

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF TAMPA GENERAL EMPLOYEES  
RETIREMENT FUND,

Petitioner,

vs.

Case No. 16-6665

BEVERLY HARVIN,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in Tampa and Tallahassee, Florida, on March 3, 2017, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Beverly Harvin, pro se  
423 Benson Street  
Valrico, Florida 33594

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

STATEMENT OF THE ISSUE

Whether Petitioner has forfeited her rights and benefits under the City of Tampa General Employees Retirement Fund pursuant to section 112.3173, Florida Statutes (2010).

PRELIMINARY STATEMENT

On or about November 4, 2016, the City of Tampa General Employees Retirement Fund (Petitioner) forwarded the instant matter to the Division of Administrative Hearings for a disputed-fact hearing. The case involves the potential forfeiture of pension benefits by Beverly Harvin (Respondent).

During the hearing, Petitioner offered the testimony of Respondent, Brent Holder, Natasha Wiederholt, and Kimberly Marple. Respondent testified on her own behalf and called no other witnesses. Petitioner's Exhibits 6 through 11 were admitted into evidence. Respondent's Exhibits 1, 2, 3, composite Exhibit 4, and 9 through 19 were also admitted into evidence.

A Transcript of the disputed-fact hearing was filed with the Division of Administrative Hearings on March 24, 2017. Petitioner submitted a Proposed Recommended Order (PRO), but Respondent did not. Petitioner's PRO was considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. On or about February 11, 1986, Respondent commenced her employment as a police community service officer with the City of Tampa Police Department. As a city employee, Respondent was eligible for, and participated in, the City of Tampa General Employees Retirement Fund, which is a public retirement system.

Respondent was continuously employed by the City of Tampa through September 1, 2011.

2. Sometime around May 1994, Respondent was promoted to the position of investigative assistant where she worked closely with a team of detectives. Respondent's job duties as an investigative assistant included interviewing crime victims, witnesses, and individuals who were suspected of having engaged in criminal activity. As an investigative assistant, Respondent often had access to confidential information, and she understood that confidential information was not to be disclosed to unauthorized individuals.

3. An "officer safety alert" is one such piece of confidential information that Respondent had access to in her position as an investigative assistant, and like other confidential information, Respondent understood that an officer safety alert should only be disclosed to authorized personnel.

4. Officer safety alerts are internal police department missives that are often issued for the purpose of advising officers to proceed with caution when encountering individuals who may be under investigation, but who have not yet been charged with a crime.

5. Around 7:50 a.m. on the morning of January 19, 2011, Respondent's co-worker, Priscilla Phillips, reviewed an officer safety alert that identified Reginald Dennard Preston as a

subject of an ongoing investigation. The officer safety alert contained a picture of Respondent's nephew, and other individuals, along with the following narrative:

The above listed subjects are part of an ongoing investigation. S.I.B./Enforcement Group 2 has purchased firearms from these subject(s) that were taken in a residential burglary. The subjects are still in possession of additional firearms. The subjects are not wanted at this time due to the ongoing nature of the investigation. Use caution when coming into contact with the listed subjects and vehicle. Also use caution if responding to calls at the listed addresses.

Due to ongoing investigations, only distribute to TPD Personnel.

LAW ENFORCEMENT SENSITIVE

The information contained within this bulletin is the property of the Tampa Police Department and constitutes active criminal intelligence information, and is exempt from public record. The information has been collected in accordance with 28 CFR Part 23 and Florida State Statute Chapter 119.

6. It is undisputed that Ms. Phillips knew that Mr. Preston was Respondent's nephew and that within minutes of reviewing the officer safety alert, she sent Respondent a text message regarding the same. Respondent admits that she sent a reply text message to Ms. Phillips within a minute or so of receiving the initial message.

7. During the morning hours of January 19, 2011, Respondent was home from work on sick leave when, according to Respondent,

she received a message from Ms. Phillips informing her that Reginald Preston was "wanted for questioning regarding a burglary." According to Respondent, Ms. Phillips then took a snapshot of Reginald Preston's photograph and sent it to Respondent without including any other information from the officer safety alert. In other words, Respondent claims that she had no knowledge that Ms. Phillips had gleaned the information regarding Respondent's nephew from an officer safety alert, and that as far as she knew, the only issue, as conveyed by Ms. Phillips, was that her nephew was "wanted for questioning regarding a burglary."

8. Respondent's credible testimony regarding this issue is as follows:

Q: Now, when Ms. Phillips contacted you on January 19th of 2011, she informed you that Preston was part of this officer safety alert; right?

A: She did not inform me that he was part of an officer safety alert. She advised me that they want[ed] to speak to my nephew in reference to a burglary. She did not mention an officer safety alert to me, sir.

Q: But she did inform you that there was an investigation ongoing that had to do with your nephew, Mr. Preston; right?

A: She did not mention an ongoing investigation to me, sir. She indicated that they want[ed] to speak to my nephew in reference to a burglary.

Q: You knew that there was an ongoing investigation when you spoke to her regarding your nephew; correct?

A: I was not at work, sir. I did not see this bulletin.

Q: But my question is: Did you know there was an ongoing investigation at that point regarding your nephew?

A: If they want[ed] to speak to him in reference to a burglary, it's an investigation; correct.

Q: Is that a yes, you knew there was an ongoing investigation regarding your nephew; correct?

A: It was an ongoing investigation. She told me they wanted to speak to him in reference to a burglary.

Tr. pp. 84-85.

9. Armed with the information from Ms. Phillips, Respondent, over the course of about two hours, had multiple conversations with her brother (Reginald Preston's father), her sister-in-law (Reginald Preston's mom), and her nephew, Reginald Preston. Respondent disclosed to her relatives that Reginald Preston was "wanted for questioning regarding a burglary" and she told them that Mr. Preston (the nephew) needed to go to the police station to address the situation.

10. As part of the investigation of this matter, the police department secured phone records for both Ms. Phillips and Respondent, and according to the testimony of Brent Holder,

neither Respondent's nor Ms. Phillips' phone records revealed the substance of the text messages sent or received by either individual. Ms. Phillips did not testify at the final hearing.

11. Also as part of the investigation, Brent Holder conducted a recorded interview of Respondent. Neither the recorded statement nor a transcript thereof was offered into evidence.

12. Brent Holder was employed by the Tampa Police Department from 1987 until his retirement in 2013. Mr. Holder was a detective with the police department for many years. Mr. Holder testified that when he interviewed Respondent on August 24, 2011, she admitted to the following:

Q: What did you do next?

A: I then conducted an interview with Ms. Harvin and showed her the same memo. And during our interview I asked her questions about it, had she had--had she disclosed the information, had she had conversation with Mr. Preston.

I will go back on her cell phone records. That morning after she received the text message from Ms. Phillips, there were numerous calls to Ms. Harvin's brother, who is the father of Reginald Preston, her sister, and there actually were five phone calls to Reginald Preston himself.

Q: From Ms. Harvin's cell phone?

A: From Ms. Harvin's cell phone, yes.

Q: And did she admit to all this during her interview?

THE COURT: Did she admit to what?

A: She admitted to making the phone calls to her brother, and during the conversation with her brother she explained that this was regarding a burglary and some stolen firearms and that Reginald Preston was the subject of this investigation. And then she also in her conversations with Reginald Preston admitted to telling him that it was regarding firearms taken in a burglary, and she said Mr. Preston's response was, "I didn't do nothing."

Q: Did she admit to anything else?

A: She admitted to having conversation with her sister.

Q: Let me ask you this question: Did Ms. Harvin ever deny learning of the officer safety alert?

A: She did not.

Q: Did she ever deny contacting Mr. Preston?

A: She did not.

Q: Did she ever deny informing Mr. Preston of the officer safety alert?

A: She did not.

\* \* \*

Q: Did Ms. Harvin admit to knowing that there was an ongoing investigation?

A: She did. She admitted knowing it was an ongoing investigation, that this was confidential information, and that it was not to be disclosed outside of the Tampa Police Department.



\* \* \*

Q: Did Ms. Harvin admit that the reason or the way she found out [about] the officer safety alert was through Ms. Phillips?

A: Yes.

Tr. pp. 29-31

13. As noted previously, Mr. Holder interviewed Respondent on August 24, 2011. There is no indication in the record that Mr. Holder's recollection as to the specifics of his interview with Respondent from nearly five and a half years ago was refreshed, and the undersigned is not persuaded that Mr. Holder independently recalls, with the specificity testified to, the details of his interview with Respondent.

14. Petitioner suggests that Respondent admitted during her deposition that she received a copy of the officer safety alert from Ms. Phillips and disclosed the contents of the alert to her nephew. Contrary to Petitioner's assertion, Respondent's deposition testimony contains no such admission, but does contain an acknowledgement by Respondent that she was confirming "what they wrote up" on the notice of disciplinary action issued to her by Petitioner.

#### CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this

action pursuant to sections 120.569, 120.57(1), and 112.3173(5), Florida Statutes (2016).

16. Petitioner has the burden of proving by a preponderance of evidence that Respondent has forfeited her retirement benefits. Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139 (Fla. 4th DCA 1989).

17. The applicable version of the pension forfeiture statute is the one in effect on the date of the criminal acts leading to forfeiture. See Busbee v. State Div. of Ret., 685 So. 2d 914, 916-17 (Fla. 1st DCA 1996).

18. Forfeitures are not favored in Florida, and the retirement forfeiture statute should be strictly construed. Williams v. Christian, 335 So. 2d 358, 361 (Fla. 1st DCA 1976).

19. Section 112.3173(3), Florida Statutes (2010), provides, in part, as follows:

Any public officer or employee . . . 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 contributions as of the date of termination.

20. In order to establish forfeiture under this statutory framework, Petitioner must prove, based upon the specific allegations made in the present case, that Respondent was a public officer or employee, that Respondent's employment with the

City of Tampa was terminated by reason of her admitted commission of a specified offense, and that Respondent committed the offense in question through the use or attempted use of power, rights, or duties associated with her public employment.

21. It is undisputed that during all times material hereto, Respondent was a public employee. Contrary to the allegations however, Petitioner failed to prove that Respondent admitted to disclosing information from the officer safety alert to unauthorized individuals. Petitioner relies heavily on the testimony of Mr. Holder, but his testimony, regarding specific admissions made by Respondent more than five and a half years ago, is not sufficiently persuasive to meet Petitioner's burden. Had Petitioner offered into evidence either Respondent's recorded statement taken by Mr. Holder, or a transcript thereof, then it is likely, assuming that Respondent admitted therein to the underlying conduct, that Petitioner would have met its burden of persuasion. In the absence of an admission to the alleged conduct by Respondent, the forfeiture of Respondent's pension benefits is not warranted.

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:

1. Finding that forfeiture of Respondent's benefits under the retirement plan is not authorized pursuant to section 112.3173, Florida Statutes (2010); and

2. Dismissing the petition for forfeiture, with prejudice.

DONE AND ENTERED this 24th day of April, 2017, in Tallahassee, Leon County, Florida.



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LINZIE F. BOGAN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 24th day of April, 2017.

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.