

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF TAMPA GENERAL EMPLOYEES
RETIREMENT FUND,

Petitioner,

vs.

Case No. 16-6664

TONIA BRIGHT,

Respondent.

RECOMMENDED ORDER

On July 25, 2017, the evidentiary hearing in this cause was held before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings (DOAH), by video teleconference with sites in Tampa and Tallahassee, Florida.

APPEARANCES

For Petitioner: Luis A. Santos, Esquire
Ford & Harrison LLP
Suite 900
101 East Kennedy Boulevard
Tampa, Florida 33602

For Respondent: No Appearance

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent's rights and benefits under the City of Tampa General Employees' Retirement Fund are required to be forfeited pursuant to article II,

section 8(a) of the Florida Constitution and the implementing statute.

PRELIMINARY STATEMENT

On January 28, 2016, Respondent Tonia Bright (Respondent) pled guilty to two felony counts of obtaining information from a protected computer in violation of 18 U.S.C. § 1030(a)(2) and (c)(2)(B)(ii). Judgment was rendered against Respondent in May 2016, adjudicating her guilty of the two offenses, sentencing her to 24 months in prison, imposing a fine, and ordering restitution.

On November 4, 2016, Petitioner City of Tampa General Employees' Retirement Fund (the Fund or Petitioner) requested that DOAH assign an administrative law judge to conduct proceedings under chapter 120, Florida Statutes, regarding the potential forfeiture of Respondent's pension benefits.

An Initial Order sought input from the parties regarding the scheduling of the evidentiary hearing. There was some delay in a joint response, because Respondent was incarcerated in a federal prison camp in West Virginia. The hearing was set for June 1, 2017, based on Respondent's expected release date, to allow Respondent the opportunity to participate in the hearing. By Motion to Continue Final Hearing, counsel for Petitioner relayed information from Respondent that her release date had been pushed back to June 21, 2017, and that Respondent requested that the

hearing be rescheduled for July 2017. Petitioner did not object to the request, and provided dates when both parties were available for a rescheduled hearing. The motion was granted and the hearing was reset for July 25, 2017.

Although the hearing was delayed at Respondent's request to await her release from incarceration so she could participate, Respondent did not appear at the rescheduled hearing. Respondent did not provide DOAH with an updated address after her release, but Petitioner provided her updated contact information. The undersigned's assistant called Respondent shortly before the hearing, and Respondent advised that she was aware of the scheduled hearing, but did not intend to make an appearance.

At the hearing, Petitioner presented the testimony of Kimberly Marple, an employee relations specialist supervisor for the City of Tampa (City), in the human resources division. Petitioner's Exhibits 1 through 7 were admitted in evidence. A court reporter recorded the hearing and a transcript was ordered.

At the conclusion of the evidence, the deadline for filing proposed recommended orders (PROs) was set for ten days after the filing of the transcript. A Post-hearing Order was issued on July 25, 2017, to inform Respondent of that filing deadline.

The one-volume Transcript of the hearing was filed at DOAH on August 17, 2017. A Notice of Filing Transcript was issued on

August 18, 2017, to inform the parties that with the filing of the Transcript, the PRO deadline would be August 28, 2017.

On the deadline day, Petitioner filed a motion for a two-day extension of the PRO deadline due to a family medical emergency. The extension was granted. Petitioner timely filed its PRO before the extended deadline. Respondent did not file a PRO or any other filing before, during, or after the hearing.

Petitioner's PRO and the evidentiary record created at the July 25, 2017, hearing have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Fund is a public retirement system as defined by Florida law. The Fund is charged with administering and managing a pension plan for City employees.

2. Respondent was an employee of the Tampa Police Department. She worked there for approximately 31 years until her employment ended on April 9, 2014.

3. By reason of her employment with the City's police department, Respondent was enrolled in the pension plan administered by the Fund. She was employed long enough to be a vested participant.

4. At the time her employment ended, Respondent was a police community service officer, a position she had held since September 2007.

5. Shortly before her employment ended, Respondent became one of the subjects of a criminal investigation regarding Tampa Police Department employees using their access to restricted computer databases to obtain personally identifiable information of individuals, such as social security numbers and birth dates. The personal information was passed on to a former police informant, Rita Girven, who was using the information to fraudulently obtain federal income tax returns. Respondent, a friend of Ms. Girven's, was identified in the investigation as one of three employees using their access to restricted databases to obtain personally identifiable information to provide to Ms. Girven.

6. During the course of the investigation, the City suspended Respondent and subsequently gave her the option to resign in lieu of termination, which she accepted. Respondent resigned effective April 9, 2014.

7. The investigation culminated in a federal indictment against Respondent on multiple counts. Respondent was represented by an attorney in the federal criminal proceedings. Respondent ultimately entered into a plea agreement to plead guilty to two counts (counts two and five of the indictment) of obtaining information from a protected computer in violation of 18 U.S.C. § 1030(a)(2) and (c)(2)(B)(ii). The crimes to which Respondent pled guilty are felonies.

8. In the plea agreement executed by both Respondent and her attorney, Respondent admitted the following facts:

Defendant is pleading guilty because defendant is in fact guilty. The defendant certifies that defendant does hereby admit that the facts set forth below are true, and were this case to go to trial, the United States would be able to prove those specific facts and others beyond a reasonable doubt.

FACTS

Tonia Bright was a civilian employee of the Tampa Police Department (TPD) working as a community service officer in TPD's District 3 station. As part of her authorized duties, Bright took reports from citizens, over the telephone or in person, related to any incident not requiring the response of a sworn police officer. In this capacity, Bright had access to local, state, and federal law enforcement databases, including the National Crime Information Center (NCIC) computerized index, but her authorized use was restricted to the performance of her official duties.

NCIC was a computerized index of criminal justice information maintained by the Federal Bureau of Investigation that was available to federal, state, and local law enforcement agencies and other criminal justice employees. The purpose of NCIC was to assist criminal justice professionals in apprehending fugitives, locating missing persons, recovering stolen property, and otherwise performing their official duties. NCIC contained personally identifiable information (PII), including names, dates of birth, and social security numbers of millions of individuals. As an employee of TPD, Bright was provided a secure and individualized user name and password that allowed her to access NCIC strictly for the purposes of carrying out her official duties.

Rita Monique Girven . . . was . . . a friend of Tonia Bright. Rita Girven pleaded guilty [to] one count of conspiracy to commit wire fraud in a related case . . . in connection with Girven electronically filing fraudulent federal income tax returns using stolen PII, some of which she obtained from one or more coconspirators, including Bright, who had access to law enforcement databases, including NCIC, for the purpose of carrying out their official duties.

From an unknown date, but at least in or around 2009, and continuing through and including in or around 2014, Tonia Bright accessed NCIC and other password-protected law enforcement databases for a prohibited purpose, specifically, to obtain PII, which she provided to Girven on at least ten occasions so that Girven could use the PII to file fraudulent federal income tax returns and/or establish, change, or access accounts to receive fraudulently obtained federal income tax refunds. When Girven received the fraudulently obtained refunds, she shared some of the proceeds with Bright. (Pet. Exh. 3, ¶ 11, at 17-19).

9. In the plea agreement, Respondent also admitted to the specific facts underlying the two counts to which she pled guilty, whereby Respondent conducted unauthorized searches in the NCIC database to obtain personally identifiable information of specific individuals, which was used by Girven to fraudulently obtain federal income tax refunds. As to both counts, Respondent admitted that she had “no legitimate work-related reason” and “no legitimate law enforcement reason” to run the searches that she did in the NCIC database. (Pet. Exh. 3, ¶ 11, at 19, 21).

Respondent's unauthorized search of the NCIC database, as described in the admitted facts underlying count two, occurred on or about June 27, 2011. Respondent's unauthorized search of the NCIC database, as described in the admitted facts underlying count five, occurred on or about March 13, 2013.

10. By Judgment in a Criminal Case issued May 11, 2016, the United States District Court for the Middle District of Florida acknowledged Respondent's guilty plea to counts two and five of the indictment, and the court adjudicated Respondent guilty of the two felony offenses.

11. Respondent has thus admitted that beginning in June 2011, while employed as a police community service officer and entrusted with access to protected computer databases for the purpose of carrying out her job duties, she abused that trust and misused her restricted access for prohibited purposes, resulting in the two felony counts to which Respondent pled and was adjudicated guilty. Respondent did not use the access to these protected databases, which had been entrusted to her because of her public position, solely in the performance of her legitimate job duties as a public employee. Instead, she used that access for her own illegitimate purposes of misappropriating others' personally identifiable information to provide to her friend to fraudulently obtain tax refunds, and to personally profit by

sharing in the proceeds of those fraudulently obtained tax refunds.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to, and subject matter of, this proceeding, pursuant to sections 120.569, 120.57(1), and 112.3173(5), Florida Statutes (2017).^{1/}

13. The Fund initiated this action to determine whether Respondent's pension benefits must be forfeited under section 112.3173(3) based on her conviction of a specified offense.

14. The Fund has the burden of proving that Respondent must forfeit her retirement benefits. Rivera v. Bd. of Trs. of Tampa's Gen Empl. Ret. Fund, 189 So. 3d 207, 210 (Fla. 2d DCA 2016).

15. The preponderance of the evidence standard is applicable to this case. See § 120.57(1)(j), Fla. Stat.; Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996). Preponderance of the evidence is defined as "the greater weight of the evidence," or evidence that "more likely than not" tends to prove a certain proposition. S. Fla. Water Mgmt Dist. v. RLI Live Oak, LLC, 139 So. 3d 869, 872 (Fla. 2014).

16. The Florida Constitution and implementing statutory law provide the framework for forfeiture of retirement benefits. Rivera, 189 So. 3d at 210; Simcox v. City of Hollywood Police

Officers' Ret. Sys., 988 So. 2d 731, 733 (Fla. 4th DCA 2008).

Since 1976, Article II, section 8(d) of the Florida Constitution has provided:

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.

17. Section 112.3173(3) is the operative forfeiture law, implementing the constitutional provision as follows:

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.

18. "Convicted," as used in the operative forfeiture law, is defined to include a plea of guilty as well as an adjudication of guilt by a state or federal court of competent jurisdiction.
§ 112.3173(2) (a) & (b), Fla. Stat.

19. A "specified offense" is defined to include the following:

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[.]

§ 112.3173(2)(e)6., Fla. Stat.

20. The statutory provisions quoted above have been in place, without change, since before 2009. Compare § 112.3173(2)(a), (b), (e)6., and (3), Fla. Stat. (2008), with § 112.3173(2)(a), (b), (e)6., and (3), Fla. Stat. (2017).

21. Respondent's earliest actions taken in furtherance of the crimes for which she was indicted were in 2009, according to the facts admitted in her plea agreement. Respondent's specific actions taken in furtherance of the crimes in counts two and five to which she pled and was adjudicated guilty were in June 2011 and March 2013, according to the facts admitted in her plea agreement. Respondent committed the felonies while she was employed as a public employee, prior to retirement. Thus, at the time Respondent committed the felonies to which she pled and was adjudicated guilty, she knew or should have known of the above-quoted mandatory forfeiture provisions in the Florida Constitution and implementing laws, and those laws apply. See Busbee v. State Div. of Ret., 685 So. 2d 914, 916-917 (Fla. 1st DCA 1996) (the applicable version of the pension forfeiture statute is the one in effect at the time the offense is committed that led to forfeiture).

22. Respondent's admissions of the detailed facts underlying her felony convictions conclusively establish that Respondent's felony convictions meet the statutory definition of "specified offense" in section 112.3173(e)6., in all respects. Respondent's admissions establish that she acted willfully and with intent to defraud the public and the Tampa Police Department of "the right to receive the faithful performance of" her duty as a public employee, by abusing the restricted computer access that had been entrusted to her solely for the purpose of carrying out her job duties. Instead of faithfully adhering to the access restrictions by limiting her use solely for purposes of carrying out her job duties, Respondent violated that trust by using her restricted access for the illegitimate, unauthorized purpose of obtaining personally identifiable information of individuals. Respondent admitted that the personal information she intentionally obtained was used for profit, shared by Respondent and her friend Ms. Girven.

23. Just as in Jenne v. State, 36 So. 3d 738, 743 (Fla. 1st DCA 2010), Respondent's plea of guilty and signed plea agreement admitting all of the material facts--matters of record in this case--establish that Respondent committed her crimes in a way that made them specified offenses as defined in section 112.3173(2) (e) 6.^{2/} Accord Bollone v. Dep't of Mgmt. Servs., 100 So. 3d 1276, 1281 (Fla. 1st DCA 2012) (finding use of work

computer to commit a felony satisfied the elements of section 112.3173(2)(e)6.).

24. The Fund clearly met--indeed, exceeded--its burden of proof. The clear, convincing, and undisputed evidence of record establishes that Respondent committed a specified offense while she was a public employee, and thus, prior to her retirement. Accordingly, Respondent must forfeit her rights and benefits under the Fund's pension plan (except to the extent of Respondent's accumulated contributions, if any, as of the date her employment ended), pursuant to section 112.3173(3).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the City of Tampa General Employees' Retirement Fund enter a final order determining that Respondent, Tonia Bright, has forfeited all of her rights and benefits in the pension plan administered by the Fund, except to the extent of Respondent's accumulated contributions, if any, as of the date her employment ended.

DONE AND ENTERED this 18th day of September, 2017, in
Tallahassee, Leon County, Florida.



ELIZABETH W. MCARTHUR
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day September, 2017.

ENDNOTES

^{1/} As to procedural matters, the law in effect at the time of the hearing was applied. Substantively, the law in effect at the time Respondent committed the acts resulting in the felony conviction that gave rise to this proceeding was applied. As a practical matter, there were no changes to procedural or substantive law that would have any material effect on this proceeding. In particular, as explained in paragraphs 20 and 21 of the Conclusions of Law, section 112.3173 has remained the same in all material respects since 2008. Thus, references to Florida Statutes herein are to the 2017 version, unless otherwise noted.

^{2/} In this regard, this case is unlike Rivera, where the court found that there was no non-hearsay evidence to prove the existence of a "nexus" between the offenses committed and Rivera's position as a City employee. See Rivera, 189 So. 3d at 212-213. Here, Respondent's own statements offered against her would be admissible over objection in a civil action, pursuant to the hearsay exception codified in section 90.803(18)(a), Florida Statutes. As such, those statements are competent evidence that may be relied on as the sole evidentiary support for findings of fact. § 120.57(1)(c), Fla. Stat.

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.