STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: ROBERT K. ROBINSON, Case No. 16-1007EC

Respondent.
_____/

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings ("DOAH"), on August 25 and 26, 2016, in Sarasota, Florida.

APPEARANCES

For Advocate: Elizabeth A. Miller, Esquire
Office of the Attorney General
Plaza Level 01, The Capitol
Tallahassee, Florida 32399

For Respondent: Brennan Donnelly, Esquire
Mark Herron, Esquire
Messer Caparello, P.A.
2618 Centennial Place
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

The nature of the controversy is set forth in the Order Finding Probable Cause issued by the Commission on Ethics (the "Commission") on September 16, 2015, which specifically alleged that Respondent, City Attorney, code enforcement special magistrate, or special or backup counsel for the City of North

Port, violated sections 112.313(3), 112.313(6), 112.313(7)(a), and 112.313(16), Florida Statutes:

> [B]y providing counsel and recommendations to the City Commission regarding the adoption of local Ordinance 2014-29 requiring the appointment of a Zoning Hearing Officer and encouraging the City Commission to amend Part II, Chapter 2, Article IX, of the City Code to replace the Code Enforcement Board with a Code Enforcement Special Magistrate and offering himself for consideration for the position of Zoning Hearing Officer as well as Code Enforcement Special Magistrate.

The issue is whether Respondent violated these provisions of the Code of Ethics for Public Officers and Employees as alleged in the Order Finding Probable Cause, and, if so, what penalty is appropriate.

PRELIMINARY STATEMENT

On September 16, 2015, the Commission issued an Order Finding Probable Cause to believe that Respondent violated various provisions of the Code of Ethics for Public Officers and Employees. Pursuant to section 112.323(3), Florida Statutes, the Commission, on its own motion, ordered a public hearing and referred the complaint to DOAH on February 19, 2016.

The case was assigned to the undersigned who entered a Notice of Hearing scheduling the final hearing for May 5 and 6, 2016. Upon motion of Respondent to continue the hearing, and over the objection of the Commission, the final hearing was rescheduled for July 25 and 26, 2016. The final hearing again

was rescheduled for August 25 and 26, 2016, upon motion of Respondent to exclude the Commission's expert or, in the alternative, to continue the hearing. The hearing commenced as scheduled on August 25 and was completed on August 26, 2016.

At the hearing, the Advocate presented the testimony of Mark Moriarty, Linda Yates, Richard Harrison, and Respondent. Advocate's Exhibits 1 through 6, 8 through 18, and 20 were admitted into evidence, and included a number of videos that were viewed at the hearing. Respondent testified on his own behalf and Respondent's Exhibits 1 through 5, 7 through 10, 12, and 13 were admitted into evidence.

A three-volume Transcript of the proceedings was filed on October 28, 2016. By agreement of the parties, proposed recommended orders were initially due on November 28, 2016. Pursuant to an unopposed motion of Respondent, the due date for submission of proposed recommended orders was extended until December 28, 2016. On that date, the parties timely filed their Proposed Recommended Orders, which have been duly considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2016), unless otherwise noted.

FINDINGS OF FACT

1. The City of North Port ("City") is an incorporated municipality, created by the Florida Legislature in 1959, and located in Sarasota County. Its electorate approved a revised charter in 1988. Subsequent amendments to the Charter were approved throughout the years, with the most recent amendment occurring in 2014. Article XIV, concerning the City Attorney, has never been amended.

2. The City's form of government is Commission-Manager. The City Commission consists of five elected City Commissioners. The City Commissioners elect the Mayor, who serves as presiding officer of the City Commission, and who is elected by majority vote of the City Commissioners. The Mayor is "responsible to see that all laws, provisions of [the] Charter and acts of the [City] Commission are faithfully executed; [to] sign on behalf of the City all intergovernmental agreements . . . and any other official documents."

3. The Charter establishes the separation of powers between the executive and legislative branches of the City.

4. The Charter requires the City Commission to appoint the City Manager who serves as the chief administrative officer. The Charter empowers the City Manager to supervise the daily administrative duties and all non-charter employees, make City personnel decisions, represent the City in contract negotiations,

sign contracts on behalf of the City, enforce agreements, and perform numerous other duties. The City Commissioners may not interfere with the selection of the personnel of the City Manager's subordinates, nor give orders to City personnel.

5. The Charter establishes the City Manager, City Clerk, and City Attorney. The Charter specifies that the City Clerk and City Attorney are offices that the City Commission cannot abolish.

6. The Charter provides for the office of City Attorney and assigns various duties to the position. As indicated in section 1.03 of the Charter, "reference to any office or officer includes any person authorized by law to perform the duties of such office."

7. The functions of City Attorney include: attending all meetings; advising the City Commission as to its compliance with the Charter and Florida law; being the legal advisor and counselor for all departments; preparing and reviewing contracts, legal and official instruments; and endorsing each legal contract as to form and correctness. The Charter states that "[n]o legal document with [the] Municipality shall take effect until his approval is so endorsed thereon."

8. Respondent provided legal services to the City of North Port from 2001 until August of 2014. From 2001 to 2006, Respondent was a partner in the Bowman, George, Scheb & Robinson

law firm which had a contract to provide legal services to the City. The firm was designated the City Attorney for the City. In 2006, simultaneously with the renewal of the Bowman George contract, Respondent moved his practice to the Nelson Hesse law firm, in which he was a partner. From 2006 until August 2012, the Nelson Hesse law firm had a contract to provide legal services to the City. The firm was designated as the City Attorney. In each instance, the City contracted with a law firm, and not a specific individual, to serve as the City Attorney.

9. From 2001 through August 2012, Respondent, as a member of a contracted law firm, performed the duties and responsibilities of the City Attorney as outlined in the City Charter and as provided in the contracts between the City and the Bowman George firm and the Nelson Hesse firm.

10. In 2011, the City Commission began discussing alternatives to the way legal services were provided due to concerns with the City's rising costs for legal fees. In the spring of 2012, the City issued a Request for Proposals (RFP) which sought "proposals from experienced and qualified law firms to provide a full range of municipal legal services serving as the City's legal counsel on a contractual basis."

11. Respondent played no role in developing the RFP or participating in any discussions concerning the RFP because he believed it "would prohibit [his] submission of a proposal to

that RFP." Commissioner Linda Yates testified that Respondent said he could not participate in the creation or discussions of the RFP due to ethical issues.

12. Throughout the RFP process, Jonathan R. Lewis served as City Manager. He had been appointed by the City Commission and acts as chief administrative officer. In addition to his various duties, he is responsible for the hiring and firing of City personnel, representing the City in contract negotiations, and signing all contracts, agreements, and applications for the City after approval by the City Commission. Mr. Lewis signed a contract with Suzanne D'Agresta to provide legal advice and counsel to the City Commission during the RFP process since Respondent removed himself from the process as he intended to submit a proposal on behalf of his firm.

13. RFP applicants were advised in writing that "[t]he City Attorney is appointed by the [City] Commission, serves as a Charter officer, and performs duties and responsibilities pursuant to the Charter of the City of North Port section 14.05 and the general law of the State of Florida." Other specialty legal services, such as bond work and pension issues, are outsourced.

14. Minimum qualifications for the position included seven years' experience in Florida municipal law, and licensure by and good standing with The Florida Bar.

15. The Nelson Hesse firm, partnering with the Lewis, Longman & Walker law firm, submitted a response to the RFP. Three other firms submitted responses to the RFP. After an interview process, the Nelson Hesse firm was ranked first by three of five members of the City Commission and the general consensus was that the firm was the most qualified applicant. The City and the Nelson Hesse firm then negotiated the terms of an agreement for legal services that were subsequently presented to the City Commission for approval.

16. On August 15, 2012, the City of North Port approved the Agreement for Legal Services with the Nelson Hesse firm whereby the City employed, engaged, and hired "the Firm to serve as and to perform the duties and responsibilities of City Attorney pursuant to Request for Proposal No. 2012-21." The Agreement stated:

> The Firm designates and the City accepts Robert K. Robinson as the primary attorney for City legal work. Mr. Robinson may utilize the services of other attorneys and staff in the Firm and [Lewis, Longman and Walker] as he deems appropriate for City legal work.

The Agreement, which commenced on September 1, 2012, was for a term of two years and could be renewed for one additional term of one year.

17. The Agreement further provided:

> The Firm shall serve as the City Attorney who shall act as legal advisor to, and attorney and counselor for, the City and all of its officers in matters relating to their official duties.

18. On September 10, 2012, the City Commission voted four-to-one to approve Nelson Hesse and Respondent to provide legal services to the City Commission. Commissioner Yates was the lone dissenter citing numerous reasons for her "no" vote.

19. Nelson Hesse's compensation was fixed by contract as required by the Charter. A monthly retainer was set at $28,333.33 to cover a maximum of 2,400 hours, and the rate was fixed at $170 for "Hourly Legal Services." Expenses, including travel within the county, were to be billed to the City.

20. The Office of City Attorney was budgeted through "Charter and Executive Services," and in FY 2012 the legal department had a budget of $776,000. Respondent was required to submit his projected budget annually.

21. Respondent had office space for his use at City Hall.

22. Unlike the contract with Ms. D'Agresta, which was signed by City Manager Lewis, Respondent's Agreement was signed by then-City Commission Chair Tom Jones. This indicates that Respondent or his firm was a Charter officer serving under the City Commission, and not a non-charter independent contractor serving under the City Manager on a temporary basis when

Respondent and his firm recused themselves from any involvement with the RFP since they intended to submit a proposal.

23. The Agreement reiterated and expanded the duties and powers enumerated in the Charter and provided that Respondent may not assign the Agreement without prior written consent of the City Commission.

24. Respondent, as an individual, believes he was never appointed City Attorney by majority vote of the City Commission nor was he elected to that position. Respondent was also not an employee of the City. His firm, Nelson Hesse, in which he was a partner, served as City Attorney. From the evidence, this appears true even though the Charter refers to the City Attorney as "he or she."

25. Following the November 2012 election of two new commissioners, the City began the process of transitioning from the use of a firm to serve as the City Attorney to the appointment of an individual to serve as the City Attorney. This process, which involved a series of meetings and workshops, included a review of all legal services for the City and eventually led to a decision to retain a consultant to conduct a search for an individual to serve as City Attorney. This process, in turn, led to the appointment of Mark Moriarty as the City Attorney by majority vote of the City Commission.

Mr. Moriarty began his employment as the City Attorney on or about September 15, 2014.

26. Well prior to Mr. Moriarty's start as City Attorney, at the June 9, 2014, City Commission meeting, at Vice-Mayor Rhonda DiFranco's request, Respondent, on behalf of his firm, Nelson Hesse, submitted a "Letter of Engagement," that he drafted, to the City Commission for approval. Since the 2012 Agreement with Nelson Hesse was going to expire on August 31, 2014, Respondent sought to provide the City with a "safety net" to ensure it would be covered for legal services until Mr. Moriarty was in place and the City had no need for further services from Nelson Hesse.

27. The Letter of Engagement would allow Respondent, through his firm, to continue to provide advice and representation beginning September 1, 2014, as the backup attorney to the new in-house counsel, Mr. Moriarty. Additionally, the Letter of Engagement specified Respondent would "provide advice and representation to the City on zoning . . . [and as] code enforcement hearing officer." The Letter of Engagement included a higher hourly fee than the previous Agreement with the City ($275 versus $170). The reason given for the higher hourly fee was that Respondent could not ascertain how many hours, if any, his firm would work under the new arrangement and, therefore, could not offer a volume discount for his time.

Nothing in the June 9 Engagement Letter required the City to use Nelson Hesse for any future work.

28. The testimony as to Respondent's motive for placing the June 9 letter before the City Commission was disputed by the parties. Respondent was not representing a private individual or entity before the City Commission at the meeting. If he was representing anyone, he believes he was representing the City. He took no action to impede or frustrate the City Commission's move to an appointed City Attorney. If anything, the evidence suggests Respondent assisted the City in its search for an in-house City Attorney by recommending a search firm, and by speaking positively about the transition to the in-house situation.

29. Because Mr. Moriarty was not going to assume his new position until September 15, 2014, the City Manager was authorized to enter into an interim agreement for legal services with Respondent's firm to cover the two-week period between the expiration of the prior Legal Agreement with Nelson Hesse and Mr. Moriarty's start date. Consistent with that new agreement, Respondent attended and provided legal services to the City Commission at its September 8, 2014, meeting. At this meeting, his firm was no longer the City Attorney, but was a contract attorney providing services during the interim period between City Attorneys.

30. The Advocate's take on the post-City Attorney plans of Respondent was quite different. The argument was made that Respondent's June 9 letter was designed to hire Respondent's firm at an increased rate of $275 per hour, plus to make Respondent the Zoning Hearing Officer and Code Enforcement Special Magistrate.

31. The Charter requires reading of a proposed ordinance at two separate public City Commission meetings at least one week apart. On the second and final reading, the proposed ordinance is offered for adoption. If adopted, it becomes local law on its effective date.

32. Respondent, as City Attorney, supervised the drafting of Ordinance 2014-29 to create the position of Zoning Hearing Officer for zoning appeals and variance matters, effective September 1, 2014. The Zoning Hearing Officer was to be hired and could be terminated by the City Commission, which also would supervise the position.

33. Ordinance 2014-29 was presented to the City Commission for first reading at the July 14, 2014, City Commission meeting. Respondent explained the ordinance to the commissioners and legally advised them on the document.

34. The second reading took place at the City Commission's July 28, 2014, meeting. Again, Respondent offered legal advice to the commissioners about the ordinance's effects. Respondent

suggested that an appointment needed to be made that night, effective September 1, 2014, the day after his Legal Agreement expired. He offered his services and responded "yes" to a question from City Commissioner Yates regarding whether a decision should be made that night. Respondent provided no other options other than to appoint him immediately.

35. Other options may have been available since it was "the norm" (Respondent's words) for City Manager Lewis to contract with attorneys from a variety of law firms for services without undertaking the competitive solicitation process when specialty legal services were needed. Respondent himself could have called an experienced attorney to handle the pending petition. Instead, Respondent informed the City Commission it was not his responsibility to provide other options to the City Commission.

36. When asked how he would be ready to go with this on September 1, 2014, Respondent said he would "take off [his] city attorney hat" and on September 1 "put on the zoning officer appeals hat." He made clear to the City Commissioners that he was "uniquely qualified" for the position, therefore no others need be considered in his opinion.

37. With no other options before them and having been advised of the urgency of making the appointment, the City Commission appointed Respondent to serve a four-year term by a four-to-one vote (Commissioner Yates being the lone dissenter).

38. Respondent served in the position of Zoning Hearing Officer from September 1 through September 19, 2014. He earned $1,453.50 for 5.5 hours worked ($264.27 per hour).

39. Respondent's 2012 Agreement did not provide he could serve as Zoning Hearing Officer. Respondent drafted the June 9, 2014, Letter of Engagement allowing him to serve as Zoning Hearing Officer.

40. As Zoning Hearing Officer, Respondent served at the pleasure of the City Commission and could be removed with or without cause by a majority of the City Commissioners. Respondent had the power to take testimony under oath and compel attendance of witnesses. He could not engage in any "ex-parte" communications with City Commissioners while serving as Zoning Hearing Officer because he was serving as a neutral arbitrator in a quasi-judicial position adjudicating controversies between two parties: the City and property owners.

41. Respondent could not serve as backup legal advisor to the City from September 1 through 14, 2014, if at the same time he was serving as Zoning Hearing Officer since he was supposed to be in a neutral and, therefore, independent position.

42. Ordinance 2014-30 amended the City Code to abolish the seven-member Code Enforcement Board and create one Code Enforcement Special Magistrate ("Special Magistrate") position, effective October 1, 2014. The Special Magistrate was to be

hired by and could be terminated by the City Commission upon a majority vote. That ordinance was presented to the City Commission for first reading on July 28, 2014.

43. Respondent advised the City Commissioners that the ordinance created a special magistrate position, and informed the City Commissioners he would work on the details for the position in September and October 2014, a period of time covered by the June 9 Letter of Engagement, but not the 2012 Legal Services Agreement. Respondent admitted he drafted the June 9 Letter of Engagement so that he could assume the special magistrate position himself.

44. After advising the City Commission on the effects of the ordinance as their attorney, Respondent offered himself for consideration for the not-yet-existent position and was appointed on a four-to-one vote of the City Commissioners to a two-year term beginning October 1, 2014.

45. Like the Zoning Hearing Officer, the Special Magistrate serves as a neutral arbitrator in a quasi-judicial position that adjudicates controversies between two parties: the City and the property owner or alleged violator.

46. Respondent attended ethics classes taught by Chris Anderson, attorney for the Commission on Ethics. Respondent denied he had a conflict of interest because in his view a violation would occur by "the attorney getting up out of his

chair and going down in front of the commission and representing John Q. Public or John Q. Developer with regard to matters that are appearing before the city commission. That was not the case with me."

47. Respondent's term as City Attorney ended on August 31, 2014. On August 28, 2014, City Manager Lewis requested authorization from the City Commission to hire Respondent to provide legal services from September 1 through 15, because the new in-house City Attorney would not begin until September 15, 2014.

48. At the next regularly scheduled meeting of the City Commission on September 8, 2014, Ordinance 2014-30 was read a second time and voted for adoption. Respondent attended the meeting as the City Commission's legal advisor. Mayor Blucher introduced him as the "City Attorney" and quickly realized his error and corrected himself to announce Respondent's new title as "attorney for the City." Respondent replied, "Careful."

49. This was apparently the only time Respondent reacted when he was identified as the appointed City Attorney. Although he claims his firm is the entity that contracted with the City to provide legal services, his silence is an admission he considered himself at least to be the de facto City Attorney or appointed public officer.

50. City Commissioner Yates strongly objected every time Respondent's name was presented for the position of interim attorney for the City (for the September 1 through 14 period), Zoning Hearing Officer, or Special Magistrate. In each instance, she asked the City Commission to delay the vote until the new in-house City Attorney came on board so that he could have some input into the decision. She was outvoted four-to-one each time.

51. Municipal governments utilize three typical arrangements for procuring legal services: 1) an in-house attorney who is directly on the government payroll; 2) an attorney in private practice whose firm (or the individual attorney) is retained through a contractual relationship under which the attorney remains employed by his/her firm; and 3) an attorney who practices in a specialized area who is retained on an as-needed basis through contract. Respondent's work for the City fits into the second category of lawyers retained to perform City business.

52. In this matter, Respondent was considered by the City as a Charter Officer holding a public office. According to the RFP, the City sought a City Attorney as contemplated by its Charter when it appointed Respondent for the office. Respondent held himself out as the City Attorney to the Florida Attorney General when requesting legal opinions, to the public on his website, and to the Commission when filing his Form 1, "Statement

of Financial Interests" (which also identifies him as an employee of his firm, Nelson Hesse). Respondent has never corrected the suggestion that he is City Attorney. His name appears as the appointed City Attorney on the City's official letterhead, and his picture hangs in City Hall with the other City officers. In City Hall, the name plate below his picture identifies him as the City Attorney and Charter Officer. The official minutes of each City Commission meeting held during his tenure indicate Respondent is the appointed City Attorney.

53. Respondent admitted, when asked at hearing, that the Charter contemplates that a person, not an entity, will be the City Attorney.

54. Respondent denies that he was "appointed" to the position of City Attorney, yet he did not correct Commissioner Blucher when he said during a meeting, "we elected him as a city attorney." City Commissioner Yates, also testifying at the hearing, believes the City Commission approved Respondent as the City Attorney.

55. The City Charter does not require the City Attorney to take an oath of office and, although City Commissioner Yates does not recall whether Respondent did, she testified she expected he would have taken an oath as a matter of course.

56. Respondent's current denial of any violations of chapter 112, Florida Statutes, and insistence that Nelson Hesse

is the City Attorney conflicts with previous statements he made. At one point he declared, "Either I am or I am not the City Attorney." Further, when declining to negotiate an assignability clause in his June 9, 2014, Letter of Engagement because, as he explained to the City Commission, "But, the thing you have to understand is, Number 1, is that – is I'm sort of the center of the universe, so wherever I go, that's where it [this contract] goes." Respondent accurately, and appropriately, portrayed himself as the primary attorney for the City, regardless of his firm being named in his 2012 Agreement for Legal Services to the City.

57. Respondent regularly signed official documents as "Robert K. Robinson, City Attorney," not as "Nelson Hesse as City Attorney, by Robert K. Robinson," or some other form of signature where he states his firm is the City Attorney.

58. It is significant that the 2012 Agreement for Legal Services was signed by Tom Jones, then-Chair of the City Commission. The City Manager did not sign the document as he would have if this contract and the legal services rendered thereunder fell into the category of non-charter personnel performing legal (or other) services for the City. Only the City Commission can appropriately sign an agreement or contract designating a Charter Officer such as the City Attorney.

59. Respondent was accountable to the City Commission for work performed under the Agreement. He acknowledged that the Agreement was on a City Commission agenda "at a public hearing where they [the Commissioners] adopted – or they executed the contract."

CONCLUSIONS OF LAW

60. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

61. Respondent is subject to the requirements of chapter 112, part III, Florida Statutes, the Code of Ethics for Public Officers and Employees, for his acts and omissions during his tenure with the City of North Port.

62. Section 112.322 and Florida Administrative Code Rule 34-5.0015, authorize the Commission to conduct investigations and to make public reports on complaints concerning violations of chapter 112, part III, which is referred to as the Code of Ethics for Public Officers and Employees.

63. The burden of proof, absent a statutory directive to the contrary, is on the Commission, the party asserting the affirmative of the issue of these proceedings. Dep't of Transp. v. J. W. C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of Health & Rehabilitative Servs., 348 So. 2d 349 (Fla. 1st DCA 1977). In this proceeding, it is the Commission, through

its Advocate, that is asserting the affirmative: that Respondent violated sections 112.313(3), 112.313(6), 112.313(7)(a), and 112.313(16).

64. Commission proceedings that seek recommended penalties against a public officer or employee require proof of an alleged violation by clear and convincing evidence. See Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997). See also, § 120.57(1)(j), Fla. Stat. Therefore, the burden of establishing the elements of a violation by clear and convincing evidence is on the Commission.

65. As noted by the Supreme Court of Florida:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and 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, 913 So. 2d 579, 590 (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.

66. Respondent is alleged in the Order Finding Probable Cause to have violated four provisions of the Code of Ethics for Public Officers and Employees, specifically, sections 112.313(3), 112.313(6), 112.313(7)(a), and 112.313(16):

> [B]y providing counsel and recommendations to the City Commission regarding the adoption of local Ordinance 2014-29 requiring the appointment of a Zoning Hearing Officer and encouraging the City Commission to amend Part II, Chapter 2, Article IX, of the City Code to replace the Code Enforcement Board with a Code Enforcement Special Magistrate and offering himself for consideration for the position of Zoning Hearing Officer as well as Code Enforcement Special Magistrate.

67. Section 112.313(16)(a), provides:

> For the purposes of this section, "local government attorney" means any individual who routinely serves as the attorney for a unit of local government. The term shall not include any person who renders legal services to a unit of local government pursuant to contract limited to a specific issue or subject, to specific litigation, or to a specific administrative proceeding. For the purposes of this section, "unit of local government" includes, but is not limited to, municipalities, counties, and special districts.

68. Respondent routinely served as the attorney for the City of North Port. Specifically, he was identified in the August 2012 Agreement for Legal Services between the City of North Port and the Nelson Hesse law firm "as the primary attorney for City legal work."

69. The August 2012 contract under which Respondent rendered legal services to the City of North Port was not limited to a specific issue or subject, to specific litigation, or to a specific administrative proceeding. The August 2012 contact provided: "The City hereby employs, engages and hires the Firm to serve as and to perform the duties and responsibilities of City Attorney pursuant to Request for Proposal No. 2012-21." In that capacity, "[t]he Firm shall serve as the City Attorney who shall act as legal advisor to, and attorney and counselor for, the City and all of its officers in matters relating to their official duties." The services provided to the City were comprehensive, not limited to a specific issue or subject, to specific litigation, or to a specific administrative proceeding.

70. The Commission asserts that Respondent was a "public officer," not a "local government attorney," because the City Charter provides that "[t]he City Commission shall, by majority vote, appoint a City Attorney who shall be a lawyer admitted to practice in this state." The Commission argues that Respondent was appointed as City Attorney by the City Commission and performed the duties enumerated in the City Charter. While Respondent performed the duties enumerated in the City Charter for the City Attorney, the City specifically retained the Nelson Hesse firm to serve as and to perform the duties and responsibilities of City Attorney. However, RFP 2012-21, "Legal

Services for City Attorney – Firm" makes numerous references to the Nelson Hesse firm serving as "City Attorney," with Respondent serving as the "primary attorney for legal work." Moreover, the record supports that Respondent through his firm, Nelson Hesse, was appointed City Attorney at a City Commission meeting. This does not resolve the issue of whether Respondent is the City Attorney or whether his firm provides City Attorney services for the City as a "local government attorney," pursuant to section 112.313(16)(a).

71. Respondent is charged with violating section 112.313(3), which provides as follows:

> DOING BUSINESS WITH ONE'S AGENCY. No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of

business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:

(a) October 1, 1975.

(b) Qualification for elective office.

(c) Appointment to public office.

(d) Beginning public employment.

72. To establish a violation of section 112.313(3), the following elements must be proved:

1. Respondent must have been either a public employee acting in an official capacity as a purchasing agent, or a public officer acting in an official capacity.

2. Respondent must have either directly or indirectly purchased, rented or leased some realty, goods or services.

3. Such purchase, rental or lease must have been for Respondent's own agency.

4. Such purchase, rental or lease must have been from a business entity of which Respondent, Respondent's spouse or Respondent's child is an officer, partner, director or proprietor, or in which Respondent, Respondent's spouse or Respondent's child, or any combination of them, has a material interest.

OR

To establish a violation of section 112.313(3), the following elements must be proved:

> 1. Respondent must have been either a public officer or employee acting in a private capacity.
>
> 2. Respondent must have rented, leased or sold realty, goods or services.
>
> 3. Such rental, lease or sale must have been to Respondent's own agency, if Respondent was a state officer or employee, or to Respondent's political subdivision or an agency thereof, if Respondent was serving as an officer or employee of that political subdivision.

73. A violation of section 112.313(3), can be established by proof that Respondent provided counsel and recommendations to the City Commission, as alleged in the Order Finding Probable Cause, regarding the adoption of local Ordinance 2014-29 requiring the appointment of a Zoning Hearing Officer and encouraging the City Commission to amend Part II, Chapter 2, Article IX, of the City Code to replace the Code Enforcement Board with a Code Enforcement Special Magistrate and by offering himself for consideration for the position of Zoning Hearing Officer, as well as Special Magistrate. The Order Finding Probable Cause, on its face, alleges a violation of section 112.313(3).

74. The Advocate argues that Respondent, "as a public officer," was prohibited by section 112.313(3) from doing business with the City of North Port, as a "local government attorney" within the meaning and scope of section 112.313(16)(a).

However, section 112.313(16)(b), specifically provides the following exemption:

> It shall not constitute a violation of either subsection (3) or subsection (7) for a unit of local government to contract with a law firm, operating as either a partnership or a professional association, or in any combination thereof, or with a local government attorney who is a member of or is otherwise associated with the law firm, to provide any or all legal services to the unit of local government, so long as the local government attorney is not a full-time employee or member of the governing body of the unit of local government.

Under the exemption provided in section 112.313(16)(b), Florida Statutes, it makes no difference whether the "local government attorney" is considered a "public officer" of the unit of local government. Regardless of whether Respondent is a "public officer" or "local government attorney," he is not a full-time employee or member of the governing body of the unit of local government, here the City, and would not be prohibited from providing legal services to the City.

75. Respondent is charged with violating section 112.313(6), which provides as follows:

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

> herself, or others. This section shall not be construed to conflict with s. 104.31.
>
> The term "corruptly" is defined by section 112.312(9), Florida Statutes, as follows:
>
> "Corruptly" means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.

To satisfy the statutory element that one acted "corruptly," proof 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 code of ethics. See Siplin v. Comm'n on Ethics, 59 So. 3d 150, 151-152 (Fla. 5th DCA 2011); Kinzer v. State Comm'n on Ethics, 654 So. 2d 1007. 1010 (Fla. 3d DCA 1995).

76. To establish a violation of section 112.313(6), the following elements must be proved:

> a. Respondent must have been a public officer or employee;
>
> b. Respondent must have:
>
> i. used or attempted to use his official position or any property or resources within his trust, or
>
> ii. performed his official duties;
>
> c. Respondent's actions must have been taken to secure a special privilege, benefit, or exemption for himself or others;

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

77. Section 112.313(6), expressly provides that Respondent, as a "local government attorney," is subject to its requirements and proscriptions. Section 112.313(16)(b), provides that the "standards of conduct" set forth in section 112.313(6) apply to any person who serves as a local government attorney.

78. What makes any findings of ethical violations problematic is that Respondent was acknowledged by the City Commission, its staff, and the general public as the City Attorney based upon a number of indicia set forth in this Order, such as signing documents as "City Attorney," having his picture in the lobby of the City Commission as City Attorney and a Charter Officer, being listed on the official letterhead of the City as "City Attorney," listing himself as City Attorney on his firm's website biography, etc. Despite the frequent moniker of "City Attorney," in virtually every instance described at hearing, Respondent could be viewed as either the "City Attorney" or a "local government attorney." The undersigned believes the intent of Respondent's actions throughout the matters that have subjected him to this review was to have his firm designated as the "City Attorney-Firm" described by the 2012 RFP. However,

that very document refers to the "City Attorney" as being "appointed by the [City] Commission, serves as a Charter Officer, and performs duties pursuant to the Charter of the City of North Port section 14.05 and the general laws of the State of Florida." This dichotomy in the very document under which Respondent and his firm were hired has created confusion as to which specific statutory provisions apply to the services he and his firm have rendered, as well as the responsibilities owed by Respondent to the City.

79. In the course of providing legal services to the City, Respondent and his firm performed a wide variety of services from 2012-2014 under the most recent Agreement. In fact, when Respondent made known that he and his firm would be submitting a proposal to continue to provide legal services under the Agreement, he suggested the City Commission hire another attorney to advise them during the pendency of the RFP discussions, thereby appropriately avoiding a conflict of interest. Once the new Agreement was awarded to Respondent and his firm, they provided a range of services that could define Respondent as a "local government attorney," who performed whatever legal services he and his firm were called upon to provide. Had the Agreement run its course through August 31, 2014, Respondent would not have been subject to any potential ethical violations.

80. The rub here is that while the City Commission was in the process of transitioning to an in-house City Attorney, Respondent presented the June 9, 2014, letter in which he and his firm offered to continue to provide legal services beginning September 1, 2014, after the expiration of his two-year Agreement with the City. This letter was duly executed by the City Manager and appeared to be Respondent's way of ensuring that his long-time client, the City, would not be without legal representation during the two-week gap between the expiration of the Nelson Hesse contract and the start of Mr. Moriarty as the in-house City Attorney. Where matters got cloudy was when the two City ordinances, 2014-29 and 2014-30, concerning the Zoning Hearing Officer and Special Code Enforcement Magistrate were being developed, a time when Respondent and his firm were assisting in the drafting of those ordinances, including the qualifications for the two positions, while under contract as either the "City Attorney" or "local government attorney" for the City.

81. Except for his involvement in the development of the two ordinances relating to the Zoning Hearing Officer and Special Magistrate, nothing in the record suggests that Respondent ever provided less than exemplary legal services to the City. Based upon his years of service to the City and based upon the fact that Respondent generally had the majority of the Commissioners on his side when he made recommendations for action to be taken,

Respondent's recommendations with respect to the City Commission hiring him as both the Zoning Hearing Officer and the Special Magistrate put him in an advantageous position with respect to securing those two contracts. Except by Commissioner Yates who appeared to be generally critical of Respondent, Respondent was a trusted and presumably well-respected City Attorney or attorney for the City. A prudent action for Respondent to have taken when the two ordinances came before the City Commission would have been to inform the City Commission it should contract with an outside attorney to handle the discussions and, ultimately, negotiations that led to Respondent securing both positions. Even more prudent would have been a suggestion by Respondent that the City Commission engage the services of this outside attorney throughout the development of the two positions described by the ordinances once he knew he intended to apply for one or both of them. Had the City Commission voted not to engage outside services, even with the knowledge Respondent would be applying for one or both of the positions, Respondent would have covered himself by avoiding any conflict or appearance of impropriety through full and open disclosure. By proceeding with the ordinances at the meetings while he was still under contract as the City Attorney, Respondent left the clear impression that he had a personal pecuniary interest in the outcome of the vote on the two ordinances. By offering his services at the 11th hour as

the best qualified candidate for the Zoning Hearing Officer position, the obvious conclusion an outsider to the process would make is that Respondent created an unfair advantage for himself and his firm.

82. Respondent is also charged with violating section 112.313(7)(a), which provides as follows:

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP. —
>
> (a) No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

83. To establish a violation of section 112.313(7)(a), the following elements must be proved:

> 1. Respondent must have been a public officer or employee.
>
> 2. Respondent must have been employed by or have had a contractual relationship with a business entity or an agency.

3. Such business entity or state or agency must have been subject to the regulation of, or doing business with, the agency of which Respondent was an officer or employee.

OR

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

2. Respondent must have held employment or a contractual relationship that will:

(a) create a continuing or frequently recurring conflict between Respondent's private interests and the performance of Respondent's public duties; or

(b) impede the full and faithful discharge of Respondent's public duties.

84. A violation of section 112.313(7)(a), could be established by proof that Respondent provided counsel and recommendations to the City Commission, as alleged in the Order Finding Probable Cause, regarding the adoption of local Ordinance 2014-29 requiring the appointment of a Zoning Hearing Officer; by encouraging the City Commission to amend Part II, Chapter 2, Article IX, of the City Code to replace the Code Enforcement Board with a Special Magistrate; and by offering himself for consideration for the position of Zoning Hearing Officer, as well as Special Magistrate. Thus, the Order Finding Probable Cause, on its face, correctly alleged a violation of section 112.313(7)(a).

85. The first part of this statute applies because Respondent and his law firm were doing business with the City. A prohibited conflict arose under the second part of section 112.313(7)(a), which prohibits any employment or contractual relationship that could impede a public officer's ability to fully and faithfully discharge his public duties. This provision creates an objective standard that requires an examination of the nature and extent of the public officer's duties together with a review of his private interests to determine whether the two are compatible, separate, distinct, or whether they coincide to create a situation that "tempts dishonor." Zerwick v. Comm'n on Ethics, 409 So. 2d 57, 61 (Fla. 4th DCA 1982). In this respect, the statute is preventive in nature, and does not require any intentionally wrongful conduct by a public officer. See CEO 13-16 (Section 112.313(7)(a) is prophylactic in nature and is designed to prevent situations where a public officer's private economic considerations could influence his ability to faithfully discharge his public duties.)

86. This provision refers to the common law notion that "[t]he same person cannot act for himself and at the same time with respect to the same matter as the agent of another whose interests are conflicting. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty and, constituted as humanity is, in the

majority of cases would be overborne in the struggle." Zerwick, 409 So. 2d at 61.

87. Respondent advised the City Commission on legal issues. In that capacity, Respondent can and did recommend and influence matters that directly benefited both Respondent and Nelson Hesse. There was an inherent conflict in this situation for Respondent, as he could have been tempted to use his official position to suggest and advocate for recommendations favorable to himself and his law firm. Such recommendations included drafting or signing off on requirements for the two new positions of Zoning Hearing Officer and Special Magistrate.

88. The Nelson Hesse firm, with Respondent as the primary attorney, had a contract with the City to provide all nature of legal services to the City. Since Respondent was not an employee or member of the City Commission, section 112.313(16)(b), permitted Respondent to sell legal services to his agency (the City) notwithstanding the provisions of section 112.313(7)(a). Similarly, section 112.313(16)(b), specifically permitted Respondent to have an employment or contractual relationship with his law firm that would potentially create a continuing or frequently recurring conflict between his private interests and the performance of his public duties or that would impede the full and faithful discharge of his public duties.

89. Thus, the Commission has not established that Respondent has violated section 112.313(7)(a).

90. Respondent is also charged with violating section 112.313(16)(c), which provides, in pertinent part, as follows:

> No local government attorney or law firm in which the local government attorney is a member, partner, or employee shall represent a private individual or entity before the unit of local government to which the local government attorney provides legal services.

91. To establish a violation of section 112.313(16)(c), the following elements must be proved:

> 1. Respondent must have been a local government attorney.
>
> 2. Respondent or the law firm in which the local government attorney is a member, partner, or employee has represented a private individual or entity before the unit of local government to which the local government attorney provides legal services.

92. The Commission asserts that Respondent represented himself and/or the Nelson Hesse law firm before the City Commission when he provided counsel and recommendations to the City Commission regarding the adoption of Ordinance 2014-29 requiring the appointment of a Zoning Hearing Officer and when he offered himself for consideration for the position of Zoning Hearing Officer. Similarly, the Commission asserts that Respondent represented himself and the Nelson Hesse law firm before the City Commission when he provided counsel and

recommendations to the City Commission regarding the adoption of local Ordinance 2014-30 regarding the establishment of a Special Magistrate to conduct code enforcement violation hearings. This became true the moment he or his firm decided they were interested in seeking either or both of the two positions created by the new ordinances. When Respondent or his firm continued to represent the City regarding the two ordinances that created new positions with the City, he violated section 112.313(16)(c), because the position he sought was for a "private individual or entity" since both Respondent and Nelson Hesse no longer would be either the City Attorney or the local government attorney after August 31, 2014, when their contract expired. He was thus acting on behalf of a private individual or entity since the positions he sought to assume after adoption of the ordinances were for him or his firm once they became private citizens as to the City after August 31.

93. Advocate has, by clear and convincing evidence, established the following: 1) Respondent violated section 112.313(6), Florida Statutes, by misusing his public position to secure special privilege and benefit himself and his law firm; and 2) Respondent violated section 112.313(16)(c), Florida Statutes, through his actions regarding the two proposed ordinances as a "local government attorney."

94. The penalties available for a former public officer who has violated the Code of Ethics or a person who is subject to the standards of the Code of Ethics, but who is not a public officer or employee include: public censure and reprimand; civil penalty not to exceed $10,000; and restitution of any pecuniary benefit received because of the violation committed. See § 112.317(1)(d), Fla. Stat. Neither chapter 112, part III, nor chapter 34-5, recognize any mitigating or aggravating factors to consider when determining the appropriate penalty.

95. The Advocate argues that the matter of In Re: James R. English, Case No. 93-1523EC (Fla. DOAH Nov. 19, 1993; Fla. Comm'n on Ethics Feb. 1, 1994), is analogous to the current matter. In that case, Mr. English was hired as the City Attorney for Tallahassee, and was paid a monthly salary, along with an overhead contribution to his law firm since he worked primarily from the firm. Mr. English signed an agreement whereby he was designated as the City Attorney, a Charter Officer of the City of Tallahassee, and was a full-time employee of the City. The agreement read, in part, as follows: "With the exception of pro bono work, his [English's] professional time was to be exclusively devoted to 'the legal work and other obligations of the charter office of the city attorney.'" Id. at par. 12. Mr. English's firm was contemplated by the agreement as eligible to provide and, in fact, did provide other hourly work to the

City of Tallahassee, while Mr. English served as City Attorney. Because he was a full-time employee of the City, Mr. English did not receive a salary from his law firm. However, he was eligible and did share in the firm's annual profits, the City of Tallahassee being one of the firm's largest clients.

96. Hearing Officer Mary Clark found Mr. English in violation of the Code of Ethics because he "directly or indirectly" purchased services from his own firm, in violation of section 112.313(3). She further found that Mr. English's firm "did business with the agency of which he was an officer," in violation of section 112.313(7), Florida Statutes. The Commission on Ethics confirmed the Recommended Order and entered a Final Order adopting the recommended penalty of $5,000 restitution and $10,000 fine ($5,000 per violation) against Mr. English. The $5,000 bore no relationship to the amount of profits distributed to Mr. English by his law firm while he was a full-time employee of the city. The orders indicate he received distributions far in excess of $5,000.

97. In the case before us, Respondent was never charged with being a full-time employee of the City of North Port. While there are indicia of his being considered the City Attorney (see paragraphs 52 and 78 above), a Charter Officer of the City, he maintained throughout that the RFP for legal services governing his employment from 2012-2014 stated on its face that it was for

"Legal Services for City Attorney-Firm," and that he was not technically the City Attorney, but merely a "local government attorney." Regardless of his designation as City Attorney or as a local government attorney, Respondent should have advised the City to retain outside counsel during the development and passage of Ordinances 2014-29 and 2014-30, creating the Zoning Hearing Officer and Special Magistrate positions since he intended to apply for one or both of the positions. This simple act on his part would have avoided both a conflict of interest and any appearance of impropriety. The fact that four of the five Commissioners supported his contracting to perform the duties of the two newly-created positions does not absolve him from his responsibility to protect the public by having the City advised by outside counsel, while he sought the positions contemplated by the two City ordinances. When Respondent previously sought to bid to provide City Attorney services in 2012, he properly suggested that the City hire outside counsel to oversee and advise the City during the RFP process, thereby avoiding any conflict of interest on his part. He could just as easily have recommended the City take the same action during the development of the two ordinances.

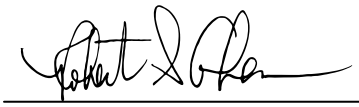
98. Based upon the two violations of the Code of Ethics, an appropriate penalty is $5,000 per violation, for a total fine of $10,000. Unlike the case of James English, relied upon by the

Advocate in recommending a penalty in this matter, Respondent's situation is considerably different. His firm, Nelson Hesse, performed services under an RFP awarded to the firm, with Respondent listed as the primary attorney for City legal services. While Respondent should have advised the City to seek outside counsel concerning the development of the two ordinances creating the Zoning Hearing Officer and Special Magistrate positions, the City Commission voted to contract with him for each position when they had every right to select someone else. The $10,941.00 he earned by serving for a short time in the two positions is distinguishable from the firm's profits earned by Mr. English at a time when he was employed full-time by the City of Tallahassee. Respondent here was not a full-time employee of the City, especially after August 31, 2014, when work was performed as Zoning Hearing Officer or Code Enforcement Special Magistrate. Mr. English benefited from money received for work performed by others in his firm at the same time he was a full-time City of Tallahassee employee, rather than from the fruit of his labors since he was prohibited from performing non-city legal services, except for pro bono work.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Respondent, Robert K. Robinson, violated sections 112.313(6) and 112.313(16)(c), Florida Statutes, and ordering him to pay a penalty of $5,000 per violation ($10,000 total).

DONE AND ENTERED this 31st day of January, 2017, in Tallahassee, Leon County, Florida.



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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.