

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ISMAEL PAGE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-0532
	)	
DEPARTMENT OF MANAGEMENT	)	
SERVICES, DIVISION OF	)	
RETIREMENT,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER OF DISMISSAL

Pursuant to notice, a final hearing was held in this case by video teleconference on July 11, 2005, with connecting sites in Miami and Tallahassee, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: No Appearance

For Respondent: Thomas E. Wright, Esquire  
Department of Management Services  
Division of Retirement  
4050 Esplanade Way, Suite 260  
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner's rights and benefits under the Florida Retirement System should be

terminated, per Respondent's Notice of Termination dated November 19, 2004.

PRELIMINARY STATEMENT

Ismael Page received notification from the Department of Management Services, Division of Retirement (Retirement) that her rights and benefits under the Florida Retirement System (FRS) were terminated because she pled guilty to criminal violations while she was employed with the Florida Department of Labor and Employment Security (DLES), citing the violations and the constitutional and statutory provisions supporting Retirement's action. Ms. Page challenged Retirement's action and requested a hearing. On February 14, 2005, this matter was referred to the Division of Administrative Hearings.

The hearing in this matter was originally set for April 26, 2005 at 11:00 a.m. in Miami, Florida. The start of the hearing was delayed to provide additional time for Ms. Page to appear. The undersigned did not begin the hearing until approximately 11:50 a.m., but Ms. Page failed to appear and no appearance was made on her behalf. Counsel for Retirement and a witness for Retirement appeared at the hearing. The undersigned determined at that hearing that the final burden of proof was on Ms. Page, and, based on that pronouncement, Retirement chose to present no testimony and to enter no exhibits into evidence, relying upon

the documents in the record. No transcript of the matters placed on the record was ordered.

By letter dated May 6, 2005, Retirement's counsel notified the undersigned that, when he returned to his office on April 28, 2005, after the hearing, he had a voice mail message from Ms. Page indicating that she had a death in her family and that she could not attend the hearing. Retirement's counsel further notified the undersigned that he telephoned Ms. Page the same day, April 28, 2005, and advised her, through voice mail, that she must request any relief that she is seeking, including a continuance, from the undersigned and that he had not had any further communication with or from Ms. Page.

By Order dated May 11, 2005, the undersigned provided an opportunity for and directed Ms. Page to file her request for a continuance or any other relief that she desired no later than May 19, 2005. Ms. Page failed to file any request for relief.

At the conclusion of the hearing on April 26, 2005, Retirement requested to file a post-hearing submission within 10 days following the hearing. Retirement timely filed a post-hearing submission.

Subsequent to Retirement filing its post-hearing submission, by Order dated May 25, 2005, the undersigned, sua sponte, re-considered the determination on the burden of proof. In the Order, the undersigned concluded, among other things,

that Retirement, not Ms. Page, had the ultimate burden of proof and that the hearing would be re-opened. The final hearing was re-set for July 11, 2005, and was conducted.

At hearing, Retirement presented the testimony of two witnesses and entered seven exhibits (Respondent's Exhibits numbered 1-7) into evidence. Ms. Page again failed to appear, and no appearance was made on her behalf. A transcript was ordered. At the request of Retirement, the time for filing post-hearing submissions was set for ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on August 9, 2005.

Retirement timely filed its post-hearing submission, which was considered in the preparation of this Recommended Order. Ms. Page did not file a post-hearing submission.

#### FINDINGS OF FACT

1. No dispute exists that Ms. Page was employed with DLES. Furthermore, no dispute exists that, because of her employment with DLES, Ms. Page is a member of FRS.

2. No evidence was presented as to Ms. Page's duties at DLES.

3. In September 1999, Ms. Page was charged by an information in the Eleventh Judicial Circuit, In and For Dade County, in The State of Florida v. Ismael Page aka May Washington aka Ismay Washington, Case No. 99-27532, with one

count of filing a false and fraudulent insurance claim in violation of Section 817.234(1), Florida Statutes, a third degree felony; and one count of grand theft in violation of Section 812.014(2)(c)1, Florida Statutes, a the third degree felony.

4. Additionally, in September 1999, Ms. Page was charged by an information in the Eleventh Judicial Circuit, In and For Dade County, in The State of Florida v. Ismael Page aka May Washington aka Ismay Washington, Case No. 99-27533, with one count of filing a false and fraudulent insurance claim in violation of Section 817.234(1), Florida Statutes, a third degree felony; one count of uttering a forged instrument in violation of Section 831.02, Florida Statutes, a third degree felony; and one count of grand theft in violation of Section 812.014(2)(c)1, Florida Statutes, a the third degree felony.

5. The count of uttering a forged instrument involved a forged letter by Ms. Page from a person, who was employed at DLES and who was alleged in the letter to be her supervisor at DLES, showing that Ms. Page had incurred lost wages as the result of an injury in an accident. The forged letter was submitted by Ms. Page to an insurance company in support of her claim for disability benefits.

6. The person who was alleged to have written the letter and to be Ms. Page's supervisor at DLES did not write the

letter.

7. Ms. Page received disability payments from the insurance company.

8. On or about September 13, 1999, Ms. Page pled guilty to and was adjudicated guilty of the one count of filing a false and fraudulent insurance claim and the one count of grand theft in Case No. 99-27532.

9. On or about September 13, 1999, Ms. Page pled guilty to and was adjudicated guilty of the one count of filing a false and fraudulent insurance claim, the one count of uttering a forged instrument, and the one count of grand theft in Case No. 99-27533.

10. By Notice of Termination of All Rights and Benefits Under the Florida Retirement System (Notice), dated November 19, 2004, Retirement notified Ms. Page that all of her rights and benefits under FRS were terminated. Retirement claimed in the Notice that Ms. Page, while employed at DLES, had pled guilty to one count of fraudulent insurance claims in violation of Section 817.234(1), Florida Statutes; one count of uttering a forged instrument in violation of Section 831.02, Florida Statutes; and one count of grand theft in the third degree in violation of Section 812.014(2)(c), Florida Statutes. Further, Retirement asserted in the Notice that, based on the criminal violations and pursuant to Article II, Section 8(d) of the Florida

Constitution, Section 121.091(5)(f), Florida Statutes (2000), and Section 112.3173, Florida Statutes, she had no further rights under FRS, that she would not be permitted to repurchase, as prior service, the years of creditable service she earned prior to the convictions, and that her accumulated contributions on deposit in the FRS Trust Fund, if any, would not be affected.

11. Ms. Page challenged Retirement's action and requested a hearing. In her challenge to Retirement's action, Ms. Page made an allegation of dismissal of charges and of being presently disabled.

12. Ms. Page failed to appear at the hearing. Because of her failure to appear, her allegation remains nothing more than an allegation without support for which no finding of fact can be made.

#### CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2005).

14. The general rule is that "the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." Florida Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). The case at hand involves the forfeiture

of Ms. Page's rights and benefits under FRS and involves Retirement asserting that she should lose her rights and benefits under FRS because of criminal convictions. Consequently, Retirement has the burden of proof by establishing through a preponderance of evidence that forfeiture is warranted. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); § 120.57(1)(j), Fla. Stat. (2005).

15. "Any public officer or employee who is convicted of a felony involving a breach of public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan in such manner as may be provided by law." Art. II, § 8, Fla. Const. (1968 Revision)

16. Section 112.3173, Florida Statutes (2000), provides in pertinent part:

(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 the 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 or her 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 the public officer or employee acts or in which he or she is employed of the right to receive the faithful performance of his or her duty as a public officer or employee, realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or herself or for some other person through the use or attempted use of the power, rights, privileges, duties, or position of his or her public office or employment position.

(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 or her admitted commission, aid, or abetment of a specified offense, shall forfeit all rights and benefits under any public retirement system of which he or she is a member, except for the return of his or her accumulated contributions as of the date of termination.

(emphasis added)

17. Section 121.091, Florida Statutes (2000), provides in pertinent part:

(5) TERMINATION BENEFITS.--A member whose employment is terminated prior to retirement retains membership rights to previously earned member-noncontributory service credit, and to member-contributory service credit, if the member leaves the member contributions on deposit in his or her retirement account. If a terminated member receives a refund of member contributions, such member may reinstate membership rights to the previously earned service credit represented by the refund by completing 1 year of creditable service and repaying the refunded member contributions, plus interest.

\* \* \*

(f) Any member who has been found guilty by a verdict of a jury, or by the court trying the case without a jury, of committing, aiding, or abetting any embezzlement or theft from his or her employer, bribery in connection with the employment, or other felony specified in chapter 838, except ss. 838.15 and 838.16, committed prior to retirement, or who has entered a plea of guilty or of nolo contendere to such crime, or any member whose employment is terminated by reason of the member's admitted commitment, aiding, or abetting of an embezzlement or theft from his or her employer, bribery, or other felony specified in chapter 838, except ss. 838.15 and 838.16, shall forfeit all rights and benefits under this chapter, except the return of his or her accumulated contributions as of the date of termination.

18. Retirement argues that Ms. Page's "conviction clearly deprived the public of the faithful performance of her duties

and was committed to obtain a benefit to which she was not entitled. It [the conviction] thus meets the definition set forth by the legislature." In support of its argument, Retirement cites the following cases: Ellis v. Division of Retirement, DOAH Case No. 97-1357 (1997) (affirmed per curiam at 731 So. 2d 652 (Fla. 1st DCA 1999)); and Jacobo v. Board of Trustees of the Miami Police, 788 So. 2d 362 (Fla. 3rd DCA 2001). Ellis and Jacobo, supra, present the factors which must be considered in the case at hand.

19. The Administrative Law Judge in Ellis, supra, whose Recommended Order was adopted in toto by Retirement, identified the duty of the public and constitutional officer (the sheriff), whose retirement benefits were being forfeited, and how the sheriff breached his duty by committing and being convicted of felony offenses which were contrary to his duty, through which he was realizing or obtaining, or attempting to realize or obtain a personal gain or profit. The felony offenses involved knowingly possessing and conspiring to possess, with intent to distribute, cocaine and marijuana and knowingly conspiring to obstruct justice. The Administrative Law Judge determined that the felony offenses that the sheriff committed, and for which he was convicted, constituted official misconduct.

20. Likewise, as to the issues raised in the instant matter, the court in Jacobo, supra, proceeded through the same

analysis, as the Administrative Law Judge in Ellis, supra, in its case with the duty of the public employee (police officer), whose retirement benefits were being forfeited. The police officer was convicted of official misconduct, a felony, by making a false statement in an arrest affidavit. Pertinent to the case at hand, the court in Jacobo held that:

[I]t is a breach of the public trust to violate any standard of ethical conduct in Chapter 112, including section 112.313(2)(e)6, which proscribes the commission of a felony with intent to defraud the public to gain an advantage for himself or someone else through the use of his office. Official misconduct . . . [as defined] is clearly a breach of the public trust . . . .

Jacobo, at 365. Further, the court provided the definition of official misconduct found at Section 839.25(1), Florida Statutes (1991), at footnote numbered 3, which was as follows:

[T]he commission of the following act by a public servant, with corrupt intent to obtain a benefit for himself or herself or another or to cause unlawful harm to another: knowingly falsifying, or causing another to falsify, an official record or official document.

Jacobo, at 365.

21. In the instant matter, the evidence demonstrates that Ms. Page is a public employee, as defined, that she was convicted of several felonies, and that she attempted to obtain and did obtain personal gain from her illegal conduct.

Retirement takes a broad approach that, because Ms. Page is a public employee, because she committed and was convicted of the offenses, and because her illegal conduct permitted her to obtain a benefit to which she was not entitled, Ms. Page "deprived the public of the faithful performance of her duties," and that the conduct meets the definition of a "specified offense" found at Section 112.3173(1)(e)6, Florida Statutes.

22. Applying the factors in the analysis provided in Ellis and Jacobo, supra, Ms. Page's duty at DLES is unknown because no evidence was presented as to her duty. Furthermore, Retirement failed to demonstrate that Ms. Page had been convicted of misconduct in office.

23. On the other hand, the Administrative Law Judge in Ellis, supra, determined that the sheriff's convictions "constituted" misconduct even though the sheriff had not been convicted of misconduct. However, the Administrative Law Judge analyzed how the convictions constituted misconduct by determining the duty of the sheriff and how the sheriff violated that duty. Again, in the instant case, the evidence presented failed to identify Ms. Page's duty and to demonstrate how she breached or violated that duty.

24. Hence, Retirement failed to establish that Ms. Page had committed a breach of public trust or that she had committed official misconduct, which is a breach of the public trust.<sup>1</sup>

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Management Services, Division of Retirement enter a final order reinstating the rights and benefits of Ismael Page under the Florida Retirement System.

DONE AND ENTERED this 2nd day of September 2005, in Tallahassee, Leon County, Florida.



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ERROL H. POWELL  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 2nd day of September, 2005.

ENDNOTE

<sup>1/</sup> The Legislature in 2003 repealed Section 839.25, Florida Statutes, and created Section 838.022, Florida Statutes, entitled "Official misconduct." Pertinent to the case at hand, Section 838.022, Florida Statutes (2003), removed the reference to obtaining a benefit for oneself and defined official record or official document as including "only public records."

§§ 838.022(1)(a) and (2)(b), F.S. (2003). Clearly, Ms. Page's conduct would not have constituted official misconduct under the new statute even if the evidence presented demonstrated her duty and how she violated that duty.

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.