

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARK G. BOLLONE,)
)
 Petitioner,)
)
 vs.) Case No. 11-3274
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF)
 RETIREMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On September 14, 2011, a duly-noticed hearing was held in Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: H. B. Stivers, Esquire
Levine and Stivers
245 East Virginia Street
Tallahassee, Florida 32301

For Respondent: Geoffrey M. Christian, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
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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 (2010).^{1/}

PRELIMINARY STATEMENT

In a certified letter dated April 13, 2011, Respondent notified Petitioner, a former Professor at the Tallahassee Community College (TCC), that his rights and benefits under the Florida Retirement System were forfeited as a result of his no contest plea to three counts of possession of child pornography, in violation of section 827.071(5), Florida Statutes. A Petition for Administrative Hearing dated May 31, 2011, was filed challenging that forfeiture.

On June 28, 2011, the matter was transferred by the Respondent to the Division of Administrative Hearings for assignment of an administrative law judge. The hearing was noticed for hearing on September 14, 2011, in Tallahassee. Respondent filed a Request for Official Notice of five documents related to Case 10-CF-3018, State of Florida v. Mark Bollone, from the Circuit Court of the Second Judicial Circuit in and for Leon County. Petitioner opposed recognition of two of these documents on hearsay grounds, but all were given official recognition by pre-hearing Order on Pending Motion dated August 8, 2011, with the caveat that no findings would be based upon hearsay contained within the documents.

At hearing, Petitioner's new objection to Exhibit R-1, the Arrest/Probable Cause Affidavit, on the basis of relevancy was sustained, and it was not admitted. Petitioner's new objection

to the Amended Information on the basis of relevancy was overruled, and Exhibit R-2 was admitted as a description of the three counts to which the Petitioner subsequently pled no contest. Exhibits R-3, the Plea and Acknowledgment of Rights, and R-4, the Transcript of the Plea and Sentencing Hearing were admitted. Exhibit R-5, the Judgment, was admitted as evidence of the fact that a judgment had been entered against Petitioner for the offenses, but not as proof of the facts underlying the specific elements of the crime.

Respondent offered eight additional documents, identified as Exhibits R-6 through R-13, which were admitted. The Leon County Sheriff's Office Offense/Incident Report, R-8, was admitted for the limited purpose of showing the investigation that prompted actions of the Department. The Supplemental Florida Offense/Incident Report, R-10, was admitted for the limited purpose of supplementing or explaining the testimony of Detective Waller as to his direct activities and observations, because much of the remainder of the report was hearsay within hearsay. Respondent also presented the testimony of four witnesses. Petitioner offered Exhibits P-1 and P-2, Annual Assessments describing Petitioner's work performance, which were admitted into evidence, and the testimony of two witnesses.

The Transcript of the formal hearing was received on September 30, 2011. Proposed Recommended Orders were filed by

both parties on October 11, 2011, and were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the record in this proceeding, including the evidence presented at the formal hearing and the stipulation of the parties in the Joint Response to Pre-hearing Order, the following Findings of Fact are made:

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

2. The Florida Division of Retirement is charged with managing, governing, and administering the FRS on behalf of the Florida Department of Management Services.

3. On or about August 19, 1991, Mark G. Bollone began employment as an instructor with TCC, an FRS-participating employer.

4. By reason of this employment, Mr. Bollone was enrolled in the FRS.

5. Mr. Bollone was assigned a computer that belonged to TCC to assist him in the performance of his job duties, create curriculum, and communicate with students and faculty.

6. Faculty at TCC are assigned computers primarily for creating curriculum and communication with students and faculty, but employees at TCC do use their computers for some other things, both for job-related purposes and for personal use.

7. Mr. Bollone did not share his faculty office with anyone else and he kept his faculty office door locked when he was not there.

8. Computer technicians, custodial workers, the police, and the Mathematics and Science Division office had keys to Mr. Bollone's office.

9. Computer technicians, custodial workers, the police, and office staff were not supposed to use Mr. Bollone's computer, which was assigned for his exclusive use.

10. On or about September 1, 2010, the Leon County Sheriff's Office executed a warrant at Mr. Bollone's personal residence.

11. During the execution of the warrant, Detective Robert H. Waller, Jr. conducted an interview with Mr. Bollone.

12. Following the interview, Detective Waller contacted the TCC Campus Police, who elected to secure the computer equipment from Mr. Bollone's faculty office.

13. On or about September 3, 2010, Detective Waller requested one of TCC's IT computer specialists to assist him in removing the hard drive from Mr. Bollone's work computer.

14. On or about September 3, 2010, Detective Waller conducted an examination of Mr. Bollone's work computer hard drive and discovered three images of child pornography.

15. Detective Waller found the child pornography among the folders associated with the LimeWire file-sharing program on the TCC computer.

16. LimeWire is a peer-to-peer file-sharing program that had been installed on the TCC computer assigned to Mr. Bollone. LimeWire is not part of the software provided by TCC.

17. LimeWire cannot be installed accidentally by clicking on a link or opening an email, but must be downloaded, with the user's consent.

18. A user cannot download files using LimeWire by accident. LimeWire has a search feature which is used to intentionally seek out and download files.

19. The forensic examination revealed that two still images of child pornography on the TCC computer assigned to Mr. Bollone had been downloaded from the Gnutella network through use of LimeWire on March 28, 2008,^{2/} and had been accessed subsequently.

20. The forensic examination revealed that one video file of child pornography on the TCC computer assigned to Mr. Bollone had been downloaded from the Gnutella network through use of Limewire on March 31, 2008, and had been accessed subsequently.

21. E-mails, lesson plans and other files bearing the name of Mark Bollone and associated with TCC classes had been created close to the times the child pornography files were downloaded,

which reflected that Mark Bollone used the computer during this time.

22. Detective Waller has completed training in digital evidence acquisition and has experience in computer forensics. His evidence as to the electronic files found on the TCC computer taken from Mr. Bollone on September 1, 2010, as well as the dates that the files had originally been downloaded and subsequently accessed, was very credible.

23. Detective Waller also has experience in recognizing and identifying child pornography. His involvement with the North Florida Internet Crimes Against Children (ICAC) Task Force in seeking out child predators on the Internet includes work with several other task forces working on similar issues nationally. His evidence that two still images and one video file found among the other pornography located on the TCC computer issued to Mr. Bollone constituted child pornography was very credible.

24. The ongoing criminal investigation by the Leon County Sheriff's Office triggered Mr. Bollone's writing of a letter to TCC President Barbara Sloan dated September 6, 2010.

25. In the letter to TCC President Barbara Sloan, Mr. Bollone asserted that he would be cleared following the criminal investigation.

26. In the letter to TCC President Sloan, Mr. Bollone admitted that, "I made mistakes. I misused my time and my resources while at work."

27. In the letter to President Sloan, Mr. Bollone admitted that, "I was stupid. I understand this and I own it."

28. In the letter to President Sloan, Mr. Bollone stated, "I am taking steps to become a healthier person. I am getting medical/professional help for my addictive behaviors."

29. At hearing, Mr. Bollone stated that the addictive behaviors he was referring to in the letter were on-line "fantasy" behaviors related to sexual identity issues with which he had been dealing.

30. Mr. Brown, Acting Vice President for Academic Affairs at TCC, notified Petitioner on September 8, 2010, that because pornography had been found on his work computer in the criminal investigation conducted by the Leon County Sheriff's Office, his employment was terminated effective October 1, 2010. Mr. Bollone was advised of his right to a hearing on the charge and the method for requesting one.

31. Mr. Bollone did not request a hearing to contest these charges resulting in his termination from TCC.

32. On or about September 10, 2010, Detective Waller filed, in connection with his investigation of Mr. Bollone, a sworn and

notarized Summary of Offense and Probable Cause Affidavit with the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, LCSO Case No. 10-173144.

33. On September 13, 2010, Mr. Bollone was arrested by the Leon County Sheriff's Office.

34. On or about January 6, 2011, Mr. Bollone was charged, by Amended Information, in relevant part, with three counts of possession of child pornography, a third-degree felony, in violation of section 827.071(5), Florida Statutes.

35. On or about March 4, 2011, Mr. Bollone entered an agreement with the State Attorney's Office to plead no contest to three counts of possession of child pornography as charged in the Amended Information.

36. On March 4, 2011, Mr. Bollone attended a plea conference in which he pled no contest to three counts of possession of child pornography on September 1, 2010, as charged in the Amended Information.

37. On or about March 4, 2011, judgment was entered withholding adjudication of guilt on all counts.

38. Mr. Bollone possessed child pornography on the computer owned by TCC, assigned to him to perform his duties as a Professor, and housed in his faculty office.

39. Mr. Bollone was not convicted of aiding or abetting embezzlement of public funds.

40. Mr. Bollone was not convicted of aiding or abetting any theft by a public officer or employee of TCC.

41. Mr. Bollone was not convicted of bribery in connection with his TCC employment.

42. Mr. Bollone was not convicted of any felony specified in chapter 838, Florida Statutes.

43. Mr. Bollone was not convicted of an impeachable offense.

44. Mr. Bollone was not convicted of any felony defined in section 800.04, Florida Statutes, against a person less than 16 years of age.

45. Mr. Bollone was not convicted of any felony defined in chapter 794, Florida Statutes, against a person less than 18 years of age.

46. Mr. Bollone had no inappropriate contact with a TCC student.

47. Mr. Bollone had no inappropriate contact with a TCC student that was harmful to the student.

48. During his tenure at TCC, Mr. Bollone always received satisfactory evaluations from his Dean.

49. During his tenure at TCC, Mr. Bollone always received average or above evaluations from his students.

50. In the 2007-2008 academic year, Mr. Bollone had excellent student evaluations. Mr. Bollone provided extra-

curricular service to the College and community, including the mentoring of a new faculty member, service as a member of the Science Expert Review Committee for the Florida Comprehensive Assessment Test (FCAT), and membership on School Advisory Councils for Lincoln High School and Swift Creek Middle School. Mr. Bollone performed all of the duties and responsibilities of fulltime faculty members at TCC satisfactorily.

51. In his 2008-2009 academic year, Mr. Bollone again had excellent student evaluations. Mr. Bollone's new web-based BSC1050 class was successful. Mr. Bollone continued to provide extra-curricular services to the College and community. Mr. Bollone carried out all of the duties and responsibilities of a fulltime faculty member at TCC satisfactorily.

52. Mr. Bollone is not retired from the FRS and is not receiving FRS retirement benefits.

53. Petitioner's substantial interests are affected by Respondent's determination that Petitioner has forfeited his retirement benefits.

54. Mr. Bollone downloaded the LimeWire file-sharing application to the TCC computer that had been assigned to him. The fact that the computer had been assigned to Mr. Bollone for his exclusive use at the time it was downloaded and the fact that there was limited access to the computer by others strongly support this conclusion.

55. Petitioner downloaded still images of child pornography on March 28, 2008, and a video file of child pornography on March 31, 2008 onto his TCC-issued computer using the LimeWire file-sharing application. Although Detective Waller admitted he did not see Petitioner do so, the forensic evidence showing that the files had been downloaded on these dates, the fact that the computer had been assigned to Mr. Bollone for his exclusive use, and the limited access to it by others strongly support this conclusion. Mr. Bollone's statement that he did not recall downloading those files was not credible.

56. Mr. Bollone accessed those child pornography files from TCC's computer after they were downloaded and prior to the discovery of these files by Detective Waller. The forensic evidence demonstrating that the files had been subsequently accessed, the fact that the computer had been assigned to Mr. Bollone for his exclusive use, and the limited access to it by others strongly support this conclusion. Mr. Bollone's statement that he did not recall having viewed those files was not credible.

57. Mr. Bollone knowingly possessed child pornography using the TCC computer that had been assigned to him. The fact that the computer had been assigned to Mr. Bollone for his exclusive use and the limited access to it by others strongly

support this conclusion. Mr. Bollone's statement at hearing that he had no knowledge of child pornography being on the computer was not credible.

58. Mr. Bollone's possession of child pornography was done willfully and with intent to defraud the public and TCC of the right to receive the faithful performance of his public duty. Mr. Bollone was aware that use of his TCC computer to acquire or view child pornography was a violation of TCC policies. The use of the TCC computer for possession of child pornography was contrary to the faithful performance of his duty as an employee, and was a breach of the public trust.

59. Mr. Bollone realized or obtained, or attempted to realize or obtain, a profit, gain, or advantage to himself through the use or attempted use of the power, rights, privileges, duties, or position of his TCC employment. Mr. Bollone possessed the child pornography for his personal sexual gratification. Mr. Bollone was able to possess child pornography on the TCC computer only through the use of the power, rights, privileges and position of his employment at TCC.

60. Mr. Bollone possessed this child pornography on the date the computer was taken from his possession, September 1, 2010, a time prior to retirement from the Florida Retirement System.

CONCLUSIONS OF LAW

61. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action pursuant to sections 120.569, 120.57(1), and 112.3173(5), Florida Statutes (2011).

62. Petitioner has demonstrated standing to maintain this proceeding.

63. Respondent has the burden of proving by a preponderance of evidence that Petitioner has forfeited his FRS retirement benefits. Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139, (Fla. 4th DCA 1989).

64. 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.

65. This section of the Constitution is implemented in chapter 112, Part III, of the Florida Statutes. The applicable version of the pension forfeiture statute is the one in effect on the date of the criminal acts leading to forfeiture.

See Busbee v. State Div. of Ret., 685 So. 2d 914, 916-17 (Fla. 1st DCA 1996).

66. Forfeitures are not favored in Florida. The retirement forfeiture statute should be strictly construed. Williams v. Christian, 335 So. 2d 358, 361 (Fla. 1st DCA 1976).

67. Section 112.3173(3) 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.

68. Section 112.3173(2)(a) provides that "conviction" and "convicted" mean an adjudication of guilty 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.

69. Mr. Bollone pled nolo contendere to three counts of possession of child pornography, a felony of the third degree under section 827.071(5). This constitutes a "conviction" pursuant to section 112.3173(2)(a).

70. A "specified offense" is defined in the statute in part to include certain felonies under chapter 838, as well as certain felonies relating to bribery, embezzlement and theft of public funds, an impeachable offense, lewd or lascivious

offenses committed upon or in the presence of persons less than 16 years of age, or sexual battery upon a person less than 18 years of age. See section 112.3173(2)(e)1.-5., 7. Mr. Bollone was not convicted of any of these offenses.

71. Section 112.3173(2)(e)6., also defines a "specified offense" to include:

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.

72. The felony of possession of child pornography to which Mr. Bollone pled no contest does not in and of itself necessarily constitute a "specified offense." Rather, the statutory conditions of the "catch all" category set forth above must be examined and applied to the conduct of the official or the employee in making this determination. Jenne v. State, 36 So. 3d 738, 742 (Fla. 1st DCA 2010).

73. In order to constitute a "specified offense" under section 112.3173(2)(e)6., the criminal acts must: (a) be a 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; (e) through use or attempted use of the power, rights, privileges, duties, or position of the Petitioner.

74. It is uncontested that Petitioner was a public employee (and a member of the FRS) and that he pled no contest to three counts of felony possession of child pornography. Therefore, the issue here is whether the other three elements of the "catch all" provision have been met.

75. Petitioner did not plead nolo contendere to downloading or accessing child pornography. The circumstantial evidence proving that he engaged in those acts was relevant to show that his possession of child pornography was done knowingly.

76. Petitioner committed the felony of possession of child pornography willfully and with the intent to defraud the public of the right to receive the faithful performance of his duties as a Professor at TCC. Petitioner's earlier downloading and accessing of the child pornography proves his possession was done knowingly. Mr. Bollone's intentional possession of child pornography on his TCC computer was contrary to TCC policies and

contrary to the faithful performance of his duty. The fact that Mr. Bollone received positive evaluations does not prove that the public received the faithful performance of his duty. Cf. Simcox v. City of Hollywood Police Officers' Ret. Sys., 988 So. 2d 731, 734 (Fla. 4th DCA 2008) ("Faithful performance" of a "duty" as a police officer under section 112.3173(2)(e)(6) does not allow an officer to traffic in drugs when off duty). The public and TCC had a right to expect Mr. Bollone would not use the computer entrusted to him for criminal activity. The public was defrauded when Petitioner used that public property to further his private interest in the possession of child pornography, a crime under the laws of Florida, and a breach of the public trust.

77. No weight was given in this order to the fact that Petitioner did not request a hearing or otherwise present a defense to his termination from employment at TCC. It is true that the failure of a party to appear or testify as to material facts within his knowledge can create an inference that the party refrained from appearing or testifying because the truth would be adverse, unless there has been a sufficient explanation.^{3/} Geiger v. Mather of Lackland, Inc., 217 So. 2d 897, 898 (Fla. 4th DCA 1968). See also Fino v. Nodine, 646 So. 2d 746 (Fla. 4th DCA 1994); Alter v. Finesmith, 214 So.2d 732 (Fla. 3d DCA 1968), cert. denied, 225 So.2d 538 (1969) (adverse

inference from failure to testify). In this case, however, the failure to request a hearing was a response to a different action and it is not clear that the termination from TCC and the criminal charges to which Petitioner pled no contest were sufficiently identical. The letter to Petitioner from TCC alleged that Petitioner had used his computer for the acquisition and viewing of "pornography" in violation of TCC policies governing immorality and misconduct in office. The Leon County Sheriff's Office Electronic Device Examination revealed that the LimeWire folder contained "numerous files." The child pornography that ultimately formed the basis for the criminal charges consisted of only three files found among other pornographic files "containing bestiality, defecation, urination, and other materials." It is not clear that Petitioner's decision not to request a hearing regarding his TCC termination was based in any significant part upon the three child pornography files. Only the possession of the three child pornography files is pertinent to this case. Petitioner's silence in the face of the broader allegations of possession of pornography supporting his termination was thus given no weight as evidence that Mr. Bollone's possession of child pornography was committed willfully and with intent to defraud the public or TCC of faithful performance of his public duty.

78. Petitioner realized or obtained, or attempted to realize or obtain, a gain or advantage for himself in possessing the child pornography. Mr. Bollone possessed the child pornography for his personal sexual gratification. Numerous hearings under this forfeiture statute and similar statutes have consistently concluded that sexual gratification constitutes personal gain. Holsberry v. Dep't. of Mgmt. Servs., Div. of Ret., Case No. 09-0087 (Fla. DOAH July 24, 2009), rejected in part, Case No. 09-0081 (Fla. DMS Oct. 21, 2009); Marsland v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 08-4385 (Fla. DOAH Dec. 15, 2008; Fla. DMS Jan. 20, 2009); Miami-Dade Co. Sch. Bd. v. Epstein, Case No. 03-4041 (Fla. DOAH May 26, 2004; Miami-Dade Sch. Bd. July 19, 2004); Tom Gallagher, as Comm'r of Educ. v. Ricardo F. Arnaldo, Case No. 00-2159 (Fla. DOAH May 16, 2001; Fla. EPC Sept. 14, 2001).

79. Petitioner's gain or advantage to himself was effected through the use of the power, rights, privileges and position of his employment at TCC. His use of the public computer was a power, right and privilege of his position which he exercised to possess child pornography.

80. Mr. Bollone's possession of child pornography on a computer owned by TCC and assigned to him for the purposes of performing his employment duties was therefore a "specified offense" within the meaning of the forfeiture statute.

81. Petitioner committed the felonies on September 1, 2010, prior to retirement of the Petitioner from the Florida Retirement System.

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 Petitioner was a public employee convicted of a specified offense committed prior to retirement pursuant to section 112.3173, Florida Statutes, and directing the forfeiture of his FRS rights and benefits, except for the return of his accumulated contributions as of the date of termination.

DONE AND ENTERED this 19th day of October, 2011, in Tallahassee, Leon County, Florida.



F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of October, 2011.

ENDNOTES

^{1/} All statutory references are to the 2010 Florida Statutes, except as otherwise indicated.

^{2/} The testimony of Kristopher Reeves indicated that subsequent to the download of the child pornography files, TCC issued Mr. Bollone a new I-Mac computer and used Migration Assistant to transfer all of the user's materials from Mr. Bollone's old computer into the new one without change. There was no suggestion that this process in any way affected the content of any of the files, and this event is found to be immaterial for purposes of this case.

^{3/} In an administrative proceeding, an inference arising from silence in the face of an accusation would create no Due Process concerns. Adamson v. Calif., 332 U.S. 46 (1947). Similarly, there would be no violation of the Fifth Amendment in non-criminal proceedings. Baxter v. Palmigiano, 425 U.S. 308 (1976).

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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.