

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: WANDA RANGE,  
Respondent.

Case Nos. 19-3176EC  
19-3177EC  
19-3178EC  
19-3179EC  
19-3180EC

RECOMMENDED ORDER

An administrative hearing was conducted in this case on August 12, 2019, in Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Advocate: Melody A. Hadley, Esquire  
Elizabeth A. Miller, Esquire  
Office of the Attorney General  
The Capitol, Plaza Level 01  
Tallahassee, Florida 32399-1050

For Respondent: Mark Herron, Esquire  
Messer Caparello, P.A.  
2618 Centennial Place  
Post Office Box 15579  
Tallahassee, Florida 32317

STATEMENT OF THE ISSUES

The issues for determination are:

Whether Respondent violated section 112.3135, Florida Statutes,<sup>1/</sup> by voting on the appointment and/or advocating for the appointment of her relative to a position within her agency and/or her agency voting to appoint and/or

advance her relative and, if so, what is the appropriate penalty?

Whether Respondent violated section 112.313(6), Florida Statutes, by using her position to appoint her relative to the position of City of Midway Mayor Pro Tem and, if so, what is the appropriate penalty?

Whether Respondent violated section 112.313(6), Florida Statutes, by using a City of Midway-owned vehicle and/or City of Midway-issued gasoline credit card for personal use and, if so, what is the appropriate penalty?

Whether Respondent violated section 112.3148(8), Florida Statutes, by failing to report the gift of the personal use of the City of Midway-owned vehicle and/or the City of Midway-issued gasoline credit card and, if so, what is the appropriate penalty?

#### PRELIMINARY STATEMENT

On April 17, 2019, the Florida Commission on Ethics (Commission), in considering five related complaints, issued an Order finding probable cause (Order Finding Probable Cause) that Respondent, Wanda Range, as a Midway City Councilmember and/or Mayor, violated sections 112.3135, 112.313(6), and 112.3148(8). The cases were forwarded to the Division of Administrative Hearings on June 11, 2019, as five separate cases, which were

given DOAH Case Nos. 19-3176EC, 19-3177EC, 19-3178EC, 19-3179EC, and 19-3180EC.

Upon assignment of the five cases, the undersigned entered an Order of Consolidation on June 18, 2019, consolidating the cases. The final hearing was scheduled to be heard August 12 and 13, 2019.

The hearing commenced as scheduled on August 12, 2019. At the hearing, the Commission presented the testimony of Respondent; Lamar Kirkland; Tammy Knight; Leslie Steele; Grayden Schafer; Ronald Colston; and Beau Jackson. The Commission offered 12 exhibits, which were received into evidence as Exhibits A-1 through A-3, A-5, A-7 through A-10, A-12, and A-14 through A-16. Respondent's testimonial evidence was presented through her testimony and cross-examination of witnesses called during the presentation of the Commission's case-in-chief. Respondent also offered the deposition transcript of Anthony Thomas, in lieu of live testimony, which was received into evidence as Exhibit R-6, and Respondent offered five additional exhibits received into evidence as Exhibits R-1 through R-5.

The proceedings were recorded and a transcript was ordered. A two-volume Transcript of the hearing was filed on September 16, 2019. By agreement, the parties were given until October 9, 2019, to file proposed recommended orders. Both

parties timely filed their respective Proposed Recommended Orders, which have been considered in preparing this Recommended Order.

#### FINDINGS OF FACT

1. At all material times, Respondent served as a member of the Midway City Council (City Council). She was initially appointed to the City Council in 2000 and served until 2003. She was subsequently elected to the City Council in 2015 and served until May of 2019. Respondent became the Mayor of the City of Midway in May of 2017.

2. As a member and/or mayor of the City Council, Respondent is subject to article II, section 8, Florida Constitution, and the requirements of part III, chapter 112, Florida Statutes, Code of Ethics.

3. In January 2018, Respondent attended and received ethics training from the Florida League of Cities. That training included information on and examples of nepotism, misuse of position, and the receipt and disclosure of gifts. It also included information about the Commission issuing advisory opinions and how to contact the Commission.

#### Nepotism Allegation

4. The form of government the City of Midway (the City) provided under its Charter is the "Council-Manager Government," under which all powers of the City are vested in an elected

council. The City Council consists of five citizens who are residents of the City and electors eligible to vote in the City elections.

5. From its members, the City Council elects a Mayor and Mayor Pro-Tem. The election of the Mayor and Mayor Pro-Tem occurs at the first regular council meeting after the City election.

6. According to the Midway City Charter, the Mayor presides at all meetings of the City Council and performs other duties consistent with the office as imposed or designated by the City Council. The Mayor has a voice and vote in the proceedings of the City Council. The Mayor is referred to as Mayor-Councilmember in the execution of any legal instruments or writing or when functioning to meet other duties arising from the general laws of Florida or from the City Charter. The Mayor is recognized as the head of City government for all ceremonial purposes, for service of process, execution of contracts, deeds and other documents. The Mayor may take command of the police and govern the City by proclamation during the times of grave public danger or emergency and the Mayor has the power during such times to appoint additional temporary officers and patrolmen. The power and duties of the Mayor-Councilmember are such as they are conferred upon him/her by the Midway City Charter and no other.

7. The Midway City Charter provides that the Mayor shall:

"(a) See that all laws, provisions of this charter, and acts of the council, subject to his/her direction and supervision are faithfully executed; (b) Submit the annual budget message; (c) Summon the appropriate law enforcement officers to suppress civil disturbances and to keep law and order during times of emergency; (d) Make such other reports as the council may require concerning the operations of city departments, offices, and agencies subject to his/her direction in time of emergency; (e) Attend, preside, and vote at all council meetings; (f) Sign contracts on behalf of the city pursuant to the provisions of applicable ordinances; (g) Be recognized as the city official designated to represent the city in all agreements with other governmental entities or certifications to other governmental entities as approved by the vote of the city council; (h) Annually prepare a state of the city message, set forth the agenda for all meetings of the council, name committees of the council, make recommendations of members for city boards to the city council; (i) Perform such other duties as specified in this charter or may be required by council."

8. The population of the City is less than 4,000 residents.

9. The City Council has land use and/or zoning responsibilities.

10. In April 2016, there was a vacancy on the City Council caused by a Councilmember departing prior to the end of that Councilmember's term. Respondent's first cousin, Sam Stevens,

wanted to be appointed to the City Council to fill the vacant seat.

11. Prior to any action on the matter, Respondent telephoned Commission legal staff member, Grayden Schafer, Esquire, and inquired whether she would be in violation of the anti-nepotism statute if the Council appointed her first cousin to serve the unexpired remainder of a departing Councilmember's term.

12. Following his telephone conversation with Respondent, on April 21, 2016, Attorney Schafer sent an e-mail to Respondent at rangewanda@yahoo.com, summarizing Respondent's inquiry and the advice he provided. The last page of that e-mail (Schafer's E-mail) states:

a public official can be held in violation of the anti-nepotism provision if the appointment is made by the collegial body on which she serves, even if she did not participate in the appointment. Given the foregoing, it appears that you can be held in violation of the anti-nepotism statute not only if you directly participate or advocate for your first cousin's appointment but also if the City Council decides on its own to appoint him, regardless of whether you vote or participate.

13. According to Respondent, she did not receive the Schafer E-mail in 2016 and did not see it until after the filing of the complaints initiating this case against Respondent.

14. Regardless of the timing of Respondent's receipt of Schafer's E-mail, the evidence is persuasive that the topic was discussed between Respondent and Attorney Schafer, and that, as a result of her telephone conversation with Attorney Schafer in April 2016, Respondent understood that, because of her kinship with Sam Stevens, she could not vote to appoint or advocate to appoint Sam Stevens to the City Council. She also was aware that, even if she recused herself from voting or participating in the discussion to appoint Sam Stevens to the City Council, if the City Council voted to appoint her first cousin to the vacant seat, she would be in violation of the anti-nepotism provision.

15. After her conversation with Attorney Schafer, in April 2016, Respondent advised the City Council of her research and that she had contacted the Commission to inquire as to whether she could vote to appoint her cousin to the City Council. She explained that she could not and would have to resign if he was appointed, even if she did not participate in the vote.

16. Sam Stevens was not appointed to fill the vacant City Council seat in 2016.

17. The next year, Sam Stevens was elected to the City Council during the April 2017 municipal election. He was not elected or appointed by the City Council, but rather was elected by City citizens voting in the election.



18. The following month, at its May 4, 2017, meeting, the City Council considered the issue of electing a Mayor and Mayor Pro-Tem as provided by the City Charter.

19. At that meeting, Councilman Colston asked if it was legal for relatives to vote for each other. The minutes of the City Council for that date indicate that "Interim City Attorney Thomas explained he had heard the rumor and did research and it is legal."

20. Contrary to the City Council minutes, in his deposition testimony, City Attorney Thomas denied that he gave that advice, but rather explained that he opined that Respondent and Councilman Sam Stevens could serve together on the City Council, but could not promote or advocate for one another.

21. Despite his denial, during his interview with the Commission's investigator, City Attorney Thomas "recalled researching the matter and advising Respondent that it was not a voting conflict for her to vote to appoint her cousin to serve as mayor pro tem."

22. Considering the conflicting evidence, it is found that the preponderance demonstrates that the City Attorney advised that it was not a voting conflict for relatives to vote for each other for Mayor and Mayor Pro-Tem.

23. Respondent did not reveal her 2016 conversation with Attorney Schafer to the City Council on May 4, 2017, nor did she

provide a copy of Schafer's E-mail dated April 21, 2016, to either the City Council or the City Attorney prior to the City Council's votes for Mayor and Mayor Pro-Tem.

24. However, at the May 4, 2017, City Council meeting, a citizen confronted Respondent with a copy of Schafer's E-mail, reading portions of Schafer's E-mail aloud.

25. Respondent testified that she did not acknowledge an ethical dilemma regarding Attorney Schafer's opinion because she believed it addressed appointment as opposed to election, and her cousin had been elected a year later, not appointed.

26. Schafer's E-mail does not address the situation in which both Respondent and her first cousin are elected members of the City Council and whether Respondent can vote to elect him as the Mayor Pro-Tem in that context.

27. At that meeting, Respondent nominated herself to serve as Mayor. Her nomination was seconded by Councilman Smith. Respondent was elected as Mayor when the City Council voted three to two for Respondent to serve as Mayor with Councilman Smith, Councilman Sam Stevens, and Respondent voting "yes," and Councilman Ronald Colston and Councilwoman Carolyn Francis voting "no."

28. Respondent, as the Mayor, received an \$800 stipend, which is \$100 more than the other councilmembers.

29. At that same May 4, 2016, meeting, Councilman Colston nominated Councilwoman Francis to serve as Mayor Pro-Tem. That nomination failed two to three, with Respondent, Councilman Smith, and Councilman Stevens voting "no." Councilman Smith then nominated Councilman Stevens to serve as Mayor Pro-Tem. The City Council voted three to two for Councilman Stevens to serve as Mayor Pro-Tem with Respondent, Councilman Stevens, and Councilman Smith voting "yes," and Councilman Ronald Colston and Councilwoman Carolyn Francis voting "no."

30. According to the City Charter, the Mayor Pro-Tem:

"shall preside over the meetings of the council during the absence of the mayor-councilmember, and in general in the absence or the incapacity of the mayor-councilmember, he/she shall do [sic] perform those acts and things provided in this Chapter to be done by the mayor-councilmember. Nothing contained herein shall be construed as to preclude the member succeeding himself or herself as Mayor-Council member."

31. The City provides no additional compensation for a Councilmember serving as Mayor Pro-Tem.

#### Vehicle Use and Gift Disclosure

32. The City has two vehicles. One is a white Ford Taurus that has air conditioning (Vehicle). The other is a white Ford Taurus with a red stripe that does not have air conditioning.

33. Respondent was given a 2002 MPV Mazda Van by her daughter, Temika Smith, on Mother's Day in 2016.

34. While serving as Mayor, Respondent had use of the Vehicle for personal use.

35. Respondent began using the Vehicle in September or October 2017 following a hurricane and had access to the Vehicle until she stopped using it in May of 2019. During this time, the Vehicle was generally parked on property adjacent to Respondent's residence. While Respondent had a set of keys to the Vehicle, there was another set of keys at the City Hall.

36. In addition to Respondent's access, other city employees or city council members could use the Vehicle. Former City Manager Steele used the Vehicle on occasion during the time that Respondent had access to the Vehicle. When former City Manager Steele wanted to use the Vehicle, she would pick it up from Respondent's residence and return it to City Hall.

37. Respondent used the Vehicle for a variety of City-related purposes. She used it to travel to Florida League of Cities' conferences. In addition, she used the Vehicle to attend events in Midway, in Gadsden County, and in Tallahassee, including meetings with the City's lobbyist and members of the Florida Legislature, as part of her duties and responsibilities as Mayor. Respondent was also observed driving the Vehicle to meetings at the City Hall.

38. Respondent's personal use of the Vehicle included, but was not limited to, traveling roundtrip between Midway and

Tallahassee. She may have had her daughter in the Vehicle on two or three occasions, and on occasion, drove the Vehicle to her daughter's house in Tallahassee.

39. On one of the occasions when Respondent drove the Vehicle to her daughter's house in Tallahassee, which occurred on March 15, 2018, Respondent had a run-in with a Midway resident who had followed Respondent to her daughter's house. The Midway Resident took pictures of the Vehicle at Respondent's daughter's house and also the Mazda MPV van, which was without a license plate. On that occasion, Respondent had gone to check on the house because her daughter was out of town.

40. At the final hearing, Respondent admitted that there was a time when the Mazda MPV was in the shop a lot, and, since she had access to the Vehicle, she turned in the Mazda's tag to save on insurance payments.

41. On another occasion in 2018, Respondent was stopped by a Gadsden County Deputy Sheriff in Midway after midnight for having a tag light out and the incorrect tag on the Vehicle. Respondent had been returning from Tallahassee. No citation was issued with respect to that stop.

42. Other examples presented at the hearing illustrating Respondent's use of the Vehicle included her transporting a child from Midway to Florida High in Tallahassee, taking a Midway resident from Midway to Tallahassee to drop him at his

place of employment, and taking an individual to Liberty County to retrieve that person's vehicle left when evacuating because of a hurricane. While providing such accommodations is not listed within Respondent's responsibilities as Mayor or Councilmember, arguably, they served a public purpose.

43. While Respondent had access and use of the Vehicle, the City did not have a vehicle-use policy.

44. The evidence indicates that former City manager Ford also used a City-owned vehicle for personal use.

45. Former City Manager Steele could not recall if any other city employees or city council members had used the Vehicle.

46. Respondent testified that employees of the City's public works department might also have used the Vehicle.

47. City Councilman Ron Colston testified that he never used the Vehicle.

48. At the May 3, 2018, Midway City Council meeting, Councilman Colston publicly requested that Respondent stop driving the Vehicle, stating that citizens had approached him with concerns about Respondent driving the Vehicle.

49. Minutes of that City Council meeting indicate that Councilman Coston commented that he had received some calls from citizens concerned with Respondent driving the City-owned

vehicle and suggested that she should park the Vehicle because of the number of complaints and that it is a liability.

50. In response to that comment, City Attorney Thomas suggested that the City Council come up with some policy and procedures on the use of City vehicles.

51. Respondent did not stop driving the Vehicle at the time of Councilman Colston's request. By the end of October 2018, the Vehicle needed a tune-up and to have its brakes checked.

52. In October 2018, Respondent started using a rental car when she got a job with the Federal Emergency Management Agency (FEMA) for debris monitoring. Respondent was not reimbursed by FEMA for the rental.

53. In January 2019, Respondent purchased a new vehicle, a 2019 Mitsubishi G4 Mirage.

54. At the time of the final hearing in this case, the City was in the process of developing a policy regarding the use of City vehicles and City Fuel Cards.

55. Respondent did not report the use of the vehicle on her income taxes and did not file a gift disclosure to report her personal use of the City-owned vehicle as a gift.

#### Fuel Card Use and Gift Disclosure

56. Respondent used a City-issued Pilot Travel Center credit card for gasoline for the Vehicle.

57. City-issued Pilot Travel Center credit card #007 (City Fuel Card) was assigned to the Vehicle. The City Fuel Card was the only one numbered #007 and it remained in the Vehicle.

58. While some of the fuel purchases charged to the City Fuel Card were related to City business, Respondent acknowledged that fuel was also purchased using the City Fuel Card during her personal use of the Vehicle.

59. Records of City Fuel Card #007 from November of 2017 through December of 2018 show the following charges:

60. November 2017:

-November 1, 2017-	623 Quincy FL-	\$33.67
-November 5, 2017-	425 Midway FL-	\$20.71
-November 5, 2017-	4556 Wildwood FL-	\$20.00
-November 8, 2017-	4556 Wildwood FL-	\$18.30
-November 9, 2017-	623 Quincy FL-	\$24.72
-November 13, 2017-	623 Quincy FL-	\$21.77
-November 13, 2017-	623 Quincy FL-	\$35.42
-November 20, 2017-	623 Quincy FL-	\$42.68
-November 20, 2017-	623 Quincy FL-	\$30.78
-November 27, 2017-	623 Quincy FL-	\$32.00

Respondent traveled on City business to and from Orlando, Florida, from November 5 through November 8, 2017. As to the multiple charges on November 13, 2017, and November 20, 2017, Respondent explained that she traveled on City business because "we were giving out turkeys during that time."



61. December 2017:

-December 2, 2017-	623 Quincy FL-	\$30.91
-December 12, 2017-	623 Quincy FL-	\$34.06
-December 15, 2017-	425 Midway FL-	\$30.27
-December 22, 2017-	425 Midway FL-	\$27.03

62. January 2018:

-January 9, 2018-	425 Midway FL-	\$33.82
-January 17, 2018-	425 Midway FL-	\$22.03
-January 18, 2018-	4556 Wildwood FL-	\$18.00
-January 21, 2018-	4556 Wildwood FL-	\$8.20
-January 22, 2018-	425 Midway FL-	\$15.50
-January 23, 2018-	425 Midway FL-	\$8.57
-January 24, 2018-	425 Midway FL-	\$10.01
-January 26, 2018-	425 Midway FL-	\$24.00

Respondent traveled on City business to and from Orlando, Florida, during the period from January 18 through 22, 2018.

63. February 2018:

-February 2, 2018-	425 Midway FL-	\$34.26
-February 15, 2018-	425 Midway FL-	\$32.00
-February 22, 2018-	425 Midway FL-	\$30.01

64. March 2018:

-March 14, 2018-	425 Midway FL -	\$31.00
-March 28, 2018-	425 Midway FL -	\$32.07

65. April 2018:

-April 7, 2018-	425 Midway FL -	\$25.00
-April 17, 2018-	425 Midway FL -	\$35.44
-April 28, 2018-	425 Midway FL -	\$7.52

66. May 2018:

-May 14, 2018-	425 Midway FL -	\$37.01
-May 20, 2018-	425 Midway FL -	\$29.02
-May 26, 2018-	425 Midway FL -	\$41.00

67. June 2018:

-June 1, 2018-	4556 Wildwood FL-	\$25.03
-June 2, 2018-	4556 Wildwood FL-	\$18.02
-June 4, 2018-	425 Midway FL-	\$20.00
-June 9, 2018-	425 Midway FL-	\$31.00
-June 15, 2018-	425 Midway FL-	\$28.04
-June 29, 2018-	425 Midway FL-	\$33.00

Respondent traveled on City business to and from Orlando, Florida during the period from May 31, 2018, through June 2, 2018.

68. July 2018:

-July 18, 2018-	425 Midway FL-	\$35.06
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69. August 2018:

-August 3, 2018-	425 Midway FL-	\$21.08
-August 14, 2018-	622 St. Lucie FL-	\$20.01
-August 14, 2018-	091 Jacksonville-	\$24.00
-August 19, 2018-	624 Dade City FL-	\$27.02
-August 20, 2018-	425 Midway FL-	\$19.33
-August 24, 2018-	425 Midway FL-	\$33.01

Respondent traveled on City business to and from Hollywood, Florida during the period from August 14 through 18, 2018.

70. September 2018:

-September 4, 2018-	425 Midway FL-	\$37.00
-September 13, 2018-	425 Midway FL-	\$35.50
-September 29, 2018-	425 Midway FL-	\$36.01

71. October 2018:

-October 10, 2018-	623 Quincy FL-	\$39.07
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72. November 2018:

-November 21, 2018-	623 Quincy FL-	\$33.07
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73. December 2018:

-December 5, 2018- 623 Quincy FL- \$18.80

74. In addition to the fact that some of Respondent's use of the City Fuel Card to put fuel in the Vehicle included her personal use of the Vehicle, Respondent used the City Fuel Card to purchase gasoline for the Vehicle when she was using the Vehicle for travel on City business, including travel to Florida League of Cities' conferences in November of 2017, as well as while traveling on City business in and around Midway and Gadsden County, and to and from Tallahassee.

75. Respondent also used the City Fuel Card to pay for gasoline while traveling on City business to attend Florida League of Cities' conferences in a rental vehicle. These conferences occurred January 18 through 22, 2018; May 31 through June 2, 2018; and August 14 through 18, 2018.

76. There was no evidence presented that Respondent used the City Fuel Card to purchase anything other than fuel for the Vehicle or fuel for a rental car while on business for the City.

77. As the City Fuel Card was kept in the Vehicle, other City Council members or City employees would have had access to the City Fuel Card when they were driving the Vehicle.

78. Respondent did not file a gift disclosure to report her use of the City Fuel Card to put gasoline in the Vehicle on those occasions when she used the Vehicle for personal use.

CONCLUSIONS OF LAW

79. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

80. 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 the Code of Ethics for Public Officers and Employees found in part III, chapter 112.

81. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issues in the proceedings. Balino v. Dep't of HRS, 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 sections 112.3135, 112.313(6)[two counts], and 112.3148(8). Proceedings, which seek recommended penalties against a public officer or employee, require proof of the alleged violation(s) by clear and convincing evidence. See Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997). Therefore, the burden of establishing by clear and convincing evidence the elements of Respondent's violations is on the Commission.

82. 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 Henson, 913 So. 2d 579, 590 (Fla. 2005)(quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). The Supreme Court of Florida further explained that although the "clear and convincing" standard requires more than a "preponderance of the evidence," it does not require proof "beyond and to the exclusion of a reasonable doubt." Id.

83. Respondent is subject to the requirements of part III, chapter 112, the Code of Ethics for Public Officers and Employees, for her acts and omissions during her tenure on the Midway City Council.

#### Nepotism

84. The nepotism prohibition under section 112.3135(2)(a) provides:

A public official may not appoint, employ, promote, or advance, or advocate for appointment, employment, promotion, or advancement, in or to a position in the agency in which the official is serving or

over which the official exercises jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual or if such appointment, employment, promotion, or advancement is made by a collegial body of which a relative of the individual is a member. However, this subsection shall not apply to appointments to boards other than those with land-planning or zoning responsibilities in those municipalities with less than 35,000 population. This subsection does not apply to persons serving in a volunteer capacity who provide emergency medical, firefighting, or police services. Such persons may receive, without losing their volunteer status, reimbursements for the costs of any training they get relating to the provision of volunteer emergency medical, firefighting, or police services and payment for any incidental expenses relating to those services that they provide.

85. The term "agency" as used in section 112.3135(2) is defined to include a "city." § 112.3135(1)(a), Fla. Stat.

86. The term "public official" as used in section 112.3135(2) is defined as:

"Public official" means an officer, including a member of the Legislature, the Governor, and a member of the Cabinet, or an employee of an agency in whom is vested the authority by law, rule, or regulation, or to

whom the authority has been delegated, to appoint, employ, promote, or advance individuals or to recommend individuals for appointment, employment, promotion, or advancement in connection with employment in an agency, including the authority as a member of a collegial body to vote on the appointment, employment, promotion, or advancement of individuals.

§ 112.3135(1)(c), Fla. Stat.

87. The term "collegial body" as used in section 112.3135(2) means "a governmental entity marked by power or authority vested equally in each of a number of colleagues."

§ 112.3135(1)(b), Fla. Stat.

88. The term "relative" as used in section 112.3135(2) is defined as follows:

"Relative," for purposes of this section only, with respect to a public official, means an individual who is related to the public official as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.

§ 112.3135(1)(d), Fla. Stat.

89. Considering the above statutory criteria, in order to establish that Respondent violated section 112.3215(2)(a), the following elements must be proved:

1. Respondent must be a "public official" as that term is defined by Section 112.3135(1)(b), Florida Statutes.

2. Respondent must have appointed, employed, promoted, or advanced, or advocated for appointment, employment, promotion, or advancement, in or to a position in the agency in which the official is serving or over which the official exercises jurisdiction or control.

3. The action taken by Respondent must have been taken for an individual who is a relative of the Respondent.

4. In the case of municipalities with less than a population of 35,000, it must be that the agency in which the Respondent is serving or over which Respondent exercises jurisdiction or control has land planning responsibilities.

90. During the relevant time period Respondent served as a member of the Midway City Council, she was a "public official."

91. Respondent acknowledged that Sam Stevens was her first cousin.

92. The evidence further established that Respondent voted to elect Sam Stevens as Mayor Pro-Tem of the City of Midway.

93. Although the evidence established that the City of Midway has a population of less than 35,000, it further established that the exemption for municipalities with populations of less than 35,000 does not apply because it was shown that the City Council has land-planning responsibilities. See § 112.3135(2)(a), Fla. Stat., quoted above.

94. While the evidence showed that Sam Stevens received no additional compensation for serving as Mayor Pro-Tem, receipt of



additional compensation is not required for a violation of section 112.3135(2). Rather, the statute prohibits a public official from promoting or advancing a relative. As explained by the Florida First District Court of Appeal "[t]o promote is to exalt in station, rank, or honor . . . ." Slaughter v. City of Jacksonville, 338 So. 2d 903, 804 (Fla. 1st DCA 1976); accord Commission on Ethics Opinion (CEO) 13-7 (citing examples where advancing occurs when there is an "enhancing" of the personal dignity and importance of the position).

95. In this case, the Mayor Pro-Tem's responsibilities include serving as chair of the City Council and other mayoral activities in the absence of the Mayor.

96. Respondent, as a member of a collegial body, voted on the election and/or advocated for the election of her relative, Sam Stevens, to become Mayor Pro-Tem in the agency in which she was serving or over which she exercised jurisdiction or control.

97. In addition, a collegial body may not appoint or elect a relative of one of its members to a position regardless of whether Respondent voted or not.

98. While the prohibition of nepotism whether or not the official participates in the decision to advance a relative may seem harsh, in CEO 95-12, the Commission explained the history of the current anti-nepotism language found in section 112.3135(2)(a):

We previously had opined that public officials could not appoint their relatives to uncompensated positions on advisory boards, even where the relative of the appointee abstained from voting on the appointment and did not otherwise advocate the appointment. See CEO 92-50 and the opinions cited therein. However, this interpretation was struck down by the Florida Supreme Court in City of Miami Beach v. Galbut, 626 So. 2d 192 (1993), where the Court construed Section 112.3135(2)(a), Florida Statutes, to prohibit only affirmative acts on the part of the public official/relative. Thus, the Court opined that Mr. Galbut was eligible for reappointment to the city zoning board of adjustment as long as his city commissioner father-in-law abstained from voting and in no way advocated [for] his reappointment. After the Court's decision in Galbut, the Legislature revisited Section 112.3135(2)(a), Florida Statutes, and amended it during the 1994 legislative session to read as follows:

A public official may not appoint, employ, promote, or advance, or advocate for appointment, employment, promotion, or advancement, in or to a position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving or exercising jurisdiction or control over the agency, who is a relative of the individual or if such appointment, employment, promotion, or advancement is made by a collegial body of which a relative of the individual is a member. However, this subsection shall not apply to appointments to boards other than those with land-planning or zoning

responsibilities in those municipalities with less than 35,000 population.

[Section 112.3135(2)(a), Florida Statutes, (Supp. 1994)]

99. In sum, the clear and convincing evidence proved that Respondent violated the nepotism prohibition found in section 112.3135(2)(a) when she voted to elect her first cousin as Mayor Pro-Tem.

Alleged Misuse of Respondent's Public Position to Promote Her Cousin

100. The Misuse of Public Position prohibition of the Code of Ethics is found in section 112.313(6), which provides:

No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with s. 104.31.

101. In order to establish that Respondent violated section 112.3215, the following elements must be established by clear and convincing evidence:

1. Respondent must have been a public officer or employee.
2. Respondent must have:
  - a. used or attempted to use his or her official position or any property or resources within his or her trust, or

b. performed his or her official duties.

3. Respondent's actions must have been taken to secure a special privilege, benefit, or exemption for him or herself or others.

4. Respondent must have acted corruptly, that is, with wrongful intent and for the purpose of benefiting him or herself or another person from some act or omission which was inconsistent with the proper performance of public duties.

102. The term "corruptly" as used in section 112.313(6) is defined as follows:

"Corruptly" means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.

§ 112.312(9), Fla. Stat.

103. As used in section 112.313(6), the term "public officer" is defined to include "any person elected or appointed to hold office in any agency, including any person serving on an advisory body." § 112.313(1), Fla. Stat.

104. The evidence clearly established that Respondent was a "public officer." During the relevant time period, Respondent served as a member of the City Council.

105. The evidence further convincingly showed that Respondent performed her official duties when she voted at the

May 4, 2017, City Council meeting to elect her first cousin, Sam Stevens, as Mayor Pro-Tem of the City.

106. The evidence was insufficient, however, to clearly and convincingly demonstrate that Respondent secured a special privilege, benefit, or exemption for herself or her cousin by voting to elect him Mayor Pro-Tem. Rather, the evidence established that the post of being Mayor Pro-Tem under the City Charter is largely ceremonial. Service as Mayor Pro-Tem was contingent upon the absence or inability of Respondent to perform her duties. The Mayor Pro-Tem received no additional compensation.

107. While the statutory provision against misuse of position does not restrict the privilege or benefit prohibited under section 112.313(6) to an economic benefit, (see, e.g., Garner v. Commission on Ethics, 439 So. 2d 894, 895 (Fla. 2d DCA 1983)), Respondent's vote for her cousin for the ceremonial and contingent duties of the Mayor Pro-Tem without more, under the circumstances of this case, does not weigh in favor of finding a "special" benefit or privilege.

108. Further, the evidence was insufficient to show that Respondent acted with the requisite "corrupt intent." To prove this element, it must be shown that Respondent acted "with reasonable notice that her conduct was inconsistent with the proper performance of her public duties and would be a violation

of the law or code of ethics in part III of chapter 112.”

Blackburn v. State, Comm’n on Ethics, 589 So. 2d 431, 434

(Fla. 1st DCA 1991).

109. Rather than showing that Respondent had reasonable notice that it would be wrong to vote to elect her cousin as Mayor Pro-Tem, the evidence showed that, prior to the vote, Respondent sought advice from the City Attorney. The City Attorney advised Respondent that it was not a voting conflict for her to vote to elect her cousin.

110. The Commission contends that Respondent’s corrupt intent was demonstrated by her failure to provide the City Attorney with a copy of Schafer’s E-mail. However, Schafer’s E-mail was directed toward a different situation, namely, the appointment of Respondent’s cousin to fill a vacant City Council seat. In contrast, the vote at issue on May 4, 2018, was a vote to elect Respondent’s cousin to a ceremonial position after he had already been elected to the City Council by the citizenry. Further, the evidence showed that Schafer’s E-mail was brought up and discussed at the May 4, 2018, City Council meeting.

111. Considering the evidence, it is concluded that it was insufficient to clearly and convincingly prove that Respondent misused her position when she voted to elect her cousin to the Mayor Pro-Tem position.

Alleged Misuse of Respondent's Public Position by Using the City Vehicle and Fuel Credit Card for her Personal Benefit

112. Consideration of whether Respondent misused her public position in violation of section 112.313(6), when she used the City's Vehicle and City Fuel Card for her personal benefit, is a closer question than Respondent's vote to elect her cousin.

113. Considering the elements to show a violation of section 112.313(6), once again, the evidence clearly established that Respondent was a "public officer," as Respondent served as a member of the City Council during the relevant time period.

114. Convincing evidence also established that Respondent's use of the City's Vehicle and the City Fuel Card constituted use of property and resources within her trust.

115. Although Respondent used the Vehicle and City Fuel Card for City business, she also used them for her personal benefit. For over a year, Respondent had the pleasure, convenience, and free use of the City's air-conditioned Vehicle for her personal use at the City's expense.

116. The evidence also established, however, that while Respondent was using the Vehicle and City Fuel Card, the City had no policy with regard to their use. Prior to Respondent's use of the Vehicle, a former City Manager had used a city vehicle for personal use. At the time of the final hearing, the

City was still in the process of developing policies regarding the use of City vehicles and fuel cards.

117. While there was no evidence of a formal assignment of the Vehicle to Respondent, as Mayor, it was understood by the City Manager that the Vehicle was kept at Respondent's residence. Without a policy in place and considering Respondent's use of the Vehicle for City business intermittently with personal use, the Vehicle was arguably an incident of Respondent's employment as Mayor.

118. The Commission argues that the lack of a policy is not a defense to a finding of corrupt intent, and points to Respondent's ethics training and her awareness that personal use of City-paid postage would be wrong as evidence of Respondent's notice that her personal use of the Vehicle and City Fuel Card was prohibited. However, considering the City's lack of a policy regarding personal use, coupled with Respondent's official use of the Vehicle and City Fuel Card with intermittent personal use, a history of personal use of a city vehicle by a former city manager, as well as the practice of allowing the Vehicle to be kept at Respondent's home and leaving a fuel card in the Vehicle for use by Respondent and other City employees, that argument is rejected. Rather, considering the evidence, it is concluded that it is insufficient to clearly and convincingly prove that Respondent had reasonable notice or intent that her



conduct was inconsistent with the proper performance of her public duties or would be a violation of the law or code of ethics. See Blackburn.

Alleged Failure to Report Use of the City Vehicle and City Fuel Card as Gifts

119. Section 112.3148(8) provides:

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

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

120. The term "reporting individual" as used in section 112.3148(8) is defined, in pertinent part, as:

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 or any individual who has been elected to, but has yet to officially assume the responsibilities of, public office.

§ 112.3148(1)(d), Fla. Stat.

121. In Florida, mayors and elected municipal council members are "local officers" who are required to annually file public disclosures of their financial interests.

See §§ 112.3145(1)(a)3. and 112.3145(2)(b), Fla. Stat.

122. The term "gift" as used in section 112.3148(8) is defined as:

(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:

1. Real property.
2. The use of real property.
3. Tangible or intangible personal property.
4. The use of tangible or intangible personal property.
5. A preferential rate or terms on a debt, loan, goods, or services, which rate is below the customary rate and is not either a government rate available to all other similarly situated government employees or officials or a rate which is available to similarly situated members of the public by virtue of occupation, affiliation, age, religion, sex, or national origin.
6. Forgiveness of an indebtedness.

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.
8. Food or beverage.
9. Membership dues.
10. Entrance fees, admission fees, or tickets to events, performances, or facilities.
11. Plants, flowers, or floral arrangements.
12. Services provided by persons pursuant to a professional license or certificate.
13. Other personal services for which a fee is normally charged by the person providing the services.
14. Any other similar service or thing having an attributable value not already provided for in this section.

(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.
2. Except as provided in s. 112.31485, contributions or expenditures reported pursuant to chapter 106, contributions or expenditures reported pursuant to federal election law, campaign-related personal services provided without compensation by individuals volunteering their time, or any other contribution or expenditure by a

political party or affiliated party committee.

3. An honorarium or an expense related to an honorarium event paid to a person or the person's spouse.

4. An award, plaque, certificate, or similar personalized item given in recognition of the donee's public, civic, charitable, or professional service.

5. An honorary membership in a service or fraternal organization presented merely as a courtesy by such organization.

6. The use of a public facility or public property, made available by a governmental agency, for a public purpose.

7. Transportation provided to a public officer or employee by an agency in relation to officially approved governmental business.

8. Gifts provided directly or indirectly by a state, regional, or national organization which promotes the exchange of ideas between, or the professional development of, governmental officials or employees, and whose membership is primarily composed of elected or appointed public officials or staff, to members of that organization or officials or staff of a governmental agency that is a member of that organization.

§ 112.312(12)(a) & (b), Fla. Stat.

123. Section 112.3148(7), regarding valuation of certain specific gifts, provides in pertinent parts:

(d) Transportation provided in a private conveyance shall be given the same value as transportation provided in a comparable commercial conveyance.

\* \* \*

(i) Except as otherwise specified in this section, a gift shall be valued on a per occurrence basis.

124. As mayor and a member of the City Council, Respondent was a "reporting individual" required to file annual public disclosures of her financial interests pursuant to section 112.3145.

125. As noted earlier, Respondent's use of the Vehicle and City Fuel Card could arguably be characterized as an incident of Respondent's employment as Mayor, and therefore, not a gift. See § 112.3148(8)(b)1., Fla. Stat., quoted above.

126. However, without the argument that the use was an incident of Respondent's employment, the evidence convincingly established that Respondent accepted a gift in the form of "[t]ransportation, other than that provided to a public officer or employee by an agency in relation to officially approved governmental business, lodging, or parking," see section 112.3148(12)(a)7., quoted above, when she used the Vehicle and City Fuel Card for her personal, non-official business, transportation.

127. In addition to her personal use, however, the evidence also established that Respondent used the Vehicle and

City Fuel Card for official business. Given Respondent's intermittent business and personal uses, the evidence was insufficient to establish continuous personal use for over a year, as argued by the Commission.

128. Moreover, considering Respondent's personal use on a "per occurrence" basis, see section 112.3148(7)(i), quoted above, the evidence was insufficient to clearly and convincingly prove that Respondent's personal use of the Vehicle or City Fuel Card exceeded \$100 on any given occurrence. Other than some specific instances, there was no evidence showing which days Respondent drove the Vehicle or where she drove it. There was no evidence showing how many miles Respondent drove the vehicle on any given day. Evidence that the Vehicle was parked at property located adjacent to Respondent's residence is not determinative that she exclusively used the Vehicle, especially in light of evidence that others used the Vehicle on occasion, picking it up from that location.

129. Considering the facts, circumstances, and evidence presented in this case, together with applicable law, it is concluded that Respondent did not violate the gift disclosure requirements of section 112.3148(8).

#### PENALTY

130. Penalties available for public officers who violate the Code of Ethics include impeachment, removal from office,

suspension from office, public censure and reprimand, forfeiture of no more than one-third of his or her salary per month for no more than 12 months, civil penalty not to exceed \$10,000, and restitution of any pecuniary benefit received because of the violation committed. See § 112.317(1)(a), Fla. Stat.

131. A primary purpose of civil penalties is to deter misconduct by securing obedience to the law. Tull v. United States, 481 U.S. 412 (1987); see also Hudson v. United States, 522 U.S. 93 (1997) ("all civil penalties have some deterrent effect.").

132. In this case, the only violation supported by clear and convincing evidence was Respondent's violation of the anti-nepotism provision of section 112.3135. Proof for that violation did not require a showing that Respondent intended to violate the law. In fact, the evidence otherwise showed that Respondent received legal advice prior to her vote opining that she was permitted to vote for her cousin. While Respondent's vote technically violated the anti-nepotism provision, under the circumstances, a substantial penalty is not justified. Rather, a nominal penalty, without censure or reprimand, is appropriate.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is:

RECOMMENDED that a Final Order and Public Report be entered finding that Respondent, Wanda Range, violated section 112.3135, Florida Statutes, and recommending the imposition of a nominal civil penalty of \$1.00 for that violation, and further finding that Respondent Wanda Range did not violate sections 112.313(6), or 112.3148(8), Florida Statutes, as alleged in the Order Finding Probable Cause.

DONE AND ENTERED this 8th day of November, 2019, in Tallahassee, Leon County, Florida.



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JAMES H. PETERSON, III  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 8th day of November, 2019.

ENDNOTES

<sup>1/</sup> All references to the Florida Statutes and Florida Administrative Code are to the current versions. Applicable portions of the current laws and rules have not substantively changed since the time of the alleged incidents forming the basis of the case against Respondent.



<sup>2/</sup> In CEO 13-7, the Commission opined that promotions or advancements include raising an individual to a higher rank of position of greater personal dignity or importance.

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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.