

MAR 03 2016

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BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re: JAMES L. MANFRE,

Respondent.

Complaint No.: 14-097

RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER

The Respondent, by and through undersigned Counsel, submits these exceptions to the Recommended Order pursuant to the Uniform Rules of Procedure, Rule 28-106.217, F.A.C. In support thereof, the Respondent states as follows:

STANDARD OF REVIEW

The standard of review applied to the Recommended Order entered by the ALJ is found at §120.57(1)(1), Florida Statutes, and provides, in pertinent part:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. **The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law....**

§120.57(1)0), Fla. Stat. (2000) see *Florida Power & Light Co. v. State* 693 So.2d 1025 (Fla. 1st DCA 1997)

It is long established administrative law that:

It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. If, as is often the case, the evidence presented supports inconsistent findings, it is the hearing officer's role to decide the issue one way or the other.

Heifetz v. Devt. of Bus. Res., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985)(citations omitted).

Exception No. 1

Recommended Finding of Fact No. 11 is not supported by competent substantial evidence and should be stricken and replaced by the language below.

11. During all times pertinent hereto, the Sheriff's office maintained a policy on credit card purchases. Pursuant to the policy, the Sheriff "will make only agency-related purchases and return receipts to Finance." The policy did not define "agency-related purchases."

Record evidence

The Sheriff's Office had a "Credit Card" guideline that was used by the finance department and kept in the finance department. T. p. 65:11-p.67:24. From January 2013 to February 2014, there was no credit card use policy at the Sheriff's Office. Ultimately, a written credit card policy was written and became effective February 7, 2014. T. p. 256 Exhibit 7.

Exception No. 2

Conclusion of Law No. 95 departs from the essential requirements of law and is not

supported by competent substantial evidence.

Although the Administrative Law Judge (ALJ) concluded that the Respondent violated the Ethics Code, the Recommended Order did not make a specific finding of fact or conclusion of law that the Respondent acted with corrupt intent with regard to the agency credit card. See Paragraphs 93-96. The ALJ, in finding that the Respondent did not violate the Ethics Code with regard to use of the agency vehicle, Paragraphs 87-92, made a specific conclusion based on an analysis of the corrupt intent standard set forth in *Blackburn v. State*, 589 So. 2d 431 (Fla. 1st DCA 1991).

Legal Analysis

To satisfy the statutory element of corrupt intent, the advocate must demonstrate with clear and convincing evidence that Respondent acted “with reasonable notice that [his] conduct was inconsistent with the proper performance of [his] public duties and would be a violation of the law or the code of ethics.” *Blackburn v. State, Comm’n on Ethics*, 589 So. 2d 431, 434 (Fla. 1st DCA 1991). Here the ALJ found that the Respondent was on reasonable notice exceeding the per diem amount provided for in Chapter 112.061 but did not make a specific finding that he knew such actions were a violation of law. She could not make such a finding because the evidence established that Respondent believed he was acting on advice of his finance director. As such, the Respondent requests that the Commission strike the finding of a violation because the ALJ did not include a specific conclusion that the Respondent acted with corrupt intent.

**Exception No. 3
Paragraph 116**

1. In light of the authorities cited in the Advocate’s Proposed Recommended Order, and other authorities, the undersigned recommends a civil penalty of \$5,000 for the single violation of misuse of office, along with public censure and reprimand. In light of

the specific facts of this case, the undersigned recommends Respondent pay a civil penalty of \$1,200 for failing to disclose a reportable gift.

Analysis

While the ALJ bases her recommendation on penalties recommended by the Advocate, because there are penalties found in unpublished final orders, the Advocate and the ALJ may have been unaware of the Final Order in *In re Donald Fleming*. (See Attachment A.) In *Fleming*, the Commission accepted a stipulation that the Respondent failed to report an honorary resort membership as a gift. According to the Advocate's recommendation, the "gift" of "honorary membership" was equivalent to a gift that required others to pay a \$20,000 refundable deposit and monthly dues of \$375. (See Attachment B.) The Commission agreed that reimbursement of \$3800 and a penalty of \$500 was sufficient for this violation. Viewing the facts of the case at hand, adding together all of the reimbursements Respondent made, the total was not close to \$3800 and the value of the gift was miniscule compared to the value of the gift that Respondent Manfre failed to report.

Relief sought

The Respondent requests that the Commission reject the penalty set forth in the Recommended Order. The Commission has the ability to reduce a penalty following a review of the record. The record in this case shows that the Respondent changed policies when existing policies did not adequately advise him or other members of the of agency procedures. He also implemented the policies so that they specifically apply to him. (T. 253:6-254, 258:8-20). Moreover, all of the actions against him occurred within the first eight months in office after having been a private citizen for eight years.

Further, the Commission should also consider the consistency in penalties. Because there

is not a specific finding of corrupt intent, the penalty for misuse of office should be rejected. However, if the Commission accepts the ALJ's Findings of Fact and Conclusions of Law as provided, the Respondent requests that the Commission impose substantially the same penalty as imposed in *In re Fleming* and eliminate the public censure and reprimand. Alternatively, the Respondent requests that the Commission remand the matter back to the ALJ for consideration of penalties based on the Fleming Order.

When reviewing a recommended order, it has been held in the case of *Goin v. Commission on Ethics*, 658 So.2d 1131, 1138 (Fla. 1st DCA 1995) that:

The question of whether facts, as found in the recommended order, constitute a violation of a rule or statute, is a question of ultimate fact which the agency may not reject without adequate explanation.

The agency may accept a recommended penalty, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record and justifying the action.

WHEREFORE, the Respondent requests that the Commission consider and accept the above referenced Exceptions to the Recommended Order.

Dated: March 2, 2016

Respectfully submitted,

/ s / Linda Bond Edwards

LINDA BOND EDWARDS

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"A Public Office is a Public Trust"

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January 30, 2013

The Honorable Rick Scott
Governor, State of Florida
The Capitol, 400 S. Monroe St.
Tallahassee, Florida 32399-0001

Re: Complaint No. 12-050, In re DONALD FLEMING

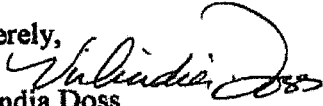
Dear Governor Scott:

The Florida Commission on Ethics has completed a full and final investigation of a complaint involving Mr. Donald Fleming, Sheriff of Flagler County. Pursuant to Section 112.324(8), Florida Statutes, we are reporting our findings and recommending appropriate disciplinary action to you in this case.

Enclosed are copies of our final order and of our file in this matter. As we have found pursuant to a stipulation that Mr. Fleming violated the Code of Ethics in the manner described by our order, we recommend that you impose a civil penalty upon him in the amount of \$500 (five hundred dollars), a penalty which he has agreed to pay.

If we may be of any assistance to you in your deliberations, please do not hesitate to contact us. We would appreciate your informing us of the manner in which you dispose of this matter. For information regarding collection of the civil penalty, please contact the Office of the Attorney General, Ms. Melody A. Hadley, Assistant Attorney General.

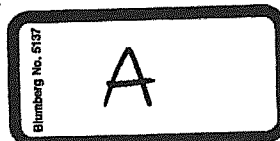
Sincerely,


Virlindia Doss
Executive Director

VAD/cca


Enclosures

cc: Mr. R. W. Evans, Attorney for Respondent
Ms. Melody A. Hadley, Commission Advocate
Mr. James Williams, Complainant



January 25, 2013.

January 30, 2013
Date Rendered


Susan Horovitz Maurer
Chair

cc: Mr. R. W. Evans, Attorney for Respondent
Ms. Melody A. Hadley, Commission Advocate
Mr. James Williams, Complainant

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

COMMISSION ON ETHICS
DATE RECEIVED
AUG 01 2012

In re: **Donald Fleming,**

Respondent.

Complaint No. 12-050

ADVOCATE'S RECOMMENDATION

The undersigned Advocate, after reviewing the Complaint and Report of Investigation filed in this matter, submits this Recommendation in accordance with Rule 34-5.006(3), F.A.C.

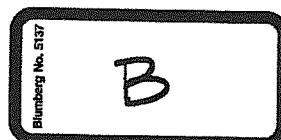
PARTIES

Respondent, Donald Fleming, serves as Sheriff of Flagler County. Complainant is James Williams of Palm Coast, Florida.

JURISDICTION

The Executive Director of the Commission on Ethics determined that the Complaint was legally sufficient and ordered a preliminary investigation for a probable cause determination as to whether Respondent violated Section 112.3148(8), Florida Statutes. The Commission on Ethics has jurisdiction over this matter pursuant to Section 112.322, Florida Statutes.

The Report of Investigation was released on June 25, 2012.



ALLEGATION

Respondent is alleged to have violated Section 112.3148(8), Florida Statutes, by failing to report an honorary resort membership as a gift.

APPLICABLE LAW

Section 112.3148(8)(a), Florida Statutes, provides as follows:

(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.

Section 112.312(12)(a), Florida Statutes, as amended, provides in its relevant part:

'Gift,' for purposes of ethics in government and financial disclosure required by law, means that which is accepted by a donee or by another on the donee's behalf, or that which is paid or given to another for or on behalf of a donee, directly, indirectly, or in trust for the donee's benefit or by any other means, for which equal or greater consideration is not given within 90 days . . .

ANALYSIS

Since March 2009, Respondent, Flagler County Sheriff, has held an honorary membership to Hammock Beach Resort (Resort). (ROI 5, 17) Complainant alleges Respondent failed to disclose this membership (gift) by way of CE Form 9, "Quarterly Gift Disclosure." (ROI 2) Complainant contends the value of the membership is approximately \$20,000 per year. (ROI 2) A review of Respondent's CE Form 9s confirmed that he had not disclosed the Resort membership. (ROI 4)

Carlton Grant, Resort Managing Director, advised that the Resort is a combination condominium, resort, and private club facility with approximately 1100 dues-paying club

members. (ROI 11) He advised that there are two types of memberships to the Resort which are the Beach Club Membership and Full Golf Membership. (ROI 12) He further advised that an honorary membership is equivalent to a Beach Club membership which allows a member access to all the Resort amenities except golf and a 20% discount on charges related to the amenities such as restaurant and spa services. (ROI 12, 16) The Beach Club Membership requires a \$20,000 refundable deposit fee and has monthly dues of \$375. (ROI 12) Grant advised that the honorary membership continued to be extended to Respondent because he is “somewhat of a figurehead” in the community and the Resort wants him to be familiar with the property, have access to the property, and have him speak well of the Resort. (ROI 17)

Through an affidavit submitted by his counsel, Respondent advised that he was offered the membership through Thomas Allhoff who was with Resort membership services. (ROI 5) Respondent further advised that the only amenity he used was the restaurant where he paid for his meals. (ROI 5)

Subsequently, in a response to the Report of Investigation, Respondent advised that he realized that he should have reported the honorary membership as a gift. He further advised that he has terminated his membership to the Resort and planned to reimburse the Resort \$3897.01 to compensate for 20% discount he received at the Resort restaurant.

In this case, an honorary membership extended benefits to Respondent. While Respondent may have only used the restaurant, he had access to other amenities that the public did not have.

This honorary membership arguably has a value over \$100 which required disclosure. However, while the evidence supports the allegation, it does not appear that further pursuit of this allegation would serve the public. Respondent has taken responsibility for his action and

based on representation from Counsel on July 31, 2012, Respondent has partially reimbursed the Resort \$1700 and plans to complete reimbursement by August 7, 2012.

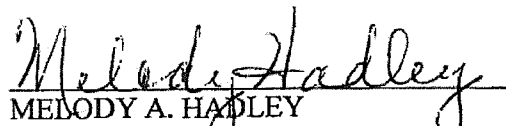
Therefore, based upon the evidence before the Commission, I recommend that the Commission find probable cause to believe that Respondent violated Section 112.3148(8), Florida Statutes, but take no further action.

RECOMMENDATION

It is my recommendation that:

There is probable cause to believe that Respondent violated Section 112.3148(8), Florida Statutes, by failing to report an honorary resort membership as a gift, but that the Commission take no further action.

Respectfully submitted this 1st day of August, 2012.


MELODY A. HADLEY
Advocate for the Florida Commission
on Ethics
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The Capitol, PL-01
Tallahassee, Florida 32399-1050
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