FLORIDA
COMMISSION ON ETHICS
SEP 15 2022
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BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

CONFIDENTIAL

In re: John Capps,

Respondent. **Complaint No. 22-024**

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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, John Capps, served as an Orange County Firefighter. Complainant is David Hepker of Winter Park, 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 Section 112.313(6), 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 August 9, 2022.

ALLEGATION

Respondent is alleged to have violated Section 112.313(6), Florida Statutes, by using or attempting to use his position and/or public property or public resources to secure a special privilege, benefit, or exemption for himself.

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

In May 2004, Respondent began serving as an Orange County Firefighter with the Orange County Rescue Department (Department). (ROI 4) In December 2020, Respondent was suspended for 16 hours without pay due to concerns related to time and attendance issues covering four days in November 2020. (ROI 7)

In January 2021, the Department began another investigation into Respondent related to alleged timecard fraud which was initiated by concerns with Respondent's failure to adhere to the Department's timecard procedure in December 2020. (ROI 4, 9) The investigation culminated in Respondent's termination in March 2021. (ROI 4)

As a non-exempt employee, Respondent was required to use the biometric Kronos device to clock in and clock out during the beginning and end of his work shift, as well as during lunch periods. (ROI 6) It is not unusual for an employee to forget to use the Kronos device when arriving to work. (ROI 11) When that occurs, the employee's supervisor is required to manually enter the employee's arrival time on the employee's timecard. (ROI 11)

On December 17, 2020, Respondent's scheduled arrival time was 10:30 a.m. (ROI 11) Respondent did not use the Kronos device when he arrived and reported an arrival time of 12:00 p.m. to his supervisor, Lt. Pamela Byrne, which was 1.5 hours late. (ROI 11) Based on Respondent's representation, Lt. Byrne inputted 12:00 p.m. as Respondent's arrival time. (ROI

11) However, a review of the Department's cameras reveal that Respondent did not arrive at the Department's rear doors until 1:06 p.m. and did not take his work assignment position until 1:08 p.m. (ROI 11)

On December 18, 2020, Respondent's scheduled arrival time was 10:30 a.m. (ROI 8) Respondent did not use the Kronos device when he arrived and reported an arrival time of 10:30 a.m. to Battalion Chief Nichol Stratman, Supervisor of the Department's Central Staffing Unit. (ROI 5, 13) Based on Respondent's representation, Chief Stratman inputted 10:30 a.m. as Respondent's arrival time. (ROI 13) However, a review of the Department's cameras reveal that Respondent did not arrive at the Department's rear doors until 11:08 a.m. and did not take his work assignment position until 11:41 a.m. (ROI 14)

On December 21, 2020, Respondent's scheduled arrival time was 10:30 a.m. (ROI 8) Respondent did not use the Kronos device when he arrived and reported an arrival time of 10:30 a.m. to Chief Stratman. (ROI 5, 13) Based on Respondent's representation, Chief Stratman inputted 10:30 a.m. as Respondent's arrival time. (ROI 13) However, a review of the Department's cameras reveal that Respondent did not arrive at the Department's rear doors until 10:47 a.m. and did not take his work assignment position until 11:16 a.m. (ROI 11)

On December 23, 2020, Respondent accessed his timecard which included the time inputted by Lt. Byrnes and Chief Stratman on December 17, 18, and 21, respectively. (ROI 16) Respondent approved that timecard attesting to those misreported times as being accurate. (ROI 16)

The Department's investigation determined that Respondent violated numerous Department Rules and Procedures including Reporting to Duty; Truthfulness; Unbecoming Conduct; Falsifying Reports; Kronos Procedures; and an article of the Orange County Firefighters

Association Local 2057 entitled, "Work Day and Work Week for 40 Hour Employees." (ROI 18) Furthermore, Complainant, Fire Chief David Hepker, contends that Respondent intentionally did not clock in to start his shift on the dates in question because he had previously been disciplined for time and attendance issues and knew the late arrivals would lead to further discipline. (ROI 17)

Attempts to contact Respondent by telephone and letter for an interview for the Commission on Ethics' investigation were unsuccessful. (ROI 19) Respondent has not provided restitution of the overpayment of $197.21 received due to his deceit regarding his timecard. (ROI 5, 19)

Respondent is a public employee who misused his position by acting in a manner inconsistent with the proper performance of his public duties to receive a special privilege, benefit, or exemption. Respondent received the benefit of salary that he did not earn and/or attempted to avoid further disciplinary action to secure the benefit of continued employment.

Therefore, based on the evidence before the Commission, I recommend that the Commission find probable cause to believe that Respondent violated Section 112.313(6), Florida Statutes.

RECOMMENDATION

It is my recommendation that:

There is probable cause to believe that Respondent violated Section 112.313(6), Florida Statutes, by using or attempting to use his position and/or public property or public resources to secure a special privilege, benefit, or exemption for himself.

Respectfully submitted this 14th day of September, 2022.

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