

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: PATRICK LOEBIG,)
)
 Respondent.) Case No. 02-0825EC
)
_____)

RECOMMENDED ORDER

Notice was provided, and a formal hearing was held on August 6, 2002, in Tallahassee, Florida, and conducted by Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Advocate: Virlindia Doss, Esquire
Department of Legal Affairs
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

For Respondent: D. Andrew Byrne, Esquire
Cooper, Byrne, Blue & Schwartz
1358 Thomaswood Drive
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

Whether Respondent violated Section 112.3148(8)(a), Florida Statutes, by failing to disclose a gift with a value in excess of \$100, which was received from a co-worker.

PRELIMINARY STATEMENT

Subsequent to a complaint and a hearing by the Commission on Ethics (Commission), an Order Finding Probable Cause was filed on September 11, 2001. The Chairman of the Commission forwarded the matter to the Division of Administrative Hearings

(Division) on February 21, 2002, and it was filed by the Division on February 22, 2002. The case was set for hearing on June 4, 2002.

Pursuant to the Advocate's Motion to Continue, filed May 14, 2002, the case was re-scheduled for hearing on August 6, 2002, and was held in Tallahassee, Florida, on that date.

The Advocate presented the testimony of five witnesses, two of which were by deposition. In addition to the deposition transcripts, the Advocate offered 15 exhibits. All of the Advocate's exhibits were admitted into evidence.

Respondent called no witnesses and offered two exhibits which were admitted into evidence.

No Transcript was filed. Both parties timely submitted Proposed Recommended Orders which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Pursuant to Article II, Section 8, Florida Constitution, and Section 112.320, Florida Statutes, the Commission is empowered to serve as the guardian of the standards of conduct for the officers and employees of the state. Pursuant to Sections 112.324 and 112.317, Florida Statutes, the Commission is empowered to conduct investigations and to issue a Final Order and Public Report recommending

penalties for violations of the Code of Ethics for Public Officers and Employees (Code of Ethics).

2. Respondent, during all times pertinent, was employed by the Florida Department of Revenue (DOR) as Chief Assistant Counsel, and, as such, was subject to the requirements of the Code of Ethics.

3. Respondent has been a member of the Florida Bar since January 1988 and has worked for DOR since June 30, 1994. He is AV rated by the Martindale-Hubble rating system and is Board certified in appellate practice by the Florida Bar.

4. Wayne Mitchell, an attorney and Respondent's co-worker, prior to October 1, 1997, purchased three multi-day passes to Disney World, a theme park near Orlando, Florida. He paid approximately \$75.00 each, plus tax, for the passes. His girlfriend, Donna Harrington, also purchased a pass for approximately \$75.00 plus tax. These passes provided unlimited access to the Magic Kingdom, EPCOT, and MGM Studios during the period October 1, 1997, through December 17, 1997.

5. The passes were not transferable. They had Mr. Mitchell's name, the names of his two children, and Ms. Harrington's name printed on them. No one other than the named parties could use the passes without defrauding Disney World.

6. In November of 1997, Mr. Mitchell gave Respondent physical possession of the four passes. It was not Mr. Mitchell's intent that Respondent use the passes. They were provided to him so that he could inspect them. Mr. Mitchell expected only that Respondent, upon examination of the passes, would conclude that they provided an economical means in which to visit theme parks. Respondent, however, believed that because Mr. Mitchell gave him possession of the passes, it was Mitchell's intent that Respondent use them.

7. Respondent took the passes to Disney World. On November 16, 1997, he successfully used the passes to enter the park. His party, including himself, consisted of seven people. He used a pass for himself, and relatives Taylor Graham, Kristi Pierce, and Josephine Caito. No one at Disney World checked to ensure that the holders of these passes had names that matched the names printed on the passes.

8. At the same time Respondent entered the park, his wife and their two children also entered the park. Respondent's wife and his two children gained access by presenting tickets she bought from the park on that day for the sum of \$103.62.

9. Respondent, his wife, and their two children subsequently returned to Tallahassee. Prior to departing for Tallahassee, he gave the passes to his brother who lived in

Iowa, who had come to the Orlando area to meet with Respondent and his family and to enjoy the theme parks.

10. On November 18, 1997, Respondent's brother, or his brother's family, used two of Mr. Mitchell's passes to visit EPCOT.

11. On November 20, 1997, Respondent's brother, or his brother's family, used two of Mr. Mitchell's passes to visit MGM Studios.

12. Respondent's brother mailed the passes back to Respondent subsequent to their return to Iowa, and Respondent thereafter returned the passes to Mr. Mitchell.

13. Respondent did not report the receipt of the passes that he used for himself and for Taylor Graham, Kristi Pierce, and Josephine Caito, and which he allowed his brother to use, on the Commission's CE Form 9, Quarterly Gift Disclosure.

14. The regular daily admission price for the attractions in November of 1997, for a child, was \$33.92 plus tax, and the price for an adult, was \$42.14, plus tax. On November 16, 1997, the cost of entry for the two adults and two children who entered on the passes, had they actually purchased tickets, would have been \$152.12, plus applicable tax.

15. Respondent testified under oath that he believed that the passes were worth less than \$100.00. Respondent maintained that the more frequently a pass was used, the lower its value.

For example, under his view of the matter, if a person used a ticket costing \$75.00 twice, the value would be only \$37.50. If used four times, the value would be \$18.75.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 120.57(1), Florida Statutes.

17. Section 112.322, Florida Statutes, and Rule 34-5.0015, Florida Administrative Code, authorize the Commission to conduct investigations and to issue final orders and public reports concerning violations of the Code of Ethics.

18. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue of the proceedings. Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). Therefore, the Commission, through its Advocate, has the burden of proof.

19. Because of the penalties provided by Section 112.317, Florida Statutes, the Commission, through its Advocate, must prove its case by clear and convincing evidence. Latham v. Florida Com'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997).

20. Section 112.3148(8)(a), Florida Statutes, the statute under which Respondent was charged, provides as follows:

112.3148 Reporting and prohibited receipt of gifts by individuals filing full or limited public disclosure of financial interests and by procurement employees.--

* * *

(8)(a) Each reporting individual or procurement employee shall file a statement with the Commission on Ethics on the last day of each calendar quarter, for the previous calendar quarter, containing a list of gifts which he or she believes to be in excess of \$100 in value, if any, accepted by him or her, for which compensation was not provided by the donee to the donor within 90 days of receipt of the gift to reduce the value to \$100 or less, except the following:

1. Gifts from relatives.
2. Gifts prohibited by subsection (4) or s. 112.313(4).
3. Gifts otherwise required to be disclosed by this section.

(b) The statement shall include:

1. A description of the gift, the monetary value of the gift, the name and address of the person making the gift, and the dates thereof. If any of these facts, other than the gift description, are unknown or not applicable, the report shall so state.

2. A copy of any receipt for such gift provided to the reporting individual or procurement employee by the donor.

(c) The statement may include an explanation of any differences between the reporting individual's or procurement employee's statement and the receipt provided by the donor.

(d) The reporting individual's or procurement employee's statement shall be sworn to by such person as being a true, accurate, and total listing of all such gifts.

(e) If a reporting individual or procurement employee has not received any gifts described in paragraph (a) during a calendar quarter, he or she is not required to file a statement under this subsection for that calendar quarter.

21. Respondent was a "reporting individual," as that term is defined in Section 112.3148(2)(d), Florida Statutes, and during times pertinent was subject to the provisions of Section 112.3148(8)(a), Florida Statutes.

22. "Gift" is defined for purposes of the Code of Ethics by Section 112.312(12), Florida Statutes, as follows:

112.312. Definitions

As used in this part and for purposes of the provisions of s. 8, Art. II of the State Constitution, unless the context otherwise requires:

* * *

(12)(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:

* * *

4. The use of tangible or intangible personal property.

23. In order for a valid gift to occur under the common law, there must be a complete and irrevocable surrender of

dominion over the res, coupled with an intent then and there to pass title. A delivery which does not confer the present right to reduce the res into possession of the donee is insufficient. See Kuebler v. Kuebler, 131 So. 2d 211 (Fla. 1st DCA 1961), and Eulette v. Merrill Lynch, Pierce, Fenner and Beane, 101 So. 2d 603 (Fla. 3d DCA 1958).

24. The language in Section 112.312(12)(a), Florida Statutes, however, provides an exception to the common law definition of a gift for purposes of Section 112.3148, Florida Statutes. This definition, when referring to the receipt of something, states "that which is accepted by the donee" without regard to whether there is a donative intent or intent to pass title.

25. It is concluded that Respondent received a gift from Mr. Mitchell. This conclusion is based upon the evidence produced at the hearing and admissions made during the course of discovery. It is also based on the wording of the joint prehearing stipulation, at E.8., to the effect that, "In November 1997, Wayne Mitchell provided the Respondent four Walt Disney World passes for Respondent's use during a planned trip to Disney World."

26. Specifically, the use of the tickets was a gift of intangible personal property, in that the passes' value is based

upon that which the property represents rather than its own intrinsic value. Section 192.001(11)(b), Florida Statutes.

27. The receipt of a gift as defined by the Code of Ethics must be reported on a CE Form 9, Quarterly Gift Disclosure, if the gift received by the recipient is one which the recipient "believes to be in excess of \$100 in value." Section 112.3148(8), Florida Statutes. Therefore, a determination of what Respondent believed the gift to be worth is required.

28. Section 112.3148(7)(h), Florida Statutes, provides as follows:

(h) Entrance fees, admission fees, or tickets shall be valued on the face value of the ticket or fee, or on a daily or per event basis, whichever is greater.

29. The face value of each of the four passes was approximately \$75.00, plus tax. Therefore, it is tempting to conclude that the value of the gift was in excess of \$300.00, or in any event, more than \$100.00. Or, if the face value methodology should be rejected, one might conclude that the amount paid by Respondent's wife, \$152.12, represented the value of the passes, and that therefore the value of the passes was, perforce, in excess of \$100.00. See CEO 94-043--October 13, 1994.

30. The passes, however, were not "tickets" of a type which fit the definition of Section 112.3148(7)(h), Florida

Statutes, because the holders of these passes had to dupe the authorities at Disney World in order to use them. Because the holders could have been turned away at the gate, an element of risk is associated with the passes which detracts from their value. Stated another way, if the passes were sold in an arm's-length transaction, the price would be discounted, possibly substantially, because the purchaser might be unsuccessful in using them.

31. In determining value one might also conclude that for an honest person, the passes would have no value at all. A person who would be unwilling to cheat Disney World, would not pay any amount for the passes.

32. If a clear statutory or rule definition of value cannot be found which fits this case, and it cannot, the determination of value becomes a task fraught with difficulty. Determining the discount attributable to the element of risk is a matter for expert testimony of a kind not produced at the hearing in this case.

33. Because of the lack of proof of value, it cannot be found that the passes were worth over \$100.00. This is not a matter which has to be proved, but if the passes were clearly of a value of more than \$100.00, a determination that Respondent was dissembling in his claim that he believed them to be worthless would be easier.

34. It is not important that Respondent's asserted belief that the passes were worth \$100.00 or less is correct, or even reasonable. The issue is whether or not Respondent actually believed that the passes were of a value of \$100.00 or less. Therefore, in order for the Advocate to prevail, it is necessary to prove by clear and convincing evidence that Respondent was prevaricating.

35. Proof in this regard is made difficult by the lack of proof as to the actual value and compounded by the fact that the record did not make manifest that at times pertinent Respondent was actually aware of the cost of the passes. Mr. Mitchell did not testify with any certainty that he told Respondent what he had paid for the passes and it is uncertain when Respondent learned what his wife paid for the three tickets she purchased. Proof of what others paid for access to Disney World, at times pertinent, would have helped to illuminate what Respondent actually believed.

36. The evidence, taken as a whole, does not prove by clear and convincing evidence that Respondent was prevaricating. Accordingly, Respondent's assertion under oath that he believed the value of the passes was not more than \$100.00 must be accepted.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered dismissing the Order Finding Probable Cause.

DONE AND ENTERED this 11th day of September, 2002, in Tallahassee, Leon County, Florida.

HARRY L. HOOPER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of September, 2002.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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