

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: JAMES L. MANFRE,
Respondent.

Case No. 15-4877EC

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RECOMMENDED ORDER

A final hearing was conducted in this case on December 2 and 3, 2015, in Tallahassee, Florida, before Suzanne Van Wyk, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Advocate: Elizabeth A. Miller, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

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

STATEMENT OF THE ISSUES

Whether Respondent violated section 112.313(6), Florida Statutes (2013),^{1/} by corruptly using his position as Sheriff of Flagler County to obtain a benefit for himself or others; or section 112.3148(8), by failing to report a gift valued in excess of \$100.00; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On July 25, 2015, the Florida Commission on Ethics (Commission) issued an Order Finding Probable Cause to believe that Respondent, James L. Manfre, as Sheriff of Flagler County, Florida, violated sections 112.313(6) and 112.3148(8), Florida Statutes. The Commission forwarded the case to the Division of Administrative Hearings on September 1, 2015.

The case was assigned to the undersigned, who entered a Notice of Hearing scheduling the final hearing for December 2 and 4, 2015. The hearing commenced as scheduled, but was completed on December 3, rather than December 4, 2015.

At hearing, the Advocate offered the testimony^{2/} of Julia Cobb Costas, Linda Tannuzzi, Frederick Justin Staly, Brandy Hanwell, Timothy Bo Schmitz, Brian McMillan, Debra Lynn Staly, Robert Malone, and Respondent. Advocate's Exhibits 1 through 3, 5 through 21, and 23 were admitted into evidence. Respondent testified on his own behalf and Respondent's Exhibits 6 through 9 were admitted into evidence.

A four-volume Transcript of the proceedings was filed on January 7, 2015. The parties timely filed their Proposed Recommended Orders which have been duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent, James L. Manfre, served as Flagler County Sheriff from January 2001 through January 2005 (Respondent's first term). Respondent was re-elected Sheriff in 2012 and began his second term on January 8, 2013.

2. Respondent is a member of the Florida Bar. Between his first and second terms, Respondent was engaged in the private practice of law, with a primary focus on land use matters.

3. While in private practice, Respondent represented two clients involved in cases with the Florida Ethics Commission. One client was a complainant who alleged misuse of position by a public official.

4. Former Undersheriff, Frederick Staly, served as Flagler County Undersheriff with Respondent from January 2013 to April 17, 2015.

5. Respondent chose Staly as Undersheriff, in part, because he had almost 40 years' experience in law enforcement, and had most recently served as Undersheriff in Orange County, Florida.

6. Undersheriff Staly advised Respondent on matters pertaining to policy and personnel decisions.

7. In December 2012, just prior to Respondent's second term, Respondent and Undersheriff Staly attended a one-day ethics training seminar for new law enforcement personnel.

8. Linda Tannuzzi has been employed by the Flagler County Sheriff's Office (FCSO) since 2001. Ms. Tannuzzi was Accounting Specialist in the FCSO Finance Department during both Respondent's first and second terms. Ms. Tannuzzi's responsibilities included processing the monthly FCSO credit card bill for payment.

9. Ms. Tannuzzi's general practice was to check the listed charges on the monthly FCSO credit card statement against the receipts submitted by employees. In the event no receipt was submitted, Ms. Tannuzzi would obtain missing receipts from either the employee or the vendor (e.g., hotel at which employee stayed).

10. The practice of the Finance Department was to pay all credit card charges accompanied by a signed receipt from the employee.

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."

12. Further, the policy advised:

Using an agency credit card during an ongoing investigation requires the following be adhered to:

Food only in amount specified by per diem rate, must include overnight stay.

No cash advances.

No car rentals without approval of Sheriff.

Travel voucher to be completed upon return.

Receipts to be attached to travel voucher.
(emphasis added).

This portion of the policy did not clearly apply to use of the agency credit card outside of ongoing investigations.

13. Respondent was issued an FCSO credit card for use during both his first and second terms.

14. Ms. Tannuzzi never questioned any receipt submitted by Respondent until October 2013. She assumed all Respondent's receipts were valid. However, no one instructed her to process Respondent's credit card charges differently from other employees.

15. Pursuant to section 112.061, at all times relevant hereto, state employees were allowed the following amounts for meals while traveling on business overnight: breakfast, \$6; lunch, \$11; and dinner, \$19. These amounts are referred to as the per diem rates.

16. Respondent was subject to section 112.061 at all times relevant hereto.

Use of Agency Credit Card

17. In May 2013, Respondent attended a National Law Enforcement conference in Washington, D.C. On May 14, 2013, Respondent dined at a restaurant called the "Madhatter" with his wife, as well as some sheriff's deputies and their spouses. The total bill for the meal was \$235.76, which Respondent paid for with the FCSO credit card. The tab included one alcoholic beverage.

18. Upon returning from the conference, Respondent submitted the signed receipt to Finance for processing.

19. Other than the meals for FCSO employees, the purchase did not serve a public purpose.

20. Each of the meals for FCSO employees exceeded the per diem rate.

21. In July 2013, Respondent attended the National Association of School Resource Officers conference in Orlando and stayed at the Rosen Shingle Creek hotel. On July 16, 2014, Respondent dined with his wife at an onsite restaurant. Respondent charged the total bill of \$86.50, which included alcohol, to his room at the hotel.

22. With the exception of Respondent's meal, the purchase did not serve any public purpose.

23. The cost of Respondent's meal exceeded the per diem rate.

24. Upon his return, Respondent submitted his receipt from the Rosen Shingle Creek hotel to Finance for processing.

25. In August 2013, Respondent attended the Florida Sheriff's Association conference in Marco Island, Florida, and stayed at a Marriott hotel. Respondent made the following room charges during his stay: On August 3, 2013, meals for himself, Undersheriff Staly, and their wives, including alcohol, totaling \$158.50, and, separately, two alcoholic beverages totaling \$12.46; on August 4, 2013, two meals and alcohol, totaling \$62.21; and on August 7, 2013, two meals totaling \$54.58.

26. Upon his return, Respondent submitted the Marriott hotel receipt to Finance for processing.

27. Other than Respondent's and Undersheriff Staly's meals, the purchases did not serve any public purpose.

28. The amount for each of Respondent's meals exceeded the per diem rate.

Public Records Request/FCSO Audit

29. In October 2013, the independent accounting firm of Carr, Riggs, and Igram began a routine financial audit of the FCSO for the fiscal year ending September 30, 2013.

30. Also in October 2013, the FCSO received a public records request, or requests, seeking information from the FCSO pertaining to Respondent's travel expenditures. In order to fully respond to the public records request(s), Ms. Tannuzzi had

to obtain a detailed receipt of Respondent's Madhatter restaurant charges from May 2013, and detailed receipts of Respondent's restaurant and bar charges, which were reflected as room charges on the July and August 2013 hotel receipts.

31. In mid-October 2013, Respondent had a meeting with Undersheriff Staly, the FCSO Director of Finance, and the FCSO attorney. The purpose of the meeting was to discuss charges Respondent made with the FCSO credit card.

32. During that meeting, Respondent was advised to reimburse FCSO for all non-agency personnel meal charges and his meal charges exceeding the approved per diem rate. The Finance Director was instructed to calculate the amounts owed by Respondent.

33. On October 31, 2013, Respondent reimbursed FCSO \$344.03 for "personal meals" charged to the FCSO account.

34. At hearing, Respondent maintained that his staff, mainly his Undersheriff and Finance Director, had the duty to inform and advise him of his obligations with respect to use of the FCSO credit card, and that they failed to perform that duty. Thus, Respondent pled ignorance as to the appropriate use of the agency credit card, and argued that when the issues were brought to his attention, he reimbursed the amounts owed and instituted new policies to provide clear guidance to all FCSO personnel.

35. Respondent assumed no responsibility for, and was neither contrite nor apologetic for, his use of the agency credit card. Respondent assigned fault to the Director of Finance for not keeping accurate accounts and "keeping track of these amounts and [telling] me if I was over the per diem rate." Respondent's attitude was best reflected in his own words:

I assumed and trusted that she knew what she was doing and would come to me when the money was owed. That was my assumption, that she was competent to do that. It was simple addition and subtraction that all she had to do was tell me what it was. I never refused to pay back any amounts when I was asked to. It is not my job to be the director of finance. My job was to be a sheriff and create a community that is safe, and I assumed that she was doing her job. Unfortunately, to my detriment, she was not.

36. Respondent admitted that he knew the charges exceeded the per diem rate for meals. Apparently, he did not intend to pay for them unless requested.

Use of Agency Vehicles

37. In January 2013, Respondent drove an FCSO unmarked Ford Crown Victoria to Destin, Florida, to attend a Florida Sheriff's Association conference. Respondent's wife accompanied him to the conference. When the conference ended, Respondent drove the FCSO vehicle to visit his in-laws in Pensacola, Florida, then on to New Orleans for a personal trip.

38. On May 3, 2013, Respondent drove an FCSO white Dodge Charger to Pigeon Forge, Tennessee, for a vacation with his wife.

39. Respondent returned to Florida from Pigeon Forge on May 7, 2013.

40. In August 2013, Respondent drove an FCSO white Dodge Charger to Virginia to view colleges with his son. During the trip, the vehicle suffered minor damage in a parking lot.

41. Upon Respondent's return from Virginia, Undersheriff Staly observed Respondent, along with the owner of a local body shop, in the parking lot inspecting the vehicle. Undersheriff Staly inquired whether there was anything wrong with the vehicle.

42. In response to Undersheriff Staly's inquiry, Respondent disclosed what had transpired. Respondent indicated that the accident did not occur in Flagler County, which Respondent knew to be "a problem."

43. Respondent consulted with Undersheriff Staly regarding the procedure to deal with the minor damage to the vehicle. Staly recommended Respondent write an internal report.

44. With respect to damage to FCSO vehicles, the policy in effect at the time required officers to document damage on an incident report and report it to the Division Director through the chain of command.

45. Respondent did not file a report pursuant to either the policy or Undersheriff Staly's advice.

46. The policy also required all officers to report vehicle damage to Fleet Maintenance. Respondent did report the damage to Fleet Maintenance.

47. Respondent released a statement (in response to press inquiries about damage to the vehicle) explaining that he did not take his personal vehicle on this trip because it had a mechanical problem. Respondent testified at final hearing that his personal vehicle had a mechanical problem.

48. At all times relevant hereto, FCSO maintained a policy on use and assignment of agency vehicles, Policy 41.3.

49. Policy 41.3 stated, "Agency vehicles are assigned by Division Directors to individual member's [sic] based on the criteria of their job performance."

50. There is no Division Director with respect to Respondent.

51. Under Use of Vehicles, Policy 41.3 states, "The Sheriff allows personnel who have been assigned an Agency vehicle use of that vehicle while off duty with the following provisions[.]" The policy requires officers to obtain permission from their supervisor in order to take an FCSO vehicle out of the county.

52. Respondent has no supervisor.

53. Respondent's position is that Policy 41.3 applied only to use of marked vehicles.

54. On October 17, 2013, Respondent reimbursed FCSO \$667 for use of the agency vehicle for personal travel to Pigeon Forge, Tennessee.

55. Use of the agency vehicle for the trip to Virginia was publicly questioned in 2014. At that time, Respondent was advised by Undersheriff Staly to reimburse FCSO for the mileage. However, Respondent asked Staly to follow up with an attorney for the Florida Sheriff's Association (which he did), who provided the same advice.

56. Respondent reimbursed FCSO for use of the agency vehicle to Virginia on July 10, 2014, when he issued a check for \$223.50. At final hearing, Respondent maintained that reimbursement was not necessary and was only made "in an abundance of caution on the advice of counsel."

Unreported Gift

57. Respondent's stay in Pigeon Forge, Tennessee, in May 2013, was courtesy of Undersheriff Staly. Staly owns three cabins in a private vacation resort in Pigeon Forge. The resort has a gated entrance, and just inside the entrance is a management office where guests check in. The resort includes amenities such as a playground, a miniature golf course, and a clubhouse.

58. Undersheriff Staly pays commercial property insurance, and pays for utilities and cable television at a commercial rate. He also pays tangible personal property tax.

59. Undersheriff Staly contracts with "Accommodations by Parkside," a vacation rental management company, to manage the cabins. He pays a management fee to Accommodations by Parkside for each rental booking. Undersheriff Staly must reserve the cabins for his personal use through Accommodations by Parkside. He does not have direct access to any of the cabins.

60. Undersheriff Staly reserved one of the cabins, "Suite Mountain View," for Respondent to use from May 3 through May 7, 2013. The particular cabin usually rents for \$430 per night during the applicable season. Undersheriff Staly offered Respondent use of the cabin for the cleaning fee of \$75.

61. The décor at Suite Mountain View does not include any family photographs or other items personal to the Stalys.

62. Respondent paid Accommodations by Parkside \$90.20 for use of the cabin during the specified dates, which included the cleaning fee and sales tax.

63. Constitutional officers are required to file with the Florida Commission on Ethics a Form 9 Quarterly Gift Disclosure for quarters ending in March, June, September, and December of each year. Respondent did not report any gift on Form 9 for the quarter ending June 2013.

64. Sometime in October 2013, Respondent participated in a conference call hosted by the Florida Sheriff's Association covering a variety of ethics topics.

65. Following the conference call, Respondent remarked to Undersheriff Staly, "I think I may have a problem with your cabin," and stated something to the effect of "I think I was supposed to report it."

66. Staly advised Respondent to report it and informed Respondent the cabin rented for \$430 per night.

67. On a separate date, Respondent again discussed with Undersheriff Staly reporting use of the cabin as a gift. At that time, Respondent stated he was going to report it at a value of \$44 per night. Undersheriff Staly advised against that method of valuing the cabin. Respondent's response was something to the effect of "forty-four dollars sounds better than the \$430, or a \$1,200 gift."

68. On May 27, 2014, seven months after Respondent verbally questioned whether he should report use of the cabin as a gift, Respondent filed a Form 9 Quarterly Gift Disclosure on which he reported use of the cabin as a gift received from Undersheriff Staly May 3 through May 5, 2013, at a monetary value of \$132.00, calculated based on a rate of \$44 per night.

69. On December 16, 2013, Carr, Riggs, and Ingram released its Auditor's Report of FCSO for fiscal year ending October 2013. Of note, the report found that "certain expenditures charged to the Office's credit card were not in accordance with allowable travel costs under Section 112.061."

70. In response to the public attention focused on Respondent's use of the FCSO credit card and agency vehicles, Respondent instituted new FCSO policies in 2014.

71. FCSO General Order 152, which took effect on January 10, 2014, prohibited non-authorized use of agency credit cards, and listed authorized and unauthorized charges. The policy defined "food and restaurant purchases" as unauthorized, as well as "alcohol, unless approved by a Senior Commander or designee for an operational necessity."

72. FCSO General Order 046, which took effect April 4, 2014, prohibited driving agency vehicles out of state while off-duty, unless on official business with prior approval.

73. In May 2014, Respondent attended a Law Enforcement Officers' Memorial service in Tallahassee, Florida, and stayed at the Four Points Sheraton hotel. During his stay, Respondent charged drinks at the bar and two breakfast buffets to his room.

74. When Respondent checked out of the hotel on May 5, 2014, Respondent presented his personal credit card for the incidentals. The hotel clerk "swiped" Respondent's credit card,

which was approved for a charge of \$50.39, the total of Respondent's bar and restaurant charges to his room. Respondent received from the hotel clerk a receipt showing charges for his room and tax only.

75. Due to a clerical error at the hotel, the FCSO credit card was billed for Respondent's incidentals, as well as his lodging.

76. The error was discovered later that same month when the FCSO credit card bill was processed. The \$50.39 charge for incidentals was correctly transferred to Respondent's personal credit card on May 27, 2014.

CONCLUSIONS OF LAW

77. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. See § 120.57(1), Fla. Stat. (2015).

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

79. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue in the proceedings. Dep't of Transp. v. J.W.C. Co.,

396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977). In this proceeding, the Commission, through its Advocate, is asserting the affirmative: (1) that Respondent violated section 112.313(6) by misusing his position to attempt to secure a benefit for himself or others; and (2) that Respondent violated section 112.3148(8) by failing to report a gift as defined therein.

80. Commission proceedings which seek recommended penalties against a public officer or employee require proof of the alleged violation(s) by clear and convincing evidence. See Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997).

81. As noted by the Supreme Court of Florida:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and 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: Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

82. Section 112.313(6) 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.

83. The term "corruptly" is defined by section 112.312(9) as follows:

(9) "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.

I. Misuse of Position

84. The Order Finding Probable Cause alleges that there is 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 travel" and "[2] by using a credit card issued and paid by the Flagler County Sheriff's Office to charge meals for non-employees and alcohol."

85. In order to establish a violation of section 112.313(6), the Advocate must establish that: 1) the Respondent is or was a public officer or employee; 2) Respondent used or attempted to use his or her official position or any property or resources within his trust; 3) Respondent's actions

were taken in order to secure a special benefit for himself or for others; and 4) Respondent's actions were taken corruptly.

86. In this case, it is clear that Respondent, as Sheriff of Flagler County, is a public officer and was a public officer at the time of the alleged incidents in this case.

a. Use of FCSO Vehicles

87. Respondent used public resources (FCSO vehicles) within his trust on three separate occasions: the trips to New Orleans, Virginia, and Pigeon Forge.

88. Respondent used those resources to obtain a special benefit for himself--avoiding either the mileage and wear and tear on his personal vehicle or the expense of a rental vehicle.

89. 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).

90. The evidence did not prove clearly and convincingly that Respondent's use of the vehicles was undertaken corruptly. The FCSO policy on use of agency vehicles, with which Respondent was familiar, did not clearly apply to his use of unmarked vehicles. Respondent had no supervisor from whom to request

permission for out-of-county use of the vehicles, or with whom to file an incident report on vehicle damage. The policy required all officers to report vehicle damage to Fleet Maintenance, which Respondent did. Respondent's interpretation of the policy as inapplicable to his position is neither unreasonable nor tortured.

91. There was no evidence that Respondent used the agency vehicles differently in his second term than in his first, differently from the prior Sheriff, or that he departed from any accepted practice. Respondent's comment that he knew the fact that the vehicle had suffered damage out of the county "to be a problem" is insufficient to prove that Respondent had reasonable notice that use of the vehicle for out-of-state personal travel was prohibited.

92. Based on the totality of the evidence, the Advocate did not prove by clear and convincing evidence that Respondent acted with corrupt intent with regard to use of the FCSO vehicles.

b. Use of Agency Credit Card

93. Respondent did use public resources, in the form of credit, when he utilized the FCSO credit card to pay the final bill at hotels in Washington, D.C., Marco Island, and Orlando, Florida.

94. Use of the FCSO credit card obviously allowed Respondent to obtain a special benefit to himself and others--namely, meals exceeding the per diem allowance and meals for non-agency employees.

95. By his own admission, Respondent was on notice that the amounts charged exceeded the per diem rates established by Florida law. Respondent's claim that the FCSO had no policy regarding the use of the agency credit card was unpersuasive. Even if it were true that the agency had no such policy, Respondent knew that obtaining meals at a cost exceeding per diem rates was inconsistent with his public duties as Sheriff. Yet, Respondent had no intent to reimburse the charged amounts exceeding the per diem rate, or the amounts paid for non-agency employees, unless and until requested by the Finance Department. Respondent's cavalier attitude belied his alleged lack of notice.

96. The totality of the evidence proved, clearly and convincingly, that Respondent acted with reasonable notice that his conduct was inconsistent with the proper performance of his public duties. There was no legitimate public purpose for charging meals exceeding the per diem rate, and meals for non-agency employees, at the Madhatter Restaurant in Washington, D.C., on May 14, 2013; or allowing the final hotel bill to be charged to the FCSO credit card at the Rosen Shingle

Creek in Orlando, Florida, on July 7, 2013, and at the Marriott in Marco Island on August 3, 2013, when those bills included meals exceeding per diem rates and meals for non-agency employees.

97. The facts do not support a finding that Respondent misused his position when he charged meals and alcohol to the room at the Four Points Sheraton Hotel in Tallahassee on May 5, 2014. The evidence was clear that Respondent intended to settle the incidental charges at checkout to his personal credit card, but that due to clerical error, they were charged to the FCSO.

II. Failure to Report a Gift

98. Section 112.3148(8) requires certain public officials, including Respondent, to report to the Commission on Ethics all gifts "he or she believes to be in excess of \$100 in value." The report is to be made on CE Form 9, and filed at the end of each calendar quarter (March, June, September, and December) for the previous calendar quarter.

99. Respondent violated section 112.3148(8) by failing to timely report use of Undersheriff Staly's cabin as a gift he believed to be valued at more than \$100, and for which he did not compensate the donor within 90 days. Respondent also underreported the value of the gift.

100. Section 112.312(12) (a) defines the use of real property as a "gift" for purposes of ethics in government and

financial disclosure requirements when paid or given to another for the donee for which equal or greater consideration is not given within 90 days. See also CEO 96-21 (Fla. Comm'n On Ethics Sept. 3, 1996) (advising that use of Westgate Vacation Villas by donee at no cost constituted a gift under the Florida Ethics Code).

101. Section 112.3148(7) provides that the value of a gift "shall be determined using actual cost to the donor, less taxes and gratuities[.]" Florida Administrative Code Rule 34-13.500 provides that "[w]here 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 terms or services[.]"

102. The record does not establish the exact actual cost to Undersheriff Staly of providing "Suite Mountain View" to Respondent on the dates in question, but the cost was easily more than \$132, the value reported by Respondent. Undersheriff Staly incurred costs such as the management fee, utilities, cable service, insurance, and taxes. Undersheriff Staly, as the donor, also incurred some costs associated with the inability to rent the cabin to paying vacationers at the customary rate of \$430 per night. The only cost paid by Respondent was the cleaning fee.

103. When Respondent did report the gift (at least eight months late), Respondent reported the value of the gift at \$132, based on a rate of \$44 per night as a private residence.

104. Section 112.3148(7)(e) provides, in pertinent part, “[l]odging 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)” or \$44 per night.

105. The Ethics Code does not define “private residence.” Neither Commission on Ethics advisory opinions nor administrative orders provide authority on the issue. The only prior construction of this statutory term located by the undersigned,^{3/} was Commission on Ethics’ opinion CEO 96-21. That opinion advised that accommodations at Westgate Vacation Villas “do not appear to be private residences[.]” However, the advisory opinion provides little in the way of details regarding Westgate Vacation Villas.

106. Based on the totality of the evidence, the undersigned concludes that the rental cabin used by Respondent was not Undersheriff Staly’s private residence. Undersheriff Staly had no homestead protection on the property, paid commercial insurance and for commercial utilities, had no direct access to the cabin, contracted with a management company to manage the property, and was required to reserve the cabin for his personal use through the management company. Further,

upon entering the resort, guests must check in at a management office.

107. Furthermore, at the time Respondent chose to report the value of the gift at \$44 per night, rather than \$430, as advised by Undersheriff Staly, he did so because "forty-four dollars sounds better than the \$430, or a \$1,200 gift." This admission by Respondent, which was unrefuted at the final hearing, belies Respondent's belief that the cabin was a personal residence on the date he reported its use.

108. Section 112.3148(7)(e) provides that "[l]odging provided on consecutive days shall be considered a single gift."

109. At the final hearing, Respondent alternatively argued that his use of Undersheriff Staly's cabin was not a reportable gift, thus he did not violate section 112.3148. By way of explanation, Respondent stated that he and his wife did not stay at the cabin on any two consecutive nights, but that "we left one day and came back again[.]"

110. Under this newly-contrived theory, Respondent's stay at the cabin would not be a reportable gift because each non-consecutive night would be a separate gift, pursuant to section 112.3148(7), valued at \$44 per night, well under the reporting threshold. Respondent's theory is, again, contingent upon the cabin being a private residence.

111. Respondent's explanation was simply not credible. He provided no details as to which nights between May 3 and May 7, 2013, Respondent and his wife stayed in the cabin, or where they stayed when they were not in the cabin. Further, the disclosure form, which Respondent signed, under oath, indicated Respondent stayed three consecutive nights—May 3 to May 6, 2013.

112. In the end, Respondent claimed that he filed the Form 9 on May 27, 2014, only "because it became an issue" and "in an abundance of caution." Apparently, not even Respondent believed the disclosure that he made under oath was accurate.

113. Based on the totality of the evidence, the Advocate proved, clearly and convincingly, that Respondent violated section 112.3148 by failing to timely report a gift he believed to be valued in excess of \$100.

III. Penalty

114. The penalties applicable to a public officer who violates the Code of Ethics include impeachment, removal from office, suspension from office, public censure and reprimand, forfeiture of no more than one-third of his or her salary for no more than 12 months, a 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.

115. In this case, the Advocate seeks a civil penalty of \$8,000 for each violation of section 112.313(6), Misuse of

Office, and a \$3,000 penalty for a violation of section 112.3148(8), along with public censure and reprimand.

116. 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.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Commission enter a final order finding that Respondent, James L. Manfre, violated section 112.313(6), Florida Statutes, in his use of the agency credit card; and section 112.3148, Florida Statutes, by failing to report a gift; and imposing a total civil penalty of \$6,200, and subjecting Respondent to public censure and reprimand.

DONE AND ENTERED this 16th day of February, 2016, in
Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of February, 2016.

ENDNOTES

^{1/} Except as otherwise provided herein, all references to the Florida Statutes are to the 2013 version. While the 2012 version was in effect on some of the dates on which Respondent's conduct was at issue, there was no substantive change to the relevant sections of the Florida Ethics Code during the 2013 legislative session.

^{2/} The testimony of most of the witnesses was offered jointly by the parties.

^{3/} Neither party cited any relevant authority construing "personal residence" under the Florida Ethics Code in their Proposed Recommended Orders.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.