

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: JAMES L. MANFRE,

CASE NO.: 15-4877EC

Respondent.

RESPONDENT'S PROPOSED RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on December 2-3, 2015, in Tallahassee, Florida, before Suzanne Van Wyk, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

The Advocate: Elizabeth A. (Buff) Miller, Esquire
Assistant Attorney General
Chief Advocate, Commission on Ethics
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050

For Respondent: Linda Bond Edwards, Esquire
J. David Marsey, Esquire
Rumberger, Kirk & Caldwell, P.A.
215 South Monroe Street, Suite 702
Tallahassee, FL 32301

STATEMENT OF THE ISSUES

The issues are whether the Respondent misused his public position in violation of Section 112.313(6), Florida Statutes, and whether he failed to report a gift in violation of Section 112.3148(8), Florida Statutes.

PRELIMINARY STATEMENT

On or about May 27, 2014, the former Finance Director for Flagler County Sheriff's Office filed an ethics complaint against Sheriff James Manfre, alleging misconduct in office; a preliminary investigation followed. On July 29, 2015, the Commission on Ethics found probable

cause to believe the Respondent, as Sheriff of Flagler County, violated Section 112.313(6), Florida Statutes, by: (1) using Flagler County Sheriff's Office vehicles for out-of-state personal transportation, and (2) using a credit card issued and paid by the Flagler County Sheriff's Office to charge meals for non-employees and alcohol. The Commission also found probable cause to believe the Respondent violated Section 112.3148(8), Florida Statutes, for the failure to disclose a gift of lodging provided by Respondent's undersheriff. The Commission found no probable cause to believe the Respondent violated Section 112.313(6), Florida Statutes, by requesting and receiving a paycheck in advance of the normal pay date, as alleged in the Complaint, and therefore, this allegation was fully resolved in Respondent's favor and was not at issue in the hearing of this matter.

At the final hearing, the Advocate called the following witnesses: Julie Cobb Costas, Bo Schmitz, Fredrick Staly, Robert Malone and James Manfre¹ as live witnesses. Brian McMillian, Linda Tannuzzi and Brandy Hanwell appeared by telephone. Advocate's Exhibits 1 through 3, 5-9 and 11-23 were admitted in evidence.

At the final hearing, the Respondent testified on his own behalf. Respondent's Exhibits 8-10 were admitted in evidence.

Official recognition was taken of section 112.061, Florida Statutes.

The Transcript of the final hearing held on December 2-3, 2015, was filed on January 7, 2016. The parties agreed to file their proposed recommended orders within 10 days of the filing of the transcript. The parties' proposed recommended orders were timely filed and have been considered in the preparation of this Recommended Order.

¹ Respondent objected to the Advocate calling the Respondent in the case in chief because the Advocate did not take any steps to secure his availability to testify during the Advocate's case in chief.

FINDINGS OF FACT

1. Respondent served as Flagler County Sheriff from 2001 – 2005 and 2013 – present. (Joint Prehearing Stipulation).

2. Respondent is an attorney and was admitted to the New York Bar and the Florida Bar. (Joint Prehearing Stipulation).

3. Respondent is prohibited from practicing law during his tenure as Sheriff. (T. P. 530 L. 12).²

4. As Flagler County Sheriff, Respondent James L. Manfre is subject to Article II, Section 8, Florida Constitution, and also the requirements of Part III, Chapter 112, Florida Statutes, Code of Ethics from January 2013 to present. (Joint Prehearing Stipulation).

5. Respondent admits that he received 2.5 hours of Ethics training on Monday, December 3, 2013, at the Florida Sheriffs Institute training course. (Joint Prehearing Stipulation).

A. This training did not include examples about the operation of agency vehicles. (T. P. 46 L. 13-19).

B. This training did not include information on the use of agency credit cards (T. P. 46 L. 21 – P. 47 L.2; T. P. 530 L. 22).

C. The Sheriff did not receive any information at this training that put him on notice that the manner in which he was using the agency credit card was prohibited by any law

² The transcript of the final hearing on December 2 and 3, 2015, is in four printed volumes. Volume I contains pp. 1-151. Volume II contains pp. 152-301. Volume III contains pp. 302-435. Volume IV contains pp. 436-549. References to the transcript shall be in the following form: T. P. 530 L. 12 in which T refers to the transcript, P to the page number and L to the line number.

rule or policy and has found two municipalities' similar practices. (T. P. 530 L. 17-22; P. 531 L. 4-5).

D. There is no evidence this training included the definition of "private residence, how to value lodging received as a gift, or specific examples of gifts of lodging for the purpose of gift disclosure requirements. (T. P. 42 L. 12 – P. 43 L. 2; P. 55 L. 10-24; P. 47 L. 3-20).

6. Respondent admits that his travel from Destin to New Orleans did not include official public business. (Joint Prehearing Stipulation).

7. The Sheriff has reimbursed the agency for this trip in the amount of \$223.50 on July 9, 2014. (T. P. 105 L. 8-25).

8. Respondent admits that his travel to Pigeon Forge was not for the purpose of official public business. (Joint Prehearing Stipulation).

9. Respondent admits that his travel to Virginia was not for the purpose of official public business.

10. The Sheriff has reimbursed the agency for this trip in the amount of \$667.50 on October 17, 2013. (T. P. 104 L. 2-10).

11. Respondent reimbursed the agency for his private use of agency vehicles. (T. P. 516 L. 10).

12. Expenses incurred by a public official traveling to and from a vacation location are personal expenses. (Joint Prehearing Stipulation).

13. Respondent used the agency credit card to pay for meals at the Madhatter Restaurant in Washington, DC, while attending the memorial service at the National Law

Enforcement Memorial Service on May 14, 2013. The amount of the charge was \$235.76 (T. P. 76 L. 13-23).

14. The Flagler Sheriff's Office credit card usage guideline does not prohibit the use of the agency credit card to charge meals above the per diem rate and there is no evidence that anybody from the accounting department advised the Respondent that he should not charge meals above the per diem rate. (T. P. 129-130 L. 8).

15. The Respondent used the agency credit card to pay for meals for a non-agency employee and for alcoholic beverages at the Headwaters Lounge at the Rosen Hotels Shingle Creek Resort in Orlando while attending the National School Resource Officers conference on July 16, 2013. The Respondent reimbursed the agency for all of the alcoholic beverages and a bowl of soup on October 31, 2013. (T. P. 84 L. 13-25; T. P. 101 L. 14).

16. The Respondent used the agency credit card to make purchases for meals for non-agency employees and for alcoholic beverages at the Marriott Hotel in Marco Island while attending the Florida Sheriff's Association conference from August 3, 2013, through August 7, 2013. (T. P. 88 L. 17-25). All uses of the credit card were related to official travel involving conferences or other official business. (T. P. 528 L. 7-19).

17. When the Respondent visited Tallahassee on May 3-4, 2014, and stayed at the Sheraton Four Points, he presented his personal credit card and a charge of \$50.39 from the hotel's Juicy Blue restaurant was authorized on his personal credit card on May 4, 2014. According to the Four Points General Manager, it is likely due to a clerical error at the hotel that this same amount, \$50.39, was charged to the agency credit card instead of Respondent's personal card. (T. P. 172 L.3-20; T. P. 183 L. 3-24).

18. When the Respondent learned that the Sheraton hotel had incorrectly charged the \$50.39 to the agency credit card, he was upset and called the hotel to request that they charge his personal card as he requested. He was upset because he believed that he had complied with the policy by presenting his personal credit card to pay for these expenses. (T. P. 537 L. 7 – T. P. 538 L. 7).

19. There was no Flagler County Sheriff's Office Policy or Procedure that prohibits the use of agency credit card for alcoholic beverages or for food for non-employees. The agency credit card guidelines would not put any employee on notice that the credit card could not be used to purchase alcohol or food for non-employees. (T. P. 118 -119 L. 22).

20. When the Sheriff submitted signed credit card receipts to the accounting department for payment of credit card bills, he was abiding by the accounting department's procedure. (T. P. 125 L. 3-19).

21. The accounting department representative did not know which state statute applied to the proper use of the agency credit card or whether the Respondent received a copy of the internal guidelines. (T. P. 120 L. 4-14).

22. There is no evidence that the Sheriff failed to provide the accounting department with the information needed to support the payment of his credit card expenditures. (T. P. 126-127). Had the finance department asked him for any additional information regarding his expenses, he would have provided what they asked. (T. P. 546 L.8-14).

23. Following a public records request in October 2013, the accounting department contacted businesses to obtain itemized receipts for hotel and restaurant charges but the amounts had already been approved and paid by the accounting department. The accounting department

did not require an itemized receipts if they had a signed receipt or folio from the Respondent. (T. P. 140 L. 8-15).

24. During an annual audit, the Respondent learned that the finance director (also the complainant) was processing his travel reimbursement differently than all other employees. (T. P. 535 L. 14-25).

25. The Respondent did not ask for any special or different treatment of his expenses and did not engage in any conduct that he believed would lead the finance director to think that he wanted special treatment. (T. P. 536 L. 5-12).

26. After discovering through the annual audit that the finance department was not timely reviewing travel reimbursements, that there was not a policy regarding credit card use, the Respondent implemented a credit card policy that provided guidance to employees about allowable charges and the proper use of the agency credit card. (T. P. 546 L.1-7).

27. The Respondent expected the finance director to review his and any other employee's expenses in a timely manner and not pay invoices that lacked proper support and were not allowable under the statute. (T. P. 545 L. 2-14).

28. The Respondent used the credit card in the manner he believed was described by the finance director and never intended for the public to pay for any meals not allowed by statute. He always intended to pay the difference between the per diem and what he spent. (T. P. 529 L. 7 -23).

29. The Respondent did not ask the finance director for ethical advice or ethical obligations; he asked her a simple question, what is the credit card policy and how is the credit card used. The Respondent also acted on the advice of his general counsel regarding the use of the credit card. (T. P. 508 L. 25 – P. 510 L. 16).

30. There was no Flagler County Sheriff's Office Policy or Procedure that prohibited the use of unmarked agency vehicles for out-of-state travel. (T. P. 495 L. 16 – P. 497 L.8).

31. The Flagler County Sheriff's Office policy regarding the use of agency vehicles out of Flagler County did not apply to Respondent. (T. P. 350 L. 17).

32. The Staly cabin in Pigeon Forge, Tennessee, was reserved for Respondent from May 3-7, 2013. (T. P. 158 L.14).

33. Respondent did not use the cabin for more than two consecutive days. (T. P. 533 L.19).

34. Mr. Staly volunteered the use of his cabin to Respondent without expectation of anything in return. (T. P. 366 L.15-22).

35. The Staly cabin was located in a gated community that contained single-family residences and no apparent indicators that it was located in a commercial area. (T. P. 370 L.13 – P. 371 L.23).

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 & 120.57, Fla. Stat. (2011).

37. The Advocate has alleged that Sheriff Manfre violated Section 112.313(6), which provides:

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.

In order to establish a violation of Section 112.313(6), Florida Statutes, the following elements must be proven:

- 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 benefitting himself or another person from some act or omission which was inconsistent with the proper performance of public duties.

38. The Advocate has the burden to establish the allegations in the Administrative Complaint by clear and convincing evidence. *Dep't of Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996); *Latham v. Fla. Comm'n on Ethics*, 694 So. 2d 83 (Fla. 1st DCA 1997). In *Slomowitz v. Walker*, 429 So. 2d 797 (Fla. 4th DCA 1983), the court developed a working definition of "clear and convincing evidence" which has been adopted by the Florida Supreme Court in *In re Davey*, 645 So. 2d 398 (Fla. 1994). The court in *Slomowitz* stated:

[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.

39. The term "corruptly" is defined in section 112.312(6) 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.

40. In order to find Respondent acted with corrupt intent, the evidence must show that he was placed on reasonable notice that his conduct was inconsistent with the proper

performance of his public duties and would be a violation of the Code of Ethics. *Blackburn v. Commission on Ethics*, 589 So. 2d 431, 434 (Fla. 1st DCA 1991). Succinctly stated, there must be some evidence to establish Respondent had prior notice that his conduct violated the code of ethics: the statutory language of Section 112.313(6), standing alone, does not provide a legally sufficient basis for putting Respondent on notice that his specific conduct constituted an unethical practice under these circumstances. *See Id.*

41. There is no record evidence that Respondent was on notice that his use of agency vehicles and credit card violated the Code of Ethics. To the extent the record contains circumstantial evidence of constructive notice of the impropriety of Respondent's conduct – which is itself doubtful – the Advocate has not established by clear and convincing evidence that Sheriff Manfre acted with corrupt intent and, therefore, has failed to show he violated Section 112.313(6), Florida Statutes.

A. Improper Use of Agency Vehicles:

42. Respondent concedes he used his agency vehicle for personal travel, including personal trips out-of-state. Respondent explains his use under those circumstances because he is a 24-hour-a-day, seven-day-a-week constitutional officer, that he is always on duty, regardless of his physical location, he must remain available at all times, and that the public obtains a benefit by such use because he can return to the county more quickly in his agency vehicle. (T. P. 188 L. 23; P. 490 L. 11; P. 494 L. 3). There is no evidence refuting Respondent's contentions that he is required to be available at all times.

The Advocate has not identified any laws, rules, regulations or decisions to establish that the Respondent was on notice that his use of the agency vehicle under these circumstances was prohibited or that his stated justification is insufficient. Indeed, former Ethics Commission

Assistant General Counsel Costas testified that despite her years of experience as an ethics attorney, she was unaware of any law, rule, regulation or decision that specifically provides notice that a government employee cannot use an agency vehicle off duty and out-of-state for personal travel. (T. P. 52 L. 23 – P. 53 L. 3).³

Conversely, although unable to cite its specific provisions, Respondent testified that he relied upon Attorney General Opinion 74-384 in support of his vehicle use. It is well established that Attorney General Opinions are entitled to careful consideration and generally should be regarded as highly persuasive. *State of Florida v. Family Bank of Hallandale*, 623 So. 2d 474 (Fla. 1993) (referencing *Lowry v. Parole & Probation Comm'n*, 473 So. 2d 1248 (Fla. 1985); *Beverly v. Division of Beverage of Dept' of Business Regulation*, 282 So. 2d 657 (Fla. 1st DCA 1973)). Moreover, the official opinions of the Attorney General, the chief legal officer of the state, are guides for state executive and administrative officers in performing their official duties until superseded by judicial decisions. *State ex rel. Atlantic Coast Line R. Co. v. State Board of Equalizers*, 94 So. 681 (Fla. 1922). In that opinion, the Attorney General recognizes that the objective of providing a quicker response by off-duty sheriff's office personnel when called back to duty because of an emergency *may* constitute sufficient public purpose to justify the off-duty use of agency vehicles.

In an apparent effort to comply with the law, respondent conferred with legal counsel and followed his advice regarding the use of agency vehicles. (T. P. 509 L. 6 – P. 510 L. 16). Also particularly persuasive of the lack of reasonable notice to Respondent is his reliance on the advice from chief deputy (a/k/a Undersheriff) Staly. (T. P. 488 L. 12). Mr. Staly, with nearly 40

³ Ms. Costas was not offered as an expert and, therefore, I credit her learned testimony only to whether she had notice of the impropriety of the personal use of an agency vehicle while traveling out-of-state and not for an opinion on the propriety of Respondent's conduct.

years of law enforcement experience – including being an undersheriff in two different administrations – previously told Respondent that his former Sheriff used his agency vehicle to travel out of state, and had no concerns about Respondent’s first use of the agency vehicle for out-of-state personal travel. (T. P. 352 L. 23; P. 352 L. 24 – P. 353 L. 17).

Based on the totality of evidence, there is insufficient evidence to establish by clear and convincing evidence that Respondent acted with corrupt intent with regard to the use of Flagler County Sheriff’s Office vehicles.

B. Improper Use of Agency Credit Card:

43. As with the use of the agency vehicle, the Respondent admits to use of the agency credit card to purchase food and alcohol for non-employees as alleged and reimbursed the agency for any amount above the per diem he was entitled to.

44. However the Advocate has failed to come forward, as she must, with clear and convincing evidence that he did so with corrupt intent. The Respondent relied on the information he received from the finance director to properly advise him of the use of the agency credit card and believed that he was following her specific directions. He also sought advice from the general counsel on the use of the credit card. The seeking of information is hardly the actions of one seeking to obtain a special benefit for himself.

45. While the Respondent also admits that he knew he was over the per diem amount for some of the food purchases, he expected the finance director to advise him of any amount due. Importantly, he expected the finance director not to pay any invoice for any item that was not properly supported.

46. Even if the finance department used an internal credit card guidance and some undefined and unidentified “state statute” when processing travel expenditures, there is no

evidence that the Respondent was on notice of the internal guidance or what “state statute” the accounting department used.

As with the use of the agency vehicle, based on the totality of evidence, there is insufficient evidence to establish by clear and convincing evidence that Respondent acted with corrupt intent with regard to the use of Flagler County Sheriff’s Office credit card.

C. Failure to Properly Report a Gift:

47. The Advocate has also alleged that Sheriff Manfre violated Section 112.3148(8), Florida Statutes, which provides in pertinent part:

Each reporting individual or procurement employee shall file a statement with the Commission on Ethics not later than 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.

(emphasis added). The value of a gift providing lodging on consecutive days shall be considered a single gift. §112.3148(7)(e), Florida Statutes. A gift of lodging in a private residence shall be valued at the statutory per diem rate of \$44.00 per day. *Id.*; *see also* §112.061, Florida Statutes. A “private residence” for the purpose of gift disclosures is not defined by statute, rule or regulation. (T. P. 43 L. 5-13). For the purposes of valuation of a gift, it is the donor, not the recipient who is responsible for setting the value of the gift. (T. P. 37 L. 16 – P. 38 L. 1).

48. Respondent concedes he initially failed to disclose his use of Undersheriff Staly’s cabin; however, he explains that he initially failed to do so because his research and the advice of his counsel, identified the cabin constituted a “private residence,” and therefore, its value fell below the reporting threshold. (T. P. 532 L. 6 – P. 534 L. 2). There is no record evidence refuting Respondent’s contentions that he researched the definition of “private residence” or that he consulted with counsel prior to determining whether the use of the cabin was a reportable gift.

49. The Advocate has not identified any laws, rules, regulations or decisions to mandate the valuation of the lodging in a specific manner or to refute the manner in which Respondent – or Mr. Staly – valued the property. The Advocate’s own witness, Julia Costas, was unaware of any specific source providing notice of what the definition of a “private residence” is for disclosure purposes. (T. P. 44 L. 7). Mr. Staly clearly had the authority and ability to establish the value of the lodging for those, like Respondent, whom he chose to allow to stay at his property under an owner’s block. (T. P. 374 L. 17). Mr. Staly valued the lodging provided to Respondent at the \$75.00 cleaning fee. (T. P. 278 L. 5). After attending an ethics seminar covering this very issue, Respondent re-visited the need to disclose the lodging, ultimately filing the disclosure. Even Mr. Staly, a candidate for the office Respondent now holds, conceded Respondent intended to comply with the disclosure requirements. (T. P. 378 L. 1).

50. There is no record evidence that Respondent was on notice that his use of the cabin under these circumstances was valued over \$100, thus requiring disclosure. To the extent the record contains circumstantial evidence of a dispute on what constitutes a “private residence” for valuation purposes, such a dispute – considering the lack of clear definition – is insufficient to establish Respondent’s violation by clear and convincing evidence and, therefore, fails to establish a violation of Section 112.3148(8), Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Ethics enter a final order and public report finding that Sheriff Manfre did not violate Sections 112.313(6) or 112.3148(8), Florida Statutes and dismissing the complaint against him.

DONE AND ENTERED this ___ day of _____, 2016, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 19, 2016, I electronically filed the foregoing with the Division of Administrative Hearings by using the eALJ electronic filing system which will send a notice of electronic filing to the following: Elizabeth A. Miller, Esquire, at Elizabeth.Miller@myfloridalegal.com (Advocate for the Florida Commission on Ethics).

/ s / Linda Bond Edwards

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