

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN F. KOONS,)
)
 Petitioner,)
)
 vs.) Case No. 10-10704
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF)
 RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Tallahassee, Florida, on May 18, 2011. By videoconference, one witness testified in West Palm Beach, where the court reporter was located. Otherwise, the parties, witnesses, and counsel appeared in Tallahassee.

APPEARANCES

For Petitioner: Mark A. Emanuele, Esquire
Panza, Maurer and Maynard, P.A.
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Fort Lauderdale, Florida 33308

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

The issue is whether Petitioner must forfeit his vested benefits in the Florida Retirement System (FRS), pursuant to section 112.3173(3), Florida Statutes, due to Respondent's commission of an act of extortion, as defined in section 836.05, Florida Statutes.

PRELIMINARY STATEMENT

By letter dated November 8, 2010, Respondent advised Petitioner that he had forfeited his FRS benefits due to his guilty plea to the felony of extortion, as provided in section 836.05, Florida Statutes. The letter cites article III, section 8(d), Florida Constitution, and sections 112.3173 and 121.091(5), Florida Statutes.

By Petition for Formal Administrative Hearing dated November 24, 2010, Petitioner requested a formal administrative hearing on the ground that the felony of extortion was not a "specified offense," under section 112.3173, so as to justify the forfeiture of his FRS benefits.

At the hearing, Petitioner called two witnesses and offered into evidence six exhibits: Petitioner Exhibits 1-6. Respondent called one witness and offered into evidence 14 exhibits: Respondent Exhibits 1-7, 9, and 11-14. All exhibits were admitted except Respondent Exhibit 5. Respondent Exhibit 6 was admitted, but only to the extent that it contains a

description of the duties of a county commissioner. Respondent withdrew Respondent Exhibit 8, but proffered two parts of the exhibit.

The Administrative Law Judge's failure to admit Respondent Exhibit 5 during the hearing was an oversight on his part, although inconsequential because both parties referred to portions of this exhibit in the findings of facts within their Proposed Recommended Orders.

Exhibit 5 is the probable cause affidavit underlying the criminal charges against Petitioner. Prior to the hearing, Administrative Law Judge Hunter had declined to take official notice of the exhibit. However, after a long discussion of its admissibility during the hearing, the Administrative Law Judge required Petitioner's counsel to identify the portions of the exhibit to which he objected. (Tr., pp. 23-24.) The Administrative Law Judge stated that, after Petitioner advised him of each provision of the affidavit to which he objected, the Administrative Law Judge would rule on Petitioner's objections. The flaw in this procedure emerged when Petitioner's counsel failed to file his objections, and, thus, the Administrative Law Judge never ruled to admit or exclude the exhibit.

The Administrative Law Judge admits Respondent Exhibit 5 at this time. During the hearing, Petitioner objected to two specific provisions of the affidavit. First, Petitioner

objected that the affidavit states that the Johnson family, whom Petitioner extorted, and their agent failed to appear at a June 17, 2010, meeting of the West Palm Beach City Commission. (Tr., pp. 17-19.) Without regard to the relevance of this fact, it is admitted by Petitioner in his sworn statement, which was admitted. Respondent Exhibit 9, p. 97.

Second, Petitioner objects to the telephone message left on the voicemail of counsel for the Johnson family; this is the voice message that constitutes the act of extortion that took place on May 6, 2010, as described below. (Tr. pp. 19-21.) Again, in his sworn statement, Petitioner listened to the message, which is recorded in the statement, and admitted that he made these statements. Respondent Exhibit 9, pp. 69-70.

The court reporter filed the transcript on June 22, 2011. The parties filed their proposed recommended orders on August 1, 2011.

FINDINGS OF FACT

1. Petitioner has lived for much of his life in West Palm Beach. Petitioner's family owned a Pepsi-Cola bottling company in West Palm Beach until selling it five or six years ago. Petitioner started with the company as a truck driver and eventually served as a vice-president.

2. Petitioner served as a locally elected official in West Palm Beach for nearly 20 years. Petitioner was elected

commissioner of the Board of Commissioners of the City of West Palm Beach and served for 12 years. Subsequently, he was elected and reelected commissioner of the Board of County Commissioners of Palm Beach County. Petitioner was prevented by term limits from serving beyond his second four-year term, which was due to end in December 2010. However, Petitioner resigned from the county commission five months earlier after he pleaded guilty to, and was adjudicated guilty of, the extortion that is described below.

3. Petitioner had planned to retire from public office after finishing his term in December 2010. In his early 60s and evidently secure financially, Petitioner looked forward to retirement, during which he planned to volunteer in the community and play with his grandchildren.

4. In the final year of his final term in public office, Petitioner busied himself with--or, perhaps more aptly, obsessed over--one major piece of unfinished business: the South Cove Restoration Project. The South Cove Restoration Project is an ecological restoration project in the Lake Worth Lagoon in downtown West Palm Beach.

5. The Lake Worth Lagoon is a 20-mile long body of water in central Palm Beach County. Located just east of Flagler Drive and north of the Royal Park Bridge, the South Cove Restoration Project's primary sponsor is Palm Beach County,

although the state has provided funds and the City of West Palm Beach and the Florida Inland Navigation District are also identified as project "partners."

6. The project consists of the creation of two acres of mangrove/spartina habitat, 3.5 acres of potential seagrass habitat, and one acre of rock revetment/oyster reef. The project also includes a 565-foot elevated boardwalk running from the sidewalk along Flagler Drive to the largest mangrove island and a 16-foot square observation deck. Lastly, the project includes the capping of an old dredge hole with clean sand. This will reduce turbidity in the adjacent water column by preventing the continual resuspension of fine-grained particles that tend to collect in the dredge hole.

7. For many years, water-quality issues in the Lake Worth Lagoon have received the attention of state, regional, and local officials, including Petitioner. For a couple of years, Petitioner had served as the county representative to, and chair of, a consortium of governmental entities that had formed the Lake Worth Lagoon Initiative (Initiative). Members of the Initiative have been drawn from the Florida Department of Environmental Protection, the South Florida Water Management District, the Palm Beach County chapter of the League of Cities, and Palm Beach County.

8. The mission of the Initiative is to restore water quality in the lagoon by obtaining and providing funding from various sources for projects to address such issues as water quality, habitat, and pollution-control. The Initiative has supported the South Cove Restoration Project, which is located to the south of a larger project recently undertaken by the City of West Palm Beach to dredge the Intracoastal Waterway adjacent to Flagler Drive as part of extensive renovations of an old city marina. The dredge spoil from the city marina project will provide the fill for the dredge hole in the South Cove Restoration Project.

9. The South Cove Restoration Project was first identified in 1997 as a Surface Water Improvement and Management project. In August 2008, the Department of Environmental Protection proposed to issue the permits necessary for the project's construction and operation.

10. Trump Plaza challenged the proposed permits in DOAH Case No. 08-4752, and Flagler Center Properties, LLP, intervened on the side of Trump Plaza. Trump Plaza is the owner-association of two 30-story condominium buildings, and Flagler Center Properties is the owner of two eight- or nine-story office buildings. Due to the proximity of their buildings to the South Cove Restoration Project, both parties challenged the project on the grounds of, among other things, the potential

obstruction of their view and the unreasonable infringement on their qualified rights to a dock. These properties and the uplands adjoining the South Cove Restoration Project are all entirely within the city limits of the City of West Palm Beach.

11. This litigation delayed the issuance of the permits by 15 months. However, in September 2009, an Administrative Law Judge issued a recommended order approving the permits, and, in November 2009, the Department of Environmental Protection issued the final order issuing the permits.

12. Members of the Johnson family own Flagler Center Properties. Like the Koonses, the Johnsons have lived in West Palm Beach for many years. The eldest Johnson is of the age of Petitioner's parents, and Petitioner knew the next generation of Johnsons, as they grew up together in West Palm Beach. The third generation of Johnsons and Koonses even attend the same school. But all of these relationships notwithstanding, at least certain members of the Johnson family with ownership interests in Flagler Center Properties have opposed at least certain aspects of the South Cove Restoration Project.

13. The extortion occurred late in the approval process for the South Cove Restoration Project. The two acts of extortion took place in the six weeks before a vote by city commissioners to allow a fourth wheelchair-ramp access to be

constructed from the existing sidewalk, over the seawall, and onto the boardwalk.

14. The city commission vote took place on June 17 or 19, 2010. As expected, the city commissioners unanimously approved the fourth wheelchair ramp. Within a few days after the city vote, the last project sponsor to commit funds--the board of the Florida Inland Navigation District--approved its \$1.5 million contribution. Evidently, the District vote was even more of a certainty than the city vote because--to the extent that Petitioner's extortion was designed to ensure final passage of the South Cove Restoration Project--Petitioner's concern, at the time of the extortion, was the city vote, not the District vote.

15. In anticipation of the city vote, on May 6, 2010, at 9:14 a.m., Petitioner called the Johnson family attorney to discuss the Johnson family's continued objection to the project, especially the boardwalk. Petitioner failed to reach the attorney, so he left a voicemail. After a brief greeting, Petitioner demanded that the attorney send Petitioner immediately a memo outlining the remaining objections of the Johnson family to the South Cove Restoration Project.

And if you don't--then I'm going to do a Public Records Request to the City of West Palm Beach on this. Dean, just for the heads up, good friend of mine, I'm going to work as hard as I've ever worked in twenty years of public service to take the Johnsons through the ringer on this if they don't

support the City of West Palm Beach. I'll have kids picketing at the building and what I'm going to say is they want [a] marina instead of an island.

I told you, this is very personal for me. Okay. This is something I really, really want. After twenty years I want the Johnsons to step away and congratulate me personally on all the work I've done. Okay? I have no idea why they're trying to fuck me on the deal but this is very personal. I'm going to work five [sic] hours a day for the next six weeks. I'm going to leverage every possible person, program--I have to get a five-oh vote out of the City Commission.

It's very personal, Dean. So, I can't understand why they want to do it ultimately, I want them to say we've [sic] love to have this project. I'm going to door to door at every tenant in the building and throw them under the fucking bus. I'm going to say they want a marina out here versus a public island. I'm going to the FBI--I'm going to the Foundation. I'm going to every tenant in the building. I'm going to see if I have a banking relationship with anybody in there. I want this done and it's a personal thing for me.

16. Shortly after this voicemail, Petitioner instructed a county employee to visit the Flagler Center Properties' site and photograph dead trees and the property's stormwater outfall. The record is not reliably developed on these points, except to the extent that these two issues are mentioned in Petitioner's next voicemail to the Johnson family attorney, which took place after the photographs were taken.

17. To dispel any doubt of his seriousness, Petitioner called the Johnson family attorney again on June 9, 2010, at 6:18 pm:

Hey, it's Koons. Just wondering, are the Johnsons still fighting that island on the maintenance issue? I was just wondering because I don't know if you noticed the dead trees that they have in their building in downtown West Palm Beach. Can't even take care of their own property with the dead trees. I don't know why they're worrying about maintenance on something else [the South Cove Restoration Project].

Anyway, also, do you have a map of where their stormwater goes? I was just trying to think if they were ever under a pre-treatment of their stormwater that goes off, I think, right where that island is going to be. Anyway, just let me know. Let me know if you want me to call Code Enforcement or what you want me to do. Thanks.

18. By Information dated August 3, 2010, the State of Florida alleged that Petitioner "on or between May 6, 2010, and June 17, 2010, . . . did either verbally or by a written or printed communication, maliciously threaten an injury to the reputation of [the Johnson family] with intent to compel the persons so threatened . . . to do any act or refrain from doing any act against their will, contrary to Florida Statute 836.05 (2 DEG FEL)". The Information also alleges two misdemeanors that are irrelevant to this case.

19. After three interviews with the authorities, Petitioner resigned from the county commission on August 3,

2010. The next day, Petitioner pleaded guilty to extortion and the two misdemeanors, and the court adjudicated Petitioner guilty of all three offenses and sentenced him to five years' county probation for the extortion and fined him \$10,000 for the extortion.

20. There is no evidence whatsoever that Petitioner extorted the Johnson family for personal financial gain. He had already declined to run for another elected office, so the record does not support a finding that he engaged in this extortion for his personal political gain. There is no evidence whatsoever that Petitioner engaged in this extortion for any other personal purposes, including obtaining wheelchair access for a family member or obtaining improper sexual advantage.

21. It is difficult to find that Petitioner engaged in this extortion to cement some sort of personal legacy. The South Cove Restoration Project is not an exceptionally large project, in terms of water quality impacts. It appears to have already been named, so general naming rights--to paraphrase a theater critic, the graffiti of the political/philanthropic class--do not seem to be involved. (Charles Isherwood, "The Graffiti of the Philanthropic Class," N.Y. Times, December 2, 2007, <http://www.nytimes.com/2007/12/02/theater/02ishe.html>).

22. As noted above, the sole practical concern of Petitioner, at the time of the acts of extortion, was the city

vote on the fourth wheelchair ramp. But this vote was a near certainty and concerned an inconsequential matter--a fourth wheelchair ramp--that would not have prevented the project from going forward. Some proponents of the project even believed that the city vote was unnecessary, and a fourth ramp could have been located nearby at a location not within the jurisdiction of the city.

23. Almost all that is left to explain the extortion is Petitioner's characterization of his acts, which he admitted were driven by anger, frustration, and stupidity. The narcissistic demands in the first voicemail that the Johnson family pay public homage to Petitioner and the eerie passive-aggressive nature of the second suggest pride to the point of hubris. But nothing else--except, of course, anger and stupidity.

24. At all material times, Petitioner was in FRS-covered employment, owned vested FRS benefits, and had not filed for FRS retirement benefits. By letter dated November 8, 2010, Respondent advised Petitioner that he had forfeited his FRS benefits when he entered a guilty plea to the felony of extortion. He timely requested a hearing.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 112.3173(5)(a), 120.569, and 120.57(1), Fla. Stat.

26. Any public officer or employee convicted of a "specified offense" committed prior to retirement forfeits his FRS benefits, except for the return of his accumulated contributions. § 112.3173(3), Florida Statutes.

27. Pursuant to section 112.3173(2)(e), a "specified offense" is:

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;
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; or

7. The committing on or after October 1, 2008, of any felony defined in s. 800.04 against a victim younger than 16 years of age, or any felony defined in chapter 794 against a victim younger than 18 years of age, by a public officer or employee through the use or attempted use of power, rights, privileges, duties, or position of his or her public office or employment position.

28. Respondent has the burden of proof. Dep't. of Transp. v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). The standard of proof is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

29. Respondent's theory of this case is that Petitioner's commission of extortion was a specified offense under section 112.3173(2)(e)6. There is no issue that Petitioner was a public officer or employee when he committed a felony. There is no issue that Petitioner committed the elements of the crime willfully.

30. However, three requirements of section 112.3173(2)(e)6. are problematic for Respondent. First, it is unclear how Petitioner, a county commissioner, threatened to use his office to punish the Johnson family, if they did not drop their opposition to the project and pay public homage to Petitioner. Petitioner was a county commissioner. The dead trees and stormwater were in the city limits. Perhaps,

Petitioner would use his prestige as a county commissioner in canvassing the tenants and stirring up trouble. But this element is tenuous, as nothing in Petitioner's threats particularly depends on his status as a county commissioner, as opposed to, say, a longtime resident with more money and time than common sense. For example, the threat to interfere with the Johnson family's banking relationships derived from Petitioner's status as a bank customer, not a county commissioner.

31. Second, it is unclear whether there is an intent to defraud the public or the county commission of the right to the faithful performance of his duties as a county commissioner. The county was the major sponsor of the South Cove Restoration Project, and Petitioner had obviously dedicated himself to the realization of this project. Although Petitioner used means that would not be endorsed by the County Commission, they both were pursuing the same goal.

32. Ultimately, it is unnecessary to resolve these first two issues because of the third issue. Petitioner's acts of extortion did not produce any profit, gain, or advantage for himself or anyone else. Respondent has argued that the gain or advantage was some combination of aesthetic and ecological benefits for the residents of West Palm Beach. That, of course, is painting with an excessively broad brush; one hopes that most

acts of an elected official are for the benefit of her constituents. More tellingly, this argument signals the difficulty faced by Respondent in trying to prove profit, gain, or advantage.

33. Respondent argues more persuasively that profit, gain, or advantage is not necessarily limited to economic benefit. If a public official leverages his office for any meaningful and measureable gain or advantage--financial or otherwise--section 112.3173(2)(e)6. may apply. In an appropriate case, the gain or advantage might be political or sexual.

34. But the statute requires some profit, gain, or advantage. Acts grounded merely in pride, anger, or stupidity--or, as here, all three--are insufficient to cause forfeiture of vested pension benefits under section 112.3173(2)(e)6. The extorter gains no meaningful or measureable benefit by indulging his impulses toward pride, anger, or even stupidity. He makes his demands--in this case, for withdrawn opposition and public displays of honor--and, even if the victim accedes to them, the extorter is left with nothing as meaningful or measureable as money, the political momentum to carry him into a higher elected or appointed office, or even transient sexual gratification. To the contrary, this extorter is left with the bitter residue of indulged pride, anger, and stupidity, which is neither measureable nor meaningful as profit, gain, or advantage. To

prevail in this case, Respondent must read out of section 112.3173(2)(e)6. the requirement that the crime be for the profit, gain, or advantage of the public official or anyone else.

RECOMMENDATION

It is

RECOMMENDED that the Division of Retirement Services enter a final order determining that Petitioner's acts of extortion, described above, do not constitute grounds for forfeiture of his FRS pension.

DONE AND ENTERED this 9th day of August, 2011, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of August, 2011.

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 must be filed with the agency that will issue the final order in this case.