

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STEPHEN J. GONOT,

Petitioner,

vs.

Case No. 13-2396

DEPARTMENT OF MANAGEMENT
SERVICES, DIVISION OF
RETIREMENT,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz for final hearing by video teleconference on November 5, 2013, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Lawrence R. Metsch, Esquire
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20801 Biscayne Boulevard
Aventura, Florida 33180-1423

For Respondent: Geoffrey M. Christian, Esquire
Department of Management Services
Suite 106
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STATEMENT OF THE ISSUE

Whether Petitioner has forfeited his rights and benefits under the Florida Retirement System (FRS), pursuant to sections 112.3173 and 121.091(5)(f), Florida Statutes, because of

his conviction for official misconduct, a third degree felony under section 838.022(1), Florida Statutes.

PRELIMINARY STATEMENT

By certified letter dated May 13, 2013, the Department of Management Services, Division of Retirement ("Respondent" or "the Division"), notified Stephen J. Gonot ("Petitioner"), that his rights and benefits under the FRS are forfeited as a result of his unsuccessful appeal of a conviction in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, for official misconduct, a third degree felony, in violation of section 838.022(1), Florida Statutes; and grand theft, a third degree felony, in violation of sections 812.014(1)(a), (b), and (2)(c)2., Florida Statutes.

Petitioner challenged the proposed forfeiture and timely requested an administrative hearing. Subsequently, Respondent referred the matter to the Division of Administrative Hearings ("DOAH") to assign an Administrative Law Judge to conduct the final hearing. This case was initially assigned to Administrative Law Judge Claude B. Arrington. On September 3, 2013, this case was transferred to the undersigned for all further proceedings.

On June 28, 2013, Respondent served a Request for Admissions ("RFA") upon Petitioner's counsel. The RFA consists of 25 separately numbered requests. After Petitioner did not timely

respond to the RFA, Respondent filed a Motion to Deem Facts Admitted, Motion to Relinquish Jurisdiction, and Motion to Compel Discovery ("Motions"), which Respondent filed on August 28, 2013. Petitioner's counsel did not timely respond to the Motions. On September 9, 2013, the undersigned entered an Order on the Motions, ruling that the matters set forth in the RFA "are deemed technically admitted due to Gonot's failure to object or otherwise respond to such requests" in accordance with the applicable Florida Rules of Civil Procedure and case law. The Order, however, allowed Petitioner the opportunity, pursuant to Fla. R. Civ. P. 1.370(b), to file by September 20, 2013, a motion to withdraw or amend the technical admissions, accompanied by responses to the RFA, unless the privilege against self-incrimination is asserted. Petitioner did not file a motion to withdraw or amend the technical admissions. Indeed, on September 22, 2013, Petitioner filed a response to the Motions and, in doing so, "acknowledged that the statements set forth in the Division's requests for admissions and official recognition are accurate."

Based upon the agreement of counsel for the parties during the October 28, 2013, telephone status conference, the final hearing was rescheduled for November 5, 2013, via video teleconference, with sites in Tallahassee and Lauderdale Lakes, Florida.

Petitioner did not attend the final hearing. At hearing, Petitioner was represented by legal counsel, who presented no testimony or exhibits. Respondent presented the testimony of one witness, Richard Clifford, Benefits Administrator, and offered Exhibits 1-8, all of which were admitted into evidence upon stipulation of the parties.

At hearing, the undersigned granted Respondent's request for official recognition of the following: 1) Part I, Art. III, section 3.05 (Oath of office), Charter of the City of Deerfield Beach, Florida; 2) Part I, Art. VIII, section 8.01 (Standards of ethics), Charter of the City of Deerfield Beach, Florida; 3) Information, State vs. Gonot, Case No. 08-CF-23813, Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, December 29, 2008; 4) Verdict, State vs. Gonot, Case No. 08-CF-23813, Circuit Court of the Seventh Judicial Circuit, in and for Broward County, Florida, May 10, 2011; 5) Circuit Court Disposition Order, State vs. Gonot, Case No. 08-CF-23813, Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, May 10, 2011; 6) Circuit Court Disposition Order, State vs. Gonot, Case No. 08-CF-23813, Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, July 29, 2011; and 7) Opinion, Gonot v. State, Case No. 4D11-2885, Court of Appeal of Florida, Fourth District, May 1, 2013.

The final hearing Transcript was filed on November 25, 2013. The parties were given ten days from the date the Transcript was filed to submit proposed recommended orders. On December 6, 2013, one day late, Respondent filed its Proposed Recommended Order, which was given consideration in the preparation of this Recommended Order. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

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

2. In January 1987, Petitioner began employment with the Florida Department of Transportation ("DOT"), an FRS-participating employer. By reason of this employment, Petitioner was enrolled in the FRS, and DOT made contributions to the FRS on his behalf.

3. In March 2001 and March 2005, Petitioner was elected to separate four-year terms as a Commissioner on the City Commission of the City of Deerfield Beach, Florida ("City"), an FRS-participating employer. By reason of his public office as a City Commissioner, Petitioner was enrolled in the FRS, and the City made contributions to the FRS on his behalf. Before entering upon the duties of his public office, pursuant to Florida law and

the City Charter, Petitioner was required to take and subscribe substantially to the following oath:

I do solemnly swear or affirm that I am a citizen of the State of Florida and of the United States of America and a registered voter and resident of the City of Deerfield Beach, as shown by the public records of Broward County, Florida. I am being employed as a Commissioner of the City of Deerfield Beach and will be a recipient of public funds. As such Commissioner I further swear or affirm that I will support the Charter of the City of Deerfield Beach, the Constitution of the State of Florida, and the Constitution of the United States, and that I will well and faithfully perform the duties of my office upon which I am about to enter.

4. All elected officials of the City were subject to the standards of ethical conduct for public officers set by Florida law and the City Charter. Effective December 11, 2008, Petitioner resigned his position as City Commissioner.

5. On or about December 29, 2008, Petitioner was charged, by information, with one count of grand theft, a third degree felony, in violation of sections 812.014(1)(a) and (b) and (2)(c)2., Florida Statutes; one count of official misconduct, a third degree felony, in violation of section 838.022(1), Florida Statutes; and one count of falsifying records, a first degree misdemeanor, in violation of section 839.13, Florida Statutes. The crimes with which Petitioner was charged were alleged to have occurred between October 6, 2007 and January 10, 2008.

6. The basis for the official misconduct charge was that Petitioner falsified a campaign treasurer's report as part of his

campaign for mayor of the City. The campaign treasurer's report is an official record or document belonging to the office of the City Clerk and/or the Florida Department of State, Division of Elections.

7. Petitioner is no longer employed by DOT or the City. Petitioner is not retired from the FRS, and he has not received FRS retirement benefits. On or about May 7, 2010, Petitioner filed with the Division a completed FRS Pension Plan Application for Service Retirement (Form FR-11). By letter dated May 11, 2010, the Division advised Petitioner in relevant part as follows:

This letter is to advise you of the status of your application for Florida Retirement System benefits.

Our Legal office is reviewing your current legal situation for a determination of whether a forfeiture of benefits has occurred. If the determination is that forfeiture occurred, you will be notified and given information if you wish to appeal that determination.

Your retirement application is pending until this review is complete.

8. On May 10, 2011, a jury rendered a verdict which found Petitioner guilty as charged in the information. On July 29, 2011, the court adjudicated Petitioner guilty of the crimes.

9. On or about August 3, 2011, Petitioner filed a notice of appeal in Florida's Fourth District Court of Appeal. On May 1, 2013, the Fourth District Court of Appeal affirmed Petitioner's convictions for grand theft, official misconduct, and falsifying

records, and authored an opinion which addressed Petitioner's contention that he was entitled to a judgment of acquittal on the count of official misconduct. The Court wrote in relevant part:

Section 838.022(1)(a), Florida Statutes (2007), makes it "unlawful for a public servant, with corrupt intent to obtain a benefit for any person or to cause harm to another, to ... [f]alsify, or cause another person to falsify, any official record or official document." In this case, the basis for the official misconduct charge was that appellant falsified a campaign report as part of his campaign for mayor of Deerfield Beach. On appeal, appellant focuses on section 838.022(2)(a), which defines "public servant" as not "includ[ing] a candidate who does not otherwise qualify as a public servant," for the argument that "he was not a public servant at the time of the alleged offense" but was "merely a candidate for public office."

However, as the State argues, at the time appellant was a candidate for mayor, he "otherwise qualif[ied] as a public servant" by virtue of his status as a city commissioner. Chapter 838 defines "public servant" as including "[a]ny officer or employee of a state, county, municipal, or special district agency or entity." § 838.014(6)(a), Fla. Stat. (2007). The statute distinguishes a mere candidate from a public job or office holder in order to reach the evil of public servants misusing their office. Here, appellant was not just a candidate at the time of the offense; it was his dual status as a candidate and an incumbent commissioner that brought him within the ambit of the statute. ...

Gonot v. State, 112 So. 3d 679, 680 (Fla. 4th DCA 2013) (emphasis in original).

ULTIMATE FACTUAL FINDINGS

10. Petitioner forfeited his rights and benefits under the FRS pursuant to sections 112.3173 and 121.091(5)(f), Florida Statutes, because he was convicted of official misconduct, a third degree felony, in violation of section 838.022(1), Florida Statutes.

CONCLUSIONS OF LAW

11. DOAH has jurisdiction of the subject matter of and the parties to this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

12. The Respondent has the burden of proving by a preponderance of the evidence that Petitioner's rights and benefits under the FRS have been forfeited. Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139, 141-42 (Fla. 4th DCA 1989); Dep't of Transp. V. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

13. "It is in the public's interest that the retirement system be prevented from inducing to public service those individuals inclined to breach the public trust." Childers v. Dep't of Mgmt. Servs., Div. of Ret., 989 So. 2d 716, 720 (Fla. 4th DCA 2008).

14. The Florida Constitution sets forth ethical mandates designed to protect the people of Florida from abuse of the trust they have placed in their public officers and employees. Fla. Const., art. II, §8. This constitutional provision, entitled

"Ethics in government," was enacted in 1976, and contains various reforms related to public service. Brock v. Dep't of Mgmt. Servs., 98 So. 3d 771, 772 (Fla. 4th DCA 2012). Significantly, section 8 provides:

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.

Art. II, §8(d), Fla. Const. (1976).

15. Section 8(d) is not self-executing, and required implementing legislation. Williams v. Smith, 360 So. 2d 417, 418 (Fla. 1978); Brock, 98 So. 3d at 773. In Williams, the court explained the need for implementing legislation, stating that section 8(d) "requires so much in the way of definition, delineation of time and procedural requirements, that the intent of the people cannot be carried out without the aid of legislative enactment." Brock, 98 So. 3d at 773 (quoting, Williams, 360 So. 2d at 420).

16. The legislature enacted section 112.3173, Florida Statutes to implement the provisions of Article II, section 8(d). §112.3173(1), Fla. Stat. (2007); Brock, 98 So. 3d at 773.^{1/}

17. Section 112.3173(3), provides, in relevant part, as follows:

(3) FORFEITURE. - - Any public officer or employee who is convicted of a specified offense committed prior to retirement, or whose office or employment is terminated by reason of his or her admitted commission, aid, or abetment of a specified offense, shall forfeit all rights and benefits under any public retirement system of which he or she is a member, except for the return of his or her accumulated contribution as of the date of termination.

18. "Public officer or employee means an officer or employee of any public body, political subdivision, or public instrumentality within the state." § 112.3173(2)(c), Fla. Stat. (2007).

19. Convicted means "an adjudication of guilt by a court of competent jurisdiction; a plea of guilty or 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." § 112.3173(2)(a), Fla. Stat. (2007).

20. Section 112.3173 (2)(e) defines specified offense as follows:

(e) "Specified offense" means:

1. The committing, aiding, or abetting of an embezzlement of public funds;
2. The committing, aiding, or abetting of any theft by a public officer or employee from his or her employer;

3. Bribery in connection with the employment of a public officer or employee;

4. Any felony specified in chapter 838, except ss. 838.15 and 838.16;

5. The committing of an impeachable offense; or

6. The committing of any felony by a public officer or employee who, willfully and with intent to defraud the public or the public agency for which the public officer or employee acts or in which he or she is employed of the right to receive the faithful performance of his or her duty as a public officer or employee, realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or herself or for some other person through the use or attempted use of the power, rights, privileges, duties, or position of his or her public office or employment position.

21. Similarly, section 121.091(5)(f) provides as follows:

(f) Any member who has been found guilty by verdict of a jury . . . of committing, aiding, or abetting any embezzlement or theft from his or her employer, bribery in connection with the employment, or other felony specified in chapter 838, except ss. 838.15 and 838.16, committed prior to retirement, or who has entered a plea of guilty or nolo contendere to such crime, or any member whose employment is terminated by reason of the member's admitted commitment, aiding, or abetting of an embezzlement or theft from his or her employer, bribery, or other felony specified in chapter 838, except ss. 838.15 and 838.16, shall forfeit all rights and benefits under this chapter, except the return of his or her accumulated contributions as of the date of termination.

22. In the present case, Petitioner, a public officer or employee, was convicted of official misconduct, a felony under section 838.022(1), Florida Statutes. Because conviction of a felony under section 838.022(1), Florida Statutes, is a specified offense pursuant to section 112.3173(2)(e), and both sections 112.3173 and 121.091(5)(f), Florida Statutes, require forfeiture for a conviction of official misconduct under section 838.022(1), Petitioner's FRS rights and benefits must be forfeited.

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 the Petitioner was convicted of a felony under section 838.022(1), Florida Statutes, and directing the forfeiture of his FRS retirement rights and benefits.

DONE AND ENTERED this 13th day of December, 2013, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of December, 2013.

ENDNOTE

^{1/} Unless otherwise noted, all statutory references are to the 2007 versions of the statutes, the applicable statutes in effect at the time when Petitioner committed the crime of official misconduct. Busbee v. State, Div. of Ret., 685 So. 2d 914, 917 (Fla. 1st DCA 1996).

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.