STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: ROBERT J. MAJKA, JR.,	)	
	)	
Respondent.	)	Case No. 05-4461EC
	)	

RECOMMENDED ORDER

This cause came on for final hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on June 15, 2006, in Panama City, Florida.

APPEARANCES

For Advocate: Linzie F. Bogan, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Robert J. Majka, Jr., violated the Florida Code of Ethics for Public Officers and Employees.

PRELIMINARY STATEMENT

Kenneth J. Kopczynski, of the Florida Police Benevolent Association, authored a Complaint concerning Robert J. Majka,

Jr. (Mr. Majka), of Bay County, Florida, which was signed on July 14, 2003, more than three years after the events alleged to be the basis of the Complaint. It was submitted to the Commission on Ethics (the Commission) and filed on the day it was signed. The Complaint alleged a possible violation of Section 112.313(2), (6) and (7), Florida Statutes (1999). The events alleged in the Complaint occurred in the year 2000.

The Commission, based on a preliminary investigation, and upon consideration of the Commission's Advocate, and subsequent to an Order For Supplemental Investigation of Facts Materially Related to Complaint filed June 29, 2004, entered an Order Finding Probable Cause that was filed on September 8, 2004. This Order found probable cause to believe Mr. Majka violated Section 112.3148(4), Florida Statutes, by accepting from Corrections Corporation of America (CCA), a trip to Nashville, Tennessee, valued in excess of $100 and by accepting a round of golf from Gary Akers, the County's financial advisor, valued in excess of $100. The Commission dismissed all other allegations.

In a letter dated December 8, 2005, the Commission's Complaint Coordinator notified the Division of Administrative Hearings that the Chairman of the Commission had requested a public hearing into the matter. The Commission also forwarded to the Division of Administrative Hearings, the cases of County Attorney Nevin Zimmerman and County Manager Jonathan A. Mantay,

also of Bay County, who had Probable Cause Orders entered for similar alleged offenses. On December 27, 2005, Respondent Zimmerman's case, Number 05-4462EC, and Respondent Mantay's case, Number 05-4463EC, were consolidated with Mr. Majka's case. The parties nevertheless requested that individual Recommended Orders be issued, which has been done.

Pursuant to a Consent Motion for Limited Relinquishment of Jurisdiction, the Count addressing the round of golf accepted from Gary Akers, was not considered by the Administrative Law Judge. Thus the only issue litigated was whether Mr. Majka knowingly violated Section 112.3148(4), Florida Statutes, by accepting a gift in the form of CCA's payment for travel expenses valued at over $100, or for which he reasonably believed was valued over $100, relative to a trip to Nashville, Tennessee.

At the hearing, the Advocate presented the testimony of two witnesses and offered 16 exhibits into evidence. Respondents presented the testimony of four witnesses and offered five exhibits into evidence.

A Transcript was filed on June 30, 2006. After the hearing, Mr. Majka timely filed his Proposed Findings of Fact and Conclusions of Law on July 31, 2006. The Advocate timely filed his Proposed Findings of Fact and Conclusions of Law on August 1, 2006.

References to statutes are to Florida Statutes (1999) unless otherwise noted.

FINDINGS OF FACT

1. Pursuant to Article II, Section 8, Florida Constitution, and Section 112.320, 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, 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 Majka is subject to the Code of Ethics. Mr. Majka, during times pertinent, was Chief of Emergency Services for Bay County, Florida, and is a reporting individual, as that term is used in the Code of Ethics, and is required to file annual financial disclosures with the Bay County Supervisor of Elections, as provided by Section 112.3145(2)(c). On February 7, 2006, long after the events involved with this case, he was promoted to the position of Assistant County Manager.

3. As Chief of Emergency Services, Mr. Majka was in charge of the County's corrections program. During times pertinent he employed a staff member named Ann Cahall, whose duties included interacting routinely with the County's privatized corrections provider, CCA.

4. On or about August 31, 1999, the Bay County Commission was addressing the problem of inmate overcrowding in its county correctional facilities, which were operated by CCA. On or about that time, the county correctional facility exceeded capacity by about 352 inmates.

5. The Bay County Commissioners decided to address the issue. The Bay County Commission directed County Manager Jonathan A. Mantay and his staff to study the problem and to recommend courses of action. As a result of the study, two possible courses of action were recommended.

6. One possible course of action was the adoption of the "Lifeline" program operated by CCA in Nashville, Tennessee, which CCA claimed would reduce recidivism by teaching inmates life skills and addressing drug abuse, among other things. CCA's corporate headquarters is located in Nashville.

7. The other possible course of action was to emulate the program operated by Sheriff Joe Arpaio, of Maricopa County, Arizona. Sheriff Arpaio's program consists of housing inmates in tents that are sufficiently primitive that inmates, after having had the tenting experience, avoid repeating it either by not committing crimes in Maricopa County, or by committing them elsewhere.

8. In order to evaluate the two courses of action, the Bay County Commission decided that three commissioners and certain

staff should travel to the two sites and evaluate the programs. Mr. Majka, County Manager Mantay, and County Attorney Zimmerman, were among those who were designated to travel to Nashville and Phoenix.

9. Mr. Majka's role, in giving that plan effect, was to contact CCA and Maricopa County and determine dates that they could support a visit from persons from Bay County. He contacted Brad Wiggins, the Director of Business Development for CCA, and also talked to the public information officer with the Maricopa County sheriff's office, in order to determine convenient dates. This was Mr. Majka's only involvement with the planning phase of the proposed trip.

10. County Attorney Zimmerman called Mr. Wiggins on February 6, 2000, and inquired if CCA would pay for the airline tickets to Nashville. Mr. Zimmerman told Mr. Wiggins, when he asked CCA to pay for the trip, that having CCA pay the airfare, ". . . was the County's preferred way of doing things, and, in fact, that's when he recounted the story of the County taking some trips to New York and maybe some other places."

11. Mr. Wiggins was not authorized by CCA to approve the payment of travel expenses for customers or others. He forwarded County Attorney Zimmerman's request to James Ball, his supervisor. Subsequently, Mr. Wiggins happened upon the CEO of CCA, a Dr. Crants, while walking about the Nashville

headquarters of CCA. Dr. Crants directed Mr. Wiggins to fund the trip.

12. Ultimately, as a result of these conversations, CCA paid Trade Winds Travel, Inc., of Panama City, Florida, for the cost of the air travel for the entire Bay County contingent to Nashville, and thence to Phoenix, and back to Panama City. The evidence is not conclusive as to whether it was the intent of CCA to fund the trip beyond Nashville, but they paid for the cost of the airfare for the entire trip.

13. The request for the payment and the request to visit CCA in Nashville was driven by Bay County's needs, not by the needs of CCA. Bay County was one of CCA's most valued customers, however, and CCA was motivated to respond to their request. This was especially true because one of CCA's first contracts to provide correctional services was with Bay County.

14. County Attorney Zimmerman's "marching orders" for many years was that if there was an opportunity to require a third party to pay an expense, then the third party should pay rather than Bay County. That policy is reflected in a variety of Bay County ordinances, including the requirement that developers pay for the cost of permitting.

15. The third party payor policy was also reflected in a 1997 trip where Westinghouse was required by the County Commissioners to pay for the commissioners' and County staff's

trip to Vancouver, B.C., and Long Island, New York, to evaluate the transfer of the resource recovery facility to another vendor. This was the trip that County Attorney Zimmerman discussed with Mr. Wiggins.

16. This policy was set forth in a letter by County Attorney Zimmerman dated October 30, 1997, which informed the County Commissioners that all expenses in connection with their travel, and with the travel of staff, would be funded by Westinghouse. He further stated that, "[it] is our opinion that the payment of these necessary expenses are not 'gifts,' as that term is defined in State law."

17. Prior to the trip to Nashville, Mr. Majka was present during a conversation between the County Manager and County Attorney. The discussion concerned whether Bay County or CCA would fund all or part of the trip. Mr. Majka could not have learned from this discussion that CCA would fund all or part of the trip, and nothing occurred which would have required him to make further inquiry. He specifically heard County Attorney Zimmerman opine during this conversation, that the trip was "legal."

18. Subsequently, Mr. Majka was contacted by a Ms. Rogers in the County Manager's Office. He was directed to go to the County Manager's office to obtain an airline ticket for the trip. He does not recall if he received that information

directly from Ms. Rogers or whether it was relayed to him by Ms. Cahall, but it was clear to him that the County Manager was requiring him to participate in the travel. He picked up the ticket as directed. The ticket did not indicate how payment was made.

19. On Thursday, February 24, 2000, Messrs. Zimmerman, Majka, and Mantay, traveled with Bay County Commissioners Danny Sparks, Richard Stewart, and Carol Atkinson, and television reporter Carmen Coursey, by commercial air, to Nashville, Tennessee. On Saturday, February 26, 2000, they traveled to Phoenix, Arizona, and they returned to Panama City on Tuesday, February 29, 2000.

20. The trip was authorized by the Bay County Commission subsequent to several public discussions concerning the need for an on-site visit to Nashville and Phoenix. There was a legitimate public purpose for the trip.

21. Channel 13 television news reporter, Carmen Coursey accompanied the officials. It is clear that there was nothing about the trip that was accomplished sub rosa.

22. The airfare was paid by CCA directly to Trade Winds Travel, Inc. CCA did not ask for or receive reimbursement from either Bay County or the travelers. The cost of Mr. Majka's airfare for the entire trip was $1,257. Mr. Majka did not learn that CCA paid for the airfare until three or more years after

the trip was completed. Mr. Majka at the time of the trip had no reason to contemplate the cost. After learning that CCA paid the tariff, he also learned that the cost of the trip exceeded $100.

23. Upon arrival in Nashville, Mr. Majka, and the other travelers were greeted by Mr. Wiggins, who transported them to the Downtown Courtyard Marriott Hotel in a van. The cost of the transportation was paid by CCA, and CCA neither asked for nor received reimbursement from Bay County or the travelers. The value was not established. Mr. Majka did not know who paid for the ground transportation.

24. The travelers ate dinner, February 24, 2000, as a group that evening. Someone paid for Mr. Majka's dinner, but the record does not indicate that CCA paid for it.

25. On Friday, February 25, 2000, Mr. Majka and the other travelers toured the Davidson County (Tennessee) Correctional Facility from 9:00 a.m. until noon. They ate lunch at the CCA corporate headquarters provided by CCA. That afternoon they met with Mr. Wiggins and other representatives of CCA. They discussed the possibility of CCA providing "Lifeline" and "Chances" programs operated by CCA, to Bay County.

26. That evening, at CCA's expense, Mr. Majka and the other travelers were transported by CCA to a dinner that was paid for by CCA. CCA neither asked for nor received

reimbursement from Bay County or the travelers. Mr. Majka was not aware of either the cost of the dinner or who paid for it.

27. Mr. Majka and the other travelers stayed two nights at the Marriott at a cost of $224.24. The cost of the hotel was paid by CCA, and CCA neither asked for nor received reimbursement from Bay County or the travelers. Mr. Majka learned after checking out from the Marriott, on February 26, 2000, through talking with others, that CCA had paid the hotel bill, but there is no evidence of record that he knew the amount, or that it was an amount more than $100. No evidence was adduced proving that Mr. Majka reasonably believed at that time that it was of a value of more than $100.

28. On Saturday, February 26, 2000, Mr. Majka and the other travelers departed for Phoenix by air and observed Sheriff Arpaio's program the following Monday morning. They also toured the Phoenix Fire Department. The travelers, with the exception of County Attorney Zimmerman, stayed at the San Carlos Hotel. Mr. Majka's hotel bill in Phoenix was paid with a credit card issued to County Manager Mantay by Bay County. On Tuesday February 29, 2000, they all returned to Panama City.

29. Bay County originally contracted with CCA to operate their detention facilities on September 3, 1985. This contract had a term of 20 years; however, it was amended on September 16, 1996, to reflect an expiration date of September 24, 1999.

Other extensions followed. An amendment dated June 18, 2000, provided that "CCA shall operate the 'Lifeline Program' through September 1, 2001." On May 15, 2001, the contract was extended to September 30, 2006.

30. Mr. Majka did not derive any person financial benefit as a result of CCA paying the lodging expenses in Nashville or as a result of CCA paying for his airfare. At no time has he attempted to reimburse CCA for the cost of the trip. Mr. Majka did not receive per diem or any amount in excess of the actual cost of the trip. The entity receiving a benefit from the trip was Bay County.

31. Mr. Majka had a County credit card in his possession but by County policy he was not allowed to charge meals on it. His usual practice, when traveling on behalf of the County, is to obtain receipts and file an expense report at the conclusion of the trip. He would thereafter be reimbursed for his travel expenses. He did not file an expense report subsequent to this travel.

32. It is found as a fact that the cost of the travel to Nashville and back to Panama City, and the cost of the hotel in Nashville, totaled more than $100 and Mr. Majka ultimately knew that the cost, when aggregated, was more than $100. Mr. Majka could not have acquired this belief, however, until more than

three years after the trip because that is when he learned that CCA had paid for the airfare.

33. It was not uncommon for Mr. Wiggins and other CCA officials to appear before the Bay County Commissioners on behalf of CCA, or to otherwise interact with representatives of CCA. Brad Wiggins was a lobbyist, as that term is defined in Section 112.3148(1)(b)1., and others interacted with Bay County on behalf of CCA and they were lobbyists also. During times relevant, Bay County did not maintain a lobbyist registration system.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.57(1) and 112.324(3), Fla. Stat (2005).

35. 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 Advocate has the burden of proof.

36. Because of the penalties provided by Section 112.317, the Advocate must prove its case by clear and convincing

evidence. Latham v. Florida Commission on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997).

37. The issue in this case is narrowly drawn by the Order Finding Probable Cause, which refers specifically to, " . . . accepting payment for expenses valued at over $100 relative to his trip to Nashville." Thus events that occurred in Arizona will not be considered in this Recommended Order.

38. It is found as a fact that the cost of the travel to Nashville and back to Panama City, and the cost of the hotel in Nashville totaled more than $100 and Mr. Majka knew that the cost when aggregated, was more than $100. Mr. Majka could not have acquired this belief, however, until more than three years after the trip because that is when he learned that CCA had paid for the airfare.

39. The pertinent subsections of Section 112.3148, are set forth below:

> 112.3148. Reporting and prohibited receipt of gifts by individuals filing full or limited public disclosure of financial interests and by procurement employees
>
> * * *
>
> (2) As used in this section:
>
> * * *
>
> (b)1. "Lobbyist" means any natural person who, for compensation, seeks, or sought during the preceding 12 months, to influence the governmental decisionmaking of a

reporting individual or procurement employee or his or her agency or seeks, or sought during the preceding 12 months, to encourage the passage, defeat, or modification of any proposal or recommendation by the reporting individual or procurement employee or his or her agency.

* * *

(c) "Person" includes individuals, firms, associations, joint ventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

(d) "Reporting individual" means any individual, including a candidate upon qualifying, who is required by law, pursuant to s. 8, Art. II of the State Constitution or s. 112.3145, to file full or limited public disclosure of his or her financial interests.

* * *

(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 political committee or committee of continuous existence, as defined in s 106.011 or from a lobbyist who lobbies the reporting individual's or procurement employee's agency, or directly or indirectly on behalf of the partner, firm, employer, or principal of a lobbyist, if he or she knows or reasonably believes that the gift has a value in excess of $100; however, such a gift may be accepted by such person on behalf of a governmental entity or a charitable organization. If the gift is accepted on behalf of a governmental entity or charitable organization, the person receiving the gift shall not maintain custody of the gift for any period of time

beyond that reasonably necessary to arrange for the transfer of custody and ownership of the gift.

40. If Mr. Majka is to be found to have violated Section 112.3148(4), the Advocate must prove that:

a. Mr. Majka is a reporting individual;

b. who knowingly;

c. accepted a gift;

d. from a lobbyist who lobbies the reporting individual's agency, or directly or indirectly on behalf of the partner, firm, employer, or principal of a lobbyist;

e. and he knew or reasonably believed that the gift had a value in excess of $100.

41. If the facts demonstrate that a gift was accepted by a reporting individual on behalf of a governmental entity, it is a complete defense to the offense alleged, if the person receiving the gift did not maintain custody of the gift for any period of time beyond that reasonably necessary to arrange for the transfer of custody and ownership of the gift.

42. It is undisputed that Mr. Majka is a reporting individual, and that he was transported by commercial air from Panama City to Nashville and ultimately back to Panama City on a tariff that was paid by CCA, the principal of a lobbyist, Mr. Wiggins.

43. What remains to be decided, is whether Mr. Majka knowingly accepted a gift, in the form of transportation and accommodations in Nashville.

44. The definition of a "gift" for purposes of the Code of Ethics is provided in Section 112.312.

> 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:
>
> * * *
>
> 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.
>
> * * *
>
> (b) "Gift" does not include:
>
> 1. Salary, benefits, services, fees, commissions, gifts or expenses associated primarily with the donee's employment, business, or service as an officer or director of a corporation or organization.

45. Construing this statute in the most simplistic way, one could conclude that transportation is automatically a gift. If one does that, however, then lodging, using the same logic, cannot be a gift since it is not enumerated in Section 112.312(12)(a)1-14. It is apparent, therefore, that the Florida Legislature meant to include lodging under the general definition at Section 112.312(12), and intended to also provide in definite terms that transportation was something that could, depending on the facts elucidated, be a gift.

46. The word "donee" is not specifically defined by Section 112.312, or elsewhere in the Code of Ethics. According to Black's Law Dictionary, a "donee" is, ". . . one to whom a gift is made." Black's Law Dictionary, 4th Ed. Rev. 1975. The record is clear that it was the intent of CCA to give air transportation and lodging to Bay County.

47. As noted in paragraph 10, above, CCA and Mr. Zimmerman did not discuss giving anything to Mr. Majka. Mr. Zimmerman prevailed upon Mr. Wiggins to fund travel on behalf of Bay County. The donee contemplated by CCA's lobbyist was Bay County. Therefore, Mr. Majka was not a donee, was not one to whom a gift was made, and therefore could not have accepted a gift as defined by Section 112.312(12)(a).

48. The Code of Ethics recognizes that Mr. Majka did not receive a gift, by noting in Section 112.312(12)(b)1, that

"gift" does not include, ". . . expenses associated primarily with the donee's employment . . . ." The travel was clearly part of his employment.

49. The Code of Ethics also recognizes that an employee may receive a gift on behalf of a governmental agency as noted in the last two sentences of Section 112.3148(4), which states, ". . . however, such a gift may be accepted by such person on behalf of a governmental entity or a charitable organization. If the gift is accepted on behalf of a governmental entity or charitable organization, the person receiving the gift shall not maintain custody of the gift for any period of time beyond that reasonably necessary to arrange for the transfer of custody and ownership of the gift."

50. In this case, the "gift," if one concludes a gift was given to Mr. Majka on behalf of Bay County, was received and simultaneously transferred back to the county in the case of the hotel bill in Nashville. With regard to the air transportation, since Mr. Majka did not learn that CCA paid for it until more than three years after the flights, if one follows this thread to its logical conclusion, the gift was knowingly accepted on behalf of Bay County sometime in 2003 and simultaneously turned over to Bay County.

51. Commission on Ethics Opinion 91-71 involved a Charlotte County Commissioner who accepted free legal

representation in the successful defense of a recall petition. The partner of the attorney providing the legal representation occasionally lobbied the County Commission. If the attorney providing the representation had not donated it to the county, the county would be legally required to pay him. The Commission concluded that the donee was Charlotte County and that therefore, the Charlotte County Commissioner had not run afoul of Section 112.3148(4). The facts in the case at bar are essentially congruent with the holding in Committee on Ethics Opinion 91-71.

52. Interestingly, Committee on Ethics Opinion 91-71 stated in part, "We are reluctant to get involved in matters regarding the procedures to be used by a county commission in conducting its business." It may be tempting to note in this case that it may be bad business for a county to prevail upon a vendor, or an entity desiring to be a vendor, to provide travel and lodging to a county commissioner or person on a county staff. However, determining the wisdom of that policy is not the province of the Administrative Law Judge, or the Commission on Ethics, as the Commission noted.

53. A consideration of Committee on Ethics Opinion 91-21 is also helpful. In that case the Okaloosa County Supervisor of Elections inquired if she might travel to California to inspect voting machines and accept travel expenses from the voting

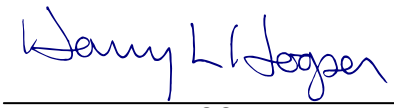
machine manufacturer. The Commission held that it was permissible under Section 112.3148(4) for the manufacturer to reimburse Okaloosa County for the travel, but impermissible for the manufacturer to provide the expense money directly to the Supervisor. In this case the vendor paid a third party for travel for the benefit of Bay County. There may be a distinction between the that case and the case at bar, but there is no difference because no one directly gave Mr. Majka money for travel.

RECOMMENDATION

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

RECOMMENDED that the Commission on Ethics issue a Final Order and Public Report finding that Robert J. Majka, Jr. did not violate Section 112.3148(4), Florida Statutes, and dismissing the complaint filed against him.

DONE AND ENTERED this 17th day of August 2006, in Tallahassee, Leon County, Florida.



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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.