STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: CARMINE MARCENO,

Case No. 21-3024EC

Respondent.
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RECOMMENDED ORDER

Pursuant to notice, Administrative Law Judge Elizabeth W. McArthur of the Division of Administrative Hearings (DOAH) conducted the hearing in this cause by Zoom conference from Tallahassee, Florida, on December 16, 2021.

APPEARANCES

For Advocate:

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For Respondent:

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STATEMENT OF THE ISSUES

The issues for determination are whether Respondent accepted a gift that exceeds a value of $100 from a vendor of his agency, in violation of section 112.3148(4), Florida Statutes, or, alternatively, whether Respondent failed to disclose the receipt of a gift that exceeds a value of $100, in violation of section 112.3148(8); and, if either violation is established, what penalty should be imposed.

PRELIMINARY STATEMENT

Between June 2, 2020, and October 6, 2020, three complainants filed four complaints against Carmine Marceno, as Sheriff of Lee County (Sheriff Marceno or Respondent) with the Florida Commission on Ethics (Commission). The complaints alleged that Respondent violated the Code of Ethics for Public Officers and Employees (Code of Ethics), chapter 112, Part III, Florida Statutes.[1] The four complaints were consolidated for an investigation. A consolidated Report of Investigation was issued on May 17, 2021. The Advocate's Recommendation to the Commission on the consolidated complaints was issued on June 21, 2021.

On July 28, 2021, the Commission issued an Order Finding Probable Cause for two of three violations alleged in complaint no. 20-172. The Order found probable cause to believe that Respondent violated section 112.3148(4) by accepting a gift that exceeds a value of $100 from a vendor of his agency, and that Respondent violated section 112.3148(8) by failing to disclose a gift that exceeds a value of $100. The Commission found no probable cause to believe that Respondent violated section 112.3148(3) by soliciting a gift from a vendor of his agency, as alleged in that same complaint.

As for the other three complaints, the Commission found no probable cause for any of the alleged violations: the Commission found no probable cause to believe

[1] Michael J. Dreikorn filed complaint no. 20-083 on June 2, 2020, complaining of Sheriff Marceno's expenditures and records associated with traveling to Tallahassee to attend a retirement ceremony for Florida Highway Patrol (FHP) Chief Derrick Barrs. Jurisdiction was accepted to investigate a possible violation of section 112.313(6). Also on June 2, 2020, Rodney Shoap filed complaint no. 20-093, raising essentially the same complaint about expenditures incurred to travel to Tallahassee for Chief Barrs' retirement event. Jurisdiction was accepted on the same basis as the first complaint. On September 1, 2020, Robert B. Forrest, III, filed complaint no. 20-172, complaining of Sheriff Marceno's failure to disclose receipt of a gift in connection with the flight to and from Tallahassee for Chief Barrs' retirement ceremony on an airplane owned by Praetorian Aviation Services, LLC, a company owned by the Lee County Sheriff's Office (LCSO) Chief Pilot, Commander Michael Tomisich. Jurisdiction was accepted to investigate possible violations of section 112.3148(3), (4), and (8). Rodney Shoap filed a second complaint, no. 20-226, on October 6, 2020, complaining of other expenditures by Sheriff Marceno that were charged on his state of Florida purchasing card. Jurisdiction was accepted to investigate a possible violation of section 112.313(6).

that Respondent violated section 112.313(6) by using his public position and/or public resources for an activity that did not serve a public purpose, in connection with the trip to Tallahassee for then-FHP Chief Barrs' retirement ceremony, as alleged in complaint nos. 20-083 and 20-093; and the Commission found no probable cause to believe that Respondent violated section 112.313(6) by using public resources for what were alleged to be non-public purposes in using his agency-issued purchasing card, as alleged in complaint no. 20-226.

The Commission then forwarded the consolidated complaints, Report of Investigation, Advocate's Recommendation, and Order Finding Probable Cause to DOAH for assignment of an administrative law judge to conduct a public hearing, limited to the matters for which probable cause was found. As stated in the Order Finding Probable Cause, the alleged violations as to which no probable cause was found "will not be at issue in any hearing held in this matter."

Prior to the hearing, Advocate and Respondent jointly filed a Pre-hearing Statement of the Parties, in which they stipulated to several facts and conclusions of law. The parties' stipulations are incorporated below to the extent relevant.

At the hearing, Advocate presented the testimony of Sheriff Marceno and Commander Michael Tomisich. Advocate's Exhibits 1, 2, and 4 through 16 were admitted into evidence; Exhibit 3 was withdrawn.

Respondent presented the testimony of Major Richard Snyder, Annmarie Reno, Kimberly Myers, Undersheriff John Holloway, Major Christopher Reeves, and Major Christopher Lalor. Respondent's Exhibits 1A through 1G, 2A through 2E, and 3 through 8 were admitted into evidence.[2]

[2] During and after the hearing, it was discovered that several of both parties' exhibits included confidential information, in the form of residential addresses that are exempt from public records. Both parties were permitted to submit substituted exhibits with the confidential information redacted.

The one-volume Transcript of the hearing was filed on January 20, 2022. In a joint motion, the parties requested an extended deadline of February 7, 2022, to file their proposed recommended orders (PROs), which was granted for good cause shown. Both parties timely filed their PROs by the extended deadline, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Carmine Marceno is the Sheriff of Lee County. He was appointed as the interim Sheriff in September 2018 and was elected to the office in November 2020.

2. The parties stipulated that Sheriff Marceno is subject to Article II, section 8 of the Florida Constitution, and the requirements of the Code of Ethics.

3. The parties also stipulated that Sheriff Marceno is a "reporting individual," as defined in section 112.3148(2)(d), who is required to file financial disclosure and gift disclosure forms.

4. The consolidated complaints investigated by the Commission primarily questioned the propriety of expenditures for Sheriff Marceno (along with six of his command staff) to travel to Tallahassee on January 7 and 8, 2020, to attend a retirement ceremony for then-FHP Chief Derrick Barrs. The complaints alleged a range of concerns. They questioned whether the trip was for a legitimate public purpose and official on-duty business, such that the seven LCSO individuals should have been paid their salaries and had their expenses paid or reimbursed by the LCSO. They also complained that, even if the trip was considered generally to be for a proper public purpose and official business of the LCSO, then the specific expenditures were excessive, with too many individuals going on the trip and staying too long, which increased the travel expenses and per diem meal allowances paid by the LCSO. The Commission found no probable cause for any Code of Ethics violations with regard to these allegations.

5. As a result, the propriety of the trip to Tallahassee for Chief Barrs' retirement ceremony is not an issue for debate in this proceeding. Instead, the predicate that must be accepted, based on the Commission's no probable cause determinations, is

that there is no question that the trip was taken for a legitimate public purpose and official on-duty business of the LCSO, so that the LCSO properly paid the salaries of Sheriff Marceno and the other six command staff, and the LCSO properly paid for, or reimbursed the travelers for, their travel expenses, including one-night's hotel stay and per diem meal allowances.[3]

6. The facts related to the two findings of probable cause are more limited. The probable cause findings stem from the fact that Sheriff Marceno, along with four other LCSO command staff, flew to Tallahassee and back for the retirement ceremony in a private plane owned by one of those LCSO command staff members, Commander Michael Tomisich, through his wholly-owned Praetorian Aviation Services, LLC (Praetorian). Another LCSO command staff member, Major Richard Snyder, was the pilot-in-training for the flight, and Commander Tomisich was the flight instructor pilot for the flight.

7. Commander Tomisich was and is employed by the LCSO as its chief pilot and head of the LCSO aviation unit. His job responsibilities include overseeing the operations of the aviation unit, supervising the other LCSO pilots and aviation mechanics, and conducting flight training as needed for the LCSO pilots to maintain certification to fly different kinds of aircraft, and to meet flight-hour experience benchmarks for the aircraft insurance coverage. The LCSO aviation unit has two helicopters and one single-engine Cessna airplane. The airplane has

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[3] Advocate acknowledged this point in her PRO, by stating: "The voluminous testimony regarding the attendees' activities at the ceremony is not relevant in this case." (Adv. PRO at 9, ¶ 56). That testimony was offered to demonstrate the public purpose of attending the retirement ceremony, and the undersigned agrees that it was not necessary to make that showing. Nonetheless, Advocate did not object to the relevancy of the "voluminous testimony," nor to the voluminous evidence—offered by both parties—of hotel bills and other travel expenses claimed by Sheriff Marceno and his six command staff who made that trip. Both parties paid a good deal of attention, in testimony and/or documentary evidence, on the parts of the complaints that did not survive the Commission's probable cause determinations. Indeed, Advocate's PRO continued to argue about such evidence, including pointing out the hearsay nature of Sheriff Marceno's testimony that Chief Barrs called him to personally invite him to attend his retirement ceremony, in addition to sending a written invitation. (Adv. PRO at 3, ¶ 6). Respondent did the same in his PRO. The evidence on this and other aspects of the retirement ceremony is viewed as background only; it is not relevant to any material facts at issue here. No findings need be made about the public purpose served by the trip or public benefits derived from the attendees' activities at the retirement ceremony. None of that is relevant to the alleged gift violations, which are the only matters for which probable cause was found.

seating for four adults, a number that includes the pilot. As a practical matter, though, space would be "very tight" with three adult passengers.

8. Commander Tomisich also works part-time as a pilot for the Lee County Mosquito Control District (Mosquito Control District), a position he has held for nearly 20 years. At the time pertinent to this proceeding, the Mosquito Control District owned a twin-engine airplane.

9. Commander Tomisich also owns his own private business. Through his wholly-owned LLC, Praetorian, Commander Tomisich provides private flight instruction to customers who own aircraft so they can meet flight-hour/training requirements imposed by their insurance carriers. He spends an estimated 60 days per year conducting this private business.

10. Praetorian holds the title to a twin-engine Cessna airplane. The plane has seating for six adults, including seating for one pilot and a co-pilot. Similar to the single-engine Cessna, though, the plane is considered well-filled with three adult passengers plus the pilot and co-pilot. Commander Tomisich, as the sole owner of Praetorian, often refers to the plane as his. Commander Tomisich does not use his plane for flight instruction to train his private customers; that training is done exclusively on the customers' planes. Commander Tomisich uses his plane for his own transportation, sometimes using it to fly to the location of his private customers when the distance is not too far.

11. Commander Tomisich's supervisor at LCSO is Major Richard Snyder. During the relevant time period, Major Snyder was in charge of the LCSO patrol and special operations divisions. In that capacity, he had supervisory authority over a number of LCSO units, including the aviation unit. At the time, he was certified to fly both helicopters and single-engine planes. He sometimes piloted the LCSO helicopters or single-engine plane in connection with LCSO official duties.

12. The LCSO used to have a twin-engine plane, but got rid of it in about 2006. The LCSO has had asset-sharing arrangements with the Mosquito Control District in the past, including when they both had twin-engine planes, with each making use of the other's twin-engine plane at times. In 2019, Commander Tomisich was

pursuing another asset-sharing arrangement between the two governmental entities, to allow the LCSO to use the District's twin-engine plane. To prepare for this possibility, in November 2019, Commander Tomisich spoke with his supervisor, Major Snyder, about conducting flight training for LCSO pilots for certification to fly multi-engine planes. It had been too long since the LCSO had a twin-engine plane for the LCSO pilots to have the flight training necessary for multi-engine aircraft certification. They agreed that Commander Tomisich should conduct this flight instruction, and that Major Snyder would be the first trainee.

13. Commander Tomisich offered to use his/Prateorian's plane for flight instruction of LCSO pilots. Since flight training was part of his job responsibilities, he would be paid his regular salary for this work activity. Major Snyder had the authority to approve use of the private plane to conduct the LCSO flight training, and Major Snyder gave his approval in November 2019 when he and Commander Tomisich agreed to the flight training activities. They agreed that the LCSO AV card would be used for the aviation fuel charges incurred for this flight training. The LCSO AV card functions as a credit card to purchase fuel and pay any remote site landing/ramp fees. Charges on the AV card are billed directly to, and paid by, the LCSO.

14. The Praetorian twin-engine Cessna is registered under FAA "part 91" regulations. It is not registered under FAA "part 135" regulations and does not have a charter service certificate. Based on the way the airplane is registered, Commander Tomisich/Prateorian cannot charge a fee for the use of the plane.[4] That would require commercial charter plane regulation and certification. The twin-engine Cessna is not used for chartered flights paid for by customers, nor can it be as it is currently regulated. Therefore, there was no discussion, or consideration

[4] Advocate's PRO attempted to undermine the unrebutted testimony of both Commander Tomisich and Major Snyder regarding the prohibition of charging a fee for use of a plane that is not registered with the FAA as a commercial charter plane, by characterizing Commander Tomisich's testimony as what he "contends," and ignoring the corroborating testimony of Major Snyder. Advocate's witness list included a "Federal Aviation Administration representative," but no such witness was called to offer testimony to contradict the consistent and persuasive testimony of Commander Tomisich and Major Snyder.

given, to Commander Tomisich/Praetorian charging the LCSO a fee for use of the plane for training purposes.

15. Commander Tomisich and Major Snyder started trying to coordinate their first training flight for late November 2019, but were unable to do so, between schedules and weather. They looked for an opportunity to conduct the training flight in December 2019, but busy schedules and holidays made it difficult to find a mutually available time. Therefore, they turned their attention to early January and settled on January 7, 2020, to begin the training. They discussed conducting a round-trip training flight from Fort Myers to Tallahassee and back, because LCSO pilots flew to Tallahassee "quite a bit" for such things as meetings with state government officials and, also, because the distance each way qualified as a "cross-country flight" of 50 miles or more, required for certification.

16. Meanwhile, sometime in December 2019, Sheriff Marceno was contacted by Chief Barrs and then received the written invitation for the LCSO to attend Chief Barrs' retirement ceremony in Tallahassee. Sheriff Marceno made the decision that he would attend. He also thought it was important for the LCSO to have a significant presence at the retirement ceremony.

17. Sheriff Marceno tasked Undersheriff John Holloway with putting together a list of command staff members with significant FHP interaction who would be appropriate to include in the plan to travel to Tallahassee for Chief Barrs' retirement ceremony.

18. Undersheriff Holloway put together a list of five others, including himself, to go with Sheriff Marceno to the retirement ceremony. One of those was Major Snyder. On or shortly after December 18, 2019, Undersheriff Holloway approached Major Snyder to let him know he was putting a group together to go to the retirement ceremony. Major Snyder responded that he and Commander Tomisich were planning their training flight for the same time. With functional capacity for three passengers, the Praetorian plane could accommodate most of the LCSO command staff making the trip. Since it was not uncommon to have passengers on a training flight, discussions ensued regarding making use of the capacity on the

training flight to take some of those going to Tallahassee for the retirement ceremony.

19. This dual-purposing of the already planned training flight suited Sheriff Marceno, who viewed it as a way to save expenses (since the LCSO was going to pay the expenses for the training flight anyway),[5] while allowing the Sheriff and several others to save time by not having to drive to and from Tallahassee. Sheriff Marceno preferred flying in planes with two engines and two pilots, and this plan also met that preference.

20. The plans for the trip to Tallahassee, including details regarding who was going on the trip and the planned expenditures, were reviewed by Undersheriff Holloway with Annmarie Reno. Ms. Reno is the LCSO budget director, to whom such proposed activities/expenditures may be submitted in advance for review and approval (or disapproval). After discussing the details, she was satisfied that the proposed expenditures were proper uses of LCSO funds. She then turned the matter over to staff for the additional travel arrangements that were necessary, including making hotel reservations and rental car reservations for ground transportation from the Tallahassee airport for those who were flying on the training flight.

21. On January 7, 2020, Commander Tomisich and Major Snyder served as the pilots of the Tomisich/Praetorian twin-engine plane and flew to Tallahassee for their training flight. They were both on duty for the training flight. Major Snyder was pilot and trainee; Commander Tomisich was the flight instructor pilot. The flight hours were appropriately recorded in their official flight logs, with Commander Tomisich's log certifying that he served as flight instructor, training Major Snyder.

22. Sheriff Marceno, Undersheriff Holloway, and Major Christopher Reeves rode as passengers. Due to space limitations, the two other command staff members traveling to Tallahassee for the retirement ceremony, Captain Andrew Prisco and

[5] Advocate was unsuccessful in attempting to elicit testimony that fuel costs would increase if passengers rode along on the training flight. Instead, the only testimony offered on the subject was that fuel costs would not increase if, instead of two co-pilots only, three more passengers rode along.

Major Christopher Lalor, drove separately in an LCSO vehicle for which they charged gas to the LCSO using an AV card.

23. After the conclusion of the retirement ceremony, Sheriff Marceno and his staff returned to Fort Myers the next day.[6] Commander Tomisich had made the decision that the return training flight would be the next day, to avoid overloading Major Snyder on his first round of multi-engine aircraft training. The one-night hotel stay and per diem allowances were paid by the LCSO for Sheriff Marceno and the other six command staff members.

24. The LCSO paid the aviation fuel charges that were billed to the LCSO on the AV card for the round-trip flight from Fort Myers to Tallahassee and back. As shown on the invoice in evidence from Million Air Tallahassee, the LCSO also paid the "ramp fee," charged as a separate line item in addition to the aviation fuel charge.[7] The LCSO also paid the regular salaries of Commander Tomisich and Major Snyder who were on duty, working as the flight instructor and flight trainee to fly the twin-engine Cessna to Tallahassee and back to Fort Myers.

25. The evidence establishes that the LCSO paid a total of $1,251.18 in charges to the AV card for the round-trip flight, for aviation fuel plus the ramp fee charged in Tallahassee. As for the salaries of the two pilots, based on the salary evidence in the record, a conservative estimate is that the LCSO paid a little more than $475 for four hours of pilot time for the round-trip flight (considering base annual salaries only, divided by 2,080 hours, without considering the incremental value of

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[6] Commander Tomisich was not included on the list prepared by Undersheriff Holloway to attend the retirement ceremony, and Commander Tomisich was not specifically invited to the ceremony. However, he went with the other six because he was in Tallahassee anyway, having conducted the training flight.

[7] Commander Tomisich testified that a landing fee is sometimes charged by remote sites, but that sometimes they waive that charge if a certain quantity of fuel is purchased. He said if there is such a charge, it would be added to the aviation fuel bill. When asked to look at the January 7, 2020, invoice from Million Air Tallahassee to the LCSO for the aviation fuel charge, he said he did not see any landing fee. But the invoice, part of Respondent's Exhibit 3, reflects an additional fee besides the aviation fuel charge: it is a separate charge for what is called a "ramp fee." How a "ramp fee" might differ from a "landing fee," if at all, was not explained. The additional ramp fee shown on the invoice was part of the AV card charge billed to and paid by the LCSO.

benefits). (Adv. Ex. 1, Bates p. 17; Adv. Ex. 10, Bates p. 164). Thus, the total travel expense for the round-trip flight paid directly by the LCSO was at least $1,726.

26. The parties stipulated that the cost of a round-trip commercial flight to Tallahassee from Fort Myers on January 7, 2020, "would have exceeded $100." The stipulation did not specify whether the cost referred to was for "unrestricted coach fare." Even if that had been the stipulation, no evidence was offered to prove by how much round-trip coach fare would have exceeded $100 on that day,[8] or how much of the fare would have been attributable to aviation fuel, ramp fees, and pilot salaries.

27. Advocate also attempted to elicit testimony regarding the cost to charter a plane like the Tomisich/Praetorian twin-engine Cessna. The evidence on this point is less than clear: Commander Tomisich testified that he was unsure, but thought the *current* rate to charter a plane like his might be $400 to $500 per hour, *if* the charge covered both fuel and pilot time. (Tr. 70). Based solely on this equivocal testimony of the possible range of current charges, Advocate proposed a finding that a fair value of the round-trip four-hour flight on January 7 and 8, 2020, was $1,800. If that were considered a fair measurement of the value of the round-trip flight on January 7 and 8, 2020, the LCSO paid an amount just shy of the full fair value of the flight, by paying at least $1,726 for the fuel, ramp fee, and pilot time.

28. If, instead of using the midpoint of the range of charter rates to which Commander Tomisich testified (with hesitancy), one were to use the low end of the range, the total charge (at current rates) to charter a comparable plane, including fuel costs and pilot time, would have been $1,600, less than what the LCSO paid.

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[8] Advocate's Exhibit 16 in evidence appears to show some information about average airfares during the first quarter of 2020, but it is unclear what exactly is shown, and the exhibit was not explained in testimony, nor mentioned in Advocate's PRO. The exhibit may show that the average airfare for a round-trip flight between Fort Myers and Tallahassee during the first quarter of 2020 was $281.74. But it is possible that the information only shows one-way airfare averages. The identified source of Advocate's Exhibit 16 is the Bureau of Transportation Statistics. Advocate's witness list included a "United States Department of Transportation representative." No such witness was called; such a witness may have been able to shed light on how to interpret the information on Advocate's Exhibit 16. Without testimony or more information about the exhibit, and without evidence showing that the three-month period addressed in the exhibit is relevant to the specific days in question, the evidence is insufficient to support a finding regarding the price of a round-trip ticket to fly coach from Fort Myers to Tallahassee and back on January 7 and 8, 2020.

29. Even using the high end of the range of current charter rates would only yield a total charge for all five persons of $2,000 for the four-hour flight time. Once again, the LCSO paid at least $1,726. If one could credit Commander Tomisich's hesitant testimony, and if current charter rates were proven to be an appropriate measure for January 2020, then the LCSO payments would have covered all but $274 of the highest in the range of charter rates. Allocating the difference of $274 among the five travelers would yield a per-traveler amount of less than $55. At the most extreme, allocating the difference among the three non-pilots would yield a per-passenger amount of $91.

30. Advocate's position seems to be that, at least in theory, the value of transportation in a private plane must include a component for fuel costs/ramp fee, another component for pilot time, and a third component for use of the plane itself. Advocate does not dispute that the LCSO paid for the first two components, despite often ignoring component two (pilot time). Advocate agrees that the LCSO "paid a partial portion of the value" of the flight. (Adv. PRO at 15, ¶ 24).

31. It was incumbent on Advocate to present clear and convincing evidence to prove the dollar value of the "partial portion of the value of the flight," if any, that was not paid for by the LCSO. There is insufficient evidence to prove the value of the use-of-the-plane component alone, separate from the other components of value—fuel, ramp fee, and pilot time—which were indisputably paid by the LCSO. It would be speculative, and indeed, contrary to what little evidence there is in the record as to comparable charges, to place any dollar value on the use-of-the-plane component, much less a dollar value that would allocate to Sheriff Marceno a value exceeding $100 for his share of the use of the plane.

32. Accepting Advocate's reliance on the range of charter plane rates to which Commander Tomisich testified (with hesitancy), and comparing that to what the LCSO paid, the evidence fails to establish that the LCSO did not directly pay the full value of the transportation for Sheriff Marceno to fly to and from Tallahassee on the Tomisich/Praetorian plane. Instead, the amount paid by the LCSO was well within the range of charter rates.

33. While Advocate proposed relying on Commander Tomisich's charter plane rate testimony because it was credible, Advocate ignored that part of his testimony making clear that his estimated range of current charter plane rates were for hourly rates that included fuel and pilot time. Instead, Advocate proposed using the entire rate without deducting the fuel and pilot time paid by the LCSO. Advocate attempted to support this methodology, despite Commander Tomisich's contrary testimony, by offering a false rental car analogy. Advocate contended that the value of the use of the plane was similar to the charge imposed by rental car companies to use a rental car. The cost of gas, Advocate suggested, is separated from the charge for use of the rental car. Based on this false analogy, Advocate suggested that the same should be applied in valuing the use of the plane. The flaw in this logic is that, unlike for rental cars, the record evidence regarding the charge to charter a plane, and for that matter, the price for a coach ticket from an airline (not established with record evidence), both include the cost of fuel, ramp fees, and pilot time. No evidence was offered of comparable commercial charges for the use-of-the-plane component alone, separate from the fuel costs, ramp fees, and pilot time.

34. No evidence was offered to prove that either Commander Tomisich or Praetorian was a vendor of the LCSO. The credible testimony by LCSO personnel, based on a search of the LCSO's current and former records systems, was that neither Commander Tomisich nor Praetorian was a vendor of the LCSO.

35. Advocate's PRO asserted that Commander Tomisich and/or Praetorian should be considered vendors of the LCSO because Commander Tomisich "provided a service to LCSO by training Snyder through the use of Praetorian's privately-owned airplane." (Adv. PRO at 9, ¶ 53). But Commander Tomisich provided the flight instruction service to the LCSO in his capacity as an LCSO employee. He was carrying out his job responsibilities to provide flight instruction and was paid his salary in doing so. His supervisor, Major Snyder, authorized the use of the private plane for the training activity, with fuel costs paid for by the LCSO.

36. The specific training flight at issue was the first training flight. The Advocate's position, then, is that the very same flight instruction activity using the

private plane claimed to be the service provided to the LCSO that made Commander Tomisich and/or Praetorian a vendor *of the LCSO*, somehow also constituted a gift provided, not to the LCSO, but to Sheriff Marceno. Neither one of these inconsistent positions comports with the facts established in the record.

Ultimate Findings of Fact

37. Neither Commander Tomisich nor Praetorian was proven to be a vendor of the LCSO.

38. The authorized use of the Tomisich/Praetorian private plane to carry out Commander Tomisich's flight instruction duties in his capacity of LCSO Chief Pilot was not proven to be a gift at all, because the full value was paid for by the LCSO.

39. Even if evidence had established that the full value had not been paid by the LCSO, any arguable gift was to the LCSO, to whom the service of flight instruction by the LCSO Chief Pilot, using the private plane, was admittedly provided.

40. The evidence does not support a finding that Sheriff Marceno received a gift at all, nor does the evidence support a finding that he received a gift with a value exceeding $100, when he rode as a passenger on the training flight to Tallahassee and back for which the LCSO paid at least $1,726 for aviation fuel, ramp fee, and pilot salaries.

CONCLUSIONS OF LAW

41. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

42. Section 112.322, Florida Statutes, and Florida Administrative Code Rule 34-5.0015 authorize the Commission to conduct investigations on complaints alleging violations of the Code of Ethics, determine whether there is probable cause to believe there are violations, conduct public hearings on matters for which probable cause have been found, and issue public reports thereon. The Commission may also refer such matters to DOAH, as it did here, to conduct the public hearing and issue a recommended order. The Commission's Advocate participates in the public

hearing to present evidence regarding the alleged violations for which probable cause was found.

43. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue in the proceeding. *See generally Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 788 (Fla. 1st DCA 1981). In this case, the Commission, through its Advocate, is asserting the affirmative of the issues for which the Commission determined there was probable cause to believe Respondent violated specified provisions of the Code of Ethics.

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

45. 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 at 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)). This burden of proof may be met where the evidence is in conflict; however, "it seems to preclude evidence that is ambiguous." *Westinghouse Elec. Corp. v. Shuler Bros., Inc.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

46. The Commission found probable cause to believe that Respondent violated section 112.3148(4) and (8). Therefore, these are the two alleged violations that will be examined. Section 112.3148, which has not been amended since 2013, provides in pertinent part:

> (4) A reporting individual or procurement employee or any other person on his or her behalf is prohibited from knowingly accepting, directly or indirectly, a gift from a vendor doing business with the reporting individual's or

> procurement employee's agency ... if he or she knows or reasonably believes that the gift has a value in excess of $100[.]
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> * * *
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> (8) (a) 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, except the following:
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> 1. Gifts from relatives.
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> 2. Gifts prohibited by subsection (4) or s. 112.313(4).
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> 3. Gifts otherwise required to be disclosed by this section.

47. Respondent was a reporting individual, as the parties stipulated. His agency was and is the LCSO.

48. By virtue of section 112.3148(8)(a)1., Advocate cannot prove by clear and convincing evidence that Respondent violated *both* subsection (4) and subsection (8). Advocate concedes this, acknowledging that the issue is whether Respondent violated *either* section 112.3148(4) *or* section 112.3148(8).

49. Respondent argues as a threshold matter that this proceeding should go no further, because the Commission found probable cause to believe that Respondent violated section 112.3148(4) *and* section 112.3148(8), when it is not possible to conclude that Respondent violated both provisions.

50. The correctness of the Commission's Order Finding Probable Cause is not at issue in this proceeding. Even if it were at issue, Respondent's logic is faulty as applied to a finding of probable cause. Although the result of this proceeding cannot be a determination that Respondent violated both subsections, that does not mean the Commission could not have found probable cause, i.e., a reasonable basis in fact, to support a belief that section 112.3148(4) was violated, while, at the same

time, finding a reasonable basis in fact to support a belief that section 112.3148(8) was violated. Respondent's threshold argument is rejected.

Section 112.3148(4)

51. Advocate's PRO offers a clear recitation of the elements that must be proven to establish a violation of section 112.3148(4). The required elements applicable to this case are:

a. Respondent must have been a reporting individual.

b. Respondent must have knowingly accepted a gift.

c. The donor of the gift must have been a vendor doing business with Respondent's agency.

d. Respondent knew or reasonably believed that the gift had a value of more than $100.

52. Section 112.3148(2)(f) defines "vendor" as follows: "'Vendor' means a business entity doing business directly with an agency, such as renting, leasing, or selling any realty, goods, or services."

53. The inquiry into the alleged violation of section 112.3148(4) need go no further than addressing the third element. Based on the Findings of Fact above, Advocate did not prove by clear and convincing evidence that the alleged donor(s), Commander Tomisich and/or his wholly-owned business Praetorian, were vendors of the LCSO.

54. Indeed, Advocate curiously relies on the very same service as that which makes Commander Tomisich and/or Praetorian vendors of the LCSO *and* that which constitutes a gift to Respondent. If, however, Commander Tomisich's provision of flight instruction services to the LCSO through use of the private plane constituted doing business directly with the LCSO, such as by renting, leasing, or selling those goods and services to the LCSO, then the same could not be a gift to Respondent.

55. Advocate's position would also improperly expand the definition of "vendor" to include services provided to the agency by an employee of the agency for which

the employee is provided a salary. Nor does the definition extend to an employee's agreement with the agency to use the employee's private property in carrying out the employee's job duties, as described in the Findings of Fact. There is no suggestion that Praetorian rented or leased the private plane directly to the LCSO. Instead, the situation here is more akin to an employee using his or her personal vehicle in connection with carrying out the employee's job responsibilities, with the understanding that the agency will pay for the fuel used in traveling for work purposes. Such use of private property by an employee in carrying out the employee's job responsibilities, would not transform the employee into a vendor.

56. Advocate has not proven, by clear and convincing evidence, that Respondent violated section 112.3148(4).

Section 112.3148(8)

57. Advocate contends that, if Sheriff Marceno did not receive a prohibited gift from a vendor in violation of section 112.3148(4), then Sheriff Marceno committed a violation of section 112.3148(8) by failing to disclose a permissible gift with a value exceeding $100.

58. The parties stipulated that, in addressing the question of whether there was a gift to Sheriff Marceno, the definitions in section 112.312(12), paragraphs (a) and (b)7., apply. Section 112.312(12) states in pertinent part:

> (a) "Gift," for purposes of ethics in government and financial disclosure required by law, means that which is accepted by a donee or by another on the donee's behalf, or that which is paid or given to another for or on behalf of a donee, directly, indirectly, or in trust for the donee's benefit or by any other means, for which equal or greater consideration is not given within 90 days, including:
>
> 1. Real property.
>
> 2. The use of real property.
>
> 3. Tangible or intangible personal property.
>
> 4. The use of tangible or intangible personal property.

5. A preferential rate or terms on a debt, loan, goods, or services, which rate is below the customary rate and is not either a government rate available to all other similarly situated government employees or officials or a rate which is available to similarly situated members of the public by virtue of occupation, affiliation, age, religion, sex, or national origin.

6. Forgiveness of an indebtedness.

7. Transportation, other than that provided to a public officer or employee by an agency in relation to officially approved governmental business, lodging, or parking.

8. Food or beverage.

9. Membership dues.

10. Entrance fees, admission fees, or tickets to events, performances, or facilities.

11. Plants, flowers, or floral arrangements.

12. Services provided by persons pursuant to a professional license or certificate.

13. Other personal services for which a fee is normally charged by the person providing the services.

14. Any other similar service or thing having an attributable value not already provided for in this section.

(b) "Gift" does not include:

* * *

7. Transportation provided to a public officer or employee by an agency in relation to officially approved governmental business.

59. Based on the Findings of Fact above, Advocate failed to prove by clear and convincing evidence that a gift was given to and accepted by Respondent. Instead, the evidence established that Commander Tomisich carried out his job

responsibilities as LCSO Chief Pilot by providing flight instruction services to the LCSO on January 7 and 8, 2020, through authorized use of a private plane. The LCSO paid the aviation fuel charges and ramp fee at the remote airport, which were billed directly to the LCSO. The LCSO also paid the salaries of the pilots for their on-duty work for the LCSO as flight instructor and flight trainee. Respondent and two others rode along as passengers on this round-trip training flight to Tallahassee and back to Fort Myers. Advocate did not prove that the three passengers increased the fuel costs, but even if Advocate had proven that, the fuel costs were paid for by the LCSO.

60. No issue is presented with regard to the public purpose for Respondent's travel to Tallahassee. There is no question that Respondent and the other six command staff were conducting on-duty business in making the trip; the propriety of the LCSO paying the salaries of Respondent and the others is not subject to debate in this proceeding. Likewise, the propriety of the LCSO paying for or reimbursing Respondent and the other six command staff for a one-night hotel stay, per diem allowances for two days, and other travel-related expenses is not in question.

61. So, too, the LCSO properly paid for the transportation expense, by paying at least $1,726 for fuel charges, ramp fee, and pilot time.

62. Even if there had not been a flight training purpose for the trip, the transportation expense paid for by the LCSO falls within the exclusion from the definition of "gift" in section 112.312(12)(a)7. and (b)7. for transportation "provided to a public officer or employee by an agency in relation to officially approved governmental business."

63. Advisory opinions issued by the Commission repeatedly emphasize that when transportation expenses are paid for by a reporting individual's agency for a trip which served a valid public purpose, there is no gift. It is only when transportation and other expenses are paid for by a third party that the payment of those expenses may be a gift from the third party.

64. In CEO 13-3, the Commission rejected an argument that a mayor's trips to conferences and trips advocating and marketing for the City, entirely paid for by private individuals or entities, should be considered gifts to the City. Instead, the Commission determined that a public officer receives a gift "when he travel[s] at the expense of someone other than his agency." That is true even though there is no question that a public purpose was served through the travel.

65. In contrast, as summarized in CEO 91-10, trips which serve a valid purpose, paid for by the official's agency or another governmental entity, need not be disclosed as a gift, as determined in CEO 90-72 and CEO 90-73.

66. In CEO 90-73, the Commission clarified that when only a portion of a reporting individual's travel expense is paid by a private party, then a gift may be reportable "only if the expenses paid for by the other person ... exceed $100. Otherwise, the expenses need not be disclosed."

67. In this case, the transportation costs for Sheriff Marceno and four command staff to fly to Tallahassee and back for the public purposes of conducting flight training and attending Chief Barrs' retirement ceremony were not paid by a private individual or entity. They were paid by the LCSO.

68. Advocate acknowledges that the aviation fuel costs were charged directly to, and paid directly by, the LCSO, using the LCSO AV card. The total of the fuel invoices, including a charge for the "ramp fee" in Tallahassee, which were billed to and paid by the LCSO was $1,251.18. In addition, the LCSO paid the salaries of the two pilots. Just considering their base salaries for the four-hour round-trip flight time, the LCSO paid a little more than $475 for pilot time. The total travel cost paid by the LCSO was a little more than $1,726.

69. Advocate argues that "Respondent received the gift of a private round-trip airplane flight between Fort Myers and Tallahassee on January 7-8, 2020 from Michael Tomisich/Praetorian, who in addition to being an LCSO employee, has a side-business as a flight instructor." (Adv. PRO at 12, ¶ 11). Inconsistently, Advocate acknowledged that Commander Tomisich "provided a service to LCSO by training Snyder through the use of Praetorian's privately-owned plane." (Adv. PRO

at 9, ¶ 53). Although Advocate implies that the flight instruction was carried out as part of Commander Tomisich's "side-business," Advocate failed to prove this theory. Instead, the unrebutted evidence, accepted in the Findings of Fact above, established that Commander Tomisich was carrying out his job responsibilities, as LCSO Chief Pilot, when he provided flight instruction services to the LCSO through the use of the private plane by training Major Snyder on the round-trip flight to Tallahassee and back.

70. Advocate attempted to brush aside the fact that Commander Tomisich was providing services to the LCSO in his capacity as an LCSO employee, by noting: "Being co-workers does not negate that a gift was received." (Adv. PRO at 13, ¶ 13). Advocate offered as authority *In re James Manfre*, Case No. 15-4877EC (Fla. DOAH Feb. 16, 2016), adopted in pertinent part, Final Order No. 16-042 (Fla. COE Apr. 20, 2016), but that Final Order is plainly inapposite. In that case, Sheriff Manfre and his wife vacationed in a co-worker's vacation mountain home, free of charge. The free use of the vacation home was determined to be a gift that had to be disclosed. Of course, the co-worker owned the vacation mountain home in his private capacity, and offered its use to Sheriff Manfre and his wife for their own personal enjoyment. Here, in marked contrast, the evidence established that Commander Tomisich was carrying out his job responsibilities by providing flight instruction services to the LCSO to train Major Snyder, for which use of the private plane was duly authorized and for which expenses were paid by the LCSO. Sheriff Marceno rode along on the training flight at no additional expense. The public purposes for the flight, and all expenditures associated with the trip, were approved in advance and are not in question in this proceeding.

71. Although Advocate admits that the LCSO "paid a partial portion of the value" (Adv. PRO at 15, ¶ 24), Advocate argued that the gift was of the entire transportation value. Without going through an analysis of what was paid by the LCSO or comparing that to the comparable charge testimony Advocate relied on, Advocate overlooked the evidence establishing that the entire transportation value was paid by the LCSO.

72. Section 112.3148(7)(d) provides: "Transportation shall be valued on a round-trip basis unless only one way transportation is provided. Round-trip transportation expenses shall be considered a single gift. Transportation provided in a private conveyance shall be given the same value as transportation provided in a comparable commercial conveyance."

73. Florida Administrative Code Rule 34-13.500(4) elaborates by providing a definition of "comparable commercial conveyance," to mean "a similar mode and class of transportation which is available commercially in the community. Where the donor provides transportation for more than one person in a single conveyance at the same time, each person's transportation is valued as if such transportation had been provided in a comparable commercial conveyance. Where the gift is transportation in a private airplane, the transportation shall be given the same value as an unrestricted coach fare."

74. Here, however, there was no "gift" of transportation, such as where a private party or entity pays the entire transportation cost. Nonetheless, an appropriate starting point is the value of the transportation, so as to test whether the LCSO paid that value.

75. Advocate proposed a finding that "[t]he credible testimony is that the average hourly rate to charter an airplane like Tomisich's Cessna 340 is $450 per hour." (Adv. PRO at 12, ¶ 12). As detailed in the Findings of Fact, the only testimony offered on that subject was from Commander Tomisich, who expressed uncertainty in saying that the current range of rates to charter a plane like his might be between $400 and $500 per hour, *if* the rates included fuel and pilot time. (Tr. 70). If this were accepted as credible testimony of the value of the round-trip flight on January 7 and 8, 2020, then the value of the transportation in a comparable commercial conveyance ranged from $1,600 to $2,000.

76. Using this measure, the LCSO payment of at least $1,726 was easily within the range charged by comparable commercial conveyances.

77. Advocate argues in the alternative that because "the gift is transportation in a private airplane," the value of the transportation gift is the value of unrestricted

coach fare. As detailed in the Findings of Fact, the evidence is insufficient to prove the value of unrestricted coach fare; there is only a stipulation that the "cost of a round-trip commercial flight ... would have exceeded $100." But again, here, any arguable gift was not "transportation," where the LCSO paid for two main components of that value. As set forth in the Findings of Fact, the only arguable "gift" would be the theoretical use-of-the-plane value component, separate from the components paid for by the LCSO: fuel costs, ramp fee, and pilot salaries. Absent a gift of the entire transportation cost, the rule providing for use of the unrestricted coach fare does not apply. Regardless, there is insufficient evidence to prove the value of unrestricted coach fare so as to compare that to the LCSO payments for transportation costs.

78. Advocate failed to prove that Commander Tomisich and/or Praetorian were donors of a gift to anyone. Instead, Commander Tomisich, in his capacity of LCSO Chief Pilot provided flight instruction services to his employer, the LCSO, through use of the private plane, for which the expenses of fuel, ramp fee, and pilot salaries were paid by the LCSO.

79. If Advocate had proven a dollar amount for the value of the use-of-the-plane component, which was not compensated by the LCSO, then by Advocate's own admission, any such gift would have been to the LCSO. The value of any such gift was not proven, but is of no consequence in determining whether Respondent failed to disclose a gift to him.

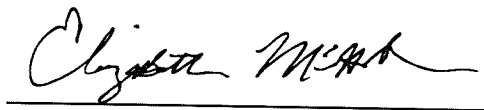
80. Even if one could maintain that the value of the use-of-the-plane component were considered a gift to Respondent, the evidence is insufficient to prove its value. Based on the only valuation evidence of record, it would be speculative to put a dollar amount on the value of any such gift. Instead, the valuation evidence of record would suggest little to no value, in no event arguably approaching, much less exceeding, the $100 threshold to trigger a reporting requirement.

81. Considering the facts, circumstances, and evidence presented in this case, together with the applicable law, it is concluded that Respondent did not violate the gift disclosure requirements of section 112.3148(8).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Commission on Ethics issue a final order and public report determining that Respondent, Sheriff Carmine Marceno, did not commit a violation of either section 112.3148(4) or section 112.3148(8).

DONE AND ENTERED this 9th day of March, 2022, in Tallahassee, Leon County, Florida.



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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.