

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: ALLEN ENRIGHT KEEN,)
)
 Respondent.) Case No. 09-1770EC
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was held on July 14, 2009, by video teleconference at sites in Tallahassee and Orlando, Florida, before Carolyn S. Holifield, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Advocate: Jennifer M. Erlinger, Esquire
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For Respondent: Mark Herron, Esquire
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STATEMENT OF THE ISSUES

The issues are: (1) whether Respondent violated Subsection 112.3148(8), by failing to report a \$2,606.25 gift of Disney World and Universal Studios tickets on a Quarterly Gift

Disclosure Form, CE Form 9; and (2) if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On March 25, 2009, the Commission on Ethics (the "Commission") issued an Order Finding Probable Cause to believe that Respondent, Allan Keen ("Respondent"), as chairman of the Orlando-Orange County Expressway Authority (the "Expressway Authority"), violated Subsection 112.3148(8), Florida Statutes (2006).¹ The Commission forwarded the matter to the Division of Administrative Hearings on or about April 3, 2009.

At the final hearing, the Advocate called two witnesses, Respondent and Ronald Pecora. The Advocate offered three exhibits which were admitted as evidence. Respondent presented the testimony of one witness, James Joseph Stanley. Respondent offered no additional exhibits.

The Transcript was filed with the Division of Administrative Hearings on July 29, 2009. By agreement of the parties, proposed recommended orders were to be filed 30 days after the Transcript was filed. In a joint motion, filed August 25, 2009, the parties requested that the time for filing proposed recommended orders be extended to September 11, 2009. By Order issued August 26, 2009, the joint motion was granted. Both parties timely filed their Proposed Recommended Orders under the extended time frame.

FINDINGS OF FACT

1. At all times pertinent to the proceedings, Respondent, Alan Keen, served as chairman of the Orlando-Orange County Expressway Authority.

2. At all times relevant hereto, Respondent was subject to the requirements of Chapter, Part III, Florida Statutes, Code of Ethics for Public Officers and Employees, for his acts and omissions as chairman of the Expressway Authority. See §§ 112.311(6) and 112.313, Fla. Stat.

3. In April 2006, Respondent was contacted by a family friend, James Stanley, who resides in Costa Rica. Mr. Stanley indicated that his father-in-law was paying for the family, consisting of four children and eight adults, to travel to the Orlando area in the Fall of 2006 and requested that Respondent see if he could obtain theme park tickets for their use.

4. Mr. Stanley called Respondent and asked him to obtain theme park tickets so that the tickets could be in-hand prior to Mr. Stanley and his family arriving in Orlando. This request was made purely for the purposes of convenience.²

5. Respondent has known Mr. Stanley for more than 20 years and considers to him to be a friend. Mr. Stanley described Respondent as his mentor and a close friend. Respondent and Mr. Stanley and their respective families socialize and have visited with each other in the United States and in Costa Rica.

6. Mr. Stanley never asked for or expected Respondent to obtain free theme park tickets. In fact, it was Mr. Stanley's understanding and belief that his father-in-law, Rodrigo Esquivel, was going to pay all the costs associated with the trip.

7. Respondent contacted Bryan Douglas, the then director of marketing for the Expressway Authority and asked Mr. Douglas if he had access to complimentary tickets to Universal Studios and Disney World theme parks.³ In response to this request, Mr. Douglas told Respondent that he did not know if he had access to complimentary tickets, but indicated that he would check.

8. As chairman of the Expressway Authority, Respondent had no supervisory authority over Mr. Douglas and never signed any of his paychecks.

9. Approximately two or three weeks after his initial telephone call to Mr. Douglas, Respondent requested that his personal assistant, Sherry Cooper, follow-up on whether Mr. Douglas had any success in obtaining any complimentary tickets. Respondent understood that Ms. Cooper, at the request of Mr. Douglas, had inquired of Mr. Stanley how many adult and how many children tickets were needed.

10. In 2006, Ronald Pecora was the owner of Pecora and Blexrud, a marketing communications and public relations firm that had a contract to do work the Expressway Authority.

11. In or about May 2006, Mr. Pecora became aware of the request for theme park tickets from Christy Payne. Ms. Payne was the representative of Pecora and Blexrud who was assigned to work with the Expressway Authority. According to Mr. Pecora, Ms. Payne reported to him that she was contacted by Mr. Douglas, the marketing director for the Expressway Authority in regard to theme park tickets.

12. Based on the above-referenced conversation between Mr. Pecora and Ms. Payne, it was his (Mr. Pecora's) understanding that the subject theme park tickets were for Respondent. However, Mr. Pecora had no idea who would be using the theme park tickets and never spoke to Respondent about those tickets.

13. During Mr. Pecora's conversation with Ms. Payne regarding the theme park tickets, he authorized her to purchase the theme park tickets with her corporate credit card. As a result of Mr. Pecora's authorization, a total of 12 theme park tickets having a value of \$2,606.25 were purchased using the Pecora and Blexrud credit card.

14. At the time Mr. Pecora authorized Ms. Payne to purchase the 12 theme park tickets, he anticipated being repaid

for the tickets. Mr. Pecora's actions after he received the theme park tickets and the invoice for the purchase of those tickets are consistent with that belief and expectation.

15. In mid-May 2006, the 12 theme park tickets and receipt for payment invoice ("invoice") were delivered to Mr. Pecora's business address in Winter Park, Florida. The invoice indicated that the \$2,606.25 payment for the theme park tickets had been charged to Mr. Pecora's credit card.⁴

16. A few days after receiving the tickets and invoice, Mr. Pecora had one of his employees deliver the theme park tickets and the original invoice for those tickets to Keewin Properties. The reason Mr. Pecora sent the invoice to Keewin Properties, whose principal was Respondent, was so that the recipient would know how much to pay him for the tickets.

17. At the time that Mr. Pecora had the theme park tickets and invoices sent to Keewin Properties, he knew that Respondent was the owner of that business.

18. At or near the time Mr. Pecora directed his employee to deliver the theme park tickets and invoice for those tickets to Keewin Properties, he memorialized that transaction. In a hand-written note dated May 18, 2006, Mr. Pecora indicated that the original invoice had been sent to Keewin Properties.

19. Mr. Pecora understood that theme park tickets were not for official business purposes of the Expressway Authority.

Accordingly, he did not send the invoice for the theme park tickets to the Expressway Authority, but to Respondent's privately-owned business.

20. On or about mid-May 2006, Respondent received the theme tickets and the invoice that were delivered to him in a small brown envelope.

21. When he received the tickets, Respondent was surprised that Mr. Pecora was involved in obtaining the tickets because he had merely asked Mr. Douglas whether he had access to complimentary theme park tickets. However, Respondent was not surprised to have received an invoice.

22. Upon receipt of the tickets, Respondent telephoned Mr. Stanley and advised him that he had obtained the theme park tickets and the invoice for the purchase of those tickets. Because Respondent would be in Costa Rica in a few weeks, he told Mr. Stanley that he would deliver the tickets and the invoice when he arrived in Costa Rica. As he had promised, a few weeks after speaking to Mr. Stanley, Respondent traveled to Costa Rica and, while there, personally delivered the theme park tickets and the invoice to Mr. Stanley.

23. When Mr. Stanley received the theme park tickets and the invoice, he reviewed them. Soon thereafter, Mr. Stanley gave both the tickets and the invoice to Mr. Esquivel. Prior to giving the tickets and the invoice to Mr. Esquivel, Mr. Stanley

highlighted the name of the individual printed on the invoice who was to be paid for the tickets.

24. On or about September 23, 2006, Mr. Stanley and his family, including Mr. Esquivel, began their visit to the Orlando area. During this trip, the theme park tickets were used by Mr. Stanley's family.

25. Respondent did not use any of the theme park tickets.

26. Mr. Esquivel did not pay for the theme park tickets prior to the time that Mr. Stanley's family used the theme park tickets.

27. About ten days after Mr. Stanley's family, including Mr. Esquivel, returned to Costa Rica from Orlando, Mr. Esquivel suffered a stroke. As a result of the stroke, Mr. Esquivel was hospitalized for about a week, but later returned to most of his usual activities.

28. Respondent first learned that the theme park tickets had not been paid for in December 2006, after reading an article in the Orlando Sentinel newspaper. Until that time, Respondent had assumed that Mr. Stanley or his father-in-law had paid for the theme park tickets.

29. Soon after reading the above-referenced newspaper article, Respondent called Mr. Stanley to ask if they had paid for the theme park tickets. Mr. Stanley told Respondent he believed that his father-in-law had paid for the tickets, but

indicated that he would check on the matter. Upon checking, Mr. Stanley determined that his father-in-law had not paid for the tickets.

30. Based on his personal knowledge of his father-in-law, Mr. Stanley concluded that his father-in-law simply forgot to pay for the tickets.⁵

31. Soon after discovering that Mr. Esquivel had not paid for the theme park tickets, Mr. Stanley also learned that criminal proceedings related to the theme park tickets were pending against Mr. Pecora. Therefore, Mr. Stanley, in consultation with his attorneys, decided that payment for the theme park tickets should be made after the criminal proceedings were over.

32. About a month prior to this proceeding, Mr. Stanley received wiring instructions from Mr. Pecora's attorney. Immediately thereafter, Mr. Stanley wired the full payment for the theme park tickets to Mr. Pecora's attorney, on behalf of Mr. Pecora.

33. Mr. Stanley's father-in-law gave him the funds which were wired to Mr. Pecora's attorney.

34. Respondent did not file a Quarterly Gift Disclosure, CE Form 9, regarding receipt of the theme park tickets. The reason Respondent did not file a Quarterly Gift Disclosure Statement was that the theme park tickets were not for him and

were not used by him. Therefore, Respondent did not believe that the tickets were a gift.

35. Mr. Pecora, the procurer of the theme park tickets, did not consider the theme park tickets as a gift. Moreover, he never intended to make those tickets a gift.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. § 120.57(1), Fla. Stat. (2009).

37. Section 112.322, Florida Statutes, and Florida Administrative Code Rule 34-5.0015 authorize the Florida Commission on Ethics to conduct investigations and to make public reports on complaints concerning violations of Chapter 112, Part III, Florida Statutes (the Code of Ethics for Public Officers and Employees).

38. Respondent is subject to the requirements of Chapter 112, Part III, Florida Statutes, for his acts and omissions during his tenure as chairman of the Expressway Authority.

39. 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); and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d

349 (Fla. 1st DCA 1977). In this proceeding, it is the Commission, through its Advocate, that is asserting the affirmative--that Respondent violated Subsection 112.3148(8), Florida Statutes.

40. Commission proceedings which seek recommended penalties against a public officer or employee require proof of the alleged violation by clear and convincing evidence. See Latham v. Florida Commission on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997). Therefore, to meet its burden, the Commission must establish by clear and convincing evidence the elements of Respondent's alleged violations.

41. As noted by the Supreme Court of Florida:

[C]lear 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 explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such 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: Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

42. Respondent is charged with violating Subsection 112.3148(8), Florida Statutes, which provides in pertinent part:

(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:

1. Gifts from relatives.

2. Gifts prohibited by subsection (4)^[6] or s. 112.313(4).^[7]

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.

* * *

(f) 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.

43. Subsection 112.3148(2)(d), Florida Statutes, defines a "reporting individual" as follows:

[A]ny 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.

44. For purposes of the Code of Ethics, the term "gift" is defined in Subsection 112.312(12)(a)10., Florida Statutes, as follows:

"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:

* * *

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

45. To prove that Respondent violated Subsection 112.3148(8), Florida Statutes, by failing to report the gift on

his Quarterly Gift Disclosure Form, CE Form 9, the following elements must be proven:

a. Respondent is a "reporting person" within the meaning of that provision.

b. Respondent, or another on his behalf, "accepted" a gift (i.e. the theme park tickets).

c. The "gift" was in excess of \$100, and Respondent did not provide compensation to reduce the value of the gift to less than \$100.

d. The "gift," not from a relative, is prohibited by Subsection 112.3148(4), Florida Statutes (i.e. gifts from political committees or lobbyists), or is otherwise required to be disclosed.⁸

e. Respondent failed to report the "gift" on his Quarterly Gift Disclosure Form, CE Form 9, no later than the last day of the calendar quarter, for the quarter in which the "gift" was received.

46. The evidence in this case established that at the time relevant to this proceeding, Respondent was a "reporting individual" within the meaning of Subsection 112.3148(2)(d), Florida Statutes.

47. The evidence established that the value of the theme park tickets received by Respondent was in excess of \$100 and that Respondent did not pay for those tickets.

48. The evidence established that the theme park tickets received by Respondent were not from a relative. Moreover, no evidence was presented that the theme park tickets were otherwise exempt from the reporting requirements of Subsection 112.3148(8)(a), Florida Statutes.

49. Respondent acknowledged that he did not report the theme park tickets on his Quarterly Gift Disclosure Form, CE Form 9, because he did not believe the tickets were gifts.

50. Having established four of the five elements required to prove a violation of Subsection 112.3148(8), Florida Statutes, the remaining and controlling issue is whether the theme park tickets were "accepted" by Respondent.

51. Subsection 112.312(12)(a)10., Florida Statutes, defines the term "gift" as "that which is accepted by a donee or by another on the donee's behalf . . . for which equal or greater consideration is not given within 90 days of receipt of the gift." See Florida Administrative Code Rule 34-13.210, which provides the same definition of "gift."

52. Pursuant to its rulemaking authority, the Commission promulgated Florida Administrative Code Rule 34-13.200. That rule defines the terms "donor" and "donee" as follows:

- (1) A "donor" is the person or entity who provides or pays for a gift, whether directly or indirectly.

(2) A "donee" is the person who receives the gift, or on whose behalf the gift is made.

53. The term "acceptance" is not defined in the Code of Ethics or in any of the rules promulgated thereunder. When a term is not defined in statute, "[o]ne of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning." Green v. State, 604 So. 2d 471, 473 (Fla. 1992). When necessary, the plain and ordinary meaning "can be ascertained by reference to a dictionary." Id.

54. According to Random House Webster's Unabridged Dictionary (2nd Ed. 2001), at page 11, "accept" means "to take or receive something offered" and "to accept as a present." Black's Law Dictionary (Revised 4th Ed. 1968) defines "accept" as follows: "[t]o receive with approval or satisfaction; to receive with the intent to retain." Finally, the term "acceptance of gift" is defined in Ballantine's Law Dictionary (1969 Lexus Law Publishing) as "a donee's exercise of dominion over, or the assertion of the rights to, the subject of the gift."

55. In light of the definitions of "accept" or derivatives thereof, it is concluded that Respondent never accepted the tickets as a gift. As demonstrated by the established facts in this case, Respondent received the theme park tickets, but never

had the intent or intended to retain the tickets. Moreover, there was no evidence that Respondent ever exercised dominion over or the asserted rights to the theme park tickets.

56. At most, the evidence in this case established only that Respondent had custody of the theme park tickets for several weeks.

57. The clear and convincing evidence established that: (1) the theme park tickets and the invoice for the tickets were delivered to and received by Respondent; (2) the theme park tickets were for Respondent's friend, Mr. Stanley; (3) upon receiving the tickets and invoice, Respondent notified Mr. Stanley that the tickets and invoice had been delivered; and (4) as Respondent had promised, he delivered the tickets and invoice to Mr. Stanley a few weeks after they were delivered to him, when he (Respondent) arrived in Costa Rica. No evidence to the contrary was presented.

58. The undisputed evidence established that neither Respondent, nor Mr. Pecora, intended the theme park tickets to be gifts.⁹ The Advocate's argument that the intent of Respondent and Mr. Pecora is irrelevant, is not persuasive. While the intent of Respondent and Mr. Pecora, without more, is not dispositive of the matter, their intent and their accompanying actions must be considered. In this case, the evidence established that, at each step, the invoice was sent along with

the tickets indicating an expectation that the tickets would be paid.¹⁰

59. As noted above, one of the elements required to establish a violation of Subsection 112.3148(8)(a), Florida Statutes, is that the gift, in this case, theme park tickets, be accepted by the reporting individual. The evidence in this case failed to establish that the theme park tickets were "accepted" by Respondent.

60. Having failed to establish, by clear and convincing evidence, that the theme park tickets were "accepted" by Respondent, there is no requirement that he report those tickets on a Quarterly Gift Disclosure Form, CE Form 9. Therefore, it is concluded that Respondent did not violate Subsection 112.3148(8), Florida Statutes.

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 finding that Respondent, Allen Keen, did not violate Subsection 112.3148(8), Florida Statutes, and dismissing the Complaint filed against him.

DONE AND ENTERED this 20th day of November, 2009, in
Tallahassee, Leon County, Florida.

Carolyn S. Holifield

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Filed with the Clerk of the
Division of Administrative Hearings
this 20th of November, 2009.

ENDNOTES

- 1/ All statutory references are to Florida Statutes (2006), unless otherwise noted.
- 2/ Mr. Stanley's father-in-law was aware of his relationship with Respondent and suggested that he (Mr. Stanley) call Respondent so they could have the tickets prior to their arrival in Orlando.
- 3/ Respondent made this request because he was aware that it was "common practice" for marketing and public relations businesses to have access to such tickets.
- 4/ This presumably was the corporate credit card of Pecora and Blexrud.
- 5/ In December 2006, due to the effects of the stroke, Mr. Stanley's father-in-law had no recollection of the theme park tickets and, thus, was unable to provide any explanation as to the reason for not sending the payment for the tickets.

6/ Subsection 112.3148(4), Florida Statutes (2006), states:

(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.

7/ Subsection 112.313(4), Florida Statutes (2006), states:

(4) UNAUTHORIZED COMPENSATION.--No public officer, employee of an agency, or local government attorney or his or her spouse or minor child shall, at any time, accept any compensation, payment, or thing of value when such public officer, employee, or local government attorney knows, or, with the exercise of reasonable care, should know, that it was given to influence a vote or other action in which the officer, employee, or local government attorney was expected to participate in his or her official capacity.

8/ See Subsection 112.3148(8)(a)1. through 3, Florida Statutes, quoted in paragraph 40 of Conclusions of Law.

9/ The fact that Mr. Pecora mistakenly believed that the tickets were for Respondent in no way changes this fact and conclusion.

10/ The evidence established that Mr. Pecora sent the tickets and the invoice to Respondent; Respondent then sent the tickets and invoice to Mr. Stanley; and when Respondent learned that Mr. Stanley had not paid for the tickets, he (Respondent) contacted him.

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.