

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: BRICE HARRIS,) Case No. 10-2798EC
)
Respondent.)
)
_____)

RECOMMENDED ORDER

Pursuant to Notice, a final hearing in this matter was conducted before Administrative Law Judge Diane Cleavinger, Division of Administrative Hearings, on October 24, 2010, in Pensacola, Florida, and October 26, 2010, in Tallahassee, Florida.

APPEARANCES

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

For Respondent: Donald C. Holmes, Esquire
110 Mill Street
Greensboro, Maryland 21639

STATEMENT OF THE ISSUE

The issue in this proceeding is whether Respondent violated section 112.3185(3), Florida Statutes.

PRELIMINARY STATEMENT

On March 3, 2010, the Florida Commission on Ethics issued an Order finding probable cause that Respondent, Dr. Brice Harris, as a former employee of the Governor's Office of Tourism, Trade

and Economic Development (OTTED), violated section 112.3185(3), Florida Statutes. Specifically, the Commission alleged that, after his employment with OTTED, Respondent violated section 112.3185(3) by holding employment or a contractual relationship with the Andrews Research and Education Institute (Andrews or AREI), in connection with a state contract in which he had allegedly participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation, while an agency employee. Respondent disputed the Commission's allegations and requested a formal administrative hearing. The matter was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner presented the testimony of seven witnesses and offered 40 exhibits into evidence. Respondent testified in his own behalf and presented the testimony of five witnesses. Additionally, Respondent offered 15 exhibits into evidence. All exhibits were admitted into evidence except for Respondent's Exhibit 11, which was not admitted into evidence.

After the hearing, Petitioner filed its Proposed Recommended Order on February 28, 2011. Respondent filed his Proposed Recommended Order on February 22, 2011.

FINDINGS OF FACT

1. The Office of Tourism, Trade and Economic Development (OTTED), is located within the Executive Office of the Governor and is part of that agency. It is headed by an Executive Director.

2. OTTED assists the Governor, Lieutenant Governor, and Legislature in developing policies and strategies designed to provide economic opportunities in Florida, as well as, promote an economic climate in which Florida's businesses can be competitive and productive. Such assistance includes grants to a variety of organizations. These grants are implemented through public/private partnerships for which OTTED provides oversight.

3. Currently, OTTED oversees the activities of seven public/private partnerships which serve to increase trade, job creation, and critical industry development in Florida. Two of the public/private partnerships with which OTTED works are Enterprise Florida, Inc. (Enterprise Florida) and Space Florida, Inc. (Space Florida)

4. Enterprise Florida was created as a nonprofit corporation by chapter 228, Florida Statutes, and serves as Florida's primary organization devoted to statewide economic development. Its mission is to diversify Florida's economy and create better paying jobs for its citizens by supporting,

attracting and helping to create globally competitive businesses. Such assistance includes monetary support through grants where Enterprise Florida acts as a pass-through funding entity for organizations.

5. Enterprise Florida is governed by a Board of Directors chaired by the Governor. The membership of the Board of Directors is statutorily prescribed and consists of certain state officials or individuals who have been appointed by various governmental officials. By statute, Enterprise Florida is not a state agency.

6. Space Florida is an independent special district of the State of Florida, created by chapter 331, Part II, Florida Statutes. Like Enterprise Florida, it is not a state agency.

7. Space Florida was created for the purpose of fostering the growth and economic development of the space industry in Florida. As such, Space Florida fosters economic development activities and projects to expand and diversify domestic and international opportunities related to the space industry. Towards that end, Space Florida supports, assists, facilitates and/or consults on space-industry-related needs with governments and private businesses that work toward developing specific projects or components of the space industry, including the development of a space tourism industry. Space Florida's

assistance and support includes monetary support, through grants or loans, for space related development.

8. Respondent, Brice Harris, holds a Ph.D. in Politics and International Relations. On July 9, 2007, he was hired by OTTED as an Economic Development Representative II. His salary was \$70,000 a year. He voluntarily left that position on August 15, 2008. During his tenure, he was considered a good employee who was passionately intense about his duties and very knowledgeable about the projects to which he was assigned.

9. In the beginning of Respondent's employment, Keisha Rice, who was then acting Director of OTTED, served as Respondent's direct supervisor until around October 2007. At that time, Dr. Dale Brill was appointed as the Director of OTTED.

10. Respondent's unofficial title during his employment was Defense and Space Coordinator. His primary duties at OTTED were to coordinate various military and aerospace-related economic development activities in which the Governor's office had an interest. He also was responsible for developing and maintaining good working relationships between the Governor's office and the senior officers of several federal military installations and Unified Combatant Commands located throughout Florida. Respondent had similar responsibilities with respect to representatives and employees of numerous state agencies,

public-private partnership organizations, and private companies, as well as business and community leaders throughout the state. As such, Respondent was required to stay current on a variety of economic opportunities in the military and aerospace fields. His duties required that he communicate with numerous individuals in connection with the various military and aerospace-related economic development activities in which OTTED was involved and included attending conferences and seminars in those fields. Indeed, Respondent's primary function at OTTED was to serve as a knowledge base and contact point for his supervisors at OTTED and other public and private military and aerospace officials who were interested in doing business in those areas. Respondent's duties at OTTED did not encompass any statutory or delegated authority for decision, approval, disapproval, or investigation with respect to any contract under consideration by OTTED, or by or on behalf of any other entity that worked with OTTED. To the extent Respondent had any advising capacity, such capacity was limited to passing along information about programs and funds to others.

11. In addition, from July 9, 2007, to late January or early February, 2008, Respondent served as a "contract manager" for OTTED. The evidence demonstrated that the duties of a "contract manager" involved the management of grants that OTTED was involved in. These duties were administrative in nature and

consisted of reviewing reports from grantees and summarizing those reports for the Director of OTTED. These duties did not entail substantial or significant decision, approval, disapproval, investigation or other control authority. These duties did entail keeping up with a number of details related to and the scope of potential and actual projects in which OTTED was involved.

12. However, Respondent's contract manager duties ended shortly after Dr. Brill reorganized OTTED and formally transferred Respondent's contract manager responsibilities to Ms. Rice in late January or early February 2008. At the time, Dr. Brill also became Respondent's direct supervisor due to some serious personality conflicts between Ms. Rice and Respondent.

13. Sometime prior to early October, 2007, Space Florida began to focus on developing or utilizing current science, technology and tourism business assets located in Florida for gaining a foothold in the emerging space tourism industry. In particular, Florida has a number of space-related assets like various NASA facilities, retired military/space equipment and decommissioned military bases, as well as science and technology assets which could be used in developing a space tourism industry. Indeed, Space Florida felt its development of the space tourism industry in Florida was falling behind since entities like Virgin Galactic were beginning to sell tickets for

space flights to private individuals without the involvement of any space-related business in Florida.

14. Toward that end, Space Florida was exploring the development of a medically sound executive physical and training program for individuals who might be interested in experiencing low orbital space flight. Such a program was viewed as essential to the development of a safe tourist experience for individuals interested in taking a trip into space. The profile for such a space tourist was generally wealthy, but untrained in either the fitness or technical rigors of space travel. Additionally, Space Florida felt that such individuals would require insurance for such travel. Given these considerations, Space Florida was looking for a medical facility with experience in executive physicals, sports medicine, fitness training and rehabilitation so that a program could be developed offering initial physical evaluations for prospective space tourists with training in needed areas to bring such a tourist to the level of fitness and health required for high and low g-force situations which occur with any space flight. Additionally, because participation of a prospective space tourist in the program would be for an extended period of time, Space Florida was interested in an institution that was located close to tourist facilities such as hotels and restaurants. Similarly, because part of preparing a space tourist for space flight would involve

some astronaut type training, Space Florida wanted a facility that was located close to specialized training equipment used for training astronauts.

15. In time, Space Florida developed a list of potential facilities that might have the expertise and research capabilities for creating a health/fitness/training program. The list was developed from a variety of sources. The evidence did not demonstrate that Respondent contributed the name of any institution to this list.

16. However, even with the list, Space Florida was having great difficulty finding an institution that was interested in pursuing the research necessary for the development of such a health/fitness/training program or in developing the standards for such a program. Indeed, most of the facilities Space Florida contacted did not call it back or indicated that they were not interested in such a program.

17. One of the businesses on the Space Florida list that Space Florida was very interested in and was trying to contact was the Andrews Research and Education Institute (Andrews or AREI) located in Pensacola, Florida. The institute is now known as the Andrews-Poulous Research and Education Institute.

18. AREI was a nonprofit subsidiary corporation of Baptist Hospital Corporation (Baptist or BHC). Joe Story, M.D., served as AREI's president. The Institute specialized in sports

medicine, human performance analysis, and related specialty fields, including diagnostic imaging, multi-specialty surgery, outpatient rehabilitation, athletic performance/training and biomechanics. Additionally, AREI performed research and program development for sports medicine, rehabilitation and training and has developed such programs for professional, amateur and Olympic sports and athletes.

19. Around early October 2007, OTTED had funds available that it needed to allocate to programs which had not yet been funded. As part of his job duties, Respondent communicated with Howard Haug, Vice President of Space Florida, asking for a list of any unfunded programs it would like to have funded. Such requests from OTTED were not unusual and occurred periodically.

20. On October 9, 2007, after a series of emails, Mr. Haug emailed Respondent, as the person responsible for coordinating OTTED's space efforts, regarding Space Florida's interest in "a number of investment opportunities over the near and mid-near term in the areas of Business Development, Education, Research & Development and Workforce." The email contained a list of 11 investment opportunities Space Florida was interested in funding and pursuing. The list identified the desire of Space Florida to pursue a "space tourism marketing campaign and it [sic] direct connection to current Florida tourism assets."

Specifically, Mr. Haug stated that space tourism:

"requires its participants to be medically and physically ready and technically trained. Florida has a number of current institutes and centers that will allow it to serve this growing segment of the market and in the long run enhance the state as a one-stop location for commercial operations that service the space tourism market."

Space Florida estimated the costs for development of a medical and training program for space tourism to be between \$250,000 and \$1,000,000. Eventually, the development of these standards and the development of a health/fitness/training program became known as Project Odyssey.

21. The evidence did not demonstrate that Respondent had any substantial or significant input into the development of Space Florida's ideas or "near-term unfunded opportunities." Indeed, the October 2007 emails between Respondent and Space Florida demonstrate that Space Florida developed these unfunded opportunities. At best, although the evidence did not demonstrate any specifics, Respondent may have edited the language that Space Florida used in order to clarify the idea it presented to OTTED. However, the evidence did not show that whatever editing Respondent may have done was significant or that Respondent's role in the development of these ideas was other than technical. In fact, the goal of the back and forth communication between Respondent and Space Florida was to coordinate and secure funding for Space Florida's potential

projects. The other goal was to keep Space Florida's supervising agency OTTED apprised of ongoing developments in this area and the work Space Florida was doing towards meeting its mission of developing the commercial use of space in Florida.

22. Additionally, because Space Florida's inquiries of other potential facilities had been met with little interested response and since Respondent was from the Governor's office and the Pensacola area, Space Florida asked Respondent to coordinate a meeting between Space Florida officials and Joe Story, M.D., of AREI in order to move the communication along. Indeed, throughout this process, Dr. Story was difficult to get in touch with. The evidence showed that it was at this time in the funding process that Respondent learned of Space Florida's interest in AREI. In early November, Respondent began work on setting up this meeting.

23. At the same time, Respondent, as "Economic Development Coordinator," had the responsibility to coordinate the application process for potential grant applicants including Space Florida and AREI. He also had the responsibility to present complete applications to Dr. Brill for his consideration and approval/disapproval, and to disseminate Dr. Brill's decision to all relevant parties. As the beginning steps in the funding process, Respondent forwarded Space Florida's unfunded

projects list to his superiors in the Governor's Office, began to determine if there was interest in the project and identify potential funding sources. At the time, Military Base Protection (MBP) funds from OTTED and MBP funds from Enterprise Florida were available. MBP funds are funds available to projects that involve the re-use of decommissioned military assets such as those located at the Naval Aerospace Medical Research Laboratory (NAMRL) in Pensacola, Florida. In order to secure such funding, an applicant is required to submit a letter/proposal requesting an MBP grant and demonstrating that the proposal relates to the re-use of decommissioned military assets. In this case, two grant request letters were necessary since both OTTED and Enterprise Florida were responsible for MBP funds.

24. In order to obtain funding, several individuals from Space Florida and Enterprise Florida developed a document titled "Scope of Work." The document was forwarded to Respondent to keep him informed of Space Florida's progress on fleshing out its unfunded project. Respondent, in turn, forwarded the document to Dr. Story on November 2, 2007, and requested a meeting between Space Florida officers and Dr. Story for November 27, 2007. There was no clear or convincing evidence that Respondent significantly contributed to this document.

25. Later, Space Florida and AREI, as well as Enterprise Florida, worked on developing a business model, proposed areas of research, contractual deliverables, etc. All of this work was leading to a Nondisclosure Agreement, a Memorandum of Agreement (MOA) and would lead eventually to final contract agreements between Space Florida, Enterprise, Florida, and AREI so that the project could be funded. However, things became so confused with so many parties involved in the process that in January 2008, Respondent was asked to be the "go-to-guy" to facilitate and coordinate communication between the various parties and to keep track of the various stages and progress of these parties' negotiations.

26. It was also at this time that Dr. Brill removed Respondent from Ms. Rice's supervision. Shortly after, in an email regarding a lunch invitation dated February 12, 2008, Respondent requested that Mr. Haug not discuss "our project in front of her." The reference to "her" was to OTTED Deputy Director Keisha Rice. However, this email reflects the extent of the personality conflict and tension between Respondent and Ms. Rice that caused the director of OTTED to remove Respondent from Ms. Rice's supervision. In regard to this email, Mr. Haug did not feel bound by such a request and would do what was in the interest of Space Florida. The email does not demonstrate

that Respondent had substantial or significant authority or influence in regards to Project Odyssey.

27. Additionally, on February 18, 2008, Respondent sent an email to Mr. Haug that detailed staff requirements and salary levels regarding Project Odyssey. However, the email reflects information that Petitioner was passing along to other entities involved in Project Odyssey that he had obtained from AREI. There was no evidence that Petitioner developed or had input into developing this information.

28. Through the February-March time period, Space Florida desired that a feasibility study of Project Odyssey be completed. The request for such a study was not unusual since it often dealt with uncharted and emerging markets in the aerospace field. Throughout this time period, Space Florida and AREI worked on funding such a study and the scope of that study with the HAAS Center located at the University of West Florida in Pensacola, Florida. Eventually the HAAS Center sent a proposal to Respondent. Respondent forwarded the proposal to the relevant parties and MOA (80809) was drafted by Space Florida. As indicated, Respondent did pass along information between the parties regarding the scope of the work. However, this was information he obtained from discussions with others regarding the scope of the project. The evidence did not demonstrate that Respondent acted in any substantial or

significant capacity or offered any substantial or significant advice regarding this MOA. Indeed, the HAAS Center, Space Florida, AREI and Enterprise Florida all had personnel that were more than experienced and qualified to develop and did develop the terms of the MOA and the terms of any contract with the HAAS Center.

29. In March 2008, the University of West Florida's Haas Center for Business Research and Economic Development began a feasibility study for Project Odyssey that was paid for by AREI through a \$60,000.00 grant from Space Florida. Respondent was provided a copy of the draft report of the study for review and comment. A final copy was sent to Respondent on July 25, 2008. The evidence demonstrated that the Haas Center and its researchers were the authors of the report in question and were responsible for the substance of the report. The evidence did not demonstrate that Respondent significantly advised or controlled the Haas study. He did provide useful information to the Haas researchers and was helpful to them. He also provided some suggestions regarding a few areas of the report. However, the evidence did not demonstrate that this aid was substantial or significant.

30. Ultimately, no business model was introduced into evidence and it was unclear if a business model was ever formally developed. The evidence was not clear what process had

to occur and what documents had to be in place for the project to be presented to and funded by OTTED. Further, the evidence did not demonstrate that Respondent had any substantial or significant input into any proposed model, deliverables or other matter discussed in these early negotiations. The evidence did show that Respondent received some copies of the parties' working papers. However, neither the emails nor the testimony at hearing shows that Respondent contributed significantly to these early negotiations. Indeed, the emails reflect that Respondent acted as a coordinator for the parties and would pass along information if he had it.

31. Eventually, AREI submitted a formal grant request to OTTED and to Enterprise Florida. Petitioner acknowledged reviewing a copy of the grant request before submission. However, he did not draft the request. The request was forwarded to OTTED's executive director along with two other grant requests from other entities.

32. On March 24, 2008, AREI's grant request for the development of a space flight research and training program was approved by the executive director of OTTED at the requested amount of \$250,000.00. The evidence demonstrated that Respondent did not recommend approval of the program to the director, but only presented it to him along with the other two requests which had been submitted for MBP funds. After

approval, Respondent, pursuant to his duties, notified Space Florida on March 28, 2008, that AREI's grant had been approved and that Space Florida was designated as the contract administrator of that grant.

33. An additional \$250,000.00 for Project Odyssey was to be provided by Enterprise Florida. At no time during his tenure at OTTED was Respondent assigned any responsibilities for OTTED's program and funding agreement with Enterprise Florida. Nor was Respondent ever assigned any management or fiduciary responsibilities for the MBP funds. The evidence demonstrated that a recommendation that Space Florida be deemed the single administrator of the grant to AREI, rather than have Enterprise Florida and Space Florida exercise joint administrative oversight of the grant, was made to OTTED by an Enterprise Florida employee, Rocky McPherson. Finally, as to the Enterprise Florida portion of the grant there was no clear or convincing evidence which demonstrated Respondent played any substantial or significant role in that application.

34. After the approval of the project, the parties continued to negotiate the terms of the final project agreements. Many emails were exchanged between representatives of the corporate parties and Respondent. In his role as coordinator, Respondent emailed a multi-page action list that he

had developed earlier to Enterprise Florida on May 24, 2008. It was not clear if the action list was sent to any other entity. The list contained a breakdown of steps that had been completed to implement project Odyssey and steps that remained to be completed. The list contained 34 separate items or tasks separated into eight categories defined by the entities involved. Persons responsible for each item were also listed. There were seven items listed as being within Respondent's responsibility. Three of those items reflected at least one other person responsible for that in addition to Respondent. The remaining 26 items reflected persons or groups, other than Respondent, as responsible for them.

35. Of the seven items pertaining to Respondent, four of those items fell under the OTTED/Space Florida category. Those four items related to getting the AREI grant request at OTTED and drafting, coordination and staffing of the OTTED/Space Florida program and funding agreement. However, evidence showed that Respondent was not the person who drafted the program and funding agreement between Space Florida and OTTED. He was the person who either passed the contract along to the respective authorities to sign or monitored the progress of that contract among its signatories. Additionally, the evidence demonstrated that the Director of OTTED, not Respondent, was the person responsible for assigning staff duties in OTTED, leaving

Respondent to notify the appropriate person in OTTED that the contract needed to be staffed. Two of the items that were shared involved attending meetings with Naval Aeronautic Medical Research Laboratory and the University of West Florida. Very little evidence was introduced in regard to these items. However, the evidence at the hearing was that Respondent's role throughout Project Odyssey was to be familiar with and coordinate efforts among the primary parties involved in Project Odyssey. Given that evidence, the action list cannot be interpreted to reflect a role outside of monitoring and coordination for Respondent. In sum, the evidence demonstrated that the vast majority of the items on the action list were left to others to negotiate and make decisions about. To that extent, this action list does not demonstrate that Respondent provided substantial or significant advice or approval to the implementation of Project Odyssey.

36. Ultimately, the implementation of Project Odyssey was accomplished through multiple joint investment and funding agreements between Space Florida, Enterprise Florida and AREI. At least two agreements were involved in the implementation of Project Odyssey: an agreement between Space Florida and AREI dated July 8, 2008, and an agreement between Space Florida and Enterprise Florida dated July 2, 2008.

37. The evidence showed that around June 2008, Space Florida drafted the initial funding agreement for the grant contract to AREI. The draft was sent to all the interested parties for their comments and revisions. The draft was also sent to Respondent in order to keep him informed of the parties' progress. Again, the evidence did not demonstrate that Respondent acted other than as a coordinator and facilitator in reference to these contracts.

38. Indeed, Respondent offered two minor comments on the draft agreement between Space Florida and AREI. Of those two comments, one concerned an error in describing equipment that was to be decommissioned. In order to correct this error Respondent suggested that the phrase "utilizing assets slated for decommissioning as a result" be substituted for "using equipment left at Andrews after the completion." The second suggestion that Respondent made was to advise of a punctuation error in the document. Both of these comments were incorporated into the final language of the Agreement. Neither of these comments was substantial or significant to Project Odyssey.

39. Respondent also made one (1) other qualified comment concerning the provision in the draft Agreement which related to intellectual property ownership rights. Respondent's comment regarding the draft language was:

"It seems to me that this will negatively affect AREI (Andrews's) ability to license the intellectual property to a commercial spin-off company, which has been an assumption underlying discussions up to this point. I would think that, at a minimum, the State of Florida, SF, and Andrews would retain cooperative ownership rights. At maximum, I would think Andrews would retain those rights exclusively. Then again, I'm no contracts expert."

40. However, this comment was not incorporated into the final language of the Agreement. Instead, the language used in the final Agreement between Space Florida and AREI that addresses intellectual property rights was inserted by Space Florida, at Mr. Haug's direction, and was derived from similar language incorporated into other agreements executed by Space Florida with other entities. Moreover, the comment in light of the testimony seems to be more of a reminder about what other authoritative parties to these contracts had discussed in the presence of Respondent. Such reminders are simply secretarial in nature and, while they may be helpful, are not substantial or significant in the overall project.

41. Ultimately, all of the agreements necessary to implement and fund Project Odyssey were the result of complex, multi-tiered and multi-phased decision processes, involving numerous organizational entities and individuals from each organization. In fact, at least 24 individuals in positions of authority and senior to Respondent were responsible for

decision-making in the present case. Approval of the project for funding was made by a unanimous vote of the 19 members of the Space Florida Board of Directors. Drafting and execution of the program and funding agreement between Space Florida and AREI required actions among numerous individuals in both organizations, as well as their respective Boards. OTTED was not a signatory party to the Space Florida/ AREI grant contract. Put simply, Respondent was a lower level employee of OTTED who did not have authority or control over decisions made in regards to Project Odyssey. The evidence was clear that all of the primary entities involved in Project Odyssey had sufficient expertise, knowledge and capabilities to create and negotiate Project Odyssey. Respondent's knowledge was helpful, but it was not substantial or significant given the authority and expertise of the primary parties. Additionally, testimony at the hearing by representatives of the primary entities demonstrated that Respondent's role was a low-level role to facilitate, coordinate and monitor the process of creating and the progress of this project.

42. The \$500,000 program and funding agreement executed between Space Florida and AREI in support of Project Odyssey commenced on July 8, 2008. In early July, after the execution of final contracts for Project Odyssey, Respondent wished to leave state government and asked Dr. Story if he could apply for

the Project Odyssey Director position. Dr. Story thought that Respondent should apply since he was familiar with Project Odyssey. Respondent also advised Dr. Brill of his application and intent to resign from OTTED.

43. At the direction of Dr. Brill, Respondent contacted the Governor's Deputy General Counsel, Gerald Curington, to discuss the issue. Based on the information provided by Respondent in which he indicates that he has a "limited role in the AREI grant process," Curington opined that no conflict probably existed. The testimony at hearing demonstrated that Respondent provided Mr. Curington with sufficient information for him to understand Respondent's role in relationship to AREI and Project Odyssey and that Mr. Curington understood that role to be limited. OTTED's general counsel agreed with Mr. Curington's assessment and advised both Dr. Brill and Respondent of her opinion.

44. In the meantime, Respondent was introduced to the administration at AREI who voted on whether he could work with AREI. Respondent was approved by AREI.

45. Thereafter, Respondent resigned on August 15, 2008, and began work under a contract with Baptist Health Care Corporation to supply consulting, support and coordination services to AREI for Project Odyssey. Respondent was hired as an independent contractor and was not employed directly by AREI.

However, AREI paid \$150,000.00 per year to Baptist for Respondent's consulting services.

46. During his contractual employment with Baptist, Respondent contributed technical knowledge and expertise to various administrative, research, and outreach activities in furtherance of the stated goals and objectives of Project Odyssey. Respondent did not have any authority to approve or disperse funds derived from the Space Florida grant. However, the evidence did not demonstrate that Respondent's employment with BHC violated Florida law since his employment with OTTED did not substantially or significantly contribute to the funding or creation of Project Odyssey. Given these facts, this action should be dismissed.

CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2010).

48. The Florida Commission on Ethics is authorized to conduct investigations and to make public reports on complaints concerning violations of chapter 112, part III, Florida Statutes, the Code of Ethics for Florida Public Officers and Employees.

49. Respondent is alleged to have violated section 112.3185(3) by becoming employed with a business entity in connection with a contract in which he was substantially involved. Section 112.3185(3) provides as follows:

No agency employee shall, after retirement or termination, have or hold any employment or contractual relationship with any business entity other than an agency in connection with any contract in which the agency employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation while an officer or employee.

50. The Advocate has the burden to establish the allegations in the Order Finding Probable Cause by clear and convincing evidence. Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997); see also Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

51. Clear and convincing evidence requires more than a preponderance of the evidence and less than the criminal standard of beyond a reasonable doubt. In re Graziano, 696 So. 2d 744, 753 (Fla. 1997).

52. As stated 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 lacking in confusion as to the facts in issue. The evidence must be

of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

53. In order to establish a violation of section 112.3185(3), Florida Statutes, the following elements must be shown:

a. The Respondent must have been an employee of the executive or judicial branch of state government.

b. After retirement or termination from public service, the Respondent must have held employment with or had a contractual relationship with a business entity.

c. Such employment or contractual relationship must have been in connection with a contract in which Respondent participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice or investigation while an officer or employee of the executive or judicial branch of state government.

54. In this case, the clear and convincing evidence established that Respondent was an employee of OTTED which is part of the executive branch of state government. As such, the Advocate has established by clear and convincing evidence that

Respondent was an employee of an agency of state government as contemplated by section 112.3185(3), Florida Statutes.

55. Likewise, the clear and convincing evidence showed that Respondent, after termination from public service, held an employment or contractual relationship with Baptist Hospital, providing consulting services to AREI on Project Odyssey. Section 112.312(5), Florida Statutes, defines a "business entity" to mean "any corporation, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state." Clearly both Baptist and AREI were business entities as defined under Florida law. Additionally, Respondent had a direct contractual relationship with Baptist and an indirect contractual relationship with AREI.

56. The final element requires that the Advocate prove by clear and convincing evidence that Respondent's employment or contractual relationship with Baptist must have been in connection with a contract in which Respondent participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice or investigation while an employee of the executive branch of state government. The purpose of section 112.3185(3) is to prohibit State employees from being able to create a position with a

private employer through influencing the award of a contract with that employer or mismanaging their responsibilities over that contract, and then leaving public employment to take that private position. Additionally, the Commission on Ethics, in interpreting this statute, has limited the scope of this statutory provision to activities related to the procurement process. Commission on Ethics Advisory Opinion 83-8.

57. Respondent argues that Project Odyssey is not a procurement contract under section 215.97, the Florida Single Audit Act. Section 215.97(2) contains the following definitions of "state financial assistance," "state program," and "state project,":

(s) "State program" means a set of special purpose activities undertaken to realize identifiable goals and objectives in order to achieve a state agency's mission and legislative intent requiring accountability for state resources.

(t) "State project" means a state program that provides state financial assistance to a nonstate organization and that must be assigned a state project number identifier in the Catalog of State Financial Assistance.

(q) "State financial assistance" means state resources, not including federal financial assistance and state matching on federal programs, provided to a nonstate entity to carry out a state project. "State financial assistance" includes the types of state resources stated in the rules of the Department of Financial Services established in consultation with all state awarding

agencies. State financial assistance may be provided directly by state awarding agencies or indirectly by non-state entities. "State financial assistance" does not include procurement contracts used to buy goods or services from vendors and contracts to operate state-owned and contractor-operated facilities. (Emphasis added.)

58. However, the exclusion of procurement contracts from the definition of state financial assistance serves only to protect contracts for services on state projects funded by state financial assistance or grants from being subject to the requirements of Florida's competitive procurement law. These definitions do not serve to limit the definition of what constitutes a procurement contract under section 112.3185(3). To interpret section 112.3185(3) as limited by the Single Audit Act would leave a gaping hole in the statute's purpose to prohibit state employees from being able to create a position with a private employer through substantially and significantly influencing the award of a grant or contract to that employer. In that regard, the evidence demonstrated that "the program and funding agreement," between Space Florida and AREI was an enforceable contract for consideration to procure the expert services of AREI to develop a health/fitness/training program for Space Florida which was named Project Odyssey. See In Re: Thomas K. Doughty, Case No. 06-4829 (Fla. DOAH Aug. 7, 2007).

59. The question then becomes whether Respondent participated substantially through decision, approval, disapproval, recommendation, rendering of advice or investigation in the Project Odyssey contract.

60. For purposes of implementing the prohibitions contained in section 112.3185(3) the Commission on Ethics, in Advisory Opinions 00-6 and 01-6, noted the following:

To participate 'personally' means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. 'Substantially,' means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial. (citing 5 C.F.R. Section 737.5(d)).

61. In this case, the evidence demonstrated that one of Respondent's many duties at OTTED was to facilitate, coordinate and monitor the process that developed into Project Odyssey. However, the evidence demonstrated that Respondent was a low-level employee with no authority or decision making ability concerning the contract at issue. Respondent's job at OTTED was

to coordinate and assemble data from all interested parties. Others decided about funding, and the terms of the contracts which created Project Odyssey.

62. Assembling the needed application documents and presenting options for funding of projects in the course of one's official duties as a lower level employee of a state agency is not the same thing as participating in the award of a contract and is neither significant nor substantial in the scope of that project. Likewise, the evidence did not clearly or convincingly demonstrate that coordinating the efforts of others is substantial or significant to the scope of a project. Such activities might make things easier, but they do not significantly impact on the essential terms of the project itself. In short, the evidence did not demonstrate that Respondent's employment with BHC violated section 112.3185, since his employment with OTTED did not substantially or significantly contribute to the funding or creation of Project Odyssey. Therefore, this action should be dismissed.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED that the Florida Commission on Ethics enter a Final Order and Public Report finding that no violation of section 112.313(6) has been demonstrated.

DONE AND ENTERED this 2nd day of May, 2011, in Tallahassee,
Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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