

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN W. ZEH,

Petitioner,

vs.

Case No. 14-0870

BOARD OF TRUSTEES OF THE CITY OF  
LONGWOOD POLICE OFFICERS' AND  
FIREFIGHTERS' PENSION TRUST  
FUND,

Respondent.

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RECOMMENDED ORDER

D. R. Alexander, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing on April 29, 2014, in Longwood, Florida.

APPEARANCES

For Petitioner: Jammison Jessup, qualified representative  
557 Noremac Avenue  
Deltona, Florida 32738-7313

For Respondent: Christopher R. Conley, Esquire  
Daniel W. Langley, Esquire  
Fishback, Dominick, Bennett, Ardaman,  
Ahlers, Langley & Geller LLP  
1947 Lee Road  
Winter Park, Florida 32789-1834

STATEMENT OF THE ISSUE

The issue is whether, pursuant to section 112.3173, Florida Statutes, Petitioner forfeited his retirement benefits under the City of Longwood's (City's) Police Officers' and Firefighters'

Pension Trust Fund (Pension Fund) by having pled nolo contendere to felony counts of burglary with assault/battery while armed (firearm) and aggravated assault with a firearm while on duty.

PRELIMINARY STATEMENT

By letter dated October 21, 2013, the Pension Fund notified Petitioner, a former police officer with the City, that he had forfeited his rights and benefits under the Pension Fund by reason of his admitted commission and conviction of certain felonies in 2011. Petitioner timely requested a hearing, and pursuant to a contract, the matter was referred by the City to DOAH to conduct a formal hearing.

Without objection by the Respondent, Petitioner was represented at the final hearing by Jamison Jessup, as his qualified representative. Petitioner's Exhibit 1 was admitted into evidence. Respondent presented the testimony of Petitioner. Also, Respondent's Exhibits 1-7 were admitted into evidence.

A one-volume Transcript of the hearing has been prepared. Proposed Findings of Fact and Conclusions of Law were filed by the parties on June 12 and 16, 2014, and have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The City is a small municipality in southwestern Seminole County lying just north of Altamonte Springs and west

of Winter Springs. Petitioner was employed as a patrol corporal by the City Police Department and was a member of the Pension Fund.

2. On January 29, 2011, while on duty, Petitioner was involved in an incident at a residence in the City where his former wife, Kimberly Zeh, also a police officer and then separated but not yet divorced from Petitioner, was temporarily living with a friend, Carol Ericson. At the time of the incident, Petitioner was on duty, in uniform, and in possession of City issued equipment, including a firearm.

3. Around 4:00 p.m. that day, Petitioner drove to the residence in his police cruiser and first attempted to telephone his wife, then rang the door bell, and finally knocked on the door. When there was no response, without permission Petitioner entered the dwelling through a sliding glass door in the kitchen. He did not have a warrant relating to the residence and there were no exigent circumstances that warranted his entry into the residence. Petitioner's mannerisms upon entering the home demonstrated and were consistent with the emotion of anger.

4. After entering the dwelling, Petitioner observed his former wife "walk[ing] across the hallway partially dressed" and Bennett Feld in the bedroom. Mr. Feld is a physician assistant then employed by the Zeh's family physician. Petitioner believed Mr. Feld was having an affair with his wife.

5. Petitioner drew his service weapon, entered the bedroom, and pushed Mr. Feld against a wall. He then pointed his service weapon at Mr. Feld's head and asked: "Do you think you're going to take my wife?" He also stated that if his former wife did not move back home then three dead bodies would be found at the residence. After holstering the weapon, he struck Mr. Feld in the face.

6. Prior to leaving the residence, Petitioner requested that his former wife return home and stated that the incident that just took place would be forgiven.

7. On March 1, 2011, an Information was filed in State of Florida v. John W. Zeh, Case No. 2011-00503-CFA, in the Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, charging Petitioner for the incident occurring on January 29, 2011. In relevant part, the Information states:

Count I: In that John W. Zeh, on or about January 29, 2011, in the County of Seminole and State of Florida, did violate F.S. 810.02(1) by knowingly entering or remaining in a dwelling, the property of Carol Ericson as owner or Kimberly Zeh as custodian, with the intent to commit an offense therein, and in the course of committing the burglary made an assault or battery upon Kimberly Zeh and/or Bennett Feld, and during the commission of the burglary John Zeh was in actual possession of a firearm, contrary to Florida Statute 810.02(2)(a), 810.02(2)(b) and 775.087. (1 DEB FEL, PBL).

\* \* \*

COUNT IV: In that John W. Zeh on or about January 29, 2011, in the County of Seminole and State of Florida, while in possession of a firearm, did intentionally and unlawfully threaten by word or act to do violence to the person of Bennett Feld, coupled with an apparent ability to do so, which created well-founded fear in that such violence was imminent, and further did commit the assault with a handgun, a firearm or deadly weapon, contrary to Florida Statutes 784.021(1)(a) and 775.087(2). (3 DEG FEL).

8. On October 11, 2011, Petitioner, represented by counsel, entered a plea of nolo contendere to, in relevant part, the following: (1) burglary with assault/battery while armed in violation of sections 810.02(2)(b) and 775.087(1)(a); and (2) aggravated assault with a firearm in violation of section 784.021(1)(a).

9. On January 4, 2012, Petitioner was adjudicated guilty of the above crimes and was sentenced accordingly.

10. After the incident, Petitioner voluntarily resigned from his position as a City police officer.

11. Upon becoming aware of Petitioner's plea, the Pension Fund initiated proceedings to determine whether Petitioner's pension fund benefits should be forfeited pursuant to chapter 112 and/or the Pension Fund's terms and conditions.

12. On October 15, 2013, the Pension Fund conducted a probable cause hearing resulting in the determination that Petitioner's rights and benefits be forfeited under the Pension

Fund. Contrary to Petitioner's assertion, the Notice of that decision was sufficient to apprise him of the intended action. The Notice precipitated the filing of Mr. Zeh's request for a hearing.

13. Paragraphs A.-G. of section 21 of the Pension Plan are identical with section 112.3173(2)(e), cited in the Conclusions of Law, so the Plan provisions will not be restated here. Like the cited statute, subsection (2) of section 21 provides in part that "[c]onviction shall be defined as . . . a plea of guilty or nolo contendere."

#### CONCLUSIONS OF LAW

14. By contract with Respondent, DOAH has agreed, on request of Respondent, to assign Administrative Law Judges to conduct hearings and issue recommended orders in cases of this type.

15. In this proceeding, Respondent asserts that Petitioner has forfeited his rights and benefits under the Pension Plan pursuant to section 112.3173.

16. Section 112.3173(1) is part of the statutory code of ethics for public officers and employees. The statute states in pertinent 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 guilt by a court of competent jurisdiction; a plea 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.

\* \* \*

(c) "Public officer or employee" means an officer or employee of any public body, political subdivision, or public instrumentality within the state.

(d) "Public retirement system" means any retirement system or plan to which the provisions of part VII of this chapter apply.

(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 employer;
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

\* \* \*

(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 is member, except for the return of his or her accumulated contributions as of the date of termination.

17. Section 21 of the Pension Plan parallels the forfeiture analysis and requirements set forth in the statute in requiring that "[a]ny Member who is convicted" of the specified offenses set forth "shall forfeit all rights and benefits under this System."

18. As the party asserting that Petitioner has forfeited his rights and benefits under the Pension Plan pursuant to section 112.3173(3), Respondent bears the burden of proof in this proceeding. See, e.g., Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

19. Not every crime committed by a public officer or employee gives rise to forfeiture of pension rights and benefits under section 112.3173. To result in forfeiture, the crime must be a specified offense as defined in section 112.3173(2)(e)1. through 7.

20. The crimes to which Petitioner pled nolo contendere are not among the specified offenses enumerated in paragraphs 1. through 5. or 7. of section 112.3173(2)(e). Accordingly, the issue is whether Petitioner's crimes fall within paragraph 6., which has been called the "catch-all" provision of the forfeiture statute. See Bollone v. Dep't of Mgmt. Servs., 100 So. 3d 1276, 1280 (Fla. 1st DCA 2012).

21. To constitute a specified offense under the catch-all provision, the criminal act must be: a felony; committed by a public employee; done 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 as a public employee; done to realize or obtain, or attempt to realize or obtain, a profit, gain, or advantage for the employee or some other person; and done through the use of or attempted use of the power, rights, privileges, duties, or position of the employee's public employment. Bollone at 1280-81.

22. To determine whether section 112.3173(2)(e)6. applies to a particular offense, these statutory conditions must be

examined and applied in light of the employee's conduct. Bollone at 1280. Whether a particular crime meets the definition of a "specified offense" under this provision depends on the way in which the crime was committed. Jenne v. Dep't of Mgmt. Servs., 36 So. 3d 738, 742 (Fla. 1st DCA 2010).

23. There is no dispute that Petitioner was a public employee at the time he committed the acts described above. There also is no dispute that Petitioner pled nolo contendere to one count of burglary with assault/battery with a firearm, one count of battery, one count of domestic battery, and one count of aggravated assault with a firearm. Thus, by operation of section 112.3173(2) (a), he is deemed as having been convicted of these offenses, which are felonies.

24. As to defrauding the public or the employee's public employer prong, this requirement is met where there is evidence of a "nexus between the crimes charged against the public officer and his or her duties and/or position." DeSoto v. Hialeah Police Pension Fund Bd. of Trs., 870 So. 2d 844, 846 (Fla. 3d DCA 2003). The nexus is satisfied where one violates his or her duties as a public officer in failing to safeguard the public's faith in that public office or position. Id.

25. Here, Petitioner testified he took an oath, and he violated such oath upon committing the felonies in question. The acts were committed while he was on duty, in uniform, and in

possession of City police officer equipment. Therefore, the nexus between the crimes charged and the duties of the public officer has been met.

26. As to the fourth prong, Petitioner contends that Respondent has failed to show that the acts were committed to obtain a profit, gain, or advantage for Petitioner or another person. Notably, the statute does not provide that only economic gain can be considered personal gain. Bollone at 1281. Here, the record demonstrates non-monetary personal gains or advantages accruing to Petitioner, who believed that his conduct against Mr. Feld would stop the affair, influence or otherwise persuade his wife to return home, and allow the couple to continue the marriage. Such personal benefits obtained while on duty, in uniform, and while carrying and using a service weapon are the types of profits and intended benefits chapter 112 was enacted to prohibit. Bollone at 1282.

27. Finally, the felonious conduct must be done through the use or attempted use of the "powers, rights, privileges, duties, or position of the employee's employment." Bollone at 1281. The record shows that Petitioner committed the felonies while on duty, while in uniform, and while carrying a City-issued firearm. The felonies occurred after he drove a police cruiser to the location of the incident.

28. In summary, the evidence establishes that the offenses to which Petitioner pled nolo contendere are "specified offenses" within the meaning of section 112.3173(2)(e)6. As such, all requirements in section 112.3173(3) for forfeiture are met. While truly unfortunate, it is concluded that Mr. Zeh has forfeited his rights and benefits under the Pension Plan, except for the return of his accumulated contributions as of the date of his termination. See § 112.3173(3), Fla. Stat.

#### RECOMMENDATION

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

RECOMMENDED that the Board of Trustees for the City of Longwood Police Officers' and Firefighters' Pension Trust Fund enter a final order determining that Petitioner has forfeited his rights and benefits under the Pension Fund, except for the return of his accumulated contributions as of the date of his termination.

DONE AND ENTERED this 30th day of June, 2014, in  
Tallahassee, Leon County, Florida.

*D.R. Alexander*

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D. R. ALEXANDER  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of June, 2014.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.