 4-3.3(a)(1) – Candor Toward the Tribunal, because her objections at the Personnel Board hearing were consistent with her position before Judge Rouse. Thus, in her response, Ms. Jones contends that the representations made by her as an officer of the court to Judge Rouse that she would not object to my allegations of LEOBOR violations being raised at the P.B. hearing as well as her representations as to the powers of the Personnel Board were clearly conditioned upon my demonstrating to the Personnel Board a nexus between the alleged LEOBOR violations and the evidence used against me at the P. B. hearing. The record belies her claims:

   a. Ms. Jones made statements to Judge Rouse that were not even arguably qualified; e.g., Ms. Jones told Judge Rouse that I had a remedy for the LEOBOR violations in the Personnel Board and she did not qualify this statement in any way. Ms. Jones did not tell Judge Rouse that I had a remedy for the LEOBOR violations with the Personnel Board only if I could show the Personnel Board how the alleged LEOBOR violations affected the outcome of the investigation; she simply said I had a remedy for my LEOBOR violations in the Personnel Board.

   b. Ms. Jones' statements to Judge Rouse that she would not object at the P.B. hearing to evidence of violations of my LEOBOR and the power of the Personnel Board to consider such violations were not clear. It was, at best, misleading for Ms. Jones to repeatedly use such strong, "absolute" language at the beginning of her statements of assurance to Judge Rouse that I could raise the LEOBOR with the Personnel Board and then add a few qualifying words at the end of those statements:
      i. e.g., *Jones*: *The Personnel Board hearing will be convened and as as the person for the County who has done more probably Personnel Board hearings in the last twenty years than anyone else in this room for sure, um I can tell you that the Board will consider anything. If they want to bring in that his rights were violated, that is* absolutely *something they can bring to the Board's attention to try to say well this evidence was tainted because the investigator did A B or C;*
      ii. *e.g., Jones: Well, I don't think he needs that in order to to preserve his rights to make the argument or make the presentation to the Personnel Board. He can bring in whatever evidence he wants that his rights were violated during the course of the investigation and and hopefully would be able to show how those violations impacted the result of the investigation and that's what I assume that they uh would try to get to. But that would be for the Personnel Board to consider. Uh the Compliance Review board, like I said judge, if you ordered one to be convened immediately, it's not gonna change that path of his, of his disciplinary action and the administrative review of that is a totally separate vehicle.*[24]

Had she not intended to mislead, Ms. Jones could have said to Judge Rouse something to the effect of: "Your Honor, it is my position that if Mr. Gardner attempts to raise the LEOBOR issues at the personnel board hearing, that would be beyond the limited scope of that hearing and the limited powers of the Personnel Board unless Mr. Gardner could show how the LEOBOR issues were relevant to the charges contained in the statement of adverse action given to him at the time the action was taken. I would

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[24] See 29:03 Disc 2 of 2 Rouse hearing; file Gardner 3 of 3.

certainly object to him raising the LEOBOR issues at the P.B. hearing unless he is able to show such relevancy." After all, this was the gist of what she wrote to the Personnel Board in her memo.

It is of paramount importance to note that with her above statements, Ms. Jones' stated position before Judge Rouse regarding the function of the Personnel Board and the evidence of LEOBOR violations I could introduce at the Personnel Board hearing is:

- I can bring in whatever evidence I want that my LEOBOR was violated during the course of the investigation;
- It is then "for" the Personnel Board to consider how the evidence of LEOBOR violations impacted the result of the investigation; i.e., Before Judge Rouse, Nancye Jones ascribed to the Personnel Board the function of first hearing evidence of LEOBOR violations and then considering how those violations impacted the investigation.

This is the exact opposite of her position before the Personnel Board: Nancye Jones told the Personnel Board that it is not the Board's function to consider the LEOBOR.

3) When read in context with the P.B. hearing and the memo, it is obvious Ms. Jones' statements to Judge Rouse lacked candor toward the tribunal. There is no congruity between Ms. Jones' representations to Judge Rouse that she would not object to evidence of LEOBOR violations being considered by the Personnel Board and the powers of the Personnel Board to consider the same and her statements made subsequent to the Rouse hearing. Although when answering to the Florida Bar, Ms. Jones describes her representations to Judge Rouse regarding my ability to raise the LEOBOR issues to the Personnel Board as qualified (i.e., I could raise the LEOBOR issues if I could show how the violations impacted the investigative results), it is important to note that her objections and statements to the Personnel Board regarding my ability to do so were most definitely all unqualified: she "absolutely" and wholly objected. Ms. Jones did not object and then tell the Personnel Board that it lacked the authority to hear the LEOBOR violations unless I could show how the violations impacted the results of the investigation; instead, she simply told the Personnel Board that it categorically/outright/wholly lacked authority to hear the LEOBOR violations:
    a. e.g., *This board is not the venue to determine whether his bill of rights were violated by the investigation. That is not part of your authority under the Charter;*
        i. Of course, if Ms. Jones did not have a deceptive intent and if she truly held the position she claims to have had at the Rouse hearing that I could bring in evidence of LEOBOR violations if I could show how they impacted the results of the investigation, she should have told the Personnel Board that the Board is the proper venue and has the authority to determine whether my LEOBOR was violated by the investigation insofar as the violations affected the investigative results.

    b. *e.g., Um it's the County's position that based again on your procedures, and the merit rules that give you authority, that whether or not Mr. Gardner's rights were violated during the investigative process is not an issue for your consideration today . . . . It's not, the statute doesn't provide that you have any remedy to give him um and it's something that is handled through the courts and is actually in the courts so um, it's our position that the Bill of Rights issue is not relevant to you and not admissible . . . .*
        i. If Ms. Jones did not have a deceptive intent and if she truly held the position she claims to have had at the Rouse hearing that I could bring in evidence of LEOBOR violations if I could show how they impacted the results of the investigation, she would have stated to the Personnel Board what she stated at the Rouse hearing: *He can bring in whatever evidence he wants that his rights were violated during the*

course of the investigation and and hopefully would be able to show how those violations impacted the result of the investigation and that's what I assume that they uh would try to get to. But that would be for [you] the Personnel Board to consider.

Therefore, if Ms. Jones did not intend to dupe either Judge Rouse or the Personnel Board, her above statements to the Personnel Board regarding the relevancy and admissibility of the LEOBOR violations as well as the Personnel Board's authority to make determinations of and provide a remedy for such violations would all include qualifying language to the following effect: "Unless Mr. Gardner can show how the LEOBOR violations affected the outcome of the investigative results in his case, the LEOBOR violations are not relevant/admissible and unless Mr. Gardner can make such a showing, this Board lacks the authority to hear the LEOBOR violations and has no remedy to give him;" instead, rather than qualify her objections to the LEOBOR violations to the Personnel Board, Ms. Jones told the Personnel Board that it was not the Board's function to consider LEOBOR as it lacked the authority to do so.

Thus, although Ms. Jones casts her statements to Judge Rouse as conditional, this does not save her. Again, she made statements to Judge Rouse regarding the Personnel Board that were not even arguably conditional; as to any statements with an arguable condition attached, it is simply impossible for Ms. Jones to reconcile those statements to Judge Rouse with her incongruous representations to the Personnel Board; for example, compare the following statements:

[to Judge Rouse]

He can bring in whatever evidence he wants that his rights were violated during the course of the investigation and and hopefully would be able to show how those violations impacted the result of the investigation and that's what I assume that they uh would try to get to. But that would be for the Personnel Board to consider.

[to the Personnel Board]

e.g., Um it's the County's position that based again on your procedures, and the merit rules that give you authority, that whether or not Mr. Gardner's rights were violated during the investigative process is not an issue for your consideration today.

Why didn't Nancye Jones tell the Personnel Board what she told Judge Rouse: that I can bring in whatever evidence I wanted of Volusia County's violations of my LEOBOR and attempt to show the Personnel Board how the LEOBOR violations impacted the results of the investigation? I submit the reason she did not do so is because (1) she did not want the Personnel Board or the public to hear all the evidence of the trampling on my LEOBOR by Volusia County and (2) she knew that I could easily and amply demonstrate how the violations of my LEOBOR impacted the results of the investigation.

Nancye Jones responds to the Florida Bar by attempting to shift the focus away from her misleading initial unequivocal, "absolute" language to Judge Rouse (e.g., . . . *the Board will consider anything. If they want to bring in that his rights were violated, that is absolutely something they can bring to the board's attention . . .; He can bring in whatever evidence he wants that his rights were violated during the course of the investigation . . .; There seems to be a great concern that he doesn't have any other remedies, but he does in fact judge, including the Personnel Board . . :)* to stress the qualifying language she attached to some (not all) of those statements to Judge Rouse (e.g., . . . *and hopefully would be able to show how those violations impacted the result of the investigation . . . But that would be for the Personnel Board to consider).* With this explanation, however, Ms. Jones' dilemma is now three-fold: (1) Her words

of qualification only serve to emphasize her representation to Judge Rouse that it is for the Personnel Board to first hear the evidence of LEOBOR violations and then for the Board to consider how those violations impacted the result of the investigation; (2) She has not/cannot explain why, particularly in light of her words of qualification to Judge Rouse that it is for the Personnel Board to consider the impact of the LEOBOR violations on the investigative results, she repeatedly told the Personnel Board that it lacked authority to hear the LEOBOR issues; (e.g., *whether or not Mr. Gardner's rights were violated during the investigative process is not an issue for your consideration today; This board is not the venue to determine whether his bill of rights were violated by the investigation. That is not part of your authority under the Charter)*; (3) The egregiousness of Ms. Jones' conduct lies precisely within the dichotomy of her words of qualification to Judge Rouse that it is for the Personnel Board to consider the impact of the LEOBOR violations on the investigation and her unqualified objections to evidence of LEOBOR violations before the Personnel Board along with her admonishments to the Personnel Board that it altogether lacked authority to hear the LEOBOR violations, because I most certainly could have shown how the violation of my LEOBOR by Volusia County significantly impacted the result of the investigation.

Please also note that in this portion of her response, Ms. Jones again attempts to confuse the reader by mixing the issues of whether my request for a Compliance Review hearing was timely, (which she concedes it was) and the issue of whether the Circuit Court pleading was timely filed:

> "The county's position at the hearing, supported by case law, was that a compliance review hearing was required only if requested [and determined to be necessary] during the course of an internal investigation. Since Mr. Gardner's petition was filed after his investigation had been concluded and disciplinary action had been taken, it was untimely."[25] [emphasis mine]

The first sentence relates to the request for a compliance review hearing made in writing to the agency head, as was done in this case. Ms. Jones then shifts the discussion to an entirely different matter, which is the timeliness of the Circuit Court pleading under the rules of civil procedure. These two sentences should not have been conjoined by the word "since," as the second statement does not follow as the result of the first statement. By confounding these two concepts, Ms. Jones attempts to leave the impression that my request for the Compliance Review hearing was untimely, when it was not.

Also, note in the quoted portion of Ms. Jones' text above that she has added the bracketed phrase "[and determined to be necessary]" which was neither uttered by Ms. Jones at the hearing nor supported by the plain reading of the statute. This phrase, inserted only in her response to the complaint, changes the meaning of her sentence from that which was actually uttered to Judge Rouse. Ms. Jones does not supply any legal support for this inserted language.

Similarly, with regard to Footnote 26, she has provided no legal support for the proposition that County Attorney Dan Eckert had the legal authority to unilaterally deny my timely request for a Compliance Review hearing. The statutory language is clear and unambiguous. Pursuant to Fla. Stat. §112.534(1)(a), the subject officer shall advise the investigator of the intentional violations by the investigator or the law enforcement agency of the requirements of the LEOBOR which the subject officer alleges have occurred. Then, pursuant to Fla. Stat. §112.534(1)(b), if the investigator fails to cure the violation or continues the violation after notification by the subject officer, the subject officer shall request the agency head be notified of the alleged intentional violation. Thus, the statute makes clear that it is the prerogative of the subject officer to determine whether the LEOBOR violations have been cured, and not that of the very investigator or agency alleged to have committed the violation. The Florida Legislature created the rights

[25] See Pages 10 of 17 and 11 of 17 of Nancye Jones' response.

collectively known as the **Law Enforcement Officers'** Bill of Rights to protect the subject law enforcement officers, not to protect the offending investigators/agencies. Furthermore, the language of Fla. Stat. §112.534(1)(d) is in the imperative and specifies that once a subject officer alleges uncured intentional violations of his LEOBOR, the compliance review hearing must be conducted within 10 working days of the filing of the request. The County had no discretion. Once I properly and timely alleged intentional uncured violations of my LEOBOR, I had a right to the compliance review hearing and the offending County had no discretion to deny that hearing.

2. April 9, 2012 memorandum to personnel board

In her response, Ms. Jones states that the "content of the April 9 memo is plain on its face and not subject to interpretation," and that "Mr. Gardner again misconstrues the context of my discussion with Judge Rouse as to what he could present to the board without objection . . . the nuance, which Mr. Gardner either misunderstands or misrepresents, is that I had no objection to him telling the board that the evidence upon which his dismissal was based was unreliable because his bill of rights had been violated during the investigation. I did not agree, however, to allow him to ask the board to make findings of such violations."[26] [emphasis mine]. I have misconstrued nothing. I fully appreciate the semantic nuance of Ms. Jones' various representations regarding the evidence of LEOBOR violations which the Personnel Board could consider. The distinction among her various statements appears subtle in that it involves the switching of only a few words; however, the distinction is no mere nicety, as the word switch produces statements completely distinct in meaning and legal significance.

In her response, Ms. Jones intentionally confuses the concept of tainted evidence with that of unreliable evidence. Within the pages of her own response, her initial concession that she would not object to the Personnel Board hearing evidence of LEOBOR violations to show how the County's evidence was tainted by the violations and so should not be relied upon by the Personnel Board is morphed into her intention to not object to my telling the Board that the evidence used to dismiss me was unreliable due to the LEOBOR violations. Of course tainted and unreliable evidence are distinct concepts, as tainted evidence is evidence obtained in violation of my rights but might otherwise be reliable.

In her representations to Judge Rouse, Ms. Jones clearly asserted that I would be able to raise the issues of the violations of the LEOBOR statute to show that the investigation had not been properly conducted and that evidence had been tainted by that unlawful investigation.

> *The Personnel Board hearing will be convened and as as the person for the County who has done more probably Personnel Board hearings in the last twenty years than anyone else in this room for sure, um I can tell you that the Board will consider anything. If they want to bring in that his rights were violated, that is absolutely something they can bring to the Board's attention to try to say well this evidence was tainted* because *the investigator did A B or C.*[27]

Knowing that there was a record of her statements, Ms. Jones concedes that she made the above statements to Judge Rouse by including the majority of these statements in her response[28] and on the same page, she asserts that her position before Judge Rouse was clear: "Mr. Gardner could argue to the personnel board that evidence gleaned as a result of charged rights violations was tainted and should not be relied upon by the board." [emphasis mine]. Two pages later, however, Ms. Jones transforms her position before Judge Rouse into merely having no objection to my telling the board that the evidence

[26] See Page 11 of 17 and 12 of 17 of Nancye Jones' response.
[27] See Rouse hearing video; 25:15 Disc 2 of 2 Rouse hearing; file Gardner 3 of 3.
[28] See Footnote 24 on Page 10 of 17 of Nancye Jones' response.

upon which my dismissal was based was unreliable because my bill of rights had been violated during the investigation. There is no support in the record for Ms. Jones' assertion that she told Judge Rouse she would not object to my telling the Personnel Board the evidence used to dismiss me was unreliable due to the LEOBOR violations.

Furthermore, it is simply impossible for Ms. Jones to reconcile her statements in her memo (as well as those in her response to the Bar and her statements at the P.B. hearing) with her previous statements to Judge Rouse. Ms. Jones' Memo does not instruct the Personnel Board that it is to exclude any evidence obtained in violation of my LEOBOR and does not even allow for that argument as she makes clear that the scope of the evidence before the Personnel Board is to be limited to that which either refutes the charges against me or that which supports them.

When the statements in Ms. Jones' Memo to the Personnel Board are viewed together with those in her response to the Florida Bar and those she made at the Personnel Board hearing, it is clear Ms. Jones' position is that all evidence to be considered at the Personnel Board originates, or flows, from the Internal Affairs investigation and is then distilled by the charges contained in the appointing authority's own final letter of termination or statement of adverse action. It is then the charges contained in this final letter of termination which the Personnel Board is bound by, as the scope of the evidence is to be limited to that which either supports or refutes those charges. Yet, Ms. Jones told Judge Rouse ***the Personnel Board will consider anything*** and ***the Personnel Board is not bound solely by what is in that internal affairs investigation. They make their determination based on*** *what the parties present to them at that hearing.*[29]

[29] See 29:03; Disc 2 of 2 Rouse hearing; file Gardner 3 of 3.

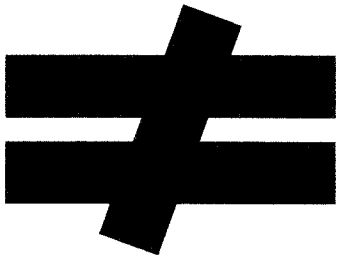
1) IA Investigator conducts investigation and gathers evidence;
2) IA investigator prepares IA Report

JONES' RESPONSE

Appointing authority reviews both:

1) IA Report and
2) All evidence gathered in the entire IA Investigation;
3) makes his/her own findings regarding sustained violations. It is on the basis of these findings that disciplinary action is taken;

JONES' RESPONSE



The Personnel Board is <u>not bound</u> solely by what is in that internal affairs investigation. They make their determination based on what the parties present to them at that hearing.

JONES' STATEMENTS AT ROUSE HEARING

If appointing authority decides to proceed with termination:

1) Appointing authority issues final letter of termination or dismissal/statement of adverse action (which is necessarily based on IA investigation)

JONES' MEMO

Personnel Board is bound by the charges contained in the final letter of termination or dismissal/statement of adverse action and evidence at Personnel Board hearing is limited to that which will support or refute charges in final letter.

JONES' MEMO &
P.B. HEARINGSTATEMENTS

Ms. Jones also asserts in this section that I misconstrue her statements to Judge Rouse and that there is no support in the record for representations which I have alleged she made to Judge Rouse; e.g., that she told Judge Rouse "the LEOBOR violations were for the. . . Board to consider."[30] The representations I attribute to Ms. Jones are supported by the record, including the following exchange with Judge Rouse:

> *Rouse: **But Mr. McKinnon seems to be suggesting, and perhaps he didn't mean to do this but I just took it this way but that this would be very helpful to his client if we did, if this court did order the empaneling or the uh compliance review panel to be constituted and undertake action here that perhaps they would find many of these allegations to be well-founded and that a record could be made of that and this could be very helpful to his client down the line to have this more independent review of this matter and could be very beneficial to uh to his client so what do you think about that?***
>
> *Jones: **Well, I don't think he needs that in order to to preserve his rights to make the argument or make the presentation to the Personnel Board. He can bring in whatever evidence he wants that his rights were violated during the course of the investigation and and hopefully would be able to show how those violations impacted the result of the investigation and that's what I assume that they uh would try to get to. <u>But that would be for the Personnel Board to consider.</u>***[31]

One need only watch the video or read the transcript prior to this excerpt to understand that Ms. Jones was referring to my LEOBOR when she used the word "rights" as she was attempting to convince Judge Rouse I did not need the Compliance Review hearing. Clearly, then, there is record support for my assertion that Nancye Jones told Judge Rouse it would be for the Personnel Board to consider the LEOBOR violations.

Please note that in Footnote 27 of her response, Ms. Jones employs a rather bizarre use of ellipses. She includes the following three sentence fragments from page 10 of my complaint in which I include the words "Personnel Board," but then Ms. Jones substitutes ellipses for the single word "personnel:"

- that the LEOBOR violations were for the Personnel Board to consider
- I had a remedy for my LEOBOR allegations in the Personnel Board
- convinced Judge Rouse the Compliance Review hearing was not necessary because the Personnel Board would provide a remedy for any LEOBOR violations

Since the common use of ellipses is to shorten a quote, to substitute them for a single word does nothing to shorten a quote and suggests an intent to alter the meaning of a sentence. Perhaps Ms. Jones is trying to confuse the Personnel Board with the Compliance Review Board in her footnote 27, but I wanted to clarify to the Bar that my sentences from which she quotes refer to the Personnel Board.

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[30] See Footnote 27 on Page 11 of 17 of Nancye Jones' response.
[31] See 29:03 Disc 2 of 2 Rouse hearing; file Gardner 3 of 3.

B. **Rule** 4-4.1(a) Truthfulness in statements to others and
Rule 4-8.4(c) Misconduct
Rule 3-4.3 Misconduct and minor

1. Meeting with Captain Dofflemyer

In my complaint, and supported by the affidavit of Captain Dofflemyer, I have asserted that Ms. Jones did misrepresent to Captain Dofflemyer that her attendance at the P.B. hearing was not required, which would violate **Rules** 4-4.1(a), 4-8.4(c), and 3-4.3. In her response, Ms. Jones simply denies the misrepresentation. I implore the Florida Bar to make its own investigation with regard to this matter by speaking directly with Captain Dofflemyer. Also, please note that Ms. Jones does not deny discussing what she refers to as the non-binding effect of the administrative subpoena with Captain Dofflemyer; she only states that she does not recall this discussion, and she also asserts that for over twenty years, it has been her stated position that administrative subpoenas are non-binding.[32]

It is not credible for Ms. Jones to assert that a Volusia County employee would not be subject to discipline for an unexcused or willful failure to attend a hearing for which that employee has been properly subpoenaed. Who better than Ms. Jones, the County attorney with many years of experience in employee discipline and Personnel Board matters, to understand that if a County employee (such as Captain Dofflemyer) had conducted an Internal Affairs investigation, was properly subpoenaed to appear at a hearing to provide testimony regarding that County work, yet willfully refused to attend the hearing as directed, it would obviously be an act of insubordination and reason for disciplinary action? Indeed, who better than Ms. Jones to easily recognize that such behavior would constitute a violation of at least the following provisions of Volusia County Merit **Rule** Section 86-53:

Sec. 86-453. **Reasons** for disciplinary action.
Any of the following violations may be sufficient grounds for disciplinary action ranging from oral reprimand to dismissal, depending on the seriousness of the offense and other circumstances related to the situation. These offenses are illustrative and not all-inclusive.

(1) Willful neglect in the performance of the duties of the position to which the employee is assigned.
(2) Disregard for or frequent violations of county ordinances, departmental policies and regulations, including safety rules.
(4) Frequent tardiness or absence from duty without prior approval.
(5) Violation of any reasonable or official order, refusal to carry out lawful and reasonable directions given by a proper supervisor, or other acts of insubordination.
(10) Incompetent or unsatisfactory performance of duties.
(13) Any conduct, on or off duty, that reflects unfavorably on the county as an employer.
(21) Any other conduct or action of such seriousness that disciplinary action is considered warranted.

Moreover, Ms. Jones' statement that in her years of handling Personnel Board hearings no such disciplinary action has been taken is meaningless when she does not assert that any employee has willfully failed to attend, or had an unexcused absence from, a hearing for which that employee was properly subpoenaed.

Ms. Jones wholly fails to explain in her response why, when the Personnel Board Chairman inquired as to Captain Dofflemyer's whereabouts, she chose not to disclose that she had a meeting in her office, and at her behest, with Captain Dofflemyer only the week before.

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[32] See Page 14 of 17 of Nancye Jones' response.

Furthermore, despite the clear language in my complaint, Nancye Jones falsely states in her response that it was my attorney who inquired into the whereabouts of Captain Dofflemyer at the P.B. hearing, when, in fact, it was the Chairman of the Personnel Board, Patrick Lane, who was making the inquiry; yet, Nancye Jones remained silent. Ms. Jones writes: "Interwoven with this allegation is Mr. Gardner's assertion that I violated these rules by remaining silent at the personnel board hearing when his attorney questioned the whereabouts of Ms. [*sic*] Dofflemyer."[33] [emphasis added]. She then refers the reader to the portion of my complaint where the following is clearly written:

> "In response to Mr. McKinnon's efforts to have the hearing continued for the purpose of securing the presence of Captain Dofflemyer, a Personnel Board member inquired into Captain Dofflemyer's absence and whether Mr. McKinnon had some indication that Captain Dofflemyer was not going to appear. Please note that this exchange provided the perfect opportunity for Ms. Jones to be forthcoming regarding her meeting with Captain Dofflemyer;"[34]

Also included with the referenced pages is the following exchange: [35]

Board member: Have you had some indication she's not coming? [interrupted]

McKinnon: I [interrupted]

Board member: Maybe she's just not here yet [interrupted]

McKinnon: Well, I've been told, and again I don't want to say, by, by other witnesses that are here, that she will not be coming. She, you know, I [interrupted]

Board member: So what's the point of continuing it is she's not going to come anyway?

McKinnon: Well, if that is, you understand, if if if we have a right to a subpoena and she is an employee of the appointing authority, she is their employee, she's not going to appear, that is detrimental to our ability to confront the witness and and that's a that's a critical point for us to be able to bring out in this case: What was done to investigate and what wasn't done to investigate? Without her here, you all won't have that opportunity and it and it severely limits us and our ability to present that evidence. So, I don't know that she won't come, but certainly being an employee of the appointing authority, you would think that there would be some ability to have her here.

Board member: She's definitely not here now?

McKinnon: She is not here this morning.

Moreover, Ms. Jones' response only reveals more deception on her part. In her response, Nancye Jones writes: "Ms. **D**o**f**f**l**emyer advised that her scheduled retirement date was **F**r**i**day**, A**pril **13, 2012** and

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[33] See Page 14 of 17 of Nancye Jones' response.
[34] See Page 10 of my Complaint.
[35] See Pages 12-13 of my Complaint.

that she would be in and out of her office during that week, cleaning out her personal effects and taking care of last minute matters. Noting that she had been subpoenaed by Mr. Gardner, she indicated that if 'they' wanted her to testify, it better be before noon on the 13th as she was going to be celebrating her retirement with friends thereafter."[36] [emphasis added]. Captain Dofflemyer denies making these statements; however, if she did make such statements to Nancye Jones then that just underscores the lack of veracity in the following statements by Ms. Jones to the Personnel Board:

> *. . . whether she's going to be here or not as you know these subpoenas are non-binding um I have* no *idea what Cap- I, I know Captain Dofflemyer is scheduled to retire I don't know when so um she may already be retired so um we don't have any way to force someone to be here.*[37]

Thus, Ms. Jones does not provide an adequate response, to explain why she did not disclose to the Personnel Board that she had a meeting with Captain Dofflemyer and that in that meeting, Captain Dofflemyer advised Ms. Jones that Captain Dofflemyer's scheduled retirement date was Friday, April 13, 2012, that she would be in and out of her office during her final week of employment (the same week of my P.B. hearing), and that Captain Dofflemyer conveyed to Ms. Jones what is tantamount to a message to me and/or my attorneys that she would be available to testify at my P.B. hearing, but if we wanted her to do so, we better call her to testify before noon on April 13, 2012 as she had plans to celebrate her retirement after that time. Ms. Jones remained strategically silent as to her meeting with Captain Dofflemyer and her conversations with her. Clearly, misrepresentation by omission is still misrepresentation.

When she was not remaining silent about Captain Dofflemyer, Nancye Jones was making affirmative false statements about her. Ms. Jones certainly does not provide a response sufficient to explain why she told the Personnel Board that she did not know when Captain Dofflemyer was scheduled to retire and she may already be retired on or before the morning of April 12, 2012, the time of Ms. Jones' statements at the hearing. Ms. Jones states in her response that she knew what Captain Doffiemyer's final official day was but was inarticulate in her comments to the Board regarding Ms. Doffiemyer's retirement.[38] Her statements were not merely inarticulate; they were clearly false.

Ms. Jones also falsely states in her response: "Mr. Gardner asserts that he subpoenaed Ms. [*sic*] Dofflemyer to appear on his behalf so she could testify about her unsustained findings from her initial internal investigation and about 'many of the LEOBOR violations.'"[39] My complaint makes no such assertion, but reads: "Captain Dofflemyer was a witness who had been subpoenaed to appear at the P.B. hearing on my behalf to testify to, among other matters, the Law Enforcement Officers' Bill of Rights violations committed by Volusia County"[40] [emphasis added] and "Nikki Dofflemyer was a key witness to establish many of the LEOBOR violations as well as other misconduct by Volusia County officials during the course of the investigation against me."[41] My statement was only intended to explain why Volusia County officials might be less than eager for Captain Dofflemyer to testify at my P.B. hearing and was never a statement of limitation on the testimony my attorneys intended to elicit from her. Furthermore, stating that Captain Dofflemyer could establish LEOBOR violations and misconduct by

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[36] See Page 7 of 17 of Nancye Jones' response.
[37] See P.B. hearing video; 0:00 of disc 1 P.B. hearing; file M2U00024.
[38] See Page 14 of 17 of Nancye Jones' response.
[39] See Page 12 of 17 of Nancye Jones' response.
[40] See Page 2 of my complaint.
[41] See Page 10 of my complaint.

County officials is not the equivalent of an assertion that I subpoenaed Captain Dofflemyer so she could testify about her unsustained findings and Nancye Jones provides no record support for this alleged assertion.

Ms. Jones admits in footnote 32 of her response that she knew I had requested a subpoena for Captain Dofflemyer. Thus, it is not compelling evidence that the subpoena had not yet been served on Captain Dofflemyer when Ms. Jones' secretary scheduled the appointment. Whether or not she was already served with the subpoena misses the point, which is that Ms. Jones knew I intended to call Captain Dofflemyer to testify and she wanted to speak to her about that. It is Ms. Jones' knowledge that I intended to call Captain Dofflemyer as a witness which would have triggered her concern and Ms. Jones concedes such knowledge when she initiated the meeting. The actual service of the subpoena on Captain Dofflemyer has no bearing on Ms. Jones' interest in what her testimony might be, since there is no reason to believe that there would be a problem with effecting service.

In her response, Ms. Jones refers to Captain Dofflemyer as being my "friend." Captain Dofflemyer is not a personal friend of mine, nor has she ever been. We were both employed by Volusia County, but in different divisions, so we had infrequent contact with each other in our professional capacity over a three to four year period. We worked in separate physical locations and only spoke on the phone a few times and served Notices of Dismissals to Beach Safety employees 2-3 times at the request of Department Director Mike Coffin or Division Director Kevin Sweat. We have never once socialized outside of work or even attended the same social function and we are not and never have been connected through any social network, such as Facebook and the like. The statements contained in Footnote 31 of Nancye Jones' response are not accurate. I have never worked "closely" with Captain Dofflemyer or her predecessor, Internal Affairs Captain Kenneth Modzelewski, on any background or Internal Affairs investigation of a beach officer nor have I ever worked "closely" with Captain Dofflemyer in my capacity as the FDLE contact for reporting officer separations due to misconduct. Any background investigation information or officer discipline action was sent by the Internal Affairs to the Beach Director Kevin Sweat, and Director Sweat would dictate the appropriate action to be entered into the FDLE system, called ATMS (*Automated Training Management System).* Any information entered into the FDLE ATMS would require hard copies of certain forms be printed and filed at Beach Services, with a copy sent via inter-departmental mail to Captain Dofflemyer for inclusion into her IA file.

Incredibly, once again, in this section of her response, Nancye Jones makes the following representation to the Florida Bar: " . . . alleged rights violations were not within the scope of the board's consideration."[42] [emphasis mine]. Of course this statement in her response completely contradicts many of the statements she made to Judge Rouse.

2. Personnel Board Hearing

a. In my complaint, I allege that Nancye Jones falsely stated to the Personnel Board that I did not request the Compliance Review hearing until after the disciplinary action was taken. In support of this allegation, I included her transcribed statements as well as the approximate time her statements could be found on the video so that the Florida Bar could hear her statements. In her response to the Florida Bar, Nancye Jones denies this allegation and added words to her statements that she never uttered to the Personnel Board; the words added by Ms. Jones in her response completely change the meaning of her statements, but her altered statements to the Florida Bar are not the ones she made at the P.B. hearing.

[42] See Page 13 of 17 of Nancye Jones' response.

Again, as stated in my complaint, here are the actual words uttered by Ms. Jones in response to the Board member asking Ms. Jones to state her objection:

Board member: Before I let him [indecipherable] I'm not going to let him answer that right now before we deal with the objection. Would you please state your objection please?

Jones: Yes Sir. My objection is the requirements of Chapter 112, the Police Officers' Bill of Rights, deal with the time period that the investigation is ongoing. . . . The request for a Compliance Review hearing was not made until after the action was taken, the disciplinary action was taken which is what the finding of Judge Rouse was. Judge Rouse considered this exact question as to the Compliance Review hearing and that is on appeal to the fifth district court of appeal and that is the venue or some other circuit court. This Board is not the venue to determine whether his Bill of Rights were violated by this investigation. That is not part of your authority under the Charter.[43]

In her response to the Florida Bar, Nancye Jones writes: "I explained that Mr. Gardner's request [by way of the petition for injunction], which resulted in the hearing with Judge Rouse, was not filed until after the discipline was taken"[44] [emphasis mine]; however, my request for a Compliance Review hearing was not made "by way of petition for injunction." My timely "request" for a "Compliance Review hearing" was made on December 21, 2012 and pursuant to Florida Statute §112.534 (1)(c) and (d) and sent to the agency head, Mr. George Recktenwald, Interim Director of the Department of Public Protection. Ms. Jones' false and misleading statements to the Personnel Board, and repeated to the Florida Bar, do not alter the fact that I made a timely request for a Compliance Review hearing to the agency head.

The record does not support Ms. Jones' response. At the P.B. hearing, Ms. Jones most certainly did not explain that my compliance review request to which she was referring was the request by way of the petition for injunction. She never explained that the request to which she was referring was the one that resulted in the Rouse hearing, which would have indicated she was referring to the petition for injunction. She also never used the word "filed" in conjunction with my request for a compliance review hearing, which tends to indicate a court action; instead Ms. Jones added these words in her response to the Florida Bar in her attempt to change the plain meaning of her statement.

b. Ms. Jones made representations to the Personnel Board that Judge Rouse had substantively addressed the LEOBOR violations, when she knew at the time she made the statements that they were not true. She knew Judge Rouse did not rule on the merits of my Petition, but that he dismissed the petition on a procedural ground; i.e., that it was untimely. Repeating a portion of the transcript I provided on page 14 of my complaint, once again shows that Ms. Jones clearly was misleading the Personnel Board members:

Jones: I I think it's probably a good time since Mr. McKinnon brought up the Police Officers' Bill of Rights, the Law Enforcement Officers' Bill of Rights, as I suspected that issue would come up today and I think it's probably a good time for me to address that. Um, a law enforcement officers' Bill of Rights are rights that are statutory and they're provided for a law enforcement officer who is under investigation for um actions that may result in adverse action to them. Um, it is something that provides for a due process during that investigative procedure. Um, Mr. McKinnon has actually already raised this in circuit court with Judge Rouse - the Bill of Rights, allegations of the Bill of Rights violations um and actually his decision is currently on appeal to the Fifth District Court of Appeals. Um, it's the County's position that based again on your procedures, and the merit rules that give you authority, that whether or not Mr.

[43] See P.B. hearing video; 26:30 Disc 5 of P.B. hearing; file M2U00032.
[44] See Page 15 of 17 of Nancye Jones' response.

Gardner's rights were violated during the investigative process is not an issue for your consideration today. It's not, the statute doesn't provide that you have any remedy to give him um and it's something that is handled through the courts and is actually in the courts so um, it's our position that the Bill of Rights issue is not relevant to you and not admissible which if that's the primary motivation for Captain Dofflemyer's testimony, we would object to that anyway. . . . [emphasis added][45]

c. In her response, Ms. Jones fails to make any argument to deny that her silence at the P.B. hearing regarding her promise as an "officer of the court" to Judge Rouse to not object to my raising the LEOBOR issues at the PB Hearing was a misrepresentation by omission. She makes a vague reference to her discussion in II. A.; however, nothing in her II A response addresses her conduct before the Personnel Board. Therefore, my argument presented on Page 15 of the Bar complaint stands substantively uncontroverted by Ms. Jones.

d. Ms. Jones' representations to the Florida Bar regarding her realization that she had never provided me with Mr. Smith's final report is false, and the video record of the proceeding clearly shows that her statement to the Florida Bar is false. Ms. Jones states that upon realizing that she "might have inadvertently violated a requirement of the bill of rights" she "quickly reviewed the statute and saw that there was no requirement to provide the report unless it was requested by the officer." Upon viewing the video of this portion of the hearing, it will be completely obvious to the Florida Bar that this statement of Ms. Jones is a total fabrication. In this instance, the video tape of the proceeding is so much more informative to the Florida Bar than the written transcript, as is shows that Ms. Jones "terse" reaction was instantaneous upon her hearing Mr. McKinnon's statement that he had never been provided with a copy of Mr. Smith's final report. There is simply no time for Ms. Jones to have quickly reviewed the statue prior to her terse retort that defense counsel had never requested the Smith report.

Though I provided extensive transcripts of this portion of the P.B. hearing in my complaint, I urge the Florida Bar to actually view the video tape to appreciate the rapid fire timing of Ms. Jones' statements and draw your own conclusions as to the veracity of her statement to the Florida Bar in her response. [46]

e. On Pages 22 through 24 of my complaint, I included extensive portions of the transcript to provide the Florida Bar with the context of Ms. Jones' cross examination where she went to great lengths to establish that I did not participate in an interview, without allowing me to explain that I was exercising specific rights provided under the LEOBOR. Her response that she had some other intent aside from implying that my conduct was insubordination or evidence of guilt is not supported by anything in the record below. Nor does she supply the Florida Bar with any transcript support for her alternative motive. Finally, she asserts the false implication was not material. As previously stated, Rule 4-8.4(c) Misconduct, and Rule 3-4.3 Misconduct and Minor Misconduct do not require materiality. Acts contrary to honesty and justice or involving dishonesty, fraud, deceit or misrepresentation may constitute cause for discipline.

As introduction to II. B.2., beginning at the bottom of Page 14, Ms. Jones claims she made no false statements of material fact or law and did not engage in conduct involving dishonesty, fraud, deceit or misrepresentation during the P.B. hearing. In rebuttal, it is my contention that Nancye Jones directly lied to a member of the Volusia County Personnel Board, Mr. Lewis, when he asked whether Volusia County made a deal with one of its witnesses at my P.B. hearing and Ms. Jones responded "no:"

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[45] See P.B. hearing video; 0:00 of disc 1 P.B. hearing; file M2U00024.
[46] See P.B. hearing video; 36:03 disc 4 of P.B. hearing; file M2U00030

Mr. Lewis:	And I'd like to ask a question. Did we make any kind of a deal with [redacted] to get her phone records and separation agreement? Did she get some kind of a deal to get that?
Mr. McKinnon:	She did.
Ms. Jones:	No.
Mr. McKinnon:	She sure did. I got a copy of that separation agreement sitting here.
Mr. Lewis:	I mean, I don't need to see it, but that's –
Ms. Jones:	No. You can't reopen the evidence, first of all.
Mr. Lewis:	No, I'm not reopening it, but that stuff –
Ms. Jones:	If she wants –
Mr. Lewis:	-- bothers me too.[47] [emphasis added]

Please see [redacted] separation agreement dated December 23, 2011,[48] which shows the terms of the deal Volusia County made with her in exchange for her cooperative testimony and personal phone records. The first paragraph under the title: [redacted] has agreed to the following" concerns the production of documents as required by Deputy Director Pozzo's December 7, 2011 memo. Please see Deputy Director Pozzo's December 7, 2011 memo, which ordered [redacted] to produce her personal cell phone records.[49]

See also e-mail correspondence of Ms. Jones discussing the terms of the separation agreement with Ms. [redacted] attorney dated December 23, 2011 (prior to the P.B. hearing in April, 2012).[50] I request the Florida Bar view this segment of the video as Ms. Jones' demeanor is quite telling. Despite email evidence that many months earlier, Ms. Jones herself prepared a draft of the separation agreement, Ms. Jones looked at Mr. Lewis and falsely responded "No.

III. Nancye Jones' Violations of Rule 4-8.1: Bar Admission and Disciplinary Matters

A. Nancye Jones knowingly makes a false statement of material fact to the Florida Bar in connection with a disciplinary matter by providing the following statement in her written response to the Florida Bar:

"I do not dispute that Mr. McKinnon made remarks about the investigative reports. However, despite these comments, I did not realize that Mr. Gardner's attorney did not have Mr. Smith's final report until Mr. McKinnon was examining a witness using Ms. [*sic*] Doffiemyer's report and, upon my objection that her findings had not been relied upon to terminate Mr. Gardner, Mr. McKinnon stated that

[47] See Page 719 of P.B. hearing transcript and P.B. hearing video; *22:17 P.B.; file M2U00042.*
[48] [redacted] Separation Agreement is attached hereto as Exhibit B.
[49] Deputy Director Pozzo's Memo is attached hereto as Exhibit C.
[50] Nancye Jones' email regarding [redacted] separation agreement is attached hereto as Exhibit D.

hers was the only investigative report. I realized then they were apparently never given a copy of Mr. Smith's report, which was not completed until some time [*sic*] in January, after Mr. Gardner's attorneys had been given all substantive evidence in his case. My immediate concern upon this realization was whether I had inadvertently violated a requirement of the bill of rights. However, when I quickly reviewed the statute and saw that there was no requirement to provide the report unless it was requested by the subject officer, I responded that they had never asked for it. [PBH p. 283-284]. Perhaps this was a terse reaction but it was not a false or dishonest statement and the issue of whether I knew that they had not received the report was not material." [emphasis added]

The above statements by Ms. Jones are not only knowingly false; they are physically impossible. With her above statements, Ms. Jones asserts that, despite Mr. McKinnon's thrice-repeated statements that there is no final investigative report and that Captain Doffiemyer's report is the only investigative report in existence, it was not until Mr. McKinnon uttered the fourth such statement that Captain Doffiemyer's report is the only investigative report that Ms. Jones finally comprehended that Mr. McKinnon did not have the Smith Report. Ms. Jones' assertion that, despite the plain meaning of Mr. McKinnon's statements, she did not realize that Mr. McKinnon did not have the Smith Report is simply not credible and is contrary to common sense. Her above statements, however, go far beyond lacking credibility as the sequence provided by Ms. Jones is simply impossible.

The sequence of events provided by Ms. Jones is: 1) Ms. Jones made an objection; 2) Mr. McKinnon stated that Captain Doffiemyer's report is the only investigative report; 3) Ms. Jones then realized (after the fourth such statement) that Mr. McKinnon did not have the Smith Report; 4) Ms. Jones then immediately became concerned that she might have inadvertently violated a requirement of the LEOBOR; 5) Ms. Jones quickly reviewed the statute and saw that there was no requirement to provide the report unless it was requested by the subject officer; 6) Ms. Jones made the "You never asked for it" statement.

The insurmountable problem for Ms. Jones is that only 2.91 seconds elapse between the end of the statement in 2) of the above sequence and the beginning of her statement in 6). In support of her version, Ms. Jones provides a reference to pages in the Personnel Board transcripts in which the above statements can be found; however, her false statement cannot be discovered by reading the transcript, for it is only when one hears the timing of the above exchange between Mr. McKinnon and Ms. Jones that the impossibility of her version is revealed.[51]

Again, the dialogue transcribed from the video of the P.B. hearing contained in my complaint is as follows:

McKinnon: This is the only investigative report.

Jones: No it's not.

McKinnon: You never provided us one.

Jones: You never requested it. [audience reacts]

McKinnon: The law requires it.

Jones: No it doesn't. Yeah, it's right here.[52]

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[51] I implore the Florida Bar to listen to this exchange between Nancye Jones and Mr. McKinnon on the video rather than just referring to the transcript.

[52] See P.B. hearing video; 36:04, Disc 4 of P.B. hearing; file M2U00030.

It is only when one listens to the video that it becomes clear that the above exchange between Mr. McKinnon and Ms. Jones involved rapid-fire responses by Ms. Jones. There was not even one full second delay between Mr. McKinnon's statements and Ms. Jones' responses; in fact, Ms. Jones' responses are so immediate, they border on interrupting Mr. McKinnon. There was absolutely no delay whatsoever before Ms. Jones' "You never requested it" statement, yet according to Ms. Jones, she had the time to quickly review the statute to determine that there was no requirement to provide the report unless it was requested by the subject officer. It is clear that Ms. Jones wrote at least this portion of her response by simply referring to her written transcript, which would seemingly allow for the possibility of her version; of course, had she taken the time to watch/listen to the exchange on video, she would have realized that she was providing the Florida Bar with an obviously false account.

The relevant statutory language takes time to locate. It can be found in Florida Statute §112.532(4)(b). One must first determine which of the sections of the part collectively known as the LEOBOR contains the language. Even when one finds §112.532, one must then take the time to scroll through to find subsection (4) and then take the additional time to read through paragraphs (a) and (b) to finally locate the applicable language buried roughly in the middle of paragraph (b). This of course, would also involve the act of turning pages and the time it takes to do that. Having been present at the hearing, I and my attorneys know that Nancye Jones never stopped and referred to any statute book or any other material during her above exchange with Mr. McKinnon. I believe that anyone present at the P.B. hearing would also agree with my account.

Thus, since it was physically impossible for Nancye Jones to have the time to quickly review the statute at the point she claims she did in her response, she was necessarily aware of the statutory language prior to her above exchange with Mr. McKinnon. The only incentive which would have prompted Ms. Jones to locate the statutory language before this point would have been any of Mr. McKinnon's three prior statements that that there is no final investigative report and/or Captain Doffiemyer's report is the only investigative report – the same clear statements that, although Nancye Jones does not dispute were made, she contends did not cause her to be aware that Mr. McKinnon only had the Dofflemyer Report and did not have the Smith Report.[53] This is, of course, nonsensical, especially since others who attended the hearings readily understood by Mr. McKinnon's words that he was not in possession of the Smith Report. The only logical conclusion is that Nancye Jones did in fact hear and comprehend at least some, if not all, of Mr. McKinnon's prior statements which put her on notice that he did not have the Smith Report. This makes her statements to the contrary to both the Personnel Board and the Florida Bar knowingly false.

Furthermore, Nancye Jones' knowingly false written response to the Florida Bar regarding her knowledge of whether I was in possession of the Smith Report at the time she denied such knowledge before the Personnel Board certainly constitutes statements of material fact in connection with a disciplinary matter. In my complaint, I allege that Nancye Jones was in violation of Rule 4-4.1(a) for making a false statement of material fact or law to members of the Volusia County Personnel Board or, in the alternative, in violation of Rule 4-8.4(c) for knowingly engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation when she falsely stated to the Personnel Board that the reason she did not supply me with the Smith Report was that she did not know I did not already have it and that she was additionally in violation of Rule 3-4.3 for engaging in conduct that is contrary to honesty and justice. Clearly, then, it constitutes a material fact before the Florida Bar whether Ms. Jones knowingly provided false statements to the Bar regarding her knowingly false statements to the Personnel Board surrounding the Smith Report.

B. Nancye Jones knowingly makes a false statement of material fact to the Florida Bar in connection with a disciplinary matter by providing the following statement in her

[53] Nancye Jones concedes what she must. Of course, Ms. Jones cannot dispute that Mr. McKinnon made three prior statements that there is no final investigative report and/or Captain Doffiemyer's report is the only investigative report because these statements are clearly contained in the record.

written response to the Florida Bar in reference to Captain Dofflemyer: "Ms. Dofflemyer advised that her scheduled retirement date was Friday, April 13, 2012 and that she would be in and out of her office during that week, cleaning out her personal effects and taking care of last minute matters. Noting that she had been subpoenaed by Mr. Gardner, she indicated that if 'they' wanted her to testify, it better be before noon on the 13th as she was going to be celebrating her retirement with friends thereafter."[54]

Nikki Dofflemyer never made this statement. First, Nikki Dofflemyer denies ever having made that statement. Second, it is implausible and contrary to common sense that Ms. Jones now readily recalls with such specificity this statement she attributes to Nikki Dofflemyer 1000 days after Ms. Jones claims Captain Dofflemyer made the statement at their April 05, 2012 meeting and 993 days after Ms. Jones made the following statement at the Personnel Board hearing and:

. . . we don't believe that um her whether she's going to be here or not as you know these subpoenas are non-binding um *I have* no *idea what Cap- I, I know Captain Dofflemyer is scheduled to retire I don't know when so* um *she may already be retired so um we don't have any way to force someone to be here.*

It is both common knowledge and common sense that recollections are fresher at or near the time of the statement and/or incident at issue. On April 12, 2012, precisely one week after the purported statement of Captain Dofflemyer that she would be retiring at noon on April 13, 2012 Nancye Jones, after failing to disclose her meeting with Captain Dofflemyer to the Personnel Board, told the Board in essence that she did not know when Captain Dofflemyer was scheduled to retire and that Captain Dofflemyer may have already retired on or before April 12, 2012; yet, in her December 31, 2013 written response to the Florida Bar in connection with my complaint against her, Ms. Jones claims to recall that Captain Dofflemyer stating that her retirement date was April 13, 2012. What is even more absurd is that Ms. Jones now recalls the specific time of day of noon that Nikki Dofflemyer was to retire on the 13th. Since it is impossible for Ms. Jones to reconcile these two statements, this begs the question: Was Ms. Jones lying then or is she lying now?

I submit she has lied in both instances. She lied at the P.B. hearing both affirmatively and by omission because she told the Personnel Board she did not know Captain Doffiemyer's retirement date and she did not disclose her meeting with Captain Dofflemyer and that during that meeting, Captain Dofflemyer told Ms. Jones if she was called to testify at my P.B. hearing, she would testify truthfully; that Ms. Jones advised Captain Dofflemyer she did not need to attend my P.B. hearing; and that Ms. Jones improperly confirmed Captain Doffiemyer's expressed understanding that her properly served subpoena was non-binding. She is lying in her response to the Florida Bar by stating that Captain Dofflemyer told her she would be in and out of her office during her last week with Volusia County so that Ms. Jones can use her feigned uncertainty as to Captain Doffiemyer's whereabouts as pretext to justify her statements to the Personnel Board that she did not know Captain Doffiemyer's retirement date and that Captain Dofflemyer may have already been retired as of April 12, 2012. She also lied to the Florida Bar by stating in her response that she made statements to the Personnel Board that she never made (see III C below).

C. Nancye Jones knowingly makes a false statement of material fact to the Florida Bar in connection with a disciplinary matter by providing the following statement in her written response to the Florida Bar in reference to Captain Dofflemyer: " . . . I told the board that I did not know if she was in the workplace because she had told me that her attendance her last week of work would be intermittent. I knew what her final official day was but was inarticulate in my comments to the board because I

[54] See p. 7 of 17 of Nancye Jones' response.

did not know where she was at that time. Again, these comments were not knowingly false and were not material to any issue before the personnel board."[55]

Nancye Jones falsely states that she was merely "inarticulate" in her statements to the Personnel Board regarding Captain Doffiemyer's retirement date and that she told the board that she did not know if Captain Dofflemyer was in the workplace. These statements to the Florida Bar are pure chicanery for several reasons:

1. In an incomplete statement in reference to Captain Dofflemyer, Nancye Jones told the Personnel Board: ***um I have*** no ***idea what Cap*** . . . . With these words, Ms. Jones conveyed the message that she had no knowledge of Captain Doffiemyer's employment status or whether Captain Dofflemyer intends to appear at the Personnel Board hearing.

2. However, if one accepts her statements to the Florida Bar as true, then it is clear that Nancye Jones had far more than an "idea" about Captain Dofflemyer; she had specific knowledge as to Captain Doffiemyer's employment status and plans. Her statements to the Bar show that Captain Dofflemyer would spend the final week of her retirement in and out of her office, cleaning out her office, and taking care of last minute matters and that Captain Dofflemyer made statements to Jones indicating that if I wanted her to testify, she would be available until noon on April 13, 2012, but thereafter would be unavailable as she would be celebrating her retirement with friends.

3. Nancye Jones stated to the Personnel Board: ***I, I know Captain Dofflemyer is scheduled to retire I don't know when so um she may already be retired . . . ;*** with these words, Ms. Jones clearly stated to the Personnel Board that:

a. Nancye Jones did not know when Captain Dofflemyer was scheduled to retire;

b. Captain Dofflemyer may have already retired on or before April 12, 2012, the day Nancye Jones uttered the statement to the Personnel Board.

4. However, referencing Captain Dofflemyer in her response to the Florida Bar, Nancye Jones clearly stated: "**I** knew what her final official day was . . . ."

5. Referencing Captain Dofflemyer in her response to the Florida Bar, Nancye Jones clearly stated: "**I** told the board that **I** did not know if she was in the workplace . . . ."

6. However, Nancye Jones never told the Personnel Board that she did not know if Captain Dofflemyer "was in the workplace."

Nancye Jones' characterization of her false statements to the Personnel Board as merely "inarticulate" is a perfect example of how she plays fast and loose with the truth. Despite her blatant attempts to spin her statements to the Personnel Board and render them innocuous, she cannot escape the fact that she very clearly stated to the Personnel Board that she did not know when Captain Dofflemyer was scheduled to retire and that indeed Captain Dofflemyer may have already retired on or before April 12, 2012. Note, that it is impossible for Ms. Jones to attempt to clean the obvious dishonesty from her statements to the Board without the use of more dishonesty to the Florida Bar, because in order to transform her statements to the Board into something less than a lie, she necessarily had to tell the Bar that she told the Board something about Captain Dofflemyer which she never did: "**I** told the board that **I** did not know if she was in the workplace . . . ." Again, that statement is not supported by the record and is outright false. With this statement to the Florida Bar, Nancye Jones is actually trying to sell the Florida Bar the idea that her statements to the Personnel Board in reference to Captain Dofflemyer were not really dishonest, because, what she really meant by: ***I, I know Captain Dofflemyer is scheduled to retire I don't know when so um she may already be retired*** is: technically speaking, I do not know Captain Doffiemyer's precise physical location at this moment. It becomes a clearly absurd argument when one equates unknown physical location with retirement; e.g.; I am presently unaware of Nancye Jones' physical location and whether she is in the workplace, but I do not suggest to the Bar that Ms. Jones has retired. Ms. Jones was aware of Captain Doffiemyer's retirement date, knew she was still in the employ of

[55] See p. 14 of 17 of Nancye Jones' response.

Volusia County, and purports to have knowledge that Captain Dofflemyer would be in and out of her office the week of her retirement and would make herself available to testify at the Personnel Board hearing until noon on Friday, April 13, 2012.

Of course, Ms. Jones' explanation excludes what is painfully obvious: As an attorney with at least 33 years of experience in the practice of law, when the issue of Captain Doffiemyer's whereabouts, employment status, or availability to testify arose, she would have been easily able to simply and candidly articulate to the Personnel Board that she met with Captain Dofflemyer only the week before and that Captain Dofflemyer stated that she would be in and out of her office but would be available to testify until noon on Friday, April 13, 2012, as she would be retired thereafter.

I request that the Florida Bar conduct a thorough investigation of these matters and impose disciplinary sanctions for unethical and unprofessional conduct by Nancye Jones.

Respectfully,

Richard S. Gardner

Volusia County
FLORIDA

221002
GARDNER, RICHARD S.
0000004014

12 APR 27 AM 9:55

County of Volusia
Personnel Action Form

Effective Date 01/16/2012
Employee ID 0000004014
Employee Name GARDNER, RICHARD S.
Original Appointment Date 05/12/1984

Previous	Personnel Action	New
	Personnel Action Code	LVOFA
	Personnel Action Code Description	LEAVE OF ABSENCE
	Personnel Action Reason Code	06
	Personnel Action Reason Description	SUSPENSION WITHOUT PAY
F	Employment Status Code	
POSITIVE PAID HOURLY EMPLOYEE	Employment Status Description	
001 / 570 / 8000	Fund/Department/Unit	
Beach Safety	Home Department Description	
Beach Safety	Home Unit Description	
221000 / 221002	Pay Location/Work Location	
0000217	Position Number	
Y	EEO Full-Time	
NONE	Union Affiliation	
	Probation Start Date	
	Probation End Date	
05/12/1984	Pay Progression Start Date	
01/01/2008	Benefits Progression Start Date	
05/12/1984	Leave Progression Start Date	
HPP8	Pay Class	
HOURLY POSITIVE PAY 8 HRS	Pay Class Description	
	Civil Service Status	
	Civil Service Status Description	
40	Time Class	
03024 / LIFEGUARD SUPERVISOR	Title Code/Title Description	
PERMANENT	Assignment Type	
	Override Leave Policy	
01P: $29.5385 30P: $18.4600	Pay Type/Pay Rate/% of Change	01P: $29.5385 ($0.0000) 36P: $18.4600 ($0.0000)
	Next Evaluation Date	10/19/2012

Comments

[0 comment(s)]

Recent ESMTs

10/01/2011	CPENC	1115110000000000080123
06/01/2011	DROP	0524110000000000082695
10/04/2004	CPENC	1014D8000000C00021106

Approvals

03/22/2012	HR Manager	dsauer
03/22/2012	HR Payroll 1	dsauer

Document ID: 03221200000000085015
Document Created: 03/22/2012 10:21:23
Document Creator: dsauer
DAT File Generated: 03/23/2012 14:48:50
Document Last Editor: dsauer
Document Last Saved: 03/22/2012 10:24:50

Exhibit A

Separation Agreement

The following are the terms of separation of employment between Volusia County Beach Services Sr. Lifeguard [redacted] and the County of Volusia:

The County of Volusia has agreed to the following:

1. Volusia County Department of Public Protection Investigation #2011-12-302 which was opened on December 14, 2011, will be closed with no findings.

2. The Volusia County personnel action form documenting the resignation of [redacted] will reflect a voluntary resignation in good standing. Separation paperwork submitted to the Florida Department of Law Enforcement, specifically CJSTC 61, will reflect a routine administrative voluntary separation not involving misconduct.

3. [redacted] will be paid for any hours of personal leave she has accrued as provided in the Volusia County Merit Rules and Regulations. In addition, her final two weeks of productive time will be waived but she will receive two weeks of pay for said time.

[redacted] has agreed to the following:

1. [redacted] will provide the documents which she was ordered to provide to Deputy Director Joseph Pozzo by memorandum dated December 7, 2011 no later than January 6, 2012.

2. [redacted] will submit a letter of resignation on December 23, 2011 with an effective date of January 7, 2012.

3. [redacted] will execute a general release of liability.

4. [redacted] will cooperate as a witness in the cases of Drury v. Volusia County and Benedetto v. Volusia County. In addition, she will cooperate as a witness in any personnel board appeal of Richard Gardner should such a hearing occur.

5. [redacted] will not be eligible for rehire with County of Volusia.

Dated this 23 day of December, 2011.

[redacted]

Joseph Pozzo, Deputy Director
Department of Public Protection

Exhibit B

Volusia County
FLORIDA

ORDER TO PRODUCE RECORDS

From: Joseph Pozzo, Deputy Director
Volusia County Department of Public Protection

To: Officer [redacted]

Re: Internal Affairs Investigation - 2011-09-297

YOU ARE HEREBY ORDERED to produce any and all personal cellphone records reflecting telephone calls and text messages sent or received by you, to and from Captain Richard S. Gardner, during hours when you were on duty with the Volusia County Division of Beach Safety, or working as an officer of the Volusia County Division of Beach Safety during an off-duty detail, from January 1, 2011 to October 18, 2011. Said records are to be obtained by you and delivered to Captain Nikki Dofflemyer, Internal Affairs Investigator, at 1300 Red John Road, Daytona Beach, Florida, no later than Monday, December 12, 2011.

DATED: December 7, 2011.

Joseph Pozzo, Deputy Director

Received by: [redacted]

Date:

Exhibit C

Return-path:	<melissa.murphy@cobbcole.com>
Received:	from covmailgate1.co.volusia.fl.us ([10.1.5.140])by co.volusia.fl.us with ESMTP; Fri, 23 Dec 2011 09:28:43 -0500
X-WSS-ID:	0LWNUVY-04-92V-02
X-TMWD-Spam-Summary:	TS=20111223142847; ID=1; SEV=2.4.2; DFV=B2011122314; IFV=NA; AIF=B2011122314; RPD=7.03.0049; ENG=NA; RPDID=7374723D303030312E3041303230230382E344546343 93031412E303033392C73733D312C72653D302E3030302C6667 733D30; CAT=NONE; CON=NONE; SIG=AAABAKR1FwAAAAAAAAAAANEQdWbAAH0=
Received:	from CCEX2010.cc.local (unknown [209.16.117.106])(using TLSv1 with cipher AES128-SHA (128/128 bits))(No client certificate requested)by covmailgate l.co.volusia.fl.us (Axway MailGate 5.0.0) with ESMTP id 2258CB6D1AF;Fri, 23 Dec 2011 09:28:45 -0500 (EST)
Received:	from CCEX2010.cc.local ([fe80::edeb:4f2d:b185:7ec2]) byCCEX2010.cc.local ([fe80::edeb:4f2d:b185:7ec2%14]) with mapi id14.01.0323.003; Fri, 23 Dec 2011 09:25:36 -0500
From:	Melissa Murphy <melissa.murphy@cobbcole.com>
To:	'Nancye Jones' <njones@co.volusia.fl.us>
Cc:	Mary Amy Efird <MEfird@co.volusia.fl.us>
Subject:	RE: Emailing: Separation.wpd
Thread-Topic:	Emailing: Separation.wpd
Thread-Index:	AQHMwXzUyJAg2N7vv06dP+NUAP8irZXpefuQ
Received(Date):	Fri, 23 Dec 2011 14:25:36 +0000
Message-iD:	<02379823620A4845861F01E5FBEFA3310E987920@CCEX2010.cc.local>
References:	<4EF44679.D8FF.00B3.1@co.volusia.fl.us>
In-Reply-To:	<4EF44679.D8FF.00B3.1@co.volusia.fl.us>
Accept-Language:	en-US
Content-Language:	en-US
X-MS-Has-Attach:	yes
x-originating-ip:	[209.4.189.136]
Content-Type:	multipart/mixed;boundary="_002_02379823620A4845861F01E5FBEFA3310E987920CCEX2010cclocal_"
MIME-Version:	1.0
Attachment	Attachment

Nancye,

Here is my revised version. I just added a date and the case number. Let me know when it is in final format and I will have [redacted] come sign it.

Thank you,

Melissa

----Original Message----
From: Nancye Jones [mailto:njones@co.volusia.fl.us]
Sent: Friday, December 23, 2011 9:15 AM
To: Melissa Murphy
Cc: Mary Amy Efird
Subject: Emailing: Separation.wpd

Melissa,

Exhibit D

Here's a quick draft which I think covers most of the terms. I did not include the EAP sessions for obvious reasons. Feel free to hack it up any way you think it needs to be edited - We will format it when we get it finalized.

I am working on editing our liability release and will send that to you shortly for review. Thanks Nancye

Your message is ready to be sent with the following file or link attachments:

Separation.wpd

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

Nancye R. Jones
Assistant County Attorney
County of Volusia
123 W. Indiana Avenue
DeLand, Fl 32720
(386) 736-5950

Separation Agreement

The following are the terms of separation of employment between Volusia County Beach Services Sr. Lifeguard [redacted] and the County of Volusia:

The County of Volusia has agreed to the following:

1. Volusia County Department of Public Protection Investigation #2011-12-302 which was opened on December 14, 2011, will be closed with no findings.
2. The Volusia County personnel action form documenting the resignation of [redacted] will reflect a voluntary resignation in good standing. Separation paperwork submitted to the Florida Department of Law Enforcement, specifically CJSTC 61, will reflect a routine administrative voluntary separation not involving misconduct.
3. [redacted] will be paid for any hours of personal leave she has accrued as provided in the Volusia County Merit Rules and Regulations. In addition, her final two weeks of productive time will be waived but she will receive two weeks of pay for said time.

[redacted] has agreed to the following:

1. [redacted] will provide the documents which she was ordered to provide to Deputy Director Joseph Pozzo by memorandum dated December 7, 2011 no later than January 6, 2012.
2. [redacted] will submit a letter of resignation on December 23, 2011 with an effective date of January 7, 2011.
3. [redacted] will execute a general release of liability.
4. [redacted] will cooperate as a witness in the cases of Drury v. Volusia County and Benedetto v. Volusia County. In addition, she will cooperate as a witness in any personnel board appeal of Richard Gardner should such a hearing occur.