

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ARTHUR J. MARSLAND, JR.,                     )  
  )  
                  Petitioner,                     )  
  )  
vs.   )     Case No. 08-4385  
  )  
DEPARTMENT OF MANAGEMENT                )  
SERVICES, DIVISION OF                     )  
RETIREMENT,                                 )  
  )  
                  Respondent.                 )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on November 12, 2008, in Green Cove Springs, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Arthur J. Marsland, Jr., pro se  
1856-B Hereford Road  
Middleburg, Florida 32068

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 is whether Petitioner has forfeited his rights and benefits under the Florida Retirement System (FRS) pursuant to Section 112.3173, Florida Statutes.

PRELIMINARY STATEMENT

Pursuant to notice, Respondent Department of Management Services, Division of Retirement (Respondent) advised Petitioner Arthur J. Marsland, Jr. (Petitioner) that he had forfeited his FRS rights and benefits under Section 112.3173, Florida Statutes. Respondent made this determination based on Petitioner's plea of guilty in a state criminal court proceeding.

Petitioner timely filed a request for an administrative hearing to challenge Respondent's decision. Respondent subsequently referred Petitioner's hearing request to the Division of Administrative Hearings.

The matter was ultimately heard on November 12, 2008. Respondent requested and was granted official recognition of the matters addressed in pleadings filed on September 29 and November 7, 2008.

The parties offered 11 joint exhibits that were accepted as evidence. The parties submitted 32 joint stipulations of facts. Petitioner testified on his own behalf. Respondent presented the testimony of one witness.

A transcript of the proceedings was not ordered. The parties' proposed recommended orders were timely filed and were duly considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

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

1. Respondent is charged with managing, governing, and administering the FRS. The FRS is a public retirement system as defined by Florida law.

2. The Duval County School Board (DCSB) employed Petitioner as a teacher at Ribault High School. As a teacher, Petitioner was subject to the Code of Ethics of the Education Profession in Florida found in Florida Administrative Code Rule 6B-1.001. Petitioner also was subject to the Principles of Professional Conduct for the Education Profession in Florida found in Florida Administrative Code Rule 6B-1.006.

3. Petitioner's employment with the DCSB began on or about August 19, 1986. By reason of this employment, Petitioner was enrolled in the FRS as a Regular Class member.

4. On or about December 7, 2001, Petitioner was arrested in connection with Officer David Coarsey's sworn information, which provided as follows in relevant part:

On 12-07-01, Lt. Remolde called the Jacksonville Sheriff's Office Sex Crimes Office and stated that a student at Ribault High School had reported to the principal, Mr. Ken Brockington, that she had penile/vaginal intercourse with this suspect.

On 12-07-01, I arrived at Ribault High

School and interviewed the victim. She stated that approximately three weeks ago, she went to the suspect's classroom at his request after school hours. The suspect asked the victim to help him with some of his work. While she was there, the suspect put his arm around the victim and began rubbing her waist. The suspect then began talking to the victim about sex. The suspect then put his hand up the victim's skirt and inserted his finger in her vagina. The suspect also pulled the victim's shirt and bra down and "sucked" on her breast. The victim said that she did not attempt to stop the suspect. The victim then told the suspect, "I don't think we should do this", and she walked out of the room.

Approximately one week later, the suspect asked the victim to come back to his classroom after school. When the victim arrived at the room, the suspect began "rubbing" on the victim's body. The victim stated that the suspect retrieved a condom from a "grey file cabinet" and then sat down in a chair. The suspect pulled his penis out and the victim put the condom on his penis. The victim pulled her shorts down and sat on the suspect's lap, at which time the suspect put his penis in the victim's vagina. After having penile/vaginal intercourse with the suspect for a short period of time, the victim stood up and the suspect masturbated until he ejaculated.

On 12-07-01, the victim met the suspect in the "Book Room". The suspect pulled the victim's shirt and bra down and "sucked" on her breast. The suspect then pulled his penis out of his pants and asked the victim to masturbate him. The victim masturbated the suspect until he ejaculated. The victim wiped the suspect's semen off of her hands with a paper towel and threw it in the trash can in the "Book Room". The victim then left the room and reported the incident to a substitute teacher, Mr. Carlos Bowers (12-25-59, 3701 Winton Dr., B/M), who in turn, reported it to the principal, Mr. Brockington. The victim stated to me that

all of the sexual encounters with the suspect were consensual.

I retrieved the trash bag that contained the above mentioned paper towel from the "Book Room" and put it in the JSO Property Room.

The suspect was transported to the JSO Sex Crimes Office by Officer D.W. Holsey #6044 and I transported the victim to the Sex Crimes Office. I contacted the victim's mother and asked her to come to the JSO Sex Crimes Office. When she arrived, she transported the victim to the Child Crisis Center for a medical exam (swabs of the victim's breasts).

I advised the suspect of his constitutional rights and asked him to sign the rights form. The suspect signed the form and agreed to speak to me and Det. Romano #7527 about the allegations. The suspect admitted to having penile/vaginal intercourse with victim one time, "sucking" on the victim's breast on two different occasions, and rubbing on her vagina once. The suspect stated that all of the sexual encounters happened at the school. The suspect stated, "It was a huge mistake, my life is fucked". The suspect gave a written statement in regards to having penile/vaginal intercourse with the victim.

The suspect was arrested and transported to the PTDF.

5. The information reported in the sworn information truly and accurately recounts the events that occurred and to which Petitioner admitted.

6. The arrest and booking report is filed in the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, in the case styled and numbered State of Florida v. Arthur John Marsland, Jr., Case No. 2002-599-CFA.

7. Petitioner resigned his employment with the DCSB on or about December 27, 2001, effective on or about January 15, 2002.

8. By reason of his employment with DCSB, Petitioner earned approximately 15.80 years of service credit in the FRS.

9. On or about February 14, 2002, Petitioner was charged, by amended information, in the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, in case number 2002-599-CFA, with (a) one count of sexual battery, a second-degree felony, in violation of Section 794.011(8)(b), Florida Statutes; and (b) one count of lewd or lascivious molestation, a second-degree felony, in violation of Section 800.04(5)(c)2., Florida Statutes.

10. The amended information provided in relevant part:

HARRY.L. SHORSTEIN, State Attorney for the Fourth Judicial Circuit of the State of Florida, in and for Duval County, charges that ARTHUR JOHN MARSLAND, JR, on or between the 1st day of November, 2001 and the 7th day of December, 2001, in the County of Duval and the State of Florida, did, while in a position of familial or custodial authority, engage in an act which constitutes Sexual Battery with \* \* \* a person 12 years of age or older, but less than 18 years of age, by placing his penis in or upon the vagina of \* \* \* contrary to the provisions of Section 794.011(8)(b), Florida Statutes.

SECOND COUNT

And for the second count of this information, your informant further charges that ARTHUR JOHN MARSLAND, JR., a person 18 years of age or older, on or between the 1st day of November, 2001 and the 7th day. Of December, 2001, in the County of Duval and the State of Florida, did in a lewd or

lascivious manner force or entice \* \* \* a child 12 years of age or older, but less than 16 years of age, to touch the genital area or clothing covering the genital area of Defendant, contrary to the provisions of Section 800.04(5)(c)2, Florida Statutes.

11. The amended information is filed in the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, in the case styled and numbered State of Florida v. Arthur John Marsland, Jr., Case No. 2002-599-CFA.

12. The victim of the alleged crimes was a student at the school where Petitioner taught. The alleged crimes took place in Petitioner's classroom or in the book room at the school where Petitioner taught.

13. On or about April 8, 2002, Petitioner entered a plea of guilty to the second count of the amended information. Petitioner pled guilty because he was in fact guilty. Petitioner made the plea freely and voluntarily.

14. On or about April 29, 2002, judgment was entered on Petitioner's guilty plea. He was adjudicated guilty.

15. The judgment and corrected order of sex offender probation are filed in the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, in the case styled and numbered State of Florida v. Arthur John Marsland, Jr., Case No. 2002-599-CFA.

16. During the hearing, Petitioner admitted that, but for his job position as a teacher, he "probably [would] not" have had an opportunity to have sexual relations with a student in the

school's classroom or book room. Petitioner also admitted that having sexual relations with one of his students was "obviously not" one of his duties and responsibilities as a teacher.

17. Petitioner wrote three letters of apology in connection with the matter. He apologized in writing to the victim, to his spouse, and the DCSB.

18. On or about September 27, 2002, Charlie Crist, as Commissioner of Education, filed an Administrative Complaint, before the Education Practices Commission of the State of Florida, in case number 02-0681-RT. The complaint sought disciplinary action against Petitioner's educator's certificate.

19. The Administrative Complaint charged Petitioner in part with the following statutory and rule violations:

#### STATUTORY VIOLATIONS

COUNT 1: The allegations of misconduct set forth herein are in violation of Section 1012.795(1)(c), Florida Statutes, in that Respondent has been guilty of gross immorality or an act involving moral turpitude.

COUNT 2: The allegations of misconduct set forth herein are in violation of Section 231.2615(1)(e), Florida Statutes, in that Respondent has been convicted of a misdemeanor, felony, or other criminal charge, other than a minor traffic violation.

COUNT 3: The allegations of misconduct set forth herein are in violation of Section 231.2615(1)(f), Florida Statutes, in that Respondent, upon investigation, has been found guilty of personal conduct which seriously reduces his effectiveness as an employee of the school board.

COUNT 4: The allegations of misconduct set forth herein are in violation of Section 231.2615(1)(i), Florida Statutes, in that Respondent has violated the Principles of Professional Conduct for the Education



Profession in Florida prescribed by State Board of Education.

COUNT 5: The allegations of misconduct set forth herein are in violation of Section 231.2615(1)(j), Florida Statutes, in that Respondent has otherwise violated the provisions of law, the penalty for which is the revocation of the teaching certificate.

COUNT 6: Section 231.2615(2), Florida Statutes, provides that the plea of guilty in any court or a decision of guilty by any court is prima facie proof of grounds for the revocation of the certificate.

#### RULE VIOLATIONS

COUNT 7: The allegations of misconduct set forth herein are in violation of Rule 6B-1.001(2), Florida Administrative Code, in that Respondent has failed to have his primary professional concern always be for the student and for the development of the student's potential and has failed to seek to exercise the best judgment and integrity.

COUNT 8: The allegations of misconduct set forth herein are in violation of Rule 6B-1.001(3), Florida Administrative Code, in the Respondent has failed to be aware of the importance of maintaining the respect and confidence of his colleagues, of students, of parents, and of other members of the community and that Respondent has failed to achieve and sustain the highest degree of ethical conduct.

COUNT 9: The allegations of misconduct set forth herein are in violation of Rule 6B-1.006(3)(a), Florida Administrative Code, in that Respondent has failed to make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental health and/or physical safety.

COUNT 10: The allegations of misconduct set forth herein are in violation of Rule 6B-1.006(3)(e), Florida Administrative Code, in that Respondent has intentionally exposed a student to unnecessary embarrassment or disparagement.

COUNT 11: The allegations of misconduct set forth herein are in violation of Rule 6B-1.006(3)(h), Florida Administrative Code, in that Respondent has exploited a relationship with a student for personal gain or advantage.

The Administrative Complaint is filed with the Education Practices Commission of the State of Florida in case number 02-0681-RT.

20. In consideration of the Administrative Complaint, the Education Practices Commission entered a Final Order permanently revoking Petitioner's educator's certificate. The Final Order is filed with the Education Practices Commission of the State of Florida in case number 02-0681-RT.

21. On or about October 20, 2003, Petitioner applied for early service retirement. Petitioner's effective date of retirement was established as November 1, 2003.

22. By certified letter dated May 2, 2008, Respondent notified Petitioner of the intended action to forfeit his FRS rights and benefits as a result of his guilty plea. The Division suspended payment of Petitioner's monthly retirement benefits in May 2008. Petitioner had received approximately \$41,309.56 in FRS retirement benefits from November 2003 through April 2008.

#### CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. See §§ 120.569 and 120.57(1), Fla. Stat.

24. The FRS is a public retirement system as defined by Florida law and, as such, Respondent's proposed action to forfeit Petitioner's FRS rights and benefits is subject to administrative review. See § 112.3173(5)(a), Fla. Stat.

25. Respondent has the burden of proving that Petitioner should forfeit his FRS retirement benefits. Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139, 141-142 (Fla. 4th DCA 1989); Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). Because none of the material historical facts relevant to the instant case is in dispute, there is no need to address the applicable standard of proof.

26. Section 112.311(6), Florida Statutes, reflects the state's policy relative to public officers and employees as follows in pertinent part:

[P]ublic officers and employees, state and local, are agents of the people and hold their positions for the benefit of the public. They are bound to uphold the Constitution of the United States and the State Constitution and to perform efficiently and faithfully their duties under the laws of the federal, state, and local governments. Such officers and employees are bound to observe, in their official acts, the highest standards of ethics ... regardless of personal considerations, recognizing that promoting the public interest and maintaining the respect of the people in their government must be of foremost concern.

27. It is a "breach of the public trust" to violate any provision of the Florida Constitution or Chapter 112, Florida Statutes, "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 ..." See § 112.312(3), Fla. Stat.

28. Article II, Section 8(d) of the Florida Constitution provides:

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.

29. This section of the Constitution is codified in Chapter 112, Part III, of the Florida Statutes. Section 112.3173(3), Florida Statutes, provides in relevant part:

(3) FORFEITURE.--Any public officer or employee who is convicted of a specified offense committed prior to retirement ... 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.

Pursuant to the above-described statutory mandate, if Petitioner is found to be subject to the forfeiture statute, his FRS rights and benefits must be forfeited. Id.

30. A "specified offense" is particularly defined in the forfeiture statute to include any felony under Chapter 838 (except Sections 838.15 and 838.16) as well as certain felonies relating to bribery, embezzlement and theft of public funds or an impeachable offense. See § 112.3173(2)(e), Fla. Stat.

31. The forfeiture statute also contains a "catch-all"

felony which can subject a public officer or employee to the forfeiture of his or her rights and benefits and states as follows:

(2)(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.

§ 112.3173(2)(e)6., Fla. Stat. In other words, the elements of Section 112.3173(2)(e)6. are: (a) any felony; (b) committed by a public employee; (c) willfully and with intent to defraud the public or the employee's public employer of the right to receive the faithful performance of the employee's duty; (d) to obtain a profit, gain or advantage for the employee or some other person; and (e) by use of the power, rights, privileges, duties, or position of the employment position.

32. In this case, Petitioner is a former public employee and a member of a public retirement system. He pled guilty to a crime committed prior to retirement, to wit: lewd or lascivious molestation, a second-degree felony, in violation of Section 800.04(5)(c)2., Florida Statutes. Petitioner's guilty plea

constitutes a conviction under Section 112.3173(2)(a), Florida Statutes. The issue, then, is whether Petitioner's crime constitutes a specified offense under Section 112.3173(2)(e), Florida Statutes.

33. Clearly, the specified offenses proscribed in Section 112.3173(2)(e)1.-5., Florida Statutes, do not apply. However, all elements of Subsection 112.3173(2)(e)6. are satisfied by the acts that Petitioner admitted committing. The crime of lewd or lascivious molestation is a second-degree felony under Section 800.04(5)(c)2., Florida Statutes. Petitioner was a public employee at time he committed the crime. The acts which were the basis of Petitioner's plea occurred prior to retirement while he was employed as a teacher.

34. Petitioner acted willfully and with intent to defraud the public and the DCSB of the right to receive the faithful performance of his duty as a public employee. He clearly acted for his own profit, gain or advantage, to wit: his own personal sexual gratification.

35. Petitioner used or attempted to use the power, rights, privileges, duties, or position of his public office. Petitioner's actions were made possible only as a result of his position as a teacher.

36. The foregoing factual scenario is sufficient to meet the statutory requirement of a nexus between the crimes charged against the public employee and his duties and/or position. See

DeSoto v. Hialeah Police Pension Fund Bd. of Trustees, 870 So. 2d 844 (Fla. 3rd DCA 2003) (sufficient nexus found between crimes and duties of a police officer, who was convicted of conspiracy to possess and distribute cocaine and to commit robbery, who informed accomplices that an individual was a drug dealer, provided surveillance prior to the robbery, contacted a police officer accomplice to notify him that victim was leaving work so the officer could conduct a traffic stop, and provided handcuffs used to restrain the victim).

37. It is concluded that Petitioner committed a specified offense as contemplated by Section 112.3173(2)(e)6., Florida Statutes. Respondent has met its burden. When Petitioner pled guilty to a specified offense, he forfeited all of his FRS rights and benefits and Respondent is without statutory authority to permit otherwise. See § 112.3173(3), Fla. Stat. Respondent is required to act on said forfeiture at this time.

#### RECOMMENDATION

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

#### RECOMMENDED:

That Respondent enter a final order finding that Petitioner was convicted of a specified offense pursuant to Section 112.3173, Florida Statutes, and directing the forfeiture of his FRS rights and benefits.

DONE AND ENTERED this 15th day of December, 2008, in  
Tallahassee, Leon County, Florida.

*Suzanne F. Hood*

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SUZANNE F. HOOD  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 15th day of December, 2008.

COPIES FURNISHED:

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

Arthur J. Marsland, Jr.  
1856 B Hereford Road  
Middleburg, Florida 32068-3104

Sarabeth Snuggs, Director  
Division of Retirement  
Department of Management Services  
Post Office Box 9000  
Tallahassee,, Florida 32315-9000

John Brenneis, General Counsel  
Department of Management Services  
4050 Esplanade Way  
Tallahassee, Florida 32399-0950



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.