STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: RENEE LEE,	)	
	)	
Respondent.	)	Case No. 11-6063EC
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on May 9, 2012, by video teleconference at sites in Tampa and Tallahassee, Florida, before Administrative Law Judge Elizabeth W. McArthur of the Division of Administrative Hearings.

APPEARANCES

For Advocate: Melody A. Hadley, Esquire
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Tallahassee, Florida 32399

For Respondent: Mark Herron, Esquire
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STATEMENT OF THE ISSUE

The issue in this case, as stipulated by the parties, is whether Respondent violated section 112.313(6), Florida Statutes (2006),[1/] by drafting a legal opinion that justified a one-percent raise in salary for herself and others without the need for approval from the Hillsborough Board of County Commissioners.

PRELIMINARY STATEMENT

On September 25, 2009, George Niemann filed an ethics complaint against Renee Lee (Respondent) with the Florida Commission on Ethics (Commission), pursuant to chapter 112, Part III, Florida Statutes, known as the Code of Ethics for Public Officers and Employees (Code of Ethics). The Commission conducted an investigation and issued its Report of Investigation on July 25, 2011. On August 8, 2011, the Advocate for the Commission (Advocate) submitted her recommendation that the Commission find probable cause with regard to the allegations in the complaint. On September 14, 2011, the Commission issued an Order finding probable cause to believe that Respondent, while serving as the Hillsborough County attorney, violated section 112.313(6)(Misuse of Public Position) by drafting a legal opinion that justified a one-percent raise in salary for herself and others without the need for approval from the Hillsborough Board of County Commissioners (HBCC).

The Commission then forwarded the complaint and related materials to the Division of Administrative Hearings for the purpose of conducting a public hearing as provided by section 112.322 and Florida Administrative Code Rule 34-5.010.

The hearing was initially scheduled for April 3 and 4, 2012. A joint motion for continuance was granted, and the hearing was rescheduled for May 9 and 10, 2012.

Prior to the hearing, the parties filed a Joint Prehearing Stipulation in which they stipulated to several facts and conclusions of law. The parties' stipulations have been incorporated below to the extent relevant.

At the hearing, the Advocate presented the testimony of Respondent, Frances (Beth) Novak, Patricia (Pat) Bean, and Christina Swanson. The parties offered Joint Exhibits 1 through 13, which were admitted in evidence; Joint Exhibit 13 presented additional testimony in the form of a Transcript of the deposition of Walter (Wally) Hill, with deposition exhibits.

The one-volume Transcript of the hearing was filed on May 15, 2012. The parties agreed to file proposed recommended orders by June 11, 2012. Both parties timely filed proposed recommended orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to this action, Respondent served as the Hillsborough County attorney.

2. Respondent was hired in August 2004, by Pat Bean, then-Hillsborough County administrator. Initially, Respondent reported to the county administrator, who served as Respondent's supervisor. However, shortly after Respondent was hired, a newly approved Hillsborough County Charter took effect and changed the organizational structure by taking the county attorney position

out from under the supervision of the county administrator. Under the new county charter, Respondent's line of reporting was directly to the HBCC, which served as her supervisor.

3. Respondent's employment agreement with Hillsborough County (Agreement) obligated her to perform the functions and duties attendant to the position of Hillsborough County attorney. The Agreement specified that Respondent "shall devote all of her professional or business time, attention and energies to Hillsborough legal work[.]" Respondent generally described the scope of her duties as overseeing the prosecution and defense of all actions related to Hillsborough County, rendering legal opinions and advising administrative departments on issues that were brought to the Office of the County Attorney (Office), and supervising the attorneys and staff within the Office.

4. The administrative business of the Office was managed by a non-lawyer office administrator, Beth Novak. Respondent directly supervised Ms. Novak, who, in turn, supervised the administrative support staff and handled such administrative tasks as preparing draft budgets for Respondent's approval and addressing the Office's computer technology needs.

5. The Office was divided functionally into separate legal sections covering different practice areas, such as land use, real estate, commercial transactions, labor and employment/human resources, and litigation. Each legal section had a managing

attorney who supervised several attorneys within the section. Although Respondent generally supervised these sections, she described the sections as largely functioning independently, such that she often did not get involved in the matters they handled.

6. Jennie Tarr was the managing attorney for the labor and employment/human resources legal section, which handled all non-litigation employment-related issues. For example, the director of employee benefits in the county's human resources department would bring issues related to employee benefits to Jennie Tarr; if a legal opinion were needed on an employee benefit issue, it would have been requested from Jennie Tarr.

7. Respondent sometimes would receive requests for legal opinions herself. On occasion, she would issue the legal opinion herself. Otherwise, she would delegate the work to a subordinate lawyer by sending an email to someone in the appropriate legal section and asking them to respond directly to the requestor.

8. In 2006, County Administrator Bean initiated a budget efficiency challenge to department directors, asking them to submit budget efficiency proposals for 2006 and 2007 that would reduce departmental costs without reducing services.

9. This was not a completely new effort; department directors had been asked for years to find ways to cut costs in their budget proposals, without great success. Therefore, in 2006, discussions were held between Pat Bean, the deputy county

administrator, Wally Hill, and the budget director, Eric Johnson, to identify options for rewarding department directors who submitted budget proposals that met the efficiency challenge. They wanted to provide a reward that would also serve as an incentive for department directors who came up short to do a better job cutting their budgets in the future.

10. Hillsborough County had three different employee award programs. One was the extra mile award program. The recipient of an award under this program would be issued a certificate with no monetary value, to simply recognize the employee's efforts in going the "extra mile." All Hillsborough County employees were eligible for this non-financial award, if nominated. Typically, the deputy county administrator, who functioned as the county's chief operating officer, would identify extra mile awardees and coordinate with staff in the human resources department to have the certificates prepared. Ms. Bean, Mr. Hill, and Mr. Johnson decided to use this award program to recognize all department directors who submitted qualifying budget efficiency proposals.

11. In addition, Ms. Bean, Mr. Hill, and Mr. Johnson discussed whether they also could use other award options that offered a financial reward and incentive. First, they considered whether they could make use of the productivity award program. Under this award program, employees who made suggestions that resulted in cost savings could be nominated for a one-time cash

award, with the decisions on award issuance made by an executive committee. The amount of this cash award was measured by a percentage of the cost savings of the employee's suggestion, up to a cap. In October 2006, Mr. Hill sought approval to issue productivity awards to department directors who submitted qualifying budget efficiency proposals. However, his request was denied, because department directors were not eligible for productivity awards; that award program was only available to lower-level employees, and was not available to anyone at the department-director level or above.

12. The only remaining option for providing a financial reward and incentive in connection with the efficiency budget proposals was the county's third award program, the special one-percent salary increase award. This award program was initiated at the suggestion of a former county administrator who recognized that reward systems were in place for the county's classified employees under the control of the Civil Service Board, but that some device was needed to reward unclassified county employees for superior or outstanding performance.

13. Ms. Bean and Mr. Hill believed that the special one-percent salary award could be used to reward department directors who submitted qualifying budget efficiency proposals with three exceptions: the one-percent salary increase award could not be given to department directors who were already

earning the maximum allowable salary level for their positions, because their salaries could not be increased; the one-percent salary increase also could not be given to former department directors who had left their county jobs after submitting qualifying budget proposals, because they were not earning a salary that could be increased; and the one-percent salary increase could not be given to the three department directors who were contract employees under contract with the HBCC, because it was believed that they were not eligible. These three contract department directors were Ms. Bean, Respondent, and Rick Garrity, who was the director of the county's Environmental Protection Commission. They decided, in addition to the extra mile awards, to go ahead with the one-percent salary increase award for all department directors who submitted qualifying budget efficiency proposals and who could receive the salary increase. For those directors falling in one of the three exception categories, they would just receive extra mile awards.

14. Extra mile award certificates were prepared for all department directors submitting qualifying budget efficiency proposals and were presented at a January 25, 2007, Board meeting. The extra mile award recipients were also announced and honored at a staff budget-kickoff meeting held on February 1, 2007. At the February 1 budget kickoff, the honored department directors were given one of two different memos acknowledging

their award(s). For those department directors just receiving an extra mile award certificate, such as Respondent, their memo acknowledged their budget efficiency proposal for which they were being given an extra mile award certificate. For those department directors who were also considered eligible for a one-percent salary increase award, their memo acknowledged their budget efficiency proposal for which they were being given an extra mile award certificate, and also, for which they would be receiving a one-percent salary increase. As stated in the memo, the one-percent salary increase was awarded retroactive to January 7, 2007.

15. Respondent did not attend the budget kickoff. However, she had received her extra mile award certificate, dated January 25, 2007, and she also received a February 1, 2007, memo, acknowledging her extra mile award (but not a one-percent salary increase award), based on her department's qualifying budget efficiency proposal.

16. After the meeting, the Office administrator, Ms. Novak, sent a curious email to Respondent, stating:

> At the budget kickoff meeting this morning, Wally handed out "Extra Mile Award" memos to some of the Department Directors, Rick Garrity, and you for your work during the last budget cycle on efficiency measures. Wally announced that each of you would be given a $1,000 award! Congratulations!

No explanation was given for this message; Ms. Novak testified that she did not recall these events or the email. The information in the email was, at best, garbled, starting with the inexplicable reference to a $1,000 cash award. In addition, Ms. Novak apparently had not been aware that there were two different versions of memos. The memo with a subject line called "Extra Mile Award," described in the email, was the version given to Respondent and others falling in one of the three exception categories, and the contents of that memo make clear that the recipient is only receiving an extra mile award certificate. The subject line of the other memo version was "Recognition of efficiency." This version of the memo was given to department directors who also received the special one-percent salary increase award, as the contents of that different memo makes clear.

17. Mr. Hill did not recall making any announcement of the financial awards. If any such announcement was made, it would stand to reason that the announcement would have tracked the contents of the two different February 1, 2007, memos--that those department directors receiving an "extra mile award" memo were recipients of the extra mile award only, and that those department directors receiving a "recognition of efficiency" memo were recipients of both the extra mile award and a one-percent salary increase award.

18. Respondent testified that she spoke with Ms. Novak about Ms. Novak's email "later that afternoon" when Respondent questioned Ms. Novak about whether Respondent could really receive a financial award. Respondent elaborated as follows:

> I was concerned about this being the Productivity Award. And she said that it wasn't the Productivity Award. And I was really very skeptical about receiving an award. And she said, "oh yeah, you have that provision in your contract." You know, "let me get it for you." And she brought my contract into my office. And you know, it was turned to the benefit section of it. And that's the section that she referred to.

19. Approximately 90 minutes after Ms. Novak's email to Respondent, Respondent sent an email to Ms. Bean and Mr. Hill, in which she stated as follows:

> After attending the Budget kick off meeting this morning Beth [Novak] reminded me that a provision in my contract allows me to receive the award . . . see page 10, Section E. which states:
>
> Hillsborough agrees to make available to the Attorney such other benefits that are not specifically covered by this agreement as they now exist, and may be amended from time to time, for other employees of Hillsborough. . . .
>
> Thank you for the award.
>
> Renee Francis Lee, County Attorney

20. Contrary to Respondent's testimony, one of the few things that Ms. Novak recalled clearly about the events in this time period was that it was Respondent who asked Ms. Novak to

get Respondent's contract and that Ms. Novak was not asked her opinion on that contract, nor did she recall offering her opinion. Ms. Novak's version of the events is accepted as more credible than Respondent's version. It is not credible that Ms. Novak, a non-lawyer, would spontaneously offer advice to Respondent regarding the interpretation of Respondent's Agreement, much less that a "very skeptical" Respondent would be immediately convinced by this non-lawyer's legal opinion. Instead, the implication of the credible testimony is that Respondent wanted to attribute the suggestion and rationale that she could accept a financial award to someone other than herself.

21. Despite the fact that Respondent's email to Ms. Bean and Mr. Hill did not explicitly refer to the salary increase award, it was interpreted by Ms. Bean and Mr. Hill to mean that Respondent believed she was eligible for the one-percent salary increase award. Up to that point, Mr. Hill and Ms. Bean believed that Respondent was not eligible because of her Agreement with the HBCC. Likewise, they believed that neither Ms. Bean nor Dr. Garrity, the other two department directors under contract with the HBCC, were eligible. Based on Respondent's email suggesting otherwise, Ms. Bean had the matter referred to the human resources department to resolve.

22. According to Respondent, the next day (February 2, 2007), she received a telephone call from Christina Swanson asking her for an opinion on the eligibility of Respondent, Ms. Bean, and Dr. Garrity for the one-percent salary award. Ms. Swanson was the division director of employee benefits in the human resources department. She was acting in place of the department director in following up on this matter.[2/]

23. Ms. Swanson had been contacted by Debbie Dahma, an employee in the executive compensation division of the human resources department. Ms. Dahma told Ms. Swanson that Respondent had requested a one-percent salary increase award and asked Ms. Swanson to find out if Respondent was eligible. Because Respondent was the one who requested the award, Ms. Swanson thought it was appropriate to call Respondent directly. Ms. Swanson told Respondent that she understood that Respondent had requested to be eligible for the one-percent salary increase and asked her for a written legal opinion. Ms. Swanson explained that she asked for a legal opinion, in writing, "knowing the sensitivity of the issue[.]" She also explained that she did not ask Jenny Tarr for this legal opinion because she usually brought "benefit" issues to Ms. Tarr, whereas this was a salary issue involving a specific employee's contract.

24. Ms. Swanson said that she asked Respondent to give her a written legal opinion addressing whether Respondent, Ms. Bean, and Dr. Garrity--the three department directors under contract with the HBCC--were eligible for the one-percent salary increase award. Ms. Swanson did not give Respondent any deadline by which, or time frame within which, she wanted or needed the legal opinion.

25. Respondent testified that she was busy on something else that day, February 2, 2007, and as a result, this matter sat on her desk all day. At the end of the day, she decided to just handle it herself rather than to delegate it to Jenny Tarr or some other lawyer, because "the contract was right there." In addition, Respondent testified that "I think, you know, for some reason I feel like I remember that they were in a rush for something or somebody was going on vacation. Something was happening that they needed it or wanted it right away. I had not gotten to it all day, so I stayed actually and wrote the opinion myself." Respondent's feeling that she may have been asked to expedite the legal opinion is rejected as not credible and contradicted by Ms. Swanson's clear recollection that no time frame was given.[3/]

26. After admittedly not working on this matter all day, Respondent issued her legal opinion by email sent to Ms. Swanson,

at 5:29 p.m., on February 2, 2007. The legal opinion, in its entirety provided:

> Christina,
>
> You have requested that I review the contracts of three employees (Garrity, Bean and Lee) to determine if they are eligible to receive the 1% salary award granted to the management staff who found efficiencies in their budget which contributed to approximately $17 million savings in the 2006-2007 budget.
>
> I do not have access to Garrity's contract, but will be happy to review it when you forward it to me.
>
> As it relates to the Bean contract, language supporting the award can be found in Section 15, entitled Other Terms and Conditions of Employment, subsection B. reads [sic] as follows:
>
> All provisions of the Hillsborough County Charter and Code, and regulations and rules of the County relating to vacation and sick leave, retirement and pension system contributions, holidays, and **other benefits** and working conditions as they now exist or hereafter may be amended, also shall apply to Employee **as they would to other managerial employees of the County**, in addition to said benefits enumerated specifically for the benefit of the Employee except as herein provided.
>
> As it relates to the Lee contract, language supporting the award can be found in Section XVI, entitled General Provisions, subsection E. which reads as follows:
>
> Hillsborough agrees to make available to the Attorney such **other benefits** that are not specifically covered by this agreement as they now exist, and may be amended from time

> to time, for other employees of Hillsborough.
>
> Please let me know if you have any other questions.
>
> Renee Francis Lee, County Attorney
> [address, phone, email address]

27. Although Respondent's legal opinion acknowledged that her task was to review the contracts, the legal opinion did not identify other provisions of the contracts that could bear on the framed question of eligibility "to receive the one-percent salary award." For example, in reviewing Respondent's Agreement, well before one finds the "General Provisions" section quoted, in part, in Respondent's opinion, one would find Section III entitled, "Compensation." This section provided in pertinent part:

> Hillsborough agrees to pay the Attorney for services rendered pursuant hereto an annual base salary of One Hundred Seventy Thousand Dollars ($170,000), payable in installments at the same time that other employees of Hillsborough are paid. Hillsborough shall consider additional salary or benefit increases as it may deem appropriate no later than 60 days after completion of the Attorney's annual performance evaluation[.]

Respondent's legal opinion does not discuss the Compensation section or why she concluded, if she did, that this section's procedure for considering "additional salary or benefit increases" was deemed not applicable to a "1% salary award." Similarly, Respondent's legal opinion does not discuss or assess

the applicability of the "Salary" section in Ms. Bean's contract, which is similar to the "Compensation" section in Respondent's Agreement.

28. In her legal opinion, Respondent represents that she has quoted Section XVI, subsection E, of her Agreement in its entirety by stating that the provision "reads as follows[.]" Contrary to that representation, Respondent only selectively quoted from the cited subsection, omitting the following sentence that comes after the sentence quoted in the legal opinion:

> These benefits will include, but not be limited to cafeteria plan options and contributions to the Florida Retirement System, holidays, and any other benefits for specified sick leave accrual as are provided for Hillsborough employees.

The omitted language would have reasonably suggested analysis, or at least consideration of, the legal principles of contract interpretation set forth in Florida cases by which the meaning of a general term (such as "but not be limited to") is determined by reference to the specific terms with which it is grouped.[4/] Application of this sort of analysis could reasonably lead one to conclude that this subsection has application to employee benefits provided across-the-board to all county employees by virtue of their status as county employees, because that appears to be the nature of the specific benefits

mentioned. Respondent's legal opinion, by selectively quoting from the subsection of her Agreement that she chose to address, omitted the legal analysis that would follow from the omitted contract language.

29. Respondent's legal opinion separately sets forth certain language from Ms. Bean's contract and from Respondent's Agreement, without any discussion or analysis of the significance of differences in the quoted language. For example, the provision relied on to support a one-percent salary award to Ms. Bean refers to benefits "as they would [apply] to other managerial employees of the County." In contrast, the quoted language from Respondent's Agreement refers to benefits "for other employees of Hillsborough County." Respondent's legal opinion does not discuss the significance of this difference, despite the fact that the issue as framed in the legal opinion is the eligibility for a one-percent salary award granted to "management staff" in connection with their budget efficiency proposals. Any analysis of the different contract terms could have led Respondent to conclude that this award was only available to managerial employees, and not to all employees of the county.

30. In this regard, Respondent's framing of the issue is itself inconsistent with the facts, which were that this one-percent salary increase award was only available to certain

managerial employees, i.e., those who served as department directors. For example, Ms. Novak, the Office administrator, was a managerial employee, but she was not the department director. So too, the managing attorneys of each of the Office's legal sections were managerial employees, but not department directors. Therefore, had Respondent assessed the significance of the "managerial employees" language in Ms. Bean's contract, she might have concluded that this award was not available to all other managerial employees of the county.[5/]

31. Respondent's legal opinion, on its face, appears to acknowledge the nature of the award at issue, i.e., that it is the special one-percent salary increase award. However, Respondent testified that she misunderstood the nature of the award she was being asked to opine on and that her confusion was caused, in part, by Ms. Swanson reading to her a description of a one-time cash award program that was not a salary increase. Respondent's testimony was not credible and was inconsistent with other testimony of both Ms. Swanson and Respondent, herself.

32. Respondent testified that she believed the award was a $1,000 one-time cash award. While this testimony would be consistent with Ms. Novak's misstatement in her email, Respondent also testified that she was concerned that the award

was a productivity award and that she pointedly asked Ms. Novak and was reassured that it was not a productivity award. There were only two types of financial awards--if the award was not a productivity award, then it had to be a special one-percent salary increase award. Respondent's testimony that she did not understand that she was addressing a one-percent salary increase award is belied by her use of the phrase "1% salary award" in the legal opinion and by her own expressed certainty that this was not a productivity award (which would have been the only type of award providing a one-time cash payment).

33. Respondent also attempted to blame Ms. Swanson for the confusion and uncertainty about the nature of the award on which she opined. Respondent testified that Ms. Swanson did not appear to know very much about the award at issue. Inconsistently, Respondent also testified that Ms. Swanson actually read to her a description of the award from the consultant's study that created the award program, which is how Respondent was led to believe it was a one-time cash payment, with caps. Ms. Swanson denied reading from the consultant's study, testifying credibly that she did not have that study at the time.

34. If Respondent was actually confused or unclear about the facts, it was incumbent on her, in the proper performance of her professional duties, to make inquiry so as to be clear about

the facts on which she offered a legal opinion. That is a very basic obligation of any lawyer asked to give a legal opinion to a client.[6/] Yet Respondent admitted that she made no such inquiries. Had Respondent asked Ms. Swanson to direct her to the person with information about the award, Respondent would have been directed to Ms. Bean, Mr. Hill, and/or Mr. Johnson, who could have explained their failure to gain approval to use the productivity award program and that the financial award at issue was a special one-percent salary increase award that would result in a one-percent salary raise to the recipients. Had Respondent inquired, she could have been given the "recognition of efficiency" February 1, 2007, memo provided to other department directors, which specifically described the award.

35. Respondent attempted to justify her failure to make these inquiries by testifying to her belief that issuance of her opinion was urgently needed--testimony previously found not credible. However, if Respondent truly was confused about the facts on which she was opining on February 2, 2007, or lacked sufficient time to properly analyze the contract language in accordance with Florida law on contract interpretation, it was incumbent on Respondent to express these limitations on her ability to render a legal opinion based on a complete understanding of the facts and application of the law to those facts. Moreover, Respondent's claim of urgency would not

explain why Respondent did not conduct any factual inquiry or legal analysis before issuing a second legal opinion six days later, which extended her legal opinion to include Dr. Garrity after she obtained his contract.

36. The point is not whether Respondent's legal opinion was right or wrong; the point is that Respondent's legal opinions failed to set forth a complete recitation of the facts or a discussion of the legal conclusions that follow from a complete recitation of the facts. Respondent claims confusion about the facts, but no such confusion was expressed in her legal opinion. Respondent claims she was rushed, but that claim was not credible and, significantly, no such limitation was expressed in her legal opinion. If it was not possible for Respondent to obtain a clear understanding of the complete facts and to discuss the legal conclusions that flow from the complete facts, it was incumbent on Respondent to specify the limitations of her opinion. The proper performance of Respondent's professional duties as Hillsborough County attorney required nothing less.

37. Instead of properly performing her professional duties by providing her client with the requisite independent professional judgment based on a complete recitation of facts and analysis of the law applicable to those facts, Respondent's legal opinion on February 2, 2007, was a self-interested

advocacy piece. Other than adding language from Ms. Bean's contract, the February 2, 2007, product was nothing more than a repackaging of Respondent's February 1, 2007, email to Ms. Bean and Mr. Hill that purported to describe a non-lawyer's opinion of Respondent's Agreement.

38. Respondent had a second chance to improve her product when she issued a second legal opinion the next week addressing Dr. Garrity's eligibility for the one-percent salary award. Despite the additional time and the fact that Respondent did not claim any rush in issuing this second legal opinion, Respondent took no steps to address the deficiencies from the February 2, 2007, letter that Respondent sought to justify because of perceived time pressure.

39. Respondent attempted to suggest that the facts underlying her legal opinions were incomplete or confused because there was great confusion at the time with regard to the various award programs. That suggestion was not borne out by the credible evidence. Ms. Swanson admitted to not fully understanding the financial award programs at the time, because she was pinch-hitting for the department director. However, it was clear from the credible evidence that the persons involved in making the decision to give financial awards understood the differences between the three award programs, understood that they could not use the productivity award program, and

understood that the financial award they were giving was a special one-percent salary increase award.

40. Respondent also seemed to suggest that her legal opinions must have been proper and sufficient, because no one asked her questions about them. In particular, Respondent points to the fact that Ms. Swanson went to law school and passed a bar examination, albeit that Ms. Swanson was admitted to the Ohio State Bar in 1976 and did not practice law.

41. Ms. Swanson testified, credibly, that she did not question Respondent's legal opinions because she did not believe that was her place. Instead, she explained that she was just looking to provide a written legal opinion on the question of eligibility as back-up to provide to the employee relations division of the human resources department, which processed the paperwork that put through the one-percent salary increases.

42. Respondent testified that she was not aware that she had been given a one-percent salary increase after she issued her legal opinion. Respondent claimed to believe that she had, instead, received a $1,000 one-time cash award. Two years later, an audit revealed that she and Ms. Bean had received the one-percent salary increase continuously since 2007. Dr. Garrity did not accept his one-percent salary increase award.

43. Respondent testified that she ultimately returned the proceeds from the one-percent salary increase. When asked why

she returned the money two years later, she testified as follows:

> Well, you know, there was such a brouhaha at the board meeting that day. And I had never intended to have a one-percent increase. I thought it was an award. I thought it was a one-time award. So, I returned it because, if they didn't want me to have it, I should give it back. If it was not what I intended to opine on, then I didn't want to keep it. So, you know, those were the reasons I gave it back.

44. Implicit in Respondent's explanation is that if she had realized that the one-percent salary "award" was a one-percent salary "increase," she would not have been able to opine that she was eligible to receive it without approval by the HBCC, because her Agreement required HBCC approval of salary increases. Yet, assuming Respondent was really confused about this, any appropriate inquiry by Respondent would have confirmed that the only award she could have been opining on was a one-percent salary increase. Whether her zeal to advocate for a financial reward for herself and others caused her to purposely mischaracterize her legal opinion after the fact or whether her zeal simply caused her, at the time, to ignore the process mandated by an attorney properly carrying out her duties to a client in rendering a legal opinion, the result is the same. The undersigned finds as a matter of ultimate fact that Respondent acted with wrongful intent by placing her own self-interest in

securing the special financial benefit she coveted above her professional obligations to her client, the HBCC. Respondent did not properly perform her professional duties when she issued first one, and then another, legal opinion to justify a one-percent salary increase for herself and others without the approval of the HBCC.

CONCLUSIONS OF LAW

45. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2011).

46. Section 112.322 and rule 34-5.0015 authorize the Commission to conduct investigations and to make public reports on complaints alleging violations of the Code of Ethics.

47. In this proceeding, the Commission, through its Advocate, is asserting the affirmative of the issue: that Respondent violated section 112.313(6), for which Respondent should be penalized. Therefore, as the parties stipulated, the Advocate has the burden of establishing by clear and convincing evidence the elements of Respondent's alleged violations. Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997), citing Dep't of Banking & Fin. v. Osborne Stern, 670 So. 2d 932 (Fla. 1996), and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

48. As stated by the Florida Supreme Court:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit, and witnesses must be lacking in confusion as to facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re: Henson, 913 So. 2d 579, 590 (Fla. 2005)(quoting Slomowitz v. Walker, 492 So. 2d 797, 800 (Fla. 4th DCA 1983)). Accord Westinghouse Electric Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991) ("Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous.").

49. The Advocate's position in this proceeding is that Respondent violated section 112.313(6) by using her position as county attorney to draft a legal opinion that justified a one-percent raise in salary for herself and others without the need for approval from the HBCC.

50. Section 112.313(6) provides as follows:

> MISUSE OF PUBLIC POSITION.--No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section

> shall not be construed to conflict which section 104.31.

51. The term "corruptly" is defined by section 112.312(9) as follows:

> "Corruptly" means 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 proper performance of his or her public duties.

52. Breaking down the foregoing provisions into their component parts, the Advocate's charge of a violation of section 112.313(6) requires proof of three distinct elements. First, the Advocate must prove that Respondent was a public officer, employee of an agency, or local government attorney at the time of the alleged violation. Second, the Advocate must prove that Respondent used or attempted to use her official position, or any other property or resources within her trust, or performed her official duties to secure a special privilege, benefit, or exemption for herself or others. Third, the Advocate must prove that Respondent acted corruptly, as statutorily defined to mean that Respondent acted with wrongful intent and for the purpose of benefiting herself or another from some act or omission which is inconsistent with the proper performance of her public duties.

53. Respondent stipulated that she was a local government attorney at the time of the alleged violation and, as such, is subject to the requirements of the Code of Ethics. Therefore, the first element necessary to prove a violation of section 112.313(6) is established.

54. Based on the facts found above, the Advocate proved that Respondent used, or attempted to use, her official position and performed her official duties as Hillsborough County attorney to secure a special privilege, benefit, or exemption for herself (and others), namely, the one-percent salary award. Respondent asked for the award and advocated for the award. Respondent was specifically asked to provide a written legal opinion addressing whether a one-percent salary award was authorized by the terms of her contract and by the terms of the contracts of two other contract employees. Thus, Respondent was on notice that her solicited written legal opinion would be relied on and that her legal opinion confirming that she could be given the one-percent salary award under the terms of her contract (and that the other two contract employees could be given one-percent salary awards under their contracts) would facilitate her (and others') receipt of that one-percent salary increase.

55. Finally, based on the facts found above, the credible evidence established clearly and convincingly that Respondent acted with wrongful intent and for the purpose of benefiting

herself and others by issuing a so-called legal opinion that was not prepared in a manner consistent with the proper performance of her public duties as Hillsborough County attorney. As such, the Advocate proved that Respondent acted "corruptly," as that term is statutorily defined.

56. Legal authorities uniformly provide that a lawyer's professional responsibility to his or her client includes the obligation to act competently by conducting the appropriate factual inquiry, research, and analysis of the law applicable to the complete facts and exercising independent professional judgment in providing candid advice. See, e.g., Restatement of the Law (Third), The Law Governing Lawyers, § 16A cmt. d. (2000) (a lawyer's duties to a client include the duty of competence: "[T]o perform the services called for by the client's objectives, including appropriate factual research, legal analysis and exercise of professional judgment."). Accord R. Regulating Fla. Bar 4-1.1. (A lawyer "shall" act competently in representing his or her clients); R. Regulating Fla. Bar 4-1.1. cmt. ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem"); R. Regulating Fla. Bar 4-2.1 (When providing legal advice to a client, "a lawyer shall exercise independent professional judgment and render candid advice.").

57. Professional publications have much to offer on the subject of a lawyer's professional responsibilities when giving a legal opinion to his or her client. For example, the "many duties" of lawyers, when giving legal opinions, are discussed in Charles E. McCallum and Bruce C. Young, Ethics Issues in Opinion Practice, published in The Business Lawyer, Vol. 62, p. 417 (Feb. 2007). In discussing the interplay between a lawyer's duty to conduct an appropriate fact investigation and a client-imposed limitation, the article observes that a limitation imposed by a client "does not relieve the lawyer of the duty to provide competent representation." Id. at 421. Further, limitations "that are material to the evaluation must be disclosed as part of the evaluation." The article discusses a formal ethics opinion issued by the American Bar Association's Standing Committee on Ethics and Professional Responsibility which stated, as follows, with regard to a lawyer's professional responsibilities when issuing legal opinions:

> In any event, the lawyer should, in the first instance, make inquiry of his client as to the relevant facts and receive answers. If any of the alleged facts, or the alleged facts taken as a whole, are incomplete in a material respect, or are suspect, or are inconsistent, or either on their face or on the basis of other known facts are open to question, the lawyer should make further inquiry.
>
> Where the lawyer concludes that further inquiry of a reasonable nature would not

> give him sufficient confidence as to all of the relevant facts, or for some reason he does not make the appropriate further inquiries, he should refuse to give an opinion.

See Id. at 422, quoting from ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 335 (1974).

58. As a result of these hallmark attributes of legal opinions, Florida decisions recognize that a properly-issued legal opinion, when shown to be based on complete facts from proper inquiry, can be evidence of a lack of wrongful intent and a lack of notice of the impropriety of action taken in reliance on the legal opinion. See, e.g., In re: George Blake, 2006 Fla. Div. Admin. Hear. LEXIS 28 (Fla. DOAH Jan. 25, 2006) (Blake sought and received a city attorney's opinion prior to acting, which opined that his actions were lawful; "[a]dvice of counsel, when based on a proper statement of the facts, as this was, is not necessarily a complete defense, [but] tends to prove a lack of wrongful intent, [and] negates the assertion [of] reasonable notice that his conduct was inconsistent with proper performance of his public duties.").

59. In contrast, however, the lack of a proper predicate for the legal opinion, such as incomplete facts, can give rise to an implication of wrongful intent by the party responsible for the lack of proper predicate. For example, in Knight Ridder, Inc. v. Dade Aviation Consultants, 808 So. 2d 1268 (Fla. 3d DCA

2002), a public records case, the court considered an argument by the public entity seeking to avoid a fee award against it, that its refusal to produce public records was reasonable and in good faith because it was taken in reliance on a legal opinion issued by independent counsel. The court rejected that argument because the public entity failed to make a "full and complete disclosure" of the operative facts upon which the legal opinion depended[;]" and it "misled counsel by withholding . . . the actual agreement" on which the opinion was based. Id. at 1269. As such, the court applied the rule "that attempts such as this to create a false basis for one's legal position not only do not demonstrate good faith, . . . but provide affirmative evidence of actual criminal responsibility." Id. The same rationale applies in this case, except that here, it was the lawyer who failed to conduct the necessary inquiry of the facts, and who selectively omitted certain facts, in issuing her legal opinions. Just as in Dade Aviation Consultants, Respondent's acts and omissions provide affirmative evidence of her wrongful intent.

60. In defending the propriety of her actions, Respondent relies heavily on section 112.313(5), which provides, in pertinent part: "No local government attorney shall be prevented from considering any matter affecting his or her salary, expenses, or other compensation as the local government attorney, as provided by law." Respondent's argument is that because this

statute specifically authorized her to issue a legal opinion on the subject of her salary or other compensation, her actions in doing so must be deemed, by definition, the proper performance of her public duties.

61. Contrary to Respondent's characterization of section 112.313(5), the statute does not specifically authorize Respondent's issuance of the legal opinions in the way she did, with acts and omissions that were inconsistent with the proper performance of her duties as county attorney. Instead, the statute provides that local government attorneys are not prohibited from considering matters that affect their salaries, expenses, or other compensation simply because of the subject matter. That does not mean that in a particular case, such as this one, local government attorneys cannot be found to have misused their public position, as set forth in section 112.313(6). That Respondent is not automatically prevented from issuing a legal opinion on a matter affecting her compensation cannot mean that Respondent is, thereby, free to abuse her position and improperly issue a so-called legal opinion for the purpose of securing additional compensation.

62. Recent Commission precedent confirms that a local government attorney taking action that affects his compensation may be found to have violated section 112.313(6) when the action is shown to meet the statutory elements establishing a misuse of

public position. In In re: Gerald Buhr, a Joint Stipulation of Fact, Law, and Recommended Order, accepted by the Commission at its June 15, 2012, meeting, determined that Mr. Buhr, as counsel for the City of Mulberry, violated section 112.313(6) by increasing his hourly rate for legal services without city commission notice or approval, contrary to his agreement with the city commission. Mr. Buhr had already settled this matter with the city, agreeing to refund amounts overpaid and to reduce his hourly rate for additional legal services. As a result, the Commission accepted the stipulation that a civil penalty of $2,500 was appropriate for this violation.

63. In this case, it is particularly ironic that Respondent relies on the language in section 112.313(5). Respondent now apparently accepts as a given, and implicitly asks the undersigned to accept without hesitation, that the subject matter of her legal opinion was "salaries . . . or other compensation." If that subject matter classification were as clear to Respondent as she now argues, one is at a loss to explain how any objective, professional legal opinion could have been properly issued without any mention, much less discussion, of Article III ("Compensation") in Respondent's Agreement, which includes the requirement for HBCC approval of any increases in salaries or benefits.

64. Respondent does not address the subject of an appropriate penalty if a violation of section 112.313(6) is found. Within the framework of the penalty authority set forth in section 112.317, the Advocate urges a recommended penalty of public censure and reprimand and a civil penalty of $5,000. That penalty is accepted as reasonable under the facts and within the authorized range of penalties.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Ethics issue a final order and public report: (1) finding that Respondent, Renee Lee, violated section 112.313(6), Florida Statutes (2006); and (2) recommending as penalties to the proper authority that Respondent be publicly censured and reprimanded, and that a civil fine of $5,000 be imposed.

DONE AND ENTERED this 11th day of July, 2012, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of July, 2012.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2006 version, which was the law in effect at the time of the alleged statutory violation.

2/ Ms. Swanson explained that the human resources department director, George Williams, had recently lost his wife; Ms. Swanson and others were pitching in to cover his responsibilities during this difficult time. This issue was new territory for Ms. Swanson; as she testified, she usually focused on benefits, whereas this was a compensation issue and a specific contract issue.

[3/] It is a matter of record that at the time Ms. Swanson requested a legal opinion from Respondent, the one-percent salary increase awards had already been acknowledged in memos issued to the non-contract department directors who qualified based on their budget efficiency proposals. Therefore, the awards were not being held up pending issuance of a legal opinion; the only remaining question was whether salary increases also would be awarded to the three contract department directors. Further, as the memos established, the one-percent salary increase awards that were given were made retroactive to January 7, 2007. Thus, there was no urgency to this matter that could possibly explain Respondent's issuance of a rushed product.

[4/] See, e.g., Transcon Trailers, Inc. v. Northland Ins. Co., 436 So. 2d 380, 381 (Fla. 4th DCA 1983)(discussing maxim of contract interpretation known as "'noscitur a sociis' which means that general and specific words capable of analogous meaning when associated together take color from each other so that the general words are restricted to a sense analogous to the specific word."). The doctrine "ejusdem generis" is a specific application of this broader maxim whereby in the construction of instruments, when certain things are enumerated and then a general phrase is used which might be construed to include other things, the general phase is interpreted restrictively, confined to things of the same general kind or class as those specifically mentioned. Id.; Mann v. Thompson, 100 So. 2d 634, 638 (Fla. 1st DCA 1958); Noble v. Kisker, 134 Fla. 233, 183 So. 836, 837 (1938).

[5/] Yet another issue raised by the language of Ms. Bean's contract, but not addressed in Respondent's legal opinion, is that the quoted provision, by its terms, appears to apply only to benefits that are set forth in "provisions of the Hillsborough County Charter and Code, and regulations and rules of the County[.]" Respondent's legal opinion did not identify any provision in the County Charter and Code, or in county regulations or rules, that provide for the one-percent salary award for other managerial employees, so as to trigger this subsection that would extend such a benefit to Ms. Bean. Similar language is included in Dr. Garrity's contract, but Respondent's February 8, 2007, legal opinion on that subject likewise fails to address the meaning of this language or identify the pertinent charter, code, regulation, or rule provision that would trigger this clause.

[6/] See, e.g., R. Regulating Fla. Bar 4-1.1. ("A lawyer shall provide competent representation to a client"); and R. Regulating Fla. Bar 4-1.1. cmt. ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem."). As made clear by legal authorities discussed in the Conclusions of Law below, this professional responsibility of basic competency requiring a lawyer to conduct inquiry into and analyze the factual and legal elements of a problem, has particular force when a client asks a lawyer to render a legal opinion.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.