

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RONALD J. ROSEN,

Petitioner,

vs.

Case No. 16-1987

DEPARTMENT OF MANAGEMENT
SERVICES, DIVISION OF
RETIREMENT,

Respondent.

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RECOMMENDED ORDER

On August 31, 2016, Administrative Law Judge J. Lawrence Johnston held the final hearing in this case by video teleconference in Orlando and Tallahassee.

APPEARANCES

For Petitioner: Thomas D. Sommerville, Esquire
Law Offices of Thomas D. Sommerville, P.A.
820 North Thornton Avenue
Orlando, Florida 32803

For Respondent: Thomas E. Wright, Esquire
Office of the General Counsel
Department of Management Services
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4050 Esplanade Way
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STATEMENT OF THE ISSUE

The issue is whether the Petitioner forfeited his retirement benefits due to criminal convictions.

PRELIMINARY STATEMENT

In 2009, the Petitioner applied for retirement benefits and was notified by the Respondent that he forfeited them in 2005 when he was convicted of two counts of lewd or lascivious molestation of a minor female student at the school where he was employed. The Petitioner disputed the forfeiture and asked for a hearing.

The Petition for Hearing alleged that the Petitioner was an educator employed with the Brevard County School Board and taught in a public elementary school when he was charged with lewdly molesting six minor female students during the 2000/2001 academic year by patting or touching them on their clothed buttocks or clothed breasts; that he denied the charges and stood trial rather than pleading guilty to one count of misdemeanor battery, with no jail, no adjudication of guilt, and no probation if he resigned his teaching position; and that he was found and adjudicated guilty on three second-degree felony counts of lewd molestation and one first-degree felony count of lewd molestation in violation of section 800.04(5), Florida Statutes.

The Petition for Hearing was referred to the Division of Administrative Hearings (DOAH), where it was designated DOAH Case 10-0101 and placed in abeyance because a motion for post-conviction relief was pending. In April 2013, the DOAH

case was closed and jurisdiction was relinquished to the Respondent without prejudice to re-open the case if the matter was not resolved after the post-conviction proceedings were concluded.

On April 4, 2016, the Respondent moved to re-open the proceeding at DOAH because the motion for post-conviction relief had been denied. The case was re-opened and designated DOAH Case 16-1987. The parties filed a pre-hearing stipulation, which states the issue to be whether the criminal convictions require forfeiture under sections 112.3173 or 121.091, Florida Statutes.

At the final hearing, the Respondent called one witness, Dale Young, a former investigator for the State Attorney's Office that prosecuted the Petitioner, and had certified copies of the criminal court records admitted as Exhibits 1, 3, and 4. The Petitioner did not appear at the final hearing, except through counsel, and presented no evidence. The Petitioner takes the position that the only evidence of a nexus between the convictions and the Respondent's employment as a teacher for the Brevard County School Board was hearsay to which the Petitioner objected.

After the evidence was presented, the parties were given until September 12, to file proposed recommended orders, or ten days after the filing of a transcript of the final hearing, if

one was ordered. On September 12, the Petitioner filed a Proposed Recommended Order, and the Respondent filed a notice that it was ordering a Transcript. The Transcript was filed on October 6. The Respondent's Proposed Recommended Order was filed on October 17. Both proposed recommended orders have been considered.

FINDINGS OF FACT

1. According to the Petition for Hearing, the Petitioner was an educator employed with the Brevard County School Board and taught in a public elementary school when he was charged with lewdly molesting six minor female students during the 2000/2001 academic year by patting or touching them on their clothed buttocks or clothed breasts.

2. The charges were filed in March 2001. The Petitioner denied the charges and stood trial by jury. In January 2005, the Petitioner was adjudicated guilty on three second-degree felony counts of lewd molestation and one first-degree felony count of lewd molestation in violation of section 800.04(5), Florida Statutes.

3. The former investigator for the State Attorney's Office that prosecuted the Petitioner testified at the final hearing in this case that the alleged victims made statements to him about the Petitioner's crime and its relation to his employment as a teacher, and that he went to the school to document the setup of

the Petitioner's classroom. The investigator had no personal knowledge, and it was unclear from his testimony whether he received information about the Petitioner's crime and its relation to his employment from anyone other than the alleged victims.

4. The Petitioner was a member of the Florida Retirement System (FRS) at the time of the criminal charges against him and would have been entitled to retirement benefits if it were not for the criminal convictions.

CONCLUSIONS OF LAW

5. At the time of the criminal charges against the Respondent, section 112.3173(3), Florida Statutes (2000), provided for the forfeiture of all rights and benefits accrued by a member of any public retirement system, except for the return of accumulated contributions, upon conviction of certain specified criminal offenses, including "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. Forfeiture of retirement benefits under this statute has been interpreted to require a nexus between the felony convictions and the FRS employment. Rivera v. Bd. of Trustees of the City of Tampa’s Gen. Emp’t Ret. Fund, 189 So. 3d 207 (Fla. 2d DCA 2016).

6. The Respondent has the burden to prove the elements of forfeiture of retirement benefits by a preponderance of the evidence. 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). The Petitioner contends that the Respondent failed to meet the burden of proof because its proof was hearsay that would not be admissible over objection in a civil action. See § 120.57(1)(c), Fla. Stat. (2016). The Petitioner’s contention fails to take into account his Petition for Hearing, which alleged the required nexus and eliminated the requirement to introduce evidence to prove the nexus.

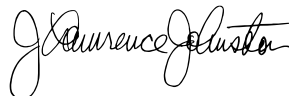
7. It appears that the Respondent also overlooked the allegations in the Petition for Hearing, as it is not mentioned in the Respondent’s Proposed Recommended Order. However, the Respondent’s Proposed Recommended Order cites for the first time the decision of the court in the Petitioner’s appeal from his criminal convictions. Rosen v. State, 940 So. 2d 1155 (Fla. 5th

DCA 2006). The court's opinion recites the facts of the case, including that the victims were the Petitioner's sixth grade students, and made it clear that the Petitioner's crimes were related to his FRS employment as a teacher.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Respondent enter a final order: denying the Petition for Hearing; and holding that the Petitioner forfeited his retirement benefits, except for the return of any accumulated contributions, when he was convicted of felonies for lewd or lascivious molestation of minor female students at the school where he was employed.

DONE AND ENTERED this 21st day of October, 2016, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of October, 2016.

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.