FLORIDA
COMMISSION ON ETHICS
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**BEFORE THE**
**STATE OF FLORIDA**
**COMMISSION ON ETHICS**

**In re: Brian Mulligan,**

**Respondent.** **Complaint Nos.: 21-101**

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## ADVOCATE'S RECOMMENDATION

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

## RESPONDENT/COMPLAINANT

Respondent, Brian Mulligan, served as a Battalion Chief for the Palm Beach County Fire Rescue. The Complainant is John A. Carey of West Palm Beach, Florida.

## JURISDICTION

The Executive Director of the Commission on Ethics determined that the Complaint was legally sufficient and on June 21, 2021 ordered a preliminary investigation for a probable cause determination as to whether Respondent violated Article II, Section 8(g)(2), Florida Constitution, and Sections 112.313(6) and 112.313(7)(a) 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 April 18, 2022.

## ALLEGATION ONE

Respondent is alleged to have violated Article II, Section 8(g)(2), Florida Constitution,[1] by abusing his public position to obtain a disproportionate benefit for himself.

## APPLICABLE LAW

Article II, Section 8, provides as follows:

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> **Ethics in government.**—A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:
>
> (g)(1) A code of ethics for all state employees and nonjudicial officers prohibiting conflict between public duty and private interests shall be prescribed by law.
>
> (2) A public officer or public employee shall not abuse his or her public position in order to obtain a disproportionate benefit for himself or herself; his or her spouse, children, or employer; or for any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest.

## ANALYSIS

Respondent was a Battalion Chief for the Palm Beach County Fire Rescue at all times relevant. (ROI 1) He retired from the Palm Beach County Fire Rescue as the Battalion Chief for Battalion 10 in May 2021. (ROI 4)

To be promoted to Captain within Fire Rescue, candidates must take a written and oral exam. (ROI 17) Use of a scoring system determines who will be placed on the Captain's promotional list. (ROI 17) The interview board consists of upper management officers who score the exams. (ROI 17) Respondent had no influence concerning who was selected for the Captain's promotional list;

[1] Article II, Section 8(g)(2) will be redesignated as Article II, Section 8(h)(2) on December 31, 2022.

however, because of his rank of Battalion Chief, he was eligible to participate in the Captain's Examination process. (ROI 17)

In addition to his public employment, Respondent previously worked with an independent company conducting mentoring/training classes to prepare candidates for the exams. (ROI 16) At that time, Respondent teamed up with another supervisor, who provided Respondent with the training material to teach the classes. (ROI 16) The training material was sent to Respondent through the County's email system. (ROI 16) Respondent replied to the supervisor who sent the email writing, "Please don't send to my work email." (ROI 16, Exhibit B)

During all times relevant, Respondent was self-employed when he taught the classes. (ROI 16)

In July 2020, the Inspector General for the Palm Beach County Inspector General's Office (OIG) received a complaint alleging Respondent offered mentoring and training classes for a Captain's promotional exam to Fire Rescue employees he directly supervised. (ROI 5) If the employee passed the promotional exam, he/she was to pay Respondent a fee of $7,500. (ROI 5, 7) If the candidate did not receive a promotion, he/she paid nothing. (ROI 7, 8, 9)

In particular, Respondent trained and/or mentored four employees[2] – three took and passed the Captain's test and two were promoted to the rank of Captain. (ROI 6) One was promoted in June 2019 and the other in November 2019. (ROI 6)

1. George Suarez, Palm Beach County Fire Rescue Lieutenant, was approached by Respondent, who was the Lieutenant's direct supervisor, about the mentoring or training classes. (ROI 7, 11) Respondent advised Lt. Suarez of the terms of the agreement regarding the classes.

[2] The four employees are Suarez, Knowles, Boyd, and Ascheman and none of them could recall any of the dates the mentoring/training classes were held. (ROI 11)

(ROI 7) As stated previously, upon a successful promotion to Captain, Lt. Suarez would pay Respondent $7,500. (ROI 7) Lt. Suarez took the Captain's Promotional Exam but did not pass, thus, he did not owe Respondent any money. (ROI 7)

2. Chad Knowles, Palm Beach County Fire Rescue Driver Operator, was discussing the upcoming Captain's Exam with other Fire Rescue employees, including Zachary Boyd, when Respondent approached them and asked if they would be interested in attending his mentoring/training classes. (ROI 8, 9) Knowles and two other Fire Rescue employees took Respondent's classes under the same terms discussed above. (ROI 8) Knowles and Respondent had a "gentleman's handshake" agreement with nothing in writing and no money was exchanged in advance. (ROI 8) Knowles took the Captain's promotional exam and passed but had not been promoted during the course of the Commission's investigation, so he had not paid Respondent for the classes. (ROI 8)

3. Zachary Boyd, Palm Beach County Fire Rescue Captain, took Respondent's classes prior to the promotional exam and was promoted to the rank of Captain on November 9, 2019. (ROI 9) Captain Boyd paid Respondent three cash payments of $2,500 each within a three-month period after he was promoted. (ROI 9) Respondent was Captain Boyd's direct supervisor. (ROI 11)

4. Timothy Ascheman is a Palm Beach County Fire Rescue Captain and operates a pool service, repair, and renovation business on his days off. (ROI 10) He did not work with Respondent in Battalion 10 at the time he took the exam. (ROI 10) Around this exam time, Respondent was repairing and/or building a pool at his home in Palm City. (ROI 10) Respondent said to Captain Ascheman, "I understand you know a lot about pools." (ROI 10) Captain Ascheman told Respondent he could not help him with his pool because he was studying for the Captain's

promotional exam and could not commit to a pool job during this time. (ROI 10) Respondent informed him about his mentoring/training classes and advised Captain Ascheman of the terms of the agreement. (ROI 10) Captain Ascheman took Respondent's classes and placed first on the 2019 Captain's promotional exam which put him at the top of the Captain's promotional list. (ROI 10)

Throughout the construction or renovation of Respondent's pool, Captain Ascheman and Respondent developed a friendship. (ROI 10) Captain Ascheman stated that as a "friend" he did not charge Respondent the full amount for the pool work. (ROI 10) After Captain Ascheman was promoted, he gave Respondent a single cash payment of $2,000 and the remainder of what he owed was bartered for his work on the pool renovation. (ROI 10) Captain Ascheman estimated the cost of the pool renovation was approximately $3,000. (ROI 10) Respondent agreed the $2,000 would suffice as the total payment for the mentoring/training classes. (ROI 10)

Respondent acknowledged receiving monetary compensation for the mentoring/training classes that included Lt. Suarez, Fire Rescue Driver Knowles, Captain Boyd, and Captain Ascheman. (ROI 16)

It is alleged that Respondent received a "disproportionate benefit" by his actions. This refers to a voter-approved prohibition on public officials and employees using their offices to benefit themselves, their families, or employers. This prohibition found in the Florida Constitution became effective on December 31, 2020, thus any events occurring before that date are inapplicable to a violation of the amendment. According to the OIG's Investigative Report (2020-0006), the complaint was filed with that office on July 2020 and the above referenced Fire Rescue employees took Respondent's classes for the 2019 Captain's promotional exam. There is no indication that Respondent taught classes or accepted money for those classes after 2019.

Therefore, based on the evidence before the Commission, I recommend that the Commission find no probable cause to believe that Respondent violated Article II, Section 8(g)(2), Florida Constitution.

## ALLEGATION TWO

Respondent is alleged to have violated Section 112.313(6), Florida Statutes, by conducting mentoring and training classes for a Captain's promotional exam to Fire Rescue employees with the use of Fire Rescue property and/or resources in exchange for something of value.

## 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 addition to the facts above in Allegation One, there are several agency policies to which Respondent failed to adhere. Those policies are as follows.

"County Rule 10.01 - Outside or Non-County Employment," General Provisions B., states:

> Employees who intend to undertake such employment must submit written notification to their Department Head of their intent to accept outside work. This notification must contain 1) Name and Address of Outside Employer, 2) When outside work is to begin, 3) Type of Work, 4) Number of days (or nights) per week, 5) Number of hours per day (or night), 6) Specific hours of work. The Department Head shall review the notification to ensure that no conflict exists.

(ROI 13, Exhibit A)

"County Rule 10.02 - Outside or Non- County Employment," Restrictions A., states:

> Employees permitted to work in secondary employment outside the County cannot conduct such employment on County time, on standby, or in any manner that interferes with performance of their County job. They cannot use County facilities, equipment or supplies, or wear a County uniform while employed outside the County.

(ROI 14, Exhibit A)

Respondent acknowledged he was aware of "County Rule 10 - Outside or Non-County Employment," but was unsure if he had completed the required paperwork to be allowed to have secondary employment. (ROI 15) Respondent thought he had completed the form at some point in the past; however, the OIG investigation did not find any evidence that Respondent had completed the required form. (ROI 15) The OIG Investigative Report reflects Respondent

received annual training in regard to "County Rule 10 - Outside or Non-County Employment." (ROI 15)

In reference to County Rules 10.01 and 10.02, County employees who have secondary employment are required to complete a Palm Beach County Commission on Ethics (PBCCOE) Employee Conflict of Interest Waiver. (ROI 12) The purpose of the form is for the PBCCOE to advise the employee if his or her secondary employment is considered to be a conflict of interest under the County's ethics rules. (ROI 12)

Lt. Suarez, Fire Rescue Driver Knowles, Captain Boyd, and Captain Ascheman, state that Respondent appears to have taken annual leave to perform the mentoring and training classes; however, the classes were held while they were on duty with the County. (ROI 18) Respondent used Station 39, without authorization, while the employees were on duty to conduct training lessons. (ROI 20) It is estimated that classes were held more than four times, but less than fifteen times at Station 39, with each class lasting three to five hours. (ROI 20)

Respondent was a public employee, thus, the first element for a violation is proven. Respondent used his official position, and agency property and/or resources for which he was entrusted for a private benefit. The use of public resources for a private purpose not authorized by law amounts to the use of one's official position to secure an unwarranted privilege. The privilege was unwarranted because agency resources are to be used solely for official agency purposes. Some of the resources and property include, but are not limited to agency contacts, agency materials, agency office space, and agency time.[3] The privilege was not available to other Fire Rescue personnel – it was special to Respondent and benefited him financially. Thus, element two is proven.

[3] Respondent tutored his students on agency time which may have interfered with their agency duties.

Respondent's actions were inconsistent with the proper performance of his duties. He was aware of the policy for outside employment, yet his actions were not in compliance with agency rules. Respondent should have protected the agency's assets and ensured their efficient use. Instead, he took advantage for his financial benefit.

In conclusion, Respondent misused his public position by initiating private business relationships with his current colleagues and then getting paid for it; privately tutoring persons under his authority whose job performance he oversees; and conducting tutoring during on-duty hours in agency facilities, without permission – all for his private financial benefit.

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.

## ALLEGATION THREE

Respondent is alleged to have violated Section 112.313(7), Florida Statutes, by privately tutoring or mentoring Fire Rescue employees for money or services.

## APPLICABLE LAW

Section 112.313(7), Florida Statutes, provides as follows:

> RELATIONSHIP. (a) No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

In order to establish a violation of Section 112.313(7), Florida Statutes, the following elements must be proved:

1. Respondent must have been a public officer or employee.

2. Respondent must have been employed by or have had a contractual relationship with a business entity or an agency.

3. Such business entity or state or agency must have been subject to the regulation of, or doing business with, the agency of which the Respondent was an officer or employee.

OR

1. Respondent must have been a public officer or employee.

2. Respondent must have held employment or a contractual relationship that will:

a) create a continuing or frequently recurring conflict between the Respondent's private interests and the performance of the Respondent's public duties;

or

b) impede the full and faithful discharge of the Respondent's public duties.

**ANALYSIS**

The facts are set forth above under Allegations One and Two. Respondent holds employment with his agency, Fire Rescue. Respondent tutors or mentors Fire Rescue employees for money or something of value via secondary employment. The Commission on Ethics has found that a self-employed person can be a "business entity" based on the definition of that term found in Section 112.312(5), Florida Statutes.[4] CEO 10-15. As such, the first part of Section 112.313(7)(a) prohibits Respondent from having any employment or contractual relationship with a business entity (e.g., his tutoring business) doing business with (selling services to) his agency

[4] "'Business entity' means any corporation, partnership, limited partnership, company, limited liability company, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state."

(Fire Rescue). However, that is not what Respondent did. He sold services to individuals within the agency.

The second part of Section 112.313(7)(a) prohibits Respondent from recruiting persons under his authority in his own agency. He could be tempted to act less than impartially and objectively toward the Fire District employees depending on whether or not they participated in his tutoring classes. This is especially true if Respondent has to take enforcement action against a subordinate.

This provision is preventative in nature. Respondent's public employment is not compatible with his secondary employment. The two are not separate and distinct and they coincide to create a situation which "tempts dishonor." *Zerweck v. Commission on Ethics*, 409 So.2d 57 (Fla. 4th DCA 1982).

Therefore, based on the evidence before the Commission, I recommend that the Commission find probable cause to believe that Respondent violated Section 112.313(7)(a), Florida Statutes.

**RECOMMENDATION**

It is my recommendation that:

1. There is no probable cause to believe that Respondent violated Article II, Section 8(g)(2), Florida Constitution, by abusing his public position to obtain a disproportionate benefit for himself.

2. There is probable cause to believe that Respondent violated Section 112.313(6), Florida Statutes, by conducting mentoring and training classes for a Captain's promotional exam to Fire Rescue employees with the use of Fire Rescue property and/or resources in exchange for something of value.

3. There is probable cause to believe that Respondent violated Section 112.313(7), Florida Statutes, by privately tutoring or mentoring Fire Rescue employees for money or services.

Respectfully submitted this 2nd day of May, 2022.

ELIZABETH A. MILLER
Advocate for the Florida Commission
on Ethics
Florida Bar No. 578411
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 414-3300, Ext. 3702

CEO 10-15 – June 9, 2010

# CONFLICT OF INTEREST

## TEACHER OFFERING SUMMER ART CAMP TO STUDENTS IN HER CLASSES

*To: Milagros Mendola, Teacher, Crystal Lake Elementary School (Stuart)*

**SUMMARY:**

A prohibited conflict of interest would be created under Section 112.313(7), Florida Statutes, were a teacher to offer a summer art camp, for a fee, to students in her school classes.

**QUESTION:**

Would a prohibited conflict of interest exist were a teacher to offer a summer art camp, for pay and on school grounds, to students assigned to her classes?

Your question is answered in the affirmative .

In the correspondence you have provided, you advise that you are the sole art teacher at an elementary school in Martin County. You state that last year you requested from the District, and received, approval to conduct a summer art camp on school grounds, for which you charge a fee. This year, the District has cautioned you that the Code of Ethics for Public Officers and Employees may be violated if students assigned to your own classes participate in the camp, prompting you to make this inquiry. You relate that you operate as a sole proprietorship and will rent space from the District to conduct the camp, which you refer to as "enrichment and not academic tutoring." You state you will charge a fee, and although the camp is open to children who do not attend your school, you expect the majority of camp attendees to come from your school. At this time, you relate, about 20 children are signed up for the program. You further inquire whether, if we find that having your own students participate in the camp would create a prohibited conflict, the conflict could be negated by your "pairing up" with a teacher from another school, who would teach your students while you teach hers. .

Section 112.313(7), Florida Statutes, provides:

> **CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.—** No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting

> in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

The first part of Section 112.313(7) prohibits you from having a contractual relationship with any business entity which is subject to the regulation of, or is doing business with, your agency.

Your situation is comparable to one we examined in CEO 04-17, where we dealt with questions regarding teachers performing engaging in private tutoring[1]. There we found, as we have in other opinions, that a teacher's agency is the school at which he or she is employed, and that even a self-employed person can be a "business entity," given the definition of that term found in Section 112.312(5), Florida Statutes[2]. Similarly, we find here that your agency is the school at which you teach, and that by operating as a sole proprietorship, you have a contractual relationship with a "business entity." However, as was the case in CEO 04-17, while the lease agreement you have with the District constitutes "doing business," your business entity will not be doing business with your agency (the school) but rather will be doing business with the school district. Accordingly, the first part of Section 112.313(7)(a) would not operate to prohibit the proposed summer camp.

The second part of Section 112.313(7)(a) prohibits you from having *any* contractual relationship which would create a continuing or frequently recurring conflict between your private interests and the performance of your public duties, or that would impede the full and faithful discharge of your public duties. This provision establishes an objective standard which requires an examination of the nature and extent of your duties together with a review of your private employment to determine whether the two are compatible, separate and distinct, or whether they coincide to create a situation which "tempts dishonor." Zerweck v. Commission on Ethics, 409 So.2d 57 (Fla. 4th DCA 1982).

In Question 3 of CEO 04-17, we said that a prohibited conflict of interest would be created should a teacher of music, dance, art, or drama also give private lessons, for a fee, to his or her own students, even where such lessons were not remedial in nature.

The requestor of that opinion suggested that permitting teachers of the arts to provide non-remedial "supplemental" tutoring to their own students presented less of a potential for conflict than would exist with respect to other disciplines, because the arts are not tested on statewide achievement tests; thus the motivation for a teacher to teach less effectively at school and thereby create a need for tutoring would be reduced. It was also suggested that because each artist/teacher generally has a particular method, style, artistic emphasis, or talent, teachers in these areas are unique, and if a parent sought extra art or music lessons for his or her child "in order to achieve greater artistic development," the parent may *want* the child to receive that extra instruction "from the specific teacher that already has an artistic relationship

with the child and has the particular emphasis, style, or talent involved in the lessons that the student already receives at school."

We rejected these arguments, finding that the fact that the lessons were not remedial in nature did not negate the conflict which would arise under the second part of the statute. We said that while a restriction on remedial instruction,

> may indeed reduce any motivation for a teacher to teach less effectively at school, the teacher's responsibility to be objective in the in-school treatment of his or her students may be compromised when some of the students are also privately taking lessons from that teacher. A teacher who has a private contractual relationship with the parents of some of his or her students may be tempted to demonstrate favoritism to those students in grading, assignment of roles in school performances and events, and other in-class treatment.

We continued,

> where a teacher gives private lessons to some of his or her own students, there is the potential for the teacher's responsibility to treat the child impartially to be impeded by the desire to maintain a harmonious relationship with the child and parents as a private tutor. By this we do not mean to suggest that the teacher would actually succumb to such temptation and thereby compromise his public duties in favor of his private interests. The statute is entirely preventative in nature.

We cannot discern any substantive difference between the facts you have provided and those of CEO 04-17. That your program is labeled an "enrichment," rather than "non-remedial, supplemental tutoring," and that it is conducted during the summer rather than after school are distinctions that do not address the underlying concern: that where a teacher is privately contracting with the parents of his or her students during the course of the school year, there is the potential for the teacher's responsibility to treat the child impartially to be impeded by the desire to maintain a harmonious and profitable relationship with the child and parents in his or her private endeavor. Nor is this concern obviated by having another teacher instruct your students while you teach hers, because doing so does not remove the potential for disparate treatment of students depending on whether they did or did not sign up for the camp.

Our finding here is consistent with our determinations in analogous circumstances. In CEO 82-39 we found a prohibited conflict of interest would be created were an auditor employed by the Department of Education ("DOE") to teach a course for a school district whose programs she audited. In CEO 94-4 we said that complaint investigators for the Office of Professional Practices Services within the DOE would be prohibited from providing training for local school districts, as the investigators' duty to conduct their investigations with impartiality could be compromised by their concern for satisfying or pleasing their private employers—the school districts employing them to provide training. And in CEO 98-1 we found that a prohibited conflict of interest would be created were a Fire Prevention Specialist

employed by the State Fire Marshal's Bureau of Fire Prevention to provide training and seminars for the architects, engineers, and contractors whose work he inspected in his public capacity, as he would be in a position to review and critique the work of the same architects, engineers, electrical contractors, and businesses for which he proposed to conduct his training and seminars.

Accordingly, we find that while you would not be prohibited from operating, for a fee, a summer art camp, a prohibited conflict of interest under Section 112.313(7), Florida Statutes, would be created were you to contract with parents of students who are in your classes to have their children participate in your summer art camp.

**ORDERED** by the State of Florida Commission on Ethics meeting in public session on June 4, 2010 and **RENDERED** this 9th day of June, 2010.

Roy Rogers
*Chairman*

[1] In fact, your circumstances are quite similar to those raised in Question 4 of that opinion, which we did not answer, because in that instance the question appeared to be wholly hypothetical.

[2] Defining "business entity" as, "any corporation, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, *self-employed individual*, or trust, whether fictitiously named or not, doing business in this state." [E.S.]