STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: JOHN MARKS,	)	Case Nos. 12-2508EC
	)	12-2509EC
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on October 8, 2012, in Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Advocate: Diane L. Guillemette, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

For Respondent: Barry Richard, Esquire
Greenberg Traurig, P.A.
101 College Avenue
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

The issues are whether Respondent, John Marks, committed the following violations as alleged in the Ethics Commission's two Orders Finding Probable Cause, both dated June 20, 2012:

> a. As to DOAH Case No. 12-2508EC, whether Respondent violated section 112.3143(3)(a), Florida Statutes, by voting on September 15, 2010, on a measure that would inure to the special private gain or loss of the Alliance

for Digital Equality ("ADE"), a principal by which Respondent was retained.

b. As to DOAH Case No. 12-2509EC, whether Respondent violated section 112.3143(3)(a), Florida Statutes, by voting on March 28, 2007, September 19, 2007, June 13, 2007, and June 18, 2008, in connection with matters that inured to the special private gain or loss of Honeywell, a principal by which Respondent was retained.

PRELIMINARY STATEMENT

On June 20, 2012, the Commission on Ethics ("Commission") entered an Order Finding Probable Cause finding that there was reasonable cause to believe that Respondent, as Mayor of the City of Tallahassee (the "City"), violated section 112.3143(3), Florida Statutes,[1/] by voting to approve the City's participation in the Federal Broadband Technologies Opportunity Program ("BTOP") in partnership with ADE, a business entity for which Respondent served in a compensated position.

Also on June 20, 2010, the Commission entered another Order Finding Probable Cause, this one finding that there was reasonable cause to believe that Respondent, as Mayor of the City, violated section 112.3143(3) by voting on March 28, 2007, September 19, 2007, June 13, 2007, and June 18, 2008, on a matter that inured to the special private gain of Honeywell, a principal by which Respondent was retained.

On July 23, 2012, the Commission referred both matters to the Division of Administrative Hearings ("DOAH") for the

assignment of an administrative law judge and the conduct of a formal hearing. The case involving Respondent's vote on a matter concerning ADE was assigned DOAH Case No. 12-2508EC, and the case involving Respondent's votes on matters concerning Honeywell was assigned DOAH Case No. 12-2509EC. On August 1, 2012, the parties filed a Joint Motion to Consolidate the cases for hearing, which was granted by order dated August 2, 2012.

The final hearing was scheduled for October 8 and 9, 2012. The hearing was convened and completed on October 8, 2012.

At the outset of the final hearing, the parties presented Joint Exhibits 1 through 19, which were admitted into evidence. The Advocate presented the live testimony of James English, City Attorney for the City; Donald DeLoach, the City's former chief information systems officer; State Representative Alan Williams, a former aide to Respondent; and Respondent. Respondent presented the live testimony of City Commissioners Mark Mustian, Gil Ziffer, and Debbie Lightsey, and proffered the testimony of City Commissioner Andrew Gillum without objection. The parties stipulated to the introduction of the deposition transcripts of Carrie Blanchard, a former aide to Respondent; Bueno Prades, an account executive for Honeywell; former Adorno & Yoss attorneys George Yoss, Anthony Upshaw, and Julie Feigeles; and former Adorno & Yoss comptroller Bob Kulpa.

The one-volume transcript of the hearing was filed at DOAH on October 22, 2012. The parties timely filed their Proposed Recommended Orders, which have been fully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At the time of the hearing, Respondent was serving as Mayor of the City, a position he has held since March 2003. The City has a commission/manager form of government. The City Manager is the chief executive officer in control of the day-to-day operations of the City government. The City Commission ("Commission") is the legislative arm of the government. The Mayor is a voting member of the Commission. He presides at Commission meetings, but otherwise has no more power than any other member of the Commission.

2. As Mayor and a member of the Commission, Respondent is subject to the requirements of section 112.3143(3)(a), which, among other things, prohibits a local public officer from voting in an official capacity upon any measure that he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained.

Facts as to DOAH Case No. 12-2508EC

3. Pursuant to the American Recovery and Reinvestment Act of 2009, the BTOP was established as a grant program administered by the National Telecommunications and Information

Administration ("NTIA") within the U.S. Department of Commerce. The BTOP funded projects to bring broadband internet infrastructure and service to underserved communities in both rural and urban areas.

4. In 2009, the City made an application for a BTOP grant toward establishing the City as a hub for providing technology services to surrounding cities and counties. The City would establish a shared services platform to bring information technology services to smaller communities unable to obtain such services on their own. This application was turned down.

5. The City's BTOP application had been prepared by Donald DeLoach, the City's chief information systems officer, and Carrie Blanchard, Respondent's chief of staff. After the grant application was rejected, Respondent suggested to Ms. Blanchard that ADE had experience in putting together such grants and that she "might want to consider them for something in the future."

6. ADE is an Atlanta-based not-for-profit organization established to assist in the development and deployment of broadband technology to underserved communities. Between April 2007, and October 2010, Respondent served as a member of ADE's "Board of Advisors," a body separate from ADE's Board of Directors. Respondent advised ADE's staff on telecommunications and broadband technology issues but was not involved in the operational aspects of the company. For his continuing

availability as a consultant, Respondent was paid $2,000 per month by ADE. Respondent's annual CE Form 1, Statement of Financial Interests, disclosed ADE as a primary source of income for the years 2007, 2008, 2009 and 2010.

7. Ms. Blanchard passed Respondent's recommendation on to Mr. DeLoach, who testified that they took a look at the company and liked what they saw. They decided to involve ADE in the new project that was taking shape for the City's second BTOP application. Both Ms. Blanchard and Mr. DeLoach testified that Respondent was not involved in preparing the second BTOP application, and that they felt absolutely no pressure from Respondent to use ADE in the project.

8. ADE was contacted and agreed to participate in the project. Claire Lawson of ADE spoke with Mr. DeLoach and Ms. Blanchard on numerous occasions to clarify points in the application regarding ADE's participation.

9. In March 2010, the City submitted its BTOP grant application to the NTIA. The executive summary of the proposed project described its intent as follows:

> The Apalachee Ridge neighborhood and the Southside of Tallahassee have been historically underserved in terms of technology and access to broadband. Many of the area's residents are minority, low-income families with limited opportunities to access the wide variety of advantages offered by a high-speed internet connection. By enhancing the technological outreach and

> skills training at the existing Apalachee Ridge Technology Center in combination with targeting at-risk student populations throughout Leon County this project will expose and train a group of underserved individuals and thereby increase the adoption and utilization of broadband technology.

10. The BTOP grant application identified three "partners" that would contribute products or services to the proposed project: Florida State University, the Go Beyond Foundation, and ADE. Throughout the application, ADE and its "Learning Without Walls" initiative are promoted as a central and essential part of the proposed project.

11. The BTOP grant application included a letter to Ms. Blanchard from Julius H. Hollis, ADE's Chairman and CEO, expressing support for the application and confirming ADE's involvement in the project, including "an in-kind contribution of computers to support your application." If the grant were awarded and implemented as proposed, ADE would have been obligated to provide $36,109 worth of software and $40,000 worth of computer equipment. Mr. Hollis was the person who hired Respondent to work for ADE.

12. On or about August 19, 2010, the NTIA awarded the grant to the City. The award documents stated that the grant required compliance with various federal regulations including 15 C.F.R. § 24.31(d), which provides, in relevant part:

> (d) Programmatic changes. Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:
>
> * * *
>
> (3) Changes in key persons in cases where specified in an application or a grant award....

13. On September 15, 2010, an agenda item was placed before the City Commission regarding this matter. The "recommended action" was to "[a]pprove the City's participation in the BTOP grant and allow the City Manager to execute the agreement with the [NTIA]." Respondent passed the presiding officer's gavel to Commissioner Lightsey so that he could make the motion that the Commission adopt the recommended action. In his comments, Respondent mentioned that he was familiar with ADE because he "had helped them out a little bit" and that ADE was a "solid non-profit organization." Respondent voted in favor of the motion, which passed unanimously.

14. James English, the City Attorney,[2/] testified that there is nothing in the City's charter or ordinances that required this matter to go before the City Commission for a vote. Other, smaller grants do not come before the Commission for a vote but are handled administratively by the City Manager. Mr. English stated that this item was put to a vote because it was a "good-news story and something you'd want to have on the

agenda. It's a public meeting and it's on live television and we celebrate . . . [It was] totally non-controversial, a happy event, a unanimous vote." Mr. English stated that, while it is "customary" to bring such items to the Commission, it was not necessary to do so. He did concede that had the Commission voted not to accept the grant, the City Manager could not have moved forward in the contracting process.

15. The September 15, 2010, Commission vote did not establish a contract between the City and any of its partners in the BTOP grant application. The purpose of the vote was simply to accept the grant from the NTIA. Before they could enter a contract with the City, the grant partners still had to demonstrate that they were in compliance with federal regulations and that they were financially able to fulfill their obligations as outlined in the grant application.

16. Ms. Blanchard testified that the City Commissioners were usually thorough in reviewing the details of proposed contracts. She testified that as of the September 15, 2010, vote no contractual details had been provided to the Commissioners because none had yet been outlined by staff. In her briefing of Commissioner Andrew Gillum prior to the vote, Ms. Blanchard confined herself to a general description of the roles to be played by each partner in the grant application.[3/]

17. Three of the Commissioners at the time of the September 15, 2010, vote, Mark Mustian, Gil Ziffer, and Debbie Lightsey, testified that they had made no commitments or decisions regarding contracts with any of the partners as of the time of their vote. Respondent proffered that Commissioner Gillum would have given the same testimony. The proffer was accepted without objection from the Advocate. Mr. English testified that none of Commissioners had indicated to him that they had decided to vote for any particular partner named in the grant application.

18. Mr. English testified that about one month after the September 15 vote, he attended a meeting of city staff to commence contract negotiations with the partners named in the grant application. This was the first face-to-face meeting between City representatives and those from ADE's Atlanta home office. At this meeting, the ADE representatives advised Mr. English that ADE could not be the contracting party because it was a 501(c)(4) corporation engaged in a lobbying activities that rendered it ineligible to accept federal funds.

19. Someone at the meeting mentioned Partners for Digital Equality ("PDE"), a separate 501(c)(3) corporation that was closely affiliated with ADE. As a 501(c)(3), PDE would be eligible to participate in the grant. Mr. English observed that all of the ADE people at the table during the meeting also

appeared to be involved with PDE, and verified that PDE could step into the role envisioned for ADE in the BTOP grant application. Mr. English concluded that the City would be dealing with more or less the same people under a different corporate umbrella. The decision was made to replace ADE with PDE for purposes of the City's negotiating contracts with its partners for the BTOP grant.

20. An item was placed on the agenda for the December 8, 2010, City Commission meeting recommending that the Commission "[p]rovide authority for the City Manager to negotiate and execute three year contracts with Go Beyond Foundation not to exceed $600,187, and [PDE] not to exceed $761,609, in accordance the provisions [sic] of the grant."

21. Mr. English testified that shortly before the December 8, 2010, Commission meeting, Respondent advised him that he was affiliated with ADE. Mr. English described the conversation as follows:

> He approached me, as you commonly do on conflict questions, and said, “Look, Jim, I am on the Board of Advisors or Board-- on the Board of ADE.[4/] This vote is coming up again, the December vote. Is that a problem, is that a conflict? It's a not-for profit.” And I advised him at that point I would say, yes, it's a conflict, don't vote.

22. Mr. English understood that the vote would be to negotiate with PDE rather than ADE, but this understanding did

not change his advice to Respondent that he should abstain from voting on the matter.

23. Following Mr. English's advice, Respondent filed a Form 8B, Memorandum of Voting Conflict for County, Municipal, and Other Local Public Officers ("Memorandum of Conflict"), disclosing that the agenda item providing the City Manager authority to negotiate and execute contracts with the BTOP grant partners "inured to the special gain or loss of The Alliance for Digital Equality (ADE), by whom I am retained as a member of its Board of Directors."[5/] Respondent also noted that "ADE is a 501C(3) non-profit [sic] entity and provides a stipend to its board members."

24. It was a few weeks or a month after his conflict discussion with Respondent that Mr. English learned Respondent was being paid by ADE. Ms. Blanchard testified that she knew at the time of the application that Respondent served on a board of ADE, but she did not know that it was a paid position.

25. At its December 8, 2010, meeting, the City Commission voted 4-0, with Respondent abstaining, to authorize the City Manager to negotiate contracts with the BTOP grant partners. Mr. English testified that any contracts negotiated by the City Manager would have had to come before the City Commission for another vote of ratification.

26. No contract was ever entered into between the City and any of the partners. The partners were unable to demonstrate their financial ability to meet the commitments they undertook in the grant application. Respondent also pointed to the publicity after ethics complaints were filed against Respondent as having "soured" the partners on the project. The City eventually notified the NTIA that it was waiving its right to accept the grant.

27. In summary, Respondent knew at the time of the September 15, 2010, vote that ADE was a named partner of the City in the BTOP grant application, and that he was being paid $2,000 per month by ADE to sit on its Board of Advisors. Respondent listed ADE as a primary source of income on his Statement of Financial Interests for the years 2007 through 2010. Respondent did not conceal his involvement with ADE, but the record discloses no affirmative efforts on his part to dispel what appeared to be the general impression that his work for ADE was gratis, until his expression of concern to Mr. English just before the December 8, 2010 vote.

28. However, the facts also indicate that at the time of the September 15, 2010, vote there was no contractual relationship between ADE and the City, and that at least two more Commission votes would be required before ADE could enter a contract and participate in the BTOP grant.

29. Of decisive significance is the fact that, as a 501(c)(4) organization engaged in lobbying activities, ADE could not accept the federal grant money sought by the BTOP application. 2 U.S.C. § 1611. Thus, a separately incorporated affiliated 501(c)(3) organization, PDE, was substituted as the entity proposed to contract with the City and to receive the BTOP grant funds.[6/] No evidence was provided to show a relationship between Respondent and PDE.

Facts as to DOAH Case No. 12-2509EC

30. Respondent entered into a written employment agreement dated June 1, 2004, with the law firm Adorno & Yoss. The firm was based in Miami, and Respondent was to open the firm's Tallahassee office. Throughout his tenure at Adorno & Yoss, Respondent was the sole attorney in the Tallahassee office.

31. The employment agreement provided that Respondent would be a "contract partner" paid at the rate of $12,500 per month. The contract made no provision for Respondent to share in the profits of the firm. Adorno & Yoss partner George Yoss, who was Respondent's main contact with the firm, confirmed that Respondent was never a "partner" or "shareholder" in the sense of having an ownership interest in the firm.

32. Respondent confirmed that he had no ownership interest in Adorno & Yoss. He testified that the employment agreement used the term "managing partner" because Adorno & Yoss "wanted

to make the office in Tallahassee look as though it was really an operation that people can depend on." Respondent stated that Adorno & Yoss exercised no control over his relationships with the clients he represented or over the cases he handled.[7/] He never had access to the books and records of Adorno & Yoss, and the firm never requested access to Respondent's books.[8/] On average, Respondent spent 20-to-25 hours per week on Adorno & Yoss work.

33. By its terms, the employment agreement was to expire on December 31, 2008. Mr. Yoss testified that Respondent remained with the firm past the expiration of the written agreement, but that in March 2009, Respondent's status was changed to "of counsel" because his financial performance was insufficient for the amount of salary he was receiving. The "of counsel" arrangement based Respondent's compensation on the amount of work he generated for the firm, rather than paying him a fixed salary.[9/]

34. On September 22, 2004, Respondent abstained from a Commission vote to approve the award of a guaranteed energy savings contract to Johnson Controls, Inc. and Honeywell International, Inc. ("Honeywell"[10/]). In his Memorandum of Conflict dated September 24, 2004, Respondent stated that the measure in question "inured to the special gain or loss of

Honeywell, Inc. and Johnson Controls, Inc., by whom I am retained."

35. Respondent testified that when this vote came up, he was concerned that a law firm as large as Adorno & Yoss might have some involvement with the contracting entities. He called the Miami office for a client check. Respondent was told that the firm did not represent Honeywell, but that it did represent Bendix, a subsidiary of Honeywell. Respondent decided that it would be prudent to recuse himself from the vote. Respondent testified that he named Honeywell rather than Bendix on the Memorandum of Conflict because Honeywell was the entity with which the City was contracting.

36. Respondent testified that in August 2006, another matter involving Honeywell was coming before the City Commission. By this time, he had met Bueno Prades, an account executive for Honeywell. Mr. Prades was involved in the sales of energy projects to entities such as the City, and introduced himself to Respondent in the course of pursuing an energy performance contract with the City in 2004. Mr. Prades made frequent sales calls on Respondent, but did not otherwise meet or socialize with Respondent.

37. Respondent testified that in August 2006, he asked Mr. Prades to determine whether Honeywell or any of its subsidiaries was represented by Adorno & Yoss. Mr. Prades sent

an email to his manager Steve Borden and Honeywell government relations manager Paul Boudreau asking them to "check into Honeywell's involvement with Adorno & Yoss and provide your input as to any potential conflict." Mr. Borden and Mr. Boudreau circulated the request to Honeywell's legal and accounting departments, which responded that there was no record of a relationship with or payment to Adorno & Yoss as to Honeywell or its subsidiaries. Mr. Prades relayed this information to Respondent. Respondent testified that the matter involving Honeywell never came to a vote in 2006 and that was the end of the matter for the time being.

38. In an "urgent" email to Mr. Boudreau and Honeywell in-house attorney Jennifer Eastman, dated March 1, 2007, at 4:08 p.m., Mr. Prades wrote as follows, in relevant part:

> Need your prompt help . . . We're getting ready to go to the Commission with this project, but the Mayor recently indicated that he may have a potential conflict and may have to recuse himself on issues dealing with Honeywell. He also mentioned this last August, and Paul Boudreau conducted a search (see e-mail trail below) but found no record of Honeywell doing business with the Mayor's firm (Adorno & Yoss). We have contacted the Mayor's office to get some clarification regarding his concern, but would like your assistance in researching this matter from Honeywell's side....
>
> Note that Mayor Marks is also on the Board of Directors of Fringe Benefits Management, a private financial services company headquartered in Tallahassee....

> 1. Does Honeywell International have any business relationship (either as a client or vendor) with Adorno & Yoss or Fringe Benefits Management?
>
> 2. If so, to what extent are we connected-- with which A&Y office do we have a contract? Which Hwl business unit? Is the contract active?

39. Also on March 1, 2007, at 11:35 p.m., Mr. Prades sent an email to: Kevin Madden, vice president of global sales; Vince Rydzewski, south region vice president and general manager; John Carter, national energy manager; Kent Anson, vice president in charge of Honeywell's utility business; Steve Smith, sales leader in the utility business; Kevin McDonough, a manager of the utility business; Kevin Colores, south region sales manager; Mr. Borden; and Frank Tsamoutales, an outside consultant. The email, with the subject line, "City of Tallahassee-- New issue may change strategy," stated as follows:

> The Mayor indicated he may have to recuse himself on a vote concerning Honeywell. In August and again yesterday,[11/] a check of the Honeywell supply management system yielded no record of any business with the Mayor's law firm (Adorno & Yoss) or the firm he serves on the Board of Directors (Fringe Benefits Mgmt). Steve Borden has contacted [Respondent's aide] Alan Williams to determine why the Mayor feels there may be a conflict, and will find out by Monday [March 5].

40. On March 13, 2007, Mr. Borden sent an email to Messrs. Rydzewski, Tsamoultes and Prades, indicating that he had

received a call from Respondent's office requesting information regarding the business relationship between Bendix and Honeywell. Mr. Borden also wrote that Ms. Eastman had informed Mr. Tsamoultes "that we have no record that the mayor's firm has any relationship with Bendix or Honeywell. I further understand that a plan is in place to deal with this issue directly with the mayor."

41. Mr. Prades testified that his only direct meeting with Respondent concerning the Adorno & Yoss issue was in August 2006. In March 2007, he met with Respondent's aide, Alan Williams, to inform him that Honeywell had been unable to find any indication that it or any of its subsidiaries had a business relationship with Adorno & Yoss. Mr. Williams confirmed the substance of this conversation, and the fact that it occurred prior to the March 28, 2007, vote involving Honeywell. Mr. Williams passed on Mr. Prades' findings to Respondent.

42. The City Commission's March 28, 2007, agenda included an item related to smart metering. One of the options before the Commission would be a staff recommendation to authorize City staff to negotiate a contract with Honeywell to provide contract management services for the full deployment of a smart metering network and smart thermostats for the City's utility system. This was the matter that was the subject of Mr. Prades' urgent

inquiries. He believed it essential that Respondent vote on the motion.

43. With the agenda item pending, Respondent sent Mr. English a short letter from Honeywell (no longer available and therefore not part of the record of this proceeding) stating that Honeywell "does not have any record of a conflict of interest with Adorno & Yoss." In an email sent on the afternoon of March 21, 2007, Respondent asked Mr. English whether he had seen the Honeywell letter and further requested, "Please advise." About a half-hour later, Mr. English replied:

> Yes-- and I did verify from the public records the sale by Honeywell of Bendix several years ago. Otherwise the letter isn't helpful. The issue isn't "conflict of interest with Adorno & Yoss" but representation by Adorno & Yoss. What you will need to do is the standard check by having your folks at Adorno & Yoss run the client check for Honeywell International and its wholly owned subsidiaries. I have the list per Honeywell's latest 10k filing and will forward it this afternoon.

44. A few minutes later, Mr. English sent a follow-up email to Respondent:

> Sorry -- I should have added a time period for the check. Current plus within the last two years should be adequate. Let me know if you need any assistance or have any questions.

45. On March 28, 2007, Respondent voted in favor of the motion to authorize the City's staff to negotiate a contract

with Honeywell to provide contract management services for the full deployment of a smart metering network and smart thermostats for the City's utility system. The vote was 3-1 in favor of the motion, with then-Commissioner Allan Katz abstaining because his law firm represented Honeywell.

46. The minutes of the March 28, 2007, Commission meeting provide as follows:

> Mayor Marks stated for the record that there had been some question at one point as to whether he had a conflict of interest on this issue; however, after extensive investigation and discussion with the City Attorney, a determination had been made that there was no conflict.

47. Mr. English wrote a memorandum to Respondent, dated June 20, 2007, and titled, "Honeywell Conflict of Interest Check." The memorandum provided as follows:

> This will serve to confirm that several weeks prior to the March 28, 2007, vote on pursuing the City's automatic metering infrastructure project, you asked that I research the issue as [to] whether or not you had any conflict of interest in voting on that matter. In pursuance of that effort, I secured from the U.S. Securities and Exchange Commission website a list of all materially owned Honeywell subsidiaries and pursuant to receipt of that data, you had your law firm perform a client check to ensure that the firm did not represent, nor had it in recent years represented, any of the entities on that list.
>
> Additionally, prior to that time, you had advised me that in the past your law firm had represented Bendix. Prior to the

> specific conflict check research, I had inquired of that matter, checked the public information, and confirmed that Bendix previously had been a subsidiary of Honeywell but had been sold by Honeywell to a German company a number of years ago.
>
> In summary, I advised you at the time, and I can still confirm, that you have no prohibited conflict of interest with regard to any votes with regard to Honeywell. As always, I appreciate your apprising me of any potential conflicts that may arise from law firm representation.

48. Mr. English testified that Respondent had "asked me to write him a memo confirming our previous discussions." Mr. English testified that his advice as to the Honeywell relationship was always based on the information that Respondent had provided. The only independent research performed by Mr. English was to confirm that Honeywell had sold Bendix and to find a list of Honeywell's subsidiaries in its 10-K filings with the S.E.C. Mr. English testified that the statement in his memo regarding the client check by Adorno & Yoss was "based on the Mayor advising me prior to the meeting that he had checked and that his law firm did not represent Honeywell."

49. In fact, Respondent did not have Adorno & Yoss run a client check on Honeywell and its subsidiaries prior to the March 28, 2007 vote, despite the fact that his usual practice was to check with the law firm regarding conflicts. He relied solely on the information provided by Honeywell through

Mr. Prades, as described above. At the hearing, Respondent explained his rationale as follows:

> Well, Honeywell had a lot of subsidiaries, quite a few subsidiaries that I was-- Jim English told me about and others, a lot of subsidiaries. So I thought it would be a lot more efficient and effective if I asked Honeywell if there are any conflicts where Adorno & Yoss was representing not only Honeywell, but any of the myriad of subsidiaries Honeywell had.

50. Respondent testified that Honeywell was "really a reputable company" and that he had no reason to believe the company would "try and do anything untoward regarding this contract or any other contract." The testimony of Mr. Prades and the Honeywell emails introduced at the hearing support Respondent's belief that Honeywell made a good faith effort to discover whether it had a relationship with Adorno & Yoss.

51. Despite the failure of Mr. Prades' inquiries to discover it, Honeywell was a client of Adorno & Yoss at the time of the March 28, 2007 vote. Anthony Upshaw, the Adorno & Yoss partner who brought Honeywell to the firm in 2003 or 2004, estimated that Honeywell was one of the firm's top fifteen clients. (Mr. Upshaw took Honeywell with him when he left Adorno & Yoss in late 2010.) Bob Kulpa, Adorno & Yoss's comptroller, testified that Honeywell was one of the firm's top ten clients.

52. Julie Feigeles was one of the three Adorno & Yoss lawyers who worked on Honeywell matters. Ms. Feigeles testified that the firm's representation of Honeywell was limited to asbestos litigation related to Honeywell's ownership of Bendix, and that the work was handled exclusively in the Miami office. She recalled that she worked with Honeywell lawyers in the "Bendix litigation group" and that there were many defendants and many law firms involved in the litigation.

53. Mr. Yoss, Mr. Kulpa, Mr. Upshaw, and Ms. Feigeles each testified that he or she never spoke with Respondent about Honeywell during the time frame relevant to this proceeding.

54. Respondent testified that his contacts with Adorno & Yoss's Miami office were minimal. As noted above, Respondent's role was to provide Adorno & Yoss a presence in Tallahassee, but he mostly serviced his own clients and kept his own accounts. He estimated that he spoke to someone from Adorno & Yoss, usually Mr. Yoss, about twice per month. Respondent visited the firm's Miami office a few times. He recalled having spent a total of about 20 hours in the Miami office.

55. The question naturally arises: why did Mr. Prades' efforts within Honeywell reveal no relationship with Adorno & Yoss, when everyone from Adorno & Yoss who testified stated that Honeywell was a major client of the firm? Mr. Prades testified that he learned later that Adorno & Yoss had been hired not by

Honeywell but by the insurance company that was defending the asbestos litigation on Honeywell's behalf.

56. This attenuation of the relationship apparently meant that Honeywell had no internal record of dealings with Adorno & Yoss, despite the fact that Ms. Feigeles recalled working with in-house Honeywell lawyers. Honeywell's accounts showed no payments to Adorno & Yoss because the payments were being made through the insurance company. From the perspective of the Adorno & Yoss lawyers, Honeywell was nonetheless their client.

57. At the hearing, Mr. English was queried about his March 21, 2007, email advising Respondent to have Adorno & Yoss "run the client check" for Honeywell and his June 20, 2007, memo stating that Respondent had his law firm perform a client check. Mr. English did not testify that Respondent directly told him that he had run the client check with Adorno & Yoss. Rather, Respondent told Mr. English prior to the March 28, 2007 Commission meeting "that he had checked and that his law firm did not represent Honeywell."

58. Mr. English assumed that Respondent ran a conflict check through his law firm, when in fact Respondent was relying on information obtained from Honeywell. Mr. English did not believe it mattered so long as the information was accurate. He knew of "no legal reason" why Respondent should check with Adorno & Yoss as opposed to Honeywell. He stated that, although

the usual course is to check with one's law firm, "It would work either way."

59. Mr. English noted that section 286.012, Florida Statutes, forbids a public official from abstaining to avoid a tough vote. The statute requires the official to vote unless there is a possible conflict of interest, and the presence of a conflict can constitute a "very difficult" judgment call. He testified that Respondent has "always been very, very conscientious . . . to the point of being a bit paranoid" about avoiding voting conflicts.

60. At the time of the March 28, 2007, vote and the later votes at issue in this proceeding, Respondent did not know that Adorno & Yoss represented Honeywell. Honeywell's good faith in attempting to ascertain its relationship with Adorno & Yoss is not in doubt, and in most cases would have been sufficient to reveal the true state of affairs. With benefit of hindsight, Respondent may be criticized for failing to complete the circle of inquiry by asking Adorno & Yoss to perform a client check, a check that would have immediately informed Respondent of the representation. However, it cannot be found that Respondent's reliance on Honeywell was so unreasonable as to constitute an effort on his part to shield himself from knowledge of Adorno & Yoss's representation of the company.[12/]

CONCLUSIONS OF LAW

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

62. The Commission is authorized to conduct investigations and make public reports on complaints concerning violations of Part III, chapter 112, Florida Statutes, the Code of Ethics for Public Officers and Employees (Code of Ethics). § 112.322, Fla. Stat.; Fla. Admin. Code R. 34-5.0015.

63. The Commission, through its Advocate, is asserting the affirmative regarding Respondent's purported violations of section 112.3143(3)(a). The party having the affirmative of the issues in a proceeding bears the burden of proof. Dep't of Transp. v. J.W.C. Co. Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977).

64. In this case, the elements of the alleged violation must be established by clear and convincing evidence. Siplin v. Comm'n on Ethics, 59 So. 3d 150 (Fla. 5th DCA 2011); Latham v. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997).

65. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the Court defined clear and convincing evidence as follows:

> [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 evidence 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 the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

66. Judge Sharp, in her dissenting opinion in Walker v. Dep't of Bus. & Prof'l Reg., 705 So. 2d 652, 655 (Fla. 5th DCA 1998) (Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

> Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantative [sic] elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L.Ed.2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the fact finder a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994).

67. It is alleged that Respondent violated section 112.3143(3), by voting to approve the City's participation in

the BTOP federal grant in partnership with ADE, a business entity for which Respondent served in a compensated position.

68. It is also alleged that Respondent violated section 112.3143(3) by voting on four separate occasions on a matter that he knew inured to the special private gain or loss of Honeywell, a principal by which Respondent's law firm had been retained.

69. Section 112.3143(3)(a) provides as follows:

> No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes. (Emphasis added).

70. Respondent does not contest the first element of proof under section 112.3143(3)(a), i.e., that at the time of the votes in question he was a "county, municipal, or other local

public officer." As Mayor of the City, Respondent was and is subject to the provisions of the Code of Ethics.

71. The standard for construing section 112.3143(3) was ably set forth by Administrative Law Judge Stuart M. Lerner in In re: Joseph Russo, Case No. 08-1567EC (DOAH Mar. 4, 2009; COE Final Order 09-072 Apr. 29, 2009), adopted as the rule in the instant case:

> 61. Inasmuch as it is a penal statute, section 112.3143(3), Florida Statutes, must be strictly construed and not extended beyond its intended reach. If there are any doubts concerning its applicability, these doubts must be resolved in favor of limiting, rather than extending, its scope of operation. See Florida Industrial Commission v. Manpower, Inc. of Miami, 91 So. 2d 197, 199 (Fla. 1956); Beckett v. Department of Financial Services, 982 So. 2d 94, 100 (Fla. 1st DCA 2008); and Latham, 694 So. 2d at 86.
>
> 62. It is telling that the Legislature, in section 112.3143(3), Florida Statutes, used the language "would inure," not "might inure" or "is likely to inure."... That there ultimately may have been a "special private gain or loss" is not determinative. A local public officer's action in voting on a particular measure must be judged, not based on hindsight, but on the circumstances that existed "at the time of the vote" in question. If, in light of these circumstances, one could have only speculated "at the time of the vote" as to whether or not a prohibited "special private gain or loss" would result from the measure voted on, the officer cannot be found guilty of having violated the statute by voting on the measure, even if it turned out that the vote did cause "the officer, his principal

(employer), or . . . other persons or entities standing in an enumerated relationship to the officer" to realize a "special private gain or loss."

63. It is also of significance in determining the reach of Section 112.3143(3), Florida Statutes, as it applies in the instant case, that the Legislature provided that, where the measure in question "would inure to the special private gain or loss [of the officer's] principal," liability attaches only if the officer "knows" that the measure would have this consequence. Importantly, the Legislature did not include the words "or should know" in the statute. Its failure to have added this language (as it has done elsewhere in the Code and in Florida Statutes) reflects its intent that the officer must have, at the time of the vote, actual knowledge of the "special private gain or loss" that "would inure" to principal for there to be a violation of the statute. See Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995) ("When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded.")... [13/]

64. To hold that section 112.3143(3), Florida Statutes, extends to situations where the officer does not have such actual knowledge would require the Commission to add language to the statute that the Legislature, by all appearances, intentionally omitted. This the Commission cannot do, particularly inasmuch as section 112.3143(3) is a penal statute that must be strictly construed in favor of the accused. . . [Endnote omitted.]

72. On September 15, 2010, Respondent voted in favor of a motion to approve the City's participation in the BTOP grant and allow the City Manager to execute the agreement with the NTIA. Respondent knew at the time of the vote that ADE was a named partner of the City in the grant application. Respondent was a member of the Board of Advisors of ADE, for which he was paid $2,000 per month.

73. On December 8, 2010, the Commission voted on a motion to authorize the City Manager to negotiate and execute three-year contracts with the BTOP grant partners, including PDE, an affiliated corporation that was substituted for ADE when ADE revealed to the City that it was ineligible to participate in the grant. After consulting with the City Attorney, Respondent abstained from voting on this motion, despite the substitution of PDE.

74. The Advocate contends that this situation presents a straightforward violation of section 112.3143(3)(a). The City was awarded federal grant money based on an application that included ADE as a partner. The City could not remove ADE as a partner without the prior approval of NTIA because of the strictures of 15 C.F.R. § 24.31(d). By the terms of the grant, ADE was to receive a benefit. Therefore, Respondent was obligated to abstain from voting on September 15, 2010, and to

file a Memorandum of Conflict, pursuant to the terms of the governing statute.

75. Respondent asserts that the matter is more complicated. Because the September 15, 2010, vote did not itself provide a benefit to ADE, and because any future benefit that ADE might receive as a result of that vote was remote and speculative, Respondent was not required to abstain from the vote.

76. Respondent points to numerous advisory opinions in which the Commission found no special private gain where there was uncertainty at the time of the vote as to whether there would be any gain or loss to the officer or a principal by whom he or she was retained. This "remote and speculative" test has been described by the Commission as follows:

> In past decisions, we have found that the statute does not apply in situations where, at the time of the vote, there is uncertainty whether there will be any gain or loss to the officer, his principal (employer), or to other persons or entities standing in an enumerated relationship to the officer, and if so, what the nature and magnitude of the gain or loss might be. Thus, we frequently have found no special private gain or loss to exist when the circumstances were such that any gain or loss to the officer, or to an enumerated person or entity, was too remote or speculative. See, for example, CEO 06-21 (town commission member voting on land use matters where member's employer has extensive contractual relationships with land use applicant), CEO 05-15 (city

> commissioner whose client is potential developer of affordable housing within city voting on amendments to affordable housing ordinance), CEO 05-2 (village workforce/affordable housing committee member voting on mobile home park measures), and CEO 88-27, Question 3, (city commissioner voting on rezoning of property sold contingent on rezoning where commissioner probably will be building contractor on the property).

CEO 07-7 (Fla. Comm'n on Ethics Mar. 7, 2007). See also CEO 06-8 (Fla. Comm'n on Ethics June 14, 2006) and Commission advisory opinions cited therein.

77. Respondent notes that the Commission has on several occasions applied this test to conclude that abstention was not necessary where the officer or principal was required to clear a number of hurdles subsequent to the vote in question before any benefit could be received. See CEO 12-01 (Fla. Comm'n on Ethics Feb. 8, 2012) (city commissioners who own businesses in an area frequented by cruise ship passengers were not required to abstain from voting on a channel-widening feasibility study; channel widening would allow larger cruise ships into the port, but so many subsequent events and approvals would be required that any benefit to the commissioners was remote and speculative); see also CEO 06-21 (Fla. Comm'n on Ethics Oct. 25, 2006) and CEO 05-15 (Fla. Comm'n on Ethics Sept. 7, 2005), cited in the inset quotation at Conclusion of Law 76 above.

78. Respondent points out that the September 15, 2010, vote did not itself provide any benefit to ADE or any other grant partner. The agenda item did nothing more than approve the City's participation in the grant and allow the City Manager to execute the agreement with the NTIA. Mr. English stated that the vote was not even necessary and was undertaken simply to publicize the good news about the federal money coming to Tallahassee. At the time of the vote there was no contractual relationship between ADE and the City. The evidence established that at the time of the vote, no contractual terms had been reached, no City Commissioner had made a commitment regarding a contract with any of the grant partners, and at least two more Commission votes would be required before ADE could enter a contract and participate in the BTOP grant.

79. Respondent also points out that the partners would be required to demonstrate their financial ability to fulfill their obligations under the BTOP project. ADE was required to provide $36,109 worth of software and $40,000 worth of computer equipment, a requirement it was ultimately unable to fulfill. Respondent argues that the obstacles to any given partner ultimately receiving a benefit from the vote on September 15, 2010, were real and substantial.

80. As to the Advocate's argument that the City could not drop ADE from the grant without NTIA's permission pursuant to 15

C.F.R. § 24.31(d), Respondent argues that the Advocate provided no evidence that the grant award or any other federal or state law mandated that all partners identified in the application remain in the grant project to its completion, and thus has provided no reason why the federal grant administrator would have declined to replace ADE with PDE.

81. This point raises the most telling aspect of the "remote and speculative" analysis: ADE was a 501(c)(4) organization engaged in lobbying activities and as such was ineligible to accept the federal grant money sought by the BTOP application. 2 U.S.C. § 1611. Had ADE not self-reported its ineligibility to the City at the initial contract negotiation, ADE's status would presumably have become apparent at some point short of its actually accepting the grant money. Whether or not the NTIA ultimately accepted PDE as the replacement partner, the grant administrator would have been forced to accept the withdrawal of ADE from the grant. Any benefit to ADE from the September 15, 2010, vote was not merely remote and speculative but illegal under Federal law. No special private gain could ever have inured to the benefit of ADE by virtue of Respondent's vote.

82. Prior to the December 8, 2010, vote from which Respondent abstained, PDE, a separately incorporated affiliated 501(c)(3) organization, was substituted as the entity proposed

to contract with the City under the BTOP grant. No evidence was presented to show a business relationship between Respondent and PDE. No evidence was presented that the status of ADE and PDE as interrelated but separate "business entities" as defined in section 112.312(5), should be disregarded for purposes of treating PDE as Respondent's de facto principal.

83. A closer question as to the "remote and speculative" test would have been presented had ADE been eligible to participate in the BTOP grant. Unlike the votes in some of the cases cited by Respondent, the September 15, 2010, vote was not a preliminary vote on a feasibility study or a vote on a general ordinance that might or might not affect the member or his principal in the future. This vote acknowledged that the biggest hurdle in the process, the obtaining of a grant in excess of $1 million from the Federal government, had been accomplished after a prior failure. The vote was staged to celebrate that fact. Respondent's principal was a named partner in the grant application, and Respondent voted on the matter in full knowledge that his principal stood to gain a substantial sum of money from its partnership with the City. At the time of the vote, ADE had represented that it would be able to meet the financial commitments undertaken in the grant application. Only well after the vote did Respondent reveal to the City Attorney his relationship with ADE, and even then he did not disclose

that he was paid by ADE for his services. Two subsequent votes would be necessary to finally secure the funding for ADE, but these votes would in all likelihood follow the recommendation of the City Manager subsequent to contract negotiations with the grant partners. It is fortuitous for Respondent's case that ADE was not eligible under Federal law to participate in the BTOP grant.

84. It is concluded that the Advocate failed to demonstrate by clear and convincing evidence that Respondent's vote on September 15, 2010, to approve the City's participation in the BTOP federal grant in partnership with ADE, a business entity for which Respondent served in a compensated position, violated section 112.3143(3), Florida Statutes.

DOAH Case No. 12-2509EC

85. It is alleged that Respondent violated section 112.3143(3) by voting on four separate occasions on a matter that he knew inured to the special private gain or loss of Honeywell, a principal by which Respondent's law firm had been retained. All the evidence produced at the hearing related to Respondent's vote on March 28, 2007, but the parties agree that the same legal analysis would apply as well to the votes made on September 19, 2007, June 13, 2007, and June 18, 2008.

86. The evidence presented at the hearing established that prior to the March 28, 2007, vote, Respondent suspected that

Honeywell might be a client of his law firm, Adorno & Yoss. He had abstained from a 2004 vote on a Honeywell matter because of Adorno & Yoss's relationship to Bendix, a Honeywell subsidiary. When another Honeywell matter was pending in August 2006, Respondent sought the assistance of Mr. Prades, a Honeywell account executive working to secure business with the City. Respondent asked Mr. Prades to determine whether Honeywell or any of its subsidiaries was represented by Adorno & Yoss. After investigating, Mr. Prades reported to Respondent that he could find no record that Honeywell had a relationship with or had paid Adorno & Yoss. The August 2006 matter never came to a vote.

87. Then, in early March 2007, Mr. Prades sent an "urgent" in-house email that again sought any information regarding any business relationship between Honeywell and Adorno & Yoss. This inquiry was triggered by Respondent's statement that he might abstain from the vote to negotiate a contract with Honeywell to manage the City's smart metering project unless he could confirm that his law firm did not represent Honeywell. After extensive inquiries within Honeywell, Mr. Prades reported to Respondent's aide that he had been unable to find any indication that Honeywell or any of its subsidiaries had a business relationship with Adorno & Yoss.

88. The Honeywell smart metering item was placed on the agenda for the Commission's March 28, 2007, meeting. One week

before the meeting, Respondent asked Mr. English to advise him on how to proceed. Mr. English advised Respondent to run a client check with Adorno & Yoss on Honeywell and its subsidiaries. Mr. English provided Respondent with a current list of Honeywell's subsidiaries.

89. Respondent did not run a client check with Adorno & Yoss, choosing instead to rely on the information provided by Honeywell. In most instances, the Honeywell inquiry would have been sufficient to establish the lack of a relationship between the company and Adorno & Yoss. However, because of an apparent quirk in Honeywell's accounting system, Honeywell's internal search failed to reveal the true state of affairs. Honeywell was in fact a substantial client of Adorno & Yoss.

90. Respondent explained that he believed that Honeywell's "myriad of subsidiaries" meant that it would be easier for Honeywell to ascertain whether any of its companies were represented by Adorno & Yoss than vice versa. His experience gave him no reason to believe that Mr. Prades or Honeywell would be less than honest in performing the investigation. The evidence presented at the hearing confirmed that Honeywell made a conscientious, good faith effort to determine its relationship with Adorno & Yoss. Respondent's reliance on Honeywell was, in hindsight, mistaken but not unreasonable at the time and under all the circumstances. There was no indication that Respondent

was attempting to shield himself from knowledge of the true state of affairs.

91. At the time of the March 28, 2007, vote and the later votes at issue in DOAH Case No. 12-2509EC, Respondent did not know that Adorno & Yoss represented Honeywell.[14/]

92. It is concluded that the Advocate failed to demonstrate by clear and convincing evidence that Respondent violated section 112.3143(3) by voting on four separate occasions on a matter that he knew inured to the special private gain or loss of Honeywell, a principal by which Respondent's law firm had been retained.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

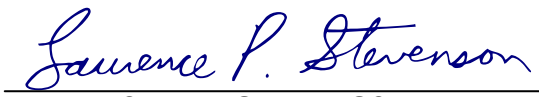
RECOMMENDED that the Commission on Ethics issue a public report finding:

1. That the evidence presented at the public hearing in this case was insufficient to establish clearly and convincingly that Respondent's vote on September 15, 2010, inured to the special private gain or loss of the Alliance for Digital Equality, a principal by which Respondent was retained, in violation of section 112.3143(3)(a); and

2. That the evidence presented at the public hearing in this case was insufficient to establish clearly and convincingly

that Respondent cast votes on March 28, 2007, September 19, 2007, June 13, 2007, and June 18, 2008, in connection with matters that inured to the special private gain or loss of Honeywell, a principal by which Respondent was retained, in violation of section 112.3143(3)(a).

DONE AND ENTERED this 27th day of November, 2012, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of November, 2012.

ENDNOTES

[1/] Unless otherwise indicated, references to Florida Statutes are to the 2012 edition. Section 112.3143 has been unchanged since 1999.

[2/] Mr. English has been the City Attorney since 1983, meaning that he has served throughout Respondent's tenure as Mayor.

[3/] Ms. Blanchard did not recall meeting with any other Commissioners prior to the vote.

[4/] Mr. English could not recall whether Respondent stated he was on the Board of Advisors or the Board of Directors. For

Mr. English's purposes, the crucial datum was that Respondent was on a board of ADE.

[5/] There was no dispute that Respondent was actually a member of ADE's Board of Advisors, not its Board of Directors.

[6/] The Advocate argues, and Respondent does not dispute, that 15 C.F.R. § 24.31(d)(3), set out at Finding of Fact 12 supra, would have required the City to seek approval from the NTIA before PDE could be substituted for ADE as a grant participant.

[7/] Respondent's testimony is credited insofar as it describes the firm's actual practice. However, it is noted that Respondent's contract required Managing Shareholder approval of "any new client and any new matter which you may send to the Firm." To avoid conflicts, Respondent was required to "promptly disclose by email or in writing to the Managing Shareholder any client representation matter in which you will be engaged . . ." The contract allowed the firm to request Respondent to provide a list of his "Personal Activities," defined as his duties as Mayor of the City and any charitable and professional activities outside his work for the firm. The contract also provided that Respondent's "Personal Activities" should not "materially interfere with the services required to be rendered" to Adorno & Yoss.

[8/] Again, whatever Adorno & Yoss's practice, Respondent's contract appears to give the firm the right to inspect his billings and accounts receivable.

[9/] Bob Kulpa, the comptroller of Adorno & Yoss, testified that he never considered Respondent to be an employee of the firm. Mr. Kulpa considered Respondent to occupy an "of counsel" relationship with Adorno & Yoss from the time of his hiring in 2004. Mr. Kulpa testified that he considered Respondent "a contract lawyer, a 1099 lawyer, as opposed to a W-2 lawyer." Mr. Kulpa's recollection of the manner in which Respondent was paid also varied from the terms of the written contract; he recalled that Respondent received a percentage of the fees he generated rather than a fixed monthly salary. Mr. Kulpa testified that he was unaware of Respondent ever being paid on a different basis. He was also unaware that Respondent ever had a written contract with the firm, which calls into question how knowledgeable he was about Respondent's position with Adorno & Yoss. Mr. Yoss' testimony is given greater credit on this point.

[10/] Most references to the company in the record of this proceeding simply use the term "Honeywell." In context, it is clear that these references are to the parent company, the formal title of which is Honeywell International, Inc.

[11/] Based on the time of this email, it is inferred that "yesterday" references the March 1, 2007, inquiry instigated by Mr. Prades' 4:08 p.m. email. Mr. Prades likely did not expect most of his recipients to read this email until the morning of March 2.

[12/] Discussed at the hearing but not addressed in the Advocate's proposed recommended order was the idea that Respondent could be found to have violated section 112.3143(3) due to his "willful blindness" to the reality of the situation. Conceding arguendo that it may be possible to infer a public official's actual knowledge from his efforts to avoid contact with persons whom he knows could definitively convey that knowledge to him, such is not the situation presented in this case. Here, it appears that Honeywell's extensive efforts satisfied Respondent, and he simply did not bother to make the inquiry at Adorno & Yoss.

[13/] In an endnote to paragraph 63, Judge Lerner gave the example of section 112.313(4), Florida Statutes, which provides that "[n]o public officer, employee of an agency, or local government attorney or his or her spouse or minor child shall, at any time, accept any compensation, payment, or thing of value when such public officer, employee, or local government attorney knows, or, with the exercise of reasonable care, should know, that it was given to influence a vote or other action in which the officer, employee, or local government attorney was expected to participate in his or her official capacity." (Emphasis added by Judge Lerner.)

[14/] In addition to the dispositive question of Respondent's knowledge, Respondent argued that his relationship with Adorno & Yoss fit the "of counsel" definition set forth by the Commission of Ethics in CEO 09-10 (Fla. Comm'n on Ethics June 17, 2009), CEO 03-7 (Fla. Comm'n on Ethics June 10, 2003), and CEO 99-9 (Fla. Comm'n on Ethics May 9, 2000). Respondent's written contract with Adorno & Yoss called him both a "contract partner" and an "employee" of the firm. The written contract and the facts of Respondent's relationship with the firm indicate that "contract partner" is an accurate description of his position,

but that Respondent's relationship to Adorno & Yoss could meet the Commission's description of "of counsel."

In CEO 03-7 (Fla. Comm'n on Ethics June 10, 2003), the Commission described the following as characteristics of the "of counsel" relationship for purposes of section 112.3143(3):

> . . . that the Council member has no ownership interest in the law firm, that the firm exercises no control over the Council member's activities or the activities of his clients, that the firm has no access to the Council member's personal books and records, that the Council member has no access to the books and records of the firm, and that the Council member does not share in the profits of the firm.

In the instant case, Respondent had no ownership interest in the law firm and did not share in the firm's profits. However, Respondent's contract with Adorno & Yoss gave the firm the right to approve new clients and new matters and to inspect Respondent's billings and accounts receivable. Respondent was represented to the public as the "partner" in charge of Adorno & Yoss' Tallahassee office. He was the face of the firm in Tallahassee. His contract gave the law firm wide scope to supervise not only his legal work but his "Personal Activities," including his mayoral duties. Respondent's ties to the firm appeared to be closer and his actions more subject to scrutiny and supervision by the firm than the Commission has accepted in the past as characteristic of an "of counsel" relationship.

COPIES FURNISHED:

Diane L. Guillemette, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

Barry Richard, Esquire
Greenberg Traurig, P.A.
101 East College Avenue
Tallahassee, Florida 32301

Kaye B. Starling, Agency Clerk
Florida Commission on Ethics
Post Office Drawer 15709
Tallahassee, Florida 32317-5709

C. Christopher Anderson, III, General Counsel
Florida Commission on Ethics
Post Office Drawer 15709
Tallahassee, Florida 32317-5709

Virlindia Doss, Executive Director
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.