STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: DAVID BERRONES, Case No. 13-1752EC

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted by video teleconference between Miami and Tallahassee, Florida, on January 7, 2014, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

Whether David Berrones (Respondent), while a member of the Board of Directors of the Homestead Housing Authority (HHA), violated section 112.3143(3)(a), Florida Statutes (2010), by

voting on February 15, 2011, to hire Oscar Hentschel (an alleged business associate) as the Executive Director of the HHA.

PRELIMINARY STATEMENT

On March 13, 2013, the Florida Commission on Ethics (the Commission) issued an Order Finding Probable Cause to believe that Respondent committed the violation at issue in this proceeding. Respondent timely requested a formal administrative hearing to challenge the alleged violation, the matter was referred to DOAH, and this proceeding followed.

In response to the undersigned's Order of Pre-Hearing Instructions, the parties filed separate pre-hearing statements which contained statements of undisputed facts. The respective statements of undisputed facts are nearly identical, and the stipulated facts that have been deemed relevant have been incorporated as findings of fact in this Recommended Order.

At the final hearing, the Advocate for the Commission (Advocate) presented the testimony of Sally Stribling (former board chair of HHA), Oscar Hentschel (Executive Director of HHA), and Respondent. The Advocate presented two exhibits, both of which were admitted into evidence. The Advocate's first exhibit was a Department of State record relating to Xcaret Group, LLC (Xcaret), and the second was an audio recording of the HHA board meeting of February 15, 2011. Respondent offered as his only exhibit the Transcript of the Advocate's audio recording, which

was admitted into evidence. Respondent presented no other evidence.

A Transcript of the proceedings, consisting of one-volume, was filed on January 31, 2014. The parties timely filed proposed recommended orders, which have been duly considered by the undersigned in the preparation of this Recommended Order.

Unless otherwise noted, all statutory references are to Florida Statutes (2010), the law in effect when Respondent cast the vote at issue.

FINDINGS OF FACT

1. Respondent is a volunteer member of the Board of Directors of the HHA.

2. Mr. Hentschel is the current Executive Director of the HHA.

3. Respondent voted to appoint Mr. Hentschel as the Executive Director of the HHA on February 15, 2011 ("the Subject Vote").

4. On September 22, 2010, Respondent and Mr. Hentschel formed an entity called Xcaret to conduct "any and all lawful business." Department of State records listed Respondent and Mr. Hentschel as the only officers of Xcaret. Xcaret was administratively dissolved by the Department of State in September 2011, when no annual report was filed. Xcaret was a legal entity on the date of the subject vote.

5. Xcaret was utilized by Respondent and Mr. Hentschel with the hope of engaging in potential business with a particular group of real estate investors, which consisted of Mr. Hentschel's brother-in-law, and a group of individuals from Mexico, who were introduced to Mr. Hentschel by Mr. Hentschel's brother-in-law (hereinafter "the Investment Group").

6. Specifically, the Investment Group had expressed their interest in purchasing two particular distressed real estate properties in Miami, which Respondent and Mr. Hentschel referred to as: 1) the Sixth Avenue Property; and 2) the Triangle Property.

7. At no point did Xcaret own, or have any legal interest in, the Sixth Avenue Property or the Triangle Property, or any other real estate.

8. Other than Xcaret, Respondent and Mr. Hentschel had no prior business relationships and have since created no other business relationships.

9. Respondent and Mr. Hentschel did not form Xcaret for the purpose of engaging in general real estate business; rather, they formed Xcaret for the sole purpose of showing the Investment Group, who expressed their interest in investing in two particular properties (i.e., the Sixth Avenue Property and the Triangle Property), that there was a legal entity ready to accept the Investment Group's particular investment funds.

10. In November 2010 (approximately two months after Xcaret was formed and approximately three months prior to the date of the subject vote), the Investment Group informed Respondent and Mr. Hentschel that they were no longer interested in purchasing the Sixth Avenue Property or the Triangle Property.

11. Because the Investment Group informed Respondent and Mr. Hentschel that they were no longer interested in purchasing either the Sixth Avenue Property or the Triangle Property, Mr. Hentschel and Respondent devoted no further resources or time whatsoever to Xcaret, after November 2010. When the investors from Mexico decided not to invest in Miami in November 2010, Mr. Hentschel told Respondent to close Xcaret. Prior to the subject vote, neither Respondent nor Mr. Hentschel checked to determine whether Xcaret had been dissolved.

12. The parties stipulated that:

- No income whatsoever was ever realized by Xcaret;
- No contracts were ever entered into on Xcaret's behalf;
- No bank account was ever opened in Xcaret's name;
- No assets were ever acquired in Xcaret's name;
- Xcaret never issued any stock;

- Xcaret never obtained or purchased any options to buy or lease any real estate or other property;

- Xcaret, and/or Respondent or Mr. Hentschel, individually, never made any offers to purchase the Sixth Avenue Property or the Triangle Property or any other real estate; and

- Respondent and/or Mr. Hentschel never engaged in any communications or transactions with any of the owners of Sixth Avenue Property or the Triangle Property or any other real estate.

13. Prior to the subject vote, in response to the question whether anyone had a relationship with Oscar Hentshel, Respondent disclosed to the HHA Board that: "He [Hentschel] is a very good friend of my brother's and I met him about ten years ago through my brother. He is a smart guy."

14. Prior to the subject vote, in response to the question if anyone had a relationship with Oscar Hentschel, Respondent did not disclose to the HHA Board, Respondent's and Mr. Hentschel's involvement with Xcaret.

15. While Xcaret was a legal entity on the date of the subject vote, the record is clear that it was not an active business enterprise on that date.[1/]

16. Respondent and/or Mr. Hentschel never received any monetary benefit or gain, whatsoever, as a result of the subject vote, other than the salary and benefits Mr. Hentschel ultimately

received by virtue of his employment as Executive Director for the HHA.

CONCLUSIONS OF LAW

17. DOAH has jurisdiction over the subject matter of and the parties to this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2013).

18. Section 112.322 and Florida Administrative Code Rule 34-5.0015, authorize the Commission to conduct investigations and to make public reports on complaints concerning violations of Code of Ethics for Public Officers and Employees.

19. The Commission seeks to penalize Respondent for his alleged violation of the Code of Ethics for Public Officers and Employees. Consequently, the Commission has the burden of proving, by clear and convincing evidence, the allegations against Respondent. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Dep't of Agric. & Consumer Servs., 550 So. 2d 112 (Fla. 1st DCA 1989); and Inquiry Concerning a Judge, 645 So. 2d 398 (Fla. 1994). As stated by the Florida Supreme Court:

> [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)).

20. Penal statutes, such as the statutes within the Code of Ethics for Public Officers and Employees, must be strictly construed. See City of Miami Beach v. Galubut, 626 So. 2d 192, 194 (Fla. 1993) ("When a statute imposes a penalty, any doubt as to its meaning must be resolved in favor of strict construction so that those covered by the statute have clear notice of what conduct the statute proscribes.").

21. Pursuant to section 286.012, when Respondent cast the subject vote, public officials had (and still have) an affirmative duty to vote on all matters before them. Abstaining from a vote is prohibited unless "there is, or appears to be, a possible conflict of interest under s. 112.311, s. 112.313, or s. 112.3143."

22. The Commission alleges that Respondent has violated section 112.3143(3)(a), which provided, in relevant part, as follows:

> No county, municipal, or other local public officer shall vote in an official capacity upon any measure . . . ***which he or she knows would inure to the special private gain or loss of a*** relative or ***business associate of the public officer.***

(emphasis added).

23. Respondent does not contest that at the time of the subject vote he was subject to the provisions of section 112.3143(3)(a).

24. To establish that Respondent violated section 112.3143(3)(a) by casting the subject vote, the Commission, through its Advocate, must prove by clear and convincing evidence, that Respondent voted in his official capacity on a measure which Respondent knew would have inured to the "special private gain" of a "business associate" of Respondent. There are two elements that must be established by clear and convincing evidence: 1) that Mr. Hentschel was a "business associate" of Respondent's at the time of the subject vote and 2) the subject vote was on a measure that inured to the "special private gain" of Mr. Hentschel. There is a violation only if both elements are proven.

25. The term "business associate" is defined under section 112.312(4) as "any person or entity ***engaged in*** or ***carrying on*** a business enterprise with a public officer." (emphasis added). The Commission has consistently recognized that section 112.3143(3)(a) is "phrased in the ***present tense***" requiring a ***current (an at-the-time-of-the-vote)*** relationship between the officer and the affected persons or entities." Op. Fla. Comm. Ethics 09-09 (2009) (emphasis added) (finding that a city commissioner was not presented with a voting conflict under this

section regarding measures affecting his former employer, because the statute was phrased in the present tense). *See also*, Op. Fla. Comm. Ethics 06-05 (2006) (opining that a city commissioner voting on measures affecting a horse track which seasonally employs him was not presented with a conflict under this section); Fla. Comm. Ethics 80-75 (1980) (finding no voting conflict under this section was created when a municipal board of adjustment member voted on a variance request concerning a project in which he was previously involved as an architect, when he had no continuing relationship with the client at the time of the vote); Op. Fla. Comm. Ethics 79-31 (1979) (opining that a city planning commission member voting on a matter affecting a person with whom he had occasionally subcontracted was not presented with a voting conflict under this section); Op. Fla. Comm. Ethics 78-96 (1978) (finding a city councilman was not presented with a conflict under this section regarding matters affecting potential clients of his real estate firm); Op. Fla. Comm. Ethics 77-183 (1977) (finding a water management district board member was not presented with a voting conflict under this section regarding measures affecting a surface water permit for entity formerly retaining his engineering services). For this reason, "past relationships or possible future relationships do not satisfy the requirements of the statute." Op. Fla. Comm. Ethics 06-05 (2006).

26. Specifically with regard to the term "business associate," the Commission has made the following relevant statements:

> It is apparent . . . that the intent of the "business associate" definition is to bring voting conflicts law to bear on business endeavors . . . rather than to bring under the law those relationships under which one merely holds a technical label of status . . . in relation to others, but absent engagement or carrying on of any common commercial/profit-making pursuit. Op. Fla. Comm. Ethics 98-09 (1998)

27. The law is clear that the relationship between Respondent and Mr. Hentschel must be examined to determine whether Mr. Hentschel was a business associate of the Respondent at the time Respondent cast the subject vote. The facts of this case are clear that Xcaret, while technically still a corporation, was a defunct business enterprise. Consequently, the undersigned concludes that Mr. Hentschel was not a business associate of Respondent at the time Respondent cast the subject vote.

28. The Advocate has failed to meets its burden of proving by clear and convincing evidence that Respondent and Mr. Hentschel were "business associates" within the meaning of section 112.312(4), Florida Statutes, "at the time of the Subject Vote" and, thus, no conflict of interest was created when

Respondent voted to appoint Mr. Hentschel as the Executive Director of the HHA under section 112.3143(3)(a).

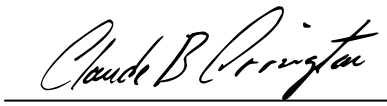
29. The Commission should enter a Final Order and Public Report finding that Respondent did not violate section 112.3143(3)(a).

30. Whether voting to hire Mr. Hentschel as the Executive Director of the HAA is a measure that would inure to the "special private gain" of Mr. Hentschel within the meaning of section 112.3143(3)(a) is a moot issue since Mr. Hentschel was not a business associate of the Respondent.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that the Florida Commission on Ethics enter a final order and public report that finds that Respondent, David Berrones, did not violate section 112.3143(3)(a). It is FURTHER RECOMMENDED that the final order dismiss the complaint filed against David Berrones, with prejudice.

DONE AND ENTERED this 28th day of February, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of February, 2014.

ENDNOTE

[1/] Petitioner elicited testimony from Respondent and Mr. Hentschel that they likely would have been willing to pursue business opportunities through Xcaret had appropriate investors been located. That speculative testimony is not relevant to the issue of whether Respondent and Mr. Hentschel were business associates at the time of the subject vote.

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.