

AUG 04 2022

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: DOUGLAS UNDERHILL,

Case Nos. 21-3753EC

21-3754EC

21-3755EC

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted via Zoom on May 9 and 10, 2022, before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings (“DOAH”).

APPEARANCES

For Advocate: Elizabeth A. Miller, Esquire
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For Respondent: Mark Herron, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent (“Commissioner Underhill”) violated sections 112.313(6), 112.313(8), 112.3148(3), 112.3148(4), and/or 112.3148(8), Florida Statutes (2019),¹ as alleged in the Order Finding Probable Cause issued by the Florida Commission on Ethics (“the Commission”) on September 15, 2021. If Respondent committed any of the aforementioned violations, then the issue turns to what penalty should be imposed.

¹ Unless stated otherwise, all statutory references shall be to the 2019 version of the Florida Statutes. None of the pertinent statutes cited herein were amended between 2016 and 2020.

PRELIMINARY STATEMENT

Three Escambia County citizens, John F. Stenicka, Joe Ward, and David Bear, filed ethics complaints against Commissioner Underhill. Mr. Stenicka and Mr. Ward alleged that Commissioner Underhill, without authorization from the Escambia County Board of County Commissioners (“the Board”), publicly shared confidential transcripts of five Board meetings that concerned ongoing litigation involving the Board. Mr. Bear alleged, in pertinent part, that Commissioner Underhill failed to disclose the following items as gifts: (a) multiple contributions exceeding \$100 to his legal defense fund; (b) free legal services; and (c) reimbursements for travel expenses and shipping costs exceeding \$100.

The Commission issued an Order Finding Probable Cause on September 15, 2021, and referred the three complaints to DOAH on December 13, 2021. The undersigned issued an Order of Consolidation and scheduled a final hearing for February 16 and 17, 2022.

During a February 10, 2022, telephonic conference, the undersigned learned that the parties needed, and agreed upon, more time to complete discovery. Accordingly, the final hearing in this matter was rescheduled for March 22 and 23, 2022.

After Commissioner Underhill filed a Motion to Continue on March 10, 2022, indicating a need for additional discovery, the undersigned issued an Order on March 16, 2022, rescheduling the final hearing for May 9 and 10, 2022.

The final hearing was convened as scheduled with the Advocate presenting testimony from Fred Hemmer, Commissioner Jeffrey Bergosh, Commissioner Underhill, Charles Pepler, Alison Rogers, Robert Malone, and Scott Remington (via deposition). Advocates Exhibits 1, 5 through 8, 11 through 13, 15 through 18, 21

through 24, 25a, 26, 28, 29², 31, 32, 32a through 32f, and 33³ were accepted into evidence. Commissioner Underhill testified on his own behalf, and Respondent's Exhibits 1, 2, 5, 7, and 9 through 19⁴ were accepted into evidence. The undersigned also accepted Joint Exhibits 1 through 5 into evidence.

The three-volume final hearing Transcript was filed on May 31, 2022. After receiving one extension of time, both parties filed timely Proposed Recommended Orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on all of the evidence adduced at the final hearing, the entire record of this proceeding, and matters subject to official recognition, the following Findings of Fact are made:

Background on Commissioner Underhill

1. Commissioner Underhill was initially elected to the Board in November of 2014. He has continuously served on the Board since then, and his current term will end in November 2022.

2. Because of his position on the Board, Commissioner Underhill is subject to the requirements of chapter 112, Part III, Florida Statutes, referred to as the Florida Code of Ethics. As part of his duties, Commissioner Underhill has annually

² Only pages 188 through 193 from the Advocate's Exhibit 29 were accepted into evidence.

³ The Advocate's Exhibit 33 is a DVD recording of Commission meetings held on January 17, 2019, May 14, 2020, May 21, 2020, and June 4, 2020, that was hand-delivered to DOAH on June 6, 2022. It was one of two proposed exhibits described in the "Joint Motion for Leave to Submit Late Filed Exhibits" ("the Joint Motion") filed on June 6, 2022, that was granted via an Order issued on June 8, 2022.

⁴ Respondent's Exhibit 19 is a composite exhibit that was the other of the proposed exhibits described in the Joint Motion. Respondent's Exhibit 19 includes two Interlocal Agreements, along with amendments thereto, between Escambia County, Florida, and the Emerald Coast Utility Authority dated June 2, 2016, and May 17, 2018.

participated in mandatory ethics training, and that training includes instruction on Florida's Public Records Act and the Sunshine Law.

3. In addition to his Board duties, Commissioner Underhill is a Commander in the U.S. Navy Reserve and manages a government program located on the Naval Air Station in Pensacola, Florida. Commissioner Underhill is not a lawyer.

4. Commissioner Underhill serves on the Board with four other Commissioners. At the time of the final hearing, those other Commissioners were Jeffrey Bergosh, Lumon May, Robert Bender, and Steven Barry.

5. Commissioner Underhill considers himself to be an opponent of "business as usual" in Escambia County. He desires to be seen as an opponent of the "good 'ole boy system" he considers to be prevalent in Escambia County governance.⁵

6. Commissioner Underhill has a contentious relationship with his fellow commissioners. Commissioner Bergosh described that relationship as follows:

I do agree that we are independently elected constitutional officers, but to the – the Board, as a whole, we act as one body, but there are five men that serve in these positions, and we each have our opinions, we each have our egos, for lack of a better word, and at points, you know, it gets very contentious. The thing is, at the end of the day, one of the first things I look at as an official, after I became a member of the School Board, is if it's a 3/2 vote, if it's a passionate, packed roomful of people, and the vote doesn't go your way, yet you move forward, and I've found that men on this Board, that I serve with, are able to do so, with the exception of Commissioner Underhill. And when we talk about contentious items, you know, these votes sometimes end up being put on social media pages, and then there's been allegations of, you know, that we're corrupt. When I say "we", the other members, the other four members, are corrupt or in the pockets of developers, or somehow acting maliciously or unethically, and I would say that that has created, sadly, it's created an atmosphere on the Board of really just four people on one side, and one on the other, because it's difficult, and of course, that's now bled through to individual members of families [] being attacked.

⁵ These findings are based on what the undersigned has inferred from Commissioner Underhill's testimony, his demeanor during the final hearing, and the totality of the evidence.

I know my own wife has been attacked by Commissioner Underhill, and her credibility. My brother, who is a Circuit Court Judge, has been attacked by Commissioner Underhill. So there is a – there’s a level of contention on this Board that’s very disappointing, unnecessary and unprofessional . . .

7. Commissioner Underhill is prolific on social media.⁶ According to Commissioner Bergosh, Commissioner Underhill uses social media to attack his fellow commissioners:

For instance, just like this past week, when he, once again, intimated that my wife was corrupt for running a nonprofit that gives dental to people who don’t have dental insurance, and medical to people who don’t have medical, when he intimated that I was corrupt, and she was corrupt, It’s a weaponization of material taken out of context and put on social media, and that’s why, when this court watches that video, there will be such anger and angst from myself and my counterparts, because we know what’s coming next, the attacks, the comments, the unsubstantiated allegations and accusations, the personal attacks on people, on elected officials and our families, and our wives and our brothers. It’s a long answer, but it’s important to be put into the record, because it’s all true.

8. The contentious relationship between Commissioner Underhill and his fellow commissioners is also exemplified by the fact that the Board has appealed a circuit court judge’s order requiring the Board to pay attorney’s fees incurred by Commissioner Underhill in defending against a lawsuit.

9. Commissioner Underhill also has a contentious relationship with the Board’s attorney, Alison Rogers, who oversees virtually all legal services provided to the Board. Ms. Rogers testified that Commissioner Underhill, approximately two years ago, “threatened to bash my reputation until the day I resign.” She brought that to

⁶ The Board had a policy to prevent commissioners from using technology to circumvent the Sunshine Law. Commissioner Underhill told the Board’s attorney, Alison Rogers, that he would not follow it. According to Ms. Rogers, Commissioner Underhill “felt it violated his own First Amendment rights, and he felt as though he had a constitutional obligation to his constituency, to keep them updated in the most accessible manner possible, which he felt like was his large social media content.”

the other Commissioners' attention during a Board meeting, and they voted to censure Commissioner Underhill.

10. In addition to their disagreement, discussed below, over whether certain Board meeting transcripts could be released to the public, Commissioner Underhill criticizes Ms. Rogers legal office for being too quick to settle cases; displaying a lack of professionalism; not propounding policies on social media, vendors, and lobbyists; and often taking "the path of least resistance."⁷

Findings Regarding the Advocate's Allegations that Commissioner Underhill Violated Sections 112.313(6) and 112.313(8) by Releasing Shade Transcripts.

11. Innerarity Island is an area in Escambia County within Commissioner Underhill's district. Fayette Dennison owned the Innerarity Island Development Corporation ("IIDC") and operated a private system, via IIDC, that provided water and sewer services to Innerarity Island residents for 30 years. Mr. Dennison died in 2012, and IIDC passed to his daughter, Katherine Collins.

12. On February 18, 2014, the Board convened a "shade meeting"⁸ in order to discuss recent developments with Innerarity Island and IIDC. Charles Peppler, who served as the Deputy County Attorney for Escambia County at that time, notified the Board that Ms. Collins had filed a notice that Innerarity Island's water and sewer system would be abandoned in 60 days. Mr. Peppler told the Board that Florida law required the Board to petition for appointment of a receiver to operate the water and sewer system. He further stated that the 60-day notice period expired on March 28,

⁷ Commissioner Underhill's relationship with his fellow commissioners and Ms. Rogers is relevant because Commissioner Bergosh and Ms. Rogers offered theories during their testimony as to how Commissioner Underhill's release of confidential transcripts of Board meetings resulted in him securing "a special privilege, benefit, or exemption for himself . . . or others" in contravention of sections 112.313(6) and 112.313(8).

⁸ Section 286.011(8), Florida Statutes, provides that "any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided that [certain] conditions are met." One of those conditions is that the "entire session shall be recorded by a certified court reporter." Once the litigation at issue has concluded, then the transcript of the meeting becomes a public record. § 286.011(8)(e), Fla. Stat.

2014. The Board decided to seek to have the Emerald Coast Utility Authority (“ECUA”) designated as the receiver. Lumon May and Steven Barry were the only current commissioners who were on the Board at that time.

13. The Board had a second shade meeting on April 10, 2014, to discuss the Innerarity Island litigation. ECUA had refused to become the receiver for the water and sewer system, and a court appointed Escambia County as the receiver. Rather than appealing the court’s order, the Board discussed asking the court to modify its order to make ECUA and Escambia County joint receivers. Lumon May and Steven Barry were the only current commissioners who were on the Board at that time.

14. A third shade meeting occurred on June 25, 2015. Commissioner Underhill joined Commissioners May and Barry as the only current commissioners who were on the Board at that time. The Board discussed a separate, but related, matter about 118 lots on Innerarity Island. Escambia County took the position that the lots were assets of IIDC and thus a receiver could sell the lots in order to generate funds to upgrade the water and sewer system on Innerarity Island. Fayette Dennison’s estate argued that the lots did not belong to IIDC and were encumbered by a mortgage. By this time, ECUA had become a joint receiver of the utility system. The purpose of this meeting was to formulate a counter-proposal to resolve the litigation.

15. Commissioner Underhill stated during the meeting that the residents of Innerarity Island had been receiving utility services at rates that were far below those paid by other residents of Escambia County. He further stated that he had been putting the residents on notice that they would eventually have to pay more.

16. The fourth shade meeting occurred on July 7, 2015. Commissioners Underhill, May, and Barry were the only current commissioners who were on the Board at that time. The Board engaged in further discussion about the litigation over the 118 lots on Innerarity Island. Commissioner Underhill stated that he had told the residents of Innerarity Island that a tax would be needed, but that his goal was to make the tax as small as possible.

17. Negotiations between the Board and ECUA culminated in the first Interlocal Agreement (“Interlocal Agreement I”) being executed on June 2, 2016. Interlocal Agreement I was intended to upgrade Innerarity Island’s utility system so that it would ultimately be accepted by ECUA. Interlocal Agreement I set forth several conditions precedent that had to be satisfied before ECUA would accept the utility system.

18. The final shade meeting at issue occurred on August 4, 2016. Commissioners Underhill, May, and Barry were the only current commissioners who were on the Board at that time. The Commissioners discussed the value of the 118 lots, the rates to charge Innerarity Island residents for their utilities, and settlement of the pending litigation involving Innerarity Island.

19. On May 17, 2018, the Board and ECUA executed a second Interlocal Agreement (“Interlocal Agreement II”) that superseded Interlocal Agreement I and increased the amount of money allocated to upgrading Innerarity Island’s utility system. Interlocal Agreement II also contained several conditions precedent for the Board to complete before ECUA would accept the utility system.

20. Neither Interlocal Agreement I nor Interlocal Agreement II concluded the litigation between the Board and ECUA over ownership of Innerarity Island’s utility system. Even after execution of Interlocal Agreement II, the Board and its attorneys considered the relationship between the Board and ECUA to be tenuous at best. The Board’s legal counsel feared that ECUA would ultimately refuse to take over the utility system or that ECUA would continuously raise the bar by requesting additional improvements to the utility system.

21. Mr. Pepler described the situation between the Board and ECUA as follows:

A: Well, we had a tenuous, in my opinion, we had a tenuous relationship with ECUA. There was ongoing litigation apart from this, regarding the installation or – of a transfer station. That litigation was ongoing and parallel to this litigation. The interlocal agreements themselves provided that neither party was waiving any claim or defense that the other party had against each other. There was also language in each agreement that allowed a termination for

cause. The – you know, the course of construction of the sanitary sewer system, again, because of the low lying areas, the high water table, working with the residents, as far as a pump grinder installation, there was always, I think the fear on the part of the county that the ECUA would find a way to pull out of the agreement and cause, you know, the agreement not to go forward.

Q: Okay. Mr. Pepler, did the very last interlocal agreement that was signed by the parties contain a statement concluding the litigation?

A: No, it did not.

Q: Was the case that we're focused on, closed on May 11, 2020.⁹

A: No, it was not.

Q: Why not?

A: Because the – the interlocal agreement had not been completed. Construction was ongoing. The ECUA was inspecting the course of construction and approving the systems as it was being constructed, so there was no termination of the agreement, but whereby ECUA says, yes, we accept the repairs, we're willing to take the sanitary sewer system over, then we could have moved the court to dissolve the receivership and ECUA would now be the owner and operator of both the potable water system and the sanitary sewer system, but that was far from complete in 2020.

22. Ms. Rogers believed it was necessary to keep the litigation between the Board and ECUA open and pending in the event that ECUA reneged on Interlocal Agreement II and refused to take ownership of the utility:

The construction, because ECUA was insistent upon the upgrades, the significant upgrades to both the water and then subsequent to that, the sewer systems, the ECUA was waiting for the county to improve that infrastructure, to

⁹ May 11, 2020, was the day Commissioner Underhill released the transcripts (“shade transcripts”) of the shade meetings.

the point where it became willing to assume those systems. So, we upgraded the water. They accepted the water. Then we upgraded the sewer system and then they accepted the sewer system. We did not want to close out the litigation until completion of all of that and acceptance of both systems, in their entirety by ECUA, we had some fear – we had some fear that the ECUA, before they got to the end, would back out, or balk, or keep raising the bar in the construction, and want more and more of a Cadillac system. We didn't know that that would happen, but we had some concern that we should keep the litigation open so that we could reserve jurisdiction of the judge to jump in, if we needed him to. That was the middle ground of the compromised situation with ECUA because their leadership did not want to have the court order, in the first place, putting the sole responsibility on them, because they wanted the system upgraded before it became their responsibility, and they didn't want the precedent that [they] had primary responsibility for abandoned systems, because the county does have, at least, at least eight or nine other ones in the county that, to this day, are still operated by private utilities, but one day, this could happen to them.

23. Commissioner Underhill adamantly supported making the five shade transcripts available to the public. Prior to May 11, 2020, he and Ms. Rogers had at least one conversation about releasing the transcripts. Ms. Rogers described that conversation as follows:

He and I had a conversation in which he indicated he wanted to release the transcripts. I advised that he could not and should not do that. The case was still in litigation. He indicated that he had looked at an Attorney General's opinion that said he could. And I indicated that, it was my opinion, that he could not, and should not release them, and I remember him being upset with that. Very upset with that opinion. He disagreed strongly with that opinion.^[10]

¹⁰ Commissioner Underhill testified that he and Ms. Rogers had many conversations about releasing the transcripts: "We discussed this, Ms. Rogers and I, in private conversations, or in conversations that also involved my aide, in her office. No few – easily, more than a dozen times. Probably, well over 20, over the course of these seven years. I have been deeply engaged in this process and shepherding it through."

24. By May 2020, Commissioner Bergosh had become the Board Chair, and he requested the shade meeting transcripts. His testimony indicates that he did so because residents of Escambia County were upset about the situation with Innerarity Island's utility system:

I was Chairman of the Board of County Commissioners in 2018, and ran the meetings, and there was understandably a lot of anger among the residents on Innerarity Island, because they were slowly coming to the understanding that their private infrastructure, because it was private, would never benefit from public dollars to improve it. They would be subject to what's called a Municipal Services Benefit Unit MSBU, or for lack of a better word, a tax, an assessment, to fix their sewage system. So, they were angry about that and justifiably. And so there was a lot of consternation. There [were] a lot of angry citizens at meetings, online, and they wanted to know why the county wasn't fixing the issue. And this was all part of the larger issue with IIDC, and their failure, and then the juxtaposition of the county taking receivership [via] ECUA, which handled water, sewage and garbage. So, it was – the environment was toxic, the environment was supercharged, and we're done. This was May of 2020. . . . And, again, I wanted, initially, to release it. I'm on the record saying it. In fact, I think at one of the meetings I agreed with Doug [Underhill], let's get it out there.

25. Ms. Rogers also described what led to the Board requesting the shade transcripts:

During a Board meeting it had been requested – a discussion had broken out at a Board meeting about the history of this particular case, and there were mixed memories amongst Board members about exactly what had happened in these Shade meetings, and what the Board's direction had been in the Shade meetings, and the role of ECUA and some other things. And so the Board, I don't remember exactly which Commissioner, but there was, I felt like, Board direction, to ensure that the Commissioners have the ability to review these transcripts, to refresh their own memories about what – what had happened at previous meetings. As you can see, these transcripts go back several years. So many years were passing in this

particular case. So, it seemed – my memory is, that the Board wanted to refresh their memories.

26. On May 11, 2020, Ms. Rogers sent an e-mail to each of the five Commissioners. The five shade transcripts were attached, and the body of the message stated the following:

CONFIDENTIAL RECORDS ATTACHED

Commissioners,

By request, attached are the transcripts of the attorney-client sessions related to the receivership of IIDC (Innerarity Island water and sewer). The litigation is still open and is not expected to be concluded until after the transfer to and acceptance of the sewer system by ECUA. Thus, these records are CONFIDENTIAL until the conclusion of the litigation (per section 286.011(8)(e), Fla. Stat.) and should not be released or shown to the public or the media.

Separately, I am gathering a timeline for you from Legal's perspective, and I assume some other departments may be doing that as well.

Please do not reply all, but get directly with me if you have questions or concerns.

Alison

27. Without consulting his fellow Commissioners and approximately 22 minutes after receiving them, Commissioner Underhill transmitted the shade transcripts to Kemp Evans in response to a public records request from Mr. Evans. Subsequently, the shade transcripts were posted to a public Facebook page and became a topic of discussion on social media.

28. Commissioner Underhill answered several questions during the final hearing pertaining to why he released the shade transcripts:

Q: [H]ow important was it to you that the citizens have this information?

A: . . . [C]ontinuing to be a part of the problem was exactly what I had promised not to do when I ran for office. So, in my opinion, now that it was clear that the citizens were asking for these things, now that it was clear that everybody knew that we had them, to – if I had chosen not to share a public record that I was clearly known to be custodian for, I would have been in violation of the law, not just madam attorney’s opinion, as she said in all of her answers, “in her opinion.” The law that requires that I share a public record that is in my possession, is much greater. So is higher on that scale of 1 to 10, if you will, than madam attorney’s opinion, which in my opinion now, it was intended to cover up prior bad acts by the board.

* * *

Q: [W]hy didn’t you release the transcripts on May 17th, 2018¹¹ when you said the conclusion of the lawsuit was?

A: Because up until the actual time that the conflict came up with madam attorney, Alison Rogers, I believed that she was acting in the best interests of the people. You know, it was this and a couple of other instances that were happening, you know, particularly with regard to actually paying the IIDC for the lots that should have been ours, to begin with, things like that. I just came to realize that, you know, I cannot hang my – or true to my moral compass, to Alison Rogers’ legal opinions. You know, we had been kind of stomped on that quite a few times, up until then . . .

Q: Does your moral compass – well, shouldn’t your moral compass keep you from violating your constitutional oath?

* * *

A: Yes ma’am. It absolutely did. Again, my moral obligation to be a proper custodian of a public record is much greater than any moral obligation or ethical obligation that may have existed when I came – when it became very clear to me, that madam attorney’s advice to make this confidential, her decision, and think about that, that’s one unilateral person, unelected by the people, makes the decision to stamp everything confidential, that does not get

¹¹ May 17, 2018, was when Interlocal Agreement II was executed.

me off the hook.^[12] So I believe that, in every way, I did follow my oath, and I followed the Constitution by following the Sunshine Law.

29. Commissioner Underhill testified that he wanted the transcripts released because he disagreed with the idea of Escambia County taking over a utility:

Q: Commissioner Underhill, what was in the transcripts that was so important that they had to be released on May 11, 2020?

A: Well, the same information that was in them, that they should have been released from the beginning. Particularly, that there was an effort on the part of Escambia County to violate state statute. The state statute that you've referred to that created the ECUA, by getting ourselves into the business of being in the sewer and water business. In doing so, that was, in my opinion, and I think that many citizens reading it, would perceive that by making the Innerarity Island sewer system a political football, to achieve other objectives within the county, instead of simply engaging in what should have been a very simple legal matter of receivership, and that pretty much ended the game. It should have been a very simple matter, and I believe that – and this is why we have a Sunshine Law, is because people tend to act better in the Sunshine. And so it was my belief that, you know, every pretense of any other argument had long since passed, once it was very clear that there was no dispute on the interlocal agreements between the ECUA and [the Board].

30. Commissioner Underhill was also of the opinion that the litigation between the Board and ECUA had ended on May 17, 2018, when the parties executed Interlocal Agreement II:

It is my testimony, that the material arguments between ECUA and [the Board], to the extent that there were any – it's actually my belief that this never should have been in

¹² This aspect of Commissioner Underhill's testimony is self-serving given that he unilaterally decided to release the shade transcripts without a vote of approval from his fellow Commissioners. While the rules governing the Board's internal operations are not part of the record, the testimony from Commissioner Bergosh and Ms. Rogers indicates that the Board acts as a typical collegial body in which every action must be put to a vote.

the Shade from the very beginning, but that the material arguments before the Court had all been settled, and that the only purpose for continuing the case, and continuing the case for as long as the county was, was with the express purpose of hiding from the people what had taken place that led us to that problem.

31. When asked what was the benefit of releasing the transcripts, Commissioner Underhill testified that

[i]t is my job. I think you heard a lot of testimony today about politics, and that really, none of it actually adds up, and there was no evidence provided for it, but the only reason that I wanted to present those transcripts is because I believe that our government is absolutely dependent upon a knowledgeable and engaged citizenry. And if we, as the government, have the ability to hide those things from them, then the citizens can only be led to a desired opinion based on the fact. I mean, hey, I'm one of those kind of wacko Constitutionlists. I can sit here and talk like that all day long, but I mean, there is no other – there is simply no other reason for doing it, other than it literally was my job.

32. When asked if he benefited from releasing the transcripts, Commissioner Underhill testified that

I can't imagine how I could have. I am individually and self imposed term limited out. So I knew, at that time, as did anybody who's ever listened to me, knew that there was never going to be a third term. So, I had no political dog in the hunt, at that point. You know, there was no, you know, no other initiative . . . So, no, to the best of my knowledge, there was no gain to be had, other than the gain that we all share, right, by having government in the Sunshine. That's why we live – part of why we live in Florida.

33. During a May 14, 2020, Board meeting, Commissioner Underhill requested that the Board release the shade transcripts without mentioning that he had already done so:

I would ask that each of the Board members, when we talked last week about the Innerarity Island Development Corporation – there was quite a bit of conversation in that

very robust meeting – what was the resolve I think that was said by everybody I think is that we really want to get down to the bottom of what is going on [and] the citizens out there do as well, so I would ask that each member of the Board permit the County Attorney to release the shade meeting minutes that have all been sent to you recently. There is no pending litigation. I think there is very little possibility – miniscule possibility that we will ever be back in a courtroom with ECUA on this matter. The last time we were in a courtroom was almost five years ago. So there really is no public value to retaining those private so I would please ask that each of you and, request that we could do it right now, let the County Attorney know that it is okay to release those so that the people that are most effected have the ability to review what was done on their behalf.

34. Commissioner Bergosh responded by asking Ms. Rogers if the shade transcripts were still confidential and if it would be ethical for an individual commissioner to release them without a vote authorizing the release from the Board. Ms. Rogers explained, “in my opinion, yes, they are still protected by statute. It is not the sort of protection you may have for medical records or social security numbers, it is up to the client in this case the five of you to waive.” The Board did not vote to release the shade transcripts.

35. During a May 21, 2020 meeting, Commissioner Underhill repeated his request for the Board to release the shade transcripts. Commissioner Bergosh made the following comment:

I have now been contacted by multiple people who – if you remember last week at this time we had a discussion about the transcripts as it pertains to Innerarity Island and I certainly did agree with Commissioner Underhill that I wanted to release them, however, upon getting legal guidance from our attorney and getting a more full understanding of the reasons why that should not happen, you know, I stood down and I understand that those are – and now subsequently have read most of them – I understand that there’s things in there that kind of give away our thoughts and perspectives on certain things as a Board and how we handle issues with other entities,

mainly ECUA. But sadly and disturbingly subsequent to that this past week I've been contacted, and I've forwarded now those emails and that information to the attorney by several residents who said that that information has been released by one of our Board members. Now, I'm not going to name him. I'm not going to say a name but I am going to request Mr. Chairman that this be looked into because as Madam Attorney very clearly stated last week, that's not something that one Board member has the right to do. That is reserved to us – the five of use as the client. And her advice last week was because we still have ongoing litigation that those should not be released and I abided by that. I have information that those have been released and now multiple people area in possession of it. I'd ask Mr. Chairman without objection that we have our Ethics and Compliance Department look into that and figure out where that leak came from.

36. During a June 4, 2020 Board meeting, Commissioner Underhill repeated his request for the Board to release the shade transcripts. No Commissioners joined in his request, and the other Commissioners voiced their displeasure with Commissioner Underhill unilaterally deciding to release the transcripts. During the discussion, Commissioner Underhill stated

I took a look at it and for my purposes I believe that my obligation to tell the people what's going on was a much higher ethical calling than to live up to the attorney's continued stamp of confidential on there. It's a choice that I made. It's a choice I'm more than happy to deal with the ethics commission. That's [] the simple choice that was made.

37. In accord with Interlocal Agreement II, ECUA accepted the sewer portion of the utility system in February or March 2021. The Board and ECUA then went back to court to dissolve the receivership and transfer ownership of the utility system to ECUA. The order concluding the case was entered on May 4, 2021. Thus, May 4, 2021, was the date on which the pertinent litigation came to an end.

38. Ms. Rogers testified during the final hearing that Commissioner Underhill released the transcripts in order to “make him[self] look good, like he was trying to

hold ECUA's feet to the fire, and potentially make it look like maybe other Commissioners had been less concerned with that part of the litigation." Ms. Rogers also testified that Commissioner Underhill "believed it would serve him politically to show the public that he had, in fact, tried to take that position earlier in the litigation."

39. Ms. Rogers's testimony on this point is speculative in nature.¹³ 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.

41. The Advocate also argues that the transcript release was intended to aid the campaign of Commissioner Underhill's friend and legislative assistant, Jonathan Owens. Mr. Owens was running against Commissioner Bergosh, and Commissioner Bergosh testified that a victory for Mr. Owens would have increased Commissioner Underhill's political power on the Board. According to Commissioner Bergosh, Mr. Owens based his campaign on how Commissioner Underhill was the only Commissioner interested in transparency and open government. According to Commissioner Bergosh, the release of the shade transcripts was campaign fodder to support Mr. Owens's claims.

¹³ 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 Ms. Rogers's testimony about how Commissioner Underhill benefited from the transcript release to be speculative, the undersigned also found it to be sincere.

42. In support of his speculative assertion that the shade transcript release was intended to damage his campaign or those of other Commissioners seeking reelection in 2020, Commissioner Bergosh cited a poll taken soon after the shade transcripts' release indicating that Mr. Owens's support increased from 18% to 22%.

43. However, other portions of Commissioner Bergosh's testimony undermined his assertion that the shade transcript release damaged the campaigns of Commissioners seeking reelection in 2020. For instance, Commissioner Underhill released the shade transcripts in May 2020. But, the Republican primary in Escambia County was not to occur until August 2020. If Commissioner Underhill had intended to maximize damage to the campaigns of other Commissioners, then he might have released the transcripts closer to the election date. Furthermore, Commissioner Bergosh testified that he ultimately won the Republican primary with almost 39% of the vote while Mr. Owens trailed with 22%.¹⁴

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 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 Commissioner Underhill's action, it was not corrupt within the meaning of section 112.313(6).

¹⁴ The testimony and documentary evidence demonstrate that there is a substantial amount of animosity between Commissioners Underhill and Bergosh. The undersigned took that into account when considering Commissioner Bergosh's testimony.

45. In sum, 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.

Findings Regarding the Advocate's Allegations that Commissioner Underhill Violated Section 112.3148(3) by Soliciting Donations from Fred Hemmer

46. Commissioner Underhill started a GoFundMe account in 2019 in order to raise money for his legal defense fund. Commissioner Underhill testified that he started the fund because his opponents turned to litigation when they were unable to defeat him at the ballot box. He also testified that Escambia County has been wrongfully refusing to reimburse him for his legal expenses. According to Commissioner Underhill, the litigation against him during his tenure on the Board has been a financial hardship.

47. Fred Hemmer is a real estate developer based in St. Petersburg, Florida, who is well known to the Board. Mr. Hemmer has significant holdings in Escambia County, has developed several hundred lots within the County, and has done business that had come before the Board.¹⁵ Mr. Hemmer contributes to all of the Commissioners' campaigns. In January of 2019, Escambia County declined his offer of \$18 million for a 500-acre tract of land owned by the County. The Clark Partington law firm has represented Mr. Hemmer in at least some of his dealings with Escambia County and/or the Board. Mr. Hemmer's relationship to the Board is that of a vendor and/or a lobbyist.

48. At some point in 2020, Mr. Hemmer donated \$250 to Commissioner Underhill's legal defense fund through Commissioner Underhill's GoFundMe page. Mr. Hemmer did not learn of the GoFundMe page through

¹⁵ An e-mail exchange between Commissioner Underhill and Mr. Hemmer in January of 2018 demonstrates that Commissioner Underhill was well aware that Mr. Hemmer was a developer with substantial knowledge of Escambia County.

Commissioner Underhill or anyone associated with Commissioner Underhill. Mr. Hemmer did not receive any sort of acknowledgment of his donation.¹⁶

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).

Findings as to Whether Commissioner Underhill Violated Section 112.3148(4) by Knowingly Accepting One or More Contributions to his Legal Defense Fund from Vendors and/or Lobbyists

50. Commissioner Underhill reported receiving a \$250 GoFundMe donation from Mr. Hemmer on November 27, 2019, on his Form Quarterly Gift Disclosure for the calendar quarter ending December 31, 2019. Mr. Hemmer's relation to the Board is that of a vendor and/or a lobbyist. Thus, Commissioner Underhill violated section 112.3148(4) by knowingly accepting a contribution to his legal defense fund from a vendor and/or a lobbyist.

Findings as to Whether Commissioner Underhill Violated Section 112.3148(8) by Failing to Disclose Contributions to His Legal Defense Fund

51. Commissioner Underhill received a \$250 GoFundMe Donation from Richard Andres which he failed to disclose on his Form Quarterly Gift Disclosure for the calendar quarter ending December 31, 2019, or for the calendar quarter ending March 31, 2020. Thus, Commissioner Underhill violated section 112.3148(8) by failing to disclose contributions to his legal defense fund.

Findings as to Whether Commissioner Underhill Violated Section 112.3148(8) by Failing to Disclose a Gift of Legal Services

52. In 2015, Gene Valentino sued Commissioner Underhill and three other defendants for defamation. Commissioner Underhill had defeated Mr. Valentino for the seat he currently holds on the Board.

¹⁶ Commissioner Underhill denied personally soliciting any individual or entity to contribute to his GoFundMe page.

53. The other three defendants retained Scott Remington of the Clark Partington law firm in Pensacola, Florida, to defend them. Commissioner Underhill also retained Mr. Remington, but the firm waived its \$5,000 retainer because Commissioner Underhill joined a case that was already underway. Just one of the four defendants, Rick Outzen, communicated with Mr. Remington about the representation while the litigation was pending.

54. The litigation concluded on November 17, 2015, but Commissioner Underhill did not pay any fees to Clark Partington in 2015 or 2016.

55. When Mr. Valentino sued him again in 2017, Commissioner Underhill contacted Mr. Remington about representing him in that case. Mr. Remington told him that he could not take the case because of the unpaid fees from the earlier case. In addition, Mr. Remington gave Commissioner Underhill an invoice for approximately \$20,000 pertaining to the earlier case. Commissioner Underhill considered that amount to be too high and did not pay.

56. At some point in 2017, Mr. Remington was under the impression that Escambia County would pay Commissioner Underhill's portion of the legal fees associated with the earlier case.¹⁷ Mr. Remington sent a copy of Commissioner Underhill's bill to Ms. Rogers, but the Board ultimately declined to pay the bill. Shortly thereafter, Commissioner Underhill made three \$100 payments to Clark Partington, but he did not pay anything in 2018 or 2019. Commissioner Underhill disputed the amount Clark Partington was seeking and requested a "clean bill" from the firm.

57. After David Bear filed one of the ethics complaints described in the Preliminary Statement, Commissioner Underhill paid \$5,022.87 to settle his debt to Clark Partington. Mr. Remington realized by that time that the client engagement letter was ambiguous with regard to how attorney's fees would be divided among the four defendants. As a result, Clark Partington and Commissioner Underhill agreed

¹⁷ Commissioner Underhill testified that the Board has a policy to reimburse Commissioners for legal expenses like the ones he incurred defending himself against Mr. Valentino.

that he was responsible for 25% of the \$22,164.50 in attorney's fees, and Commissioner Underhill ultimately paid \$5,022.87 to the firm on May 8, 2020.

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. Findings as to Whether Commissioner Underhill Violated Section 112.3148(8) by Failing to Disclose Reimbursed Travel and Shipping Expenses

59. In April of 2018, a private entity was hosting a boating race near the Alabama-Florida border called the Emerald Coast Grand Prix. The private entity had arranged to obtain safety buoys from a provider in Florida, but that arrangement fell through. Because the race could not be held without the safety buoys, the private entity arranged to obtain safety buoys from another provider based in Canada. Because the safety buoys could not be shipped commercially in time for the race, Commissioner Underhill volunteered to drive to Canada and bring the buoys to Florida. He also agreed to commercially ship the buoys back to the Canadian provider at the conclusion of the Grand Prix.

60. A non-governmental entity, Pensacola Sport Association ("PSA") reimbursed Commissioner Underhill \$1,106.90 on August 8, 2018, for the roundtrip mileage from Florida to Canada incurred in transporting the buoys to the site of the Grand Prix. Commissioner Underhill testified that he agreed to be reimbursed at the "GSA" mileage rate.¹⁸ On August 21, 2018, after the race, PSA reimbursed Commissioner Underhill \$1,039.50 for the actual cost of shipping the safety buoys back to the Canadian provider.

¹⁸ Presumably, Commissioner Underhill was referring to the federal General Services Administration.

61. Commissioner Underhill did not disclose the aforementioned reimbursements on any of his CE 9 Forms, and he was not required to do so because those reimbursements were not gifts within the meaning of section 112.3148(8). There is no persuasive evidence that Commissioner Underhill received anything more than the actual costs he incurred in transporting the safety buoys from Canada and shipping them back there.

CONCLUSIONS OF LAW

62. DOAH has jurisdiction over the parties and the subject matter of this proceeding. § 120.57(1), Fla. Stat.

63. Section 112.322 authorizes the Commission to conduct investigations and to make public reports on complaints concerning violations of the Code of Ethics.

64. The Commission must prove its allegations by clear and convincing evidence when it seeks to impose penalties against a public officer or employee. *See Latham v. Fla. Comm'n on Ethics*, 694 So. 2d 83 (Fla. 1st DCA 1997).

65. The court in *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), explained that:

[C]lear 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 the witnesses must be lacking in confusion as to the 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.

66. The Florida Supreme Court later adopted the *Slomowitz* court's description of clear and convincing evidence. *See In re Davey*, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal has also followed the *Slomowitz* test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous."

Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

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

67. The Advocate alleges that Commissioner Underhill violated sections 112.313(6) and 112.313(8) by transmitting the shade transcripts to Kemp Evans on May 11, 2020.

68. Section 112.313(6) is entitled “Misuse of Public Position” and states that

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.

(emphasis added).

69. Section 112.312 defines certain terms used within chapter 112, and section 112.312(9) defines “corruptly” as being “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.”

70. Section 112.313(8) is entitled “Disclosure or Use of Certain Information” and provides that

[a] current or former public officer, employee of an agency, or local government attorney may not disclose or use information not available to members of the general public and gained by reason of his or her official position, except for information relating exclusively to governmental practices, for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity.

71. There is no dispute that Commissioner Underhill obtained the shade meeting transcripts because he holds a seat on the Commission. The only questions are what

special privilege, benefit, or exemption, if any, he obtained as a result of transmitting the shade meeting transcripts to Mr. Evans; and, if he did obtain a special privilege, benefit, or exemption, was it inconsistent with the proper performance of his or her public duties. *See* § 112.313(6), Fla. Stat. (referring to securing “a special privilege, benefit, or exemption for himself, herself, or others.”); § 112.312(9), Fla. Stat. (defines “corruptly,” in pertinent part, as seeking “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.”); § 112.313(8), Fla. Stat. (prohibiting using certain information “for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity.”).

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.

73. As for the Advocate’s argument that Commissioner Underhill benefitted because releasing the transcripts enhanced his efforts to be viewed as an opponent of “business as usual” in Escambia County, *Blackburn v. Commission on Ethics*, 589 So. 2d 431 (Fla. 1st DCA 1991) is instructive. Louise Blackburn was a member of the Gadsden County Commission in 1988. Ms. Blackburn had two Gadsden County employees prepare a written article on a garbage ordinance that became the dominant political issue in Ms. Blackburn’s reelection campaign during the summer of 1988. As described by the *Blackburn* Court, “the article was a forceful statement in support of the garbage ordinance and its objectives. The information in the article was used by [Ms. Blackburn] in political speeches in support of the ordinance and in her candidacy for reelection, and she had it published as a paid political advertisement in a local newspaper.”

74. A political opponent filed a complaint with the Commission against Ms. Blackburn. A hearing officer concluded in a Recommended Order that the preparation of the article for use in Ms. Blackburn's campaign "constituted a special benefit for her." The Commission entered a final order finding Ms. Blackburn guilty of violating section 112.313(6).

75. On appeal, the First District Court of Appeal examined the relevant statutory provisions and concluded that Ms. Blackburn had not violated section 112.313(6):

It is quite apparent that the primary concern of these statements of legislative intent and purpose lies in avoiding conflicts of interest by public officials in matters under their charge, and eliminating private gain, directly or indirectly, by financial compensation or otherwise, in carrying out their official duties on behalf of the government they are sworn to serve. Section 112.311(5) specifically refers to the code of ethics enacted in this part to implement the policy and intent recited in the preceding subparagraphs (1) through (4), and the standards of conduct set forth in section 112.313 must be construed in the context of these provisions.

We find nothing in the language of these sections that suggests the incidental benefit appellant may have received or enjoyed in respect to her campaign for reelection by having a county employee draft the subject article was intended to be covered by this code of ethics. Both the hearing officer and the Ethics Commission agreed that it would have been appropriate for appellant to have obtained the information and written article in this case to use in her official capacity as County Commissioner *apart from being used in the reelection campaign*. Appellant insisted that the employee's work product was intended to be used and was in fact used for dual purposes: to inform the public as a county commissioner on an issue of vital importance to the county citizens, and to assist appellant in her reelection campaign. The first purpose is obviously a valid one, and the pertinent statutory language provides no basis for converting that valid purpose into an illegal or unethical act simply because the information was also to be used in a political campaign. There is no evidence in the record, apart from appellant's having freely admitted use of the article in her campaign, that disputes or contradicts

her testimony regarding her intent to use the material for both purposes. The record does not contain competent substantial evidence to support a finding of fact that appellant's only purpose in obtaining the article was to corruptly use her office to obtain a prohibited benefit for use in her campaign.

We also reach this conclusion because there is nothing inconsistent with appellant's duties as county commissioner in her soliciting public support for the garbage ordinance she felt so strongly was in the public interest, even though that occurred during the course of a political campaign. The statutory definition of "corruptly" in section 112.312(7) not only requires that the conduct complained of be done with a wrongful intent, it also requires that the "act or omission" be "inconsistent with the proper performance of [her] public duties." The statement of intent and policy in section 112.311(4) makes it clear that the ethics code is to be construed and applied so as to facilitate "the recruitment and retention of qualified personnel by prescribing restrictions against conflicts of interest without creating unnecessary barriers to public service." A county commissioner's use of information and written documents, otherwise ordinarily available from county employees for use as a commissioner, in a reelection campaign must be weighed against the obvious duty of the commissioner to communicate with the electorate concerning the performance of the commissioner's public duties, and to place such a rigid restriction on the commissioner as the hearing officer and Commission concluded to do in this case is contrary to the stated legislative intent and policy. It would be difficult, indeed, for this commissioner or anyone else to know when their use of county employees in the performance of their official duties would cross the line of prohibited conduct. If the code of ethics in section 112.313 is to cover the acts charged and proved against appellant in this case, the legislature must evidence that intent in more specific statutory enactments.

Id. at 435-36.

76. Previous Commission final orders have turned on whether there was a direct connection between the conduct at issue and the benefit allegedly sought. *See In re*

Daniel Calabria, Case No. 14-4678 (Fla. DOAH May 12, 2015; Fla. Comm’n on Ethics July 29, 2015)(addressing a situation in which a liquor store displayed a sign supporting a public official’s political opponents and the public official’s notice to the liquor store owner that the sign allegedly exceeded a “long and convoluted” size limitation ordinance; finding “[i]t was not proven by clear and convincing evidence that the Respondent’s actions with respect to the Pasadena Liquors marquee were taken for the purpose of influencing the elections, and it is unlikely that they had any influence on the election.”); *In re Dustin Daniels*, Case No. 20-3599 (Fla. DOAH Feb. 19, 2021), *rejected in part*, Case No. 21-004 (Fla. Comm’n on Ethics Apr 21, 2021)(concluding that “Mr. Daniels, as chief of staff, oversaw the sending of an email, utilizing the Mayor’s Office’s [online communication software], that was an invitation to a 2015 fundraising event to support the Florida Democratic Party,” and concluding that the use of the software paid for with public resources for a private event was a violation of section 112.313(6));¹⁹ *In re Ramiccio*, Case No. 00-0265 (Fla. DOAH Aug. 2, 2000), *rejected in part*, Case No. 00-48 (Fla. Comm’n on Ethics Oct. 10, 2000)(finding that “the evidence clearly established that the Respondent intended the threatened discontinuance of the City’s patronage to Ms. Dippel’s store as punishment for her supporting Respondent’s political opponent, and concluding that the statement and conduct of Respondent was intentional and inconsistent with Respondent’s performance of his public duties.”);²⁰ *In re Lynch*, Case No. 94-2068 (Fla. DOAH Aug. 19, 1994), *rejected in part*, (Fla. Comm’n on Ethics Oct. 18, 1994)(finding that “the public official performed her duties as a title clerk with the Walton County Tax Collector’s Office to secure a special benefit for herself and for Sue Carter, [the public official]’s preferred candidate in the tax collector’s political race. [The public official] passed out Ms. Carter’s palm cards to customers of the tax collector’s office while she was on duty in the tax collector’s office and told customers

¹⁹ The modification to the Recommended Order concerned the penalty recommendation.

²⁰ The Commission made a minor modification to a finding of fact that had no material impact of the result.

that they should vote for Sue Carter. The special benefit which [the public official] sought was votes for her preferred candidate to secure the election of Ms. Carter and thereby securing [the public official]’s continued employment with the tax collector’s office.”).²¹

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).²²

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)

78. Section 112.3148(3) mandates that:

A reporting individual or procurement employee is prohibited from soliciting any gift from a vendor doing business with the reporting individual’s or procurement employee’s agency, a political committee as defined in s. 106.011, or a lobbyist who lobbies the reporting individual’s or procurement employee’s agency, or the partner, firm, employer, or principal of such lobbyist, where such gift is for the personal benefit of the reporting individual or procurement employee, another reporting individual or procurement employee, or any member of the immediate family of a reporting individual or procurement employee.

79. Commissioner Underhill’s GoFundMe page was a passive, as opposed to an active, request for funding. In other words, there is no evidence that he personally or directly contacted Mr. Hemmer and asked him to donate to his legal defense fund through the GoFundMe page.

²¹ The modification to the Recommended Order concerned the penalty recommendation.

²² 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*.

80. In arguing in its Proposed Recommended Order that Commissioner Underhill violated section 112.3148(3), the Advocate appears to argue that even a passive request to Mr. Hemmer amounts to a violation of section 112.3148(3):

Respondent solicited a gift, namely monetary donations to his GoFundMe Account. Indeed, the GoFundMe Account was established to solicit money for his legal defense in various lawsuits. Words on the account, such as “fundraiser” and “donate,” denote a request for money (i.e., a gift). The plain language of the statute does not require [that] the solicitation be in person, in writing, or through electronic methods. Solicitation of a prohibited donor by any means is unlawful.

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. *Ocampo v. Dep’t of Health*, 806 So. 2d 633, 634-35 (Fla. 1st DCA 2002); *Elmariah v. Dep’t of Pro. Regul.*, 574 So. 2d 164, 165 (Fla. 1st DCA 1990).

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).

Commissioner Underhill Violated Section 112.3148(4) by Knowingly Accepting One or More Contributions to his Legal Defense Fund from Vendors and/or Lobbyists

84. Section 112.3148(4) states that

A reporting individual or procurement employee or any other person on his or her behalf is prohibited from

knowingly accepting, directly or indirectly, a gift from a vendor doing business with the reporting individual's or procurement employee's agency, a political committee as defined in s.106.011, or a lobbyist who lobbies the reporting individual's or procurement employee's agency, or directly or indirectly on behalf of the partner, firm, employer, or principal of a lobbyist, if he or she knows or reasonably believes that the gift has a value in excess of \$100; however, such a gift may be accepted by such person on behalf of a governmental entity or a charitable organization. If the gift is accepted on behalf of a governmental entity or charitable organization, the person receiving the gift shall not maintain custody of the gift for any period of time beyond that reasonably necessary to arrange for the transfer of custody and ownership of the gift.

85. Commissioner Underhill stated in his Proposed Recommended Order that “[t]he Commission established by clear and convincing evidence that [he] was a reporting individual; that he accepted a gift having a value in excess of \$100; and that the donor was the principal of a lobbyist.” Thus, Commissioner Underhill concedes that he violated section 112.3148(4).

Commissioner Underhill Violated Section 112.3148(8) by Failing to Disclose Contributions to His Legal Defense Fund

86. Section 112.3148(8) provides, in pertinent part, that

[e]ach reporting individual or procurement employee shall file a statement with [the Commission] not later than the last day of each calendar quarter, for the previous calendar quarter, containing a list of gifts which he or she believes to be in excess of \$100 in value, if any, accepted by him or her, for which compensation was not provided by the donee to the donor within 90 days of receipt of the gift to reduce the value to \$100 or less . . .

87. Commissioner Underhill, as a Commissioner, is required to file an annual CE Form 1, “Statement of Financial Disclosure,” and a CE Form 9, “Quarterly Gift Disclosure,” for gifts over \$100, with the Commission.

88. Commissioner Underhill stated in his Proposed Recommended Order that he “received a \$250 GoFundMe Donation from Richard Andres which he failed to disclose on his Form Quarterly Gift Disclosure for the calendar quarter ending December 31, 2019 or for the calendar quarter ending March 31, 2020.” Thus, Commissioner Underhill concedes that he violated section 112.3148(8).

Commissioner Underhill Violated Section 112.3148(8) by Failing to Disclose a Gift of Legal Services

89. Legal services can constitute a gift. *See* § 112.312(12)(a), Fla. Stat. (defining a “gift” to include “[s]ervices provided by persons pursuant to a professional license or certificate.”). A preferential rate, preferential terms, or forgiveness of a debt can also constitute a gift. *See* § 112.312(12)(a)5. and 6., Fla. Stat.

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.

The Advocate Did Not Prove by Clear and Convincing Evidence that Commissioner Underhill Violated Section 112.3148(8) by Failing to Disclose Reimbursed Travel and Shipping Expenses

91. The Commission failed to prove by clear and convincing evidence that Commissioner Underhill received anything over and above the actual costs he incurred in transporting the safety buoys from Canada and shipping them back. As a result, the reimbursement he received from PSA was not a gift that needed to be disclosed.

Penalty Recommendation

92. Section 112.317(1)(a) provides that a public officer guilty of violating the Code of Ethics may be punished by impeachment, removal from office, suspension from office, public censure and reprimand, forfeiture of no more than one-third of his or her salary per month for no more than 12 months, and/or a civil penalty not to exceed \$10,000.

93. Neither the Code of Ethics nor Florida Administrative Code Chapter 34-5 recognize any mitigating or aggravating factors to consider when determining the appropriate penalty.

94. In its Proposed Recommended Order, the Advocate asserts that Commissioner Underhill should be removed from office. In support thereof, the Advocate argues that only removal from office will prevent Commissioner Underhill from committing future violations.

95. 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 112.313(6).

97. The undersigned agrees with Commissioner Underhill that his violations of sections 112.3148(4) and 112.3148(8) justify a public censure and reprimand.

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.

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 imposing the following penalties on Douglas Underhill: a public censure, reprimand, and a \$5,000 fine.

DONE AND ENTERED this 4th day of August, 2022, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
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Steven Zuilkowski, General Counsel
Florida Commission on Ethics
Post Office Drawer 15709
Tallahassee, Florida 32317-5709

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.