

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

In re: Douglas Underhill,

DOAH Case Nos. 21-3753EC,
21-3754EC, 21-3755EC
(consolidated)

Respondent.
_____ /

ADVOCATE'S MOTION TO COMPEL AND, IN THE ALTERNATIVE,
MOTION TO DEEM MATTERS ADMITTED AND TO RELINQUISH JURISDICTION

I. MOTION TO COMPEL

COMES NOW, Advocate for the Commission on Ethics, and pursuant to Rule 28-106.204, *Florida Administrative Code*, and Rule 1.380, Florida Rules of Civil Procedure, respectfully moves this Court for entry of an Order compelling Respondent, Douglas Underhill, to Respond to Discovery (Admissions, Interrogatories, and Request for Production). In support of this motion, Advocate states:

1. A final hearing is scheduled for February 16 and 17, 2022; 9:30 a.m., Central Time, by Zoom Conference.
2. On December 28, 2021,¹ Advocate emailed discovery requests to Respondent's Counsels. Respondent was advised to respond within 30 days. The due date for Respondent's completed discovery responses to be served on Advocate was Friday, January 28, 2022.
3. Advocate emailed Respondent's Counsels on February 8, 2022, inquiring about Respondent's due date for complying with discovery.
4. Respondent's Counsels promptly advised Advocate that their client has not been responsive to their requests.
5. On February 9, 2022, Advocate advised Respondent's Counsel, J. Brennan

¹ Discovery was emailed after 5:00 p.m., therefore, Advocate counted the 30 days from December 29, 2021.

Donnelly, that a Motion to Compel would be filed.²

6. Due to Respondent's failure to participate in this matter, Advocate requests that the Administrative Law Judge deem matters admitted and relinquish jurisdiction if Respondent does not comply by 5:00 p.m. on Thursday, February 10, 2022.

7. Advocate is entitled to the requested discovery and is in need of such for hearing preparation. Time is of the essence.

8. This motion is brought in good faith. Advocate and Respondent's Counsels have sought Respondent's compliance prior to seeking the Court's intervention.

WHEREFORE, Advocate respectfully requests that Honorable Administrative Law Judge Chisenhall issue an Order as follows:

- a. Compelling Respondent to respond to Advocate's discovery requests by 5:00 p.m. on Thursday, February 10, 2022, or be in jeopardy of the Court deeming all matters admitted;
- b. Awarding the reasonable attorney's fees and costs incurred; and
- c. Considering the following motion either in the alternative to the Motion to Compel or in the event Respondent does not produce discovery by 5:00 p.m. on Thursday, February 10, 2022.

II. MOTION TO DEEM MATTERS ADMITTED AND TO RELINQUISH JURISDICTION PURSUANT TO SECTION 120.57(1)(i), FLORIDA STATUTES

COMES NOW, Advocate for the Commission on Ethics, pursuant to Rule 28-106.204, *Florida Administrative Code*, and Rule 1.370, Florida Rules of Civil Procedure, and moves this Honorable Court for an entry of an Order Deeming Matters Admitted and

² Mark Herron, co-counsel, is in trial today and, thus, unavailable until later today.

Relinquishing Jurisdiction to the Commission on Ethics. In support of this motion and on good grounds, Advocate states:

STATEMENT OF FACTS

1. Respondent was elected to the Escambia County Board of County Commissioners, District 2, in November 2014, and has served continuously.

2. On September 15, 2021, the Commission on Ethics (Commission) issued its Order Finding Probable Cause to believe that Respondent violated the law by committing these specified actions:

- a. Section 112.313(6), Florida Statutes, by publicly sharing and/or publishing confidential transcripts, including the minutes of meetings of the Escambia County Board of County Commissioners;
- b. Section 112.313(8), Florida Statutes, by disclosing or using information not available to members of the general public (i.e., shade meeting transcripts, including the minutes) and gained by reason of his official position for his personal gain or benefit or the personal gain or benefit of another person or business entity;
- c. Section 112.3148(3), Florida Statutes, by soliciting a donation(s) from Fred Hemmer, a vendor doing business with the Respondent's agency, or a lobbyist who lobbies the Respondent's agency, or the principal of such lobbyist;
- d. Section 112.3148(4), Florida Statutes, by knowingly accepting a contribution(s) exceeding \$100 to a legal defense fund from vendor(s) doing business with Respondent's agency, or lobbyist(s) who lobby Respondent's agency, or principal(s) of such lobbyist(s);

- e. Section 112.3148(8), Florida Statutes, by failing to timely file a CE Form 9, "Quarterly Gift Disclosure," disclosing contribution(s) exceeding \$100 to a personal legal defense fund, and/or by failing to fully disclose information required to be reported on a CE Form 9, "Quarterly Gift Disclosure" regarding contribution(s) exceeding \$100 to a personal legal defense fund;
- f. Section 112.3148(8), Florida Statutes, by failing to file a CE Form 9, "Quarterly Gift Disclosure," disclosing free personal legal services exceeding \$100 from the Clark Partington law firm; and
- g. Section 112.3148(8), Florida Statutes, by failing to file a CE Form 9, "Quarterly Gift Disclosure," disclosing reimbursed travel expenses and shipping costs exceeding \$100.

3. The matter was forwarded to the Division of Administrative Hearings (DOAH) for an administrative hearing, pursuant to Section 120.57(1), Florida Statutes, and the parties were authorized to conduct discovery. Fla. Admin. Code R. 28-106.206; *Initial Order*, dated December 13, 2021.

4. On December 28, 2021,³ Advocate served by email on Respondent's Counsels the Advocate's First Request for Admissions, Advocate's First Set of Interrogatories, and Advocate's First Request to Produce, in accordance with Rules 1.370, 1.340, and 1.350, Florida Rules of Civil Procedure, respectively.

5. Pursuant to Rules 1.340(a), 1.350(b), and 1.370(a), Florida Rules of Civil Procedure, Respondent was advised to respond to the discovery requests within thirty (30) days. Respondent was specifically informed that failure to respond to the Request for

³ Discovery was emailed after 5:00 p.m., therefore, Advocate counted the 30 days from December 29, 2021.

Admissions within 30 days after service of the request could result in the matter being admitted, pursuant to Fla. R. Civ. P. 1.370. Additionally, a copy of the rule was provided to Respondent.

6. Pursuant to Rule 28-106.103, *Florida Administrative Code*, no additional time shall be added if service is made by email.

7. Accordingly, Respondent was required to respond to the requests on or before January 28, 2022. Forty-two (42) days have elapsed since service of Advocate's discovery requests.

8. Respondent has not filed a response, nor has he requested a continuance to respond to Advocate's discovery requests.

9. Additionally, upon information and belief, Respondent has not responded to his attorneys' requests to complete discovery.

10. This matter is currently set for final hearing on February 16 and 17, 2022.

ARGUMENT

The Matters Asserted in Advocate's Request for Admissions are Deemed Admitted and Jurisdiction of this Matter Should be Relinquished to the Commission on Ethics Because No Disputed Issues of Material Fact Exist

A. The Request for Admissions must be Deemed Admitted as a Matter of Law, pursuant to Fla. R. Civ. P. 1.370(a), if a party does not respond to a request for admissions within thirty days after service of the request or such shorter or longer time as the court may allow. *The Florida Bar v. Eubanks*, 752 So.2d 540, 544 (Fla. 1999); *Florida Dep't. of Financial Services v. Tampa Service Co.*, 884 So. 2d 252, 253 (Fla. 1st DCA 2004); *Singer v. Nationwide Mut. Fire Ins. Co.*, 512 So. 2d 1125, 1126 (Fla. 4th DCA 1987).

Over 30 days have passed since the Advocate served discovery requests upon Respondent and he has neither answered, objected to, nor sought an extension of time for

responding to the Request for Admissions. Therefore, the matters asserted in Advocate's Request for Admissions are deemed admitted by operation of Fla. R. Civ. P. 1.370(a).

B. The Request for Admissions Has Been Deemed Admitted and is Conclusively Established as a Matter of Law.

Pursuant to Fla. R. Civ. P. 1.370(b), any matter that has been admitted shall be considered conclusively established. By deeming the Request for Admissions contained in Advocate's discovery requests admitted, the truth of the matters contained therein are conclusively established.

Due to Respondent's failure to respond to Advocate's Request for Admissions, Respondent has admitted the following facts, which have been established as matters of fact⁴:

1. Respondent was elected to the Escambia County Board of County Commissioners, District 2, in November 2014. (§ 1, 2)
2. Respondent has served continuously as an Escambia County Commissioner for District 2 from November 2014 to present. (§ 2)
3. By virtue of Respondent's position as a member of the Escambia County Board of County Commissioners, he is subject to the requirements of Part III, Chapter 112, Florida Statutes, Code of Ethics, from November 2014 through present. (§ 3)
4. Respondent was required to timely file a "Quarterly Gift Disclosure," CE Form 9, as long as he was a member of the Escambia County Board of County Commissioners. (§ 4)
5. Respondent was required to file a CE Form 9 for non-family member-related

⁴ All paragraphs refer to Advocate's Request for Admissions which has not been attached as an exhibit *solely* for the purpose of length. Exhibits will be provided upon request of the Court.

gifts (donations) exceeding \$100 and the travel reimbursement money. (§ 5, 33)

6. Respondent was advised by County Attorney Alison Rogers that he had to file a CE Form 9 relative to the GoFundMe page for contributions exceeding \$100. (§ 6)

7. Respondent was aware that he had to file a CE Form 9 for contributions exceeding \$100 to the GoFundMe page when he created the GoFundMe page, as well as the travel reimbursement money. (§ 7, 33)

8. Respondent was able to determine the identity of donors who wished to remain "anonymous" on the GoFundMe page. (§ 8)

9. Respondent solicited the public-at-large for monetary contributions to the GoFundMe page. (§ 9, 37)

10. Respondent failed to timely file, or ever file, a "Quarterly Gift Disclosure," CE Form 9 for a \$250 donation to the GoFundMe page. The money was contributed by Richard Andres. (§ 10, 11)

11. Respondent knew he was required to file a CE Form 9 for Richard Andres' \$250 donation by the end of June 2020. (§ 12)

12. Respondent failed to timely disclose the legal fees for which payment was either not made contemporaneously or not made at all. (§ 13)

13. Respondent was aware that on January 7, 2019, Fred Hemmer submitted a Letter of Intent to the Escambia County Commission to have his company, Hemmer Consulting, LLC, and 68 Ventures, LLC, purchase property from the County. (§ 14)

14. Respondent was aware that Fred Hemmer and his attorney appeared before the January 17, 2019, Escambia County Board of County Commissioners' Committee of the Whole Workshop meeting and spoke in favor of being considered to purchase property from Escambia County. (§ 15)

15. Respondent is/was aware that Fred Hemmer is a vendor of Escambia County or is an officer, principal, or agent of a vendor of Escambia County, yet he still solicited his donation. (§ 16, 30)

16. Respondent accepted a \$250 donation to his GoFundMe page from Fred Hemmer in November 2019. (§ 17)

17. Respondent was aware that he was prohibited from accepting a donation exceeding \$100 from a vendor of Escambia County, or an officer, principal, or agent of such vendor, or a lobbyist who lobbies the Escambia County Board of County Commissioners, or the principal of such lobbyist. (§ 18)

18. Respondent admitted that he failed to file a CE Form 9 in violation of the law and "intent" is not an element of such violation. (§ 19)

19. Respondent admitted there are no mitigating factors to excuse his failure to timely file a CE Form 9. (§ 20)

20. Respondent admitted that Fred Hemmer is a lobbyist, or a principal of a lobbyist, who has lobbied the Escambia County Board of County Commissioners, yet he still solicited his donation. (§ 21, 30)

21. Respondent admitted he solicited donations to the GoFundMe page from the public at large, which included vendors of Escambia County, and officers, principals, or agents of vendors of Escambia County. (§ 22)

22. Respondent admitted that he gained access to "shade meeting" transcripts by virtue of his official position. Due to a pending lawsuit, County Attorney Alison Rogers told Respondent the "shade meeting" transcripts could not be released to the public because they were still confidential. (§§ 23, 24, 31, 36)

23. Respondent admitted that he disregarded Attorney Rogers' legal advice and

released the transcripts to the public anyway, without the consent of the entire Board of County Commissioners, for his benefit and the benefit of others. (¶¶ 25, 26, 27, 28, 29, 38)

C. No Disputes of Material Fact Exist Because the Advocate Has Conclusively Established Its Prima Facie Case.

In order to prevail, Advocate must demonstrate by clear and convincing evidence that Respondent was required to comply with the applicable statutes and that Respondent failed to meet the requirements. *Dep't. of Banking & Finance v. Osborne Stern & Co.*, 670 So. 2d 932, 935 (Fla. 1996); *Ferris v. Turlington*, 510 So. 2d 292, 294 (Fla. 1987). In the matter at hand, Advocate must prove the following for each violation set forth:

Section 112.313(6), Florida Statutes, 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 with s. 104.31.

The term "corruptly" is defined by Section 112.312(9), Florida Statutes, 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 the proper performance of his or her public duties.

In order to establish a violation of Section 112.313(6), Florida Statutes, the following elements must be proved:

1. Respondent must have been a public officer or employee.
2. Respondent must have:

- a) used or attempted to use his or her official position or any property or resources within his or her trust,
- or
- b) performed his or her official duties.

3. Respondent's actions must have been taken to secure a special privilege, benefit or exemption for him- or herself or others.

4. Respondent must have acted corruptly, that is, with wrongful intent and for the purpose of benefiting him- or herself or another person from some act or omission which was inconsistent with the proper performance of public duties.

Section 112.313(8), Florida Statutes, provides as follows:

DISCLOSURE OR USE OF CERTAIN INFORMATION.
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.

In order to establish a violation of Section 112.313(8), Florida Statutes, the following elements must be proved:

- 1. Respondent must have been a public officer or employee.
- 2. Respondent must have disclosed or used information which was:
 - a) not available to members of the general public
 - and
 - b) gained by reason of Respondent's official position.

2. Such information must have been disclosed or used with an intent to secure personal gain or benefit for Respondent or another person or business entity.

Section 112.3148(3), Florida Statutes, provides as follows:

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.

In order to establish a violation of Section 112.3148(3), Florida Statutes, the following elements must be proved:

1. Respondent must have been a reporting individual or procurement employee.
2. Respondent must have solicited a gift, food or beverage.
3. The gift must have been solicited from a vendor doing business with Respondent's agency, political committee or committee of continuous existence or a lobbyist who lobbies the Respondent or his agency or the partner, firm, employer, or principal of such a lobbyist.
4. The gift must be 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.

Section 112.3148(4), Florida Statutes, provides as follows:

**REPORTING AND PROHIBITED RECEIPT OF GIFTS
BY INDIVIDUALS FILING FULL OR LIMITED PUBLIC
DISCLOSURE OF FINANCIAL INTERESTS AND BY
PROCUREMENT EMPLOYEES**

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. If the gift is 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.

In order to establish a violation of Section 112.3148(4), Florida Statutes, the following elements must be proved:

1. Respondent must have been a reporting individual or procurement employee.
2. Respondent must have knowingly accepted a gift.
3. The donor of the gift must have been a vendor doing business with Respondent's agency, a political committee, or lobbyist who lobbies the Respondent or his agency.
4. Respondent knew or reasonably believed that the gift had a value of more than \$100.

Section 112.3148(8), Florida Statutes, provides as follows

(8)(a) Each reporting individual or procurement employee shall file a statement with the Commission on Ethics on 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, except the following:

1. Gifts from relatives.

2. Gifts prohibited by subsection (4) or s. 112.313(4).
3. Gifts otherwise required to be disclosed by this section.

Section 112.312(12)(a), Florida Statutes, provides in its relevant part:

"Gift" for purposes of ethics in government and financial disclosure required by law, means that which is accepted by a donee or by another on the donee's behalf, or that which is paid or given to another for or on behalf of a donee, directly, indirectly, or in trust for the donee's benefit or by any other means, for which equal or greater consideration is not given within 90 days

- D. Respondent is/was Required to Comply with Chapter 112, Part III, Florida Statutes, while he serves as an Escambia County Commissioner.

Chapter 112, Part III, Florida Statutes, places certain requirements on public officials. Respondent violated Section 112.313(6), Florida Statutes, by publicly sharing and/or publishing confidential transcripts, including the minutes of meetings of the Escambia County Board of County Commissioners;

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

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

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

Respondent violated Section 112.3148(8), Florida Statutes, by failing to file a CE Form 9, "Quarterly Gift Disclosure," disclosing contribution(s) exceeding \$100 to a personal legal defense fund;

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

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

E. The Administrative Law Judge Should Relinquish Jurisdiction of this Matter to the Commission on Ethics.

An Administrative Law Judge is required to render an order relinquishing jurisdiction to the agency if no genuine issue of material fact exists. §120.57(1)(i), Fla. Stat. Based on the facts that are deemed admitted, Advocate has conclusively shown that Respondent violated Sections 112.313(6), 112.313(8), 112.3148(3), 112.3148(4), and 112.3148(8), Florida Statutes.

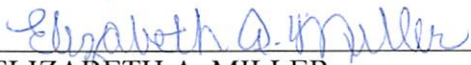
Advocate has advised opposing counsel, J. Brennan Donnelly, that she intends to file this Motion. Advocate has briefly conferred with Mark Herron about discovery; however, Mr. Herron is in a trial today and not available until later.

WHEREFORE, Advocate respectfully requests the Honorable Administrative Law Judge GRANT this motion and issue an Order as follows:

- a. Deeming Matters Admitted pursuant to Rule 1.370(a), Florida Rules of Civil Procedure;
- b. Relinquishing Jurisdiction to the Commission on Ethics pursuant to section 120.57(1)(i), Florida Statutes, for rendition of a Final Order; and

c. Awarding attorney's fees and costs.

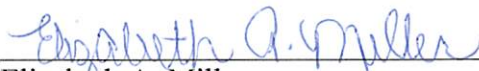
RESPECTFULLY SUBMITTED on the 9th day of February, 2022.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this document has been sent to Respondent's attorneys, Mark Herron and J. Brennan Donnelly, Messer Caparello, 2618 Centennial Place, Tallahassee, Florida 32308, via e-mail only at mherron@lawfla.com and bdonnelly@lawfla.com on the 9th day of February, 2022.



Elizabeth A. Miller