

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: DUSTIN DANIELS,

Case No. 20-3599EC

Respondent.

RECOMMENDED ORDER

On October 29, 2020, Administrative Law Judge Robert J. Telfer III, of the Florida Division of Administrative Hearings (Division), conducted an evidentiary hearing pursuant to section 120.57(1), Florida Statutes (2020), in Tallahassee, Florida, via Zoom web-conference.

APPEARANCES

For Advocate: Elizabeth A. Miller, Esquire
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For Respondent: Jennifer S. Blohm, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent Dustin Daniels, while serving as Chief of Staff for the Mayor of Tallahassee, violated section 112.313(6), Florida Statutes, by corruptly using or attempting to use his official position or any property or resource which may have been within his trust, or performed his official duties, to secure a special privilege, benefit, or exemption for himself or others; and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On January 30, 2019, the Florida Commission on Ethics (Commission) issued an Order Finding Probable Cause to believe that Mr. Daniels, while serving as Chief of

Staff for the Mayor of Tallahassee, violated section 112.313(6). The Commission forwarded the case to the Division on August 14, 2020.

On August 20, 2020, the undersigned noticed this matter for a final hearing, via Zoom web-conference, for October 29, 2020.

The Advocate filed a Motion in Limine or, in the Alternative, Notice of Intent to Introduce Evidence of Other Crimes, Wrongs, or Acts (Williams Rule), on October 19, 2020 (Motion). On October 20, 2020, Mr. Daniels filed a Response in Opposition to the Advocate's Motion. The undersigned conducted a telephonic hearing on the Motion on October 26, 2020, and deferred ruling on the Motion until the final hearing.

The undersigned conducted the final hearing on October 29, 2020, by Zoom web-conference. The Commission presented the testimony of Mr. Daniels; Max Kamin-Cross, the vice president of corporate development and strategic projects for Every Action, Inc.; Andre Libroth, the former procurement services manager for the City of Tallahassee; Tyler Epstein, a Sergeant with the Leon County Sheriff's Office; and Andrew Gillum, the former Mayor of Tallahassee. Additionally, Mr. Daniels testified on his own behalf. The undersigned admitted Joint Exhibits 1 through 8, Commission's Exhibit P1 through P14, and Respondent's Exhibits R1 through R9 into evidence.

The two-volume Transcript of the final hearing was filed with the Division on December 1, 2020. On December 7, 2020, Mr. Daniels filed an Unopposed Motion for Extension of Time to File Post-Hearing Submittal. On December 7, 2020, the undersigned entered an Order Granting Extension of Time to File Post-Hearing Submittal, extending the deadline for filing proposed recommended orders to January 15, 2021. The parties timely submitted proposed recommended orders on

January 15, 2021, which the undersigned has considered in the preparation of this Recommended Order.

All statutory references are to the 2016 codification of the Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

1. Mr. Daniels served as the Chief of Staff to the Mayor of Tallahassee, Mr. Gillum, from November 2014 through April 2018.

2. Mr. Daniels previously served as Mr. Gillum's campaign manager for his mayoral campaign.

3. As Chief of Staff, Mr. Daniels managed the day-to-day responsibilities of the Mayor's Office, supervised the Mayor's staff, advocated on behalf of the Mayor's initiatives, and approved purchases made using city-issued credit cards (p-cards).

NGP VAN

4. NGP VAN is a cloud computing software suite that describes itself as:

[T]he leading technology provider to Democratic and progressive campaigns and organizations, as well as nonprofits, municipalities, and other groups, offering clients an integrated platform of the best fundraising, compliance, field, organizing, digital, and social networking products.

5. In February 2015, the Mayor's Office entered into a contract with NGP VAN for a subscription to its services, and used funds from the Mayor's "office account," *i.e.*, leftover funds from his campaign account, to pay for the NGP VAN subscription for the remaining 11 months of that year. *See* § 106.141(5)(d), Fla. Stat., (providing a candidate elected to local office the opportunity to transfer from a campaign account to an office account certain amounts of remaining funds from the campaign account, provided that such office account funds are used "only for legitimate expenses in connection with the candidate's public office."). From January 2016 through the end

of 2017, the City of Tallahassee, rather than the Mayor's Office account, paid for the NGP VAN subscription; specifically, Mr. Daniels used a p-card to make these payments.

6. Mr. Daniels explained the Mayor's Office's use of NGP VAN as follows:

NGP VAN is a set of online – it's a company that provides online communication services, digital communication services, in various forms. For the purposes of what I have used it for, what I use it for in the city was basically as a Client Relationship Management, or what's commonly known as a CRM. It's basically a system that allows for mass communications with large numbers of people via email, as well as social media in some cases.

But for the most part, it was basically – it's a system that allows kind of two-way feedback. So instead of just sending emails, it allowed for you to understand how effective the communication was that you were sending. So it would provide you information about open rates, click-through rates ... how engaged the audience was, how effective the message of the emails actually was. And so things that's essentially what we used it for.

7. Mr. Gillum provided additional context for the Mayor's Office's use of NGP VAN. Mr. Gillum became familiar with NGP VAN during his work for what he labeled as a progressive organization, and then used it during subsequent campaigns for city commission, mayor, and, most recently, governor of Florida. As a member of the city commission, Mr. Gillum stated that one of his "big frustrations" was the "absence of a real communication tool" with voters. He recalled that, during this time period, "there were no newsletters being sent from commissioners to their residents."

8. Mr. Gillum testified that prior to his election as Mayor, the Mayor's Office's method of electronic communication consisted of taking contact information from an Excel spreadsheet and transferring that information to the City of Tallahassee's Outlook email program, and then sending out a mass email with that contact information. NGP VAN was a "completely new and dynamic way of being in communication" that allowed his office to determine whether communications it sent

were being opened and read, as well as “a way for us to organize information through our offices as well.”

9. Mr. Kamin-Cross testified that NGP VAN had a subscription account with the “Office of Andrew Gillum.” He stated that this subscription was used as a CRM “for tracking interactions with people[.]” He stated that more than two-thirds of NGP VAN’s revenue is from subscriptions to elected officials and municipalities; the remaining subscribers are candidates who identify as Democrats or progressives, as NGP VAN’s parent company “operates on a set of business ethics outlined in our terms of service that generally prohibits us from working with Republican campaigns based off of our business ethics.”

10. Mr. Daniels also testified concerning the Mayor’s Office’s use of NGP VAN as follows:

So we would mass email folks of a variety of different things that we were working on, and then we would look at, again, the information or the key performance indicators that each one of those messages would create for us about, again, click-through rates, open rates, essentially telling us a story behind all of that[.]

Like how effective was that email? You know, could we make changes that would make it more appealing for people to want to stay engaged with the things that we were doing? We used it solely for that purpose, as well as to maintain, obviously, our large database of contacts. And outside of that, no other services were used.

11. NGP VAN offers more than a CRM for managing various forms of communications. Mr. Kamin-Cross mentioned that “[t]here are add-on modules for things like donations or compliance filings[.]” as well as another campaign-related tool known as “Vote Builder.” Mr. Gillum testified as to NGP VAN’s usefulness in a campaign with respect to fundraising, including tracking contributions and generating campaign finance reports.

12. However, the version of NGP VAN utilized in the Mayor’s Office between February 2015 and the end of 2017 did not utilize any of these campaign-related add-

ons; rather, the Mayor’s Office utilized NGP VAN solely as a CRM for managing communications—namely, mass emails.

13. Both Mr. Daniels and Mr. Gillum testified that the NGP VAN subscription utilized by the Mayor’s Office served the public purpose of establishing accountability to the citizens of Tallahassee by effectively communicating the Mayor’s initiatives and priorities, while also digitally organizing information that encouraged public engagement beyond what previous mayors had accomplished.

Purchase of NGP VAN Subscription

14. At the beginning of his employment with the City of Tallahassee, Mr. Daniels received training on the use of the p-card, which primarily focused on the different spending limits for different levels of city employees, and improper uses of p-cards, such as the purchase of alcohol or other personal purchases.

15. In January 2016, the Mayor’s “office account” no longer paid for the NGP VAN subscription. From January 2016 through April 2018 (the duration of Mr. Daniels’s employment as Chief of Staff), Mr. Daniels used his p-card to pay for the NGP VAN subscription. Mr. Daniels made four payments to NPG VAN with the p-card, as follows: (a) \$1,050.00; (b) \$750.00; (c) \$1,050.00; and (d) \$2,115.00. These four payments total \$4,965.00.

16. P-Card Procedures #603 (Procedure 603), found in the City of Tallahassee’s Administrative Procedures Manual, establishes “departmental procedures for the procurement of supplies and services with a City of Tallahassee credit card (Purchase Card) that has been implemented for small purchase transactions less than \$25,000.” P-Card Procedure 603.09, entitled “PROGRAM REQUIREMENTS/LIMITATIONS,” provides, in part:

All purchases that exceed \$1,000 shall be supported by at least three-documented phone or written quotes; evidence of contract; sole source, etc. (See Administrative Policy and Procedure #242CP).

17. At least three of the purchases of the NGP VAN subscription (totaling \$4,965) with the p-card were subject to Procedure 603, and specifically, P-Card Procedure 603.09.

18. Mr. Libroth, who was the City of Tallahassee's procurement services manager during the time Mr. Daniels served as Chief of Staff, testified as to the City of Tallahassee's purchasing procedures, and confirmed that any purchase above \$1,000.00 required three quotes, or documentation that it was from a sole source. Mr. Libroth additionally testified that the City of Tallahassee's procurement policies require not only three quotes for any p-card purchase above \$1,000.00 (that is not from a sole source), but also that the purchaser must ultimately purchase the goods or services from the vendor with the least expensive price quote.

19. Mr. Daniels testified that his understanding of the procedures for purchasing goods or services above \$1,000.00 with a p-card:

[M]y understanding of the process that we had to essentially go and get at least three quotations from those – from different vendors to basically try to understand not only pricing for those services, but also quality of services and utility of services; and that we would basically keep a record of those instances where we sought a quote; that we had to basically keep records of the fact that we did that.

20. The undersigned has reviewed Procedure 603 and specifically, P-Card Procedure 603.09, and has not located any requirement that, for p-card purchases above \$1,000.00, the purchaser must purchase the goods or services from the vendor with the least expensive price quote.

21. When asked if he recalled whether Mr. Daniels followed P-Card Procedure 603.09 with respect to the purchase of the NGP VAN subscription with the p-card—*i.e.*, procuring three documented quotes—Mr. Libroth stated, “I can't with 100 percent certainty.” He testified that after receiving a public records request for this information, he searched for this information, but again, stated that he could not recall if he had a discussion with someone in the Mayor's Office, or observed something written concerning the Mayor's Office seeking the documentation, and

requested (during the final hearing) if he could consult with another city employee to confirm this.¹ The undersigned finds that Mr. Libroth's testimony was unclear and confusing on this important point.

22 Despite this uncertainty, Mr. Libroth stated that Mr. Daniels failed to follow Procedure 603, in particular, "[c]ompetition and proper documentation." He further testified that the "three documented quotes" that would accompany this purchase, as required under P-Card Procedure 603.09, would be found in the City of Tallahassee's "On Base system," but for the purchase of NGP VAN, he could not find these three quotes in the "On Base system."

23. The undersigned has reviewed Procedure 603, and has found no requirement that a user of a p-card include the required three documented quotes in the City of Tallahassee's "On Base system." To the contrary, in a Procedure 603 subsection entitled "Documentation Retention Requirements," Procedure 603 states:

A filing system that promotes quick and easy retrieval is required. One method is to attach all supporting documentation to a copy of the cardholder's monthly statement. However, any method that is consistent with departmental procedures and maintains an adequate retrieval system is satisfactory.

24. Mr. Daniels testified that, in 2015, he received quotes from three other vendors that provided CRM services: Salsa Labs; Mailchimp; and iConstituent. With respect to iConstituent, Mr. Daniels stated that he utilized a free trial of its CRM system. Mr. Daniels provided evidence, in the form of a "screen shot," of communications with a representative from Salsa Labs, one of which was entitled "Pricing Request Lead Alert." He also provided more written substantial evidence

¹ That other city employee was Matt Lutz, who the Commission did not timely list or disclose as a witness, as required under the August 20, 2020, Order of Pre-hearing Instructions. However, during the final hearing, and during its case-in-chief, the Commission attempted to call Mr. Lutz as a witness, claiming he was a rebuttal witness. The undersigned declined to allow Mr. Lutz to be called as a rebuttal witness during the Commission's case-in-chief, and the Commission did not later attempt to call Mr. Lutz after Mr. Daniels rested.

that reflected the trial period, and cost, for the iConstituent service. Mr. Daniels did not provide any written evidence concerning a “quote” from Mailchimp, but testified that he received one. However, Mr. Libroth testified that he could not recall whether he had a verbal discussion with the Mayor’s Office, or saw some type of written documentation with respect to other CRM systems, concerning this issue, while responding to a public records request, which occurred in 2017.

25. Mr. Daniels further testified that he maintained these “quotes” in the Mayor’s Office, and ultimately determined that NGP VAN was “one of the most cost effective” CRMs that the Mayor’s Office reviewed, and decided to use it as a CRM. The undersigned finds Mr. Daniels’s belief that he followed Procedure 603 credible, while Mr. Libroth’s testimony on the issue of whether Mr. Daniels followed Procedure 603 in procuring and paying for NGP VAN with a p-card unclear, confusing, and at least with respect to the retention of the written quotes, contrary to Procedure 603.²

26. The Commission also questioned Mr. Libroth concerning other, unrelated p-card transactions that Mr. Daniels made, as “similar fact evidence” under sections 90.404(2) and 120.57(1)(d), Florida Statutes, to establish that Mr. Daniel’s used the p-card for other unauthorized purchases, and to show intent or indifference with respect to non-official City government related expenses. And again, Mr. Libroth’s testimony was less than clear on this issue. For example, when asked if it was appropriate to use the p-card for charitable donations—something the Commission contends Mr. Daniels did, improperly—he stated that as long as it was not an organization that had been red-lined as an unacceptable vendor, it would be an allowable charge (unless determined otherwise during an audit). When asked about a p-card charge related to an expense for a political protest or rally, Mr. Libroth stated that he did

² In its Proposed Recommended Order, the Commission contends that Mr. Daniels violated Procedure 603’s requirement that “[p]urchase card purchases of assets that exceed \$1000 must be recorded in the fixed asset system to ensure that the item is properly safeguarded. Departmental representatives shall prepare the appropriate documents to ensure the item is added to the fixed asset inventory.” The Commission presented no evidence at the final hearing whether the NGP VAN CRM was recorded in the City of Tallahassee’s “fixed asset system” and did not question either Mr. Daniels or Mr. Libroth on this contention.

not know, and could not find it during a quick review of Procedure 603. When asked if he saw problems with the Mayor's Office's use of the p-cards during this time period, he stated, "at certain times, yes. I mean, I can't put my finger on a particular transaction. . . ." When asked on cross-examination about the p-card charges for charitable donations (to organizations that allowed use of their facilities for meetings), and for the "political protest or rally" (to rent a table and chairs at an event in the courtyard of the Florida Legislature), Mr. Libroth admitted that such charges could comport with Procedure 603. And, with respect to issues the Commission also raised concerning catering charges, Mr. Libroth admitted that if such charges were later reimbursed with grant funds, then the charges were appropriate, so long as proper procedures were followed, although he would prefer to see "good documentation."

Mayor's Office's Use of NGP VAN and Investigation

27. Mr. Daniels and the Mayor's communications director, Jamie Van Pelt, were the only two employees of the Mayor's Office who had passwords, and thus access to, the Mayor's Office's NGP VAN account.

28. The Mayor's Office's NGP VAN subscription account resided in "the cloud," as opposed to the City of Tallahassee's servers.

29. Mr. Daniels, and other employees of the Mayor's Office, added individual's contact information to the NGP VAN account in numerous ways. Beginning in February 2015, the mayor had approximately 5,937 contact records that were migrated to the NGP VAN system. The Mayor's Office also added contact information to NGP VAN from any person who contacted the Mayor's Office, as well as contact information volunteered from individuals who attended various initiative events. Additionally, the Mayor's Office requested all of the email addresses from the City of Tallahassee's utilities department, which Mr. Daniels believed would be residents of or connected to the City of Tallahassee.

30. During the course of Mr. Daniel's employment as Chief of Staff, the contact list in the Mayor's Office's NGP VAN account grew to approximately 31,282 individual contacts.

31. From the time period between February 2015 to the end of 2017, the Mayor's Office sent out 106 emails using NGP VAN's CRM system to the individual contacts in the NGP VAN system. These emails are numerous and varied. Many of these emails included information concerning such initiatives from the Mayor's Office as the Longest Table, regular meetings of the Faith Leaders Network, the Community Summit on Children, the Tallahassee Innovation Partnership, and Tallahassee Forward. At the final hearing, the Commission questioned Mr. Daniels and Mr. Gillum concerning a small number of these and other emails, which will be discussed separately below. With respect to the categories of emails previously mentioned, Mr. Daniels testified that the Mayor's Office used these emails to communicate the initiatives and work of the Mayor's Office, and to "usher in . . . a change of strategy for the city as a whole as it relates to how we engage with people digitally[.]"

32. In 2017, Mr. Daniels became aware of an internet blog post that raised questions about the Mayor's Office's use of NGP VAN for these emails. Soon thereafter, he became aware of a press inquiry and then a public records request for these emails. Mr. Daniels testified that he worked with the City of Tallahassee and NGP VAN to ensure that all of the emails sent from the Mayor's Office were available for production. Mr. Daniels noted that the database of individual contacts in the NGP VAN CRM was also located in the City of Tallahassee's server. He also noted that he believed that most of the emails sent using the NGP VAN CRM were also on the City of Tallahassee's server as well; as Mr. Daniels and other city employees were recipients of these emails, these emails would necessarily be found on the City of Tallahassee's server. Mr. Daniels also testified that the Mayor's Office often saved drafts of these emails on the City of Tallahassee's server, prior to sending them to the individual contacts through the NGP VAN.

33. The undersigned finds that all of the records related to the Mayor's Office's use of the NGP VAN subscription between February 2015 and 2017 appear to have been produced pursuant to (at least) a public records request and a law enforcement subpoena, and were admitted into evidence in this proceeding. During the course of

this matter, the Commission did not file any pleadings with the undersigned that indicated that it was unable to obtain any of documentation related to the NGP VAN subscription, and, as discussed below, law enforcement did not appear to have any issues procuring it from the city as well.

34. On March 2, 2017, Mr. Gillum reimbursed the City of Tallahassee for the City of Tallahassee's cost of the NGP VAN CRM subscription, plus an additional amount to cover a credit card fee. At that time, Mr. Gillum had announced his intention to run for Governor of Florida. Mr. Gillum explained:

I purchased the system NGP and all of its data when I – when this became an issue – it wasn't an issue until I guess someone had made a complaint, and when this thing got into sort of controversial territory, I purchased the system, and you know, I haven't touched it again. I never re-subscribed or anything like that.

35. Mr. Gillum stated that he did not use the Mayor's Office's NGP VAN CRM for his gubernatorial campaign. He further stated that his gubernatorial campaign advisers suggested that he purchase the Mayor's Office's NGP VAN CRM because:

It was an expense that I made for the benefit of the fact that my folks wanted to move on to another issue and didn't want me going out there having to make the case as to why a contact management system was necessary for the Office of the Mayor in the eighth largest city in the third largest state in all of America.

36. On March 6, 2017, the State Attorney's Office of the Second Judicial Circuit received a complaint that Mr. Gillum had committed grand theft and "official misconduct by falsifying official document or record" while serving as mayor of Tallahassee. The State Attorney referred this matter to the Leon County Sheriff's Office (LCSO), who assigned this matter to Sergeant Epstein, who at that time was a detective with LCSO.

37. Sergeant Epstein testified that he obtained records from both the City of Tallahassee (via subpoena) and NGP VAN (via an electronic search warrant),

concerning Mr. Gillum’s time as mayor of Tallahassee. He received roughly 3500 emails from NGP VAN, as well as payment records, and a contact list. He also received a large number of documents from the City of Tallahassee, including p-card records, and approximately 1,628 emails.³ He then reviewed these emails under the “scope” of “were there elements of grand theft, and were there any elements for official conduct.” He further looked at how the Mayor’s Office used the NGP VAN system, and whether “there was any political advertisement sent through that program during the time frame that the city was paying for it.”

38. Sergeant Epstein also analyzed the 31,282 contacts within the Mayor’s Office’s NGP VAN CRM. Of these contacts, Sergeant Epstein confirmed that 5,626 contained the word “Tallahassee” in the “city” field of the contact list, or had a zip code associated with Leon County, and concluded that this number of contacts were Tallahassee residents. When he analyzed contacts that identified anything other than “Tallahassee” in the “city” field of the contact list, he found 2,083 contacts that he concluded were not Tallahassee residents. Another 23,370 contacts did not contain anything in the “city” field of the contact list, or an associated zip code; Sergeant Epstein determined that these contacts had an “unknown location.”

39. Sergeant Epstein looked at emails that were sent from the Mayor’s Office using NGP VAN—through comparing the emails produced by the City of Tallahassee and NGP VAN—and verified that the Mayor’s Office sent a total of 106 emails using NGP VAN. Sergeant Epstein testified:

The majority of those emails were around city events Long Table, I think the 1,000 Mentor program, just different community service programs that when you—and I read every single one of those fliers; of the 106, only four were identified as being political in nature.

³ Sergeant Epstein explained that the subpoena to the City of Tallahassee requested emails with “NGP VAN” in the email; in response, he received some “random political advertisements” unrelated to Mr. Gillum in which a political candidate had utilized NGP VAN for that candidate’s race, and to which a city employee had subscribed, which he explained was a reason for the relatively large number of responsive emails (compared to the 106 NGP VAN-utilized emails sent from the mayor’s office). However, Sergeant Epstein stated that the 106 emails received from NGP VAN matched the same 106 emails received from the City of Tallahassee.

40. Sergeant Epstein stated that he turned these four emails he identified as being “political in nature” to the state attorney for consideration by a grand jury.⁴ These four emails can be described as follows:

a. An email that stated “Join Vice President Joe Biden and Dr. Jill Biden in Tallahassee[,]” for a free event would take place at Florida A&M University, with a further message from Mr. Gillum touting this event as the last major “get out the vote” effort in Tallahassee;

b. An email from Mr. Gillum stating that he will be representing Florida at the Democratic National Convention in a speaking role, and included a link to an article in the Tallahassee Democrat;

c. An email from Mr. Gillum’s wife, R. Jai Gillum, stating that Mr. Gillum was the only Floridian to have a speaking role at the Democratic National Convention, that she was proud of him, and provided a link to a video of that speech, as well as excerpts from several news articles about Mr. Gillum’s speech; and

d. A 2015 invitation to “Join Us for an Evening With a Special Guest,” indicating that the “special guest” was “United States Senator Bill Nelson” and “Chairwoman Allison Tant,” that this event was chaired by “Florida Democratic Party Vice Chair &

⁴ Sergeant Epstein relied on the definition of “political advertisement” that he found in the Leon County Supervisors of Elections handbook, which referenced section 106.011(15), Florida Statutes, in making this determination. Section 106.011(15) provides:

“Political advertisement” means a paid expression in a communications medium prescribed in subsection (4), whether radio, television, newspaper, magazine, periodical, campaign literature, direct mail, or display or by means other than the spoken word in direct conversation, which expressly advocates the election or defeat of a candidate or the approval or rejection of an issue. However, political advertisement does not include:

(a) A statement by an organization, in existence before the time during which a candidate qualifies or an issue is placed on the ballot for that election, in support of or opposition to a candidate or issue, in that organization’s newsletter, which newsletter is distributed only to the members of that organization.

(b) Editorial endorsements by a newspaper, a radio or television station, or any other recognized news medium.

Tallahassee Mayor Andrew Gillum,” that the event was in support of the Florida Democratic Party, and which provided various monetary sponsorship levels for this event.

41. Sergeant Epstein’s report of investigation included the following conclusion:

Over the course of this investigation the following was learned. Andrew Gillum originally purchased the NGP VAN program for use in his campaign for City Commissioner. After his election, then-City Commissioner Gillum did not utilize the NGP VAN software program as a CRM tool while on the City Commission. In 2014, City Commissioner Gillum again utilized the NGP VAN program during his campaign for Mayor of Tallahassee. After winning the election and being sworn into office, Mayor Gillum along with Chief of Staff Daniels made the decision to use the NGP VAN program in the mayor’s office as a CRM. The decision was made by Chief of Staff Daniels ... to use the NGP VAN program in the mayor’s office as a CRM. The decision was made by Chief of Staff Daniels to initially pay for this program out of the converted office account, then out of the mayor’s office budget. The use of this program as a CRM was widely known in the mayor’s office and was utilized as a contact database list. Based on the evidence provided, the fundraising component built into the NGP VAN program was not utilized in the mayor’s office. Obtained documents suggest, Chief of Staff Daniels did evaluate other CRM vendors (Salsa Labs, Mailchimp, iConstituent), but ultimately decided to stay with NGP VAN due to familiarity with the program. Of the 106 mass emails sent through the NGP VAN program while it was in the Mayor’s Office, four emails were identified as “political advertisement.” In his testimony Mayor Gillum acknowledges that one of the four emails should not have been sent out through the NGP VAN program and labels the decision a “human error.” Mayor Gillum continued to support his decision to use the NGP VAN program in the mayor’s office as a CRM, however Mayor Gillum made the decision to reimburse the City of Tallahassee because by his own admission, he did not want this to be an issue in his run for the governor’s office.

42. On August 7, 2017, the State Attorney presented the criminal complaint to the grand jury, to determine whether Mr. Gillum committed the crimes of grand theft or official misconduct “by paying for this software with public funds when he believed they served no public purpose to the taxpayer.” On that same date, the grand jury issued a No True Bill Presentment, and made numerous findings, including:

The software here was only utilized as a CRM or Client Relations Management System. Such a system is commonly used in government and industry to manage communications with clients or constituents. NGP Van [sic] software also holds the ability to track responses and assist in fundraising. There is no evidence that this fundraising option was utilized during the relevant period.

* * *

The investigation never revealed any evidence of public records being destroyed, altered, or mutilated. Furthermore, there is no evidence of advantage or detriment to any person through manipulation of public records.

* * *

We conclude that governmental bodies at all levels spend vast monies communicating to their constituents as so the use of this software to announce city affairs does not constitute a crime. While the investigation shows that this software was capable of fundraising and other activities that might not serve a legitimate interest, the only way it was utilized was as a client relations management system distributing mass emails. The wisdom or waste of governmental officials in deciding which tools to use is a political issue and not one for criminal prosecution.

* * *

Finally, we decide whether this governmentally leased software was used for personal or political purposes outside the scope of legitimate communication with constituents. We find it was. There is no question that the advertisement

for Florida DEMS fundraising was outside the duties of the Mayor of Tallahassee and served no public interest.

We find the other three emails more questionable. While the investigator concluded they were political speech, we are not as sure. One any mayor's duties is to be the City of Tallahassee's representative when interacting with other political leaders. Whether speaking at the Democratic National Committee [sic] or introducing the current Vice President of the United States, the voters of Tallahassee chose Mayor Gillum to be the person invited. The dissemination of his appearance at each may constitute an appropriate use of the software.

* * *

Two persons, Jamie Van Pelt and Dustin Daniels, had the password for the system. ... Hence, only these staffers could hold criminal liability for inappropriately sending out political emails. The system was lawfully utilized to communicate the public actions of Mayor Gillum. To be guilty of misappropriation, the State would have to prove that these staffers had a criminal intent to steal when they utilized this system to distribute each of these questionable emails. We don't find such evidence. These men sent 102 emails announcing the Mayor's Longest Table and the Faith Leadership Network. Our issue is when they also announced the Mayor's participation and support of candidates and fundraising. We find that a less than 4% error rate in determining whether the Mayor was acting in furtherance of his position as Mayor, or as a private political fundraiser, cannot support a conclusion of criminal intent.

43. No criminal charges have been filed against Mr. Daniels, Mr. Gillum, or any other person involved with this criminal investigation.

44. In April 2018, Mr. Daniels resigned from his position as Chief of Staff and declared his candidacy for Mayor of Tallahassee. Mr. Daniels did not take or use any of the information from the Mayor's Office's NGP VAN CRM, nor did he use this information in his unsuccessful run for mayor.

45. The Commission correctly notes, in its Proposed Recommended Order, that its scope in this proceeding is different than the grand jury's scope.

46. With respect to three of the four emails that were the subject of the criminal investigation, Mr. Daniels offered credible testimony as to his intent in sending these emails using the Mayor's Office's NGP VAN system. For example, with respect to the email concerning then-Vice President Biden's visit to FAMU, he stated that the Vice President's visit to Tallahassee was a "big deal," that he was visiting a "major institution of public learning in this community," and that "citizens deserved to know that this was happening." With respect to the two emails concerning Mayor Gillum's speech at the Democratic National Convention, he stated that "anything the mayor was involved with in a leadership capacity, in his official capacity as mayor, then that was something that was fair game for citizens to both know about and engage with[,]" and that "he was invited as mayor of the City of Tallahassee, he represented the city on a very large, national—maybe international stage, and we felt like that—again, it was worthwhile for folks to know about that." The undersigned credits Mr. Daniels's explanation for these three emails, and finds that his sending, or authorizing to send, these emails using the Mayor's Office's NGP VAN CRM was consistent with the performance of his public duties as chief of staff, and did not otherwise violate Florida law.

47. With respect to the remaining email that was the subject of the criminal investigation, which was the fundraising event held to benefit the Florida Democratic Party—which Mr. Gillum admitted to Sergeant Epstein was a "human error"—Mr. Daniels testified that he has some "remorse" because it had "become a distraction," but also stated, "I still believe that the mayor was involved in his official capacity, and at the time it made sense to me that this was something that the citizens of Tallahassee ought to know about." The undersigned finds Mr. Daniels's justification for this particular email to be less than credible; a person of Mr. Daniels's position—the Chief of Staff to the mayor of a large Florida city—should know that sending an advertisement for a partisan fundraiser to contacts and

constituents from a public email was inconsistent with the performance of his public duties and would be violative of Florida law.

48. In its Proposed Recommended Order, the Commission details many other emails (*i.e.*, other than the four emails that Sergeant Epstein identified as “political in nature” in paragraph 40 above, and which the grand jury reviewed) sent from the Mayor’s Office’s NGP VAN system that it contends are “self aggrandizing,” that identify Mr. Gillum as the mayor of the City of Tallahassee, and that (at least some) include the seal of the Mayor’s Office, which do not constitute a public purpose. The Advocate questioned Mr. Daniels about one of these “other” emails, which advertised the opening of the Edison restaurant; Mr. Daniels stated that the Edison restaurant was formerly the City of Tallahassee’s old electricity building, that it was a project that utilized Community Redevelopment Agency funds, and that it was appropriate to alert the public of its grand opening. And, at the final hearing, Mr. Daniels mentioned one email concerning Mr. Gillum receiving the Small Business Advocate award from the Conference of Mayors, and an event at City Hall commemorating this award. And, as found previously in paragraph 31 above, Mr. Daniels and Mr. Gillum testified as to the emails that included information initiatives from the Mayor’s Office, such as the Longest Table, regular meetings of the Faith Leaders Network, the Community Summit on Children, the Tallahassee Innovation Partnership, and Tallahassee Forward.

49. The Commission did not question Mr. Daniels—or any witness—at the final hearing concerning these other “unexamined” emails it argues in its Proposed Recommended Order do not constitute a public purpose, except for what is discussed above. Other than successfully moving into evidence all 106 emails sent from the NGP VAN system in the Mayor’s Office, the Commission, which has the burden in this matter, presented *no* competent, substantial evidence on these other, unexamined emails from which the undersigned could make a factual finding that Mr. Daniels acted corruptly in the sending of these other, unexamined emails.⁵

⁵ Nor should a finding of corrupt intent be implied with respect to these other, unexamined emails. See *Robinson v. Comm’n on Ethics*, 242 So. 3d 467, 471 n.4 (Fla. 1st DCA 2018).

Findings of Ultimate Fact

50. Based on the foregoing, the undersigned finds, as a matter of ultimate fact, that the Commission did not prove, by clear and convincing evidence, that Mr. Daniels's purchase of the NGP VAN subscription with the City of Tallahassee p-card constituted a violation of section 112.313(6).

51. Additionally, based on the foregoing, the undersigned finds, as a matter of ultimate fact, that the Commission did not prove, by clear and convincing evidence, that Mr. Daniels's use of the NGP VAN CRM constituted a violation of Florida's Sunshine Law, *see* chapter 119, Florida Statutes, and thus, the commission did not prove that the use of the NGP VAN CRM constituted a violation of section 112.313(6).

52. The undersigned finds, of the 106 mass emails sent from the Mayor's Office's NGP VAN CRM system, the Commission proved, by clear and convincing evidence, that one email—which is described in paragraph 40d. above, an invitation to a fundraiser for the Florida Democratic Party, which listed Mr. Gillum as both "Florida Democratic Party Vice Chair" and "Mayor of Tallahassee," and which listed various contribution levels—constituted an improper use of his and the Mayor's Office's resources. The dissemination of that email was not consistent with the performance of his public duties, as a partisan fundraising email from the Mayor's Office's public account constitutes an improper political advertisement, and thus constituted a violation of section 112.313(6).

53. With respect to the remaining 105 mass emails sent from the Mayor's Office's NGP VAN CRM, the undersigned finds, as a matter of ultimate fact, that the Commission did not prove, by clear and convincing evidence, that Mr. Daniels's mass emailing of these various other emails constituted a violation of section 112.313(6).

CONCLUSIONS OF LAW

54. The Division has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569 and 120.57(1).

55. 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, the Code of Ethics for Public Officers and Employees.

56. 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 & Rehab. 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 Mr. Daniels violated section 112.313(6). Commission proceedings which seek recommended penalties against a public officer or employee require proof of the alleged violation(s) by clear and convincing evidence. *See Latham v. Florida Comm'n on Ethics*, 694 So. 2d 83 (Fla. 1st DCA 1977). Therefore, the Commission has the burden of establishing, by clear and convincing evidence, the elements of Mr. Daniels's violations.

57. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997). The Florida Supreme Court further held:

This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy. 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 lacking in confusion as to the facts in issue. The evidence must be of such a 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 Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

58. Section 112.313(6), provides:

MISUSE OF PUBLIC POSITION.—No public officer, employee of an agency, or local governmental 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.

59. Section 112.312(9) defines “corruptly” 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.

60. Courts have provided further direction on what constitutes acting “corruptly” under section 112.313(6). In *Blackburn v. Commission on Ethics*, 589 So. 2d 431, 434 (Fla. 1st DCA 1991), the First District held that to satisfy the “corruptly” statutory element, the Commission must prove that a respondent acted “with reasonable notice that her conduct was inconsistent with the proper performance of her public duties and would be a violation of the law or code of ethics in part III of chapter 112.”; *See also Siplin v. Comm’n on Ethics*, 59 So. 3d 150, 151-52 (5th DCA 2011).

61. To establish a violation of section 112.313(6), the Commission must prove, by clear and convincing evidence, that:

- a. Mr. Daniels is or was a public officer or employee;
- b. Mr. Daniels: (i) used or attempted to use his official position or any property or resources within his trust; or (ii) performed his official duties;
- c. Mr. Daniels’s actions must have been taken to secure a special privilege, benefit, or exemption for himself or others; and

d. Mr. Daniels must have acted corruptly, that is, with wrongful intent and for the purpose of obtaining any benefit, which is inconsistent with the proper performance of his public duties.

62. The evidence established that Mr. Daniels, who served as chief of staff for the City of Tallahassee Mayor's Office, was, at all relevant times, an "employee of an agency" as provided in sections 112.313(2) and (6), and was thus a public employee subject to the requirements of chapter 112, part III, at the time of the alleged violations.

63. The evidence also established that Mr. Daniels, by virtue of his position as chief of staff, had access to certain property or resources of the City of Tallahassee, such as the p-card, computers, internet service, and employees. Additionally, as chief of staff, Mr. Daniels performed his official duties, which included advocating on behalf of the mayor's initiatives, in sending mass emails utilizing the NGP VAN CRM.

Purchase of NGP VAN

64. The undersigned concludes that the evidence failed to establish, by clear and convincing evidence, that the Mayor's Office's purchase of the NGP VAN subscription for use as a CRM—either through the use of the office account or later with the p-card—was done to secure a special privilege or benefit for Mr. Daniels or the Mayor's Office, or that Mr. Daniels acted corruptly. Both Mr. Daniels and Mr. Gillum credibly testified that NGP VAN was selected as a CRM to better engage with individuals concerning various initiatives from the Mayor's Office, which allowed for more accountability.

65. The Commission also failed to establish, through clear and convincing evidence, that Mr. Daniels's purchase of the NGP VAN subscription, and his use of the p-card to pay for the NGP VAN subscription, violated Procedure 603 or the City of Tallahassee's record documentation requirements. Mr. Daniels's credible testimony established that he reasonably believed the purchase of the NGP VAN subscription, and subsequent use of the p-card to pay for it, was consistent with city

procurement policies, while Mr. Libroth offered unclear and confusing testimony on this issue.

66. Additionally, the evidence presented at the final hearing established that the Mayor's Office only used the NGP VAN subscription as a CRM for mass emails, and not for any other purpose, such as fundraising, and that neither Mr. Daniels nor Mr. Gillum subsequently used any of the contacts from the NGP VAN CRM contact list for their races for mayor or governor. Mr. Daniels's purchase and use of a CRM to improve the ability to provide communications from the Mayor's Office did not create a special privilege, benefit, or exemption for himself or others, and was not done so corruptly.

67. Despite the Commission's contentions to the contrary, the undersigned cannot conclude that the Mayor's Office's transfer from his campaign account to an office account to pay for some of the NGP VAN subscription was violative of Florida law, and, therefore, cannot conclude that it constituted misuse of position under section 112.313(6). Section 106.141(5)(d) plainly authorizes such a transfer, and section 106.141(5) further provides that such funds "shall be used only for legitimate expenses in connection with the candidate's public office." With the exception of one email, to be discussed further below, the undersigned concludes that the use of the office account, and later, the use of the p-card, to purchase and pay for the NGP VAN subscription as a CRM, constituted a legitimate public purpose, as opposed to an improper purpose that created a special privilege, benefit, or exemption for Mr. Daniels or others.

Use of NGP VAN

68. The Commission failed to establish, through clear and convincing evidence, that Mr. Daniels's use of NGP VAN constituted a violation of the Florida's public records law, *see* chapter 119, and thus, a violation of section 112.313(6). Mr. Daniels's credible testimony established that the emails sent using the NGP VAN CRM were located on the City of Tallahassee's server. Additionally, Sergeant Epstein's testimony and investigation confirmed that all of the emails, as well as the list of contacts, located with the City of Tallahassee (and provided through a subpoena),

matched those emails and contacts provided by NGP VAN pursuant to an electronic search warrant.

69. A contention of the Commission is that the Mayor's Office set up the NGP VAN CRM to establish a contact list that did not necessarily consist of local constituents, and to send out "self aggrandizing" messages to these contacts that were intended to further Mr. Gillum's candidacy for Governor, which did not serve a public purpose. The Commission's attempt to "connect the dots" to establish this contention was unsuccessful. The evidence established that Mr. Gillum did not transfer, or otherwise use, the Mayor's Office's NGP VAN subscription in his subsequent campaign (and, nor did Mr. Daniels use it in his campaign for mayor). The evidence established that the Mayor's Office only used the NGP VAN system as a CRM, and did not utilize any available "add-ins" that might be considered more political in nature.

70. And, with the exception of one email (to be discussed below), Mr. Daniels's sending, or authorizing to send, the mass emails sent using the Mayor's Office's NGP VAN CRM from the Mayor's Office, that were examined at final hearing, was consistent with the performance of his public duties as chief of staff, and did not otherwise violate Florida law. With respect to 105 of 106 of these emails sent using the NGP VAN CRM, the undersigned concludes that the Commission failed to establish, by clear and convincing evidence, that Mr. Daniels's actions secured a special privilege, benefit, or exemption for himself or others, and was not done so corruptly.⁶

⁶ The undersigned has not ignored the Commission's argument concerning its advisory opinion CEO 91-37, which considered whether a city commissioner would encounter a prohibited conflict of interest if he were to mail an informational newsletter to constituents, where a private organization would pay for the cost of mailing. In CEO 91-37, the Commission suggested that the newsletter's stationery would contain the City of Tallahassee's logo, and to advised the city commissioner to include a disclaimer indicating no public funds were used to pay the cost of the newsletter to avoid a violation of section 112.313(6). The undersigned finds this advisory opinion distinguishable from the case at bar, as (a) the examined emails in the case at bar were not newsletters, but instead, as found by the undersigned, concerned initiatives in the Mayor's Office and other events that had a public purpose (with the exception of one email); and (b) the advisory opinion was provided in the context of gift laws. See §§ 112.312(9) and 112.3148, Fla. Stat.

71. In clear contrast to the 105 emails discussed above, Mr. Daniels, as chief of staff, oversaw the sending of an email, utilizing the Mayor's Office's NGP VAN CRM, that was an invitation to a 2015 fundraising event to support the Florida Democratic Party, that was chaired by "Florida Democratic Party Vice Chair & Tallahassee Mayor Andrew Gillum," which provided various monetary sponsorship levels for this event. At this time, the Mayor's Office account paid for the NGP VAN CRM subscription. Section 106.141(5), which allows for a candidate to transfer funds from a campaign account to an office account, expressly states that "[a]ny funds so transferred by a candidate shall be used only for legitimate expenses in connection with the candidate's public office." Section 106.141(5) further provides that these office account funds can be used to produce and mail various forms, so long as "such correspondence does not constitute a political advertisement, independent expenditure, or electioneering communication as provided in s. 106.011. . . ." The email invitation to a fundraiser for a political party, a political advertisement, pursuant to section 106.011(15), cannot be considered to be a legitimate expense of the Mayor's Office. The undersigned concludes that Mr. Daniels's overseeing of this email constituted an improper use of his and the Mayor's Office's resources, which was not consistent with the performance of his public duties, and that Mr. Daniels should have known that sending this particular email from the public office of the mayor was violative of Florida law. Accordingly, the undersigned concludes that the Commission established, by clear and convincing evidence, that this single email (out of a total of 106), constituted a violation of section 112.313(6).

Recommended Penalty

72. The penalties available for a former public employee who violated the Code of Ethics include, pursuant to section 112.317(1)(d): (a) public censure and reprimand; (b) a civil penalty not to exceed \$10,000; and (c) restitution of any pecuniary benefits received because of the violation committed.

73. Neither the Code of Ethics or chapter 34-5, recognize any mitigating or aggravating factors to consider when determining the appropriate penalty.

74. The Commission argues, in its Proposed Recommended Order, for a significant civil penalty. The undersigned has reviewed the two cases it uses as comparison: *In re: Renee Lee*, DOAH Case No. 11-6063EC (DOAH July 11, 2012); Comm'n on Ethics Sept. 12, 2019), which recommended a \$5,000 fine, as well as a public censure and reprimand; and *In re: Stephan Carter*, DOAH Case No. 16-3637EC (DOAH Jan. 3, 2017; Comm'n on Ethics Mar. 15, 2017), in which the Commission recommended a \$10,000 fine, as well as a public censure and reprimand. In the two cases provided by the Commission, the respondents used their positions to secure additional compensation for themselves, in the forms of salary increases or severance packages.

75. In the instant matter, Mr. Daniels did not use his position for any type of pecuniary gain. Rather, the undersigned has concluded that one, out of a total of 106 emails from the Mayor's Office that used the NGP VAN system, was improper, and constituted a violation of section 112.313(6). The Commission concedes in its Proposed Recommended Order that restitution is not requested because the full cost of the NGP VAN subscription was reimbursed to the City of Tallahassee. The undersigned concludes that the two cases provided by the Commission do not provide an appropriate basis for its requested fine of \$5,000.

76. The undersigned recommends the imposition of a \$250 fine as the appropriate penalty for Mr. Daniels's violation of section 112.313(6). This penalty effectively addresses both the frequency and severity of this violation.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby RECOMMENDS that the Commission enter a final order finding that Respondent, Dustin Daniels, violated section 112.313(6), and that Respondent be subject to a \$250 fine.

DONE AND ENTERED this 19th day of February, 2021, in Tallahassee, Leon County, Florida.



ROBERT J. TELFER III
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Filed with the Clerk of the
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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.