

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: DERRYL O'NEAL,

Case No. 18-1879EC

Respondent.
_____ /

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings ("DOAH"), on August 10, 2018, by video teleconference at sites located in St. Petersburg and Tallahassee, Florida.

APPEARANCES

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

For Respondent: Andrew J. Salzman, Esquire
Unice Salzman Jensen, P.A.
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STATEMENT OF THE ISSUE

The nature of the controversy is set forth in the Order Finding Probable Cause issued by the Commission on Ethics (the "Commission") on March 9, 2018, which specifically alleged that Respondent, as fire chief, acting city manager, and/or city manager for the City of Madeira Beach (the "City" or

"Madeira Beach"), violated section 112.313(6), Florida Statutes, by keeping or storing his Jet Ski on a City-owned Jet Ski lift.

PRELIMINARY STATEMENT

On March 9, 2018, the Commission issued an Order Finding Probable Cause to believe that Respondent violated a provision of the Code of Ethics for Public Officers and Employees. Pursuant to section 112.313(6), the Commission, on its own motion, ordered a public hearing and referred the complaint to DOAH on April 11, 2018.

The case was assigned to the undersigned, who entered a Notice of Hearing scheduling the hearing on June 22, 2018. However, Respondent filed an unopposed Motion to Continue Hearing on June 7, 2018, which was granted the same day. On June 11, 2018, an Order Rescheduling Hearing by Video Teleconference was issued setting the hearing for August 10, 2018, and the hearing was held as scheduled.

At the hearing, the Commission's Advocate presented the testimony of Robert Preston, the complainant; Shane Crawford, the former city manager of Madeira Beach; and Respondent. The Advocate offered Exhibits 1 through 13, which were accepted into evidence. Respondent testified on his own behalf, and presented the testimony of Lt. Todd Ermscher and Steve Suranyi. Respondent offered Exhibits 1 and 2, which were admitted into evidence.

A one-volume Transcript of the proceedings was filed on August 27, 2018. The parties filed their Proposed Recommended Orders on September 6 (the Advocate) and September 7 (Respondent), 2018, respectively, which have been duly considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2018), unless otherwise noted.

FINDINGS OF FACT

1. At all times material to this action, Respondent served as fire chief, acting city manager, or city manager for Madeira Beach.

2. Respondent has been either a public officer or public employee in the City continuously since 2011. He previously worked for the City since 2001, except for a two-year period when he worked for the City of Mineola, Florida.

3. Respondent was subject to the requirements of chapter 112, part III, which is referred to as the Code of Ethics for Public Officers and Employees, for any acts or omissions during his tenure as a public officer and public employee.

4. Respondent's homestead is a condominium in close proximity to City Hall in Madeira Beach, and only 758 feet from the City-owned Jet Ski lifts.

5. Respondent has a personal vehicle, a Jeep, and has exclusive use of a City-owned vehicle.

6. Respondent bought a 20-foot long Yamaha VXR Jet Ski in 2011. Prior to moving the Jet Ski to Madeira Beach, he kept it in Minneola, where he worked as fire chief, on a lift provided by the City of Minneola.

7. Shane Crawford was hired in January 2012 to serve as the Madeira Beach City Manager. He held this position until his termination in June 2017.

8. Mr. Crawford supervised Respondent when he was fire chief, as well as all the City departments, to ensure the laws and provisions of the City Charter were carried out and enforced.

9. Respondent developed a Jet Ski program for water resources in Minneola and stored his Jet Ski on city property.

10. After returning to Madeira Beach from Minneola, Respondent sought to institute "a watercraft rescue-type program."

11. Respondent requested that the City purchase two Jet Skis, similar to his personal Jet Ski, to be used in the new water rescue program.

12. Mr. Crawford testified that the City was interested in purchasing two, not three, Jet Skis for the program. Had they needed three, he said, they had sufficient funds to purchase a third.

13. The City requested and received an exemption from the Florida Fish and Wildlife Conservation Commission to allow Jet

Skis to be docked on lifts in the water behind City Hall since state rules prohibited craft with propellers or propulsion systems from being docked in the manatee-frequented waters.

14. Shortly after completion of the two Jet Ski lifts, Respondent moved his personal Jet Ski onto one of the two City-owned Jet Ski lifts where it remained for two years, until December 2017.

15. In addition to Respondent's Jet Ski, one of the City-owned Jet Skis was kept on the lifts behind City Hall. The other was kept on a boat trailer at the Fire Department. Respondent testified that the two City-owned Jet Skis were rotated so that one was always in an area protected from the water and outdoor elements in order to increase the longevity of the watercraft.

16. The two Jet Skis were on a five-year replacement plan, depending on their usage and condition.

17. The City-owned Jet Ski lifts are public property. Respondent was aware of Ordinance 2016-04, Chapter 78, Section 78-40, which restricts private use of public property.

18. Ordinance 2016-04 was adopted by the Madeira Beach Commission on April 12, 2016, and reads, in part: "No person shall secure, tie, dock, or anchor any boat or vessel of any kind to any public property . . . except docks or boat launching ramps," except under specified conditions, none of which are

applicable here. This ordinance was in effect for most of the time Respondent stored his personal Jet Ski on the City-owned Jet Ski lift.

19. This prohibition includes the City's Jet Ski lifts and prohibits an individual from using City property for personal use. Respondent violated this ordinance by storing or docking his personal Jet Ski on the City's Jet Ski lifts.

20. Respondent was aware that "John Joe citizen" could not keep his personally-owned Jet Ski on the City lift as he did.

21. On one occasion, Respondent charged the City for fuel for his personal Jet Ski, but the rest of the time "all expenses and operational issues were furnished [by Respondent]."

22. Respondent recommended the purchase of the two Jet Skis as an inexpensive way for the City to provide water rescue operations. One was to be used in the intercoastal waterway and the other on the Gulf side of Madeira Beach.

23. After some period of time, a decision was made not to use a Jet Ski on the Gulf side of Madeira Beach due to the rough conditions compared with the calmer intercoastal side.

24. Respondent attempted to justify the use of one of the City-owned Jet Ski lifts for his personal craft so it could be used to supervise the training of new fire fighters who would use the Jet Skis for water rescues.

25. Respondent made the decision to use the three Jet Skis for training. The city manager, Mr. Crawford, allowed this to happen because his philosophy was to allow his department heads, like Respondent, to have free reign in running their departments. Respondent believed that Mr. Crawford was aware that Respondent's Jet Ski was on the lift and that one of the City-owned Jet Skis was kept on the trailer by the fire department.

26. Mr. Crawford, however, testified he would never have allowed the personal Jet Ski to be kept on the City's lift because that was "flat out against the ordinance."

27. Respondent told Mr. Crawford the City was saving money and preserving the Jet Skis by rotating the two City-owned craft on and off the lift while his personal craft stayed out in the elements at all times. Respondent said this would prolong the life of the two Jet Skis and have his ready for use in training throughout the year.

28. Thirteen members of the Madeira Beach Fire Department required annual training. Respondent told Mr. Crawford the City was saving man hours and keeping down costs through rotating the Jet Skis. The City could train two firefighters at a time, which expedited the process and reduced the downtime in manpower.

29. In theory this sounded practical, but the evidence of the amount of use of Respondent's Jet Ski did not demonstrate great cost savings.

30. Respondent claimed the annual savings by using his Jet Ski, along with the two City-owned craft, was \$4,000-\$6,000 per year, based upon a per-hour cost to run a Jet Ski of about \$100. The issue of him keeping his personal Jet Ski on the City-owned lift did not become a problem prior to August 29, 2017.

31. This became an issue after Mr. Crawford was terminated as city manager, due to a change in the composition of the Madeira Beach Commission. Respondent became the acting city manager and agreed to remove his personal Jet Ski from the City-owned lift.

32. Respondent testified that his keeping the personal Jet Ski on the lift only became an issue after he became the acting city manager and some city residents wanted Mr. Crawford back in the job.

33. At a meeting of the Madeira Beach Commission on August 29, 2017, one Commissioner, Terry Lister, said he believed Respondent's Jet Ski should not be kept on the City-owned lift. The Mayor and another Commissioner did not have a problem with him keeping the Jet Ski on the City's lift.

34. Respondent testified that he could have kept his Jet Ski on his girlfriend's property at no cost, and he only kept it on the City lift to help out with water rescue training.

35. Respondent also testified he could not keep his Jet Ski at his condominium free of charge. He also could not keep it

trailed there in the parking lot since that would violate the rules of his condominium association.

36. The monthly cost to keep his Jet Ski on a trailer in dry storage at the Madeira Beach Marina is \$140. A wet slip to store Respondent's 20-foot-long Jet Ski would be \$180 per month.

37. Respondent's Jet Ski hour meter indicated the craft was operated only 20 hours over the course of the two years his Jet Ski was available for use by the Madeira Beach Fire Department and kept on the City-owned lift. Some of those hours were attributable to Respondent's personal use, although not quantified by Respondent, and the Jet Ski was available for his personal use during non-working hours, whether he actually used it regularly or not.

38. Respondent testified that he removed his Jet Ski from the City list "[w]hen I became aware that this was going to be a huge issue during the time when I was the acting city manager and one of the commissioners made a comment about it." The Jet Ski remained on City property for four months following the City Commission meeting where he said he would remove it to avoid any controversy.

39. Once he removed his Jet Ski from City property, Respondent moved it to his girlfriend's home in Palmetto, Florida, in Manatee County, more than 30 miles from Madeira Beach.

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

41. Respondent is subject to the requirements of chapter 112, part III, the Code of Ethics for Public Officers and Employees, for his acts and omissions during his tenure with the City of Madeira Beach, Florida.

42. Section 112.322 and Florida Administrative Code Rule 34-5.0015 authorize the Commission to conduct investigations and to make public reports on complaints concerning violations of chapter 112, part III, Florida Statutes.

43. The burden of proof, absent a statutory directive to the contrary, is on the Commission, the party asserting the affirmative of the issue of these proceedings. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977). In this proceeding, it is the Commission, through its Advocate, that is asserting the affirmative: that Respondent violated section 112.313(6).

44. Commission proceedings which seek recommended penalties against a public officer or employee require proof of an alleged violation by clear and convincing evidence. See Latham v. Fla.

Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997). See also, § 120.57(1)(j), Fla. Stat. Therefore, the burden of establishing by clear and convincing evidence the elements of a violation is on the Commission.

45. As noted by the Supreme Court of Florida:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

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

46. The Order Finding Probable Cause in this matter alleges that "Respondent, as Fire Chief, acting City Manager, and/or City Manager of Madeira Beach violated section 112.313(6) by keeping or storing his Jet Ski on a City-owned Jet Ski lift."

47. Respondent is charged with violating section 112.313(6), which 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.

48. The term "corruptly" is defined by section 112.312(9), 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.

To satisfy the statutory element that one acted "corruptly," proof must be adduced that Respondent acted with reasonable notice that his conduct was inconsistent with the proper performance of his public duties and would be a violation of the law or code of ethics. See Siplin v. Comm'n on Ethics, 59 So. 3d 150, 151-152 (Fla. 5th DCA 2011); Kinzer v. State Comm'n on Ethics, 654 So. 2d 1007, 1010 (Fla. 3d DCA 1995).

49. To establish a violation of Section 112.313(6), the following elements must be proved:

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

- ii. performed his official duties;
- c. Respondent's actions must have been taken to secure a special privilege, benefit, or exemption for himself or others;
- d. Respondent must have acted corruptly, that is, with wrongful intent and for the purpose of benefiting himself or another person from some act or omission which was inconsistent with the proper performance of public duties.

50. Respondent was a public officer in his position as acting city manager or city manager and a public employee in his position as fire chief. Respondent was, at all relevant times to this matter, a "public officer" or an "employee of an agency," as provided in sections 112.312(2) and 112.313(6). Therefore, the first element for a violation of section 112.313(6) was met.

51. The second element was met when Respondent used or attempted to use his official position to store his personal Jet Ski on the City-owned Jet Ski lift.

52. A regular citizen could not use the City's Jet Ski lift to store a personal Jet Ski. It was only because of Respondent's position as acting or permanent city manager or fire chief that he had access to and was able to store his personal property on public property for two years.

53. Storing his personal Jet Ski on the City's ski lift provided a special benefit and privilege for Respondent for several reasons: 1) he did not have to pay a storage or docking fee; 2) the Jet Ski was readily available for his personal use at

any time; and 3) he was allowed ingress and egress to an otherwise restricted boating area or waterway.

54. A typical (non-leap-) year has 8,760 hours. Two typical years have a total of 17,520 hours. Respondent's Jet Ski was utilized only 20 hours for public business (and an unspecified amount of personal use) during the two-year period. The remaining hours in the two-year period were available for Respondent's personal use of the Jet Ski kept on the City-owned lift, regardless of the frequency, or infrequency, of his desire to use the watercraft. Respondent's testimony that his Jet Ski was not equipped for rescue operations and, therefore, only suitable for observation of trainees on the two appropriately equipped Jet Skis, further supports the lack of need for his Jet Ski being stored on public property. At Respondent's stated value per hour for renting a Jet Ski to use for training purposes (as an observer or trainer, not a rescuer) of \$100, the maximum value to Madeira Beach of having this Jet Ski available at all times was \$2,000. No evidence was produced to support a dollar value for having the Jet Ski available on the City's lift at all times for training.

55. Although, there is some merit to Respondent's testimony that rotating the two City-owned Jet Skis between the lift and a trailer in the fire station has merit, no attempt was made to quantify the value of such rotation. Therefore, the testimony on

this point can be given little, if any, weight. In short, the conclusion reached here is that the value of rotating the two Jet Skis over a two-year period is de minimus.

56. Respondent's claim that he gave the City a gift by allowing it to use his Jet Ski in training does not overcome the fact that the minimal amount of time the craft was used for City business was far outweighed by the benefit of having free storage on the City-owned lift. Therefore, the third element was met.

57. Proving the fourth element of section 112.313(6) requires clear and convincing evidence that the public officer acted with reasonable notice that his conduct was inconsistent with the proper performance of his public duties and would be a violation of the law or the Code of Ethics. Blackburn v. State Comm'n on Ethics, 589 So. 2d 431, 434 (Fla. 1st DCA 1991).

58. "Direct evidence of [wrongful] intent is often unavailable." Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (11th Cir. 1996); see also State v. West, 262, So. 2d 457, 458 (Fla. 4th DCA 1972) ("[I]ntent is not usually the subject of direct proof.").

59. Circumstantial evidence, however, may be relied upon to prove the wrongful intent which must be shown to establish a violation of section 112.313(6). See U.S. v. Britton, 289 F.3d 976, 981 (7th Cir. 2002) ("As direct evidence of a defendant's fraudulent intent is typically unavailable, 'specific intent to

defraud may be established by circumstantial evidence and by inferences drawn from examining the scheme itself that demonstrate that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension.'") (Citation omitted.). For instance, such intent may be inferred from the public servant's actions. See Swanson v. State, 713 So. 2d 1097, 1101 (Fla. 4th DCA 1998) ("Actions manifest intent."); and K.G.D. v. State, 391 So. 2d 327, 328-29 (Fla. 1st DCA 1980) ("Appellant testified that he did not intend to break the window, but the record indicates that he did willfully kick the window, and he may be presumed to have intended the probable consequences of his actions.").

60. As noted in Blackburn v. State, 589 So. 2d at 434:

An essential element of the charged offense under section 112.313(6) is the statutory requirement that appellant acted with wrongful intent, that is, that she acted with reasonable notice that her conduct was inconsistent with the proper performance of her public duties and would be a violation of the law or the code of ethics in part III of chapter 112.

61. The court, in Blackburn, found the actions taken by the county commissioner only "incidental" to her campaign and not sufficient to support a violation of section 112.313(6). The court, in overturning the ruling below finding a violation, stated:

They have reached this conclusion without citing to any specific provision by rule or statute other than section 112.313(6), or referring to any published opinion of any Florida court or the Ethics Commission itself, that would give fair and reasonable warning that appellant's obtaining the assistance of the county employee under the circumstances shown in this case would be unlawful or unethical.

62. It is interesting that Respondent drew the line for the use of the City-owned lift for storage of his personal Jet Ski at not seeking reimbursement for his expenses (gas and any required maintenance) for the use by the Fire Department of the watercraft. He denied that these were expenses he should have charged to the City.

63. The credible evidence does not support Respondent's claim that the Fire Department needed Respondent's personal Jet Ski to conduct official business or provide services. The use of the third Jet Ski might have some positive effect on the City by allowing two Jet Skis to be used at once for training of firefighters to perform water rescues while Respondent, the trainer, looked on. But the amount of usage over the two-year period--20 hours--was incidental, at most. If the amount of training supervision provided by Respondent was so minimal, the \$2,000 cost to the City (20 hours at \$100 per hour) to rent a Jet Ski for this purpose is an insignificant cost that does not justify keeping a rarely-used, privately-owned Jet Ski on the

City-owned lift year round. Any benefit of this arrangement was trivial.

64. Respondent provided scant evidence that the City needed three Jet Skis for the small amount of water rescue training performed by him. Further, any argument that Respondent's Jet Ski enhanced the ability of the Fire Department to perform water rescues is likewise not persuasive since he admitted his personal Jet Ski was not equipped for water rescues since it did not have the necessary sled for transporting an individual who has been rescued. The evidence in this case failed to demonstrate that any legitimate, non-corrupt (as that term is used in the Code of Ethics) reasons exist for Respondent to store his personal Jet Ski on the City-owned lift for two years.

65. The last element of proof of a violation pursuant to section 112.313(6) was met. The fact that no one on the Madeira Beach Commission or the city manager made an issue out of the fact of the personal use of the City-owned lift does not pardon Respondent's acts. These acts were done with wrongful intent.

66. The Advocate has established, by clear and convincing evidence, that Respondent, a public officer and employee, corruptly used and/or attempted to use his position to secure a special privilege, benefit, or exemption for himself or others by storing his Jet Ski on City-owned property, which is inconsistent with the proper performance of his public duties.

PENALTY

67. Section 112.317 provides penalties which may be imposed for a violation of the Code of Ethics for Public Officers and Employees. Section 112.317 provides, in relevant part, as follows:

(1) Any violation of this part, including, but not limited to, failure to file disclosures required by this part or violation of any standard of conduct imposed by this part, or any violation of s. 8, Art. II of the State Constitution, in addition to any criminal penalty or other civil penalty involved, under applicable constitutional and statutory procedures, constitutes grounds for, and may be punished by, one or more of the following:

* * *

(b) In the case of an employee or a person designated as a public officer by this part who otherwise would be deemed to be an employee:

1. Dismissal from employment.
2. Suspension from employment for not more than 90 days without pay.
3. Demotion.
4. Reduction in his or her salary level.
5. Forfeiture of no more than one-third salary per month for no more than 12 months.
6. A civil penalty not to exceed \$10,000.
7. Restitution of any pecuniary benefits received because of the violation committed. The commission may recommend that the restitution penalty be paid to the agency by which the public employee was employed, or of which the officer was deemed to be an employee, or to the General Revenue Fund.
8. Public censure and reprimand.

68. Pursuant to the above-cited provisions, the undersigned recommends a civil penalty be assessed against Respondent in the amount of \$2,000, and that restitution be made to the City for the cost of wet storing a personal Jet Ski in the City-owned marina for two years less the value of the use of Respondent's Jet Ski for 20 hours in service to the City for water rescue training during the two-year period at issue (since the personal use was not quantified, it cannot be deducted). The marina charge for 24 months of wet storage, based upon the uncontested evidence at hearing is \$4,320 (24 x \$180) and the value of the 20 hours of usage of the Jet Ski is \$2,000 (20 hours x \$100). The net restitution owed by Respondent is \$2,320. The combined amount of the restitution and civil penalty is, therefore, \$4,320.

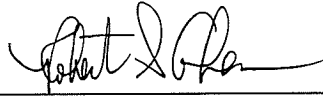
69. Respondent had a duty to avoid impropriety by avoiding acts which place personal or private interests above pursuit of the public interest. Here, Respondent believed the offering of his personal Jet Ski to assist in training firefighters in water rescue served a good public purpose. However, when he saw that the value of keeping his personal Jet Ski on the City-owned lift far exceeded the necessary use of the Jet Ski for training purposes, he should not only have offered to pay the cost of storage for the time the Jet Ski was not being used for training, but insisted that he do so. As either an employee of the City or

a public official, he should not have accepted "free rent" for his personal watercraft. It is not germane to the discussion that the mayor and members of the City Commission knew he was keeping his Jet Ski on the City's lift. It is germane that the City Commission never approved his free use of the lift. It was his duty and responsibility as a public official not to take the benefit that was not available to any regular citizen. However, in light of his many years of service to the City and having seen no evidence of prior ethics violations or discipline against Respondent, I find that the restitution and civil penalty are sufficient punishment without requiring public censure and reprimand, as recommended by the Advocate.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Ethics enter a final order requiring Respondent to make restitution to the City of Madeira Beach in the amount of \$2,320, plus a civil penalty of \$2,000 for a total of \$4,320.

DONE AND ENTERED this 16th day of November, 2018, in
Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of November, 2018.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.