



ETHICS ADVISORY OPINION

To: Commissioner Antonio Arserio

From: James A. Cherof, Interim City Attorney *SSG*
Jacob G. Horowitz, Assistant Interim City Attorney *JGH*

Date: December 12, 2018

Re: City of Margate (“City”) / Code of Ethics – Advisory Opinion

I. ISSUE AND FACTS PRESENTED

You have asked the City Attorney’s Office to provide you with an advisory opinion examining whether the Broward County Code of Ethics for Elected Officials (“Code of Ethics”) permits you to:

- A. Retain the frequent flyer miles and/or points earned from hotels when you travel on official business for the City of Margate; and
- B. List your preferred airlines and/or hotels with the City of Margate as your airlines and hotels of choice.

II. ANSWER

The Code of Ethics incorporates the definition of “gift” from Ch. 112, F.S. The Florida Commission on Ethics (“FCE”) is legally empowered to interpret this definition and determine whether frequent flyer miles and hotel points are “gifts” under state law and, correspondingly, under the Code of Ethics. Irrespective of whether frequent flyer miles and hotel points are considered gifts the Code of Ethics does not prohibit you from accepting them from the City. Consider the following:

- 1) If frequent flyer miles and hotel points are not considered “gifts” under state law, the Code of Ethics does not apply to the facts presented. In other words,

if they are not gifts, the Code of Ethics does not prohibit you from accepting miles and points from the City.

- 2) If frequent flyer miles and hotel points are considered “gifts” under state law, they would be gifts in your official capacity given to you by the City. The \$50.00 limitation on gifts that you may receive in your official capacity, set forth in the Code of Ethics, does not apply to a governmental entity giving a gift to its own elected official. Therefore you may accept the miles and points from the City even if they are legally considered gifts.

The Code of Ethics does not address whether you may list airlines or hotels with the City as preferred accommodations; however there are considerations under Ch.112, F.S., which must also be taken into account.

ANALYSIS

The Code of Ethics provides, in part, that all words or terms used in the code but not otherwise defined therein shall be defined by Part III of Chapter 112, Florida Statutes. For purposes of the Code of Ethics, “Gift” is defined in accordance with Section 112.312(12), F.S. This definition provides, in relevant part, as follows:

“Gift,” for purposes of ethics in government...means that which is accepted by a donee or another on the donee’s behalf...directly [or] indirectly...for which equal or greater consideration is not given within 90 days, including:

...

14. Any other similar service or thing having an attributable value not ready provided for in this section.

Florida law does not articulate whether frequent flyer miles or hotel points have an “attributable value.” The valuation of frequent flyer miles has been considered by courts in the context of divorce proceedings. In *Beasley v. Beasley*, the Fourth District Court of Appeal rejected the trial court’s decision to assign a \$.10/mile value to approximately 500,000 frequent flyer miles. *Beasley v. Beasley*, 717 So.2d 208 (Fla. 4th DCA 1988). The DCA noted that there was no evidence to support either a \$.01 or \$.10 valuation for the miles, and that the trial court erred in assigning a value to the miles absent evidence to support that valuation. *Id.* Our further research has indicated that different airlines value miles differently and that the value may vary depending on the class of travel (i.e. economy, business, first, etc...).¹

Our examination of this issue has also concluded that different hotels value their rewards points differently, and that the value is often calculated in manner similar to frequent flyer miles. It is unclear under Florida law whether frequent flyer miles and hotel points have an “attributable value” and are, therefore, “gifts” for purposes of Section 112.312(12), F.S. This is an issue that the FCE is authorized and empowered to interpret. The City Attorney’s Office cannot answer this question as it requires an interpretation of state law.

¹ Though unconfirmed, Wikipedia suggests that airlines place a value on such points in their financial statements at less than one one-thousandth of a cent per point.

Irrespective of whether frequent flyer miles and hotel points are considered “gifts” under state law and the Code of Ethics, the Code of Ethics does not prohibit you from accepting such miles and points when you travel on official business for the City.

A. If frequent flyer miles and hotel points are not “gifts”

If frequent flyer miles and hotel points are not determined to be “gifts” under state law and the Code of Ethics, then the Code of Ethics does not apply to the facts presented.

Please be advised that while the Code of Ethics may not legally apply to the facts presented, there may be other considerations under state law regarding the issues set forth herein. While the City Attorney’s Office cannot offer a legally binding opinion on Ch. 112, F.S., we have had a preliminary conversation with the general counsel for the Florida Commission on Ethics to discuss several of these issues. The general counsel was focused less on the “gift” issue and directed us to an analysis of Section 112.313(6), F.S., pertaining the potential misuse of public office based on the facts presented.

The general counsel specifically referred our office to *Blackburn v. Commission on Ethics*, a Florida appellate decision which offers a detailed analysis of Section 112.313(6), F.S., related to misuse of public office. Note that Section 112.313(6), F.S., requires corrupt intent in order for a public official to have been found to have misused their public position. In *Blackburn*, the DCA recognized that the fact that a public official received an “incidental benefit” from their official position did not equate to “corrupt” intent for purposes of the “misuse” statute. *Blackburn v. Commission on Ethics*, 589 So.2d 431, 435 (Fla. 1st DCA 1991). The general counsel suggested that receiving frequent flyer miles and/or hotel points as part of travel for official business would equate to an “incidental benefit” and would likely not rise to the “corrupt” standard required to establish that a public official has misused their public position.

The general counsel also noted, however, it may be legally problematic for a public official to request travel accommodations with specific airline carriers and hotels for the specific purpose of accruing miles and points if the costs of such travel is higher than comparable rates with other providers. In other words, the City cannot legally pay for a public official to fly on a preferred airline for the purposes of accruing miles on that airline when other air carriers are cheaper. Similarly, the city cannot legally pay for a public official to stay at a particular hotel for the purpose of accruing awards points at that hotel when there are cheaper options available. In order for a city to accommodate a public official’s request for a particular airline or hotel, that airline or hotel must be comparably priced or cheaper than other available travel options.

B. If frequent flyer miles and hotel points are “gifts”

The Code of Ethics allows elected officials to accept gifts from “other sources” (i.e. not lobbyists, vendors and contractors) given to them in their official capacity up to a maximum of \$50.00 per occurrence. The Code of Ethics also provides that a governmental entity giving a gift to its own elected official shall not be considered an “other source” for purposes of the \$50.00 limitation.

Therefore, if the frequent flyer miles and hotel points are legally considered “gifts,” there is no limitation on the value of the miles and points that you may accept from the City. In other words, if they are “gifts” under state law, the miles and points would be considered gifts in your official capacity that you are legally able to accept from the City.

III. CONCLUSION

Based on the foregoing, it is the opinion of the City Attorney’s Office that the Code of Ethics **does not legally prohibit** you from accepting frequent flyer miles and hotel points when you engage in official travel for the City. As detailed herein, subject to the interpretation of “gift” under state law, either the code does not apply or the miles and points are a legally permissible gift.

Please be advised that this opinion is limited to the Broward County Code of Ethics for Elected Officials. These facts present other issues under Ch. 112, F.S. that must also be considered.

This advisory opinion is issued pursuant to Section 1-19(c)(8) of the Code of Ethics, and may be relied upon by the individual who made the request. This analysis is limited solely to the facts presented. Within fifteen (15) days of receiving this opinion, a copy must be sent in a searchable “pdf” format to ethicsadvisoryopinions@broward.org for inclusion in the searchable database of advisory opinions maintained by the County.

Please contact our office if there is any additional information that we can provide.