BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re DOUGLAS UNDERHILL,	Complaint Nos. 20-060, 20-073, & 20-103 (consolidated)
Respondent.	DOAH Case Nos. 21-3753EC, 21-3754EC & 21-3755EC (consolidated)
	Final Order No. 22-041

FINAL ORDER AND PUBLIC REPORT

This matter came before the State of Florida Commission on Ethics ("Commission"), meeting in public session on October 21, 2022, on the Recommended Order ("RO") of an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH") rendered on August 4, 2022.

Background

This matter began with the filing of three separate ethics complaint by David M. Bear, Joe Ward, and John F. Stenicka ("Complainants") against Douglas Underhill ("Respondent" or "Underhill"). The complaints raised a variety of allegations, and the Executive Director of the Commission on Ethics determined that each of them, separately, was legally sufficient to indicate a possible violation of the Code of Ethics (Part III, Chapter 112, Florida Statutes). Accordingly, Commission staff was ordered to investigate the complaints, which were consolidated, resulting in a Report of Investigation ("ROI") dated April 19, 2021.

By order rendered September 15, 2021, the Commission found probable cause to believe, based on the investigation and the amended recommendation of the Commission's Advocate, that the Respondent had violated the following statutory provisions:[1]

- Section 112.313(6), Florida Statutes, by publicly sharing and/or publishing confidential transcripts, including the minutes, of meetings of the Escambia County Board of County Commissioners.

- Section 112.313(8), Florida Statutes, by disclosing or using information not available to members of the general public (i.e., shade meeting transcripts, including the minutes) and gained by reason of his official position for his personal gain or benefit or the personal gain or benefit of another person or business entity.

- Section 112.3148(3), Florida Statutes, by soliciting a donation(s) from Fred Hemmer, a vendor doing business with the Respondent's agency, or a lobbyist who lobbies the Respondent's agency, or the principal of such lobbyist.

- Section 112.3148(4), Florida Statutes, by knowingly accepting a contribution(s) exceeding $100 to a legal defense fund from vendor(s) doing business with the Respondent's agency, or lobbyist(s) who lobby the Respondent's agency, or principal(s) of such lobbyist(s).

- Section 112.3148(8), Florida Statutes, by failing to timely file a CE Form 9, "Quarterly Gift Disclosure" disclosing contribution(s) exceeding $100 to a personal legal defense fund, and/or by failing to fully disclose information required to be reported on a CE Form 9, "Quarterly Gift Disclosure" regarding contribution(s) exceeding $100 to a personal legal defense fund.

- Section 112.3148(8), Florida Statutes, by failing to file a CE Form 9 "Quarterly Gift Disclosure" disclosing free personal legal services exceeding $100 from the Clark Partington law firm.

- Section 112.3148(8), Florida Statutes, by failing to file a CE Form 9, "Quarterly Gift Disclosure" disclosing reimbursed travel expenses and shipping costs exceeding $100.

The matter was forwarded to DOAH for assignment of an ALJ to conduct a formal hearing and prepare a recommended order. A formal evidentiary hearing was held before the ALJ on May

[1] In its order, the Commission also found no probable cause on several additional allegations not discussed herein.

9 and 10, 2022, via Zoom. The Advocate filed a proposed recommended order with the ALJ on July 5, 2022. The Respondent also filed a proposed recommended order with the ALJ that same day, July 5, 2022.

On August 4, 2022, the ALJ entered his Recommended Order ("RO") finding that the Respondent violated Section 112.3148(4) by knowingly accepting one or more contributions to his legal defense fund from vendors and/or lobbyists, violated Section 112.3148(8) by failing to disclose contributions to his legal defense fund, and violated Section 112.3148(8) by failing to disclose a gift of legal services. The ALJ recommended that the Respondent receive a public censure and reprimand regarding the violations of Sections 112.3148(4) and 112.3148(8), and, regarding the particular allegation that he failed to disclose a gift of legal services, that he also receive a civil penalty of $5,000.

In addition, the ALJ recommended in the RO that the Respondent had not violated Section 112.313(6) or 112.313(8) by releasing the shade transcripts, that the Respondent had not violated Section 112.3148(3) by soliciting donations to his legal defense fund from Fred Hemmer, and that the Respondent had not violated Section 112.3148(8) by failing to disclose reimbursed travel and shipping expenses.

On August 19, 2022, the Advocate submitted to the Commission her exceptions to the RO. The Respondent submitted to the Commission a Response to the Advocate's exceptions on August 29, 2022. Meanwhile, on August 19, 2022, the Respondent submitted to the Commission his exceptions to the RO. And the Advocate then submitted to the Commission a Response to the Respondent's exceptions on August 25, 2022. Both the Respondent and the Advocate were notified of the date, time, and place of the Commission's final consideration of this matter; and both were given the opportunity to make argument during the Commission's consideration.

Standards of Review

An agency may not reject or modify findings of fact made by an ALJ unless the agency first determines from a review of the entire record, and states with particularity in its order, that the findings of fact were not based upon competent, substantial evidence or that the proceedings upon which the findings were based did not comply with essential requirements of law. See Freeze v. Department of Business Regulation, 556 So. 2d 1204 (Fla. 5th DCA 1990), and Florida Department of Corrections v. Bradley, 510 So. 2d 1122 (Fla. 1st DCA 1987). "Competent, substantial evidence" has been defined by the Florida Supreme Court as such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusions reached." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

The agency may not reweigh the evidence, may not resolve conflicts in the evidence, and may not judge the credibility of witnesses, because such evidential matters are within the sole province of the ALJ. See Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). An ALJ is entitled to rely on the testimony of only a single witness in making a fact finding, even if that testimony is contradicted by the testimony of a number of other witnesses. See Lantz v. Smith, 106 So. 3d 518, 521 (Fla. 1st DCA 2013). In addition, an agency may not reject findings of fact that are supported by competent substantial evidence in order to substitute new fact findings, even if the alternate findings are also supported by competent substantial evidence. See Lantz, 106 So. 3d at 521. Consequently, if the record of the DOAH proceedings discloses any competent substantial evidence to support a finding of fact made by the ALJ, the Commission on Ethics is bound by that finding.

Under Section 120.57(1)(l), Florida Statutes, an agency may reject or modify the conclusions of law over which it has substantive jurisdiction and the interpretations of

administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion or interpretation and must make a finding that its substituted conclusion or interpretation is as or more reasonable than that which was rejected or modified.

An agency may accept the entirety of a hearing officer's findings of fact and conclusions of law, yet still reject the recommended penalty and substitute an increased or decreased recommended penalty. See Criminal Justice Standards and Training Comm'n v. Bradley, 596 So. 2d 661, 664 (Fla. 1992). Under Section 120.57(1)(l), Florida Statutes, an agency may reduce or increase the recommended penalty only upon a review of the complete record, stating with particularity the agency's reasons for reducing or increasing the recommended penalty, and citing to the record in support of its action.

Having reviewed the RO, the complete record of the proceeding, the Advocate's exceptions, the Respondent's response to the Advocate's exceptions, the Respondent's exceptions, and the Advocate's response to the Respondent's exceptions, and having heard argument from the Advocate and the Respondent's counsel, the Commission on Ethics makes the following rulings, findings, conclusions, recommendations, and dispositions:

Rulings on Advocate's Exceptions

The Advocate submitted twelve exceptions to the RO.

Advocate's Exceptions 1 through 4: Paragraphs 39, 40, 44, and 45

In her first four exceptions, the Advocate takes issue with paragraphs 39, 40, 44, and 45 of the RO, which are designated as findings of fact in the RO and provide:

39. Ms. Rogers's testimony on this point is speculative in nature.[2] While Commissioner Underhill's reputation among certain constituents in Escambia County may have been enhanced by his release of the shade transcripts, the Commission presented no documentary evidence (such as polling) to support this argument. Also, a review of the shade transcripts does not clearly and convincingly establish that Commissioner Underhill could have reasonably expected any such benefits to result from his transmittal of the shade meeting transcripts.

40. Moreover and as explained in the Conclusions of Law below, the Code of Ethics does not prohibit a government official from obtaining an incidental or indirect political benefit through his or her official position. While one could take issue with Commissioner Underhill releasing the shade transcripts, that act was not inconsistent with how he views his role as a Commissioner.

44. Given the circumstances that were present in May 2020, Ms. Rogers correctly advised the Board that the shade transcripts should not be released, and Commissioner Bergosh was well-advised to accept her counsel. Even at that point in time, it was not inconceivable that the agreement between Escambia County and ECUA [Emerald Coast Utility Authority] could fall through. Commissioner Underhill recklessly disregarded Ms. Rogers's advice, and his decision to release the shade transcripts was ill-advised. His statements to the Board following the shade transcript release strongly suggest that he came to that realization after the fact. One statement even suggests he had realized that he was in jeopardy of being investigated by the Commission. However, reckless and/or ill-advised actions do not necessarily amount to corrupt actions. At the time he released the shade transcripts, Commissioner Underhill believed he was acting consistently with the performance of his public duties. While one could justifiably question the wisdom of Commission[er] Underhill's action, it was not corrupt within the meaning of section 112.313(6).

45. In sum, there is no clear and convincing evidence that Commissioner Underhill violated sections 112.313(6) or 112.313(8)

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[2] Following this sentence in paragraph 39, the ALJ included a footnote stating "In assessing Ms. Rogers's testimony, the undersigned has been cognizant of the possibility that her testimony could be biased due to the contentious nature of her relationship with Commissioner Underhill. While the undersigned considered Mrs. Rogers's testimony about how Commissioner Underhill benefitted from the transcript released to be speculative, the undersigned also found it to be sincere."

> by obtaining a prohibited benefit through his release of the shade transcripts. Unlike in previous prosecutions, the Commission did not establish a direct connection between the action at issue and the alleged benefit being sought.

These paragraphs refer to the allegations that the Respondent violated Sections 112.313(6) and 112.313(8) by releasing the transcripts of the County Commission's shade meetings.

The Advocate raises two arguments in response to these paragraphs. First, regarding Section 112.313(6), the Advocate claims there is no competent substantial evidence supporting the ALJ's fact finding that the Respondent's release of the transcripts was done without a corrupt intent.[3] In particular, the Advocate challenges the finding in paragraph 40 that the release of the transcripts was "not inconsistent with how [the Respondent] views his role as a Commissioner[,]" the finding in paragraph 44 that the Respondent "believed he was acting consistently with the performance of his public duties," and the finding in paragraph 44 that "[w]hile one could justifiably question the wisdom of Commissioner Underhill's actions [regarding the transcripts' release], it was not corrupt within the meaning of section 112.313(6)."

As support for rejecting or modifying these fact findings concerning whether the Respondent acted with a corrupt intent, the Advocate asserts that evidence was introduced demonstrating the Respondent should have realized the release of the transcripts was improper, such as that the County Attorney personally had instructed him not to release the transcripts and that the County Commission had been instructed that the transcripts could not be released without

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[3] The term "corruptly," as used in Section 112.313(6), is defined in Section 112.312(9), Florida Statutes, to mean an:

> act done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.

a vote of the full Commission. The Advocate argues that, in light of this, there was "no record evidence to support" the ALJ's finding that the Respondent did not act "corruptly."

To the extent that the Advocate is challenging the evidentiary basis for the ALJ's finding of no "corrupt intent," the finding is one of ultimate fact and, therefore, can be altered only if it is not supported by competent, substantial evidence. See Goin v. Commission on Ethics, 658 So. 2d 1131 (Fla. 1st DCA 1995); Holmes v. Turlington, 480 So. 2d 150 (Fla. 1st DCA 1985). Here, competent substantial evidence supported the finding that the Respondent did not have a "corrupt intent" in releasing the transcripts. Such evidence includes, but is not limited to, his testimony that he was a custodian of the County's public records and that he would be in violation of the law—notwithstanding the opinion of the County Attorney—were he not to release the transcripts (RO, paragraph 28; DOAH Transcript, p. 270-271), that he did not trust the County Attorney's legal opinion on whether the transcripts should be released (RO, paragraph 28; DOAH Transcript, p. 270-272), that he had a "moral obligation" to release the records as their "proper custodian" (RO, paragraph 28; DOAH Transcript, p. 272), that the County Attorney's decision to "stamp everything confidential [] does not get me off the hook" (RO, paragraph 28; DOAH Transcript, p. 273), that he believed the release of the transcripts was required by the Sunshine Law (RO, paragraphs 28 and 32; DOAH Transcript, p. 273, 279), that he believed the underlying legal disputes requiring confidentiality had been settled (RO, paragraph 30; DOAH Transcript, p. 264, 266-267), and that it was his "job" to release the transcripts as "government is absolutely dependent upon a knowledgeable and engaged citizenry." (RO, paragraph 31; DOAH Transcript, p. 277).

As previously mentioned, the Advocate emphasizes other testimony to show the Respondent either realized—or should have realized—that the records were still confidential. She also argues that, even if the Respondent mistakenly believed the records could be released, he can

still be found in violation of Section 112.313(6) because "ignorance or a mistaken understanding of the law is no excuse for noncompliance[.]" However, a violation of Section 112.313(6) requires "corrupt" conduct, meaning, as explained above, an action done with a "wrongful intent." For this reason, and unlike other statutes at issue in this matter, a public officer or employee cannot be found in violation of Section 112.313(6) if they are simply mistaken; a "wrongful intent" is needed to violate the prohibition. Moreover, questions of intent are tied to the credibility of the witness and, as such, are solely within the province of the ALJ and cannot be reweighed by the Commission. While there may have been evidence supporting a finding that the Respondent knew the release of the shade transcripts was contrary to his public duties, there was alternate evidence—in the form of the Respondent's testimony summarized above—indicating he thought he was acting in conformity with his public duties, despite having received contrary advice from the County Attorney. The Commission does not have the authority to second-guess the ALJ's treatment of this conflicting evidence, or to question the ALJ's finding that the Respondent's testimony in this respect was credible. For this reason, we reject the Advocate's exceptions to the extent that they challenge the ALJ's finding that the Respondent's release of the transcripts was not "corrupt" under Section 112.313(6).

The Advocate's second argument regarding these paragraphs is that competent substantial evidence does not support the ALJ's finding that the release of the transcripts conferred no benefit. This pertains to the finding in paragraph 39 of the RO that "a review of the shade transcripts does not clearly and convincingly establish that Commissioner Underhill could have reasonably expected any such benefits to result from his transmittal of the shade meeting transcripts[,]" and the finding in paragraph 45 that "there is no clear and convincing evidence that Commissioner Underhill violated sections 112.313(6) and 112.313(8) by obtaining a prohibited benefit through

his release of the shade transcripts. Unlike in previous prosecutions, the Commission did not establish a direct connection between the action at issue and the alleged benefit being sought."

The Advocate argues the evidence demonstrated the Respondent benefitted from the release of the transcripts, and that Kemp Evans, the recipient of the transcripts, obtained a benefit as well. To the extent that the Advocate is asserting the Respondent personally obtained a benefit from the release of the transcripts, competent substantial evidence supports the ALJ's finding that he did not. As noted in paragraphs 31 and 32 of the RO, the Respondent testified the "only reason" that he released the transcripts was to ensure a "knowledgeable and engaged citizenry," that he "can't imagine how [he] could have" obtained any benefit, particularly as he was not intending to run for reelection, and that "there was no gain to be had other than the gain that we all share, right, by having government in the Sunshine." (DOAH Transcript, p. 277-279). The testimony, in itself, provides competent substantial evidence to support the ALJ's finding that the Respondent did not benefit, even if conflicting evidence may have been presented.

Turning to the Advocate's argument that the Respondent was acting for the benefit of Kemp Evans, the recipient of the confidential transcripts, we are mindful that, when reviewing an ALJ's fact findings, an agency may not substitute its findings for those of the ALJ or make new findings on its own. See Abrams v. Seminole County School Bd., 73 So. 3d 285, 294 (Fla. 5th DCA 2011). In the paragraphs cited by the Respondent, the ALJ makes no findings of fact concerning Mr. Evans. However, previously in the RO—in paragraph 27—the ALJ did find the Respondent "transmitted the shade transcripts to Kemp Evans in response to a public records request from Mr. Evans." This is based on testimony offered by the Respondent during the DOAH hearing. (DOAH Transcript, p. 428, 430-432). And paragraph 44 of the RO makes additional findings that, "[g]iven the circumstances that were present in May 2020"—at the time that the transcripts were released—

the County Attorney properly advised "that the shade transcripts should not be released," that "Commissioner Underhill recklessly disregarded [this] advice," and that "his decision to release the shade transcripts was ill-advised." This is based on testimony and evidence during the DOAH hearing, indicating, among other things, that the County Attorney had advised the transcripts were confidential until related litigation was concluded, that the transcripts were flagged as confidential, and that Mr. Evans had no means to see them until the Respondent released them. (DOAH Transcript, p. 272-273, 318, 320-323, 428, 430-432; DOAH Advocate's Exhibit 8). It is not, then, substituting a finding or creating a new finding to reiterate these previous findings—made in the RO and supported by evidence—in the paragraphs now being challenged by the Advocate. In short, given what the ALJ found in these paragraphs, no further fact finding is needed to show a benefit to Mr. Evans under Section 112.313(8). Stating that Mr. Evans experienced a benefit simply reiterates the ALJ's prior findings, which indicate the Respondent allowed Mr. Evans to review documents that the law would not have allowed Mr. Evans to access.

Given the foregoing discussion, the Advocate's first, second, and third exceptions are rejected, while her fourth exception is granted in part, although the proposed language by the Advocate is not used; parts of paragraph 45 are modified so that the paragraph now reads:

> 45. In sum, there is no clear and convincing evidence that Commissioner Underhill violated sections 112.313(6) or 112.313(8) by obtaining a prohibited benefit <u>for himself</u> through his release of the shade transcripts. Unlike in previous prosecutions, the Commission did not establish a direct connection between the action at issue and the alleged benefit being sought. <u>However, considering that the transcripts were released to Kemp Evans, as noted in paragraph 27, and that the transcripts were still confidential at the time, as discussed in paragraph 44, no further fact finding is needed to show that Commissioner Underhill's actions in releasing the transcripts resulted in a personal gain or benefit for Mr. Evans inasmuch as it allowed Mr. Evans access to documents to which he was not entitled.</u>

Advocate's Exceptions 5 through 6: Heading on page 25, and Paragraphs 72, 76, and 77

In her next four exceptions, the Advocate takes issue with the heading on page 25 of the RO, and with paragraphs 72, 76, and 77 of the RO, which are designated as conclusions of law in the RO and provide:

> [Heading on page 25] The Commission Failed to Prove by Clear and Convincing Evidence that Commissioner Underhill Violated Sections 112.313(6) and 112.313(8) by Releasing the Shade Transcripts
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> 72. As found above, the undersigned found no clear and convincing evidence that Commissioner Underhill released the shade meeting transcripts in order to benefit the campaign of his aide, to damage the campaign of Commissioner Bergosh, or to damage the campaigns of other Commissioners seeking reelection. There is no evidence that Commissioner Underhill sought or gained any such benefit. Also, the evidence does not clearly and convincingly demonstrate that Commissioner Underhill could have reasonably expected any such benefits to result from his transmittal of the shade meeting transcripts.
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> 76. Previous Commission final orders have turned on whether there was a direct connection between the conduct at issue and the benefit allegedly sought. [citations omitted]
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> 77. Therefore, to whatever extent that transmitting the shade transcripts to Mr. Evans benefitted Commissioner Underhill politically by enhancing his desire to be viewed by his constituents in Escambia County as an opponent of "business as usual," that act conferred no "special privilege, benefit, or exemption," and Commissioner Underhill did not violate sections 112.313(6) or 112.313(8).[4]

[4] This paragraph contains a footnote stating "Given that Commissioner Underhill testified that he will not be seeking reelection, any political benefit to be gained from releasing the transcripts would be *de minimis*." This footnote is not affected by any modifications in this Final Order and Public Report and will remain intact.

These paragraphs, similar to those addressed in the Advocate's first four exceptions, relate to the allegations that the Respondent violated Sections 112.313(6) and 112.313(8) by releasing the transcripts of the County Commission's shade meetings.

The Advocate argues these conclusions of law must be modified or rejected because clear and convincing evidence was introduced showing the Respondent's actions were "corrupt," and resulted in a benefit to both himself and Mr. Evans. The Advocate also asserts that paragraph 76—which cites numerous cases wherein a public officer or employee was found in violation of Section 112.313(6)—reflects a misunderstanding of the law, as the ALJ does not account for the statute being violated when the benefit being sought is for another. Based on these arguments, the Advocate asks that the Commission substitute legal conclusions finding the Respondent, in releasing the shade transcripts, violated both Sections 112.313(6) and 112.313(8).

To the extent that the Advocate's exceptions concern rejecting or modifying the ALJ's legal conclusions regarding Section 112.313(6), they are rejected. As previously explained, the ALJ's decision that the release of the shade transcripts was not "corrupt conduct" hinges upon a credibility determination that the Commission is not allowed to disturb. For this same reason, the Commission rejects any alteration to paragraph 76, which entirely concerns Section 112.313(6), and, contrary to the Advocate's statements, does cite several cases in which an improper benefit was being sought for an individual or entity other than the public officer or employee in question. See In re Dustin Daniels, Complaint No. 18-168; Final Order No. 21-004 (finding Section 112.313(6) was violated when a public employee oversaw the sending of an email, utilizing public software, that benefitted the Florida Democratic Party); In re Lynch, Complaint No. 92-147; Final Order No. 94-044 (finding Section 112.313(6) was violated when an on-duty tax collector staff member handed out cards advocating her preferred candidate in a political race).

However, to the extent that the Advocate's exceptions concern rejecting or modifying the ALJ's conclusions regarding Section 112.313(8) to reflect that Mr. Evans benefitted from the release of the transcripts, they are accepted.[5] The "corrupt intent" required for a violation of Section 112.313(6) is not an element of Section 112.313(8), so any lack of evidence concerning intent does not preclude the Commission from finding a violation of Section 112.313(8). And, as explained above, the ALJ's fact findings indicate that Mr. Evans did gain from the release of the shade transcripts, inasmuch as the Respondent gave him access to confidential document to which he was not entitled. We recognize that an agency is prohibited from labeling or categorizing a new finding of fact as a legal conclusion of law because, otherwise, an agency would be able to use a conclusion of law to negate each fact finding with which it disagrees, even if those findings have adequate evidentiary support. See Pillsbury v. State, 744 So. 2d 1040, 1041 (Fla. 2d DCA 1999). However, we do not view altering the conclusions of law to recognize the benefit to Mr. Evans as surreptitiously engaging in fact finding. As discussed above, the ALJ found the Respondent released the records to Mr. Evans and indicated they were still confidential at time of release. To not use these findings—made by the ALJ—to reach the legal conclusion of a violation of Section 112.313(8) would render the order legally inconsistent. For this reason, where the paragraphs challenged by the Advocate concern Section 112.313(8), we find the legal conclusions substituted below to be as or more reasonable than the language recommended by the ALJ.

For the foregoing reasons, the Advocate's seventh exception is rejected, while her fifth, sixth, and eighth exceptions are granted in part, although the proposed language by the Advocate

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[5] While the Advocate also claims the ALJ's legal conclusions regarding Section 112.313(8) should be rejected as the Respondent received a benefit from the release of the shade transcripts, we reject this argument, because, as previously discussed, competent substantial evidence supports the ALJ's fact findings that he did not.

is not used; the header on page 25 of the RO, and parts of paragraph 72 and 77, are modified so that they now read:

> [Heading on page 25] The Commission Failed to Prove by Clear and Convincing Evidence that Commissioner Underhill Violated Sections 112.313(6) ~~and 112.313(8)~~ by Releasing the Shade Transcripts, but Established That the Release Violated Section 112.313(8)
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> 72. As found above, the undersigned found no clear and convincing evidence that Commissioner Underhill released the shade meeting transcripts in order to benefit the campaign of his aide, to damage the campaign of Commissioner Bergosh, or to damage the campaigns of other Commissioners seeking reelection. There is no evidence that Commissioner Underhill sought or gained any such benefit. Also, the evidence does not clearly and convincingly demonstrate that Commissioner Underhill could have reasonably expected any such benefits to result from his transmittal of the shade meeting transcripts. However, as previously found, there is evidence that Commissioner Underhill obtained a prohibited benefit for Mr. Evans through the release of the transcripts.
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> 77. Therefore, to whatever extent that transmitting the shade transcripts to Mr. Evans benefitted Commissioner Underhill politically by enhancing his desire to be viewed by his constituents in Escambia County as an opponent of "business as usual," that act conferred no "special privilege, benefit, or exemption," as would be needed to find a violation of Section 112.313(6) ~~and Commissioner Underhill did not violate sections 112.313(6) or 112.313(8)~~. Moreover, given the previous finding that the release of the transcript was not "corrupt," Commissioner Underhill did not violate Section 112.313(6). That being said, Section 112.313(8) does not require evidence of corrupt conduct, and, as previously found, the release of the transcripts did confer a gain to Mr. Evans inasmuch as he obtained information that was still confidential and to which he was not entitled. Considering this gain to Mr. Evans, Commissioner Underhill did violate Section 112.313(8).[6]

Advocate's Exceptions 9 and 10: Heading on page 30, and Paragraph 83

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[6] The footnote to paragraph 77 will remain fully intact in the place in the paragraph designated by the ALJ.

In exceptions 9 and 10, the Advocate takes issue with the header on page 30 of the RO, and with paragraph 83, which is designated in the RO as a conclusion of law, and provide:

> [Heading on page 30] The Commission Failed to Prove by Clear and Convincing Evidence that Commissioner Underhill "Solicited" Donations to His Legal Defense Fund from Fred Hemmer in Violation of Section 112.3148(3)
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> 83. Given that there is no evidence that Commissioner Underhill directly contacted Mr. Hemmer in order to obtain a donation to his legal defense fund, the Advocate failed to prove by clear and convincing evidence that Commissioner Underhill violated section 112.3148(3).

These paragraphs relate to the allegation that the Respondent violated Sections 112.3148(3) by soliciting through a "GoFundMe" page a donation from Fred Hemmer, whom the ALJ previously found—in paragraph 47 of the RO—to be a vendor and/or lobbyist of the Respondent's agency.

The Advocate argues these conclusions of law should be modified or rejected as the ALJ incorrectly concluded that, to violate Section 112.3148(3), the solicitation had to be personal or direct. The Advocate asserts this interpretation limits the reach of the statute, does not reflect the statute's legislative intent, and fails to read the statute in conjunction with the definition of "solicitation" in Section 496.404, Florida Statutes, which sets out standards and practices for charitable organizations soliciting funds.

We note the Advocate does not take exception to the following fact findings and legal conclusions, which would also have to be modified, at the very least, according to her argument: Paragraph 49 (which states "[t]he Advocate failed to prove by clear and convincing evidence that Commissioner Underhill violated section 112.3148(3)"), Paragraph 81 (which provides the dictionary definitions that "strongly imply that someone must personally or directly contact a

prospective donor in order to be 'soliciting'"), and Paragraph 82 (stating that the statute "must be strictly construed, with any ambiguity interpreted in favor of Commissioner Underhill").

We accept the Advocate's exceptions as we find the term "soliciting" under Section 112.3148(3) includes passive gift requests through a "GoFundMe" page, and that this interpretation is as or more reasonable than the ALJ's legal conclusion that "soliciting" for purposes of the statute must be personal or direct. The following discussion explains our reasoning.

Overlaying any questions of statutory interpretation regarding the Code of Ethics (Part III, Chapter 112, Florida Statutes) is the principal that its statutes, due to their penal nature, must be strictly construed in favor of the party against whom they are to be applied. See Latham v. Comm'n on Ethics, 694 So. 2d 83, 86 (Fla. 1st DCA 1997). The ALJ recognizes this in paragraph 82 of the RO. However, even under a strict interpretation, it cannot be said that the term "soliciting" requires a personal or direct request.

The polestar of interpreting any statute is to ascribe its terms their plain and ordinary meaning. See Lopez v. Hall, 233 So. 3d 451, 453 (Fla. 2018); School Bd. of Palm Beach Cnty. v. Survivors Charter Schools, Inc., 3 So. 3d 1220, 1233 (Fla. 2009); Nehme v. Smithkline Beecham Clinical Labs., Inc., 863 So. 2d 201, 204-205 (Fla. 2003). Only if the term in question is then still ambiguous should other methods of statutory interpretation—such as analyzing how the term is used in other statutes—be used. See Lopez, 233 So. 3d at 453. And courts have found that, in ascertaining a term's plain and ordinary meaning, a dictionary definition may be used. See Shepard v. State, 259 So. 3d 701, 705 (Fla. 2018); School Bd. of Palm Beach Cnty., 3 So. 3d at 1233; Nunes v. Herschman, 310 So. 3d 79, 82 (Fla. 4th DCA 2021).

In paragraph 81 of the RO, the ALJ cites the Webster's Dictionary definition of "soliciting," which contains four alternate definitions (defining the term as "to make petition to," "to approach

with a request or plea," "to urge strongly," and "to try to obtain by usually urgent requests or pleas"). The ALJ writes these definitions "strongly imply" personal or direct contact. We do not agree. A public officer or employee may, without personally or directly contacting or conversing with a prohibited donor, make a general petition, approach a community or group with a request or plea, or make a general request phrased in an urgent or strong manner. These definitions in no way require that the request be personal or direct in nature, and, instead, encompass requests that are more general.

This more general approach is also taken in the language of Section 112.3148(3), which does not specify that the solicitation be personal or direct, which shows an intent for the statute to encompass even passive solicitations, such as those made through a "GoFundMe" account. And to interpret the term "soliciting" to require a personal or direct request creates a loophole in the law that permits those subject to Section 112.3148(3) to ask for monetary gifts from sources prohibited by the statute, which is the exact conduct that the statute was designed to prevent. Indeed, under this argument, so long as the request does not specify any particular person from whom a gift is being sought—but is, instead, a general plea or request to the community, whether through social media or the Internet, a fundraiser open to all, or a comment made to a sufficiently large group of people—the prohibition in the statute would not be triggered. Such an interpretation does not reflect either the clear purpose behind the statute or the reality of our political landscape, where fundraising is often accomplished through general solicitations over the Internet. It also encourages those subject to the statute to skirt its application simply by keeping their gift requests broadly phrased. In this respect, we note the Respondent's testimony that, when setting up his "GoFundMe" account, he had the opportunity to include language instructing County vendors and

lobbyists not to donate, yet his account webpage shows he did not include such limitations. (DOAH Transcript, p. 250-251; DOAH Advocate's Exhibit 26).

We also note that interpreting the term "soliciting" to encompass passive solicitations, such as those made through a "GoFundMe" account, reflects how the term has been used in other statutory contexts. For example, as noted in the Advocate's exceptions, Section 496.404(24), Florida Statutes, which sets out standards and practices for charitable organizations seeking funds, contains a definition of "solicitation" that includes the following:

> (a) Making any oral or written request;
> (b) Making any announcement to the press, on radio or television, by telephone or telegraph, or by any other communication device concerning an appeal or campaign by or for any charitable organization or sponsor or for any charitable or sponsor purpose; [or]
> (c) Distributing, circulating, posting, or publishing any hand bill, written advertisement, or other publication that directly or by implication seeks to obtain any contribution[.]

None of these examples of "solicitation" under Section 496.404(24) require a personal or direct request of a particular donor.

Drawing together the threads of this analysis, we find that interpreting "soliciting" under Section 112.3148(3) to encompass a passive request—such as through a "GoFundMe" account—is as or more reasonable than the ALJ's interpretation of the term. Therefore, we grant the Advocate's ninth and tenth exceptions, although only the proposed language in the Advocate's ninth exception is used, and make additional modifications to other paragraphs of the RO; paragraphs 49, the header on page 30 of the RO, and paragraphs 81 through 83, are modified so that they now read:

> 49. There is no persuasive evidence that Commissioner Underhill directly contacted Mr. Hemmer in order to obtain a donation to his legal defense fund. ~~Accordingly, the Advocate failed to prove by~~

~~clear and convincing evidence that Commissioner Underhill violated section 112.3148(3).~~

[Heading on page 30] The Commission Proved ~~Failed to Prove~~ by Clear and Convincing Evidence that Commissioner Underhill "Solicited" Donations to His Legal Defense Fund from Fred Hemmer in Violation of Section 112.3148(3)

81. Section 112.3148(3) utilizes the term "soliciting," and that term is alternatively defined as: (a) to make petition to; entreat; (b) to approach with a request or plea; (c) to urge strongly; and (d) to try to obtain by usually urgent requests or pleas. *See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/solicit* (last accessed July 28, 2022). ~~The foregoing definitions strongly imply that someone must personally or directly contact a prospective donor in order to be "soliciting."~~

82. Given the penal nature of this proceeding, section 112.3148(3) must be strictly construed, with any ambiguity interpreted in favor of Commissioner Underhill. *Ocampa v. Dep't of Health*, 806 So. 2d 633, 634-635 (Fla. 1st DCA 2002); *Elmariah v. Dep't of Pro. Regul.*, 574 So. 2d 164, 165 (Fla. 1st DCA 1990). That being said, the definitions listed in paragraph 81 do not limit "soliciting" to circumstances of personal or direct contact with a prospective donor, but extend to requests collectively made to a group or community, such as funding requests through a GoFundMe account.

83. While ~~Given that~~ there is no evidence that Commissioner Underhill directly contacted Mr. Hemmer in order to obtain a donation to his legal defense fund, the evidence shows Commissioner Underhill requested funding through a GoFundMe account, and that Mr. Hemmer, a County vendor and/or lobbyist, responded, which is all that is needed to demonstrate "soliciting" under Section 112.3148(3). Accordingly, the Advocate proved ~~failed to prove~~ by clear and convincing evidence that Commissioner Underhill violated section 112.3148(3).

Advocate's Exceptions 11 and 12: Paragraphs 95 and 96

In exceptions 11 and 12, the Advocate takes issue with paragraphs 95 and 96, which make recommendations concerning the penalty to be assessed. The Advocate argues these paragraphs should be modified to indicate that the Respondent violated Section 112.3148(3) by soliciting a

donation from a vendor, lobbyist or principal of a lobbyist, and that his release of the confidential shade transcripts constitute violations of both Sections 112.313(6) and 112.313(8).[7] The Advocate does not recommend an alternate penalty to those imposed by the ALJ, but asserts instead that the Commission should find the Respondent "incapable of performing or unwilling to uphold his oath of office and perform the duties of the office at an acceptable level of in an acceptable way," and then "impose an appropriate penalty."

To the extent that these exceptions recommend finding the Respondent in violation of Section 112.313(6), they are rejected pursuant to the discussion above.

To the extent that exception 11 recommends finding the Respondent in violation of Section 112.3148(3), it is granted, based on the previous discussion interpreting the term "soliciting" to encompass a passive request, such as through a "GoFundMe" account.

And to the extent that exception twelve recommends finding the Respondent in violation of Section 112.313(8), it is granted, based on the previous discussion and record citations concerning how the Respondent's release of the shade transcripts to Mr. Evans conferred a benefit to Mr. Evans by allowing him to access and review confidential records to which he was not entitled.

In short, the Advocate's eleventh exception is granted, and her twelfth exception is granted in part, although the proposed language by the Advocate in exception twelve is not used. Paragraphs 95 and 96 are modified so that they now read:

> 95. Commissioner Underhill violated section 112.3148(3) by soliciting a donation from a vendor, lobbyist, or principal of a

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[7] In particular, the Advocate asserts the RO should be amended to indicate the release of the transcripts constitutes "corrupt" conduct under Section 112.313(8). This would be legally incorrect, as acting "corruptly" is not an element of Section 112.313(8), but only of Section 112.313(6).

> lobbyist. In his Proposed Recommended Order, Commissioner Underhill concedes that he violated section 112.3148(4) by knowingly accepting a gift from a lobbyist. He also concedes that he violated section 112.3148(8) by failing to disclose a gift to his legal defense fund. Commissioner Underhill argues that his penalty should be limited to a public censure and reprimand.
>
> 96. The most serious charge concerned Commissioner Underhill's release of the shade transcripts. While the undersigned considers Commissioner Underhill's release of the shade transcripts to be reckless and ill-advised, the evidence did not establish that his action was corrupt within the meaning of section 112.13(6). However, as explained above, the Commissioner Underhill's release of the transcript to Mr. Evans did constitute a violation of Section 112.313(8).

Additional changes to the RO reflecting recommended penalties for the violations of Sections 112.3148(3) and 112.313(8) will be explained in the "Disposition" portion of this order, below.

Rulings on the Respondent's Exceptions

The Respondent submitted four exceptions to the RO.

Respondent's Exception 1: Paragraph 58

In his first exception, the Respondent takes issue with paragraph 58 of the RO, which is designated as a finding of fact in the RO and provides:

> 58. While Commissioner Underhill disputed the amount of money he owed Clark Partington, there is no doubt that Commissioner Underhill owed Clark Partington far more in 2018 and 2019 than the $300 he paid to the firm in 2017. As noted above, Clark Partington represented Mr. Hemmer in at least some of his dealings with Escambia County and/or the Board. Owing a debt of several thousand dollars to Clark Partington was a potential conflict of interest that should have been disclosed. In sum, the totality of the evidence clearly and convincingly demonstrates that Commissioner Underhill should have disclosed his nonpayment of fees as a gift.

This paragraph refers to the allegation that the Respondent violated Section 112.3148(8) by failing to disclose on a CE Form 9 certain legal services provided by the Clark Partington law firm.

The Respondent specifically takes exception to the second sentence of this paragraph—that finds Clark Partington represented Mr. Hemmer in dealings with Escambia County and its County Commission—and argues there is no competent substantial evidence in the record supporting this finding of fact. The Respondent then goes on to challenge the other factual allegations in the paragraph, ultimately asking the Commission to reject the paragraph entirely and replace it with findings indicating the Respondent never received a gift of legal services. The Respondent argues this request is supported by hearing testimony and evidence that he was not sent all communications regarding the legal bills, the amount he owed the law firm was actively in dispute, and he paid the bill as soon as the amount owed was clarified.

We reject the Respondent's exception, both the specific claim regarding Mr. Hemmer and the more general claim that the evidence did not show the legal services were a gift. Testimony at the hearing from Mr. Hemmer supports the ALJ's finding that Clark Partington represented him for compensation on at least one matter involving the Escambia County Commission. (DOAH Transcript, p. 29-30). In addition, hearing testimony indicated Clark Partington's engagement letter specified payment for legal services was due within 30 days after receipt of an invoice (DOAH Transcript, p. 226-227; Advocate's Exhibit 32B, p. 2) and that the Respondent did not pay every 30 days after receiving an invoice (DOAH Transcript, p. 226-227; Advocate's Exhibit 32, p. 8). In addition, evidence indicated that while the Respondent initially retained Clark Partington in June 2015 (Transcript, p. 224), he did not pay his legal fees—which eventually totaled over $5,000—until May 2020, nearly five years later, with the exception of making three separate payments totaling $300 in 2017. (DOAH Transcript, p. 232-234; Respondent's Exhibit 1; Advocate's Exhibit 32, p. 10-11, 28). In other words, for nearly five years, the Respondent paid only a nominal amount of his legal fees, despite an obligation to pay sooner. Moreover, hearing

testimony indicated Clark Partington only sent him a final invoice in May 2020 after an ethics complaint about the matter had been filed. (DOAH Transcript, p. 234). In short, considering the foregoing, competent substantial evidence supports the ALJ's findings that the legal fees should have disclosed as a gift in paragraph 58. For this reason, we reject the Respondent's first exception.

Respondent's Exceptions 2 and 3: Paragraphs 90 and 98

In his second and third exceptions, the Respondent takes issue with paragraphs 90 and 98 of the RO, which are designated as conclusions of law in the RO and provide:

> 90. The Advocate proved by clear and convincing evidence that Commissioner Underhill violated section 112.3148(8) by failing to disclose a gift of legal services from the Clark Partington law firm. While Commissioner Underhill asserts that he forgot that he owed payment for attorney's fees to the firm and disputed the amount once he was provided an invoice in 2017, he cites to no authorities establishing those two circumstances as defenses to a failure to disclose. Also, there is no doubt that Commissioner Underhill owed Clark Partington far more in 2018 and 2019 than the $300 he paid to the firm in 2017. In sum, it is clear that Commissioner Underhill owed a debt to Clark Partington in 2018 and 2019, and that he should have disclosed his nonpayment of fees as a gift.
>
> 98. Commissioner Underhill's nonpayment of legal services to Clark Partington should have been disclosed because that conceivably could have represented a conflict of interest. Commissioner Underhill's failure to do so is exacerbated by the fact that he paid nothing toward that debt in 2018 and 2019, and ultimately paid after his nonpayment was the subject of an ethics complaint. Commissioner Underhill's failure to disclose his nonpayment to Clark Partington justifies a $5,000 fine.

The Respondent challenges these legal conclusions—and argues paragraph 98 should be deleted in its entirety—by reiterating his arguments from his exception to paragraph 58. In essence, the Respondent urges the Commission to modify or reject these legal conclusions and find he was in not in violation of Scction 112.3148(8) as he did not receive a gift. We, in turn, rely on our above discussion of his first exception. Because competent substantial evidence supports the ALJ's fact

findings regarding whether the legal fees should have been disclosed as a gift, we decline to modify the ALJ's legal conclusions that the Respondent was in violation of Section 112.3148(8). The Respondent's second and third exceptions, therefore, are rejected.

Respondent's Exception 4: Recommendation on page 35

In his fourth exception, the Respondent challenges the recommended penalty of $5,000 regarding the violation of Section 112.3148(8). The Respondent asserts that because the legal fees from Clark Partington were not a gift, the $5,000 penalty should be removed from the ALJ's Recommendation. Given the previous discussion in which we decline to disturb the fact findings or legal conclusions regarding this allegation, we similarly decline to remove the corresponding penalty and reject this fourth exception.

Findings of Fact

Except to the extent modified above in granting certain of the Advocate's exceptions, the Commission on Ethics accepts and incorporates into this Final Order and Public Report the findings of fact in the Recommended Order from the Division of Administrative Hearings.

Conclusions of Law

Except to the extent modified above in granting certain of the Advocate's exceptions, the Commission on Ethics accepts and incorporates into this Final Order and Public Report the conclusions of law in the Recommended Order from the Division of Administrative Hearings.

Disposition

As discussed above, the Commission on Ethics determines that the Respondent has violated Sections 112.313(8), 112.3148(3), 112.3148(4), and has committed two violations of Section

112.3148(8), Florida Statutes.[8] The question then becomes what penalty for each of these violations is appropriate to recommend. We modify and/or increase the penalty recommendations made in the RO as follows:

Regarding the violation of Section 112.313(8), in the past, when confronted with a violation of this provision, the Commission has recommended imposing a penalty of a public censure and reprimand, along with a civil fine of $7,500. See In re Mickey Rosado (Complaint 07-001; Final Order No. 10-096). It has also recommended imposing a penalty of public censure and reprimand, as well as a civil penalty of $10,000. See In re Drew Gribnitz, (Complaint 99-097; Final Order No. 02-020). Given these previous recommendations, as well as the previous discussion and record citations concerning how the Respondent's release of the shade transcript to Mr. Evans conferred a benefit to Mr. Evans by allowing him to access and review confidential records to which he was not entitled. (DOAH Transcript, p. 272-273, 318, 320-323, 428, 430-432; DOAH Advocate's Exhibit 8), we recommend a penalty of a public censure and reprimand, along with a civil penalty of $10,000, for this violation.

Regarding the violation of Section 112.3148(3), we note that the County Attorney wrote a memorandum to the Respondent on September 22, 2017—well before the Respondent established the "GoFundMe" account in 2019 (DOAH Transcript, p. 241)—specifically advising him that any fundraising pertaining to a legal defense fund was subject to the gift law requirements of Chapter 112, Florida Statutes, and that he should not "solicit a gift from any vendor or lobbyist of the County[.]" (DOAH Transcript, 355-356; DOAH Advocate's Exhibit 18). We also note the

[8] And the Commission on Ethics determines the Respondent did not violate Section 112.313(6), Florida Statutes, concerning the release of the shade transcripts, and did not violate Section 112.3148(8), Florida Statutes, concerning the reimbursement of travel expenses and shipping costs.

evidence shows the Respondent, when establishing his "GoFundMe" account, did not avail himself of opportunities to restrict vendors and lobbyists of the County from contributing. (DOAH Transcript, p. 250-251; DOAH Advocate's Exhibit 26). Accordingly, we recommend a civil penalty of $6,250 for this violation.

Regarding the violation of Section 112.3148(4), we note the ALJ has recommended a public censure and reprimand for this allegation. However, considering that the Respondent previously had been instructed in writing by the County Attorney that he would be in violation of the gift law requirements were he to accept a gift towards any legal defense fund of over $100 from a lobbyist or vendor of the County (DOAH Transcript, p. 355-356; DOAH Advocate's Exhibit 18), we recommend a civil penalty of $6,250, as well as a public censure and reprimand, for this violation.

Regarding the violation of Section 112.3148(8) concerning the contribution exceeding $100 to the Respondent's legal defense fund, we note the ALJ has recommended a public censure and reprimand for this offense. However, considering that the Respondent had been previously instructed in writing by the County Attorney that any fundraising through a legal defense fund would be subject to the gift law requirements, including the requirement to "report every gift [received] from a non-lobbyist or non-vendor on [a] quarterly gift reporting form" (DOAH Transcript, p. 355-356; DOAH Advocate's Exhibit 18), as well as testimony from the Respondent that he is "certain" that, when he opened his "GoFundMe" account, the County Attorney advised him to disclose contributions on a gift disclosure form (DOAH Transcript, p. 236), we recommend a civil penalty of $6,250, as well as a public censure and reprimand, for this violation.

Regarding the violation of Section 112.3148(8) concerning his failure to report legal services from the Clark Partington law firm, we note the ALJ has recommended a public censure

and reprimand, along with a civil penalty of $5,000. However, considering the evidence—previously cited—that the firm's engagement letter specified each invoice was to be paid within 30 days of receipt (DOAH Transcript, p. 226-227; Advocate's Exhibit 32B, p. 2), that the Respondent did not pay every 30 days after receiving an invoice (DOAH Transcript, p. 226-227; Advocate's Exhibit 32, p. 8), that the Respondent accrued nearly $5,000 in legal fees and did not pay for over five years, except for three nominal payments of $100 (DOAH Transcript, p. 232-234; Respondent's Exhibit 1; Advocate's Exhibit 32, p. 10-11, 28), and that the Respondent was sent a final invoice only after an ethics complaint in the instant matter was filed (DOAH Transcript, p. 234), we recommend increasing the civil penalty to $6,250, as well as a public censure and reprimand, for this violation.

Finally, considering the cumulative severity of these five violations, and relying on the record cites made in this section of the final order, we recommend that the Respondent be removed from office.

ORDERED by the State of Florida Commission on Ethics meeting in public session on October 21, 2022.

October 26, 2022
Date Rendered

John Grant
Chair, Florida Commission on Ethics

THIS ORDER CONSTITUTES FINAL AGENCY ACTION. ANY PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER HAS THE RIGHT TO SEEK JUDICIAL REVIEW UNDER SECTION 120.68 AND SECTION 112.3241, FLORIDA STATUTES, BY FILING A NOTICE OF ADMINISTRATIVE APPEAL PURSUANT TO RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, WITH THE CLERK OF THE COMMISSION ON ETHICS, P.O.

DRAWER 15709, TALLAHASSEE, FLORIDA 32317-5709, OR AT THE COMMISSION'S PHYSICAL ADDRESS OF 325 JOHN KNOX ROAD, BUILDING E, SUITE 200, TALLAHASSEE, FLORIDA 32303; AND BY FILING A COPY OF THE NOTICE OF APPEAL ATTACHED TO WHICH IS A CONFORMED COPY OF THE ORDER DESIGNATED IN THE NOTICE OF APPEAL ACCOMPANIED BY THE APPLICABLE FILING FEES WITH THE APPROPRIATE DISTRICT COURT OF APPEAL. THE NOTICE OF ADMINISTRATIVE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE DATE THIS ORDER IS RENDERED.

cc: Mr. Mark Herron, Attorney for Respondent
Ms. Elizabeth A. Miller, Commission Advocate
Mr. Rick Figlio, Attorney for Complainant
Ms. Alexandra Akre, Attorney for Complainant
Mr. Joe Ward, Complainant
Mr. John F. Stenicka, Complainant
The Honorable G.W. Chisenhall, Division of Administrative Hearings