STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: JAMES L. MANFRE,

DOAH Case No.: 15-4877EC

Respondent.
_____/

ADVOCATE'S PROPOSED RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Suzanne Van Wyk, held a formal hearing in the above-styled case in Division of Administrative Hearings, Hearing Room 1, 1230 Apalachee Parkway, Tallahassee, Florida on December 2 - 3, 2015, at 9:30 a.m.

APPEARANCES

Advocate:	Elizabeth A. Miller, Esquire Florida Bar No. 578411 Advocate for the Florida Commission on Ethics Office of the Attorney General Plaza Level One, The Capitol Tallahassee, Florida 32399-1050 (850) 414-3702 elizabeth.miller@myfloridalegal.com
For Respondent	Linda Bond Edwards, Esquire Florida Bar No. 57282 Rumberger, Kirk & Caldwell P.A. 215 South Monroe Street, Suite 702 Post Office Box 10507 Tallahassee, Florida 32302-2507 ledwards@rumberger.com J. David Marsey Florida Bar No. 10212 Rumberger, Kirk & Caldwell P.A. 215 South Monroe Street, Suite 702 Post Office Box 10507 Tallahassee, Florida 32302-2507 dmarsey@rumberger.com

STATEMENT OF THE ISSUE

The issues for determination are:

Whether Respondent violated Section 112.313(6), Florida Statutes, by using Flagler County Sheriff's Office vehicles for out-of-state personal transportation and, if so, what is the appropriate penalty;

Whether Respondent violated Section 112.313(6), Florida Statutes, by using a credit card issued and paid by the Flagler County Sheriff's Office to charge meals for non-employees and alcohol and, if so, what is the appropriate penalty; and

Whether Respondent violated Section 112.3148(8), Florida Statutes, by failing to properly report a gift and, if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On July 29, 2015, the Florida Commission on Ethics issued an Order Finding Probable Cause to believe that Respondent, James L. Manfre, Sheriff of Flagler County, violated Sections 112.313(6) and 112.3148(8), Florida Statutes, as stated above. The case was forwarded to the Division of Administrative Hearings on September 1, 2015.

A hearing was set for December 2 and 4, 2015. The hearing proceeded on December 2, 2015 and resumed by agreement of the parties on December 3, 2015, upon the Honorable Suzanne Van Wyk's calendar becoming available. A Joint Prehearing Stipulation was filed on November 23, 2015. An Amended Joint Prehearing Stipulation was filed on November 25, 2015. At the final hearing, Advocate called nine witnesses: Julie Cobb Costas; Linda Tannuzzi; Frederick Justin Staly; Brandy Hanwell; Timothy Bo Schmitz; Brian McMillan; Debra Lynn Staly; Robert Malone; and Respondent, James L. Manfre. Respondent's counsel called three witnesses: James L. Manfre, Respondent; Frederick Justin Staly; and Linda Tannuzzi. Advocate and Respondent offered sixteen joint exhibits which shall be referenced as "JExhibit" The Advocate offered seven exhibits which shall be referenced as "AExhibit." Respondent offered four exhibits which shall be referenced as "RExhibit." The Amended Joint Prehearing Stipulation

shall be referenced as "Amd. Stip." All references to the record shall be in parentheticals. A transcript of the hearing was filed. References to the hearing transcript shall be made as "Tr." followed by the appropriate page number and the name of the witness in brackets.

Advocate timely filed the Proposed Recommended Order on January 19, 2016.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the Sheriff of Flagler County, Florida. (Amd. Stip.; Tr. p. 476, lines 8-13; [Manfre])

2. As Flagler County Sheriff, Respondent was subject to the requirements of Part III, Chapter 112, Florida Statutes, Code of Ethics and Article II, Section 8, Florida Constitution. (Amd. Stip.; Tr. p. 476, lines 19-21; [Manfre])

Respondent's Experience, Knowledge, and Training

3. From 1985 to approximately 1989, Respondent was an attorney for the Town of Babylon, New York. (Tr. p. 477, lines 21-23; [Manfre]) His duties included investigating mob-related influence in the waste carting industry. (Tr. p. 477, lines 23-25; p. 478, lines 1-9; [Manfre])

4. Respondent previously served as Sheriff of Flagler County from 2001 to 2005. (Tr. p. 476, lines 14-18; [Manfre])

5. In May 2005, Respondent became licensed to practice law in Florida. (Tr. 479, lines 1-2; [Manfre]) While in private practice, Respondent was hired to represent a candidate for the Flagler County Commission in a matter concerning filing Form 6[1] with the Florida Ethics Commission (Commission). (Tr. p. 483, lines 6-25; p. 484, lines 1, 14-20; [Manfre]) Respondent also represented a complainant in an alleged misuse of public position case which involved a violation of the Florida Ethics Code, Part III, Chapter 112, Florida Statutes. (Tr. p. 483, lines 17-

[1] Form 6 is the "Full and Public Disclosure of Financial Interests."

18; p. 484, lines 21-25; p. 485, lines 1-8; [Manfre])

6. In both cases, Respondent read the law and felt competent in the subject matter. (Tr. p. 484, lines 14-20; p. 485, lines 16-22; [Manfre])

7. Respondent was elected in 2012 for a second term as Flagler County Sheriff. (Amd. Stip.) During Respondent's election campaign, he promoted his success as the County's former Sheriff by stating that the Sheriff's Office was "accredited for the first time in an 80-year history. This required organizing the entire office personnel in an effort to improve its policies and procedures . . . . I personally reviewed and provided oversight of each and every policy and the performance of each department." (Tr. p. 202, lines 1-5, 11-13; [McMillan])

8. Further, during the campaign, Respondent stated, "[t]he public should vote for me rather than my opponent [incumbent Sheriff Fleming] due to his pattern of unethical behavior over the past nine months that has affected his credibility and that of the department. I will return the office to . . . high ethical standards . . . ." (Tr. p. 202, lines 14-15, 20-25; p. 203, lines 1-3 [McMillan])

9. Respondent told the Flagler County community that his understanding of the law and his legal experience helps him so that he would not have made the ethical mistakes Sheriff Fleming made. As Sheriff, "[y]ou're not supposed to use your position to get things other people cannot get;" and as an office-holder, Fleming is imputed to know the law. "It is not a defense to say 'I don't know' because ignorance of the law is not a defense." (Tr. p. 204, lines 21-25; p. 205, lines 1-3; p. 206, lines 14-15; p. 207, lines 8-17 [McMillan])

10. Respondent attended the New Sheriffs Institute training from December 2 through 7, 2012, just prior to assuming office in January 2013. (Exhibit 1; Tr. p. 486, lines 23-25; [Manfre]) On December 3, 2012, Respondent participated in a 2½ hour session entitled, "Keeping the Tarnish off the Badge: Maintaining the Integrity of Your Office." (AExhibit 1; Tr.

p. 19, lines 9-10; p. 20, lines 9-25; [Costas]; Tr. p. 507, lines 2-6 [Manfre])

11. During the training session, Julie Costas, then-Assistant General Counsel, Florida Commission on Ethics for 24 years, presented a PowerPoint presentation on the Code of Ethics for Public Officers and Employees, Part III, Chapter 112, Florida Statutes (Code). (JExhibit 2; Tr. p. 17, lines 18-21; p. 18, lines 24-25; p. 21, lines 22-24; [Costas]).

12. Costas advised the participants on the goals of the Code, including but not limited to "prevent[ing] use of office for private gain." (Tr. p. 22, lines 16-22; [Costas]) The PowerPoint presentation included slides and discussion on the gift prohibition, gift acceptance and disclosure requirements, misuse of position or property to get a special privilege, how to seek an advisory opinion from the Commission on Ethics, and how to research the ethics laws. (JExhibit 2; Tr. p. 23, lines 16-25; p. 24, lines 1-10; [Costas])

13. Examples of violations were discussed, but it is not possible to provide an example of every single violation that could constitute a misuse of office. (Tr. p. 30, lines 19-25; p. 31, lines 1-3; [Costas])

14. Costas recalled Respondent being interested in the outcome of a sensational gift disclosure ethics case against former Flagler County Sheriff Fleming that had recently been concluded. (Tr. p. 19, lines 11-25; p. 20, line 1; p. 49, lines 20-25; [Costas])

15. Respondent took home materials pertaining to the ethics training. (Tr. p. 507, lines 7-9; [Manfre])

Sheriff's Office Personnel

16. Former Undersheriff Frederick (Rick) Staly was employed as the Undersheriff of the Flagler County Sheriff's Office from January 2013 to April 17, 2015. (Tr. p. 60, lines 20-25; [Staly]) He has been in law enforcement since 1975. (Tr. p. 61, lines 5-17; [Staly])

17. Staly advised Respondent on matters pertaining to personnel decision, "policy, the

example of the vehicle, having to document the damage . . . [and] a litany of different conversations and advice." (Tr. p. 315, lines 19-25, p. 316, lines 1-2; [Staly]) More often than not Respondent would not accept Staly's advice. (Tr. p. 318, lines 5-13; [Staly])

18. According to Respondent, the Undersheriff only has the powers delegated to him by Respondent and those powers are only delegated if Respondent is incapacitated. (Tr. p. 490, lines 19-23; [Manfre]) However, the "Duties of the Undersheriff" agreement signed by Respondent and Staly explicitly states that the Undersheriff's responsibilities include assuming "command of the agency during the absence of the Sheriff." (RExhibit 8)

19. Linda Tannuzzi has been employed for 15 years as the Accounting Specialist for the Sheriff's Office. (Tr. p. 63, lines 16-20; p. 64, lines 6-8; [Tannuzzi]) Her specific duties include accounts payable, accounts receivable, and general ledger. (Tr. p. 64, lines 9-11; [Tannuzzi])

Use of Flagler County Sheriff's Office Vehicles for Out-of-State Personal Transportation

20. An agency vehicle is a resource of the Sheriff's Office. (Tr. p. 493, lines 4-6; [Manfre])

21. Respondent used his personal vehicle for travel outside Flagler County "from time to time" between January through December 2013. (Amd. Stip.; Tr. p. 511, lines 1-2; [Manfre])

22. The expenses incurred by a public official traveling to and from a vacation location are personal expenses. (Amd. Stip.)

Pensacola and New Orleans

23. Respondent and his wife used an unmarked agency vehicle, a Crown Victoria, for travel from Destin to Pensacola in January 2013 for the purpose of visiting Respondent's wife's parents. (Tr. 487, lines 1-14; [Manfre]) There was not a primary public purpose for this trip. (Tr. p. 487, lines 12-14; [Manfre])

24. This out-of-state trip in an agency vehicle was not for the purpose of official public business. (Amd. Stip.)

25. Respondent and his wife then drove to New Orleans from Pensacola in the agency's unmarked Crown Victoria. This trip served no public purpose. (Tr. p. 487, lines 15-25; p. 488, line 1; [Manfre])

26. Staly was aware that Respondent drove an agency vehicle to New Orleans but he did not talk to Respondent about it because he did not think about it. (Tr. p. 267, lines 2-9; p. 353, lines 13-17; [Staly])

27. Sixteen months after the trip, Respondent reimbursed the Sheriff's Office $223.50 on July 9, 2014 for the Pensacola and New Orleans trip. (JExhibit 21; Tr. p. 517, lines 308, 19-25; [Manfre])

Pigeon Forge, Tennessee

28. Respondent and his wife used a new unmarked agency vehicle, a white Dodge Charger, to drive to Pigeon Forge for vacation in May 2013. (Tr. 493, lines 7-13; [Manfre]; p. 272, lines 11-15; p. 286, lines 7-15; [Staly])

29. This out-of-state trip in an agency vehicle was not for the purpose of official public business. (Amd. Stip.)

30. At the time, Staly was not aware of what vehicle Respondent took to Pigeon Forge. (Tr. p. 285, lines 23-25; [Staly])

31. Respondent reimbursed the Sheriff's Office for this trip the day before the instant administrative hearing – 2½ years after the fact. (JExhibit 21; Tr. p. 517, lines 308, 19-25; [Manfre])

Virginia

32. Respondent and his wife used the unmarked agency Dodge Charger for travel

with their son to view colleges in Virginia in August 2013. (Tr. p. 488, lines 2-9; [Manfre])

33. Staly was not aware at the time that Respondent used an agency vehicle to travel to Virginia. (Tr. p. 272, lines 16-18; p. 361, lines 4-9; [Staly])

34. After the Virginia trip, Staly saw the owner of a local paint and body shop in the driver's seat of Respondent's vehicle. Respondent told Staly that the vehicle had been involved in an accident. (Tr. p. 311, lines 19-25; p. 312, lines 1-4; [Staly])

35. Staly advised Respondent to prepare an internal accident report to which Respondent replied, "I will think about it." (Tr. p. 312, lines 7-11; [Staly])

36. Respondent was required to report the accident pursuant to agency policy. (JExhibit 5; Tr. p. 313, lines 1-7; [Staly])

37. Respondent never filed an internal report documenting the accident. (JExhibit 5; Tr. p. 247, lines 8-12; Tr. p. 313, lines 1-7; [Staly])

38. Seven to ten days later, Respondent told Staly that a newspaper owner/editor was "digging around on the damage to his car." (Tr. p. 312, lines 12-17; [Staly])

39. Respondent then admitted to Staly that he drove the agency vehicle to Virginia because "my car had high mileage and I didn't trust it to go to Virginia." (Tr. p. 311, lines 20-21, p. 312, lines 12-25; [Staly]) Respondent told the press that he took an agency vehicle because "his car was broken down." (Tr. p. 315, lines 9-14; [Staly])

40. Two months later, Respondent reimbursed the Sheriff's Office $667.50 on October 17, 2013 for mileage. (JExhibit 21; Tr. p. 517, lines 308, 19-25; [Manfre])

Policy

41. As the Sheriff, Respondent is responsible for promulgating all rules applicable to the agency. (Tr. p. 254, line 25; p. 255, lines 1-5; [Staly]) All policies of the predecessor sheriff remained in place if not amended or repealed. (Tr. p. 245, lines 13-25; [Staly]) For the agency's

initial accreditation in 2005, during Respondent's first term as Sheriff, and for its re-accreditation, Respondent had to approve all of the agency's policies and procedures. (Tr. p. 251, lines 1-25; p. 252, lines 1-2; Tr. 263, lines 14-19; [Staly])

42. A few days before Respondent's swearing-in, Staly drafted a memorandum, which Respondent signed, that stated all policies are in effect and remain in effect, except for a couple policies. (Tr. p. 245, lines 17-21; p. 246, lines 6-8; [Staly])

43. The accreditation standards require all policies apply to the Sheriff, unless he is specifically exempted. (Tr. p. 262, lines 11-13; [Staly]) Respondent cannot unilaterally exempt himself from a policy and the agency remains in compliance with accreditation. (Tr. p. 262, lines 18-20; [Staly])

44. The Sheriff's Office "Assignment of Agency Vehicles," policy number 41.3, became effective on December 1, 2003, which was during Respondent's first term as Sheriff, and was amended on April 1, 2007 and April 25, 2008. This policy was in place between January and December 2013 of Respondent's second term. (JExhibit 5).

45. The policy "sets forth the guidelines for the assignment of Agency vehicles" whether the vehicle is leased, marked, or unmarked. (JExhibit 5)

46. Under the heading "Use of Vehicles" in the "Assignment of Vehicles" policy, all members are prohibited from taking marked and unmarked agency vehicles out of the county without permission. (JExhibit 5; Tr. p. 246, lines 16-25; p. 247, lines 13-22; [Staly])

47. The vehicle-use policy allows off duty use of an agency vehicle conditioned upon the employee complying with the guidelines set forth therein, such as informing Communications with off duty status, locations, and responses to calls; parking the vehicle at the employee's residence; not using the vehicle in private employment of non-law enforcement related jobs; and being appropriately attired. (JExhibit 5) Further, it is anticipated that the vehicle

will only be driven within the geographic limits of Flagler County, except with permission or for approved routine out-of-county trips (e.g., Corrections (Transportation)). (JExhibit 5)

48. The policy provides that "squad room" vehicles are to be kept in designated areas and be used for official needs and "ready room" vehicles are only for official purposes. (JExhibit 5) There is no exemption from this policy for the Sheriff. (JExhibit 5)

49. "Training" policy number 33.1 was approved by Respondent during his first term as Sheriff and became effective March 15, 2011, and remained effective during Respondent's second term as Sheriff from January through December 2013. (JExhibit 6) Under the "Travel Arrangement & Compensation" heading, civilian and sworn members were permitted to use an agency vehicle for conducting any agency business. (JExhibit 6) Again, there is no exemption from this policy for the Sheriff. (JExhibit 6)

50. Newly-appointed sworn and civilian personnel are required to take specific orientation classes, including training in the agency's policies and procedures. (JExhibit 6; Tr. p. 250, lines 20-15; [Staly]) If there is not an exemption for the Sheriff, then the training requirement applies to Respondent, under the accreditation guidelines. (JExhibit 6; Tr. p. 250, lines 20-25; [Staly]) There is no exemption for the Sheriff. (JExhibit 6)

51. Respondent's reason for using an agency vehicle was "I am a 24-hour, seven-day-a-week constitutional officer, and the vehicle went with me wherever I went in case I had to get back to the county for an emergency." (Tr. p. 488, lines 21-25; p. 489, line 1; [Manfre])

52. The Undersheriff, as well as all command staff and technically deputy sheriffs, who are on emergency recall, are considered 24-hour-a-day, 7-days-a-week, 365-days-a-year employees. (Tr. p. 235, lines 17-25; p. 236, lines 1-3; p. 358, lines 14-16; [Staly])

53. Respondent did not know whether he would authorize an agency employee to use an agency vehicle for personal use, i.e., to take his or her family on vacation out of state, to visit

family, or to take a son to tour college campuses out of state. (Tr. 496, lines 20-25; p. 497, lines 1-25; p. 498, lines 1-10; [Manfre])

54. Respondent believes that the agency's policy in place during January 2013 and December 2013 would not have prohibited such activity with an unmarked vehicle but the policy enacted "when this issue came about" applies to all unmarked vehicles as well. (JExhibits 5, 9; Tr. p. 497, lines 22-25; p. 498, lines 1-2, 24-25; p. 499, lines 1-4, 8-13; [Manfre])

55. Respondent "religiously searched" and found no information that would prohibit him from taking the agency vehicle wherever he wants. (Tr. p. 531, lines 17-25; p. 532, lines 1-2; [Manfre]) The only information he found was Attorney General Opinion 74-384, which Respondent believes supports his personal use of an agency vehicle. (Tr. p. 532, lines 2-5; [Manfre])

56. The Sheriff's Office does not keep any records on the use of unmarked or marked agency vehicles off duty. (Tr. p. 521, lines 23-25; p. 522, lines 1, 13-15; [Manfre])

57. Respondent is not aware of anyone else in the agency keeping such records. (Tr. p. 521, lines 23-25; p. 522, lines 1, 13-15; [Manfre])

58. Respondent has no law enforcement authority outside Flagler County. (Tr. p. 490, lines 6-8; [Manfre]). Outside Flagler County, Respondent is not authorized to speed, or run the vehicle's lights and sirens. Respondent speculated that other states would provide a courtesy to him to speed through their states in case of an emergency back in Flagler County – but only if he is in an agency vehicle. (Tr. p. 491, lines 2-3, 7-8, 16-18; p. 492, lines 6-20; [Manfre]) The courtesy would not be provided to him in his private vehicle. (Tr. p. 491, lines 19-21; [Manfre])

Use of Credit Card Issued and Paid by the Flagler County Sheriff's Office to Charge Meals for Non-Employees and Alcohol

59. Respondent used the agency credit card to pay for meals and alcoholic beverages

for non-employees on May 14, 2013, July 16, 2013, and from August 3 through 7, 2013. (Amd. Stip.; JExhibits 16, 17, 18)

60. Respondent made the following purchases with the agency credit card on the dates specified:

Date	Restaurant	Total Bill	Reimbursement
5/14/2013	Madhatter	$235.76	$158.76 (6 dinners, 3 wines, tax & tip)
7/16-17/2013	Headwaters Lounge	$ 86.50	$ 52.43 (1 dinner, 3 wines, tax & tip)
8/3-7/2013	Kurrents	$168.50[2]	$ 49.34 (1 dinner, 1 wine, tax & tip)
	Quinns	$ 62.21	$ 40.98 (1 dinner, 1 wine, tax & tip)
	Tropiks	$ 54.58	$ 30.06 (1 breakfast, tax & tip)

(JExhibits 16, 17, 18, 20)

61. On or around October 30, 2013, the Finance Director of the Sheriff's Office, Linda Bolante,[3] told Staly there was a problem with Respondent's credit card. (Tr. p. 290, lines 5-19; [Staly])

62. On October 30 or 31, 2013, a meeting between Respondent, Staly, Bolante, and counsel for the Sheriff's Office was held regarding the charges on Respondent's credit card.[4] (Tr.

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[2]Staly was advised Respondent purchased meals for Staly and his wife on the agency credit card. (JExhibit 14) Staly believed Respondent had purchased the meals on Respondent's personal credit card. Staly provided a check to the agency for $71.23 on 10/31/13 for the cost of the two meals. (JExhibit 14)

[3]In several places in the transcript, the name is incorrectly spelled as Belonti.

[4]Upon objection to testimony regarding statements made during the meeting based on attorney-client privilege, the Court ruled that "the privilege has been waived." (Tr. p. 306, lines 6-8) The attorney-client privilege does not apply to every communication with an attorney or just because an attorney was in the room. Communications made in the presence of third persons unnecessary to accomplish the purpose for which the attorney was consulted are not confidential and not protected by the privilege. Oral communications between the Sheriff's Office General Counsel and individual staff at the October 31, 2013, meeting were not intended to be confidential. Nonetheless, any alleged privilege was waived because the content of the communications was not kept confidential. The discussions at the meeting were disclosed to persons outside the meeting, including the Commission's investigator. (Robert Malone interviews of Staly, p. 440, lines 7-9; Manfre, p. 440, lines 19-25; and Bolante, p. 446, lines 8-13). Also, any alleged privilege would not apply because Manfre and Bolante have opposing adverse interests, as evidenced by the content of the communications; thus, there was no expectation of privacy. See, *Dominguez v. Citizens' Bank & Trust Co.*, 56 So. 682 (1911).

p. 291, lines 23-25; p. 292, lines 1-14; [Staly])

63. At the meeting, Respondent was advised to repay the money for meals for non-employees and alcoholic beverages. (Tr. p. 309, lines 17-18; [Staly]) Respondent became very angry and told Linda Bolante that she would have to take the fall for this. (Tr. p. 309, lines 21-25; [Staly])

64. Bolante was angered by this comment and responded in an e-mail that she would tell the truth if questioned or called to testify. (Tr. p. 309, lines 21-25; [Staly])

65. Respondent stated that he "never intended for the agency to pay anything other than the per diem amount nor did he expect to receive anything to which he was not entitled." (Amd. Stip.) Respondent blamed the finance department for not making per diem calculations or advising him that he needed to reimburse the agency for any expenses. (Amd. Stip.)

66. Respondent recognized that he spent over the per diem amount on at least one occasion. (Tr. p. 525, lines 11-12; [Manfre]) Respondent also recognized that it was his responsibility to pay back taxpayer funds when he went over the per diem amount – but only when he was told to do so. (Tr. p. 526, lines 22-24; p. 527, lines 1-2; [Manfre]). Respondent took no affirmative action to repay the money and only did so when he was asked. (Tr. p. 525, lines 11-24; p. 526, lines 4-24; [Manfre])

67. Respondent said, "I never refused to pay back any amounts when I was asked to." (Tr. 526, lines 16-17; [Manfre])

"Credit Card Purchases" Guideline

68. "Training" policy number 33.1 establishes the per diem rate for meals at the rate set by Florida Statute:[5] $6 for breakfast; $11 for lunch; and $19 for dinner. (JExhibit 6; Tr. p. 75,

[5] § 112.061, Fla. Stat.

lines 4-6; [Tannuzzi])

69. The finance department's written guideline entitled "Credit Card Purchases" was approved by Respondent during his first term and has not been amended. (Tr. p. 67, lines 21-25; Tr. p. 86, lines 22-25; p. 87, lines 3-5; [Tannuzzi]) The guideline was kept in Tannuzzi's office and was available if Respondent wanted to review it. (JExhibit 15; Tr. p. 65, lines 23-25; p. 66, lines 1-15, 23-25; p. 67, lines 1-10, 15-20; [Tannuzzi])

70. The policy explicitly states that the "Sheriff will make only agency-related purchases and return receipts to Finance." (JExhibit 15) Tannuzzi had no reason to believe Respondent was confused about the use of the credit card with the policy in place. (Tr. p. 107, lines 23-25; p. 108, line 2; [Tannuzzi])

71. There was no public purpose for buying Respondent's wife and non-employees meals and alcoholic beverages with the agency credit card. (Tr. p. 503, lines 21-25; p. 504, lines 1-3; [Manfre])

72. Tannuzzi followed the same process for all employees in the agency for credit card payment and travel when she received a receipt. (Tr. p. 71, lines 1-25; p. 107, lines 12-15; [Tannuzzi]) When Tannuzzi received a credit card statement, she would review the bill to make sure that the charges met the guideline's parameters. (Tr. 69, lines 7-13; [Tannuzzi]) Respondent was the only employee with a credit card who did not provide appropriate documentation to her. (Tr. p. 107, lines 16-22; [Tannuzzi])

73. During January 2013 to May 2014, Tannuzzi noticed that information provided by Respondent was "waning off." (Tr. p. 73, lines 20-25; [Tannuzzi]) Respondent's monthly submission of specific information pertaining to expenses became less and less. (Tr. p. 144, lines 6-18; [Tannuzzi]) In the beginning, Tannuzzi was getting receipts from Respondent with explanations written on them. Then, Respondent would not write an explanation or not provide a

receipt. (Tr. p. 73, lines 20-24; [Tannuzzi])

74. For example, Respondent provided one receipt for $235.76 from Madhatter. Respondent merely wrote "DC National Law Enforcement" and signed it for payment. (JExhibit 16; Tr. p. 76, lines 18-24; [Tannuzzi]) It was later determined that this was a restaurant bill for 12 people and included alcoholic beverages. (JExhibit 16)

75. On another receipt, Respondent simply wrote "dinner with undersheriff." (JExhibit 18; Tr. p. 527, lines 5-8; [Manfre]) In fact, the meal was for 4 people: Respondent, his wife, Staly, and his wife. (Tr. p. 527, lines 11-12; [Manfre]) When questioned why he wrote "undersheriff" instead of disclosing all participants, Respondent simply replied, "No idea." (Tr. p. 527, lines 7-10; [Manfre])

76. At times, Tannuzzi had difficulty getting appropriate documentation from Respondent. (Tr. p. 107, lines 20-22 [Tannuzzi]) Yet, according to Respondent, once the expenditures were submitted, *if* they were not allowable pursuant to statute, his finance department should not have paid it. (Tr. 545, lines 7-11; [Manfre])

77. Respondent's signature or initials on a receipt indicated to Tannuzzi his approval of expenses and direction to pay it. (Tr. p. 122, lines 15-25; p. 123, lines 1-3; p. 141, lines 3-9; [Tannuzzi])

78. Tannuzzi did not question what came directly from Respondent or the validity of the charges when Respondent "signed off" on the receipt "[b]ecause he is the sheriff, and in my many, many years of working, I believe that he was the – he was the one to say if it was right or wrong. If he gave it to me, then I assumed it was right." (Tr. p. 77, lines 5-11; p. 90, lines 11-25; p. 91, lines 1-2; p. 123, lines 10-17; p. 124, lines 8-9; [Tannuzzi])

79. During the pertinent time periods herein, no one who possessed an agency credit card, except Respondent, submitted for payment a receipt for alcoholic beverages or any meals

that were unauthorized by virtue of the fact they were for non-employees. (Tr. p. 110, lines 16-25; p. 111, lines 1-11; [Tannuzzi])

Audit

80. Carr, Riggs & Ingram, LLC, CPAs and Advisors, conducted an independent audit of the Sheriff's Office for the year ending September 30, 2013. (JExhibit 11) The auditors found that certain expenditures charged to the agency credit card were not in accordance with allowable travel costs under Section 112.061, Florida Statutes. (JExhibit 11)

81. There was no necessary and reasonable authorized public purpose for the unallowable expenses. (JExhibit 11)

82. Respondent did not inquire which employee was violating the law so that he could remedy the situation and make sure that tax dollars were being spent appropriately because he assumed the reference pertained to him. (Tr. p. 544, lines 14-25; p. 545, lines 1-14)

Failing to Properly Report a Gift

83. Staly purchased cabins in Pigeon Forge as investments. (Tr. p. 276, lines 8, 16; [Staly]) He stays in one of the cabins two to three times a year. (Tr. p. 277, lines 5-7; [Staly])

84. Respondent and his wife stayed in one of Staly's cabins from May 3 – 7, 2013. (Tr. p. 158, lines 4-11; [Hanwell]) At that time, the cabin would have rented for $430 per night. (Tr. p. 158, lines 20-22; [Hanwell])

85. Respondent was required by law to file CE Form 9 "Quarterly Gift Disclosure" (Form 9) with the Commission on Ethics (Commission) disclosing receipt of his stay in the cabin as a gift of lodging, on or before September 30, 2013. (JExhibit 3; Tr. p. 443, lines 15-18; [Malone])

86. In October 2013, the Florida Sheriffs Association held a series of conference calls for the purpose of ethics training. (Tr. p. 279, lines 1-22; [Staly]) After one session, Respondent

related to Staly that he believed he needed to file a gift disclosure form for the cabin stay but he was concerned that he would be penalized for submitting the form late. (Tr. p. 279, lines 10-15; [Staly])

87. Staly advised Respondent to claim the cabin and told him that it rents for $430 a night. (Tr. p. 279, lines 10-15; [Staly]) Respondent replied, "I will think about it." (Tr. p. 279, lines 13-14; [Staly])

88. After an ethics complaint was filed against him, Respondent was working on his Form 9 and told Staly that he was going to claim $99 per night as the value of the cabin. (Tr. p. 422, lines 18-25; p. 423, lines 1-15; [Staly]) Staly replied, "Sheriff, I don't recommend that because it is very public that this cabin rents for $430 a night." (Tr. p. 423, lines 13-15; [Staly])

89. Subsequently, Respondent told Staly that his secretary had found something on the back of the reporting form that said he only had to list the cabin at $44. (Tr. p. 281, lines 13-21; [Staly]) Staly again advised Respondent against claiming the cabin at $44 per night because it rents for $430 a night, to which Respondent replied, "$44 sounds better than the 430 or $1,200 gift." (Tr. p. 281, lines 21-23; [Staly]) Staly reiterated that the rates are publicly listed and the amount could be verified through the website. (Tr. p. 281, lines 24-25, p. 282, lines1-2; [Staly])

90. Respondent did not file Form 9 with the Commission until May 27, 2014 and claimed the gift for the quarter ending March 2014. (JExhibit 3)

91. Respondent disclosed receipt of the gift of lodging in Staly's Pigeon Forge cabin from May 3 to May 5, 2013. (JExhibit 3)

92. Respondent listed the monetary value of his stay at $44.00 per night for a total of $132.00 received as a gift. (JExhibit 3)

93. Respondent swore to the truthfulness of the information by signing the following statement on the form:

> I, the person whose name appears at the beginning of this form, do depose on oath or affirmation and say that the information disclosed herein and on any attachments made by me constitutes a true accurate, and total listing of all gifts required to be reported by Section 112.3148, Florida Statutes.

(JExhibit 3)

94. Brandy Hanwell has been employed as the operations manager of Accommodations by Parkside in Pigeon Forge for about five years. (Tr. p. 156, lines 21-23; p. 157, lines 3-9; [Hanwell]) Accommodations by Parkside is an overnight rental management company that has a rental contract with Rick and Debbie Staly to manage their three Pigeon Forge rental properties. (Tr. p. 156, lines 23-25; p. 157, lines 10-23; [Hanwell])

95. One cabin was reserved for Respondent and his wife for May 3 – 7, 2013; therefore, it was not available during that period for rental to others. (Tr. p. 158, lines 12-19; p. 170, lines 22-25; [Hanwell]) Based on previous years' bookings and the desirability of this particular cabin, there was a "very, very good chance it would have rented" if it had not been reserved for Respondent. (Tr. p. 159, lines 14-23; [Hanwell])

96. Accommodations by Parkside is a vacation resort with 32 cabins, no full-time residents, and three private, non-rental second homes. (Tr. p. 159, lines 24-25; p. 160, lines 1-20; [Hanwell]) Hanwell does not believe Staly's cabin is a private residence. (Tr. p. 160, lines 21-23; [Hanwell])

97. Staly does not describe the cabins as either personal residences or private homes because they are located in a mixed-use resort community that is for vacation rental property, he pays for commercial insurance, commercial water, commercial internet, phone and television services, and he has to pay tangible property tax, along with commercial property taxes. (Tr. 277, lines 10-20; p. 282, lines 19-21; [Staly]) Access to the cabins is controlled by Accommodations by Parkside so Staly does not have a key to access any of his cabins. (Tr. p. 284, lines 9-15; [Staly])

98. Respondent said that he researched "private residence" and didn't find anything other than the dictionary definition of what "private" is and what "residence" is, but he used his knowledge as a land use attorney to determine that the cabin was a private residence. (Tr. p. 533, lines 11-15; [Manfre])

99. The value of the gift is determined by the cost to the donor; it is not up to the recipient to determine the value of a gift. (Tr. p. 37, lines 21-25; p. 38, line 1; [Costas])

100. Commission Senior Investigator Robert Malone interviewed Respondent under oath concerning this investigation. (Tr. p. 439, lines 19-23; p. 440, lines 19-25; [Malone]) Respondent told Malone that his stay at the cabin was from May 3 to May 7, 2013. (Tr. p. 444, lines 19-24; [Malone])

101. At the final hearing in this matter, Respondent testified under oath that he and his wife did not use the cabin more than two consecutive days so he never had an obligation to file a gift disclosure form. (Tr. p. 533, lines 16-20; [Manfre])

102. According to Respondent, he ultimately filed Form 9 just because it became an issue. (Tr. p. 533, lines 16-25; [Manfre])

103. As candidate for Sheriff, Respondent made a statement to the press in reference to the Commission on Ethics' probable cause finding in incumbent Sheriff Fleming's ethics case:

> It shows that the sheriff has embarrassed this community . . . he's embarrassed the sheriff's office by the finding that he in fact has violated the code of ethics. It's been recently reported that Florida has one of the highest rates of corruption of any state, and it's been reported that the ethics code needs to be tightened in order to prevent corruption, and one of the basic ways that public officials are corrupted is by accepting gifts . . . . So he's violated a basic public trust by accepting this gift, then he violated the law by not reporting it. The ethics code is a law and he's violated the law. It's that simple.
>
> http://flaglerlive.com/45595/ethics-commission-don-fleming/; 10/19/12.

(Amd. Stip.)

CONCLUSIONS OF LAW

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

105. The Commission on Ethics has jurisdiction over this matter to determine whether any violations have occurred. § 112.324(3)(4), Fla. Stat.

106. Section 112.322, Florida Statutes, and Rule 34-5.0015, Florida Administrative Code, authorize the Commission on Ethics to conduct investigations and to make public reports on complaints concerning violations of Part III, Chapter 112, Florida Statutes (Code of Ethics for Public Officers and Employees).

107. The burden of proof, absent a statutory directive to the contrary, is on the Florida Commission on Ethics, the party asserting the affirmative of the issue of these proceedings. *Department of Transportation v. J.W.C. Co., Inc.*, 396 So.2d 778 (Fla. 1st DCA 1981); *Balino v. Department of Health and Rehabilitative Services*, 348 So.2d 349 (Fla. 1st DCA 1977). In this proceeding, it is the Commission, through its Advocate, that is asserting the affirmative: that Respondent violated § 112.313(6), Florida Statutes, on two counts, and § 112.3148, Florida Statutes. Commission on Ethics 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 1997). Therefore, the burden of establishing by clear and convincing evidence the elements of Respondent's violations is on the Commission.

As noted by the Supreme Court of Florida:

> [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the

> mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re: Davey, 645 So. 2d 398, 404 (Fla. 1994, quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). The Supreme Court of Florida also explained, however, that, although the "clear and convincing" standard requires more than a "preponderance of the evidence," it does not require proof "beyond and to the exclusion of a reasonable doubt." *Id.* (Amd. Stip.)

108. Section 112.313(6), Florida Statutes, the provision with which Respondent is charged in two counts, provides as follows:

> MISUSE OF PUBLIC POSITION. No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with s. 104.31.

109. In order to establish a violation of § 112.313(6), Florida Statutes, the following elements must be shown by clear and convincing evidence:

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

b. Respondent must have:

i. used or attempted to use his official position or any property or resources within his trust,

or

ii. performed his official duties;

c. Respondent's actions must have been taken to secure a special privilege, benefit, or exemption for himself or others;

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

110. The term "corruptly" is defined by Section 112.312(9), Florida Statutes, as

follows:

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

111. "Direct evidence of [wrongful] intent is often unavailable." *Shealy v. City of Albany, Ga.*, 89 F.3d 804, 806 (11th Cir. 1996); *see also State v. West*, 262 So. 2d 457, 458 (Fla. 4th DCA 1972) ("[I]ntent is not usually the subject of direct proof.").

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

ISSUE 1

Use of Flagler County Sheriff's Office Vehicles for Out-of-State Personal Transportation

113. The parties stipulated that Respondent, as Sheriff, was subject to the requirements of Part III, Chapter 112, Florida Statutes. Therefore, the first element required to show a violation of Section 112.313(6), Florida Statutes, has been established.

114. To establish the second and third elements, it must be shown that Respondent used or attempted to use resources or property within his trust, or performed his official duties to secure a special privilege, benefit, or exemption for himself or others. An agency vehicle is a resource and property of the Sheriff's Office. But for his official position, Respondent would not have had access to an agency vehicle to drive to Pensacola, New Orleans, Pigeon Forge, and Virginia.

115. The benefits conferred on Respondent by the use of agency vehicles were significant: no wear and tear on Respondent's personal vehicle; thousands of miles not logged on his personal vehicle; Respondent had no out-of-pocket expenses when the vehicle was in an accident because the Sheriff's Office was responsible to pay for repairs; and Respondent and his family rode in the comfort, security, and safety of a new white Dodge Charger.[6]

116. By allowing his wife and son to travel in the vehicle with him, Respondent also secured a special privilege and benefit for them. See, CEO 81-44 (employee secured special privilege and benefit for his sister by allowing her to ride in his agency vehicle to work with him. The benefit is "special" because it was available only to the employee's sister and not to all persons.); CEO 93-06 (Law enforcement inspector's use of his agency vehicle to pick up items and make bank deposits for his supervisor constituted a special benefit to the supervisor rather than an incidental personal benefit of the use of the public vehicle to the Inspector. Commission recognized AGO 74-295 and AGO 74-384.); CEO 82-82 (Personal trips and vacations using

[6] The Commission's is only authorized to interpret the ethics law, but it does not do so in a vacuum. Section 145.011, Florida Statutes, sets forth the legislative intent to provide only by general law for the annual compensation and method of payment for sheriffs. Although not charged with such violation, Respondent's purely personal use of an agency vehicle, "to the extent it is more than an incidental benefit resulting from a use which serves primarily a public purpose" is compensation over and above allowed by Chapter 145, Florida Statutes. AGO 89-18. Further, the Internal Revenue Service requires public employees to report their personal use mileage as a taxable fringe benefit. Respondent's use does not fall within any exemption. See, 26 CFR § 1.274.5(k)(3).

vehicles loaned to the FL DHSMV would constitute use of property or resources within public employee's trust and would constitute a special benefit for employee and employee's family.)

117. In that regard, it was shown that Respondent, as Sheriff, used a resource or property within his trust to secure a special privilege, benefit, or exemption for himself and his family.

118. To establish the fourth element, it must be shown that Respondent acted corruptly, as statutorily defined to mean that Respondent acted with wrongful intent and for the purpose of benefiting himself or another from some act or omission which is inconsistent with the proper performance of his public duties.

119. In order to assess intent, it is necessary to look to the existence of standards that would put the official on notice that he was doing something wrong. *Blackburn v. State, Commission on Ethics*, 589 So. 2d 423, 434 (Fla. 1st DCA 1991). The issue of intent is a matter for the trier of fact to determine. *Dobry v. State*, 211 So. 2d 603 (Fla. 3d DCA 1968).

120. Respondent alleges that he had no corrupt intent because there were no existing standards that would put him on notice that he was doing something wrong. *Blackburn v. State, Commission on Ethics*, 589 So. 2d 423, 434 (Fla. 1st DCA 1991).

121. Respondent misplaces reliance on *Blackburn* to insulate himself from the "notice" requirement. *Blackburn* may allow Respondent's enjoyment of a private benefit ancillary or secondary to a primary public purpose, such as transportation to and from work, but it does not allow manipulation of public resources and property for trips where there was absolutely no public purpose (e.g., travel to Pensacola to visit relatives; travel to New Orleans and Pigeon Forge for vacation; or travel to tour college campuses with his son).

122. The First District Court of Appeal cautioned that "[o]ur holding in this case [*Blackburn*] is limited to the particular circumstances shown and should not be read as a carte

blanche authorization . . . ." 589 So. 2d at 436, FN 1. Unlike *Blackburn*, Respondent's case is not about an incidental benefit derived from the use of a pamphlet where the issues involved general political concern over a garbage collection ordinance.

123. The matter herein involves Respondent's blatant use of his public position as the Sheriff to convert public agency resources and property to personal use for himself and his family and to monetarily benefit himself and his family - not for any benefit to his constituents or agency. Such interests do not equate with the incidental campaign benefits to the county commissioner in *Blackburn.*

124. The Florida Supreme Court has held that "notice" may be "actual" or "constructive," and actual notice may be "express" or "implied." *Sapp v. Warner*, 141 So. 124, 127 (1932).

125. The Court explained:

> The principle applied in cases of alleged implied actual notice is that a person has no right to shut his eyes or ears to avoid information, and then say that he has no notice; that it will not suffice the law to remain willfull[y] ignorant of a thing readily ascertainable by whatever party puts him on inquiry, when the means of knowledge is at hand. [Emphasis added.]

Sapp, 141 So. 2d at 255.

Implied actual notice is thus present when a party has knowledge of enough facts that would cause a prudent person to make further inquiry. *See McCausland v. Davis,* 204 So. 2d 334, 335 (Fla. 2nd DCA 1967).

126. Section 112.313(6), Florida Statutes, is not the only basis which gave Respondent fair and reasonable warning that it would be unethical or unlawful for him to use the power and resources of his position for his personal benefit.

127. Contrary to Respondent's testimony, Sheriff's Office policy 41.3 applies to

unmarked agency vehicles and any off duty use is intended to be within the jurisdiction of the Sheriff's Office, with the operator prepared to respond in an emergency. Nowhere does the policy authorize use of any vehicle for personal, out-of-state travel that serves no public purpose. A policy must be consistent with, and in no case contradict, state law. It would be a violation of state law for any supervisor to approve conduct demonstrated by Respondent. §§ 112.313(6); 112.061, Fla. Stat. Respondent's assertion is that he did not have a supervisor to ask and, therefore, is not governed by the policy. Regardless, Respondent is governed by state law and is not able to exempt himself from the constraints thereof. See, CEO 75-20 (Municipality may enact a code of ethics more stringent than, or with provisions differing from Part III, Ch. 112, F.S., as long as it does not conflict with state statutes.); see, also, AGO 91-89.

128. If the agency had no policy prohibiting Respondent's use of an agency vehicle, this case is analogous to *In re: William G. Smith*, 13 F.A.L.R. 3239 (Comm'n on Ethics, 1990). Smith was the Sheriff of Calhoun County who used the agency's deputies and vehicles to transport a day-laborer to Smith's private farm to perform work. The Sheriff's Office did not have a written or unwritten policy in place prohibiting the Sheriff's Office personnel from giving rides to private individuals, permitting them to provide such transportation, or stating under what circumstances that it is permissible to give rides to private citizens. Smith was found to have acted "corruptly" as defined by the statute, because his intent was simply to secure a personal benefit for himself, was wrongful, and his actions, which served only a private purpose, were inconsistent with the proper performance of his public duties in violation of Section 112.313(6), Florida Statutes.

129. Just as Respondent herein alleges, Smith argued "that whether the agency has adopted any policies regarding the use of vehicles is an indicator of whether the official's actions were inconsistent with the proper performance of his public duties." *Id.* at 3246. The Hearing

Officer rejected Smith's argument stating:

> [N]o policies were in effect here, so whether the Respondent complied or did not comply with established policies cannot bear on a determination of whether his actions were inconsistent with the proper performance of his duties. Furthermore, where, as here, the Respondent is responsible for setting the policies of the agency, the fact that he did not adopt any relevant policies should not weigh in his favor. *Id.*

130. Similarly, Respondent should not be not be able to conduct himself in any manner he chooses, or act arbitrarily, and then use the excuse that it is lawful because he, as the ultimate policy maker, has not instituted policies governing such behavior. There would never be an incentive for any public officer to establish internal regulations or policies.

131. Even if there was no internal agency policy, procedure, or guideline, the "notice" setting forth a standard of duty for which Respondent was compelled to comply may be external, such as an ethics class, case law, or statute.

132. Respondent's testimony indicated that he had notice: first, as an attorney, Respondent felt competent to represent two clients in ethics-related matters -- indicating that he had notice and knowledge of the ethics law; second, Respondent ran against an incumbent sheriff who had ethics problems stating the "you're not supposed to use your position to get things other people cannot get" and part of Respondent's campaign platform was to restore high ethical standards to the Sheriff's Office -- indicating that he recognized ethical conduct verses unethical conduct; and third, Respondent had training in the ethics laws after his election and just prior to being sworn-in where he was told that any public resource and property cannot be used for private benefit -- indicating that he was on notice that such conduct would be inconsistent with his public duties. Nonetheless, he took the agency vehicle out of state on three occasions for personal travel.

133. Respondent's proffered reason that it was lawful to drive an agency vehicle out of state so that he could return quickly in an emergency is purely pretextual because it 1) has no basis in fact; 2) did not actually motivate Respondent's conduct; and 3) is an insufficient reason for using public resources and property for family-related personal out-of-state travel.

134. Contrary to Respondent's assertion, the primary beneficiaries of his use of the agency vehicles for out of state travel were Respondent and his family – not the Flagler County Sheriff's Office or Respondent's constituents. Any public purpose was incidental to the primary purpose that motivated Respondent.

135. Respondent's conduct was motivated his own self interests in not wanting to use his personal vehicle for out-of-state travel rather than by any legitimate reasons. If Respondent truly believed he was authorized to use an agency vehicle to take his son to visit college campuses in Virginia, when challenged, he would not have made excuses to Staly and the press (e.g, his personal vehicle had high mileage, was not trustworthy, or was broken down), and he would not have attempted to conceal the fact the vehicle had been in an accident. Respondent's conduct indicates wrongful intent.

136. Respondent asserted that Attorney General Opinion 74-384 supports his use of the agency vehicle for personal travel. In AGO 74-384, the Attorney General reiterated that in an earlier opinion he concluded that "city employees may not use city-owned automobiles for their personal business or pleasure" yet "[t]here may, of course, be situations in which the use of a city automobile would personally benefit a city employee incidentally, while the *overall purpose* served by that use would be primarily a public one."[7] [Emphasis in original.] As an example, the Attorney General stated:

> [I]f a city employee must be 'on call' or duty, at all times while at home, it

[7] AGO 74-295.

> would seem to be a valid public purpose to provide this person with a city automobile to respond to emergencies . . . . I said that the driving of the automobile to and from work by the employee would be a personal benefit incidental to the public purpose and, therefore, proper. **However, I restricted the use to that of driving to and from work.** [Emphasis added.]

The Attorney General instructed that the legitimate use of the agency vehicle "off duty" requires that guidelines be implemented, data maintained and frequent reviews be conducted to ensure the program is meeting the objective – that is, fulfillment of a valid public purpose. AGO 74-384.

137. Importantly, the Attorney General stressed that the mere statement that a public purpose is served by allowing the private use of the agency vehicles off duty is insufficient; rather, it must be shown that the public purpose objectives are fulfilled. See, AGO 74-384.

138. "The conclusion in AGO 74-384 was based upon the cited objectives of a plan to provide quicker response of off-duty personnel when called back to duty or to emergency situations . . . and restricting use of the vehicle to within the jurisdictional limits of the law enforcement agency." AGO 90-61.

139. Respondent provides nothing more than a bald-faced assertion that the public purpose was for him to return quickly to his jurisdiction in an emergency. Respondent did not even attempt to comply with any of the conditions specified in the Attorney General's opinion. Yet, even if he had implemented, maintained, and reviewed data on off duty vehicle usage to ensure the fulfillment of a valid public purpose, Respondent's unfettered use of agency vehicles would still not have been supported by AGO 74-384.

140. Respondent bases the validity of a perceived "public purpose" of returning quickly in an emergency on mere speculation that he can use lights and sirens to unlawfully speed through several states to return quickly. He assumes that other jurisdictions would provide

this courtesy and allow him to endanger their own citizens. Respondent's stated reason is invalidated because the agency's emergency contingency plan is already in place by the Undersheriff assuming command in Respondent's absence. Respondent's reason is further diminished, given the availability of today's technology allowing continuous communication via smart phone; and to even further diminish Respondent's reason, in dire circumstances requiring his speedy return, Respondent would fly.

141. Lastly, Respondent's stated reason has no limits. To illustrate the absurdity of Respondent's logic, one could infer that he would justify using an agency vehicle to drive even as far as Alaska so that he could return quickly in an emergency.

142. As a matter of ultimate fact, Respondent acted with wrongful intent by placing his own self-interest in securing his own special financial benefits above the interests of his agency and the constituents he serves.

143. Respondent violated Section 112.313(6), Florida Statutes, by using Flagler County Sheriff's Office vehicles for out-of-state personal transportation.

ISSUE II

Use of Credit Card Issued and Paid by the Flagler County Sheriff's Office to Charge Meals for Non-Employees and Alcohol

144. As noted under Issue I, above, the parties have stipulated that Respondent is subject to the requirements of Part III, Chapter 112, Florida Statutes, for his acts and omissions as Flagler County Sheriff. Therefore, the first element required to show a violation of Section 112.313(6), Florida Statutes, has been established.

145. To establish the second and third elements, it must be shown that Respondent used or attempted to use resources or property within his trust, or performed his official duties to secure a special privilege, benefit, or exemption for himself or others. An agency credit card and

agency funds are resources and/or property of the Sheriff's Office. But for his official position, Respondent would not have had access to an agency credit card or the ability to authorize payment of personal expenses charged to that card.

146. The special benefit to Respondent and others was payment of meals and alcoholic beverages, in connection with entertainment, hospitality, and goodwill. By such use of the credit card, Respondent acted in a manner calculated to obtain a personal benefit for himself and others.

147. Respondent was aware that the use of the agency credit card would impact him financially. To conclude otherwise would be to believe that Respondent was at least naive. Such conclusion is not supported by the weight of the evidence based upon Respondent's success of his professional career and his educational background.

148. To establish the fourth element, it must be shown that Respondent acted corruptly, as statutorily defined to mean that Respondent acted with wrongful intent and for the purpose of benefiting himself or another from some act or omission which is inconsistent with the proper performance of his public duties.

149. During his first term as Sheriff, Respondent approved and instituted agency policy number 33.1, which remained in effect during all pertinent times herein. The policy provided that "per diem (meals) is paid at the rate set by Florida Statute." The statute specifically limits travel expenses to those incurred on official business of the state and to those expenses "necessarily incurred" in the performance of a public purpose. § 112.061(3)(a)(b), Fla. Stat.

150. Additionally, the "Credit Card Purchases" guideline was most likely approved by Respondent during his first term. As Sheriff, Respondent is excepted from getting a requisition for purchases and may use the credit card for those purchases. Yet, his authority to purchase with the credit card is restricted to "only agency-related purchases."

151. Clearly, meals and alcoholic beverages for Respondent's wife and non-employees were not authorized under either state law or the agency's Credit Card Purchases guideline. Thus, Respondent's conduct was inconsistent with the proper performance of his public duties.

152. The benefits were what motivated Respondent to incur the charges. Respondent's intent was not to carry out the business of the Sheriff's Office by purchasing meals and alcoholic beverages for his wife and non-employees.

153. Respondent blamed the finance department or specific subordinates, with inferior knowledge of the law and ethics code, for not making calculations of the per diem or advising him that he needed to reimburse the agency for any expenses.

154. In many instances, the legality of the expenditures was not readily apparent to Tannuzzi. Respondent deliberately provided incomplete and vague descriptions on the receipts or insufficient documentation regarding the expenses, such that Tannuzzi was not alerted to the inappropriateness of the charges.

155. Nonetheless, Respondent's signature or initials attested to the accuracy of the charges and indicated authorization for payment. Respondent, as the person requesting payment of the expense, was obligated to prepare the receipts to indicate in no uncertain terms and in such language that would indicate to Tannuzzi and to the public the legality of such payments.

156. The lack of information hid the invalidity and true purpose of the credit card expenditures and raises questions concerning Respondent's belief that the Sheriff's Office was responsible or has authority to use public funds for such expenses. See, AGO 068-12.

157. The lack of information also gives rise to an implication of wrongful intent by the party responsible for the lack of proper information. For example, in *Knight Ridder, Inc. v. Dade Aviation Consultants*, 808 So. 2d 1268 (Fla. 3d DCA 2002), a public records case, the court considered an argument by the public entity seeking to avoid an attorney's fee award against it,

stating that its refusal to produce public records was reasonable and in good faith because it was taken in reliance on an opinion issued by independent counsel. The court rejected that argument because the public entity failed to make a "full and complete disclosure" of the operative facts upon which the opinion depended and counsel was misled by the entity's withholding of information. *Id.* at 1269. As such, the court applied the rule "that attempts such as this to create a false basis...not only do not demonstrate good faith . . . but provide[s] affirmative evidence of actual criminal responsibility." *Id.*

158. The same rationale applies in this case. Respondent selectively omitted pertinent information that Tannuzzi would need to determine the legality of the expenses. Respondent made it impossible for Tannuzzi to know that a $235.76 receipt labeled as "DC National Law Enforcement" actually included inappropriate charges for alcoholic beverages and meals for 12 people. Respondent's acts and omissions provide affirmative evidence of his wrongful intent.

159. Implicit in Respondent's explanation that he "never intended for the agency to pay anything other than the per diem amount nor did he expect to receive anything to which he was not entitled" indicates Respondent was aware that the charges for his wife's and non-employees' meals and alcoholic beverages were inappropriate.

160. Yet, he took no immediate action to reimburse the agency for any of those expenses. Not until the expenditures were questioned publicly, did Respondent reimburse the agency. Respondent was angry when told he had to do so and attempted to place blame on someone else. This is not the reaction of someone who anticipates reimbursing the money.

161. Furthermore, the Code is preventative in nature. The violation occurred at the time the agency credit card was used for personal purposes. Reimbursement, especially delayed, non-voluntary reimbursement, does not obviate the violation.

162. With respect to Respondent's claim that his subordinates within the Sheriff's Office did not warn him of any ethical transgressions is not credible. There is no evidence to show Respondent would have taken anyone's advice. In fact, the evidence showed that Respondent often refused Staly's advice, even when informed the agency policy required compliance. For example, Staly advised Respondent to fill out an internal accident report for the agency vehicle. Respondent ignored that advice.

163. Further, Respondent did not submit any evidence to corroborate or support his hearsay assertion blaming others. § 120.57(1)(c), Fla. Stat. Also, Respondent presented no evidence that he was treated differently than other agency employees regarding the agency credit card. The credible evidence is that Respondent was treated no differently.

164. In 2013, the Osceola County Board of County Commissioners sought the Commission's guidance concerning the newly-enacted ethics training for constitutional officers. In CEO 13-15, the Commission opined that any knowledgeable person or entity may provide the ethics training but cautioned that "public officers and employees should remember that ultimate responsibility for compliance with the Code of Ethics lies with the individual public officer or employee, and that receipt of erroneous information is not generally a defense to an allegation that an individual has violated the Code."

165. A finding that a Sheriff can escape the proscriptions of Section (8)(e), Article II of the Florida Constitution, and Section 112.313(6), Florida Statutes, by blaming others who did not stop his unlawful actions, which they may not have even been aware of, would only serve to strip those provisions of all meaning and significance.

166. Respondent places importance on the fact that he is a constitutional officer. In 1971, the ultimate constitutional officer - Governor Reubin Askew - inquired of the Attorney General whether he could legally use the Governor's discretionary fund to pay for items,

including but not limited to entertainment for visiting dignitaries, and travel expenses and per diem for his wife. The Attorney General opined that it would be illegal for public funds to be spent in this manner since the Legislature had not authorized the expenditure for these purposes. AGO 071-28.

167. Respondent violated Section 112.313(6), Florida Statutes, by using a credit card issued and paid by the Flagler County Sheriff's Office to charge meals for non-employees and alcoholic beverages.

ISSUE III

Failing to Properly Report a Gift

168. In order to establish a violation of § 112.3148(8), Florida Statutes, the following must be shown by clear and convincing evidence:

> (8)(a) Each reporting individual or procurement employee shall file a statement with the Commission on Ethics on the last day of each calendar quarter, for the previous calendar quarter, containing a list of gifts which he or she believes to be in excess of $100 in value, if any, accepted by him or her, for which compensation was not provided by the donee to the donor within 90 days of receipt of the gift to reduce the value to $100 or less, except the following:
>
> 1. Gifts from relatives.
> 2. Gifts prohibited by subsection (4) or s. 112.313(4).
> 3. Gifts otherwise required to be disclosed by this section.
>
> (b) The statement shall include:
>
> 1. A description of the gift, the monetary value of the gift, the name and address of the person making the gift, and the dates thereof. If any of these facts, other than the gift description, are unknown or not applicable, the report shall so state.
>
> 2. A copy of any receipt for such gift provided to the reporting individual or procurement employee by the donor.
>
> (c) The statement may include an explanation of any differences between the reporting individual's or procurement employee's statement and the receipt provided by the donor.
>
> (d) The reporting individual's or procurement employee's statement shall be sworn to by such person as being a true, accurate, and total listing of all such gifts.
>
> * * *

> (7)(e) Lodging provided on consecutive days shall be considered a single gift. Lodging in a private residence shall be valued at the per diem rate provided in s. 112.061(6)(a) 1. less the meal allowance rate provided in s. 112.061(6)(b).

169. As noted under Issue I, above, the parties have stipulated that Respondent is subject to the requirements of Part III, Chapter 112, Florida Statutes, for his acts and omissions as Flagler County Sheriff. Therefore, the first element required to show a violation of Section 112.3148(8), Florida Statutes, has been established.

170. For the next element, it must be shown that Respondent accepted a gift he believed to be in excess of $100 in value for which repayment was not made within 90 days of receipt. Respondent filed the "Quarterly Gift Disclosure" Form CE 9 (Form 9) disclosing under oath that the value of the cabin for his three-day stay was over $100. Therefore, the second element is met.

171. However, at the final hearing Respondent alleged that no violation occurred because his stay at the cabin was not on consecutive days so he never had to report it.

172. Respondent told Investigator Malone that his stay at the cabin was from May 3 to May 7, 2013. If he believed the cabin's value was $44 per night at a minimum, Respondent should have known that the gift exceeded $100. Also, Respondent told Staly that reporting $44 sounded better than reporting $430 or $1,200,[8] indicating that he was aware of the value being more than $100.

173. Respondent made three contradictory statements, all under oath, regarding the length of his stay: 5 nights to Malone; 3 nights on Form 9; and 2 non-consecutive nights to the Administrative Law Judge. Respondent's statement to Malone that he stayed 5 nights is most believable as it was made more contemporaneous to the stay at the cabin.

[8] Respondent's spontaneous comment indicates a stay of 3 days.

174. The length of Respondent's physical stay in the cabin is irrelevant because the cabin was specifically reserved for Respondent's sole use for 5 nights and remained "off the market" for that length of time. The quantifiable cost to Staly was approximately $2,150 due to Respondent's reservation.

175. Respondent was required to file Form 9 "no later than the last day of the calendar quarter that follows the calendar quarter for which this form is filed (For example, if a gift is received in March, it should be disclosed by June 30.)" (JExhibit 3)

176. Thus, Respondent was obligated to file Form 9 by September 30, 2013. Respondent filed 8 months late.

177. The value of his complimentary use of the use of the cabin is determined using the actual cost to the donor. See, Section 112.3148(7)(a), Florida Statutes, and Fla. Admin. Code Rule 34-13.500 (1), which provides that "actual cost to the donor" means

> the price paid by the donor which enabled the donor to provide the gift to the donee. Where the donor engages in the business of selling the item or service, other than personal services that is provided as a gift, the donor's "actual cost" includes the total costs associated with providing the items or services divided by the number of units of goods or services produced.

178. The Staly cabin is not a "private residence" under either Florida or Tennessee law.

179. Respondent correctly points out that Florida statutes do not provide a definition of "private residence," but the Staly cabin fits the statutory definition of "transient public lodging establishment." A "'[t]ransient public lodging establishment' means any unit . . . dwelling, . . . which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests." § 509.013, Fla. Stat.

180. The Tennessee Attorney General opined that owners of overnight rental cabins, where no business activity occurs on the premises, are not "private residences." They are in the same category with hotels, motels and other transient accommodations that are designed for short-term use. Tenn.Op.Atty.Gen. No. 02-036.

181. Under Respondent's interpretation of the Florida statute, a public officer or employee would be able to thwart or otherwise defeat the intent of the Legislature by simply asserting that, in spite of contrary evidence, he decided that the value of the gift was *de minimus* and not reportable.

182. It is a well established canon of statutory construction that a court is to choose that interpretation of statutes and rules which render the provisions of a statute meaningful and that a court must give preference to a construction which will give effect to the statute over another construction which would defeat it. *Hawkins v. Ford Motor Co.*, 748 So. 2d 993 (Fla. 1999); *Schultz v. State*, 361 So. 2d 416 (Fla. 1978).

183. There is no indication from reviewing the language of the statute that the Legislature intended for the subjective belief of a public official or employee to be the determining factor on the question of valuation of a gift.

184. Respondent was required to file Form 9 on or before September 30, 2013 for the quarter ending June 2013, and report the gift value in the amount of $2,150.[9] Therefore, Respondent untimely filed Form 9 and misreported the value of the gift, as well as the quarter.

185. Respondent violated Section 112.3148(8), Florida Statutes, by failing to properly report a gift.

PENALTY

The penalties available for a public officer who violates the Code of Ethics include:

[9] $430 x 5 nights (May 3, 4, 5, 6, 7) = 2,150.

impeachment, removal from office, suspension from office, public censure and reprimand, forfeiture of no more than one-third of his or her salary per month for no more than 12 months, civil penalty not to exceed $10,000, and restitution of any pecuniary benefit received because of the violation committed. *See*, § 112.317(1)(a), Fla. Stat.

A number of Commission on Ethics cases involve the misuse of position in violation of Section 112.313(6), Florida Statutes.

In 2011, a county attorney was found to have violated Section 112.313(6), Florida Statutes, by drafting a legal opinion that justified a one-percent pay raise in salary for herself and others without the need for approval from the County Commission. The Commission accepted the Administrative Law Judge's recommendation of a $5,000 fine, and public censure and reprimand. *In Re: Renee Lee*, Case No. 11-6063 (Fla. DOAH July 11, 2012).

In 2015, a county commissioner was found to have twice violated Section 112.313(6), Florida Statutes, by asking a county staff member to approve a zoning application for specific property and by asking a county employee to look for and selectively enforce code violations against a specific restaurant. The Commission accepted the Administrative Law Judge's recommendation of imposition of a civil penalty of $5,000 for each violation, together with public censure and reprimand. *In Re: Robert Skidmore, III*, Case No. 14-1912 (Fla. DOAH February 27, 2015).

In regard to a violation of Section 112.3148(8), Florida Statutes, the Commission issued a Final Order and Public Report accepting the parties' Pre-Probable Cause Stipulation wherein a city manager admitted accepting a gift of two dinners and two football tickets and failing to report the gifts to the Commission. Garner waived all further proceedings and agreed to pay a penalty of $1,652.80 *In Re: Elmon Lee Garner*, Complaint No. 11-112 (Fla. Comm'n on Ethics).

A civil penalty of $8,000 for each violation of Section 112.313(6), Florida Statutes, and a $3,000 penalty for a violation of Section 112.3148(8), Florida Statutes, along with public censure and reprimand is appropriate in this matter.

Neither Chapter 112, Part III, Florida Statutes, nor the Florida Administrative Code, Chapter 34-5 identifies mitigating or aggravating circumstances.

RECOMMENDATION

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

RECOMMENDED that a Recommended Order be entered finding that Respondent, James L. Manfre, twice violated Section 112.313(6), Florida Statutes, and violated Section 112.3148(8), Florida Statutes, and recommending the imposition of a total civil penalty of $19,000, and public censure and reprimand.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The foregoing is respectfully submitted, together with a copy in Microsoft Word Format, to the DOAH Clerk at Claudia_Llado@doah.state.fl.us, this 19th day of January, 2016.

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent **via e-mail** to Linda Bond Edwards, Esquire, and J. David Marsey, Esquire, Rumberger, Kirk & Caldwell P.A., 215 S. Monroe St., Ste. 702, P.O. Box 10507, Tallahassee, FL 32302, ledwards@rumberger.com, dmarsey@rumberger.com, on this 19th day of January, 2016.

Elizabeth A. Miller

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