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DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

W. D. CHILDERS,

Petitioner,

vs.

STATE OF FLORIDA,
DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,

Respondent.
_____/

Final Order No. DMS-07-0122

DOAH Case No. 07-2128
OGC Case No. 04-03615

FINAL ORDER

This cause came before me for the purpose of issuing a final agency order.

APPEARANCES

For Petitioner: I. Jeffrey Pheterson, Esq.
Buckingham, Doolittle & Burroughs, L.L.P.
5355 Town Center Road, Suite 900
Boca Raton, Florida 33451-0155

For Respondent: Geoffrey M. Christian, Esq.
Assistant General Counsel
Department of Management Services
Office of the General Counsel
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STATEMENT OF THE ISSUE

Whether, pursuant to Section 112.3173, Florida Statutes, Petitioner forfeited his rights and benefits under the Florida Retirement System (FRS), as a result of his convictions of (1) bribery, a third degree felony, in violation of Section 838.015, Florida Statutes, and (2) receipt of unlawful compensation or

reward for official behavior, a third degree felony, in violation of Section 838.016(1), Florida Statutes.

PRELIMINARY STATEMENT

By certified letter dated August 26, 2004, Respondent notified Petitioner of the agency action, pursuant to Section 112.3173, Florida Statutes, to forfeit his FRS rights and benefits. The agency action was premised on Petitioner's convictions in a state court proceeding wherein he had been charged with certain criminal offenses.

Petitioner timely sought an administrative review of the agency action and simultaneously moved to stay the proceedings pending the outcome of an appeal to the First District Court of Appeal in the criminal case upon which agency action was based. Respondent accepted Petitioner's request for an administrative hearing and granted Petitioner's motion for a stay.

On or about August 15, 2006, Petitioner again moved to stay the proceedings pending the outcome of an appeal to the Florida Supreme Court in the criminal case upon which agency action was based. Respondent granted Petitioner's motion.

On or about October 13, 2006, Petitioner again moved to stay the proceedings pending the filing of a Federal Habeas Corpus pleading in the United States District Court. Respondent did not enter an order in response to the motion, but, by letter dated January 22, 2007, inquired as to the status of Petitioner's appeals. The case then was transferred to the Division of Administrative Hearings for the assignment of an administrative

law judge to conduct a formal hearing pursuant to Section 120.57(1), Florida Statutes.

The matter was ultimately heard on July 17, 2007. At the hearing, Petitioner offered the testimony of his wife, Ruth Childers, over Respondent's objection. Petitioner's Exhibits 1 through 4 were received into evidence, also over Respondent's objections. Respondent presented the testimony of Andy Snuggs, a Benefits Administrator at its Bureau of Calculations. Respondent's Exhibits 2, 3, 5, and 6, were received into evidence without objection. Petitioner stipulated to Respondent's request for admissions, numbers 1 through 10, and Respondent's unilateral response to pre-hearing order, paragraph (e), numbers 1 through 7 and 9 through 13.

The transcript of the proceeding was filed with the Division of Administrative Hearings on July 27, 2007. The parties' proposed recommended orders were timely filed and were duly considered by the Administrative Law Judge in preparing her Recommended Order. The Administrative Law Judge submitted her Recommended Order and all exhibits offered into evidence to the Division. A copy of the Recommended Order is attached hereto and made a part hereof. In addition, Petitioner submitted exceptions to the Recommended Order. Petitioner's exceptions have been duly considered in preparing this final agency order.

STANDARD OF REVIEW

Subsection 120.57(1)(l), Florida Statutes (2007), provides that an agency reviewing a Division of Administrative Hearings

recommended order may reject or modify the findings of fact of an Administrative Law Judge if "the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." Florida law defines "competent substantial evidence" as "such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla.1975). However, an agency may not create or add to findings of fact because it is not the trier of fact. See Friends of Children v. Department of Health and Rehabilitative Services, 504 So.2d 1345, 1347, 1348 (Fla. 1st DCA 1987).

Subsection 120.57(1)(l), Florida Statutes (2007), provides that an agency may reject or modify an Administrative Law Judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction" whenever the agency's conclusions or interpretations are "as or more reasonable" than the conclusions or interpretations made by the Administrative Law Judge. Florida courts have consistently applied this subsection's "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the Administrative Law Judge's application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the Administrative Law

Judge's interpretation of a statute or rule over which the Legislature has provided the agency administrative authority. See Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So.2d 1140, 1141-42 (Fla. 2nd DCA 2001); Barfield v. Department of Health, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001). Further, an agency's interpretation of the statutes and rules that it administers is entitled to great weight, even if it is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. See State Board of Optometry v. Florida Society of Ophthalmology, 538 So.2d 878, 884 (Fla. 1st DCA 1998).

PETITIONER'S EXCEPTIONS TO FINDINGS OF FACT

Petitioner excepts to the failure of the Administrative Law Judge to include in her Recommended Order certain findings of fact that were outlined in Petitioner's Proposed Recommended Order. The Department finds Petitioner's exceptions to be without merit and, as grounds, states:

1. Exception 1, addressed in paragraphs 7, 11, and 17 of the Recommended Order, is cumulative and is denied.

2. Exception 2, addressed in paragraphs 7, 11, and 17 of the Recommended Order, is cumulative and is denied.

3. Exception 3, addressed in paragraphs 4, 7, 11, and 17 of the Recommended Order, is cumulative and is denied.

4. Exception 4, addressed in paragraphs 3, 4, and 5 of the Recommended Order, is cumulative and is denied.

5. Exception 5 is nonsensical and is denied.

6. Exception 6 is immaterial and is denied.

7. Exception 7 is immaterial and is denied.

8. Exception 8 is not supported by the record and is denied.

9. Exception 9, addressed in paragraphs 3, 5, and 11 of the Recommended Order, is cumulative and is denied.

10. Exception 10, addressed in paragraphs 4, 5, and 11 of the Recommended Order, is cumulative and is denied.

11. Exception 11, addressed in paragraphs 3, 4, 5, and 11 of the Recommended Order, is cumulative and is denied.

12. Exception 12, even if true, is immaterial and is denied.

13. Exception 13, even if true, is immaterial and is denied.

14. Exception 14, even if true, is immaterial and is denied.

15. Exception 15, even if true, is immaterial and is denied.

16. Exception 16, even if true, is immaterial and is denied.

17. Exception 17, even if true, is immaterial and is denied.

18. Exception 18 is not supported by citations to the record and is denied.

19. Exception 19, even if true, is immaterial and is denied.

20. Exception 20, even if true, is immaterial and is denied.

21. Exception 21, even if true, is immaterial and is denied.

22. Exception 22, even if true, is immaterial and is denied.

23. Exception 23, even if true, is immaterial and is denied.

24. Exception 24, even if true, is immaterial and is denied.

25. Exception 25, even if true, is immaterial and is denied.

26. Exception 26, even if true, is immaterial and is denied.

27. Exception 27, addressed in paragraphs 7, 11, and 17 of the Recommended Order, is cumulative and is denied.

PETITIONER'S EXCEPTIONS TO CONCLUSIONS OF LAW

Petitioner excepts to the failure of the Administrative Law Judge to include in her Recommended Order certain conclusions of law that were outlined in Petitioner's Proposed Recommended Order. The Department finds Petitioner's exceptions to be without merit. The Department notes Petitioner's exceptions merely reiterate the conclusions of law he presented at hearing and in his Proposed Recommended Order. In addition, the Department notes the Administrative Law Judge clearly and specifically addressed the various aspects of Petitioner's

positions on these matters in her Recommended Order. Under these circumstances, the Department is not obligated to respond to Petitioner's exceptions to the alleged failure of the Administrative Law Judge to include Petitioner's proposed conclusions of law. Britt v. Department of Professional Regulation, 492 So.2d 697 (Fla. 1st DCA 1986); Adult World Inc. v. State of Florida Division of Alcoholic Beverages & Tobacco, 408 So.2d 605 (Fla. 5th DCA 1982). Accordingly, Petitioner's exceptions are denied.

FINDINGS OF FACT

The Department hereby adopts and incorporates by reference the Findings of Fact set forth in the Recommended Order.

CONCLUSIONS OF LAW

The Department hereby adopts and incorporates by reference the Conclusions of Law set forth in the Recommended Order, with the exception of the portion of paragraph 17 which refers to the use of the forfeiture statute to "strip ... [Petitioner's] beneficiaries" of Petitioner's FRS rights and benefits. To the contrary, designation as a beneficiary provides Petitioner's beneficiary only a contingent interest, at best, that could have been terminated by Petitioner, without consent, at any time. Section 121.091(6)(d), Florida Statutes. The events required for any such beneficial interest to rise to the level of entitlement to administrative due process protections in the present instance would require that such beneficiary survive Petitioner and that such beneficiary establish his or her continuing right to receive

benefits. Petitioner's beneficiary's interest has 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.

Based upon the foregoing it is,

ORDERED and DIRECTED that, pursuant to Section 112.3173, Florida Statutes, Petitioner forfeited his rights and benefits under the Florida Retirement System, as a result of his convictions of bribery, a third degree felony, in violation of Section 838.015, Florida Statutes, and receipt of unlawful compensation or reward for official behavior, a third degree felony, in violation of Section 838.016(1), Florida Statutes.

DONE and ORDERED on this 26 day of Sept, 2007.

LINDA H. SOUTH, Secretary
Department of Management Services
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Tallahassee, Florida 32399

Copies to:

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NOTICE OF RIGHT TO APPEAL

UNLESS EXPRESSLY WAIVED BY A PARTY SUCH AS IN A STIPULATION OR IN OTHER SIMILAR FORMS OF SETTLEMENT, ANY PARTY SUBSTANTIALLY AFFECTED BY THIS FINAL ORDER MAY SEEK JUDICIAL REVIEW BY FILING AN ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF MANAGEMENT SERVICES, AND A COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE CLERK OF THE APPROPRIATE DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER, IN ACCORDANCE WITH RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, AND SECTION 120.68, FLORIDA STATUTES.

Certificate of Clerk:

Filed in the Office of the Agency Clerk of the Department of Management Services on this 27th day of September, 2007.

Debbie Stroup
Agency Clerk

DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF FLORIDA
(Department Of Management Services,

Division Of Retirement of the State of Florida)

W. D. CHILDERS, Petitioner

Case No. 07-2128

v.

DEPARTMENT OF MANAGEMENT SERVICES,

DIVISION OF RETIREMENT, Respondent/

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 17, 2007, with the Petitioner appearing in West Palm Beach, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida. The Recommended Order was issued by the Administrative Law Judge on August 31, 2007. These exceptions are filed with the Department Of Management Services, Division Of Retirement of the State of Florida.

The following proposed findings of fact and conclusions of law presented in this proceeding are supported by competent substantial evidence in the record, and the Petitioner excepts to the failure of the Administrative Law Judge to make such findings and conclusions. The numbering system below refers to the numbers of the original proposed findings of fact in the Proposed Recommended Order Of Petitioner. Those portions of the Conclusions of Law not adopted are also set forth below.

1. 3. Petitioner was never arrested for, nor convicted of, any crimes during his tenure in the as a math teacher in Escambia County. (T-37, Transcript of hearing, at page ___.)

2. 5. Petitioner was never arrested for, nor convicted of, any crimes during his tenure in the Florida Senate. (T-38)

3. 6. Petitioner was forced to retire in 2000 from the Florida Senate by term limits imposed by the Florida Constitution, based upon an initiative passed by the voters in Florida in 1992. Fla. Const. Art. VI, § 4 (2007). He was constitutionally prohibited from continuing this State employment, through his elected office as a member of the Florida Senate. That period of State employment, with that State employer, was concluded without any legal concerns, and was served by Petitioner with merit and with distinction.

4. 7. Petitioner was employed by three separate employers, each with separate plans under FRS. (T-39) This is admitted by Respondent.

5. 8. Mr. Snuggs, Benefits Administrator for Respondent, admitted that although the FRS benefits received may be identical, these are separate three employers. (T-39)

6. 9. Mr. Snuggs, Benefits Administrator for Respondent, admitted that each separate employer has a separate payroll. (T-39)

7. 10. Mr. Snuggs, Benefits Administrator for Respondent, admitted that each separate employer has a different contribution rate. (T-39)

8. 11. Mr. Snuggs, Benefits Administrator for Respondent, admitted that each separate employer has a separate pension plan. (T-39)

9. 12. While employed by the School Board of Escambia County, Petitioner was in the Teachers' Pension Fund. (T-36) The School Board of Escambia County is a separate and distinct employer from the Escambia County Board of County Commissioners.

10. 13. While employed by the State of Florida directly, with the Florida Senate, he was in the "HE - state elected official" plan of the FRS for purposes of determining his pension benefits. The State of Florida is a separate and distinct employer from the Escambia County Board of County Commissioners.

11. 14. While employed by the Escambia County Board of County Commissioners directly, he was in the "HI - county elected official" plan of the FRS for purposes of determining his pension benefits. Again, this is a separate and distinct employer from his two prior public employers.

12. 15. Ruth Childers testified at the hearing, Petitioner's wife of fifty three and a half years. Ms. Childers is the primary beneficiary of W.D. Childers under the FRS pension.

13. 16. W.D. Childers currently resides in Palm Beach County, Florida. (T-55) (Re: potential appellate venue)

14. 18. Once elected to the Florida Senate, W.D. Childers took his responsibilities as an elected official seriously. As Ms. Childers relates, "He was the first one in public office as a legislator where people could come and visit and bring their problems to a legislator. Before that time most of them were lawyers and businessmen. The only access you had to them usually was if they came to the session in Tallahassee. Or else you made an appointment to go see them at their place of business as a client." (T-46)

15. 19. "He let everybody know you could come and see me with your problems or you can call me on the telephone. And they did. It did not take long and it was a total full time job. People just didn't being legislative problems. Government is complicated. People had problems with getting driver's licenses. They had problems with food stamps. They had problems of every

kind. And he didn't turn anybody away. There were things you could not do that he directed them to the right people and to the offices where they could get help." (T-46, 47)

16. 20. "He worked for them full time; back and forth to Tallahassee. He would be gone for all week and come home on the weekends. And there was no interstate at that time. It was a long, hard drive. And when he was in Tallahassee in sessions, again, it was full time. He went with no experience. He read all the bills. He went to every committee meeting. He watched and listened and he learned to be an effective legislator. And he took it seriously. He was not in a country club. He did not play golf. All he did was work from early morning until late at night. And this went on for thirty years." (T-47)

17. 21. W. D. Childers' salary or compensation as a Senator during his Senate years was modest. Ms. Childers reported that "for most of the time, it was about twelve thousand dollars a year. And then near the end of his term it went up; finally, to eighteen thousand. I think the year he served as Senate President, he got an extra two thousand. So for two years he made twenty thousand dollars. Most of the rest of the time it was twelve thousand a year in the Senate.... His work was full time. The pay was not." (T-56, 57)

18. 22. FRS retirement benefits are part of an employee's compensation package. In this case, an important part.

19. 23. W. D. Childers had an unrivaled tenure of service in the Florida Senate. His thirty year career included election by his peers to the post of Senate President from 1980 to 1982. He was Dean of the Florida Senate, or the Senator with the longest tenure in the Senate in Florida history, from 1988 to 2000, a distinction which will remain his as long as the constitutionally mandated term limits exist. Petitioner's Exhibit 1 (P-1)

20. 24. His district originally covered four counties; Escambia, Santa Rosa, Okaloosa, and Polk. In this District 1, W. D. Childers funded public works projects, prisons, and authorized and funded the civic center, state parks, roads, judicial buildings, and an historic district. He also funded the arts. (T-49) (P-2) Based upon personal experiences with disabilities in friends and family, he became an outspoken advocate for the disabled in the Florida Legislature. (T-53, 54)

21. 25. He chaired the Ways and Means Committee, and, among others, the Appropriations, Commerce, Insurance, Community Affairs, Agriculture and Transportation Committees. (T-50) (P-3) He chaired and served on the Natural Resources Committee, being an early supporter of ecology. He served on numerous Conference Committees to resolve differences between the House and Senate on legislation.

22. 26. Ms. Childers testified that "From morning until night there are committee meetings and he never missed." (T-50).

23. 27. His lists of achievements and recognition for public service is extensive. (P-4) His office was just covered; the walls were covered in plaques, and framed things; all kind of things that were given to him in appreciation for different legislation that he had passed.... I think there are a hundred and sixteen in total." (T-53)

24. 28. This Senate tenure affected the family. "A lot of speeches. A lot of dinners. I mean it wasn't just him, it was the whole family. It took away from our children. From the time he was elected we had four daughters. I had them ages three, seven, eleven, and fifteen. So I was busy. I mean, he missed graduations. He missed recitals. A lot of things that he missed with the children because of his public service." (T-52)

25. 29. The State Senate related pension benefits are important for the financial well being of this family. Ms Childers testified that, "Well, it's important. First the principle that he earned it

and deserves it, and rightfully should be eligible for it. But also, I get six hundred and thirty four dollars a month through Social Security.... Of course, it's important. But just the principle is important to me as anything, but the funds, of course, are important as well. Because, I mean, the children are grown, but I have eight grandchildren, six great-grandchildren. You know, somebody is always in need." (T-59)

26. 30. The Childers family, including but not limited to Ms. Childers, has a demonstrated reliance on these benefits and would suffer greatly if the forfeiture is granted.

27. 34. Respondent has admitted that these criminal convictions were in *no way* related to Petitioner's thirty years of service in the Florida Senate, or his tenure as a school teacher.

CONCLUSIONS OF LAW

First, this is a case of first impression. The question in this case has not arisen previously whether conviction of a specified criminal act by a former state employee which was committed after voluntary termination or retirement from employment with one employer in the FRS system jeopardizes that former employee's pension and credits from earlier periods of FRS employment with separate and distinct employers. There are no Court decisions discovered to date adverse to Respondent's position.

All reported decisions involve the forfeiture of a pension based upon an act taken by the employee in the course and scope of (or during) the same employment which lead to entitlement to that pension.

The absence of contrary precedent supports Petitioner's right to these benefits. As stated in more detail below, as a general rule forfeitures are not favored either in law or equity and the Division and the Courts must strictly construe forfeiture statutes.

Second, the framework for consideration of this issue under Florida law is based on a contract analysis. Public employee pensions are considered to be a contract between the employee and employer, or plan administrator. The terms of the contract are imposed by law. For example, the pension is accrued by certain types of service at certain rates, and it may be forfeited if certain acts occur, all as set forth in the statutes.

Public employee pensions are a part of the bargain struck by public employees concerning their compensation, which often works to the benefit of the employer. In this instance, the contractual framework assists the position taken by Petitioner.

The contract analysis is straightforward. If a then current employee commits a specified offense (not the date of conviction, look to the dates of the underlying criminal actions), then under the terms of that contract, he has breached the contract, and he loses the rights to benefits under the contract as to that employer.

If however, at the time of the conclusion of employment no prior specified offense has been committed, as here with Petitioner and the State, then the employee has satisfied all of the terms of that contract concerning that employment, and the pension rights of the employee are vested. The pension should be locked in.

misinterpret

Essentially, once an employee concludes employment with that entity, without a disqualifying act occurring prior to the end of that employment, then the employee's rights to that pension should be vested.

Petitioner's entitlement to these benefits is entirely consistent with language in the two seminal cases on this topic from the Supreme Court of Florida, *Florida Sheriff's Association v.*

Department of Administration, Division of Retirement, 408 So. 2d 1033; 1981 Fla. LEXIS 2934 (Fla. 1981) and *State of Florida ex rel. Stringer v. Lee*, 2 So. 2d 127 (Fla. 1941).

In *Florida Sheriff's Association*, 408 So. 2d at 1036, the Supreme Court of Florida stated:

> Although, ... this Court has stated that the legislature can alter retirement benefits of active employees, the Court has also expressly held that, whether in a voluntary or mandatory plan, once a participating member reaches retirement status, the benefits under the terms of the act in effect at the time of the employee's retirement vest. The contractual relationship may not thereafter be affected or adversely altered by subsequent statutory enactments.

In *Stringer*, 2 So. 2d at 132, the Supreme Court of Florida held that:

> An employee fulfilling [the statutory] conditions then has a vested interest in retirement pay which cannot be destroyed, weakened, or departed from by subsequent legislation. Neither dismissal from service or office, nor any involuntary removal, can affect this vested right to retirement pay. We endeavored to specifically hold in the McGovern case that eligibility for retirement pay is complete as soon as an employee or member of the retirement system has satisfied the conditions requisite for retirement, whether the employee chooses to retire immediately or to continue in active service. His rights to such pay are fixed as of the time he attained eligibility. Until retirement pay is earned as above described the right is inchoate. During this period retirement pay is being built up. The inchoate right becomes a complete vested right when the conditions connected with the particular retirement system are complied with. This right cannot be thereafter disturbed by legislation.

The context of the two cases above concerns amendments to pension legislation, and in each case, the employee was deemed entitled to the benefits in place at the time employment ended, not based on subsequent legislative amendments at a later time.

The contract regarding the pension was complete, and thus deemed unchangeable, as of the end of the employee's employment. At the employee's eligibility to receive retirement pay at the end of employment, his rights to such benefits "are fixed" as noted above, and this remains

true "whether the employee chooses to retire immediately or to continue in active service." *State of Florida ex rel. Stringer v. Lee*, 2 So. 2d at 132.

Consequently, the appeal of Petitioner should be found to be meritorious based on the principles of Florida law underlying these cases. At the time his employment with the State ended, no specified actions whatsoever had occurred. Thus, the contract with regard to the State Senate employment and prior teacher employment was complete regarding his compensation, including its pension component, and consequently, his eligibility for benefits was likewise unchangeable, as of the end of his employment.

FORFEITURE STATUTES ARE NOT FAVORED AND MUST BE STRICTLY CONSTRUED

"Forfeiture statutes are not favored and are strictly construed in favor of the party against whom the penalty is sought to be imposed." *Cabrera v. Department of Natural Resources*, 478 So. 2d 454, 455-56 (Fla. 3d DCA 1985) (citing *inter alia*, *Boyle v. State*, 47 So. 2d 693 (Fla. 1950)).

Sections 112.3173 and 121.091, Florida Statutes, mandate that enumerated offenses *in connection with the employment*, which result in convictions, committed *prior to retirement* subject an employee's FRS pension benefits to forfeiture. It is logical that Petitioner should not have his benefits accrued during his service in the Florida Senate forfeited nor should his benefits from his tenure as a math teacher from 1955-1957 be forfeited.

There is a statutory requirement of a *nexus* between the crimes charged against the public officer and his or her duties and/or position. *DeSoto v. Hialeah Police Pension Fund Bd. of Trustees*, 870 So.2d 844 (Fla. 3d DCA, 2003).

Not required
no nexus

STATUTORY CONSTRUCTION – OTHER STATES

This is a novel issue of law and a case of first impression in Florida and it is proper to look to sources of law from outside the jurisdiction of the State of Florida for guidance. Illinois and New Jersey have similar pension statutes when compared with Florida. Petitioner would receive the earlier earned credits under the laws in those states (but not the Escambia County credits), under similar, but admittedly not identical, statutory language. A review of the rationale of those sister state Supreme Court decisions is instructive.

Illinois' pension statute §7-219 provides:

> None of the benefits provided for in this Article shall be paid to any person who is convicted of any felony *relating to or arising out of or in connection with his service as an employee.*
>
> This Section shall not operate to impair any contract or vested right heretofore acquired under any law or laws continued in this Article, nor to preclude the right to a refund.

The language in the pension forfeiture statute in Illinois is more sweeping than the corollary Florida statute. Forfeitures occur after the conviction of *any* felony with no language requiring that the offense was committed prior to retirement, as is the case under Florida law.

Despite this more broad statutory prohibition, as reflected below, the Courts in Illinois (and presumably the related Illinois state agency) would grant pension benefits to W.D. Childers for his Senate tenure and teaching employment, on the facts which are reflected in the record in this case.

In *Taddeo v. Bd. of Trustees of the Ill. Municipal Retirement Fund*, 837 N.E. 2d 876 (Ill. 2005), the Illinois Supreme Court logically held that a requirement exists in Illinois that a *nexus* must be present between the convictions and the service as an employment for a government pension to be forfeited. This holding is similar to the Florida *DeSoto* case requiring a nexus.

The facts in *Taddeo* reflect the following. C. August Taddeo ("Taddeo") served as a township supervisor from 1969 until 1999 (thirty years) and he served an overlapping term as a village mayor from 1972 until 1997 (twenty five years, all within the same period as his township supervisor tenure). He thus earned concurrent service credits in the Illinois Municipal Retirement Fund ("IMRF" or "Board") because of his participation in, and contributions to, the IMRF as both township supervisor and mayor.

Taddeo pled guilty to an extortion charge relating to his service as mayor. Following his guilty plea and conviction, the IMRF, pursuant to Section 7-219 of the Illinois Code (see above), notified Taddeo that all of his pension benefits were being terminated as a result of his felony conviction. His attempt to secure benefits was denied initially because of the felony convictions, based on Section 7-219.

Taddeo requested an appeals hearing at the administrative level to contest the forfeiture of his pension benefits. In that appeals process he conceded that his felony convictions were "related to" and "in connection with" his employment as mayor and that pursuant to Section 7-219, any IRMF pension benefits to be received as a result of his mayoral service must be forfeited. *Id.* at 878. He argued that his pension benefits accrued from his service as township supervisor should not be forfeited because there was no nexus between his service as township supervisor and his felony convictions. *Id.* at 878. The Board disagreed with Taddeo, and reasoned that, because Taddeo was "an employee" and committed felonies related to his employment with one of his IMRF employers, he was entitled to "*none* of the benefits."

On appeal, the Illinois Supreme Court reversed, as it determined that the legislative intent and proper interpretation of Section 7-219 did not justify the harsh effects of forfeiture. The IRMF argued before the Court in support of denial of these benefits that the plain language of the

statute must be read literally, and that Taddeo should be denied *all* benefits because he committed *a felony* related to or in connection with his service as an employee. The Board argued that "an employee" should be interpreted broadly to mean an employee of *any* IRMF employer.

The Illinois Supreme Court held that Taddeo was to forfeit his pension benefits arising from his service as a mayor, but that Taddeo was entitled to receive his benefits arising from his concurrent employment as a township supervisor. The Court recognized that there was a nexus between the felonious acts and Taddeo's mayoral service, but no such nexus existed between the felonious acts and his service as a township supervisor. Without such a nexus, there is no basis for disqualifying Taddeo from receiving his benefits from his service as a township supervisor. *Id.* at 880.

In *Taddeo*, the Illinois employee earned service credits from separate employers *concurrently* into the same pension fund, whereas Petitioner earned service credits from separate employers during *separate and distinct tenures which did not overlap. Taddeo* presented a much harder case, and the pension was still protected.

In New Jersey, a balancing test is used for every pension forfeiture matter. Currently, this balancing test is enacted in the public pension legislation. However, this was not always true.

The pension forfeiture statute for policemen and firemen, prior to 1982, stated that any pension benefits owed to an employee were subject to *honorable service*. *See* New Jersey Laws of 1981, Chapter 241 (amending the pension laws of NJ in NJ Stat. 43:16-1). Any dishonorable action would trigger pension forfeiture, not only felonies. The statute was very broad and expressly required honorable service.

The New Jersey Supreme Court held that full pension forfeiture for any public employee was not equitable for one act of dishonorable service after many years of faithful service. *Uricoli v. Bd. of Trustees, Police and Firemen's Retirement System*, 449 A. 2d 1267 (N.J. 1982).

In *Uricoli*, a policeman was convicted for a single ticket-fixing incident after twenty years of flawless service. When the policeman applied for pension benefits, his request was denied, despite the prior decades of honorable and faithful service. The statute in effect at the time expressly provided that an employee must have "served honorably" to be eligible for pension benefits. As here, and in *Taddeo*, the state pension board denied Uricoli's pension claim because of his conviction.

His appeal reached the New Jersey Supreme Court. The Court, rather than deem Uricoli's conviction as a trigger for automatic statutory forfeiture of his full pension benefits, created a balancing test. This test was used to determine how much of his pension was to be forfeited because of the conviction, and what factors would be considered in reaching that determination. Among the factors that are part of this balancing test include the member's length of service; the member's public employment history and record covered under the retirement system; any other public employment or service; the relationship between the misconduct and the member's public duties; the availability and adequacy of other penal sanctions; and the personal circumstances relating to the member which bear upon the justness of forfeiture. This balancing test subsequently was codified by the New Jersey Legislature in 1996 in New Jersey Statute §43:1-3.

In *Eyers v. State of N.J., Bd. of Trustees Pub. Emp. Retirement Sys.*, 449 A. 2d 1261, (N.J. 1982), a pension member's spouse requested survivor benefits and was denied by the pension board because of her deceased spouse's convictions stemming from misconduct while in

public office. The *Eyers* court used the balancing test from *Uricoli* to invalidate the full denial of benefits and award the spouse with the benefits earned prior to the misconduct. The spouse showed a demonstrated need to the pension benefits. *Eyers* involved the spousal benefits of a public employee who was convicted of misconduct in office and taking money unlawfully. The Court determined that, after adjusting the pension benefits owed to the husband using the *Uricoli* balancing test, the survivor should receive those benefits earned through the time of the deceased's misconduct in office and nothing after that period. Section 43:1-3, New Jersey Statutes, as amended after these decisions, still conditions pension benefits upon honorable service, but includes the *Uricoli* balancing test.

In the instant case of first impression, the use of the strict construction principles of law applicable in forfeiture cases comes into play, and thus the strict construction utilized by the Illinois Supreme Court, or the balancing test created by the New Jersey Supreme Court is appropriate.

Clearly, use of different statutory schemes may lead to different results. However, the commonalities in these cases predominate – a clean period of employment, particularly a long and well-served period, and more particularly, employment with separate and distinct prior employers, in different plans, militates in favor of granting – and not forfeiting - pension benefits.

The penalty to be exacted by these statutes is loss of pension rights related to a conviction for corrupt public employment. If Petitioner previously had been in an unrelated municipal pension system, and then was convicted as a County Commissioner, his non-FRS City pension would not be touched. If he had been a federal employee previously, that federal pension would be sacrosanct, as it was "fixed" before the subsequent conviction. His prior employment, albeit

with employers within the FRS master system, must be viewed in the same manner. This is a due process concern of fundamental importance, implicating equal protection concerns.

The family of W. D. Childers supported Senator Childers throughout his Senate tenure. He earned his pension by thirty years of daily accomplishments through many legislative sessions, and by his decades of diligent and unblemished service to the citizens of the State of Florida in the Senate. During his career he was lauded for his work on may issues, to advance the health safety and welfare of the people of Florida.

These Herculean efforts, which are unrebutted in this record, took a toll on his wife and his family. Ms. Childers is an intended beneficiary of this pension system. One of the silver linings to his absences and out-of-town work in the Senate (if satisfaction in a job well done was not sufficient) was the fact that he had earned a pension that would provide some financial security for his family. His family now needs this pension.

It is apparent that there is absolutely no *nexus* between Petitioner's criminal convictions and his thirty two years of service in the Florida Senate and as a teacher in Escambia County. As was the case in *Taddeo*, that nexus is crucial to the forfeiture decision. Moreover, the equitable considerations that the courts looked to in *Uricoli* would permit Petitioner and his family to retain his pension benefits arising from his tenure in the Florida Senate and as a teacher, while mandating that the pension benefits earned in Escambia County are to be forfeited.

Based on the findings of fact, conclusions of law and applicable precedent herein, the Division has not established that Petitioner's conviction, in itself, mandates forfeiting of his entire FRS pension, and the Division has not established that Petitioner's convictions relate to his long periods of unsullied and stipulated good creditable employment with these two prior employers before December 2001. Additionally, the Division has not met its burden of

demonstrating a nexus between Petitioner's convictions and prior periods of employment. Accordingly, Petitioner did not commit a specified offense that justifies the forfeiture of his pension benefits earned prior to his service for the Escambia County Board of County Commissioners.

Based on the foregoing Findings of Fact and Conclusions of Law, the Department of Management Services should enter a final order restoring Petitioner's pension benefits under the FRS accrued through and including November 2000, encompassing his tenure with the School Board of Escambia County and Florida Senate tenures, prior to his period of employment by the Escambia County Board of County Commissioners, and forfeiting only those benefits which relate to his employment by the Escambia County Board of County Commissioners.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof was furnished, by fax and U. S. Mail, this 14th day of September, 2007 to:

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Respectfully submitted,

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