

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

W. D. CHILDERS,)
)
 Petitioner,)
)
 vs.) Case No. 07-2128
)
 DEPARTMENT OF MANAGEMENT,)
 SERVICES, DIVISION OF)
 RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 17, 2007, by video teleconference, with the Petitioner appearing in West Palm Beach, Florida, and the Respondent appearing in Tallahassee, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: I. Jeffrey Pheterson, Esquire
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For Respondent: Geoffrey M. Christian, Esquire
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STATEMENT OF THE ISSUE

Whether the Petitioner's rights and benefits under the Florida Retirement System ("FRS") have been forfeited as set forth in the Notice of Forfeiture of Retirement Benefits dated August 26, 2004.

PRELIMINARY STATEMENT

In a Notice of Forfeiture of Retirement Benefits dated August 26, 2004, the Department of Management Services, Division of Retirement ("Division"), notified W.D. Childers that his rights and benefits under the FRS were forfeited as a result of his conviction of bribery and unlawful compensation for acts committed while he was employed by the Escambia County Commission. According to the notice, the convictions constituted violations of Section 112.3173, Florida Statutes, which provides for forfeiture of all rights and privileges under the FRS upon conviction of offenses specified in Section 112.3173(2)(e). Mr. Childers timely requested a formal administrative hearing but also requested that the Division stay the proceedings pending the outcome of several appeals of his convictions. The Division transmitted the matter to the Division of Administrative Hearings on May 11, 2007, for assignment of an administrative law judge. Pursuant to notice, the final hearing was held on July 17, 2007.

At the hearing, the Division offered its evidence first, and it presented the testimony of Andy Snuggs; Respondent's Exhibits 2, 3, 5, and 6 were offered and received into evidence. Mr. Childers presented the testimony of his wife, Ruth Childers, and Petitioner's Exhibits 1 through 4 were offered and received into evidence. The parties stipulated to the matters included in the Division's Request for Admissions numbered 1 through 10 and to the facts set forth in the Division's Unilateral Response to Pre-Hearing Order numbered 1 through 7 and 9 through 13. These stipulated facts have been incorporated in the Findings of Fact herein, to the extent that they are relevant to resolution of the issue presented.

The one-volume transcript of the proceedings was filed with the Division on July 27, 2007, and the parties timely filed proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, on the stipulation of the parties, and on the entire record of this proceeding, the following findings of fact are made:

1. The Division is the state agency charged with the responsibility of managing, governing, and administering the FRS on behalf of the Department of Management Services.

2. The FRS is a public retirement system as defined by Florida law. It provides benefits to local and state employees, including teachers, state legislators, and local public officials.

3. Mr. Childers was employed as a school teacher in Escambia County from 1955 to 1957, and this employment continued for approximately two and one-half years. During this time, Mr. Childers was a member of the Teacher Retirement System, which later became part of the FRS. His two and one-half years of service as a teacher is credited service under the FRS.

4. In November 1970, Mr. Childers was elected to serve as a member of the Florida Legislature, and he continued to serve as a state legislator until November 2000, when he left office as a result of term limits. As a state legislator, Mr. Childers was a member of the FRS class of State Elected Officials, and his 30 years of service is credited service under the FRS.

5. In November 2000, Mr. Childers was elected to serve as a member of the Escambia County Board of County Commissioners. In this position, Mr. Childers was a member of the FRS class of County Elected Officials, and his years of service as a County Commissioner is credited service under the FRS.

6. On or about June 17, 2002, Mr. Childers was charged by indictment with one count of money laundering, a second-degree felony pursuant to Section 896.101(3)(a)1. and 2.a. and (5)(b),

Florida Statutes (2002)¹; one count of bribery, a third degree felony pursuant to Section 838.015, Florida Statutes²; and one count of receipt of unlawful compensation or reward for official behavior, a third degree felony pursuant to Section 838.016(1), Florida Statutes.³

7. The charges in the June 17, 2002, indictment were based solely on activities allegedly occurring subsequent to November 2000 and arising out of Mr. Childers's service as a member of the Escambia County Board of Commissioners.

8. Mr. Childers was tried and found guilty by a jury of two counts in the indictment, bribery and unlawful compensation or reward for official behavior.⁴

9. On or about May 16, 2003, Mr. Childers was adjudicated guilty of these two crimes and was sentenced to 42 months in prison, to be followed by 18 months probation.

10. Mr. Childers has not, to date, applied for retirement benefits under the FRS.

11. Mr. Childers was a public officer who was adjudicated guilty of two offenses specified in Chapter 838, Florida Statutes, which arose out of his service as a member of the Escambia County Board of Commissioners. None of the actions related to his service as a state legislator or as a teacher in Escambia County.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2007).

13. Article II, Section 8(d), Florida Constitution (1976), provides in pertinent part:

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.

14. Section 112.3173, Florida Statutes, 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 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:

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.

The Division asserts that all of Mr. Childers's rights and benefits under the FRS must be forfeited pursuant to Section 112.3173(3), Florida Statutes, because Mr. Childers was convicted of two felonies specified in Sections 838.015 and .016, Florida Statutes, bribery and unlawful compensation or reward for official behavior, which are "specified offenses" pursuant to Section 121.2173(2)(e)4., Florida Statutes.

15. The Division, as the party asserting that Mr. Childers's rights and benefits under the FRS should be forfeited, bears the burden of proof in this proceeding. See Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 788 (Fla. 1st DCA 1981)("In accordance with the general rule, applicable in court proceedings, 'the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.'")

Balino v. Department of Health & Rehabilitative Serv., 348 So. 2d 349 (Fla. 1st DCA 1977.").

16. The statutory forfeiture provision at issue herein is not penal and does not involve disciplinary action against a license. See Busbee v. State, Division of Retirement, 685 So. 2d 914, 918 (Fla. 1st DCA 1996)(statutory FRS pension forfeiture provision does not impose punishment or involve disciplinary action). The standard of proof, therefore, is "preponderance of the evidence." See § 120.57(1)(j), Fla. Stat. (2007)("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute").

17. Mr. Childers and the Division have stipulated to most of the facts material to resolution of the issue presented in this case. The parties dispute the application of Section 112.3173(3), Florida Statutes, to strip Mr. Childers and his beneficiaries of all the rights and benefits under the FRS that he accrued as a teacher and state legislator in the 32 years prior to his service on the Escambia County Board of Commissioners. There is no dispute that the offenses for which Mr. Childers was convicted were committed subsequent to his giving up his seat in the Florida Legislature as a result of

term limits and were not in any way related to his service prior to his membership on the Escambia County Board of Commissioners.

18. As a forfeiture statute, Section 112.3173(3), Florida Statutes, must be strictly construed if there is any ambiguity in the language of the statute or if it rests on uncertain authority. Judge Cope, in his dissenting opinion in Warshaw v. City of Miami Firefighters' & Police Officers' Ret. Trust, 885 So. 2d 892, 896 (Fla. 3rd DCA 2004)(Cope, J., dissenting.), stated:

Writing about the statute now before us [Section 112.3173(2)(e)6. and (3), Florida Statutes], the pension forfeiture statute, the First District said: "No citation of authority is required to support the rule that forfeitures are not favored in law. They are considered harsh exactions, odious, and to be avoided when possible. **Statutes imposing forfeiture will be strictly construed in a manner such as to avoid the forfeiture and will be liberally construed so as to avoid and relieve from forfeiture.**" Williams v. Christian, 335 So. 2d 358, 361 (Fla. 1st DCA 1976)(footnote omitted; emphasis added); see Mulligan v. City of Hollywood, 871 So. 2d 249, 252-53 (Fla. 4th DCA 2003)(citing Williams v. Christian). Thus, "the determinative analysis of the question before us begins, proceeds and ends with the particular terms of the authorizing statute which, because the law is said to abhor forfeitures, must be strictly construed." Flam v. City of Miami Beach, 449 So. 2d 367, 368 (Fla. 3d DCA 1984)(citations omitted)."

See also Mulligan v. City of Hollywood, 871 So. 2d 249, 252-253 (Fla. 4th DCA 2003)("[F]orfeitures are harsh remedies, not

avored by the legal system, and thus forfeiture statutes are strictly construed. . . . Strict construction in this context suggests that in doubtful cases the courts will construe ambiguous statutes, or even clear forfeiture provisions resting on uncertain authority, against any loss and in favor of an owner's retention of property. . . . Under this strict construction, in the absence of clear meaning and manifest authority, we should construe the ordinance in question in a manner consistent with the interest of the owner and against the City."(Citations omitted).

19. Upon careful analysis, it appears that there is no ambiguity in the language of Section 112.3173(3), Florida Statutes, and it is not, therefore, subject to statutory construction. Rather, the statute clearly provides that all rights and benefits under the FRS are forfeited if a public official is convicted of any specified offense, one of which is conviction of a felony specified under Chapter 838, Florida Statutes.

20. Mr. Childers argues that the application of the forfeiture provision in Section 212.3173(3), Florida Statutes, should be limited to the rights and benefits he accrued under the FRS subsequent to his leaving the state legislature in November 2000. He contends that the offenses of which he was convicted arose out of and related exclusively to his service on

the Escambia County Commission, so there is no nexus between these offenses and his 32 years of service as a teacher in the state legislature. There is, however, no requirement of a nexus between the Mr. Childers's offenses and his employment under the circumstances of this case.

21. The Division specified in its Notice of Forfeiture of Retirement Benefits that Mr. Childers' conviction of two felonies specified in Chapter 838, specified offenses pursuant to Section 112.3173(2)(e)4., Florida Statutes, was the basis for its decision that forfeiture of his retirement benefits was required. Section 112.3173(2)(e)4., Florida Statutes, does not require that the felonies arise out of the public official's employment for them to be specified offenses, although it is inherent in the offenses themselves that the prohibited conduct arise in the context of the exercise of a public official's discretion in carrying out his public duties. See §§ 838.015 and 838.016, Fla. Stat. Had the Legislature intended that the felonies arise out of the public official's employment for purposes of forfeiture, it could have included this language in Section 112.3173(2)(e)4., Florida Statutes, as it did in Section 112.3173(2)(e)3., Florida Statutes, which identifies as a specified offense "[b]ribery in connection with the employment of a public officer or employee," and as it did in Section 112.3173(2)(e)6., Florida Statutes, which identifies as

a specified offense "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.")⁵

22. Mr. Childers also argues that his entitlement to the rights and benefits under the FRS he accrued as a teacher and state legislator vested when he left the legislature without having committed any specified offenses that would subject him to forfeiture and that his eligibility to receive the benefits he accrued during those employments was fixed at the time he ended his service as a state legislator and cannot be altered as a result of events occurring after that service ended. In support of this contention, Mr. Childers relies on language contained in Florida Sheriff's Association v. Department of Administration, Division of Retirement, 408 So. 2d 1033 (Fla. 1981), and in State, ex rel. Stringer v. Lee, 2 So. 2d 127 (Fla. 1941).

23. The issue before the Florida Supreme Court in Florida Sheriff's Association was whether the Legislature could reduce prospectively the percentage of special risk credit that special risk law enforcement officers could earn toward retirement. In resolving this issue, the court considered the effect of Section 121.011(3)(d), Florida Statutes, on the Legislature's authority to enact amendments that alter members' rights and benefits under the FRS.⁶ The court held that the effect of Section 121.011(3)(d), Florida Statutes, was to "vest[] all rights and benefits already earned under the present retirement plan so that the legislature may now only alter retirement benefits prospectively." Fla. Sheriff's Ass'n, 408 So. 2d at 1037 (emphasis in original). The court in Florida Sheriff's Association described its ruling in Stringer as follows: "The Court has . . . 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." Id. at 1036.

24. Neither of these cases is relevant to the application of Section 112.3173(3), Florida Statutes, to require forfeiture of all the rights and benefits Mr. Childers earned under the FRS during his employment as a teacher and his service as a state

legislator and as a county commissioner. The court in Florida Sheriff's Association concluded that the Legislature could alter the rights and benefits available under the FRS to active employees, as long as the alteration was prospective only. The court in Stringer concluded that the Legislature could not alter the rights and benefits available under a public retirement system after a member had retired. These rulings are entirely consistent with the limitation in Section 112.3173(3), Florida Statutes, that forfeiture applies only when specified offenses have been "committed prior to retirement." Neither case supports Mr. Childers' contention that the rights and benefits he accrued prior to leaving the Legislature in November 2000 were vested and cannot be subject to forfeiture as a result of offenses he committed subsequent to that date when he was serving as a county elected official. Such would be the case only if he had committed the offenses after his retirement under the FRS.

25. Finally, Mr. Childers' contentions that the Division should require him to forfeit only a portion of the rights and benefits he accrued under the FRS and that the Division should apply a balancing test to determine the portion of his rights and benefits under the FRS that should be subject to forfeiture, weighing the harm to him and his family that would be caused by the forfeiture against the harm to the public occasioned by his

offenses, are rejected. Firstly, as noted by Mr. Childers, the use of a balancing test applied in New Jersey to determine the portion of public retirement benefits that should be subject forfeiture is required by a statutory enactment effective in 1996, and, secondly, the court in the two 1982 New Jersey cases cited by Mr. Childers applied a balancing test because the public pension forfeiture legislation in New Jersey did not clearly and unambiguously provide for forfeiture in all instances or for forfeiture of the total benefits accrued under the pension plan. This is not the case in Florida: Section 112.3173(3), Florida Statutes, unequivocally requires the forfeiture of all rights and benefits under the FRS when a public officer is convicted of the specified offenses identified in Section 112.3173(2)(e), Florida Statutes.

26. Based on the findings of fact herein and the legal standards stated above, the Division has met its burden of proving by a preponderance of the evidence that Mr. Childers' rights and benefits under the FRS are subject to forfeiture pursuant to Section 112.3173(3), Florida Statutes.

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 finding that W.D. Childers committed specified offenses, as defined in

Section 112.3173(2)(e), Florida Statutes, prior to his retirement from public service and ordering that, pursuant to Section 112.3173(3), Florida Statutes, W.D. Childers forfeit all his rights and benefits under the Florida Retirement System, except for the return of any accumulated contributions.

DONE AND ENTERED this 31st day of August, 2007, in Tallahassee, Leon County, Florida.



PATRICIA M. HART
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of August, 2007.

ENDNOTES

^{1/} All references to the Florida Statutes herein shall be to the 2002 edition unless otherwise indicated.

^{2/} "Bribery" is defined in Section 838.015(1), Florida Statutes, as follows:

corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept for himself or herself or another, any pecuniary or other benefit with an intent or purpose to influence the

performance of any act or omission which the person believes to be, or the public servant represents as being, within the official discretion of a public servant, in violation of a public duty, or in performance of a public duty.

^{3/} Section 838.016(1), Florida Statutes, provides as follows:

It is unlawful for any person corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept, any pecuniary or other benefit not authorized by law, for the past, present, or future performance, nonperformance, or violation of any act or omission which the person believes to have been, or the public servant represents as having been, either within the official discretion of the public servant, in violation of a public duty, or in performance of a public duty. Nothing herein shall be construed to preclude a public servant from accepting rewards for services performed in apprehending any criminal.

^{4/} Mr. Childers' state appeals have been exhausted, and his federal appeals are pending.

^{5/} The only Florida case cited by Mr. Childers to support his contention that a nexus is required between the crimes of which a public official is convicted and his or her public duties and position, DeSoto v. Hialeah Police Pension Fund Board of Trustees, 870 So. 2d 844 (Fla. 3d DCA 2003), involves the specific offense identified in Section 112.3173(2)(e)6., Florida Statutes, not the specific offense identified in Section 112.3173(2)(e)4., Florida Statutes, as in this case.

^{6/} Section 121.011(3)(d), Florida Statutes, provides:

The rights of members of the retirement system established by this chapter shall not be impaired by virtue of the conversion of the Florida Retirement System to an employee noncontributory system. As of July 1, 1974,

the rights of members of the retirement system established by this chapter are declared to be of a contractual nature, entered into between the member and the state, and such rights shall be legally enforceable as valid contract rights and shall not be abridged in any way.

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.