

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LAWRENCE E. ELLIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 97-1357
	)	
DEPARTMENT OF MANAGEMENT	)	
SERVICES, DIVISION OF RETIREMENT,	)	
	)	
Respondent.	)	
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RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, Don W. Davis, held a formal hearing in the above-styled case on May 29, 1997, in Tallahassee, Florida.

APPEARANCES

For Petitioner:	John A. Barley, Esquire Post Office Box 10166 Tallahassee, Florida 32301
For Respondent:	Augustus D. Aikens, Jr., Esquire Division of Retirement Cedars Executive Center, Building C 2639 North Monroe Street Tallahassee, Florida 32399-1560

STATEMENT OF THE ISSUE

At issue in this proceeding is whether Petitioner's rights and benefits under the Florida Retirement System are subject to forfeiture.

PRELIMINARY STATEMENT

By letter of August 10, 1993, Respondent notified Petitioner that his rights and benefits under the Florida Retirement System had been forfeited as a result of conviction for distribution of drugs and conspiracy to obstruct justice, violations of Title 21, United States Code, Section 841(a)(1), Title 18, United States Code, Sections 2, 371 and 1503. The letter advised Petitioner of his right to a formal hearing to contest Respondent's decision. Petitioner elected to request a formal hearing, and the matter was referred to the Division of Administrative Hearings for conduct of formal proceedings pursuant to Section 120.57(1), Florida Statutes.

By joint motion filed on February 1, 1994, counsel for the parties requested the matter be abated pending completion of Petitioner's appeal of his federal conviction before the United States 11th Circuit Court of Appeals.

By order dated February 18, 1994, the motion was granted and the file of the Division of Administrative Hearings was closed and the case referred back to Respondent until such future time as either party might request further proceedings on the matter.

Respondent, by pleading dated March 12, 1997, requested return of the case to the active trial docket and scheduling of a final hearing inasmuch as the criminal appeal requiring abatement had been concluded.

Petitioner's request for further continuance, pending conclusion of additional attempts to obtain federal post conviction relief, was denied.

At hearing, Petitioner presented testimony of his wife, Connie Ellis. Petitioner's exhibits 1-6 were received into evidence. Respondent called Maurice Helms as a witness, and its exhibits 1-10 were received into evidence.

The transcript of hearing was filed June 17, 1997, and the parties were granted leave to file proposed findings more than ten days beyond that date. The parties' proposed recommended orders have been duly considered in the preparation of this recommended order.

#### FINDINGS OF FACT

1. Petitioner, Lawrence E. Ellis (Ellis), was employed as a deputy sheriff in the Nassau County Sheriff's office on or about April 1, 1966. Thereafter, with the exception of a two year hiatus (March, 1980 until July, 1982) from public employment, Ellis was employed in various public positions through which he accumulated credit in the Florida Retirement System until conclusion of his service as Sheriff of Nassau County, Florida, on December 31, 1992.

2. As the Sheriff of Nassau County, Ellis was a constitutional officer required by state law to enforce all provisions of the Florida Comprehensive Drug Abuse Prevention and Control Act codified in Chapter 893, Florida Statutes, as well as

other provisions of law. Upon assuming his constitutional duties as Sheriff, Ellis took an oath to "support, protect, and defend the Constitution and Government of the United States and the State of Florida."

3. Effective January 1, 1993, Ellis began receiving monthly retirement benefits from Respondent pursuant to an option he had chosen where benefits were payable jointly to him and his wife. Each monthly benefit payment was in the amount of \$1,978.88.

4. On February 19, 1993, a federal indictment, issued in the United States District Court for the Middle District of Florida (Case No. 93-52-Cr-J-10), charged Ellis with eight drug-distribution related counts and two counts of obstruction of justice. The indictment detailed the overt acts alleged to have been committed by Ellis and specifically charged him with committing a series of felonies during the period of time when he was Sheriff of Nassau County.

5. On July 15, 1993, Ellis was convicted, pursuant to jury trial on the charges in the indictment, for certain violations of 21 United States Code Section 841(a)(1) and 18 United States Code Sections 2, 371 and 1503. Specifically, as stipulated by the parties, Ellis was found guilty and adjudged guilty of:

- a.) knowingly possessing, with intent to distribute, cocaine, a Schedule II controlled substance, as the result of an offense concluding on June 3, 1992, as set forth in Counts 3, 4, and 6 of the indictment.
- b.) knowingly possessing, with intent to distribute, marihuana, a Schedule I controlled substance, as the result of an

offense concluded on July 25, 1991, as set forth in Counts 2, 5, and 7 of the indictment.

c.) knowingly conspiring to obstruct justice as the result of false testimony, an offense concluded on September 2, 1992, as set forth in Count 10 of the indictment.

d.) knowingly conspiring to possess with intent to distribute cocaine and distributing cocaine; and knowingly possessing with intent to distribute and distributing marihuana; and knowingly conspiring to obstruct justice (false statements) as set forth in Counts 1 and 9 of the indictment.

6. On or about August 4, 1993, Respondent, without prior notice to Ellis, determined that Ellis' convictions on the charges in the indictment required the forfeiture of his retirement benefits. Thereafter, on August 5, 1993, Ellis' name was removed from the retirement payroll.

7. Ellis was sent a letter, dated August 10, 1993, by Respondent's representative, informing Ellis that his retirement benefits were forfeited due to his convictions and that he would receive no further benefit payments since the total of benefit payments made to him already exceeded the total of contributions made by Ellis to the retirement system. Ellis was apprised in the letter of his right to initiate administrative proceedings within 21 days to challenge the action taken by Respondent.

8. By letter dated September 9, 1993, Ellis' counsel requested formal administrative proceedings. While admitting that Ellis was convicted of the charges in the indictment, the letter disputed whether such charges constituted a felony

conviction, as well as Respondent's determination of the amount of contributions made by Ellis to the retirement system.

9. Ellis' accumulated contributions on deposit at the time of his retirement totaled \$6,025.26. Ellis received a total of \$13,882.39 in monthly retirement payments, inclusive of a payment of \$2,009.11 in July of 1993. Ellis received \$7,857.13 in excess of his accumulated contributions.

10. On October 1, 1993, United States District Judge Terrell Hodges adjudged Ellis to be guilty of the charges referenced above and committed Ellis to custody of the United States Bureau of Prisons for a term of 192 months.

#### CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. Sections 112.3173(5)(a) and 120.57(1), Florida Statutes.

12. Pertinent to this case, portions of Section 112.3173, Florida Statutes, address the grounds for forfeiture of retirement benefits and the procedure to be followed in a forfeiture determination as follows:

Felonies involving breach of public trust and other specified offenses by public officers and employees; forfeiture of retirement benefits.--

(1) INTENT.--It is the intent of the Legislature to implement the provisions of s. 8(d), Art. II of the State Constitution.

2) DEFINITIONS.--As used in this section, unless the context otherwise requires, the term

(a) "Conviction" and "convicted" mean an adjudication of guilt by a court of competent jurisdiction; a plea of guilty or of nolo contendere; a jury verdict of guilty when adjudication of guilt is withheld and the accused is placed on probation; or a conviction by the Senate of an impeachable offense.

\* \* \*

(c) "Public officer or employee" means an officer or employee of any public body, political subdivision, or public instrumentality within the state.

\* \* \*

(e) "Specified offense" means:

1. The committing, aiding, or abetting of an embezzlement of public funds;
2. The committing , aiding, or abetting of any theft by a public officer or employee from his employer;
3. Bribery in connection with the employment of a public officer or employee;
4. Any felony specified in chapter 838, except ss. 838.15 and 838.16;
5. The committing of an impeachable offense; or
6. The committing of any felony by a public officer or employee who, willfully and with intent to defraud the public or the public agency for which he acts or in which he is employed of the right to receive the faithful performance of his duty as a public officer or employee, realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or for some other person through the use or attempted use of the power, rights, privileges, duties, or position of his public office or employment position. (Emphasis Supplied.)

(3) FORFEITURE. Any public officer or employee who is convicted of a specified offense committed prior to retirement, or whose office or employment is terminated by reason of his admitted commission, aid, or abatement of a specified offense, shall forfeit all rights and benefits under any

public retirement system of which he is a member, except for the return of his accumulated contributions as of his date of termination.

\* \* \*

(5) FORFEITURE DETERMINATION.

(a) Whenever the official or board responsible for paying benefits under a public retirement system receives notice pursuant to subsection (4), or otherwise has reason to believe that the rights and privileges of any person under such system are required to be forfeited under this section, such official or board shall give notice and hold a hearing in accordance with chapter 120 for the purpose of determining whether such rights and privileges are required to be forfeited. If the official or board determines that such rights and privileges are required to be forfeited, the official or board shall order such rights and privileges forfeited.

13. The office of sheriff is a constitutional office established under Article VIII, Section 1(d), Constitution of Florida, and possesses the executive power of the State within the county. 40 Fla. Jur.2d, Police, Sheriffs, and Constables, Section 68. Residing in the office of sheriff is a portion of the sovereign power of the State, and the office has with it all of the common law powers and duties associated with the office. Id., Section 80. A sheriff takes an oath of office in which he swears that he will support, protect, and defend the Constitution and government of the United States and of the State of Florida and will faithfully perform the duties of sheriff. Id. Section 73.



14. As heretofore noted in the findings of fact, Ellis was convicted of these offenses: (1) knowingly possessing, with intent to distribute, cocaine, a Schedule II controlled substance for an offense which concluded on June 3, 1992, as charged in Counts 3, 4, and 6 of the indictment; (2) knowingly possessing, with intent to distribute, marihuana, a Schedule I controlled substance for an offense which concluded on July 25, 1991, as charged in Counts 2, 5, and 7 of the indictment; (3) knowingly conspiring to obstruct justice of an offense which concluded on September 2, 1992, as charged in Count 10 of the indictment; and (4) knowingly conspiring to possess with intent to distribute cocaine and distributing cocaine; possessing with intent to distribute marihuana and distributing marihuana; and knowingly conspiring to obstruct justice (false statements) as charged in Counts 1 and 9 of the indictment.

15. All peace officers of the State of Florida are required to enforce "all provisions" of the Florida Comprehensive Drug Abuse Prevention and Control Act, Chapter 893, Florida Statutes. See Section 893.09, Florida Statutes. Contrary to this duty, Ellis committed and was convicted of felony offenses constituting official misconduct. Section 839.25, Florida Statutes. Accordingly, Ellis' retirement benefits are subject to forfeiture under the provisions of Sections 112.3173 and 121.091(5)(f), Florida Statutes.

16. Contrary to arguments advanced by Petitioner's counsel, Respondent is not authorized or required to include Petitioner in its preliminary decision-making process regarding whether to implement forfeiture proceedings. Respondent's August 10, 1993 letter to Ellis provided notice of Respondent's intended action and accorded with requirements of Chapter 120, Florida Statutes.

17. Similarly, argument of Petitioner's counsel that Ellis' spouse was inadequately noticed regarding agency action affecting her substantial interest must be rejected. Designation as a joint annuitant provided Mrs. Ellis only a contingent interest, at best, that could have been terminated by her husband without her consent at any time. Section 121.091(6)(d), Florida Statutes. Events required for the spousal interest to rise to the level of entitlement to administrative due process protections in the present instance would require that Mrs. Ellis survive Petitioner as his spouse and that she establish his continuing right to receive benefits at his death. Mrs. Ellis' interest has clearly not ripened to this stage at present and is not the type of interest designed to be protected by Section 112.3173(5), Florida Statutes.

#### RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that a final order be rendered determining that Petitioner forfeited all rights and benefits under the Florida

Retirement System upon his July 15, 1993 federal felony convictions and requiring the refund by Petitioner of \$7,857.13 in benefits paid to him by Respondent in excess of Petitioner's accumulated contributions.

DONE AND ENTERED this 29th day of July, 1997, in  
Tallahassee, Leon County, Florida.

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DON W. DAVIS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of July, 1997.

COPIES FURNISHED:

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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.