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State of Florida
COMMISSION ON ETHICS
P.O. Drawer 15709
Tallahassee, Florida 32317-5709

325 John Knox Road
Building E, Suite 200
Tallahassee, Florida 32303

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www.ethics.state.fl.us

June 27, 2016

Confidential

George Neugent
1583 Eastward Ho Lane
Marathon, Florida 33050

RE: Complaint No. 14-149, In re GEORGE NEUGENT

Dear Mr. Neugent:

Enclosed, for your information, is a copy of the Advocate's Recommendation in the above-referenced complaint. If you wish to provide us with a written response for consideration at the probable cause hearing, it should be filed with our office no later than July 11, 2016.

The complaint will be considered at the **Friday, July 29, 2016,** Commission meeting. The meeting has been scheduled to begin at 10:00 a.m. in the Third Floor Courtroom, First District Court of Appeal, 2000 Drayton Drive, Tallahassee, Florida.

Under the Commission's rules, the Respondent, the Complainant, and their counsel may attend the hearing to observe the Commission's deliberations. The Respondent and the Commission Advocate will be given ten minutes each to provide oral statements to the Commission. That statement, as well as any written statement you may choose to send in advance of the meeting, may address only the preliminary investigation and the applicability of the law to the circumstances set forth in the investigative report. No witnesses may be called at this hearing and no new evidence may be introduced. The sole purpose of the probable cause hearing is to evaluate the results of the preliminary investigation. If you plan to attend, please notify our office at least two days prior to the meeting.

If the Commission finds no probable cause to believe that a violation has occurred, the complaint will be dismissed and no further action will be taken. If the Commission finds probable cause, the Respondent will have the right to a full, evidentiary hearing before any final determination is made.

Please do not hesitate to contact this office if you have questions concerning this matter.

Sincerely,
Millie W. Fulford
Millie W. Fulford
Complaint Coordinator

cc: Melody A. Hadley, Commission Advocate

ORIGINAL

FLORIDA
COMMISSION ON ETHICS
JUN 27 2016
RECEIVED

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

CONFIDENTIAL

In re: George Neugent,

Respondent.

Complaint No. 14-149

/

ADVOCATE'S RECOMMENDATION

The undersigned Advocate, after reviewing the Complaint and Report of Investigation filed in this matter, submits this Recommendation in accordance with Rule 34-5.006(3), F.A.C.

RESPONDENT/COMPLAINANT

Respondent, George Neugent, serves as a member of the Monroe County Commission. Complainant is Richard Boettger of Key West, Florida.

JURISDICTION

The Executive Director of the Commission on Ethics determined that the Complaint was legally sufficient and ordered a preliminary investigation for a probable cause determination as to whether Respondent violated Sections 112.313(6), 112.3143(3)(a), 112.313(2), 112.313(4), 112.3148(8), Florida Statutes, Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes. The Commission on Ethics has jurisdiction over this matter pursuant to Section 112.322, Florida Statutes.

The Report of Investigation was released on June 13, 2016.

ALLEGATION ONE

Respondent is alleged to have violated Section 112.313(6), Florida Statutes, by using his position to influence the awarding of Monroe County's animal services contract to his friend.

APPLICABLE LAW

Section 112.313(6), Florida Statutes, provides as follows:

> MISUSE OF PUBLIC POSITION. 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.

The term "corruptly" is defined by Section 112.312(9), Florida Statutes, 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.

In order to establish a violation of Section 112.313(6), Florida Statutes, the following elements must be proved:

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.

ANALYSIS

Monroe County contracted with three non-profit corporations to provide animal control and shelter services to three geographic areas (upper, middle, and lower Keys) in the County. (ROI 3) In approximately 2002/2003, Stand Up for Animals, Inc. (SUFA) contracted with Monroe County to provide such services for the middle Keys (Big Pine Key to Layton). (ROI 3, 8) Linda Gottwald served as SUFA's Executive Director. (ROI 5, 8) SUFA was funded through a combination of its contract with the County plus donations and fundraisers. (ROI 3)

In 2010, SUFA's contract came up for renewal. (ROI 3) The County issued a Request for Proposal (RFP) for the animal services contract for the middle Keys. (ROI 3) SUFA was the only responder with a bid that asked for a 24.4% fee increase, approximately $60,000 more per year when the County was already providing $250,000. (ROI 3, 12, 14, 20) However, issues arose, which included an audit of SUFA and the freezing of its accounts, which led to SUFA terminating the contract. (ROI 5, 8)

On July 19, 2010, Safe Harbor Animal Rescue of the Keys, Inc. (SHARK) was formed with Cora Baggs as one of its officers. (ROI 6, 7) Eventually, SHARK contracted to provide animal services for the middle Keys. (ROI 6)

Complainant alleges that Respondent was the catalyst for these issues and then voted to award the contract to his friend, Baggs and SHARK. (ROI 1) Complainant advised Respondent had a meeting with Baggs in June 2010 during which he advised her to form a nonprofit to assume the animal services contract and provided an email exchange between the two as evidence. (ROI 3, Complaint 11) In addition, Complainant maintains that Respondent attended

a July 6, 2010 meeting where he was instrumental in seeking to have an audit performed for the County's animal shelters because of possible improprieties involving SUFA. (ROI 4)

Complainant advised that this allegation is evidenced by Respondent's meeting with Baggs and a July 7th email from Connie Cyr, Administrative Aide to the County Administrator, and Beth Leto, then-Assistant Director of the Public Works Department. (ROI 4, Complaint 19, 20) It should be noted that neither Respondent's name nor his attendance at the July 6th meeting are mentioned in the email chain. (ROI 4 NOTE)

The investigation shows:

At the June 16, 2010 County Commission meeting, then-Director of the Public Works Department Dent Pierce recommended that the Commission not renew SUFA's contract because of the requested increase in the contract amount. (ROI 12, Exhibit A) The Public Works Department's written recommendation reflects that staff recommended rejection of all bid proposals from SUFA and recommended re-advertising the contract for bids. (ROI 12) The video of the meeting shows Respondent stating that SUFA had done a "fantastic" job of operating the animal shelter, but that the County Commission was required to be the steward of the County's finances and could not afford increased payments to SUFA. (ROI 12) County Administrator Roman Gastesi informed the board that his office would review whether there were less expensive means of obtaining animal control services. (ROI 12) The Commission, including Respondent, voted to continue SUFA's contract on a month-to-month basis for 90 days and to address the request for a funding increase at a September 2010 meeting. (ROI 12)

On July 6, 2010, a meeting was held to discuss SUFA's performance as alleged by Complainant; however, there is no evidence that Respondent was present. (ROI 13-15, 20) Pierce advised that he never meet with Respondent relative to concerns about SUFA. (ROI 13)

Leto advised that her July 7th email which refers to "improprieties involving SUFA" was based on the significant increase requested in SUFA's bid even though SUFA indicated in records that it was housing and caring for fewer animals than in the past. (ROI 14) Leto advised that subsequent to the July 7th email, she was contacted by SUFA employee Katie Bentley who advised that Gottwald had left the County and was living in Michigan. (ROI 14) Leto further advised that she had no contact with Respondent relative to SUFA. (ROI 14)

On July 8, 2010, County Administrator Gastesi asked the County Clerk to perform an audit of the three County animal shelter providers. (ROI 22) Gastesi advised that during the time that SUFA asked for the fee increase, the County was experiencing a financial hardship due to the recession. (ROI 20) Gastesi advised that as a result of SUFA's fee increase request, he decided to ask the County Clerk to perform an audit of all three of the companies providing animal control services to determine whether there were areas where funding could be reduced. (ROI 20) He further advised that Respondent was not involved with his decision to request the audit and does not recall Respondent attending meetings between him and staff regarding the audit. (ROI 20)

Danny Kolhage served as the County Clerk from 1983 until he was elected to the County Commission in 2012. (ROI 21) Kolhage advised that his office received a complaint from SUFA employee Bentley about how Gottwald was using County funds. (ROI 21) Kolhage advised that he had no contact with Respondent relative to SUFA and that Respondent was not involved with the completion or release of the findings from the audit. (ROI 21)

On July 21, 2010 the Commission, including Respondent, voted to execute an amendment to the agreement with SUFA to operate the middle Keys for an additional 90 days on a month-to-month basis. (ROI 23)

On August 6, the preliminary draft audit report of SUFA reflects that among other issues, SUFA used $2,900 in operating account funds to construct a farm fence for the animal shelter in Michigan; paid $1,154.90 in legal expenses for the purchase of the land in Michigan; paid three months of rent and utility bills for Gottwald's private residence; and used a County vehicle to transport animals to Michigan. (ROI 26) Sandra Mathena, then-County Clerk Director of Internal Audits, advised that she had no contact with Respondent relative to her audit of SUFA. (ROI 24, 27)

Gottwald acknowledged opening a second animal shelter in Traverse City, Michigan in the summer of 2010. (ROI 7, 28) She acknowledged that she may have commingled funds from the County with funds from donations and fundraisers but she denied using County funds for the operation of her animal shelter in Michigan. (ROI 28)

Gastesi advised that he and the County Attorney were concerned that Gottwald would use County funds for the Michigan animal shelter and it was decided to request a court freeze SUFA's bank accounts until the audit could be completed. (ROI 29) On August 10, 2010, the County filed a declaratory injunction against SUFA which resulted in its bank accounts being frozen. (ROI 30)

County Attorney Suzanne Hutton advised that she unilaterally decided to obtain a court order to freeze SUFA's bank accounts. (ROI 31) She further advised that she did not inform the county commissioners about her decision until right before the petition was filed. (ROI 31) She confirmed that it was not Respondent's decision to freeze the bank accounts and that he did not influence her decision in this matter.[1] (ROI 31)

[1] While Hutton advised that neither Respondent nor the Commission were involved in her decision to seek the petition, Respondent did email her a question about "sequestering" funds on August 4, 2010. (ROI 24, Complaint 29)

At the August 18, 2010 County Commission meeting, Kolhage informed the Commission that he attempted to perform an onsite inspection SUFA's shelter to obtain records for the audit but was prevented from entering the property by SUFA staff. (ROI 32) The Commission was informed of the preliminary audit findings and was told that the commingling of funds may have resulted in County funds being used for unauthorized purposes. (ROI 32) It was at this meeting when the Commission was informed about the petition for the declaratory injunction to freeze SUFA's bank accounts. (ROI 32) Respondent advised that he learned that no SUFA board members lived in the County and asked the County Attorney to include a residency provision in future RFPs for animal control contracts.[2] (ROI 32) There was no formal vote, but the Commissioners gave oral approval for the Clerk and Attorney to proceed with their current actions. (ROI 32) In addition, the Commission, including Respondent, voted to allow the Attorney to use emergency measures to ensure services were covered in the event SUFA abruptly stopped providing animal control services. (ROI 32)

At the September 8, 2010 special County Commission meeting, the Commissioners were advised that SUFA asked to terminate its contract with the County as of August 23, 2010 and that the lower Keys contractor, FKSPCA, had taken over SUFA's duties until the contract could be rebid. (ROI 34) The Commission, including Respondent, voted to terminate SUFA's contract. (ROI 34) In addition, the Commission, including Respondent, voted to approve a temporary contract with FKSPCA. (ROI 34) Lastly, the Commission, including Respondent, voted to schedule a closed session meeting for September 15, 2010 to discuss strategy for the lawsuit against SUFA. (ROI 34)

[2] Gottwald advised that three of the six SUFA corporate officers lived in the County during that period of time. (ROI 8)

On October 10, 2010, the final audit report was issued and reflected that SUFA: did not keep proper receipts for expenditures; charged customers for fees that had not been approved by the County Commission; did not remit fees that were owed to the County; was not issuing licenses for cat adoptions; was not completing annual independent audits; spent $2,900 for a fence located at the company's animal shelter in Michigan; spent $1,154.90 for legal services in Michigan; spent $622.87 in planning and administrative fees for the shelter in Michigan; used a County vehicle to transport five dogs from Monroe County to the shelter in Michigan; used $5,290.64 for travel and entertainment without proper documentation; spent funds for programs, marketing, and other responsibilities that were not the responsibility of Monroe County; paid $4,197 in rent for the Director's personal residence; paid $1,095.20 for utility bills at the Director's personal residence; paid personal expenses through SUFA's operating account; paid spay and neuter expenses using County funding; had inadequate internal controls concerning deposits; paid for private cremations from SUFA's operating account; paid costs totaling $24,521.36 on a vehicle purchased and used by the SUFA Director and kept in Michigan at the time of the audit; had the SUFA Director also serving on the corporation's Board of Directors, which allowed her to increase her salary without official action being taken by the SUFA Board; had the Director relocate to Michigan, while still collecting her full salary from SUFA; had invoices and receipts that did not identify purposes for the purchases; had employees classified in error as independent contractors; and had no documentation for $2,000 in repairs to the Big Pine Key Shelter building. (ROI 36)

On October 20, 2010, the Commission, including Respondent, voted to continue FKSPCA's agreement to provide animal control services for the middle Keys. (ROI 37)

On January 19, 2011, the Commission, including Respondent, voted to approve an agreement for professional services from Carr, Riggs, & Ingram, LLC, to perform a forensic audit to determine how much funding SUFA owed to the County.[3] (ROI 38)

On February 15, 2011, three sealed bids for animal control services for the middle Keys were opened. (ROI 39) The bids were submitted by SHARK, FKSPCA, and Responsible Pethood, Inc. (ROI 39)

On February 16, 2011, the Commission, including Respondent, voted to approve an extension to FKSPCA to provide animal control services to the middle Keys until April 30, 2011. (ROI 40)

On March 2, 2011, the County's bid selection committee, which included Gastesi, Pierce, Leto, and two private citizens ranked FKSPCA, SHARK, and Responsible Pethood, first through third, respectively. (ROI 41) The committee voted to recommend that the Commission split the bid and award the animal control services for the Big Pine Key service area to FKSPCA while SHARK would provide the services for Marathon. (ROI 41) On March 16, 2011, the Commission, including Respondent, voted to accept the committee's recommendation subject to the limiting the contract with SHARK for an amount not more than what was paid in the past for animal control services in that area. (ROI 42)

At the April 20, 2011 County Commission meeting, Pierce recommended that based upon the contract negotiations with FKSPCA and SHARK, the Commission should use SHARK for Big Pine Key and Marathon. (ROI 43) The Commission, including Respondent, voted to award the bid to SHARK. (ROI 43)

[3] Gottwald filed a countersuit against the County. The bank accounts were released and Gottwald settled against the County for $45,000 in June 2014. (ROI 9)

Baggs advised that she was informed by SUFA employee Bentley that Gottwald was in Michigan opening an animal shelter and that she (Bentley) believed that Gottwald was using SUFA funds to open the shelter. (ROI 17) Bentley believed that Gottwald was not operating the shelter for the benefit of the animals. (ROI 17) Repeated attempts to contact Bentley for an interview were unsuccessful. (ROI 18)

Baggs advised that this motivated her to relay these problems to a county commissioner. (ROI 17) She acknowledged that Respondent is a friend so she contacted him to ask what could be done about the issues at SUFA. (ROI 17) They spoke briefly at his campaign event where he suggested that if she thought she could do a better job of running the shelter then she should form a nonprofit and submit a bid. (ROI 17)

Respondent has never served as a corporate officer or principal of SHARK. (ROI 44, 45, 47) He advised that he did not benefit from SHARK being awarded the middle Keys contract. (ROI 44) Respondent acknowledged meeting with Baggs and that she is a friend but contends that he offered her the same information that he would provide to any constituent. (ROI 16, 17) He maintains that her service on the board of SHARK did not influence his actions relative to SUFA. (ROI 16)

There is insufficient evidence to show that Respondent was responsible for the actions that allegedly were for the special benefit of SHARK, etc. There is insufficient evidence to show that Respondent's participation in the votes was a corrupt use of his position.

Therefore, based on the evidence before the Commission, I recommend that the Commission find no probable cause to believe that Respondent violated Section 112.313(6), Florida Statutes.

ALLEGATION TWO

Respondent is alleged to have violated Section 112.3143(3)(a), Florida Statutes, by voting on multiple matters which would inure to the special private gain of his friend's nonprofit.

APPLICABLE LAW

Section 112.3143(3)(a), Florida Statutes, provides as follows:

> No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

Section 112.3143(1)(d), Florida Statutes, defines special private gain or loss as follows:

> "Special private gain or loss" means an economic benefit or harm that would inure to the officer, his or her relative, business associate, or principal, unless the measure affects a class that includes the officer, his or her relative, business associate, or principal, in which case, at least the following factors must be considered when determining whether a special private gain or loss exists:
>
> 1. The size of the class affected by the vote.
>
> 2. The nature of the interests involved.
>
> 3. The degree to which the interests of all members of the class are affected by the vote.
>
> 4. The degree to which the officer, his or her relative, business associate, or principal receives a greater benefit or harm when compared to other members of the class.

The degree to which there is uncertainty at the time of the vote as to whether there would be any economic benefit or harm to the public officer, his or her relative, business associate, or principal and, if so, the nature or degree of the economic benefit or harm must also be considered.

In order to establish a violation of Section 112.3143(3)(a), Florida Statutes, the following elements must be proved:

1. Respondent must have been a county, municipal or other local public officer serving on a collegial body.

2(A). Respondent must have:

1) voted in his or her official capacity on a measure which would have inured to the Respondent's own special private gain or loss,

or

2) voted in his or her official capacity on a measure which the Respondent knew would have inured to the special private gain or loss of a principal by whom the Respondent was retained or to the parent organization or subsidiary of a corporate principal by which the Respondent was retained,

or

3) voted in his or her official capacity on a measure which the Respondent knew would have inured to the special private gain or loss of a relative or business associate of the Respondent.

OR

(B). When abstaining from a vote because of a conflict, the Respondent, prior to the vote being taken, must have failed to publicly state to the assembly the nature of his or her interest in the measure described in paragraph 2(A), above.

OR

(C). After abstaining from a vote because of a conflict, the Respondent failed to disclose the nature of his or her interest in the measure described in paragraph 2(A), above, as a public record in a memorandum filed within 15 days after the vote occurred with

the person responsible for recording the minutes of the meeting at which the vote occurred.

ANALYSIS

The underlying facts and circumstances relating to this allegation are contained above in Allegation One. Complainant alleges that Respondent's votes in Allegation One would inure to the special private gain of SHARK. (ROI 1)

There is insufficient evidence to show that Respondent has a relationship with SHARK such that he would have a voting conflict.

Therefore, based on the evidence before the Commission, I recommend that the Commission find no probable cause to believe that Respondent violated Section 112.3143(3)(a), Florida Statutes.

ALLEGATION THREE

Respondent is alleged to have violated Section 112.313(2), Florida Statutes, by soliciting and/or accepting an honorary golf club membership based upon an understanding that his vote, official action, or judgment would be influenced.

APPLICABLE LAW

Section 112.313(2), Florida Statutes, provides as follows:

> SOLICITATION OR ACCEPTANCE OF GIFTS. No public officer, employee of an agency, local government attorney, or candidate for nomination or election shall solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service, based upon any understanding that the vote, official action, or judgment of the public officer, employee, local government attorney, or candidate would be influenced thereby.

In order to establish a violation of Section 112.313(2), Florida Statutes, the following elements must be proved:

1. Respondent must have been either a public officer, a public employee or a candidate for nomination or election.

2. Respondent must have solicited or accepted something of value to him or her, including a gift, loan, reward, promise of future employment, favor, or service.

3. Such solicitation or acceptance must have been based upon an understanding that the Respondent's vote, official action or judgment would be influenced thereby.

ANALYSIS

From 1988 through 1991, Respondent was employed by Sombrero Country Club (Club) as a bartender and lead caterer. (ROI 69) In 1992, Respondent became a "summer member" of the Club and was assigned a membership number for billing purposes. (ROI 69) While Respondent cannot recall how long he paid the summer member membership fee, he acknowledged that he continued to play golf at the Club after he stopped paying the fee. (ROI 69) He estimated that he has played golf less than twice per month over the last five years. (ROI 69) He advised that some of the green fees were paid by members who invited him to play but that the fees were never more than $100 per round of golf. (ROI 69) He further advised that he pays for his own cart fees and for any meals or drinks that he consumes while at the Club. (ROI 69) He contends that the only benefit that he received for the Club is the ability to have any charges that he incurs while at the Club billed to him via a monthly billing statement. (ROI 69)

Robert Belcaster serves as president of the Club which is now known as Florida Keys Country Club after it was sold in January 2015. (ROI 67, 71) Belcaster advised that Respondent had a membership titled, "Honorary Member." (ROI 71) Honorary members paid for all of the incidental charges that they incurred while at the Club such as greens fees, cart fees, meals, and beverages; however, this membership included unlimited golf. (ROI 71) During the relevant time, the regular membership was $500 per month which Respondent did not pay. (ROI 71)

The Club's website reflects that the fee to play 18 holes of golf as a guest or summer member is $55. (ROI 70) Respondent does not receive any discounts or waivers due to the honorary membership. (ROI 69, 72) It is Belcaster's understanding that Respondent did not retain this membership status when the Club was sold. (ROI 71)

The instructions on the CE Form 9, "Quarterly Gift Disclosure," require a reporting individual to list a description of any gift that has a value of over $100 and to include the value of the gift, the date received, and the name and address of the gift giver. (ROI 68) Gifts include food or beverages, membership dues, entrance fees, and admission fees. (ROI 68)

Between September 2009 and January 2015, the Club's representatives did not appear before the County Commission. (ROI 73) In addition, Respondent did not vote on any matter concerning the Club during that time. (ROI 73)

The honorary membership is a gift. However, to establish a violation of Section 112.313(2), Respondent must have solicited or accepted with the understanding that it would influence his vote, official action, or judgment. There is insufficient evidence to show that Respondent solicited or accepted the honorary membership with the understanding that his vote, official action or judgment would be influenced.

Therefore, based on the evidence before the Commission, I recommend that the Commission find no probable cause to believe that Respondent violated Section 112.313(2), Florida Statutes.

ALLEGATION FOUR

Respondent is alleged to have violated Section 112.313(4), Florida Statutes, by accepting an honorary golf club membership as unauthorized compensation.

APPLICABLE LAW

Section 112.313(4), Florida Statutes, provides as follows:

> 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.

In order to establish a violation of Section 112.313(4), Florida Statutes, the following elements must be proved:

1. Respondent must have been a public officer, employee of an agency, or local government attorney.

2. Respondent or Respondent's spouse or minor child must have accepted some compensation, payment or thing of value.

3. When such compensation, payment or thing of value was accepted:

a) Respondent knew that it was given to influence a vote or other action in which Respondent was expected to participate in an official capacity; or

b) Respondent, with the exercise of reasonable care, should have known that it was given to influence a vote or other action in which Respondent was expected to participate in an official capacity.

The underlying facts and circumstances relating to this allegation are contained above in Allegation Three. See Analysis in Allegation Three.

Therefore, based on the evidence before the Commission, I recommend that the Commission find no probable cause to believe that Respondent violated Section 112.313(4), Florida Statutes.

ALLEGATION FIVE

Respondent is alleged to have violated Section 112.3148(8), Florida Statutes, by failing to report an honorary golf club membership valued over $100 as a gift.

APPLICABLE LAW

Section 112.3148(8), Florida Statutes, provides as follows:

> (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) or s. 112.313(4).
> 3. Gifts otherwise required to be disclosed by this section.

Section 112.312(12)(a), Florida Statutes, provides in its relevant part:

> "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 . . .

ANALYSIS

The underlying facts and circumstances relating to this allegation are contained above in Allegation Three. This honorary membership has a value over $100. During the time period in which Respondent received the membership, he was required to disclose it which he failed to do.

Therefore, based on the evidence before the Commission, I recommend that the Commission find probable cause to believe that Respondent violated Section 112.3148(8), Florida Statutes.

ALLEGATION SIX

Respondent is alleged to have violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statues, by failing to properly disclose an asset on his 2012 CE Form 6 "Full and Public Disclosure of Financial Interests."

APPLICABLE LAW

Article II, Section 8 of the Florida Constitution provides:

> (a) All elected constitutional officers and candidates for such offices and, as may be determined by law, other public officers, candidates, and employees shall file full and public disclosure of their financial interests.
>
> * * *
>
> (i) Schedule–On the effective date of this amendment and until changed by law:
>
> (1) Full and public disclosure of financial interests shall mean filing with the secretary of state by July 1 of each year a sworn statement showing net worth and identifying each asset and liability in excess of $1,000 and its value together with one of the following:
>
> a. A copy of the person's most recent federal income tax return; or
>
> b. A sworn statement which identifies each separate source and amount of income which exceeds $1,000. The forms for such source disclosure and the rules under which they are to be filed shall be prescribed by the independent commission established in subsection (f), and such rules shall include disclosure of secondary sources of income.
>
> (2) Persons holding statewide elective offices shall also file disclosure of their financial interests pursuant to subsection (i)(1).
>
> (3) The independent commission provided for in subsection (f) shall mean the Florida Commission on Ethics.

Section 112.3144(1), Florida Statutes, provides as follows

> (1) An officer who is required by s. 8, Art. II of the State Constitution to file a full and public disclosure of his or her financial interests for any

calendar or fiscal year shall file that disclosure with the Florida Commission on Ethics.

ANALYSIS

Complainant alleges Respondent failed to properly disclose assets on his 2012 CE Form 6 "Full and Public Disclosure of Financial Interests." (ROI 48, Complaint 57-58) In Part B – Assets, Respondent listed "Savings" as an asset without any other indentifying information. (ROI 48, Complaint 57) The instructions for the disclosure form reflect that the description of intangible property should include the name of the "business entity or person to which or to whom it relates." (ROI 49)

Respondent advised that the asset, "Savings," is an annuity that he has with the RiverSource Life Insurance Company. (ROI 51) He acknowledged that he did not read the instructions for completing the disclosure form. (ROI 51) He said, "I always looked at it [filing financial disclosure] as a pain in the ass." (ROI 51) He related that early in his political career he was advised to not put substantial information on the form because it did not have to be accurate unless someone filed an ethics complaint. (ROI 51)

There is sufficient evidence to show that Respondent did not properly disclose an asset on his 2012 disclosure form.

Therefore, based on the evidence before the Commission, I recommend that the Commission find probable cause to believe that Respondent violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes.

ALLEGATION SEVEN

Respondent is alleged to have violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes, by failing to properly disclose an asset, liability, and income on his 2013 CE Form 6 "Full and Public Disclosure of Financial Interests."

APPLICABLE LAW

Article II, Section 8, Florida Constitution and Section 112.3144, Florida Statutes, are quoted under Allegation One, above.

ANALYSIS

Complainant alleges Respondent failed to properly disclose an asset, a liability, and income on his 2013 CE Form 6 "Full and Public Disclosure of Financial Interests." (ROI 52, 57, 62, Complaint 55-56)

In Part B – Assets, Respondent listed "assort stocks annuities" as an asset without any other indentifying information. (ROI 52-53, Complaint 55) The instructions for the disclosure form reflect that the description of intangible property should include the name of the "business entity or person to which or to whom it relates." (ROI 53) See CEO 12-10. Respondent acknowledged that he did not properly disclose this asset on his form. (ROI 54) There were subsequent filings of his 2013 CE Form 6; however, Respondent still failed to properly disclose the asset. (ROI 55-56, Exhibit E)

In Part C – Liabilities, Respondent listed "medical" as a creditor without any other identifying information. (ROI 57-58, Complaint 55) The instructions for the disclosure form reflect that the filer should include the name and address of each creditor. (ROI 58) Respondent advised that he failed to list the name and address of the creditor because he failed to read the instructions. (ROI 59)

In Part D- Income, Respondent failed to list the complete address for the source of his income. (ROI 62-63, Complaint 56) He listed "Simington" as the address for the Monroe County Administration Building instead of the correct address, "1100 Simonton Street, Key West, Florida." (ROI 63, Complaint 56) Respondent advised that he failed to list the complete

address because he failed to read the instructions and did not devote the amount of time necessary to correctly complete this section of the disclosure form. (ROI 64) On one of the other three 2014 forms filed (June 19, 2014), Respondent listed the correct address. (ROI 65) According to Section 112.3144(8)(a), Florida Statutes, the Commission shall treat an amended full and public disclosure of financial interests which is filed before September 1 of the year in which the disclosure is due as the original filing, regardless of whether a complaint has been filed.

There is sufficient evidence to show that Respondent did not properly disclose an asset and liability on his 2013 disclosure form.

Therefore, based on the evidence before the Commission, I recommend that the Commission find probable cause to believe that Respondent violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes.

RECOMMENDATION

It is my recommendation that:

1. There is no probable cause to believe that Respondent violated Section 112.313(6), Florida Statutes, by using his position to influence the awarding of Monroe County's animal services contract to his friend.

2. There is no probable cause to believe that Respondent violated Section 112.3143(3), Florida Statutes, by voting on multiple matters which would inure to the special private gain of his friend's nonprofit.

3. There is no probable cause to believe that Respondent violated Section 112.313(2), Florida Statutes, by soliciting and/or accepting an honorary golf club membership based upon an understanding that his vote, official action, or judgment would be influenced.

4. There is no probable cause to believe that Respondent violated Section 112.313(4), Florida Statutes, by accepting an honorary golf club membership as unauthorized compensation.

5. There is probable cause to believe that Respondent violated Section 112.3148(8), Florida Statutes, by failing to report an honorary golf club membership valued over $100 as a gift.

6. There is probable cause to believe that Respondent violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes, by failing to properly disclose an asset on his 2012 CE Form 6 "Full and Public Disclosure of Financial Interests."

7. There is probable cause to believe that Respondent violated Article II, Section 8, Florida Constitution, and Section 112.3144, Florida Statutes, by failing to properly disclose an asset and liability on his 2013 CE Form 6 "Full and Public Disclosure of Financial Interests."

Respectfully submitted this 27th day of June, 2016

Melody Hadley

MELODY A. HADLEY
Advocate for the Florida Commission
on Ethics
Florida Bar No. 0636045
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 414-3300, Ext. 3704

CEO 12-10 – April 4, 2012

FINANCIAL DISCLOSURE

METHOD OF REPORTING ASSETS

To: Name withheld at person's request (Counsel for the Florida Prepaid College Board)

SUMMARY:

Investment products held in Individual Retirement Accounts, 401(k)s, the Florida Retirement Investment Plan, the Florida College Prepaid Plans, and Deferred Option Retirement Accounts should be reported as assets on a CE Form 6, Full and Public Disclosure of Financial Interests, if their value exceeds the reporting threshold. When funds are held in a bank, credit union, or other institutional account, the account should be identified as an asset.

QUESTION 1:

What is the proper method of reporting, on a CE Form 6, Full and Public Disclosure of Financial Interests, assets held in an Individual Retirement Account?

Your question is answered as follows.

You write on behalf of the Chairman of the Board of the Florida College Prepaid Plan, who is required to file CE Form 6, Full and Public Disclosure of Financial Interests, and who has questions pertaining to the proper means of reporting various assets. You present the scenario of an Individual Retirement Account (IRA), containing individual investment products as follows: General Electric (GE) stock valued at $15,000, Kroger Corporation stock valued at $800, and stock in the Vanguard Large Cap Index Fund valued at $9,200.

Article II, Section 8, Florida Constitution, requires that "all elected constitutional officers and candidates for such offices and, as may be determined by law, other public officers, candidates, and employees shall file full and public disclosure of their financial interests." It further states that "Full and public disclosure of financial interests shall mean filing with the custodian of state records by July 1 of each year a sworn statement showing net worth and identifying each asset and liability in excess of $1,000 . . . ."

Your question is whether investment and savings vehicles, such as an IRA or a 401(k), are the "assets" to be reported, as opposed to the investment products that comprise the investment or savings vehicles.

Borrowing from the definitions in Black's and Ballentine's Law Dictionaries, we have long defined an "asset" as anything which can be made available for the payment of debts. See CEO 78-1. Given such a definition, an "asset" would include tangible and intangible personal property. The question then becomes whether it is the IRA or 401(k), or the products contained therein, which are the official's intangible personal property.

In CEO 11-11, we spoke to the proper reporting, on the CE Form 1, Statement of Financial Interests, of "intangible personal property," as required by Section 112.3145, Florida Statutes. In that opinion, we pointed out that "IRA" and "401(k)" are simply names given to certain types of retirement

savings plans created pursuant to federal law[1], and found that it is not the IRA or 401(k), but the property held *within* these plans, which is the intangible personal property. Thus, we said that investment products within an IRA or a 401(k) should be reported on a CE Form 1 as intangible personal property, if their value exceeds the threshold chosen by the reporting individual.

Similarly here, we find that the assets in the scenario you present are the GE stock valued at $15,000, the Kroger Corporation stock valued at $800, and the Vanguard stock valued at $9,200. The value of the Kroger Corporation stock does not exceed the reporting threshold of $1,000 and therefore that asset need not be reported. The GE and Vanguard stocks are each more than $1,000, and each stock should therefore be reported separately as an "asset" in Part B of CE Form 6.

QUESTION 2:

What is the proper method of reporting, on a CE Form 6, Full and Public Disclosure of Financial Interests, money held in bank accounts or other institutions?

Your question is answered as follows.

You present a scenario of $75,000 in cash in a residential safe, three separate checking accounts at three separate banks with balances of $10,000, $20,000, and $5,000, and another $5,000 in an IRA. You write that "bank accounts, like the IRA, are not intangible personal property. Rather, the cash within the accounts is the intangible personal property" and suggest that instead of reporting each account separately, the asset should be described only as "cash," and the value of the accounts should be aggregated with the $75,000 in the safe and reported as $115,000.

We agree that the $75,000 should be reported as "cash," but find that an account at a bank or other institution is fundamentally different from cash in a residential safe. 5 Fla. Jur. 2d Banks, s. 192 states:

> A deposit creates a mere chose in action, or right to money; it is a debt owing by the depository, collectible by the owner. When used in connection with a banking transaction, the term "deposit" denotes a contractual relation created when one delivers money or a thing to a bank, which receives it upon the agreement that the deposit will be paid out on the order of the depositor or returned to him or her on demand. As a general rule of Florida law, when funds are deposited with a bank, the bank takes title to money and owes debt to its customer, which corresponds to amount of deposit. Under Florida law, relationship between bank and holder of deposit account is contractual in nature. A bank receives a deposit of funds on the implied condition that it will only disburse the funds on the order of the depositor or someone authorized to act for the depositor. [Footnotes omitted.]

Because a checking or savings account is a right to receive money, it is an asset, and should be reported as such on a CE Form 6 as, for example: "savings account" "name of institution."

With respect to the IRA, pursuant to 26 U.S.C. s. 408, "the term 'individual retirement account' means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries . . . ." In CEO 78-37, we found that where an official created savings accounts in his name but in trust for his children, the accounts were revocable trusts and were required to be reported

as assets. The courts have also referred to IRAs as "contracts." See, Luszcz v. Lavoie, 787 So. 2d 245, 248 (Fla. 2nd DCA 2001), holding that an IRA is a contract with an institution that involves a third-party beneficiary designation, and the rights of a spouse named a beneficiary arise from that contract. Under either characterization, the funds contained in the account are the asset of the account owner, but as with a bank savings account, are not the equivalent of cash in a home safe. Therefore, such accounts should be reported as, for example: "Cash in IRA" "name of institution."

QUESTION 3:

What is the proper method of reporting, on a CE Form 6, Full and Public Disclosure of Financial Interests, funds invested in defined benefit pension plans, defined contribution pension plans, Florida DROP benefits, and prepaid college savings plans?

Your question is answered as follows.

You have generally inquired about how to report funds invested in defined benefit pension plans, defined contribution pension plans, Florida DROP benefits, and prepaid college savings plans.

We are unable to answer your questions as to defined benefit and defined contribution pension plans with precision, because your materials do not indicate specifically the characteristics and features of the defined benefit or defined contribution pension plan at issue. However, in CEO 11-11 we advised that CE Form 1 filings regarding investments in the Florida Retirement System (FRS) Investment Plan—a defined contribution plan—should disclose all financial products held within the plan which had a value greater than the reporting threshold chosen. Our rationale there was that with the Investment Plan, the participant has a choice of various investment funds and allocates his or her contributions and account balance among them. We compared the Investment Plan to an IRA or 401 (k) because "the participant can choose and knows, at any given time, where his or her funds are invested and their value, and has the ability to manage those investments." While the potential for conflict arising from such known investments may be small, we reasoned, there is a public purpose to be served in requiring disclosure.

We also noted in CEO 11-11 that in contrast to the Investment Plan, the FRS Pension Plan is a defined benefit plan in which the participant has no voice in how the funds are invested and virtually no way to ascertain the present-day value of the investment. In addition to the practical inability of the reporting individual to calculate whether the value of the pension exceeds the reporting threshold chosen, we found that to the extent that the purpose of the Form 1 disclosure is to identify potential sources of conflict, that purpose is not served by requiring disclosure of the FRS pension. The vast majority of reporting individuals have no influence on pension investment decisions, we reasoned, and in the unlikely event they know what products Pension Plan funds are invested in, the sums invested are so large that an individual's interest in the invested-in company or product is diluted to the point that the potential for conflict is miniscule.

As to funds in Florida Prepaid College Plans, we found in CEO 11-11 that participants in the Prepaid College Plan, a plan in which the plan participant makes no investment choices and can transfer the Plan to another qualified family member or cancel the Plan and receive a refund (less a cancellation fee of up to $50 for participants who have had their Plan for less than two years) would report the Plan as intangible personal property if the balance exceeds the reporting threshold selected. Similarly, we believe the Florida Prepaid College Plan is an "asset," for purposes of Form 6 reporting, and should be reported as "Prepaid College Fund" "State of Florida" if its value exceeds $1,000.

We also found in CEO 11-11 that the Florida College Investment Plan is an investment vehicle in which participants may select one or any combination of five investment options. We found in that opinion, that as with an IRA, it is the investment product, not the Plan itself, that is intangible

personal property. Consistent with CEO 11-11, we find that the financial product or products which make up the Investment Plan are assets, and should be reported if their value exceeds $1,000.

Finally, as to money held in the Florida Deferred Retirement Option Program (DROP), in CEO 11-11 we found that the dollars accrued in such an account were intangible personal property of the reporting individual, and should be disclosed as "Deferred Retirement Option Account" "State of Florida" on the Form 1 if they exceed the reporting threshold. Similarly, we find here that such funds should be reported on the CE Form 6 if the value exceeds $1,000.

ORDERED by the State of Florida Commission on Ethics meeting in public session on March 30, 2012 and **RENDERED** this 4th day of April, 2012.

Robert J. Sniffen, *Chairman*

[1] Title 26 United States Code § 408 and Title 26 United States Code § 401(k), respectively.