

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DOUG WILLIAMS,

Petitioner,

vs.

Case No. 16-3298

CITY OF CORAL SPRINGS POLICE
OFFICERS' PENSION FUND,

Respondent.

_____/

SHERRY WILLIAMS,

Petitioner,

vs.

Case No. 16-3302

CITY OF CORAL SPRINGS POLICE
OFFICERS' PENSION FUND,

Respondent.

_____/

RECOMMENDED ORDER

On September 30 and October 10, 2016, a duly-noticed hearing was held by video teleconference at locations in Lauderdale Lakes and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Nicholas E. Christin, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined is whether the Board of Trustees for the City of Coral Springs Police Officers' Pension Fund (Respondent or the Board) should issue final orders suspending payment of pension benefits to Douglas Williams and Sherry Williams (Petitioners or the Williamses) pending a later Board decision on forfeiture pursuant to section 112.3173, Florida Statutes (2016),^{1/} consistent with initial orders recommending such suspension of benefits issued on March 15, 2016.

PRELIMINARY STATEMENT

On February 24, 2016, the Board voted to suspend the Williamses' pension benefits, and the Board issued initial orders to that effect dated March 15, 2016, which were served on the Williamses the following day. The Williamses timely requested a formal hearing pursuant to sections 120.569 and 120.57, Florida Statutes, on April 15, 2016. On May 27, 2016, the cases were referred to the Division of Administrative Hearings for assignment of an Administrative Law Judge. An

Order of Consolidation was issued on July 5, 2016. After a continuance, the final hearing was conducted on September 30 and October 10, 2016, by video teleconference.

The parties stipulated to certain facts, which were accepted and have been incorporated into the Findings of Fact below. At hearing, both parties offered testimony from the same two witnesses: Sergeant Glenn Matonak, president of the Coral Springs Fraternal Order of Police Lodge No. 87, Inc.; and Sergeant Scott Myers, a supervisor in the Coral Springs Police Department and chairman of the Board. Petitioners also offered testimony from Gina Orlando, the administrator of the Coral Springs police and fire pensions.

Petitioners offered Exhibits P-1 through P-8, which were admitted into evidence without objection. Respondent offered Exhibits R-1 and R-2, admitted without objection, and Exhibits R-3 through R-6, admitted over Petitioners' objections that they were hearsay, with the caveat that under chapter 120, hearsay may only supplement or explain other evidence and is not alone sufficient to support a finding of fact.

The two-volume Transcript was filed on October 19, 2016. Both parties timely filed proposed recommended orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The City of Coral Springs is a municipality in Broward County, Florida. It exercises broad power pursuant to Article VIII, section 2, Florida Constitution, and the Municipal Home Rule Powers Act, chapter 166, Florida Statutes.

2. The City Commission of the City of Coral Springs (Commission) may create other offices, boards, or commissions to administer the affairs of the city and may grant them powers and duties.

3. The Commission has adopted the Coral Springs Police Officers' Pension Plan (the Plan), which is amended from time to time by ordinance and is set forth in sections 13-5 through 13-17 of the Code of Ordinances of the City of Coral Springs.

4. The Plan is administered by the Board, the powers of which are set forth in sections 13-13 through 13-15 of the Code of Ordinances of the City of Coral Springs.

5. The Plan requires mandatory participation from all officers. Officers must provide continuous service to the department and contribute to the Plan to receive benefits.

6. The Plan creates a 100-percent vested interest after ten years of continuous service and contribution.

7. The Plan allows officers to enter the Deferred Retirement Option Plan ("DROP") on the first day of the month coincident with their normal retirement date.

8. When an officer enters DROP, no additional contributions are made to the Plan, and the benefits are calculated as if the officer had actually retired. Those benefits are transferred to an investment account and cannot be distributed until the officer's actual separation from service.

9. Officers who enter DROP must resign from their employment within five years of entry into the program.

10. Once an officer enters DROP, any changes in the Plan's benefits do not apply to that officer.

11. After entering DROP, changes in the Plan may only be applied to those officers if the changes are also applicable to retired members. The only provisions that mention revision of benefits after DROP are the cost-of-living adjustment provision and the repeal or termination of the entire system provision.

12. The Plan does not provide for change in the vested interest in the Plan after the officer enters DROP.

13. The Plan does not provide for the Board to suspend an officer's vested interest in the Plan after the officer enters DROP.

14. Section 112.3173 provides for the forfeiture of pension benefits if a member is convicted of certain "specified offenses." This section of the statute applies, with some exceptions, to any employee pension benefit plan supported in whole or in part by public funds. Section 112.3173 applies to the Plan.

15. Section 112.3173 does not contain a provision for suspending a member's benefits pending criminal charges.

16. Douglas Williams was a full-time Coral Springs police officer from September 1981 through September 30, 2009.

17. Douglas Williams's vested interest in his pension plan reached 100 percent in 1991, after ten continuous years of service and contributions.

18. On December 1, 2004, Douglas Williams became eligible for retirement, and he entered into DROP.

19. Effective October 1, 2009, Douglas Williams began receiving monthly pension payments after terminating his employment.

20. From December 1, 2004, through February 1, 2016, Douglas Williams received \$703,819.30 in pension payments.

21. Douglas Williams's contributions to his pension plan totaled \$80,302.74.

22. On September 4, 2014, Douglas Williams was arrested and charged with multiple counts of grand theft related to his volunteer position with the Coral Springs Fraternal Order of Police Lodge No. 87, Inc.

23. Sherry Williams was a full-time Coral Springs police officer from August 1995 through September 30, 2014.

24. Sherry Williams's vested interest reached 100 percent in 2005, after ten continuous years of service.

25. On February 1, 2012, Sherry Williams became eligible for retirement, and she entered DROP.

26. Effective October 1, 2014, Sherry Williams terminated her employment and began receiving monthly pension payments.

27. From February 1, 2012, through February 1, 2016, Sherry Williams received \$363,901.65 in pension payments.

28. Sherry Williams's contributions to her pension plan totaled \$97,901.65.

29. On September 5, 2014, Sherry Williams was arrested and charged with multiple counts of grand theft and fraud related to her position with the Coral Springs Fraternal Order of Police Lodge No. 87, Inc.

30. The Williamses' positions with the Coral Springs Fraternal Order of Police Lodge No. 87, Inc., required them to be police officers with the City of Coral Springs.

31. Sergeant Scott Myers, and possibly other members of the Board, became aware of the possibility of suspending the payment of benefits to individuals charged with certain crimes at a Florida Public Pension Trustees Association (FPPTA) conference in September 2015.

32. No contract has been entered into between the City Commission and the Fraternal Order of Police allowing for the enactment of a statute or ordinance that amends the Plan to allow the Board to suspend a member's benefits after retirement before an adjudication of guilt of a specified offense under section 112.3173.

33. On January 25, 2016, the Board adopted its "Policy Regarding Payment of Pension Benefits Pending Forfeiture Under Florida Statute §112.3173" (Board Policy).

34. The Board Policy provides that when a member has commenced receipt of benefits, and evidence has been brought to the Board's attention that the member has been charged with what may be a specified offense, the Board shall vote at the next regularly scheduled meeting to allow the member to continue to receive the monthly pension up to an amount equal to their employee contributions. Thus, when monthly pension payments exceed the employee contribution, payments would be suspended

pending the outcome of charges and held in the interim by the Board.

35. The Board Policy further provides that while benefits are being held by the Board, the balance will accrue interest at the Plan's assumed rate of return.

36. The Board provided notice to Douglas and Sherry Williams, both personally and through their attorney of record in the criminal cases, that the Board would consider the suspension of their benefits pursuant to the Board Policy at its February 24, 2016, meeting.

37. Douglas Williams attended the meeting; Sherry Williams did not.

38. On February 24, 2016, determining that the offenses with which Douglas and Sherry Williams had been charged may be specified offenses under section 112.3173, the Board decided to suspend Douglas and Sherry Williams's pension benefits, and the Board issued each of them an Order Recommending Suspension of Benefits (Board Orders) on March 15, 2016.

39. The Board conducted no factual inquiry into the basis for the charges against Douglas and Sherry Williams.

40. Each Board Order states that the Board reviewed the records, including charging documents from the Broward Clerk of Court; section 112.3173; and the case of Warshaw v. City of

Miami Firefighters' and Police Officers' Retirement Trust, 885

So. 2d 892 (Fla. 3rd DCA 2004). The Board Orders stated that Doug and Sherry Williams were "charged with . . . felonies which may be specified offenses under Florida Statutes 112.3173."

41. The Information against Douglas Williams charged, in part, that he committed the second-degree felony of engaging in an organized scheme to defraud, and:

[U]tilizing his position on the Coral Springs Fraternal Order of Police Lodge No. 87, Inc. to defraud the Coral Springs Fraternal Order of Police Lodge No. 87, Inc. by systematically, and through an ongoing course of conduct with intent to defraud, did misappropriate funds to himself and did unlawfully convert to his use or the uses of others not entitled thereto property, to wit: United States Currency in an aggregate amount in excess of twenty thousand dollars (\$20,000.00) but less than fifty thousand dollars (\$50,000.00) or more belonging to Coral Springs Fraternal Order of Police Lodge No. 87.

In addition, the Information contained seven related counts of the third-degree felony of grand theft.

42. The Information against Sherry Williams similarly charged that she committed the first-degree felony of engaging in an organized scheme to defraud the Coral Springs Fraternal Order of Police Lodge No. 87, Inc., of property consisting of United States Currency in an aggregate amount in excess of \$50,000.00. Her Information also contained one second-degree

felony of grand theft in excess of \$20,000.00 and five counts of the third-degree felony of grand theft.

43. The crimes Douglas and Sherry Williams were charged with have not been determined by the Board to be specified offenses under section 112.3173.

44. The Board Orders for Douglas Williams and Sherry Williams were served on Petitioners on March 16, 2016. The orders provided:

The Claimant has thirty (30) days from receipt of this Administrative Order to request a full hearing on the suspension of benefits by sending a letter outlining the specific reasons for the appeal to Gina Orlando at the City of Coral Springs, Pension Office, 9551 West Sample Road, Coral Springs, FL 33065. The hearing process followed will be pursuant to Florida Statutes §120.569 and §120.57(1).

45. The Williamses timely requested formal hearings pursuant to sections 120.569 and 120.57 on April 15, 2016.

46. The Williamses have not been convicted of the crimes with which they have been charged.

CONCLUSIONS OF LAW

47. DOAH has jurisdiction over the parties and subject matter of this proceeding. § 120.65(6), Fla. Stat.

48. The parties disagree as to which bears the burden of proof. The issue here is whether monthly pension benefits currently being paid to Petitioners under the Plan should be

suspended. The burden of proof as to this contested issue lies with Respondent, which is arguing for suspension. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981) (the party asserting the affirmative of the issue has the burden of proof). See also Amico v. Div. of Ret., Dep't of Admin., 352 So. 2d 556, 557 (Fla. 1st DCA 1977) (once payment of disability retirement benefits begins, burden to prove lack of entitlement lies with the Division of Retirement); Balino v. Dep't of HRS, 348 So. 2d 349, 350 (Fla. 1st DCA 1977) (where state intends to discontinue, suspend, or reduce assistance, it bears the burden to prove the basis for reclassification). Respondent thus has the burden to prove by a preponderance of the evidence that final orders suspending benefits should be issued. § 120.57(1)(j), Fla. Stat.

49. Petitioners are substantially affected by Respondent's intended decision to suspend payment of their retirement benefits and have standing in this proceeding.

50. The petitions filed in these cases timely requested a formal hearing on the Board Orders. However, it is clear that the basic dispute between the parties--as framed by the Amended Pre-hearing Stipulation, at hearing, and in the proposed recommended orders--revolves around the validity of the January 25, 2016, Board Policy, upon which those orders were based.^{2/} Petitioners make several arguments.

51. First, Petitioners argue that the Board Policy allows suspension without requiring the Board to make a determination that a specified offense has occurred. Under section 112.3171(2)(e), "specified offense" for purposes of forfeiture 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;
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.

52. Although substantial interests of Petitioners are being determined, suspension is far less serious than forfeiture. The Board Policy requires that "evidence be brought to the Board's attention that a member has been charged with what may be a specified offense." This is similar to the requirement in the state retirement statute, section 121.091(5)(k), Florida Statutes, which requires suspension "if the resolution of such charges could require the forfeiture of benefits."

53. A full evidentiary proceeding to determine exactly what occurred is not required in order to suspend benefits prior to a forfeiture hearing that will consider that same issue. It is enough that an information or indictment alleges an offense which could warrant forfeiture upon conviction.

54. Certainly issues will always remain to be litigated in the forfeiture proceeding, but a determination that a member has been charged with what may be a specified offense is sufficient to support suspension.

55. Second, Petitioners argue that the Board Policy allows suspension to be imposed without opportunity for the member to present a case in opposition. This argument is rejected. Certainly, it would have been preferable for the Board Policy to

describe the hearing process, but its failure to do so is not fatal, and adequate procedures were followed. While the point of entry to request a section 120.57(1) hearing is offered only after the Board's initial action to suspend, members then have an opportunity for a full and complete hearing. Final agency action takes place only after the Board receives the Recommended Order. See McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 578 n.5 (Fla. 1st DCA 1977) (explaining that section 120.57(1) proceedings are designed to formulate agency action, not to review it).

56. Third, Petitioners argued at hearing that adoption of the Board Policy was improperly motivated by consideration of the Williamses' specific situation. However, judicial interest in legislative action is limited to the question of power. Inquiry "does not extend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act." Izaak Walton League v. Monroe Cnty., 448 So. 2d 1170, 1172 (Fla. 3d DCA 1984) (quoting City of Miami Beach v. Schauer, 104 So. 2d 129 (Fla. 3d DCA 1958)). Even if the Trustees did have the Williamses' situation in mind at the time they voted to adopt the Board Policy, this would not invalidate their action. An administrative body's exercise of its legislative power is not interfered with in the absence of "fraud or gross abuse of

discretion," not alleged here. Hillsborough Cnty. Aviation Auth. v. Taller & Cooper, Inc., 245 So. 2d 100, 102-03 (Fla. 2d DCA 1971). See also Hunter v. Carmichael, 133 So. 2d 584, 586 (Fla. 2d DCA 1961) (in the absence of fraud or corruption, public officials are presumed to have properly performed their duties in accordance with law).

57. Fourth, Petitioners maintain that the Board Policy contravenes state law, specifically, section 112.3173. It is beyond doubt that a state statute prevails over a conflicting municipal ordinance or local rule. City of Casselberry v. Orange Cnty. Police Benevolent Ass'n., 482 So. 2d 336, 340 (Fla. 1986). The test is "whether one must violate one provision in order to comply with the other." In other words, there is a conflict when the two legislative enactments cannot co-exist. Sarasota Alliance for Fair Elections, Inc. v. Browning, 28 So. 3d 880, 888 (Fla. 2010).

58. As Petitioners assert, the suspension provisions of section 121.091(5)(k) are not applicable to the Plan and section 112.3173 does not include a provision authorizing suspension.

59. Petitioners are also correct that the statement in the Board Policy that section 112.3173 "does not address" what procedure is to be employed when a member has been receiving

benefits prior to conviction is not entirely correct. Section 112.3173(5) (d) provides:

If any person's rights and privileges under a public retirement system are forfeited pursuant to this section and that person has received benefits from the system in excess of his or her accumulated contributions, such person shall pay back to the system the amount of the benefits received in excess of his or her accumulated contributions. If he or she fails to pay back such amount, the official or board responsible for paying benefits pursuant to the retirement system or pension plan may bring an action in circuit court to recover such amount, plus court costs.

As Petitioners contend, it is clear that this paragraph refers to benefits paid to a retiree prior to conviction, and that it authorizes the official or board administering the retirement fund to bring an action in circuit court to recover benefits paid in excess of the retiree's contributions.

60. Petitioner's further argument--that this statutory procedure is exclusive, and that the Board's adoption of any procedure to suspend payment of benefits prior to conviction is therefore contrary to statute--is not persuasive, however.

61. Authorization to bring an action in circuit court is not in conflict with suspension of payments. Since circuit court action is not statutorily required, the provisions can co-exist as alternatives. More importantly, if suspension is imposed after retirees have already received benefits which

exceed the amount of their contributions, circuit court action to recover the excess amount paid still remains an option. No conflict exists that would require the violation of one provision to comply with the other.

62. Petitioners next contend that the Board lacked authority to adopt the Board Policy, rendering invalid any subsequent attempts to apply it.

63. The power of municipalities in Florida is very broad. Article VIII, section 2(b), Florida Constitution, provides that "municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law." The enactment of the Municipal Home Rule Act, chapter 73-129, Laws of Florida (codified in chapter 166), recognized that the constitution had granted municipalities "broad exercise of home rule powers . . . for municipal governmental, corporate, or proprietary purposes not expressly prohibited." § 166.021(4), Fla. Stat. Section 166.041 describes the procedures that must be followed to enact an ordinance. It also expressly provides that a municipality does not have the power or authority to lessen or reduce requirements set forth in general law.

64. The Board is not a municipal government, however. Administrative policies that regulate or otherwise affect persons outside the Board itself must be based upon legislative power that has been delegated to the Board, otherwise they are void ultra vires; administrative bodies have no inherent powers. Dep't of Env'tl. Reg. v. Puckett Oil Co., 577 So. 2d 988, 991 (Fla. 1st DCA 1991) (powers of administrative agencies are measured and limited by the statutes or acts in which such powers are expressly granted or implicitly conferred).

65. The Board Policy constitutes legislation. It purports to establish a generally applicable policy. Bd. of Cnty. Comm'rs v. Snyder, 627 So. 2d 469, 474 (Fla. 1993) (local government action is legislative if it formulates a general rule of policy). By its own terms, when evidence is brought to the Board's attention that a member has been charged with what may be a specified offense, the policy requires the Board to vote to allow the member to continue to receive monthly pension benefits only up to an amount equal to their employee contributions.

66. The same restrictions which apply to the Legislature's delegation of legislative authority also apply in the enactment of municipal ordinances. Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972). See also Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978) (fundamental and primary policy decisions must be made by the Legislature);

Blicht v. City of Ocala, 195 So. 406, 407 (Fla. 1940) (en banc) (ordinances must not constitute a delegation of legislative authority).^{3/}

67. There is no allegation here that an ordinance of the City of Coral Springs invalidly delegates legislative authority to the Board. Petitioners contend rather that suspension of the payment of benefits in anticipation of forfeiture is not even mentioned in the city ordinance, and that nothing in the Plan authorizes the Board to create such a policy.

68. Respondent argues that the Board Policy is valid, noting that it does not amend the terms of the Plan and does not conflict with the Plan or any other applicable law. But this is not the correct test. The question is not whether the Board Policy constitutes an amendment of the Plan, which all parties agree cannot be done. Unlike a municipality, which has plenary, residual authority, the Board does not have authority to adopt policy simply because it does not conflict with the Plan or other applicable law. Instead, the Board has only that legislative authority that has been affirmatively granted to it. The explicit powers of the Board must therefore be carefully examined. See, e.g., Fla. Virtual Sch. v. K12, Inc., 148 So. 3d 97, 99 (Fla. 2014).

69. The Board is granted legislative power by subsection 13-14(f) of the Code of Ordinances of the City of Coral Springs, which provides:

Subject to the limitations of this chapter, the board shall from time to time establish uniform rules and regulations for the administration of the plan and fund created by this chapter and for the transaction of its business.

70. Respondent asserts that pursuant to its rulemaking grant to administer the Plan, the Board Policy simply carries out responsibilities assigned to the Board. Subsection 13-14(h) of the Plan provides in relevant part:

The duties and responsibilities of the board shall include, but not necessarily be limited to, the following:

- (1) To construe the provisions of the plan and determine all questions arising thereunder.
- (2) To determine all questions relating to eligibility and participation.
- (3) To determine or have determined and certified the amount of all retirement allowances or other benefits hereunder.
- (4) To receive and process all applications for participation and benefits and, where necessary, conduct hearings thereon.
- (5) To authorize all payments whatsoever from the fund, and to notify the disbursing agent, in writing, or approve benefit payments and other expenditures arising through operation of the plan and fund.

71. However, Respondent has identified no provision of the Plan that the Board Policy is construing, administering, or applying. The Board Policy does not pertain to eligibility or participation in the Plan, the determination of the amount of benefits, the processing of applications, or the authorization of payments and expenditures. As seen earlier, these decisions and actions took place some time ago with respect to Petitioners' pensions. The forfeiture provisions of section 112.3173 operate independently and do not involve any retrospective determination that Petitioners' pensions were erroneously, fraudulently, or illegally granted. The creation of a new policy relating to suspension of benefits pending a determination of forfeiture under section 112.3173 does not fall within the administration of any of these Plan provisions.

72. Respondent's main argument, however, is not that these enumerated duties of the Board authorize it to adopt a suspension policy, but instead that fiduciary standards authorize and require it to do so. Subsection 13-14(i) of the Plan provides:

Board members, in the performance of their duties, must conform and act pursuant to the documents and instruments establishing and governing the plan. Members shall carry out their duties with the care, skill, prudence and diligence under the circumstances then prevailing which a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of

like character and like aims. Members are subject to the fiduciary standards in F.S. §§112.656, 112.661, and 518.11, and the Code of Ethics in F.S. §§112.311-112.3187.

73. Section 112.656(1) provides:

A fiduciary shall discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan.

74. Respondent convincingly asserts that if Petitioners are convicted of specified offenses, the Board will have to collect at least \$889,516.00 from them, and there is no guarantee that the Board will ever be able to recoup the full amount owed.

75. Respondent goes on to argue, less persuasively, that to meet fiduciary standards, Respondent is required to suspend the payment of benefits.

76. Respondent cites to cases from the State of New Jersey: In the Matter of Frank Watts, 2010 WL 4721193 (N.J. Super. Ct. App. Div. 2010); and Mount v. Trustees of the Public Employees' Retirement System, 335 A.2d 559, 562 (N.J. Super Ct. 1975). In these cases, it was found that, even in the absence of a statutory provision authorizing suspension (and in Mount, even the absence of an administrative rule), the trustees could suspend payment of benefits. The court in Mount noted that the

criminal charges that had been filed were inconsistent with honorable service, an implicit requirement for receipt of a pension in New Jersey. The court stated, "The board of trustees are [sic] fiduciaries and therefore have a duty to protect the fund and the interests of all beneficiaries thereof."

77. In Watts, the court went on to state, quoting other New Jersey cases:

Generally speaking, we will "intervene only in those rare circumstances in which an agency action is clearly inconsistent with its statutory mission or with other state policy." Only if the agency's action was arbitrary, capricious, or unreasonable should it be disturbed (citations omitted).

78. This broad concept of the extent of power that may be exercised by an administrative agency stands in stark contrast with the far more limited power of administrative agencies under Florida law, as discussed above.

79. It is clear that fiduciary standards compel the Board to exercise all of the powers granted to it by statute and municipal ordinance with the highest degree of care and loyalty toward Plan retirees and to always use these powers in their best interest. However, it does not logically follow, as Respondent seems to argue here, that if a suspension policy is in the retirees' best interest, that the Board therefore has authority to create it. The Board has the authority to act on

behalf of the Fund only through the exercise of the duties granted to it.

80. In short, the provisions requiring the Board to act in accord with fiduciary standards do not in themselves create any new powers, but do dictate how powers otherwise already existent in the Board must be exercised. This is plainly stated in the quoted language above of both subsection 13-14(i) of the Plan, "shall carry out their duties," and section 112.656, "discharge his or her duties." The New Jersey cases are not persuasive on this point.^{4/} Under Florida law, it cannot be concluded that the Board has powers beyond those granted to it by provisions of statute and the Plan.

81. Examination of the Code of Ordinances of the City of Coral Springs shows that the city has neither adopted a suspension policy itself, nor properly delegated the authority to do so to the Board. Petitioners' argument that the Board Policy is invalid is accepted. Respondent has not demonstrated that it has authority to suspend Petitioners' benefits.

82. Petitioners finally contend that even if the Board did have authority to adopt the Board Policy, its failure to preserve vested rights violates due process and impairs existing contracts. They assert that Douglas Williams's contract cannot be changed after 2004, and that Sherry Williams's contract cannot be changed after 2012. See, e.g., Busbee v. Div. of

Ret., 685 So. 2d 914, 916 (Fla. 1st DCA 1996) (analyzing state law forfeiture provisions using a contract analysis). These arguments are not considered. Should the City of Coral Springs choose to amend the Plan to include a provision authorizing suspension, these constitutional claims can be considered in due course by an appropriate court.^{5/}

83. Respondent failed to prove by a preponderance of the evidence that a final order suspending Petitioners' retirement benefits can be issued.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Trustees for the City of Coral Springs Police Officers' Pension Fund not issue final orders suspending payment of pension benefits to Douglas Williams and Sherry Williams in the absence of provisions in the Coral Springs Pension Plan providing for such action.

DONE AND ENTERED this 18th day of November, 2016, in
Tallahassee, Leon County, Florida.

F. Scott Boyd

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 18th day of November, 2016.

ENDNOTES

^{1/} Citations to Florida Statutes and to the Code of Ordinances of the City of Coral Springs, Florida, are to the versions now in effect, except as otherwise indicated.

^{2/} Even in civil actions, an issue is tried by consent if there is no objection to the introduction of evidence. See Fla. R. Civ. P. 1.190(b). Administrative proceedings are less formal and the pleading requirements less strict. It should also be noted that section 120.57(1)(e)1. clearly provides that a separate challenge to a rule or unadopted rule underlying agency action need not be filed. Here, the proposed order to suspend the Williamses' retirement benefits determines their substantial interests and may not be based on the Board Policy if it is an invalid rule.

^{3/} Many decisions examine the validity of delegations of authority by a city to administrative agencies that it has created, often involving zoning boards. The cases apply the same restrictions which apply to the Legislature's delegation of legislative authority to state agencies. In Clarke v. Morgan, 327 So. 2d 769 (Fla. 1976), the supreme court discussed a number of cases and emphasized that a critical factor is the extent to which the delegation of authority includes meaningful standards

to guide the agencies in their administration of the various city zoning ordinances. The fundamental legislative power to zone may not itself be delegated. State v. Roberts, 419 So. 2d 1164, 1165 (Fla. 2d DCA 1982).

^{4/} Similarly of no support to the Board is the fact that Florida Administrative Code Rule 60S-4.021(4)(a), applicable only to the Florida Retirement System Pension Plan administered by the Division of Retirement, provides that the administrator may suspend the payment of benefits pending resolution of criminal charges by the circuit court. While that administrative rule may, as argued by Respondent, demonstrate the prudence of the Board Policy, it offers no example of administrative authority untethered to statute. The rule implements an explicit legislative authorization contained in section 121.091(5)(k). Should that legislative authorization be repealed, the administrative rule would lose its force. Rules adopted by the Board similarly must implement legislative authorization by the City of Coral Springs or Florida Legislature. As discussed, the Plan contains no such provision.

^{5/} Petitioners assert that their claims that the Board Policy violates the due process and impairment of contract clauses may be addressed by an administrative tribunal, citing Miami Association of Firefighters Local 587 v. City of Miami, 87 So. 3d 93 (Fla. 3d DCA 2012). They note that invalidation of a statute is not involved and that when considering agency action, Administrative Law Judges may also address constitutional questions when exhaustion requires their consideration of statutory ones. The invalidation of an agency rule on constitutional grounds must be distinguished, however. Courts have long permitted consideration of constitutional issues in proposed rule challenges, in which the rule has not yet been filed for adoption. Dep't of Env'tl. Reg. v. Leon Cnty., 344 So. 2d 297 (Fla. 1st DCA 1977). However, they have not permitted consideration of constitutional issues in existing rule challenges. Dep't of Admin., Div. of Pers. v. Dep't of Admin., Div. of Admin. Hearings & Harvey, 326 So. 2d 187, 189 (Fla. 1st DCA 1976). Even if the constitutional questions could be considered here, it would not be appropriate to do so, since it is not necessary. Constitutional challenges to legislative action by a local government body are considered through suit in circuit court. City of St. Pete Beach v. Sowa, 4 So. 3d 1245, 1247 (Fla. 2d DCA 2009).

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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.