

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHNSON HOLSBERY, JR.,)
)
 Petitioner,)
)
vs.) Case No. 09-0087
)
DEPARTMENT OF MANAGEMENT)
SERVICES, DIVISION OF)
RETIREMENT,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was held in this case, as previously scheduled, on May 8, 2009, by video teleconference between sites in West Palm Beach and Tallahassee, Florida, before Administrative Law Judge Eleanor M. Hunter of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mary F. Aspros, Esquire
Meyer and Brooks, P.A.
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Tallahassee, Florida 32301

For Respondent: Geoffrey M. Christian, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner has forfeited his rights and benefits under the Florida Retirement System pursuant to Section 112.3173, Florida Statutes (2008).

PRELIMINARY STATEMENT

In a certified letter dated June 13, 2008, Respondent notified Petitioner, a former teacher, that his rights and benefits under the Florida Retirement System were forfeited as a result of his guilty plea to one count of child abuse, in violation of Subsection 827.03(1), Florida Statutes (1999). A Petition for Administrative Hearing dated July 3, 2008, was filed to seek full reinstatement of Petitioner's retirement benefits.

On January 8, 2009, the matter was transferred by the Respondent to the Division of Administrative Hearings for the assignment of an administrative law judge to resolve disputed issues of fact. The hearing, initially scheduled for March 5, 2009, in Tallahassee, was re-scheduled for May 8, 2009, to allow attendance by video at the Palm Beach site at the request of Petitioner. At the formal hearing, Petitioner presented no witnesses or exhibits. Respondent presented the testimony of Petitioner and Angelette Green, and Respondent's Exhibits 2 through 9 that were received into evidence. The Transcript of the formal hearing was received on May 15, 2009. After an

extension of time was granted on motion filed by Respondent, proposed recommended orders were filed on June 26, 2009.

FINDINGS OF FACT

Based on the record in this proceeding, including the evidence presented at the formal hearing and the joint pre-hearing stipulation¹ of the parties, the following Findings of Fact are made:

1. The Florida Retirement System (FRS) is a public retirement system as defined by Florida law.

2. Respondent, Department of Management Services, Division of Retirement (Respondent or Division), is charged with managing, governing, and administering the FRS.

3. Petitioner, Mr. Johnson Holsberry, Jr. (Petitioner or Mr. Holsberry), was formerly employed as a teacher at the West Area School of Choice by the Palm Beach County School Board (PBCSB).

4. By reason of his employment with the PBCSB, Mr. Holsberry became a member of the FRS.

5. As a teacher, Mr. Holsberry was subject to the Code of Ethics of the Education Profession in Florida found in Rule 6B-1.001, Florida Administrative Code.

6. As a teacher, Mr. Holsberry was subject to the Principles of Professional Conduct for the Education Profession in Florida found in Florida Administrative Code Rule 6B-1.006.

7. On or about December 5, 2000, Mr. Holsberry resigned his teaching position with PBCSB.

8. On or about October 24, 2001, Mr. Holsberry was charged, by amended information, in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, with one count of child abuse, a third degree felony, in violation of Section 827.03(1), Florida Statutes. The same amended information is filed in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, in State of Florida v. Johnson Leo Holsberry, Jr., Case No. 01-CF-001185.

9. The victim of the alleged crime, R.D., was a female student at the Area School of Choice.

10. In Palm Beach County, Florida, between the dates of January 1, 1999, and December 31, 1999, Petitioner, while teaching in a position of parental responsibility, was alleged to have had contact with R.D. and to have acted in such a manner as to cause mental injury to said child.

11. On or about October 24, 2001, Mr. Holsberry entered an agreement with the State Attorney's Office wherein he agreed to plead guilty as charged in the amended information. The same plea agreement is filed in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, in

State of Florida v. Johnson Leo Holsberry, Jr., Case No. 01-CF-001185.

12. Mr. Holsberry's guilty plea was made freely and voluntarily.

13. Mr. Holsberry pled guilty because he was in fact guilty.

14. On or about October 24, 2001, Mr. Holsberry was adjudicated guilty. The same judgment is filed in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, in State of Florida v. Johnson Leo Holsberry, Jr., Case No. 01-CF-001185.

15. On or about January 8, 2001, Mr. Holsberry applied to the Division for early service retirement from the FRS and began receiving retirement benefits.

16. The Division suspended payment of Mr. Holsberry's monthly retirement benefits in June 2008.

17. By certified letter dated June 13, 2008, Mr. Holsberry was notified of the Division's intended action to forfeit his FRS rights and benefits as a result of his guilty plea in the case styled and numbered State of Florida v. Johnson Leo Holsberry, Jr., Case No. 01-CF-001185.

18. At the hearing, Mr. Holsberry testified that R.D. was in his classroom a few times, but that he was not sure of the year, frequency, or why she was there. He testified that he

does not remember taking a picture of R. D. sitting at his desk, but that might have taken place. Mr. Holsberry also testified that he does not recall permitting R. D. to access her email from his classroom, or inviting her to join him on trips, to come to his home, or otherwise to meet him any place outside of the school. Mr. Holsberry testified that he does not recall giving R. D. his home telephone number. He recalls having an email screen name of Sameagle1, but does not recall whether he emailed R. D. from that email address or whether he had another screen name, Gutster. He testified that he does not recall referring to himself as H-Man (although he said some students called him "Mr. H.") or referring to R.D. as "Dukey Dufus." In general, Mr. Holsberry's testimony that he does not recall his actions that ultimately ended his career as a teacher is not credible.

19. Mr. Holsberry noted that R.D. was not officially assigned to any of his classes, so that he was not responsible for her education, nor was he involved with her in any after school program that would have made him responsible for her welfare.

20. Mr. Holsberry testified that he probably would not have met R.D. but for his position as a teacher at her school. He also recalled having being interviewed by an investigator named Green.

21. Angelette Green, an employee of the Palm Beach County School District for 15 years, was the investigator assigned to Mr. Holsberry's case. Detective Green testified that Mr. Holsberry admitted that he helped R. D. set up an email account, communicated with her by email, including having sent by internet a picture of her taken in his classroom. She also testified that she remembers emails inviting R. D. to go somewhere. She said Mr. Holsberry called R. D. "Dukey Dufus" after he sent her an email and she questioned who it was from.

22. On July 30, 2002, an Administrative Complaint was filed by the Commissioner of Education seeking disciplinary sanctions against Mr. Holsberry's license based on allegations of professional misconduct.

23. Mr. Holsberry did not contest the disciplinary matter, having already agreed to surrender permanently his teaching certificate as a part of his plea agreement. The Education Practices Commission entered a final order permanently revoking his teaching certificate.

24. On October 24, 2001, a plea conference was held on the following charge:

Amended Information For:

1) CHILD ABUSE

In the Name and by the Authority of the State of Florida:

BARRY E. KRISCHER, State Attorney for the Fifteenth Judicial Circuit, Palm Beach County, Florida, by and through his undersigned Assistant State Attorney, charges that JOHNSON LEO HOLSBERRY JR. on or between January 01, 1999 and December 31, 1999, in the County of Palm Beach and State of Florida, did knowingly or willfully, intentionally inflict physical or mental injury upon R.D., a child, {or} did an intentional act or actively encourage another to do an act that results or could reasonably be expected to result in physical or mental injury to R.D., a child, contrary to Florida Statute 827.03(1). (3 DEG FEL)

25. At the plea conference, the following exchange occurred:

[By Mr. Jaegers, Assistant State Attorney:] The defendant will be adjudicated guilty of the offense; he will be placed on five years probation. There will be no early termination contemplated. The defendant will be required to pay Court costs in the amount of \$261.00, \$50.00 to the Drug Trust Fund, \$50.00 cost of prosecution. The defendant must undergo a psychological evaluation and successfully complete any recommended treatment.

* * *

The defendant is to surrender all and not seek at any time in the future any teaching certificates in any jurisdiction in the world. There will be no contact with children under 18 unless they're in the presence of an adult who is aware of these charges.

And those are the terms of the negotiated settlement.

The facts in this case, Judge, are that the defendant, Johnson Leo Holsberry, Jr., did in Palm Beach County, Florida, on, between the dates of January 1, 1999 and December 31st, 1999, while teaching in a position of parental responsibility, in that capacity had contact with a juvenile female by the name of, or by the initials of SRD, I think it's on the plea sheet.

MR. WILINSKEY [Counsel for Mr. Holsberry] That's right.

MR. JAEGER: -- RD, and did act in a manner such as to cause mental injury to said child. The -- those are the facts that occurred in Palm Beach County.

THE COURT: Sir, raise your right hand, please.

JOHNSON LEO HOLSBERRY, JR.
BEING FIRST DULY SWORN BY THE COURT,
TESTIFIED AS FOLLOWS:

THE COURT: Your name?

THE DEFENDANT: Johnson Leo Holsberry, Jr.

THE COURT: How old are you?

THE DEFENDANT: 62

* * *

THE COURT: Do you understand what the things are you have to do?

THE DEFENDANT: Yes, sir.

THE COURT: Are you pleading guilty because you are guilty?

THE DEFENDANT: Yes.

THE COURT: Do you agree with the facts the State Attorney gave me as the basis for your plea of guilty?

THE DEFENDANT: Yes, sir.

CONCLUSIONS OF LAW

26. 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. (2008).

27. 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. (2008).

28. Respondent has the burden of proving by a preponderance of the evidence 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).

29. 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.

30. 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.

31. Section 112.3173, Florida Statutes, provides in 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 guilty by a court of competent jurisdiction; a plea of guilty or if 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.

32. A "specified offense" is 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. (2008).

33. The forfeiture statute also contains a so-called "catch-all" provision which can also 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. (2008). 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.

34. 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, e.g.: child abuse, a third-degree felony, in violation of Section 827.03(1), Florida Statutes.

35. The specified offenses proscribed in Section 112.3173(2)(e)1.-5., Florida Statutes, do not apply. The issue, then, is whether the elements of Subsection 112.3173(2)(e)6. are satisfied by the acts that Petitioner admitted committing. Petitioner was a public employee and a public school teacher, at the time he committed the crime, a felony.

36. Petitioner acted willfully and with intent to defraud the public and the PBCSB of the right to receive the faithful performance of his duty as a teacher, using his position to have contact with a student in a manner that he agreed was harmful to her for his own personal gain and advantage. As conceded in Petitioner's Proposed Recommended Order, personal gain and advantage is not limited to economic benefit. See Arthur J. Marsland, Jr. v. Dept. of Management Services, Division of Retirement, DOAH Case No. 08-4385 (R.O. 12/15/08; F.O. 01/20/09).

37. Petitioner used or attempted to use the power, rights, privileges, duties, or position of his public office, and his contact with R.D. was made possible only as a result of his position as a teacher.

38. Sufficient facts to meet the statutory requirement of a nexus between the crimes charged against the public employee and his duties and/or position may be determined based on the admissions during a plea colloquy. See Simcox v. City of Hollywood Police Officers' Retirement System, 988 So. 2d 731 (Fla. 4th DCA 2008).

39. Therefore, it is concluded that Respondent has met its burden by establishing that Petitioner committed a specified offense as contemplated by Section 112.3173(2)(e)6., Florida Statutes, and, therefore, forfeited his FRS rights and benefits. Petitioner argues that the undersigned should ignore precedent and more strictly construe the forfeiture statute, as did Judge Cope in his dissenting opinion in Warshaw v. City of Miami Firefighters and Police Officers Ret. Trust, 885 So. 2d 892 (Fla. 3rd DCA 2004). An administrative law judge lacks the jurisdiction to do so. Respondent is also without statutory authority to permit otherwise. See § 112.3173(3), Fla. Stat. (2008).

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 24th day of July, 2009, in Tallahassee, Leon County, Florida.



ELEANOR M. HUNTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 2009.

ENDNOTE

^{1/} Findings of Fact 1 through 17 were stipulated by the parties. See, Joint Stipulation in Compliance with Pre-Hearing Order, filed on April 29, 2009.

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.