

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD BRANDENBERGER,)
)
 Petitioner,)
)
 vs.) Case No. 06-3659
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF)
 RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On November 15, 2006, a formal administrative hearing in this case was held in Orlando, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Edward Gay, Esquire
1516 East Concord Street
Orlando, Florida 32803

For Respondent: Geoffrey M. Christian, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

The issue in the case is as set forth in the Notice of Forfeiture of Retirement Benefits dated November 10, 2005, and issued by the Department of Management Services, Division of

Retirement (Respondent), to Richard Brandenberger (Petitioner).

PRELIMINARY STATEMENT

By Notice of Forfeiture of Retirement Benefits dated November 10, 2005, the Respondent advised the Petitioner that the Petitioner's benefits under the Florida Retirement System were forfeited because of his guilty plea to charges related to acts committed while employed by the Orange County Board of County Commissioners. The Petitioner requested a hearing in December 2005.

The dispute was forwarded to the Division of Administrative Hearings on September 25, 2006, and an Initial Order was entered. By Notice of Hearing dated October 5, 2006, the hearing was scheduled for November 15, 2006, in accordance with dates of availability identified by the parties in their joint response to the Initial Order.

At the hearing, the Petitioner testified on his own behalf and had one exhibit admitted into evidence. The Respondent presented the testimony of one witness and had exhibits identified as 1 through 4 and 6 admitted into evidence.

The Transcript of the hearing was filed on December 14, 2006. By Joint Motion for Extension of Time filed the day prior to the Transcript, the parties stipulated to an extension of the deadline for filing proposed orders to January 12, 2007, and

subsequently filed Proposed Recommended Orders on the agreed date.

FINDINGS OF FACT

1. At all times material to this case, the Petitioner was employed by the Orange County Board of County Commissioners as a correctional officer at the county jail and participated in the Florida Retirement System (FRS).

2. The Respondent is the state agency charged with administering the FRS.

3. The applicable position description for employment by Orange County as a correctional officer included, in relevant part, the following description of the job duties:

Supervises inmates to prevent altercations, intimidation, undesirable or illegal acts, intercedes when necessary, and to ensure the safety of the facility, other Correctional staff and the inmates.

4. On or about October 29, 2003, a grand jury issued a one-count indictment against the Petitioner as follows:

On or about July 3, 2003, in Orange County, Florida, defendant knowingly and intentionally possessed with intent to distribute and distributed Methylenedioxymethamphetamine ("MDMA") commonly known as "ecstasy", and marihuana, controlled substances listed in Schedule I of 21 U.S.C. Section 812, all in violation of 21 U.S.C. Sections 841(a)(1), 841(b)(1)(C), and 841(b)(1)(D).

5. The Petitioner was subsequently arrested. He then retired from employment in December 2003 and began receiving benefits from the FRS the following January.

6. On or about January 29, 2004, the Petitioner, represented by legal counsel, entered a plea of guilty to the indictment and executed a written plea agreement that stated in material part as follows:

Count Pleading To

The defendant shall enter a plea of guilty to Count One of the indictment. Count One charges the defendant with possession with intent to distribute and distribution of MDMA and marihuana, in violation of 21 U.S.C. Sections 841(a)(1).

* * *

Elements of the Offense

The defendant acknowledges understanding the nature and elements with which defendant has been charged and to which defendant is pleading guilty. The elements of Count One are:

First: That defendant knowingly possessed or distributed MDMA or marihuana as charged; and

Second: That defendant possessed the substance with the intent to distribute it.

* * *

Factual Basis

Defendant is pleading guilty because defendant is in fact guilty. The defendant certifies that defendant does hereby admit that the facts set forth below are true, and

were this case to go to trial, the United States would be able to prove those specific facts and others beyond a reasonable doubt.

FACTS

In October 2002, FBI task force officers received information from the Orange County Corrections Department that an inmate had filed a complaint alleging that inmates were involved in the sale of drugs such as heroin, cocaine and marihuana in the Orange County correctional facility, and that correctional officers were bringing the drugs into the jail. Follow up interviews with several inmates implicated defendant RICHARD BRANDENBERGER in smuggling illegal drugs into the facility for delivery to inmates. One inmate indicated that defendant was also smuggling ecstasy (MDMA) into the jail to inmates. The inmates would have someone outside the jail supply the drugs to defendant, who would bring the drugs into the jail for a fee. The inmates used their inmate accounts at the jail to fund these deals.

An inmate who was cooperating with investigators set up a meeting between an undercover officer and BRANDENBERGER outside the jail so the undercover officer could provide the MDMA and marihuana to defendant for delivery to the inmate in the jail. On July 2, 2003, the undercover officer called defendant and arranged to meet him in a parking lot in Orlando, Florida, to accomplish the drug transaction. During the meeting, which was videotaped, the undercover officer gave fifty MDMA pills and one ounce of marihuana to defendant. The drugs were clearly visible to defendant, and the officer told defendant that the bags contained marihuana and ecstasy. The officer told the defendant to deliver the marihuana and pills to the inmate, to which defendant replied, "I got to take care of my boys."

In a later interview, BRANDENBERGER admitted his involvement in this offense.

7. In April 2004, the Petitioner was adjudicated guilty of the crimes charged and sentenced to serve a term in prison, which he did.

8. After becoming aware of the conviction, the Respondent suspended payment to the Petitioner of the retirement benefits in November 2005.

9. At the hearing, the Petitioner testified that he did not actually take the pills into the facility. The charge, upon which the Petitioner was convicted, was that he "knowingly possessed or distributed MDMA or marihuana as charged" and that he "possessed the substance with the intent to distribute it." The distinction being made by the Petitioner's testimony is immaterial to the issue in this case.

10. The Petitioner also testified that he received no payment for smuggling the drugs into the jail, but acknowledged that he received \$50 from an inmate's girlfriend on one occasion to purchase gas. When directly asked by the Administrative Law Judge the reason for which the girlfriend would have given him the money, the Petitioner responded as follows:

I guess because I'm delivering the pills -- excuse me, not the pills, the weed, to her boyfriend.

11. The Petitioner's attempt to assert that he received no compensation for the delivery of the illegal substances to inmates lacked credibility and is rejected.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2006).

13. The Respondent has the burden of proof in this proceeding and must establish facts upon which its allegations are based by a preponderance of the evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). The Respondent has met the burden.

14. Article II, Subsection 8(d), Constitution of the State of Florida, provides in relevant part as follows:

Section 8. 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:

* * *

(d) 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.

15. Subsection 112.312(3), Florida Statutes (2006), provides the following definition:

"Breach of the public trust" means a violation of a provision of the State Constitution or this part which establishes a standard of ethical conduct, a disclosure requirement, or a prohibition applicable to public officers or employees in order to avoid conflicts between public duties and private interests, including, without limitation, a violation of s. 8, Art. II of the State Constitution or of this part.

16. Section 112.3173, Florida Statutes (2006), provides in relevant part 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.

(b) "Court" means any state or federal court of competent jurisdiction which is exercising its jurisdiction to consider a proceeding involving the alleged commission of a specified offense.

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

(d) "Public retirement system" means any retirement system or plan to which the provisions of part VII of this chapter apply.

(e) "Specified offense" means:

* * *

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.

(4) NOTICE.--

(a) The clerk of a court in which a proceeding involving a specified offense is being conducted against a public officer or employee shall furnish notice of the

proceeding to the Commission on Ethics. Such notice is sufficient if it is in the form of a copy of the indictment, information, or other document containing the charges. In addition, if a verdict of guilty is returned by a jury or by the court trying the case without a jury, or a plea of guilty or of nolo contendere is entered in the court by the public officer or employee, the clerk shall furnish a copy thereof to the Commission on Ethics.

(b) The Secretary of the Senate shall furnish to the Commission on Ethics notice of any proceeding of impeachment being conducted by the Senate. In addition, if such trial results in conviction, the Secretary of the Senate shall furnish notice of the conviction to the commission.

(c) The employer of any member whose office or employment is terminated by reason of his or her admitted commission, aid, or abetment of a specified offense shall forward notice thereof to the commission.

(d) The Commission on Ethics shall forward any notice and any other document received by it pursuant to this subsection to the governing body of the public retirement system of which the public officer or employee is a member or from which the public officer or employee may be entitled to receive a benefit. When called on by the Commission on Ethics, the Department of Management Services shall assist the commission in identifying the appropriate public retirement system.

(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.

(b) Any order of forfeiture of retirement system rights and privileges is appealable to the district court of appeal.

(c) The payment of retirement benefits ordered forfeited, except payments drawn from nonemployer contributions to the retiree's account, shall be stayed pending an appeal as to a felony conviction. If such conviction is reversed, no retirement benefits shall be forfeited. If such conviction is affirmed, retirement benefits shall be forfeited as ordered in this section.

(d) If any person's rights and privileges under a public retirement system are forfeited pursuant to this section and that person has received benefits from the system in excess of his or her accumulated contributions, such person shall pay back to the system the amount of the benefits received in excess of his or her accumulated contributions. If he or she fails to pay back such amount, the official or board responsible for paying benefits pursuant to the retirement system or pension plan may bring an action in circuit court to recover such amount, plus court costs.

(6) FORFEITURE NONEXCLUSIVE.--

(a) The forfeiture of retirement rights and privileges pursuant to this section is supplemental to any other forfeiture requirements provided by law.

(b) This section does not preclude or otherwise limit the Commission on Ethics in conducting under authority of other law an independent investigation of a complaint which it may receive against a public officer or employee involving a specified offense.

17. As set forth in the plea agreement, the facts under which the Petitioner was convicted clearly constitute a "specified offense" and subject the Petitioner's FRS retirement benefits to forfeiture.

18. As set forth in the plea agreement, the Petitioner smuggled illegal drugs into the jail for which he received a fee and provided them to inmates. As a correctional officer, the Petitioner was assigned the duty of supervising inmates to prevent illegal activity. The evidence establishes that the Petitioner, through the means of his employment as a correctional officer, committed a felony, and, in so doing, deprived the agency by which he was employed of the right "to receive the faithful performance of his or her duty as a public officer or employee" in exchange for monetary gain.

19. The Petitioner asserts that the Respondent prematurely suspended payment of the benefits in this case because the Petitioner's reading of Subsection 112.3173(5)(a), Florida Statutes (2006), requires that a hearing be conducted prior to suspension of payments. The Petitioner now argues entitlement,

at the very least, to payment of some type of interest on the allegedly-prematurely unpaid benefit.

20. A reading of the statute does not support the Petitioner's assertion. Had the Petitioner appealed his conviction, he would not have been entitled to payment of benefits during the appeals process. Subsection 112.3173(5)(c), Florida Statutes (2006), provides that "[t]he payment of retirement benefits ordered forfeited . . . shall be stayed pending an appeal as to a felony conviction." If the conviction had been vacated, the Respondent would have paid the benefits stayed during the appeal.

21. It is unlikely that an administrative hearing would be conducted on an issue of retirement benefit forfeiture while a conviction was on appeal. It is illogical to assume the Legislature intended that benefits would be paid during an appeal, either of an underlying conviction or through the administrative hearing process.

22. In any case, the evidence here clearly supports the forfeiture of benefits, and there is no provision for the payment of any kind of interest.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Respondent enter a final order

stating that the Petitioner has forfeited his rights and benefits under the Florida Retirement System.

DONE AND ENTERED this 7th day of February, 2007, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 7th day of February, 2007.

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.