

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: ALEX DIAZ DE LA PORTILLA,

Case No. 19-2521EC

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on October 16, 2019, and February 24, 2020, via video teleconference from sites in Miami and Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge (“ALJ”) of the Division of Administrative Hearings.

APPEARANCES

For Advocate: Melody A. Hadley, Esquire
Elizabeth A. Miller, Esquire
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For Respondent: Benedict P. Kuehne, Esquire
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STATEMENT OF THE ISSUES

The issues are whether Respondent, Alex Diaz de la Portilla, committed the violation alleged in the Ethics Commission’s Order Finding Probable Cause, dated January 30, 2019, i.e., filing an inaccurate CE Form 6, “Full and Public Disclosure of Financial Interests” (“Form 6”), for the year 2016, and, if so, what penalty should be imposed for the violation.

PRELIMINARY STATEMENT

On January 30, 2019, the Commission on Ethics (“Commission”) entered an Order Finding Probable Cause finding that there was probable cause to believe that Respondent, as a candidate for the Florida Senate, violated Article II, Section 8, Florida Constitution, and section 112.3144, Florida Statutes, by filing an inaccurate Form 6 for the year 2016.

The Order Finding Probable Cause did not make specific factual allegations beyond asserting the conclusion that Respondent filed an inaccurate Form 6. However, the Order Finding Probable Cause stated that its finding was “[b]ased on the preliminary investigation of the complaint and on the recommendation of the Commission’s Advocate.”

The Report of Investigation submitted by the Commission’s investigator, A. Keith Powell, on December 4, 2018, made the following relevant findings:

(1) The complaint in this matter was filed by Mr. Juan-Carlos Planas of Miami, Florida, who alleges that the Respondent, a candidate for Florida State Senate District 40, Alex Diaz de la Portilla, violated the Code of Ethics for Public Officers and Employees. The Respondent’s bid for the Florida State Senate District 40 seat ended on July 25, 2017, when he was defeated in the Republican primary.

(2) The Complainant alleges that the Respondent failed to make accurate disclosures on his 2016 CE Form 6, Full and Public Disclosure of Financial Interests ... as to his assets, liabilities, and/or net worth.

* * *

(5) The Department of State, Division of Elections online records confirm that between May 8, 2017, and July 20, 2017, the Respondent personally contributed \$443,500 to his campaign. However, as

of May 25, 2017—the date the Respondent chose for his reporting date—he had only loaned his campaign \$50,000. This was in two loans of \$25,000 each, on May 8 and May 25, according to Division of Elections online records. The Respondent did not report these loans as liabilities on the CE Form 6 he filed as a candidate and the only bank account he disclosed at the time held a reported \$2,536.[¹]

* * *

(6) In his disclosure the Respondent listed the following assets:... a home located at 1519 S.W. 19th Street in Miami, valued at \$603,357....

(7) The Dade County Property Appraiser’s website lists the 2017 market value of the Respondent’s home (located at 1519 S.W. 19th Street in Miami) as \$338,929, which is \$264,428 below the value reported by the Respondent in his disclosure.

The Advocate’s Recommendation, dated December 12, 2018, includes the following under the heading “Analysis”:

[A]ccording to Department of State, Division of Elections’ records, Respondent personally contributed \$50,000 in the form of two \$25,000 loans to his campaign on May 8 and 25, 2017. The term “loan” indicates that the funds are expected to be paid back and the loan falls under the term “accounts/notes receivable” which is an asset. Respondent did not list either loan as an asset.

Respondent did list a home located at 1519 S.W. 19th Street, Miami, Florida as an asset valued at \$603,357. The instructions for the CE Form 6 on how to value assets provide, “Real property may be valued at its market value for tax purposes, unless a more accurate appraisal of its fair market value is available.” The Dade County Property Appraiser’s website lists the home’s 2017 market

¹ The complaint questioned the sourcing of the funds used by Respondent to make the loans to his campaign. The source of Respondent’s funds was not an issue in this case.

value at \$338,929 which is \$264,428 below the value reported by Respondent on his disclosure. [Citations to the investigative record omitted.]

The Advocate recommended that “There is probable cause to believe that Respondent violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes, by filing an inaccurate CE Form 6, ‘Full and Public Disclosure of Financial Interests,’ for the year 2016.”

Respondent timely requested a formal administrative hearing to contest the Order Finding Probable Cause. On May 15, 2019, the Commission forwarded the case to the Division of Administrative Hearings for the scheduling and conduct of a formal hearing. The case was initially set for hearing on July 24 and 25, 2019. One continuance was granted and the hearing was rescheduled for October 16 and 17, 2019.

On October 8, 2019, the parties filed a Joint Prehearing Stipulation. In its position statement, the Advocate named the three allegations then being contested by the parties: whether Respondent properly listed two investment accounts as assets on his Form 6²; whether Respondent should have listed the two \$25,000 loans to his campaign as assets on his Form 6; and whether Respondent properly valued the real property at 1519 Southwest 19th Street in Miami on his Form 6. However, the Advocate stated that these three allegations were only “examples” of the inaccuracies contained in Respondent’s Form 6, raising the possibility that other allegations might arise at the final hearing.

At the outset of the final hearing, the undersigned inquired whether the Advocate believed she was permitted to introduce new factual allegations against Respondent at the final hearing. The Advocate stated that this was

² This allegation was abandoned by the Advocate at the start of the formal hearing.

indeed the Advocate's position. The Advocate characterized events leading up to the Report of Investigation as a "preliminary investigation." The Advocate stated that the open-ended nature of the Order Finding Probable Cause meant that any available facts establishing that Respondent filed an inaccurate Form 6 could be used against Respondent at the final hearing, whether or not such facts had been alleged in a charging document prior to the hearing. The Advocate characterized the discovery process of this proceeding as a continuation of the "investigation" and asserted that if discovery revealed new factual grounds to allege that Respondent had filed an inaccurate Form 6, those facts could be introduced at the final hearing.

The undersigned informed the parties that administrative due process would not allow the Advocate to introduce new factual allegations at the final hearing. The hearing would go forward on the two allegations of which Respondent had been given fair notice: the failure to list the two \$25,000 campaign loans as assets and the alleged overvaluation of Respondent's residence on Form 6.

The hearing went forward on that basis, over the Advocate's objection and in spite of the Advocate's attempt to inject the issue of whether Respondent was the sole owner of the property at 1519 Southwest 19th Street in Miami, an issue that was mentioned in neither the Report of Investigation nor the Advocate's Recommendation. The raising of the new issue at trial necessitated a continuance of the hearing and a round of briefing before the case could be rescheduled and completed on February 24, 2020.

At the hearing, the Advocate presented the testimony of Respondent, Alex Diaz de la Portilla; Anabel Castillo, a realtor/broker who provided Respondent with a valuation of his residence; Brent Sparkman, a certified public accountant ("CPA"); A. Keith Powell, a Senior Investigator for the

Commission; Kristi Willis, Bureau Chief of Election Records in the Division of Elections; and Daena Richardson, Assistant Director for the Residential Division of the Miami-Dade Property Appraiser. The Advocate's Exhibits 2 through 4, 7, 9, 11 through 13, 15, 25, 26, 28, 29, and 34 through 49 were admitted into evidence.³ Respondent presented the testimony of CPA Anthony Brunson and offered no additional exhibits into the record.

The four-volume Transcript of the hearing was filed at the Division of Administrative Hearings on March 9, 2020. The parties jointly requested three extensions of the time for filing proposed recommended orders, all of which were granted. Pursuant to the Third Order Granting Extension, the parties timely filed their Proposed Recommended Orders on April 13, 2020.

On April 20, 2020, Respondent filed a motion to strike paragraphs 76 and 164 through 169 of the Advocate's Proposed Recommended Order on the ground that they improperly attempted again to inject the issue of Respondent's ownership of the property located at 1519 Southwest 19th Street in Miami. In its response to the motion, the Advocate again asserts a right to raise new matters learned in discovery regardless of whether they were included in the Order Finding Probable Cause or the documents incorporated therein. Respondent's motion to strike is GRANTED and paragraphs 76 and 164 through 169 of the Advocate's Proposed Recommended Order are stricken. The undersigned declines to expand the

³ Several of the Advocate's admitted exhibits were portions of Advocate Exhibit 33, which was not admitted in its entirety. Advocate Exhibit 34 was Bates stamped page 239 of Advocate Exhibit 33. Advocate Exhibit 35 was Bates stamped page 241 of Advocate Exhibit 33. Advocate Exhibit 36 was Bates stamped page 242 of Advocate Exhibit 33. Advocate Exhibit 37 was Bates stamped page 240 of Advocate Exhibit 33. Advocate Exhibit 38 was Bates stamped pages 255 through 257 of Advocate Exhibit 33. Advocate Exhibit 39 was Bates stamped pages 243 through 250 of Advocate Exhibit 33. The documents originally submitted as Advocate Exhibits 34 through 41 were renumbered as Advocate Exhibits 40 through 47 and admitted into evidence.

issues for decision beyond the reporting of the two \$25,000 campaign loans and the valuation of Respondent's residence.

All references to the Florida Statutes are to the 2017 edition, unless otherwise noted.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. Article II, Section 8(a), Florida Constitution, provides that all elected constitutional officers and candidates for such offices must file full and public disclosure of their financial interests. Section 112.3144(1) provides that all persons required by Article II, Section 8 to file a full and public disclosure of their financial interests must file that disclosure with the Commission.

2. The Commission has promulgated Form 6 as the means by which officers and candidates are to make full and public disclosure of their financial interests. Fla. Admin. Code R. 34-8.002.

3. Respondent was a candidate in the 2017 special election to fill the seat for State Senate District 40 and was therefore required to file a Form 6. Respondent served as his own campaign treasurer and completed the Form 6 without the assistance of an attorney or CPA. Respondent attested that he read and understood the accompanying instructions to the Form 6. Respondent also attested that he read and understood the requirements of chapter 106, Florida Statutes, regarding campaign financing.

4. Respondent was an experienced political candidate in 2017, having served in the Florida House of Representatives and the Florida Senate.

5. The 2016 version of Form 6 was in effect at the time of Respondent's candidacy and was the version that he executed on May 26, 2017, and filed with the Commission on May 30, 2017.

6. Form 6 comprises six parts: Part A, Net Worth; Part B, Assets; Part C, Liabilities; Part D, Income; Part E, Interests in Specified Businesses; and Part F, Training. The instant case concerns Respondent's reporting under Part B, Assets.

7. The instructions for Part B provided as follows, in relevant part, under the heading "Assets Individually Valued at More Than \$1,000":

Describe, and state the value of, each asset you had on the reporting date you selected for your net worth in Part A, if the asset was worth more than \$1,000 and if you have not already included that asset in the aggregate value of your household goods and personal effects. Assets include, but are not limited to, things like interests in real property; cash; stocks; bonds; certificates of deposit; interests in businesses; beneficial interests in trusts; money owed you; bank accounts; Deferred Retirement Option Program (DROP) accounts; and the Florida Prepaid College Plan....

8. Form 6 also included instructions on "How to Value Assets," which provided as follows, in relevant part:

-- Value each asset by its fair market value on the date used in Part A for your net worth.

* * *

-- Real property may be valued at its market value for tax purposes, unless a more accurate appraisal of its fair market value is available.

* * *

-- Accounts, notes, and loans receivable: Value at fair market value, which generally is the amount you reasonably expect to collect.

9. The instructions for Part A of the 2016 Form 6 instructed the filer to "[r]eport your net worth as of December 31, 2016, or a more current date, and list that date. This should be the same date used to value your assets and

liabilities.” Respondent’s Form 6 listed his net worth as of May 25, 2017, the day before he executed the form. Therefore, his assets and liabilities were also counted as of May 25, 2017.

THE CAMPAIGN “LOANS”

10. Candidates for elective office are required to electronically submit reports to the Division of Elections (“Division”) disclosing campaign contributions received and/or campaign expenditures via the Division’s electronic filing system (“EFS”). § 106.0705, Fla. Stat. The Division provides candidates with a handbook to guide them in submitting reports through the EFS.

11. After Respondent filed his appointment of campaign treasurer and designation of campaign depository for the special election for Senate District 40, the Division sent him a letter, dated May 4, 2017, to inform him that his first campaign treasurer’s report would be due on June 12, 2017.

12. On or about June 12, 2017, Respondent electronically submitted a Campaign Treasurer’s Report covering the period from May 8 to June 8, 2017.

13. The Campaign Treasurer’s Report form includes a summary page with total amounts of contributions and expenditures for the reporting period. Under the “Contributions” column, the form lists two categories of contributions: monetary and in-kind. Monetary contributions are divided into two subcategories: “Cash & Checks” and “Loans.” Respondent’s report listed \$22,500 in cash and checks and \$50,000 in loans.

14. The details of the Campaign Treasurer’s Report show that Respondent made two \$25,000 contributions to his campaign, one on May 8, 2017, and one on May 25, 2017, that he identified as loans on the report.

15. Section 106.011(5)(a), Florida Statutes, defines “contribution” as a “gift, subscription, conveyance, deposit, loan, payment, or distribution of money or anything of value, including contributions in kind having an

attributable monetary value in any form, made for the purpose of influencing the results of an election or making an electioneering communication.”

16. The term “loan” is not defined by chapter 106 or chapter 112. For such a term of common usage, the definition in Black’s Law Dictionary is sufficient: “A thing lent for the borrower's temporary use, esp., a sum of money lent at interest.” As noted above, the instructions for the Commission’s Form 6 state that a loan should be valued “at fair market value, which generally is the amount you reasonably expect to collect.”

17. Section 106.08(1)(a) provides that no person may, in any election, make contributions in excess of \$1,000 to a candidate for legislative office. Section 106.08(1)(b) provides that the \$1,000 limitation does not apply to contributions by a candidate to his or her own campaign.

18. Respondent testified as to his understanding of the campaign finance reporting requirements. He understood that he was not limited to \$1,000 in making contributions to his own campaign. However, he believed that the Division under no circumstances allows any person, even the candidate himself, to report a contribution in excess of \$1,000. Respondent believed that in order to contribute more than \$1,000 to his own campaign, he was required to report the excess amount as a loan on his Campaign Treasurer’s Report.

19. Kristi Willis, Bureau Chief of Election Records for the Division, testified that candidates are not required to report contributions to their own campaigns in excess of \$1,000 as loans.

20. Respondent offered no statutory support for his belief that he was required to report the two \$25,000 contributions as loans.

21. Respondent did not list the two \$25,000 contributions as assets on the 2016 Form 6 that he filed on May 26, 2017. The Advocate contends that these contributions should have been reported on Form 6 as assets because they were loans.

22. Respondent testified that, although he characterized them as “loans” to his campaign, he had no expectation of recovering either of the \$25,000

contributions. Respondent's campaign was not established as a corporation or limited liability company with a separate existence from Respondent. He considered the campaign to be his alter ego and believed that he had essentially "lent" the money to himself. He had no intention of creating an obligation on the part of his campaign to repay him. He could not sue himself for repayment of the loan. Respondent's intention at all times was to spend the money in pursuit of the State Senate District 40 seat.

23. In the same Campaign Treasurer's Report that included Respondent's two \$25,000 loans, Respondent listed a total of \$22,500 in contributions from other sources. Thus, Respondent's campaign was more than two-thirds self-funded for the period of May 8 to June 8, 2017.

24. Though only the two \$25,000 contributions were at issue in this proceeding for the time period covered by Respondent's Form 6, Respondent in fact contributed 17 times to his State Senate campaign between May 8 and July 20, 2017, for a total of \$443,500. Each of the 17 contributions was labeled a loan on Respondent's campaign finance reports. Respondent made four contributions totaling \$262,000 on or after July 18, 2017, for an election to be held on July 25, 2017.

25. All other contributions to Respondent's campaign amounted to \$52,750. In other words, Respondent's campaign for State Senate District 40 was more than 89 percent self-funded by loans from Respondent to his campaign.

26. Respondent could have had no reasonable expectation of collecting these loans unless he chose to spend no money on the campaign, which would have defeated the purpose of making the loans.

27. The special primary election for State Senate District 40 was held on July 25, 2017. Respondent was eliminated from the race.

28. In a form memorandum dated August 9, 2017, Ms. Willis informed Respondent that as an eliminated candidate, he must dispose of all funds on deposit in his campaign account within 90 days of the special primary

election, pursuant to section 106.141. Ms. Willis stated that Respondent's final expenditure report would have to be filed via the EFS no later than October 23, 2017.

29. Respondent's final expenditure report indicates that between July 21, 2017 and August 3, 2017, the campaign spent \$127,577.90. Most of these expenditures consisted of payments to campaign workers and sums for postage, media, and legal services. The report shows "loan reimbursements" to Respondent of \$1,000 on July 28, 2017, and of \$3,000 on August 3, 2017. Respondent could not recall the details of these relatively minor reimbursements at two years' removed from the events, but believed that they must have been repayments for specific expenditures he had made on behalf of the campaign.

30. The report shows that on September 29, 2017, long after the last expenditures to pay for goods and services to the campaign were recorded on August 3, 2017, Respondent gave himself "loan reimbursements" totaling \$36,785.69, presumably to reduce the campaign account to zero as required by section 106.141.

31. The Advocate suggests that by characterizing his contributions as loans, Respondent was giving himself priority when it came to the disbursement of surplus campaign funds. Section 106.11(6) provides:

(6) A candidate who makes a loan to his or her campaign and reports the loan as required by s. 106.07 may be reimbursed for the loan at any time the campaign account has sufficient funds to repay the loan and satisfy its other obligations.

32. In a campaign that was almost entirely self-funded, it makes little sense that Respondent would characterize his contributions as "loans" for the purpose of obtaining repayment priority prior to the election, particularly when nearly 57 percent of those contributions were made in the week before the election. Again, Respondent could have expected repayment only if he

chose to stop spending money on his campaign, which would raise the question, why make the loans in the first place?

33. Whether or not he labeled contributions to his own campaign “loans,” Respondent *already* had post-election priority by virtue of section 106.141(2), which provides:

(2) Any candidate required to dispose of funds pursuant to this section may, before such disposition, be reimbursed by the campaign, in full or in part, for any reported contributions by the candidate to the campaign.

34. It is noted that the total reimbursements Respondent took after he was eliminated from the State Senate election amounted to less than one-tenth of the amount he “lent” to the campaign.

35. In summary, Respondent reported contributions to his own campaign as loans because he misunderstood the reporting requirements of chapter 106. He did not report those contributions on his Form 6 because they were not actual loans in any real sense. If the Commission insists that Respondent’s characterization of his campaign contributions should govern this proceeding, then it is found that the fair market value of those loans, i.e., the amount that Respondent could have reasonably expected to collect, was zero.

THE REAL PROPERTY VALUATION

36. On Part B of his Form 6, Respondent listed as an asset “Real Property located at 1519 S.W. 19 Street” and stated that the value of this asset was \$603,357.

37. Respondent testified that this property was his residence. It was purchased by his parents in 1964. Respondent grew up in the home and now owns it.

38. It is undisputed that the Miami-Dade Property Appraiser established the 2017 market value for tax purposes of Respondent’s property at \$338,929.

The Advocate contends that this is the number Respondent should have used as the value of the asset and that Respondent violated Article II, Section 8, Florida Constitution, and section 112.3144 by submitting an inaccurate Form 6.

39. The instructions for Form 6 advise the filer that “[r]eal property may be valued at its market value for tax purposes, unless a more accurate appraisal of its fair market value is available.” This language establishes that reporting the value of a property at its market value for tax purposes is the default option, operating as a safe harbor for the reporting individual in terms of the Commission’s compliance criteria.

40. Respondent understood that he could have reported the Miami-Dade Property Appraiser’s number and been done with it. However, Respondent testified that the political climate in Miami-Dade County was such that he could expect rivals to go over his campaign finance and public disclosure filings with a fine-tooth comb, looking for anything that could be used against him. He testified that the Complainant in the instant case had filed previous complaints against him and was acting as legal counsel for one of Respondent’s opponents in the special election.

41. Respondent testified that the Miami-Dade Property Appraiser had historically undervalued residential properties for taxation purposes to ensure that senior citizens could afford to stay in their homes. Respondent decided to comply with the spirit of the law by obtaining a more realistic valuation of his home, in part to forestall baseless allegations by his political enemies that he had undervalued his home by reporting the Property Appraiser’s number.

42. Anabel Castillo is a real estate salesperson and broker in Miami. She worked as a legislative assistant to Respondent off and on between 1996 and 2010. Respondent phoned Ms. Castillo and asked her to perform a comparative market analysis (“CMA”), to determine the market value of his

home. Respondent knew and trusted Ms. Castillo. He also knew that Ms. Castillo was familiar with his neighborhood and his residence.

43. Respondent testified that he knows little about the real estate business and relied on Ms. Castillo's judgment as to the valuation of his home. Before Ms. Castillo undertook her valuation, Respondent made sure she understood that he wanted a thorough valuation. He asked her to physically visit the comparable properties, not just look at them online. He wanted her to drive around the neighborhood and learn the prices houses were fetching.

44. Ms. Castillo agreed with Respondent's opinion that the Miami-Dade Property Appraiser undervalued residential properties. Ms. Castillo testified that Respondent did not tell her why he wanted a valuation of the fair market value of his home but that she has performed thousands of CMAs in her career and agreed to undertake this one for Respondent.

45. Ms. Castillo began by looking for active, expired, sold, and pending properties in the Multiple Listing Service, a proprietary tool available to realtors and brokers. Ms. Castillo explained that an "expired" property is one that has been on the market but failed to sell.

46. Ms. Castillo examined county records and went out to visit four or five properties. She went inside at least one of the comparable houses and found it to be in worse condition than Respondent's house. Ms. Castillo stated that none of the comparable houses was as large as Respondent's five bedroom, three bath house. Ms. Castillo opined that Respondent's property was in good condition. The kitchen had been renovated and there were no issues with the roof or the bathrooms.

47. After performing her CMA, Ms. Castillo told Respondent that she could easily sell his property for \$635,000. She had no knowledge as to why he stated a value of \$603,357 on Form 6. Ms. Castillo suggested that Respondent may have just decided to err on the side of conservatism.

48. At the time, Ms. Castillo did not prepare a written report of her CMA. She merely made an oral report of the result to Respondent. Ms. Castillo testified that after the instant case was begun, she was approached by counsel for Respondent who asked her to create a document memorializing the CMA and price evaluation she performed in May 2017.

49. Ms. Castillo testified that the document she produced at the request of Respondent's counsel was a fair recreation of her contemporaneous work, but she could not state with certainty whether the houses she selected as comparable properties for the document were the same houses she used as comparables in 2017. Though she was unable to verify that she had perfectly recreated her 2017 CMA, Ms. Castillo nonetheless expressed confidence that her evaluation was accurate and that any other professional would be comfortable using the same comparable properties and would have calculated a value in the same range as she did.

50. Ms. Castillo's written recreation of her CMA stated that as of May 2017, Respondent's property would appraise at \$603,000. Ms. Castillo did not explain why her recreation arrived at a value of \$603,000 when she originally told Respondent that she could sell the property for \$635,000. The most likely explanation is that Ms. Castillo was somewhat clumsily attempting to assist Respondent by making her CMA match the number on Respondent's Form 6.

51. Daena Richardson is the Assistant Director for the Residential Division of the Miami-Dade Property Appraiser. Ms. Richardson testified that the Property Appraiser uses a "mass appraisal" process to determine the value of properties. She described the process as follows:

Basically, the difference between mass appraisal and what you would have for someone that's either selling their home or possibly doing a refinance is a fee appraisal, meaning they are going in, they are looking at the subject property, they are finding comparable sales within that immediate area in order to determine a value for whether [sic] loan

purposes or refinance purposes or purchasing purposes.

Within the property appraiser's office, because we have so many parcels, it is not possible for us to do individual appraisals for every single property, so, therefore, we have to do it in mass based on market area.

Basically, we will take, for example, an area like the subject property, we will take all of those properties within the subject area, we will see what sales sold within that subject area, we will see if there is any additional external influences that we need to be aware of, that we need to make adjustments for, and then we will determine values for those properties based on the sales within that area, and then we will apply those values to the entire population.

52. As the name suggests, the mass appraisal process does not consider each property individually. Ms. Richardson testified that in the last year about 60,000 property owners filed petitions contesting the Property Appraiser's mass appraisal valuation of their properties. Those petitions go before special magistrates with the county's Value Adjustment Board. Ms. Richardson conceded that the Value Adjustment Board considers market value information provided by real estate brokers on behalf of petitioners.

53. Ms. Richardson discussed the Property Appraiser's summary of Respondent's property, including the lot size, building size, adjusted square footage of the building, year built, "effective age,"⁴ and zoning. The summary included a statement of the Property Appraiser's determination of the land value, building value, "extra features" value, market value, and assessed value of Respondent's property for the tax years 2014 through 2018.

⁴ A building's effective age is determined by reference to renovations done subsequent to its initial construction.

Ms. Richardson also discussed the list of comparable properties for each of those years, as determined by the Property Appraiser.

54. Ms. Richardson noted that the Property Appraiser's Office never valued Respondent's property at more than \$430,054 for any tax year between 2014 and 2018.

55. The Property Appraiser's market value for Respondent's property was \$201,652 for tax year 2014 and \$430,054 for tax year 2018. The value did not increase steadily over the five year period. Rather, the market value jumped from \$201,652 for tax year 2014 to \$346,759 for tax year 2015, mostly due to the Property Appraiser's determination that the value of Respondent's land nearly quadrupled in a single year, from \$52,173 in tax year 2014 to \$192,324 in tax year 2015. The market value then remained steady for the next two years: \$338,246 for tax year 2016 and \$338,929 for tax year 2017. The value then jumped by nearly another \$100,000 in tax year 2018, again because of an increase of nearly \$100,000 in the assessed value of Respondent's land.

56. Even during the apparently consistent years from 2015 to 2017, there were significant changes within the values that make up the Property Appraiser's market value, which is the sum of land value plus building value plus the relatively negligible value of "extra features." From 2015 to 2016, Respondent's land increased in value from \$192,324 to \$236,313, but the value of his house decreased from \$151,492 to \$98,308. The overall market value was virtually the same for tax years 2016 and 2017, but only because another decrease of \$22,806 in the value of the building was offset by an increase of \$23,592 in the value of the land.

57. Ms. Richardson testified about a map showing the locations of the comparable properties for the tax years 2014-2018 that the Property Appraiser used during its valuation process. Ms. Richardson testified that her office used values from within the market area of Respondent's property to determine its value.

58. The properties used by the Property Appraiser were generally closer to Respondent's property than were the comparable properties selected by Ms. Castillo. Ms. Richardson explained that the properties used by the Property Appraiser "were all within close proximity, maybe one or two blocks away from the subject property, all having the same external factors, all having the same influence as far as traffic, whether it's the elementary school or just people going through the neighborhood. It all shows the same influences that the subject property would have as well."

59. The properties selected by Ms. Castillo were outside of the boundaries of the "market area" as determined by the Property Appraiser. In Ms. Richardson's opinion, these properties would not be considered true comparables to Respondent's property.

60. Ms. Richardson's opinion is credited to the extent of her expertise: Ms. Castillo's selections would not be comparable properties for the purposes of the Property Appraiser's Office in establishing the value of a residential property for taxation.

61. Ms. Castillo's opinion is likewise credited to the extent of her expertise. The Advocate presented no evidence to suggest that another realtor or broker would have reasonably disagreed with Ms. Castillo's methodology and conclusions as to the fair market value of Respondent's property.

62. Anthony Brunson, a CPA who has worked for political campaigns for over 20 years, testified that a property appraiser's valuation would be the last thing he would use for determining fair market value for Form 6 purposes because property appraisers throughout Florida tend to undervalue residential property. Mr. Brunson credibly testified that the most common method of determining the value of real property for reporting purposes is to obtain:

a fair market study done by a realtor wherein you look at like property sales in the geographic area,

which could provide, in my view, the best estimate of the current market value of your particular property. Beyond that, a formal appraisal is actually the very best, but that becomes costly, and I believe, you know, not warranted in a circumstance like this.

63. All witnesses agreed that placing a fair market value on a piece of property is an art, not a science. There are different methodologies employed to establish value and different reasons for seeking to establish value. The Property Appraiser looks at actual sales in the market area. It is backward looking and could result in undervaluing properties in a rising market. A broker performing a CMA looks not only at completed sales but at active and pending listings; it is a more current snapshot but also carries the risk of overvaluing the property based on asking prices rather than completed sales. As the Advocate pointed out, there may be a difference between “market price” as established by completed sales and “market value” in the opinion of a real estate broker.

64. There is also the question of whether a CMA, such as that performed by Ms. Castillo, may be considered a “more accurate appraisal” of fair market value than the market value set by the Property Appraiser. Respondent conceded that Ms. Castillo did not, and could not, lawfully perform a formal appraisal of his property. Only a licensed appraiser may perform a formal appraisal, which is usually commissioned by a lender seeking an opinion on the collateral value of a property about to be sold. A full formal appraisal may cost several hundred dollars, as opposed to a CMA that is generally offered free of charge by a real estate agent or broker. For purposes of Form 6 reporting, Mr. Brunson’s opinion was that a CMA is preferable to a property appraiser’s valuation and that he would not advise a client to go to the further expense of obtaining a formal appraisal.

65. Chapter 475, part II, Florida Statutes, sets forth the definitions and standards governing property appraisers in the State of Florida. The

Advocate's Proposed Recommended Order attempts to import the statutes and rules regarding appraisers into Form 6 because of its reference to an "appraisal." The undersigned is unpersuaded because he is confident that if the Commission intended to provide that the only alternative to a property appraiser's valuation is to retain a licensed appraiser to perform a full formal appraisal at a cost of hundreds of dollars, and further intended to adopt the definitions and standards of chapter 475, part II, in their entirety and by reference into Form 6, it would have done so clearly and expressly rather than to hang so much meaning, without undergoing rulemaking, on the single word "appraisal."

66. The evidence presented at the hearing established that Respondent in good faith sought a better estimate of the fair market value of his residence than the "market value for tax purposes," in light of the common perception that property appraisers undervalue residential properties and Respondent's knowledge that his political rivals would minutely examine his Form 6 for any possible flaws. Mr. Brunson credibly testified that he routinely advises clients that a CMA is preferable to a property appraiser's valuation for purposes of Form 6 filing.

67. Respondent had a personal and professional relationship with Ms. Castillo prior to engaging her to perform the CMA for his property in 2017. It appears that when asked to recreate her CMA in 2019, Ms. Castillo shaded her conclusion in a misguided effort to assist Respondent in this hearing, making her CMA conclusion match more closely the number Respondent included on his Form 6. Respondent offered no satisfactory explanation as to why he changed Ms. Castillo's \$635,000 valuation to \$603,357 on Form 6.

68. These discrepancies in Respondent's case were disquieting but ultimately not dispositive. It is understood that a statement of fair market value is an estimate made by a real estate professional. While the Miami-Dade Property Appraiser's statement of the market value for tax purposes is

presumptively acceptable for Form 6 purposes, the evidence presented at the hearing demonstrated that the mass appraisal process does not necessarily yield a satisfactory value for each individual parcel, as evidenced by 60,000 petitions in one year contesting the Property Appraiser's valuations.

69. Therefore, it was not unreasonable for Respondent to believe that an individuated CMA for his property would be more accurate than the value stated by the Property Appraiser. The Advocate made insinuations regarding Respondent's possible motives for reporting an inflated value for his property but failed to offer actual evidence that Respondent was interested in anything other than reporting an accurate fair market value.

70. Because of the subjectivity involved in producing a CMA or any other valuation of real property, and absent a definitive showing of bad faith or illicit intent, there should be a fairly wide range of acceptable "fair market value" numbers for financial disclosure purposes. If the Commission truly intends that a candidate's estimate of the value of his real property must be accurate enough to withstand forensic financial examination by a CPA, Form 6 should be revised through rulemaking to include that cautionary note.

71. Clear and convincing evidence was not presented that Respondent filed an inaccurate Form 6 for the year 2016.

CONCLUSIONS OF LAW

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

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

74. The Commission, through its Advocate, is asserting the affirmative regarding Respondent's purported violations of Article II, Section 8, Florida Constitution, and section 112.3144. The party having the affirmative of the issues in a proceeding bears the burden of proof. *Dep't of Transp. v. J.W.C. Co. Inc.*, 396 So. 2d 778 (Fla. 1st DCA 1981); and *Balino v. Dep't of HRS*, 348 So. 2d 349 (Fla. 1st DCA 1977).

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

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

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

77. Judge Sharp, in her dissenting opinion in *Walker v. Department of Business & Professional Regulation*, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)(Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. *In re Inquiry Concerning a Judge re Graziano*, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative [sic] elements. *In re Adoption of Baby E.A.W.*, 658 So. 2d

961, 967 (Fla. 1995), *cert. denied*, 516 U.S. 1051, 116 S. Ct. 719, 133 L.Ed.2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. *Id.* It must produce in the mind of the fact finder a firm belief or conviction as to the truth of the allegations sought to be established. *Inquiry Concerning Davey*, 645 So. 2d 398, 404 (Fla. 1994).

78. Article II, Section 8 of the Florida Constitution provides as follows, in relevant part:

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.

(b) All elected public officers and candidates for such offices shall file full and public disclosure of their campaign finances.

* * *

(f) There shall be an independent commission to conduct investigations and make public reports on all complaints concerning breach of public trust by public officers or employees not within the jurisdiction of the judicial qualifications commission.

* * *

(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.

* * *

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

79. Section 112.3144 provides as follows, in relevant part:

(1)(a) 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, or any other person required by law to file a disclosure under this section, shall file that disclosure with the Florida Commission on Ethics....

* * *

(8) Forms or fields of information for compliance with the full and public disclosure requirements of s. 8, Art. II of the State Constitution shall be prescribed by the commission.

80. In furtherance of its statutory mandate, the Commission has promulgated Form 6 for the full and public disclosure of financial interests. Fla. Admin. Code R. 34-8.002.

81. Respondent stood as a candidate in the 2017 special election for State Senate District 40. As a candidate for legislative office, Respondent was required to file full and public disclosure of his campaign finances to the Division by way of a Campaign Treasurer's Report, and to file a full and public disclosure of his financial interests with the Commission via Form 6. In this case, Respondent is alleged to have filed an erroneous Form 6 in violation of Article II, Section 8, Florida Constitution and section 112.3144.

82. During the relevant reporting period, Respondent made two \$25,000 contributions to his campaign that he reported as "loans" on his Campaign Treasurer's Report. Respondent did not report these amounts as "assets" on his Form 6. The instructions for Form 6 state "money owed you" is considered an asset and instructs the filer that "accounts, notes, and loans receivable" should be valued "at fair market value, which generally is the amount you reasonably expect to collect."

83. The Findings of Fact established that Respondent reported his contributions to his own campaign as "loans" out of a mistaken understanding of the Division's reporting requirements. Respondent never considered these sums to be loans as that term is used in Form 6. He did not believe the money was owed to him. He had no reasonable expectation of collecting any of it. At the conclusion of his campaign, Respondent recovered less than one-tenth of the total amount he contributed as "loans."

84. The Advocate cites *In Re: Steven Mueller*, Case No. 12-3138EC (Fla. DOAH Jan. 24, 2013; Fla. Comm'n on Ethics Mar. 15, 2013) as authority in this case. Among other things, Mr. Mueller was found to have violated the cited constitutional and statutory provisions by making a \$20,000 loan to his own political campaign and not reporting the loan as an asset on his Form 6. The Recommended Order in *Mueller* is a conclusory 11-page document, five pages of which are statutory quotation, and offers little illumination for the decision in this case. Mr. Mueller represented himself in the case and did not file a proposed recommended order. No detail of the nature of Mr. Mueller's

loan is provided. No information is provided as to whether the loan was repaid. The findings of fact and conclusions of law are so cursorily stated that it is unclear whether Mr. Mueller even contested the allegation regarding the loan at the final hearing.

85. The ALJ in *Mueller* noted a lengthy catalogue of reporting failures that “all point to a casual indifference to the financial disclosure requirements of Florida law.” *Mueller*, ¶ 20. In the instant case, Respondent is accused of one omission and one inaccuracy, and has vigorously contested both charges. The evidence established that Respondent was far from indifferent to the state’s financial disclosure requirements. If anything, he was hypersensitive about filing accurate disclosure forms because of the political atmosphere in which he operated.

86. In the instant case, the question of whether Respondent’s campaign contributions were really loans was fully litigated. Based on the totality of the evidence, the undersigned found that there was no loan to be disclosed on Respondent’s Form 6. In the alternative, if the Commission were to conclude that Respondent’s campaign contributions were reportable as loans, the undersigned found that the amount Respondent reasonably expected to recover was zero. Any civil penalty imposed by the Commission should reflect the asset value of the “loans” at the time they were made.

87. In summary, the Advocate failed to demonstrate by clear and convincing evidence that Respondent’s failure to report his campaign contributions as assets on his Form 6 constituted a violation of Article II, Section 8, Florida Constitution, or section 112.3144.

88. On his Form 6, Respondent reported the value of his property at 1519 Southwest 19th Street in Miami as \$603,357. Respondent derived this number, in a way never quite explained, from a CMA that estimated the value of his property at \$635,000. The CMA was performed by an experienced realtor and broker named Anabel Castillo, who was a former employee and still a friend of Respondent. Ms. Castillo described how she performed the

CMA, which was in keeping with the standard methodology used in her industry.

89. The Advocate disputed whether the comparable properties chosen by Ms. Castillo were within the market area of Respondent's home, but the only supporting evidence was the opinion testimony of Property Appraiser employee Deana Richardson. The undersigned found Ms. Richardson to be making an apples-to-oranges comparison between the selection of comparable properties for the Property Appraiser's purpose of establishing taxable value and the selection of comparables for the purpose of a real estate broker's CMA.

90. Anthony Brunson, a CPA with a great deal of experience in filing reports for political campaigns, credibly testified that he regularly advises clients to use CMAs to report property values on Form 6 because they provide the best estimate of current fair market value. Mr. Brunson agreed with Ms. Castillo that property appraisers tend to undervalue residential property.

91. In light of the evidence and the plain language of Form 6, the undersigned declines the Advocate's suggestion that a reporting individual's only alternative to reporting the market value for tax purposes is to commission a formal appraisal. The undersigned concludes that if the Commission intended for Form 6 to import all the definitions and requirements of chapter 475, part II, it would make that intent explicit. It is reasonable to read the term "appraisal" in Form 6 in a less restrictive way that encourages individuals to make honest attempts at reporting more accurate values for their properties than the mass appraisal value stated by the Property Appraiser for tax purposes.

92. The Advocate argues that a candidate may be motivated to falsely embellish his net worth to give "the appearance or image of success in one's personal and professional life." The Advocate posits that people are more

likely to vote for a financially stable candidate than one who is struggling financially.

93. The Advocate presented no solid evidence that Respondent's motives were to mislead the public or to do anything other than report the most accurate fair market value available. Respondent filed his disclosures in the sure knowledge that his political opponents would perform a granular examination of his Form 6. It is difficult to fathom why Respondent would abandon the safe harbor of valuing his property "at its market value for tax purposes" unless he believed he was using a more accurate appraisal of its fair market value. Given the acknowledged subjectivity of real estate valuation, there is no factual or legal reason why the Commission should not be satisfied with the value reported on Respondent's Form 6.⁵

94. In summary, the Advocate failed to demonstrate by clear and convincing evidence that Respondent's statement of the fair market value of the property at 1519 Southwest 19th Street in Miami on his Form 6 constituted a violation of Article II, Section 8, Florida Constitution, or section 112.3144.

95. At the hearing, the Advocate attempted to introduce evidence that Respondent was not the sole owner of the property at 1519 Southwest 19th Street. During discovery, the Advocate obtained information indicating that Respondent's former wife may have still had an interest in the property. The Advocate suggested that this shared ownership might affect the valuation Respondent reported on his Form 6. *See* § 112.3144(6), Fla. Stat. Neither the Report of Investigation nor the Advocate's Recommendation made any allegation regarding the status of Respondent's ownership of the property at 1519 Southwest 19th Street. The Advocate took the position that

⁵ As suggested above, if the Commission intends to strictly interpret "a more accurate appraisal" to mean a full formal appraisal by a licensed appraiser, it should amend the language of the Form 6 instructions to make its intent clear.

because it was alleged that Respondent had filed an inaccurate Form 6, any facts supporting that general allegation could be asserted to support a finding of a violation, regardless of whether those facts were pled at the outset of the hearing.

96. The mere reference to the charging statute, without supporting factual allegations, was not sufficient to place Respondent on notice of the charges against him. *Trevisani v. Dep't of Health*, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005). *See also Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996) (“Predicating disciplinary action against a licensee on conduct never alleged in an administrative complaint or some comparable pleading violates the Administrative Procedure Act. To countenance such a procedure would render nugatory the right to a formal administrative proceeding to contest the allegations of an administrative complaint.”).

97. Based on these principles, the undersigned ruled at the hearing that the Advocate would not be permitted to raise issues not alleged in the Order Finding Probable Cause or the supporting documents referenced therein. *See In re: Lonnie Evans*, ¶¶ 40-44, Case No. 10-6459EC (Fla. DOAH Feb. 16, 2011; Fla. Comm’n on Ethics Mar. 3, 2011)(concluding that “it would have been improper to consider evidence against Lonnie Evans to support factual allegations never identified in the Order Finding Probable Cause.”).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Commission issue a public report finding that the evidence presented at the public hearing in this case was insufficient to establish clearly and convincingly that Respondent violated Article II, Section 8, Florida Constitution, or section 112.3144, Florida Statutes, by filing an inaccurate CE Form 6, “Full and Public Disclosure of Financial Interests,” for the year 2016.

DONE AND ENTERED this 26th day of May, 2020, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
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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.