

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF TAMPA GENERAL EMPLOYEES
RETIREMENT FUND,

Petitioner,

vs.

Case No. 16-6668

BOBBY E. RICHARDSON,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in Tampa and Tallahassee, Florida, on December 29, 2016, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Bobby E. Richardson, pro se
13103 Melissa Court
Riverview, Florida 33569

STATEMENT OF THE ISSUE

Whether Petitioner has forfeited his rights and benefits under the City of Tampa General Employees Retirement Fund pursuant to section 112.3173, Florida Statutes (2009).

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 Bobby E. Richardson (Respondent).

During the hearing, Petitioner offered the testimony of Respondent, Korey Diener, Michael Victor, and Kimberly Marple. Respondent testified on his own behalf and called no other witnesses. Petitioner's Exhibits 3 through 6, and 8 through 11, were admitted into evidence. No exhibits were admitted into evidence on behalf of Respondent.

A Transcript of the disputed-fact hearing was filed with the Division of Administrative Hearings on January 17, 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. Respondent was a participant in Petitioner's retirement benefits fund. The retirement fund qualifies as a public retirement system.

2. Respondent was hired by Petitioner on February 16, 1998, and at the time of his termination from employment he worked as a sewer operations team leader in Petitioner's wastewater collections department. According to the Notice of Disciplinary Action dated July 8, 2010, Respondent's employment with the City of Tampa was terminated based on the following:

During the course of an investigation by the Tampa Police Department, report #2010-900187, you admitted to the following violations of City of Tampa policy:

Using a City issued cellular phone for non-City related phone calls which furthered illegal activity; and using a City issued vehicle to participate in activities not related to your employment; both of which are violations of City of Tampa Personnel Manual, Discipline Administration, B28.2,3(c)(9), Neglect of Duty, Use of City equipment, including vehicles, for any unauthorized purpose.

Wearing a City issued uniform while conducting unauthorized and illegal activities, violating City of Tampa Personnel Manual, Discipline Administration, B28.2,3(b)(8), Insubordination, Inappropriate use of City identification, including uniforms.

Further, your behaviors as revealed in the investigation by the Tampa Police Department, are incompatible with the moral and ethical

standards expected of City of Tampa employees and these behaviors are violations of City of Tampa Personnel Manual, Discipline Administration, B28.2,3(d)(9), Moral Turpitude, Engaging in any employment, activity or enterprise which is illegal, incompatible or in technical conflict with the employee's duties and responsibilities as a City employee.

3. The instant proceeding, as noted in Petitioner's PRO, does not focus on whether Respondent's conduct violated the City of Tampa's "moral and ethical standards," but instead focuses on whether Respondent, during the course of an investigation by the Tampa Police Department, admitted to wearing his city-issued uniform, and using his city vehicle and cell phone in furtherance of illegal activity.^{1/}

A. Background

4. In 2010, Detective Korey Diener of the Pinellas County Sheriff's Office, was involved in a long-term investigation involving counterfeit checks. As part of the investigation, Detective Diener was monitoring a suspect by the name of Shannon Edwards (Edwards).

5. During a circuit court probation hearing on February 24, 2010, Edwards, who was acquainted with Respondent because they hung out in the same neighborhood, presented a State of Florida, Department of Corrections, Public Service Hours form, which indicated that he (Edwards) had completed his court-ordered community service hours. Another detective, who was also

involved with the case, was present in the courtroom and knew that the form was falsified based, in part, on a surveillance conversation he heard between Edwards and his girlfriend, Chelsea Niles (Niles). During the surveilled conversation, Edwards asked Niles to contact Respondent so that he could secure for Edwards a form showing that Edwards had performed the required community service hours, when in actuality he (Edwards) had not.

6. According to Petitioner, Edwards, while using Niles as his agent, reached out to Respondent because Respondent, as a city employee, "knew somebody" who could prepare the needed community service form. Mr. Edwards did not testify during the disputed-fact hearing, and his statement is not being accepted for the truth of the matter stated therein.

7. Ross Fabian (Fabian) was Respondent's contact person for securing the fraudulent form. Respondent's undisputed, credible testimony is that he knew Fabian because as a juvenile, Respondent had gotten into trouble and performed his ordered community service hours under Fabian's supervision. Respondent maintained a relationship with Fabian throughout the years, but there is no evidence that the relationship between the two was in any way connected to Respondent's employment with the city.

8. Petitioner seeks to infer from Edwards' statement that Respondent was a "city employee that knows somebody," the existence of a nexus between Respondent's employment and the

securing of the fraudulent form. The evidence is insufficient to support such an inference.

B. Police Interview

9. The predicate for the instant action lies in that portion of the Notice of Disciplinary Action which provides that during the course of an investigation by the Tampa Police Department, Respondent "admitted" to "[u]sing a City issued phone for non-City related phone calls which furthered illegal activity, using a City issued vehicle to participate in activities not related to your employment, and [w]earing a City issued uniform while conducting unauthorized and illegal activities." The evidence of record does not establish that Respondent admitted to the conduct as alleged.

10. On June 16, 2010, Respondent was interviewed by Detective Mike Victor of the Tampa Police Department and Detective Korey Diener of the Pasco County Sheriff's Office. A transcript of the audio recording was admitted into evidence.

11. During the interview, Respondent was asked about the phone that he used when speaking with Edwards about the fraudulent community service hours. In response to the question, Respondent informed the detectives that he used his personal phone when speaking with Edwards. At no point during his interview with law enforcement did Respondent admit to using a

city-issued cell phone as part of the transactions related to the fraudulent form.

12. Furthermore, in reviewing the transcript of audio recording, Respondent was never asked if he used his city truck or was wearing his city-issued uniform while interacting with Edwards, Fabian, Niles, or anyone else who may have been involved with the execution of the fraudulent community service form. Succinctly stated, the transcript of Respondent's recorded interview does not in any way indicate that Respondent admitted to using his city truck, or to wearing his city-issued uniform while completing the transactions related to the execution of the fraudulent community service form.

CONCLUSIONS OF LAW

13. 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).

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

15. 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).

16. 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).

17. Section 112.3173(3), Florida Statutes (2009), 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.

18. 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 his 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 his public employment. In other words, Petitioner has "to establish the existence of a 'nexus' between the offense or offenses committed and [Respondent's] position as a City employee." Rivera v. Bd. of Trs. of Tampa's Gen. Empl. Ret. Fund, 189 So. 3d 207, 210-211 (Fla. 2d DCA 2016).

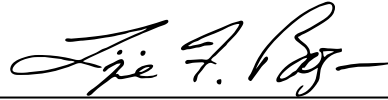
19. It is undisputed that Respondent was a public employee when he facilitated the execution of a fraudulent community service form. However, as noted above, Petitioner failed to offer competent, substantial evidence that Respondent admitted to wearing his city-issued uniform, and to using his city vehicle and cell phone in furtherance of illegal activity. Succinctly stated, Petitioner failed to prove a nexus between Respondent's activity and his position as a City of Tampa employee.^{2/} 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 there is no nexus between Respondent's conduct and his public employment;
2. Finding that forfeiture of Respondent's benefits under the retirement plan is not authorized pursuant to section 112.3173, Florida Statutes; and
3. Dismissing the petition for forfeiture, with prejudice.

DONE AND ENTERED this 8th day of February, 2017, in
Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of February, 2017.

ENDNOTES

^{1/} Respondent was arrested and charged with violating section 838.022, Florida Statutes (2009). Respondent's case was referred for pre-trial intervention. Respondent successfully completed the pre-trial intervention program, which resulted in dismissal of the criminal charges. There is no evidence that Respondent entered a plea, or otherwise admitted to, the charges as part of the pre-trial intervention process. Accordingly, there is no evidence that Respondent was convicted of a violation of section 838.022, and Petitioner does not argue to the contrary.

^{2/} In Rivera, the court noted, with great detail, the City's efforts to prove its case through inadmissible hearsay contained in police investigative files. In the instant case, Petitioner relied upon the same tactic, but took the extra step of having certain law enforcement officials testify about the contents of the files. What the law enforcement officials testified to in the instant case was classic hearsay that did not fit within the business or public records exception to the hearsay rule. See Lee v. Dep't of HRS, 698 So. 2d 1194, 1201 (Fla. 1997) (In adopting section 90.803(8), Florida Statutes, the legislature specifically excluded as admissible hearsay the corresponding federal rule which allows for "a record setting forth factual findings resulting from an investigation made pursuant to

authority granted by law."). It is not enough to have law enforcement to testify regarding what they were told by a third party, but instead, "a witness must be called who has personal knowledge of the facts." Id.

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.