STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: DAVID RIVERA, Case No. 13-1043EC

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this matter on February 12, 2014, in Tallahassee, Florida, and Miami, Florida (via video teleconference), and continued on February 20, 2014, in Tallahassee, Florida, before Administrative Law Judge W. David Watkins of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Advocate: Diane L. Guillemette, Esquire
Lisa Raleigh, Esquire
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For Respondent: Emmett Mitchell, IV, Esquire
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STATEMENT OF THE ISSUES

There are seven alleged violations at issue, six of which are related to alleged financial disclosure violations. As stipulated by the parties, at issue is whether Respondent violated:

1. Section 112.313(6), Florida Statutes,[1/] by requesting and/or accepting State reimbursement for travel expenses that were paid by campaign accounts and/or State office expense accounts;

2. Article II, section 8, Florida Constitution, by failing to or not properly reporting income; and/or stocks and bonds; and/or secondary source income on his 2005 CE Form 6, Full and Public Disclosure of Financial Interest;

3. Article II, section 8, Florida Constitution, by failing to or not properly reporting income; and/or stocks and bonds; and/or bank accounts; and/or real property; and/or secondary source income on his 2006 CE Form 6, Full and Public Disclosure of Financial Interest;

4. Article II, section 8, Florida Constitution, by failing to or not properly reporting income; and/or stocks and bonds; and/or bank accounts; and/or real property; and/or secondary source income on his 2007 CE Form 6, Full and Public Disclosure of Financial Interest;

5. Article II, section 8, Florida Constitution, by failing to or not properly reporting income; and/or stocks and bonds; and/or bank accounts; and/or real property; and/or secondary source income on his 2008 CE Form 6, Full and Public Disclosure of Financial Interest;

6. Article II, section 8, Florida Constitution, by failing to or not properly reporting income; and/or stocks and bonds; and/or bank accounts; and/or real property; and/or secondary source income on his 2009 CE Form 6, Full and Public Disclosure of Financial Interest; and

7. Section 112.3144, Florida Statutes, by failing to file a CE Form 6F "Final Full and

Public Disclosure of Financial Interests" within 60 days of leaving his position with the Florida House of Representatives.

PRELIMINARY STATEMENT

On October 24, 2012, the Commission on Ethics ("Commission") entered an Order Finding Probable Cause, finding that there was reasonable cause to believe that Respondent violated provisions in chapter 112, Florida Statutes, and Article II, section 8, Florida Constitution. Specifically, it found probable cause to believe Respondent violated the following provisions:

Section 112.313(4), Florida Statutes, by receiving income from Southwest Florida Enterprises, Inc., when he knew, or with the exercise of reasonable care should have known, it was given in an effort to influence Respondent's vote[s] and/or actions;

Section 112.313(7), Florida Statutes, by having a contractual relationship with Southwest Florida Enterprises, through Millennium Marketing Inc., which was regulated by the Respondent's agency, and/or a relationship which would create a continuing or frequently recurring conflict between Respondent's private interests and the performance of his duties as a Florida Representative, and/or would impede the full and faithful discharge of Respondent's public duties;

Section 112.313(6), Florida Statutes, by using campaign funds for non-campaign related expenditures;

Section 112.313(6), Florida Statutes, by requesting and/or accepting State

reimbursement for travel expenses that were paid by campaign fund accounts and/or State office expense accounts;

Article II, section 8, Florida Constitution, by failing to or not properly reporting income; and/or stocks and bonds; and/or secondary source income on his 2005 CE Form 6, Full and Public Disclosure of Financial Interests;

Article II, section 8, Florida Constitution, by failing to or not properly reporting income; and/or stocks and bonds; and/or bank accounts; and/or real property; and/or secondary source income on his 2006 - 2009 CE Form 6, Full and Public Disclosure of Financial Interests;

Section 112.3144, Florida Statutes, by failing to file a [2010] CE Form 6F, Final Full and Public Disclosure of Financial Interests, within 60 days of leaving his position with the Florida House of Representatives; and,

Section 112.3148(8), Florida Statutes, by failing to report Millennium Marketing, Inc.'s gift of forgiveness of a portion of Respondent's indebtedness.

The matter was referred to DOAH on March 20, 2013, for the assignment of an administrative law judge to conduct a public hearing and enter a recommended order. Thereafter, the matter was assigned to the undersigned, and set for hearing on June 11 and 12, 2013, in Miami, Florida. However, at the request of the parties the final hearing was continued three times, and ultimately scheduled to commence on February 12, 2014.

Prior to the final hearing, the parties stipulated to several facts and conclusions of law in a Joint Pre-hearing Statement. The parties' stipulations have been incorporated below to the extent they are relevant. Also prior to the hearing, the Advocate abandoned allegations relating to purported violations of sections 112.313(4), 112.313(7), and 112.3148(8). Thus, the only remaining allegations in dispute are the seven stipulated by the parties in their Joint Pre-hearing Statement.

The final hearing was conducted in two parts. On February 12, 2014, the hearing was conducted via video teleconference with locations in Tallahassee and Miami. The second and final day of hearing was held on February 20, 2014, in Tallahassee.

At the final hearing, the Advocate presented the testimony of the following witnesses: Alex Havenick, Brett Lycett, Kelly Kimsey and Keith Powell. The Advocate offered 26 exhibits, all of which were received in evidence. Respondent testified on his own behalf, and offered six exhibits, five of which were received in evidence.

The three-volume Transcript of the hearing was filed at DOAH on March 10, 2014. On April 9, 2014, the parties timely filed their Proposed Recommended Orders, which have been

carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon the testimony and documentary evidence presented at hearing, the demeanor and credibility of the witnesses, and on the entire record of this proceeding, the following findings of fact are made:

Background

1. At all times material to the Complaint, Respondent was a public officer. Respondent no longer holds public office.

2. Respondent successfully ran for the Florida House of Representatives in 2002, 2004, 2006, and 2008. Respondent briefly ran for election to the Florida Senate in 2010 and opened a campaign account for that purpose.

3. Respondent successfully ran for U.S. House of Representatives in 2010, but was defeated in 2012 for re-election.

4. Respondent also ran for State Committeeman, a private, political party office of the Republican Party of Florida, in 2003, 2004, and 2008, and opened campaign accounts for that purpose.

State Reimbursement for Travel Expenses that were Paid from Respondent's Campaign Accounts or State Office Expense Accounts

5. The State of Florida allows reimbursement to employees and elected officials for travel and related expenses incurred during the conduct of official state business. Such expenses include, among other things, airfare, rental cars, hotels, and meals while travelling.

6. The Florida House of Representatives' Office of Legislative Services is responsible for reviewing and approving expense reimbursements for members of the Florida House of Representatives. Respondent's state travel expenses were reimbursed by the Office of Legislative Services when he served as a member of the Florida House of Representatives from 2002-2010.

7. Kelly Kimsey, at the time a Senior Crime Intelligence Analyst II with the Public Corruption Unit of the Florida Department of Law Enforcement (FDLE), testified that she conducted the forensic analysis for this case utilizing financial records subpoenaed from financial institutions. In doing so, Ms. Kimsey analyzed Respondent's personal bank accounts, as well as his campaign accounts, and compared them against his campaign records.

8. Ms. Kimsey created a summary showing Respondent's Bank of America campaign accounts ending in 1626, 9269, and 0856.

The account statements, as well as the actual cancelled checks, reflect payments directly from the campaign accounts to Respondent's credit card accounts, in payment of the full balance due on Respondent's personal credit cards.

9. Notwithstanding the fact that Respondent had several credit cards, including a Chase Visa, American Express, and U.S. Senate Federal Credit Union Visa Gold, Respondent did not pay for expenses relating to his official duties as a state representative on a designated credit card. Rather, Respondent testified that his personal expenses, political party expenses, state house campaign expenses, and state house official expenses were all comingled among all of his credit cards "because the Florida House of Representatives does not issue credit cards."

10. On twenty-nine separate occasions throughout the period at issue, Respondent requested and received State of Florida direct-deposit reimbursement into his personal bank account for travel that was paid for by one of his campaign accounts, either his official campaign account or his committeeman account. The total reimbursement Respondent improperly received in this manner totaled tens of thousands of dollars. Three such examples follow.

11. Respondent requested reimbursement of $622.90 for official state travel in March of 2006. Respondent's travel expenses were charged to his Chase credit card. The Chase

credit card balance, which included the travel expenses, was paid for by Respondent's Campaign account numbered 1626. The State paid $622.90 for that travel into Respondent's personal bank account.

12. Respondent requested reimbursement of $738.59, also for travel in March of 2006. Respondent's travel expenses were charged to his U.S. Senate Federal Credit Union credit card. The U.S. Senate Federal Credit Union credit card balance, which included the travel expenses, was paid by Respondent's Campaign accounts numbered 9269 and 1626. The state paid $738.59 for that travel into Respondent's personal bank account.

13. Respondent requested reimbursement of $1,692.32 for official state travel in December of 2008. Respondent's travel expenses were charged to his American Express credit card. The American Express credit card balance, which included the travel expenses, was paid by Respondent's Campaign account numbered 9269. The state paid $1,692.32 for that travel into Respondent's personal bank account.[2/]

14. The Advocate established by clear and convincing evidence that Respondent received State of Florida reimbursement for travel and related expenses that were in fact paid for by one of his campaign accounts. Thus, Respondent was reimbursed for tens of thousands of dollars of expenses which he did not "incur." The evidence also clearly and convincingly established

that this double-reimbursement was knowing and intentional, since Respondent himself authorized the travel-related credit card charges, and then subsequently personally drafted the campaign account checks used to pay off the credit card balances. He also personally signed and submitted the State of Florida reimbursement requests.

15. The amounts reimbursed by the State of Florida for travel-related expenses that were paid by Respondent's campaign accounts represent income to Respondent.

16. Respondent characterized the "double-reimbursement" allegation as an "accounting dispute." Respondent testified that he had loaned his campaigns personal funds, and that the payments made from his campaign accounts directly to his credit card accounts should be considered repayments of his loans to his campaign accounts. However, Respondent provided no corroborative evidence to substantiate personal loans to his campaign accounts, and his testimony in this regard is rejected as not credible.

Additional Sources of Income

17. Millennium Marketing, Inc. (Millennium) and Southwest Florida Enterprises entered into a Consulting Agreement (Agreement) effective November 1, 2006. Pursuant to that agreement, Millennium (Consultant) was to provide consulting and

strategic advice relative to a Miami-Dade County referendum campaign for approval of slot machine gaming.

18. Respondent acted as the chief strategist and primary provider of services under the Agreement. Indeed, the Agreement expressly stated that Respondent was to be the person primarily responsible for leading the strategic effort to win approval of the referendum:

> The Consultant agrees, as a condition precedent to this Agreement, that it shall engage David Rivera as the key person to act as the primary provider of service pursuant to the terms and conditions of this Agreement and to act as the intermediary on behalf of the Consultant with the Company for all purposes, and that the failure of David Rivera to act in these capacities shall be grounds to terminate immediately this Agreement, without notice and without the Company's being required to pay any further amounts or damages, except for accrued, payable and incurred amounts due and previously invoiced as the date of termination.

19. The Agreement provided for a base compensation to Millennium of $250,000.00, with an additional bonus of $750,000.00 should the gaming referendum prove successful.

20. The officers of Millennium were Respondent's mother, Daisy Magarino-Rivera, and Ileana Medina.

21. On October 13, 2010, a Miami Herald article was published in which Respondent’s income was questioned. In response to the article, the Florida Department of Law

Enforcement (FDLE) immediately began a criminal investigation of Respondent's sources of income and financial reporting.

22. A subpoena was issued to Millennium on December 2, 2010, requesting any and all financial records from the inception of Millennium to the present concerning any and all payments made to or received from David Rivera and/or Interamerican Government Relations.

23. Millennium supplied documents pursuant to the subpoena in two separate productions. FDLE received the first group of documents on December 17, 2010, and a second group on January 24, 2011. The first response included 11 checks made payable to Respondent, totaling $132,000. The checks have no notation on the "For" line, whether loan, contingent loan, compensation, or otherwise.

24. The following checks were drafted by Millennium, made payable to David M. Rivera, and deposited into Respondent's personal bank account:

Check No. 1006, dated January 8, 2007, $25,000 deposited January 10, 2007;

Check No. 1007, dated February 20, 2007, $10,000 deposited February 22, 2007;

Check No. 1024, dated February 26, 2008, $10,000 deposited March 11, 2009;

Check No. 1015, dated June 12, 2008, $20,000 deposited July 10, 2008;

Check No. 1025, dated October 2, 2009, $18,000 deposited October 6, 2009;

Check No. 1026, dated October 3, 2009, $12,000 deposited October 6, 2009;

Check No. 1031, dated February 12, 2010, $10,000 deposited March 16, 2010;

Check No. 1032, dated February 26, 2010, $8,000 deposited March 16, 2010;

Check No. 1033, dated March 10, 2010, $7,000 deposited March 18, 2010;

Check No. 1036, dated August 10, 2010, $8,000 deposited August 16, 2010;

Check No. 1038, dated August 12, 2010, $4,000 deposited August 16, 2010.

25. As can be seen, Check No. 1024 is out of check number sequence for the date, and was not deposited until March 11, 2009, more than a year after it is dated. While it is possible that this check was intentionally pulled from the back of the checkbook and drafted, such seems extremely unlikely given that the rest of the check numbers are in numerical order for the dates of issuance. Rather, the more plausible explanation for this anomaly is that the check was actually drafted shortly before it was deposited by Respondent in March 2009, and for some reason intentionally backdated to February 26, 2008. This inference is supported by the fact that with one exception, all of the other checks were deposited by Respondent within 30 days, and most within just a few days, of the check date.[3/] Given this

inference, the promissory note purporting to correspond to the February 26, 2008, loan was, in all likelihood, also inaccurately dated.

26. Respondent contends that the above payments represent the proceeds of loans made to him by Millennium. In support of this contention, Respondent introduced 11 promissory notes whose dates correspond exactly to the dates of the 11 checks above.

27. Copies of the promissory notes were not included in Millennium's first document production to FDLE, but rather were included with the second group of documents provided by Millennium on or about January 24, 2011.

28. The promissory note dated February 26, 2008, corresponds directly with check number 1024. As noted, the corresponding proceeds of that purported loan ($10,000) were not actually received by Respondent until the following year when check number 1024 was deposited on March 11, 2009.

29. Respondent testified that he repaid the Millennium loans in November 2010 with two checks from his personal account in the amounts of $29,760.27 and $11,845.21, and the conveyance of ownership of the condominium unit identified as collateral in the promissory notes.

30. Ileana Medina of Millennium and Respondent's mother (Ms. Magarino-Rivera) loaned Respondent the cash to timely repay the loans to Millennium. Specifically, on October 29, 2010,

Respondent's personal account received a deposit of $49,000 from Ileana Medina's Bank of America Home Equity Line of Credit (HELOC). The deposit raised his balance to $55,418. That deposit allowed Respondent to clear two checks to Millennium on November 24, 2010, totaling $41,605.48, both checks identified as "loan repayment."

31. Between December 21 and 24, 2010, Respondent deposited $19,714.72 from his mother's savings bonds into his personal account. On December 22, 2010, Respondent deposited $10,000 into his personal bank account from his Charles Schwab account. These two deposits allowed Respondent to repay nearly $30,000 towards Ms. Medina's HELOC on December 28, 2010.

32. On January 6, 2011, Respondent deposited $20,000 from his inactive campaign account number 9269[4/] into his personal account. The $20,000 had been deposited into Account No. 9269 by cashier's check, remitter Daisy Rivera. That deposit allowed Respondent to pay off the remaining $18,286 of Ms. Medina's HELOC.

33. Respondent testified that he secured the $49,000 HELOC loan from Ms. Medina for his congressional campaign in case he needed more money than what had been budgeted for media time. However, as of October 2010 (the time of the loan from Ms. Medina), Respondent's congressional campaign account had a

balance of $96,645.19. Notably, the campaign had donated $87,000 to charitable organizations just the month before.

34. Brett Lycett was the lead investigator for the FDLE criminal investigation of Respondent. Being skeptical of the legitimacy of the promissory notes, Inspector Lycett asked Millennium for the original promissory notes and the computer on which the promissory notes were prepared in order to conduct a forensic analysis. A forensic analysis of the computer and the original documents would have helped identify when the actual documents were created and/or signed.

35. Ms. Magarino-Rivera (Respondent's mother) told Investigator Lycett that the computer on which the promissory notes were created had been discarded. Ms. Magarino-Rivera also advised Investigator Lycett that the original promissory notes had been given to Respondent once he had repaid the loans.

36. The Advocate propounded discovery to Respondent in this case requesting the original promissory notes. In response, Respondent stated "[O]nly copies of such promissory notes are in Respondent's possession."

37. The greater weight of the evidence supports the conclusion that the $132,000 in payments made to Respondent from 2007 through 2010 were compensation paid to Respondent for his consulting work on the gaming referendum, rather than the proceeds of loans from Millennium. This evidence includes: the

absence of any notation on the actual checks that they represented a loan to Respondent; the Check No. 1024 anomaly discussed in Finding of Fact 25 above; and the absence of the computer and original promissory notes upon which a forensic analysis could be performed to determine the legitimacy of the dating. That having been said, the evidence of record does not rise to the "clear and convincing standard" required in this proceeding.

38. Respondent testified that repayment of the $132,000 in Millennium loans was contingent on whether Respondent consummated a business relationship with or joined Millennium by January 15, 2011. Thus, for financial disclosure purposes, Respondent treated the loans he received from Millennium as "contingent liabilities," and did not report the loans on his CE Form 6's for the years 2007-2010.

39. Respondent offered no evidence to support his contention that Millennium considered the loans to Respondent to be contingent on whether Respondent consummated a business relationship with or joined the company. Moreover, Respondent's contention is belied by the express language of the promissory notes themselves, which make no mention of Respondent's repayment obligation being contingent on any future event.

40. Respondent's assertion that the loans from Millennium were contingent liabilities is rejected. Rather, the best

evidence of Respondent’s obligation to repay the loans are the promissory notes, which clearly state that Respondent’s obligation to repay the loans was unconditional.

Respondent’s Form 6 Financial Disclosures for 2005 through 2009.

41. On his 2005 CE Form 6, Respondent disclosed only his State of Florida, House of Representatives' salary of $29,916. However, review of Respondent's personal bank account records reflects income of approximately $52,473 in 2005, and personal expenditures of approximately $75,000.

42. On his 2006 CE Form 6, Respondent disclosed only his State of Florida, House of Representatives' salary of $30,576. However, review of Respondent's personal bank account records reflects income of approximately $44,968 in 2006, and personal expenditures of approximately $54,000.

43. On his 2007 CE Form 6, Respondent disclosed only his State of Florida, House of Representatives' salary of $31,932. However, review of Respondent's personal bank account records reflects income of approximately $101,000 in 2007, and personal expenditures of approximately $128,000.

44. On his 2008 CE Form 6, Respondent disclosed only his State of Florida, House of Representatives' salary of $30,336. However, review of Respondent's personal bank account records reflects income of approximately $79,789 in 2008, and personal expenditures of approximately $88,000.

45. On his 2009 CE Form 6, Respondent disclosed only his State of Florida, House of Representatives' salary of $29,697. However, review of Respondent's personal bank account records reflects income of approximately $93,000 in 2009, and personal expenditures of approximately $113,000.

46. The Advocate clearly and convincingly established that for reporting years 2005 through 2009, Respondent had income well in excess of what he reported on his CE Forms 6 for those years. Even assuming the $95,000 received from Millennium during 2007, 2008, and 2009 was a loan, not income, Respondent's other income still exceeded by tens of thousands of dollars the amounts that he reported on his CE Form 6's for the years at issue.

47. No loans, contingent or otherwise, were disclosed as liabilities in Respondent's 2006, 2007, 2008, or 2009 CE Forms 6.

48. CE Form 6 requires a specific description of each asset valued over $1,000. On his 2005 through 2009 CE Forms 6, Respondent listed "real estate," "401K," "stocks and bonds" and "bank accounts." In his Proposed Recommended Order, Respondent conceded that he did not list certain assets with the level of detail required by the Commission for the years 2006-2009.

49. CE Form 6 asks for major clients under section D as Secondary Sources of Income. For purposes of the CE Form 6,

"Secondary Sources" are not second jobs. Rather, the reporter is required to disclose major customers, clients and other sources of income to business entities of which they have an interest.

50. Under "Secondary Sources of Income," Respondent listed Interamerican Government Relations as a "business entity" with the U.S. Agency for International Development as a "major client" on his 2005-2009 CE Form 6's. According to Respondent, while serving in the Florida House, Respondent was engaged in international democracy building programs with the U.S. Government. Funds paid to the Respondent under these grant programs were nominal and intended to pay only for expenses incurred while Respondent participated in the programs.

51. Respondent also disclosed Millennium as a secondary source of income on his 2005 CE Form 6, but not on his 2006 through 2009 CE Form 6's.

52. Respondent filed the first set of CE Form 6X, Amendment to Full and Public Disclosure of Financial Interests, on October 15, 2010. These amendments delete the secondary source of income disclosed for 2003 through 2009, but make no other changes.

53. Respondent filed a second set of CE Form 6X on January 4, 2011, for the years 2006 through 2009, which specifically identifies parcels of real estate, provides the

address for Respondent's bank account with Bank of America, and lists stocks and bonds with particularity. The amendments for 2007, 2008, and 2009 also list contingent loans from Ileana Medina and/or Millennium for those years.

54. A CE Form 6F, "Final Full and Public Disclosure of Financial Interest" was required to be filed within 60 days from November 2, 2010, the date Respondent left office as a state representative.

55. The significant difference between a CE Form 6 and a CE Form 6X is that the CE Form 6 asks for the financial information as of December 31, or a more current date. The CE Form 6X asks for financial information as of the date the discloser left office.

56. On March 25, 2011, Respondent filed CE Form 6 which refers to an attachment under liabilities. Attached is a United States House of Representatives' Disclosure Statement which lists a "contingent liability/loan" from Ileana Medina and/or Millennium as paid in full in 2010.

57. On August 7, 2012, and August 24, 2012, Respondent filed two CE Forms 6X. The accompanying cover letter refers to the forms as amendments to Respondent's CE Form 6F filed for 2010. The Form filed on August 24, 2012, lists Millennium as a contingent liability and also lists a loan from Ileana Medina for $49,000.

58. Respondent testified that he was not aware that he was required to file a CE Form 6F in January 2011. He stated that he thought the report was due in May or June of the following year. He also testified that he filed the report in March 2011, because he received a call from the Florida House counsel advising him that the report was overdue.

CONCLUSIONS OF LAW

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

60. As a member of the Florida House of Representatives from 2002 through 2010, Respondent was subject to Article II, section 8, Florida Constitution, and part III, chapter 112, Florida Statutes (the Code of Ethics for Public Officers and Employees) for his acts and omissions during the time of the alleged violations.

61. Section 112.322, and Florida Administrative Code Rule 34-5.0015, authorize the Commission on Ethics to conduct investigations and to make public reports on complaints alleging violations of the Code of Ethics.

62. The Florida House of Representatives has jurisdiction over the appropriate penalty in this matter. § 112.324(8)(e), Fla. Stat.

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

64. As noted by the Florida Supreme Court:

> [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.

In re: Henson, 645 So. 2d 398, 404 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). The Supreme Court of Florida also explained, however, that, although the "clear and convincing" standard requires more than a "preponderance of the evidence," it does not require proof "beyond and to the exclusion of a reasonable doubt." Id. Reimbursement for Travel-Misuse of Public Position.

65. Section 112.313(6) provides as follows:

> (6) 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 section 104.31.

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

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

67. In order to establish a violation of section 112.313(6), 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.

68. Section 112.061(3)(b) provides:

> Travel expenses of travelers shall be limited to those expenses necessarily incurred by them in the performance of a public purpose authorized by law to be performed by the agency and must be within the limitations prescribed by this section.

69. According to the Advocate, Respondent recovered the costs of his travel twice - once, from the State of Florida and a second time through one of his campaign accounts. By doing so, Respondent secured a special private gain, that of additional income, which is inconsistent with his public duties. Respondent maintains that he was owed reimbursements from his various campaign accounts dating back to 2002. He further maintains that he is still owed funds from his campaign accounts to this day. Some of the funds owed are from his political party campaigns.

70. The facts adduced at hearing do not support Respondent's theory that campaign account payments made to him, as well as directly to his credit card accounts, represented reimbursements for past loans. Accordingly, Respondent's testimony in this regard is rejected as non-credible.

71. The credible forensic financial evidence presented at hearing revealed that payments toward Respondent's personal credit cards came from both his committeeman and Florida House Campaign accounts. The evidence also established that Respondent's committeeman campaign accounts were primarily used to pay Respondent's personal credit card charges. He presented no evidence that funds from account number 1626, at the time it was designated a committeeman account, were used for any campaign related expenses. The records reflect that it was used solely to pay Respondent's personal credit cards, or for cash withdrawals. Account number 9269 does show campaign related expenses of $143,470.44, mostly in July and August 2008, but more than $80,000 of that account was applied to Respondent's personal credit cards.

72. Regardless of which campaign paid for Respondent's travel expenses, Respondent did not incur the expenses himself. When Respondent requested and received deposits to his personal bank account for travel expenses from the State of Florida he accepted money that he was not due from the State of Florida.

73. To satisfy the statutory element of corrupt intent, clear and convincing evidence must be adduced that Respondent acted "with reasonable notice that his conduct was inconsistent with the proper performance of his public duties and would be a violation of the law or the code of ethics." Blackburn v.

State, Comm'n on Ethics, 589 So. 2d 431, 434 (Fla. 1st DCA 1991).

74. "Direct evidence of [wrongful] intent is often unavailable." Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (l1th Cir. 1996); see also State v. West, 262 So. 2d 457, 458 (Fla. 4th DCA 1972) ("[I]ntent is not usually the subject of direct proof.").

75. Circumstantial evidence, however, may be relied upon to prove the wrongful intent which must be shown to establish a violation of section 112.313(6). See U.S. v. Britton, 289 F.3d 976, 981 (7th Cir. 2002) ("As direct evidence of a defendant's fraudulent intent is typically unavailable, specific intent to defraud may be established by circumstantial evidence and by inferences drawn from examining the scheme itself that demonstrate that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension.") (internal quotation marks omitted). For instance, such intent may be inferred from the public servant's actions. See Swanson v. State, 713 So. 2d 1097, 1101 (Fla. 4th DCA 1998) ("Appellant's actions are sufficient to show intent to participate."); State v. Breland, 421 So. 2d 761, 766 (Fla. 4th DCA 1982) ("Actions manifest intent."); and G.K.D. v. State, 391 So. 2d 327, 328-29 (Fla. 1st DCA 1980) ("Appellant testified that he did not intend to break the window, but the record indicates that he did

willfully kick the window, and he may be presumed to have intended the probable consequences of his actions.").

76. Respondent personally authorized the travel expenses which were charged to his credit cards. He also personally signed and submitted the travel reimbursement requests to the State of Florida. Finally, Respondent also personally signed the campaign account checks used to pay off his credit card balances. Respondent individually, and without the participation of anyone else, personally orchestrated this sequence of events. Thus, Respondent knowingly and intentionally received travel reimbursements from the State of Florida to which he was not entitled. Thus, the required mens rea element of section 112.312(9) (corrupt intent) has been met.

77. At the time of the state travel payments, Respondent was a public official. The Advocate established by clear and convincing evidence that Respondent used his official position to request and receive state travel reimbursement for travel expenses that he did not personally incur. These actions gave Respondent a special benefit, additional income. Such acts were inconsistent with the proper performance of Respondent's public duties, and therefore constitute a violation of section 112.313(6).

Financial Disclosure

78. Article II, section 8 of the Florida Constitution provides in relevant part:

> **Section 8 Ethics in government. —** A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:
>
> (a) All elected constitutional officers and candidates for such offices and, as may be determined by law, other public officers, candidates, and employees shall file full and public disclosure of their financial interests.
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> * * *
>
> (i) Schedule—On the effective date of this amendment and until changed by law:
>
> (1) Full and public disclosure of financial interests shall mean filing with the custodian of state records by July 1 of each year a sworn statement showing net worth and identifying each asset and liability in excess of $1,000 and its value together with one of the following:
>
> a. A copy of the person's most recent federal income tax return; or
>
> b. A sworn statement which identifies each separate source and amount of income which exceeds $1,000. The forms for such source disclosure and the rules under which they are to be filed shall be prescribed by the independent commission established in subsection (f), and such rules shall include disclosure of secondary sources of income.
>
> (2) Persons holding statewide elective offices shall also file disclosure of their financial interests pursuant to subsection (i)(1).

(3) The independent commission provided for in subsection (f) shall mean the Florida Commission on Ethics.

79. Section 112.3144(1) provides as follows:

(1) An officer who is required by s. 8, Art. II of the State Constitution to file a full and public disclosure of his or her financial interests for any calendar or fiscal year shall file that disclosure with the Florida Commission on Ethics.

A. The Millennium Marketing "Loans"

80. The Advocate contends that payments from Millennium to Respondent for the years 2007-2010 were income and should have been disclosed by the Respondent on his CE Form 6's for the applicable years. However, as found herein, the Advocate did not prove that the funds received by Respondent from Millennium were income, rather than loans, by clear and convincing evidence.

81. The Advocate argues that because Respondent (and Millennium) failed to produce the original promissory notes, or the computer on which they were prepared, the undersigned should draw an adverse presumption that an examination of the originals would have shown that they were prepared and signed much later in time, and not contemporaneously with the dates stated on the face of the documents. However, even were the undersigned to agree that under the facts of this case such a presumption is merited, it would not rise to the level of clear and convincing evidence.

82. A contingent liability is defined in the CE Form 6 instructions as:

> [O]ne that will become an actual liability only when one or more future events occur or fail to occur, such as where there is pending or threatened litigation, where you are liable only as a partner (without personal liability) for partnership debts, or where you are liable only as a guarantor surety or endorser on a promissory note.

83. Neither the promissory notes, nor the checks themselves, indicate any type of contingency. Respondent's testimony that both he and Millennium considered the loans to be contingent is not supported by the evidence and is rejected.

84. While the Advocate has not established by clear and convincing evidence that the Millennium funds represented income that should have been reported on CE Form 6, it has been established by clear and convincing evidence that Respondent violated Article II, section 8 of the Florida Constitution by failing to report his loans from Millennium, since they represented liabilities well in excess of $1,000.

B. Income from State of Florida Travel Reimbursements

85. Respondent did not disclose the income he received from State of Florida travel reimbursements. Since Respondent did not personally pay for the travel expenses he was reimbursed for, the payments he received represented income to Respondent. Accordingly this income, totaling tens of thousands of dollars,

should have been, but was not, reported on CE Form 6's for 2005, 2006, 2007, 2008, and 2009.

C. Non-Disclosure of Other Sources of Income

86. The Advocate also clearly and convincingly established that for reporting years 2005 through 2009, Respondent had income well in excess of what he reported on his CE Form 6's for those years, in violation of Article II, section 8 of the Florida Constitution.

D. Description of Assets

87. Respondent conceded that he did not list certain of his assets with the level of detail generally required by the Commission for the years 2006-2009.

88. "One of the acknowledged purposes of financial disclosure is to provide members of the public with the opportunity to detect conflicts of interest on the part of public officials." CEO 77-139; Goldtrap v. Askew, 334 So. 2d 20 (Fla. 1976).

89. "[E]ach asset should be identified sufficiently to allow the public to ascertain with what persons or business entities the officer's personal financial interests lie." CEO 77-139.

90. Respondent's general description of his assets on his 2005 through 2009 CE Form 6's ("real estate property," "401K," "stocks and bonds," and "bank accounts") are so vague as to

preclude the public from ascertaining whether a conflict could exist between Respondent's public duties and his holdings.

91. Respondent filed two sets of amendments to his CE Form 6's for the years in question. The first set on October 15, 2010, does not address this issue. The second set filed on January 4, 2011, does describe Respondent's assets in detail for the years 2006, 2007, 2008, and 2009. A second amendment for 2005 was not filed. Although Respondent has now appropriately described his assets, the public was deprived of that information prior to the second set of amendments.

E. Final Full Public Disclosure

92. Section 112.3144(6), provides as follows:

> (6) Each person required to file full and public disclosure of financial interests shall file a final disclosure statement within 60 days after leaving his or her public position for the period between January 1 of the year in which the person leaves and the last day of office or employment, unless within the 60-day period the person takes another public position requiring financial disclosure under s. 8, Art. II of the State Constitution, or is otherwise required to file full and public disclosure for the final disclosure period. The head of the agency of each person required to file full and public disclosure for the final disclosure period shall notify such persons of their obligation to file the final disclosure and may designate a person to be responsible for the notification requirements of this subsection.

93. Respondent's last day serving in the Florida House of Representatives was November 2, 2010. Consequently, he should have filed a CE Form 6F "Final Full and Public Disclosure of Financial Interests" by January 2, 2011. Respondent did not. He did file a CE Form 6 Full Public Disclosure of Financial Interests for the year 2010 on March 25, 2011. Attached to that Form was a "United States House of Representatives Ethics in Government Act Calendar Year 2010 Financial Disclosure Statement."

94. Respondent violated section 112.3144(6) by not filing a CE Form 6F "Final Full and Public Disclosure of Financial Interests" by January 2, 2011.

95. In cases concerning former members of the Florida Legislature who have violated provisions applicable to former members or whose violation occurred while a member of the legislature, as is the case here, the appropriate penalty is to be determined by the Speaker of the House of Representatives. § 112.324(8)(e), Fla. Stat.

RECOMMENDATION

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

RECOMMENDED that the Commission on Ethics issue a Final Order finding that Respondent:

1. Violated section 112.313(6), Florida Statutes, by requesting and accepting State of Florida reimbursement for travel expenses that were not incurred by him, but rather were paid by his campaign fund accounts;

2. Violated Article II, section 8, Florida Constitution, by failing to or not properly reporting income and/or stocks and bonds; and/or secondary source income on his 2005 through 2009 CE Form 6, Full and Public Disclosure of Financial Interest;

3. Violated section 112.3144, Florida Statutes, by failing to file a CE Form 6F "Final Full and Public Disclosure of Financial Interests" within 60 days of leaving his position with the Florida House of Representatives.

DONE AND ENTERED this 6th day of June, 2014, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of June, 2014.

ENDNOTES

[1/] Unless otherwise noted, all references to the Florida Statutes are to the 2013 version.

[2/] The $1,692.32 reimbursement was combined with another State of Florida travel reimbursement for $399.12. Accordingly, Respondent's personal bank account reflects a combined State of Florida deposit of $2,091.44.

[3/] The exception is the February 12, 2010, check, which was not deposited until March 16, 2010.

[4/] There had been no activity in this account since June 2010.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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