BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re NEVIN ZIMMERMAN, Respondent.	Complaint No. 03-084 DOAH Case No. 05-4462EC Final Order No.06-316

FINAL ORDER AND PUBLIC REPORT

This matter came before the State of Florida Commission on Ethics (Commission), meeting in public session on October 20, 2006, on the Recommended Order (RO) of an Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH) rendered on August 17, 2006.

Background

This matter began with the filing of an ethics complaint by Kenneth J. Kopczynski ("Complainant" or "Kopczynski"), on July 14, 2003, against Nevin Zimmerman ("Respondent" or "Zimmerman"), alleging that the Respondent (as Attorney for Bay County, Florida) violated Sections 112.313(4), 112.3148(4), and 112.3148(8), Florida Statutes, regarding an alleged trip to Tennessee and Arizona provided by a company (or its employees, agents, or representatives) doing business with or seeking to do

business with the County.[1] By order dated August 6, 2003, the Commission on Ethics' Executive Director determined that the allegations of the complaint were legally sufficient to indicate possible violations of the statutes and ordered Commission staff to investigate the complaint, resulting in a Report Of Investigation dated July 8, 2004. By order dated September 8, 2004, the Commission found probable cause to believe the Respondent, as Bay County Attorney, violated Section 112.3148(4), Florida Statutes, by accepting from Corrections Corporation of America (CCA) expense-paid trips valued at over $100 to Tennessee and Arizona; and found probable cause to believe the Respondent violated Section 112.3148(8), Florida Statutes, by failing to file a CE Form 9, Quarterly Gift Disclosure, based upon gifts received from CCA. Subsequently, the matter was forwarded to DOAH for assignment of an ALJ to conduct a formal hearing and prepare a recommended order. A formal evidentiary hearing was held before the ALJ on June 15, 2006 (including the presentation of witnesses and the admission of exhibits); a transcript of the hearing was provided; and both the Respondent and the Advocate for the Commission on Ethics filed proposed recommended orders with the ALJ. On August 17, 2006, the ALJ entered his Recommended Order (RO) recommending

[1] The ALJ's reference in the RO to Sections 112.313(2), (6), and (7), Florida Statutes, is in error. None of these provisions was at issue before the Commission or the ALJ.

that the Commission issue a final order and public report finding that the Respondent did not violate Section 112.3148(4) or Section 112.3148(8), Florida Statutes, and recommending that the ethics complaint filed against the Respondent by the Complainant be dismissed. On September 1, 2006, the Advocate timely filed (with the Commission) exceptions to the RO; and on September 11, 2006 the Respondent filed a response to the Advocate's exceptions. Both the Respondent and the Advocate were notified of the date, time, and place of our final consideration of this matter; and both were given the opportunity to make argument during our consideration.

Standards of Review

Under Section 120.57(1)(l), Florida Statutes, an agency may reject or modify the conclusions of law and interpretations of administrative rules contained in a recommended order. However, the agency may not reject or modify findings of fact made by an ALJ unless a review of the entire record demonstrates that the findings were not based on competent, substantial evidence ("CSE") or that the proceedings on which the findings were based did not comply with the essential requirements of law. See, e.g., Freeze v. Department of Business Regulation, 556 So. 2d 1204 (Fla. 5th DCA 1990), and Florida Department of Corrections v. Bradley, 510 So. 2d 1122 (Fla. 1st DCA 1987). CSE has been

defined by the Florida Supreme Court as such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusions reached." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

The agency may not reweigh the evidence, may not resolve conflicts in the evidence, and may not judge the credibility of witnesses, because such evidential matters are within the sole province of the ALJ. Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Consequently, if the record of the DOAH proceedings discloses any CSE to support a finding of fact made by the ALJ, the Commission on Ethics is bound by that finding.

Under Section 120.57(1)(l), Florida Statutes, an agency may reject or modify the conclusions of law over which it has substantive jurisdiction and the interpretations of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion or interpretation and must make a finding that its substituted conclusion or interpretation is as or more reasonable than that which was rejected or modified.

Having reviewed the RO and the entire record of the proceeding, the Advocate's exceptions, and the Respondent's response to the exceptions, and having heard the arguments of the Advocate and the Respondent, the Commission on Ethics makes the following rulings, findings, conclusions, dispositions, and/or recommendations:

Rulings on Advocate's Exceptions

1. The Advocate takes exception to paragraph 41 of the ALJ's RO, taking issue with the ALJ's reasoning as to whether "transportation" and "lodging" can constitute "gifts" for purposes of Section 112.3148, Florida Statutes, and arguing that paragraph 41 misstates the law in this regard.

This exception is accepted to the extent that it takes issue with the ALJ's failure to recognize that lodging is defined as a gift under Section 112.312(12)(a)7, Florida Statutes, because "lodging" is enumerated in Section 112.312(12)(a)7. This exception is rejected to the extent that it argues that the ALJ failed to recognize that transportation or lodging can constitute gifts because paragraph 41 clearly recognizes that they can. Further, because paragraph 41 is a conclusion of law, the Commission can reject or modify it under Section 120.57(1)(l), Florida Statutes. Therefore, to the extent, if any, that paragraph 41 misstates the law, for

clarity, the Commission hereby modifies it to state that "lodging" is defined as a "gift" under Section 112.312(12)(a)7, Florida Statutes, and that both "transportation" and "lodging" can constitute a gift for purposes of Section 112.3148, Florida Statutes.[2]

2. The Advocate takes exception to paragraph 42 of the RO, arguing that the ALJ relied on a Black's Law Dictionary definition of "donee" (and in so doing ignored the Commission's administrative rule which defines "donee") in finding, in the last sentence of paragraph 42, that "[t]he record is clear that it was the intent of CCA to give air transportation and lodging to Bay County," and arguing that "donee" under the Commission's rule only includes natural persons (not counties or other government entities), and further arguing that intent of a donor is not relevant to the issue of the identity of a "donee" (public employee versus the employee's government entity) where the natural person (public employee) directly receives an item defined as a gift (further arguing that intent of a donor is relevant only in indirect gift situations).

[2] The Commission's reason for rejection or modification of the any contrary conclusions of the ALJ is that Section 112.312(12), which is a part of the definition of "gift," clearly encompasses both "transportation" and "lodging"; and the Commission finds that its substituted conclusions are as or more reasonable that any contrary conclusions by the ALJ.

This exception is rejected as to the last sentence of paragraph 42, which is a finding of fact.[3] However, to the extent that paragraph 42 seeks to substitute a law dictionary definition of "donee" for the Commission's promulgated rule definition of the same term, this exception is accepted. It is the province of the Commission under Section 120.57(1)(l), Florida Statutes, to construe the meaning of a law and its terms. Nevertheless, to the extent that the Advocate argues that, under various rules of the Commission, intent of the donor as to whom the donor wishes to bestow a gift upon is irrelevant to a determination by an ALJ or by the Commission as to the identity of the donee, or to the extent that the Advocate argues that a government entity (as opposed to its employee) can never be a donee when the employee directly receives an item within the definition of "gift," this exception is rejected. Actual or physical receipt of an item, intent of the donor, and other factors can, depending upon the circumstances, be relevant as to whether a given public employee (reporting individual) has received a gift in violation of Section 112.3148, Florida Statutes.[4]

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[3] The last sentence states that "[t]he record is clear that it was the intent of CCA to give air transportation and lodging to Bay County."

[4] The Commission's reason for rejection or modification of any contrary conclusions of the ALJ is that the Commission's rule defining "donee" controls over any differing dictionary definition; and the Commission finds

3. The Advocate excepts to paragraph 43 (which essentially states that Bay County and not the Respondent was the donnee of a gift from CCA) of the RO, making argument similar to that made in his exception to paragraph 42 of the RO.

This exception is rejected to the extent that paragraph 43 constitutes factual findings. To the extent that paragraph 43 constitutes legal conclusions (regarding the meaning of the term "donee," etc.), this exception is accepted like the exception to paragraph 42.

4. The Advocate excepts to paragraph 44 of the RO, arguing that, contrary to the ALJ's determination, as a matter of law the exclusion from the definition of "gift" codified at Section 112.312(12)(b)1, Florida Statutes ("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."), cannot apply to the employment which constitutes the donee's public position.

This exception is accepted.[5] Contrary to the conclusion of the ALJ, Commission Rule 34-13.214(1), Florida Administrative

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that its substituted conclusions are as or more reasonable than any contrary conclusions by the ALJ.

[5] The Commission's reason for rejection or modification of any contrary conclusions of the ALJ is that the Commission's administrative rule construing the meaning of the language of Section 112.3148(4) at issue is contrary to the meaning ascribed to the language by the ALJ; and the

Code, provides that "'[a]ssociated primarily with the donee's employment or business' means associated with the donee's principal employer or business occupation and unrelated to the donee's public position."[6]

5. The Advocate excepts to paragraphs 45 and 46 of the RO, arguing that the ALJ's interpretation of the language of Section 112.3148(4), Florida Statutes (". . . 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."), to allow for a "simultaneous transference" of a gift [i.e., the Respondent's receiving the substance or benefit of the items provided by CCA (the trip to Nashville) as an agent or employee of Bay County—the ultimate recipient (donee)] is an incorrect conclusion as to the meaning of the language.

This exception is rejected. Paragraph 45 is an accurate statement of the law; and the Advocate agrees in his exception

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Commission finds that its substituted conclusions are as or more reasonable than any contrary conclusions by the ALJ.

[6] However, failure of Section 112.312(12)(b)1 to encompass Respondent's situation does not result in a determination by the Commission that Respondent violated Section 112.3148, given other content of the RO and of this Final Order And Public Report.

that it is. Regarding paragraph 46, the Commission has never held that a natural person recipient of a gift for a governmental entity must "hold" a gift for any period of time in order for the gift to come within the language stated in paragraph 45.[7] Rather, we conclude that the language of Section 112.3148(4) referred to in paragraph 45 allows for both immediate and delayed transfer of gifts to governmental entities received by a natural person (reporting individual), provided that any delay in transfer does not exceed the time reasonably necessary to arrange for the transfer. The other determinations of paragraph 46 are findings of fact regarding which we are severely constrained by Section 120.57(1)(l).[8]

6. The Advocate excepts to paragraph 49 of the RO, arguing that it misstates and mischaracterizes the factual summary and holding of CEO 91-21 (gift acceptance: county supervisor of elections accepting meals, transportation, and

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[7] The Pritchard and Colon ethics complaint matters (in which the Commission found probable cause at its June 2006 meeting) cited by the Advocate are pending hearing, settlement, and/or final disposition, and thus should not be considered "precedent" as to our interpretation of the meaning of the language referenced in paragraph 49. Issues as to all of the elements of alleged violations of Section 112.3148(8), including issues of whether the respondents accepted gifts, which are necessarily interwoven with the issue of whether the items were a gift to their governmental entity, are still pending.

[8] The essence of this exception appears to go to the substance of the ALJ's factual findings in paragraph 46 (that Bay County, rather than Respondent, was the donee of the gift; or, stated differently, that Respondent merely was the County's agent who received the benefit of an item substantively provided to the County). Regardless, it is inescapable that the RO finds as a factual matter that the County, and not the Respondent, received the gifts, and does not find that the Respondent received a gift.

lodging from manufacturer of voting equipment to inspect factory and products of manufacturer).

This exception is rejected. The ALJ has not misstated or mischaracterized CEO 91-21, which, in essence, holds that after-the-fact reimbursement to the government entity is permissible. Further, the last two sentences of paragraph 49 are findings of fact to which the Advocate did not take exception, and regarding which we are severely constrained under Section 120.57(1)(l).[9] The Advocate excepts to paragraph 50 of the RO, arguing that the ALJ incorrectly found that the Respondent did not receive a gift and, therefore, that the Respondent did not violate Section 112.3148(8), Florida Statutes, by not reporting a gift. This exception is rejected. The ALJ made findings of fact that the Respondent did not receive a gift.

7. To summarize and to clarify our view of the gift law in this area, when an individual is transported or provided lodging and it is paid for or provided by another, so long as that individual did not provide equal or greater consideration to the payor or provider for that transportation or lodging, the individual received a "gift" as that term is defined in Section 112.312(12), unless the circumstances are specifically excluded

[9] A point of the ALJ's findings in the last two sentences is that there is a similarity between the manufacturer's paying the government entity (not the supervisor) in CEO 91-21 and CCA's paying persons other than the Respondent (e.g., hotel, airline) in the instant matter: similar in that no one directly gave either the supervisor or the Respondent money for travel.

by a paragraph within Section 112.312(12). To the extent that our opinion CEO 91-71, which concerned legal services, would imply otherwise, that opinion is revoked.

8. We find this view of the law more reasonable than that proposed by the ALJ, because it does not require that any legal fictions be created, such as a hypothetical 2003 "transfer" to the County of transportation that was provided to the Respondent in 2000 or an "simultaneous" transfer of lodging provided to the Respondent when the hotel bill was paid. Nor does it require that the employee's agency be considered to have received "lodging" or "transportation," when an agency cannot be transported or lodged.

9. This view of the law also is more consistent with opinions, rendered by the House General Counsel during the first year after the law was enacted, about travel that was taken in an official capacity. For example, in HCO 91-29 the Member was appointed by the Speaker as Florida's representative for a Council of State Governments Environmental Mission to Japan. As part of that representation, he was invited to an educational briefing in Washington to assist him in fulfilling his obligations as a representative. Because of State budget shortfalls, the Council agreed to pay his expenses to Washington, which expenses would normally be paid by the State

of Florida. The opinion concluded this would be a reportable gift from the Council, regardless of the fact that it could be argued that the payment of such expenses was a gift to the State rather than to the Member, as his expenses would otherwise be reimbursable by the State. The Council's payment of a portion of the travel expenses to Japan were also a "gift," notwithstanding that the House paid for some of the travel and the travel was related to fulfilling official duties as a Member of the House. HCO 91-44. See also, HCO 91-09 (the payment or waiver of parking charges would constitute a gift, "notwithstanding that the ultimate beneficiary is the State of Florida, which would be required to reimburse you for the reasonable expenses incurred by you when parking at the airport for state business."); HCO 91-07 ("linkage" institutes operated within the Department of Education providing travel and other expenses for legislators and other public officials when traveling to the foreign linkage partners would constitute a "gift."); and HCO 91-13 (an individual citizen may charter a plane for the purpose of flying the St. Johns County Legislative Delegation round trip between their districts and Tallahassee to address the Governor and Cabinet, but it would constitute a "gift."). Clearly, if the Legislature intended that transportation in one's official capacity for a matter involving

a public purpose is not a "gift," these opinions would have reached completely different results.

10. In addition, if it is not a "gift" as defined by the Legislature whenever a public officer or employee travels in an official capacity on public business at the expense of a person or entity other than his or her public agency, we would be forced to ignore the language of two very specific provisions of the gift law. Subparagraphs 112.312(12)(a)7 and (b)7 exclude from the definition of a "gift" transportation "provided to a public officer or employee by an agency in relation to officially approved governmental business." As this language only addresses transportation provided "by an agency," it clearly means that transportation provided by private persons and entities are not excluded from being a "gift," even if the travel has some official purpose. Also, subsection 112.3148(6) allows the gift, but requires a very specific disclosure, when certain governmental agencies give a gift worth over $100 "if a public purpose can be shown for the gift," even though those agencies may employ lobbyists to influence the recipient's public agency. Again, if it were not a "gift" when what is being provided or paid for ultimately saves money for one's public agency, we would have to ignore this part of the gift law.

Findings of Fact

Except to the extent that the findings of fact of the ALJ substantively constitute conclusions of law rejected or modified above, the Commission on Ethics accepts and incorporates into this Final Order And Public Report the findings of fact in the Recommended Order from the Division of Administrative Hearings.

Conclusions of Law

Except to the extent rejected or modified above, the Commission on Ethics accepts and incorporates into this Final Order And Public Report the conclusions of law in the Recommended Order from the Division of Administrative Hearings.

Disposition

Procedurally, under the APA we cannot make the findings of fact that will have to be made to apply our view of the law to the circumstances presented here, which means that one alternative would be to remand this case to the ALJ to make the findings of whether the Respondent accepted a gift and whether his actions were prohibited by Section 112.3148(4). However, it is clear that the Respondent acted under a mistaken impression of the law. In addition, this complaint is one of six that were filed against County officers and employees who went on this trip, three of which resulted in no probable cause findings and one of which has resulted in a finding of no violation. All the

facts and circumstances surrounding these trips have been explored during the preliminary investigations and hearings of these complaints. And now we have put all public officers and employees on notice of how the law in this area should be read. Under these circumstances, we conclude that it would be appropriate to exercise our authority under Section 112.324(11), Florida Statutes, and to dismiss this complaint based on our determination that the public interest would not be served by proceeding further, with the issuance of this final order and public report.

Accordingly, the Commission on Ethics dismisses the complaint pursuant to Section 112.324(11), Florida Statutes.

ORDERED by the State of Florida Commission on Ethics meeting in public session on October 20, 2006.

October 25, 2006
Date Rendered

Norman M. Ostrau
Chair

THIS ORDER CONSTITUTES FINAL AGENCY ACTION. ANY PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER HAS THE RIGHT TO SEEK JUDICIAL REVIEW UNDER SECTION 120.68, FLORIDA STATUTES, BY FILING A NOTICE OF ADMINISTRATIVE APPEAL PURSUANT TO RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, WITH THE CLERK OF THE COMMISSION ON ETHICS, P.O. DRAWER 15709, TALLAHASSEE, FLORIDA 32317-5709

(PHYSICAL ADDRESS AT 3600 MACLAY BLVD., SOUTH, SUITE 201, TALLAHASSEE, FLORIDA); AND BY FILING A COPY OF THE NOTICE OF APPEAL ATTACHED TO WHICH IS A CONFORMED COPY OF THE ORDER DESIGNATED IN THE NOTICE OF APPEAL ACCOMPANIED BY THE APPLICABLE FILING FEES WITH THE APPROPRIATE DISTRICT COURT OF APPEAL. THE NOTICE OF ADMINISTRATIVE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE DATE THIS ORDER IS RENDERED.

cc: Mr. Albert T. Gimbel, Attorney for Respondent
Mr. E. Gary Early, Attorney for Respondent
Mr. Mark Herron, Attorney for Respondent
Mr. Linzie F. Bogan, Commission Advocate
Mr. Kenneth J. Kopczynski, Complainant
The Honorable Harry L. Hooper
Division of Administrative Hearings