

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF TAMPA GENERAL EMPLOYEES
RETIREMENT FUND,

Petitioner,

vs.

Case No. 16-6669

PRISCILLA PHILLIPS,

Respondent.

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (DOAH) heard this case by video teleconference between sites in Tallahassee and Tampa, Florida, on January 20, 2017.

APPEARANCES

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

For Respondent: Priscilla Phillips, pro se
1719 West St. Joseph Street
Tampa, Florida 33607

STATEMENT OF THE ISSUE

Should Respondent, Priscilla Phillips, forfeit her rights and benefits under the retirement system of the City of

Tampa (Tampa) on account of the termination of her employment because she admitted aiding or abetting a "specified offense?"

PRELIMINARY STATEMENT

Tampa terminated Ms. Phillips' employment, effective September 1, 2011. The Board of Petitioner, City of Tampa General Employees Retirement Fund (Retirement Fund), referred the issue of whether Tampa terminated Ms. Phillips' employment for admittedly aiding or abetting a specified felony that would require forfeiture of her retirement benefits to DOAH.

The Retirement Fund submitted testimony from two witnesses. It entered five exhibits into evidence. Ms. Phillips testified on her own behalf. A Transcript of the hearing was filed. Both parties timely submitted Proposed Recommended Orders. They have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Background

1. Ms. Phillips worked for Tampa from December 10, 1984, to September 1, 2011. In 2007, Tampa suspended Ms. Phillips for one day for violating computer use policies. Otherwise, Ms. Phillips' employment history is discipline-free.

2. Throughout her employment, Ms. Phillips worked for the Tampa Police Department as a Data Terminal Operator. Her responsibilities included identifying stolen goods in pawn shops. Ms. Phillips was a public employee of Tampa and a participant in

the City of Tampa General Employees Retirement Fund. The Retirement Fund is a public retirement system.

3. On September 1, 2011, Tampa terminated Ms. Phillips' employment for violating the following provisions of Tampa's Manual of Regulations: #1814-Restrictions on Revealing Information, #1104-Interference with Cases, and #1005-Standard of Conduct. Tampa relied also on violations of the following provisions of its Personnel Manual as a basis for termination: "B28.2A(3)c(11), Neglect of Duty-Unauthorized release of information or records" and "B28.2A(3)d(2), Moral Turpitude-Violation of City Code or other City policies relating to impartiality, use of public property, conflict of interest, disclosure and/or confidentiality."

Facts Admitted by Ms. Phillips

4. On January 22, 2011, Ms. Phillips received and reviewed a confidential Officer Safety Alert issued by the police department's Strategic Investigations Bureau.

5. The Strategic Investigation Bureau is responsible for undercover investigations. Ms. Phillips knew this.

6. The Officer Safety Alert included names and pictures of three subjects of an investigation. One was Reginald Preston. Ms. Phillips knew Mr. Preston and had met him about five times. She knew that he was a convicted felon who had been recently released from incarceration. Mr. Preston is the nephew of

Ms. Phillips' friend Beverly Harvin. At the time, Ms. Harvin worked for the police department as a Community Service Officer.

7. The Officer Safety Alert stated:

The above listed subjects are part of an ongoing [sic] 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 vehicles. Also use caution if responding to calls at the listed addresses.

Due to the 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 records[.]

8. Ms. Phillips read the alert when she received it. She understood that providing the information in the alert to the subjects identified in it could cause them to flee.

9. Ms. Phillips called Ms. Harvin after reading the alert. Ms. Harvin was at home on medical leave recovering from a broken collar bone.^{1/} Ms. Phillips told Ms. Harvin about the alert, including the fact that Ms. Harvin's nephew was identified in it. Ms. Phillips photographed the alert with her cellphone and sent the picture to Ms. Harvin.

10. Ms. Phillips asked Ms. Harvin "could she get in touch with him [Mr. Preston] to come down and talk with the police officer." Ms. Phillips intended for Ms. Harvin to contact Mr. Preston with the information that he was being investigated. In her words, Ms. Phillips "wanted him to come down and clear himself if he was not involved in this." Ms. Harvin told Ms. Phillips that she would contact Mr. Preston, and she did.

11. During the entire period of her employment with the police department, Ms. Phillips knew of only one time when an individual turned himself in after learning that he was wanted.

Additional Information

12. During an internal investigation of the incident, Ms. Phillips admitted the preceding facts to the investigating officers. Her termination on September 1, 2011, followed.

13. The information in the alert about the stolen guns investigation was not available to the general public. Ms. Phillips obtained the information because she was a public employee.

14. If Mr. Preston learned he was the subject of an undercover investigation, that would have obstructed and impeded the investigation. It would also have endangered the lives of the undercover officers.

CONCLUSIONS OF LAW

15. Sections 120.569 and 120.57, Florida Statutes (2016), and the City of Tampa General Employees Retirement Fund Forfeiting Pension Procedure give DOAH jurisdiction over this proceeding.

16. The Retirement Fund, citing Wilson v. Department of Administration, Division of Retirement, 538 So. 2d 139 (Fla. 4th DCA 1989), asserts that it must prove by a preponderance of the evidence that Ms. Phillips has forfeited her retirement benefits. Loss of retirement benefits is as significant as loss of livelihood due to revocation of a professional license. Consequently, there are sound arguments for concluding that the Retirement Fund must prove its allegations by clear and convincing evidence. Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83, 85 (Fla. 1st DCA 1997). The issue does not need to be resolved in this case since the material facts are established by clear and convincing evidence. Byrd v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 07-5008 (Fla. DOAH Jan. 16, 2008; Fla. DMS Feb. 21, 2008).

17. Section 112.3173(3), Florida Statutes (2011), states:

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. Ms. Phillips is a public employee. Her employment was terminated. The Retirement Fund maintains that Ms. Phillips' employment was terminated by reason of her admitted commission of a "specified offense."

19. "Specified offenses" include any felony specified in chapter 838 of the Florida Statutes, except for sections 838.15 and 838.16. § 112.3173(2)(e)4., Fla. Stat. (2011). Section 838.21, Florida Statutes (2011), makes it unlawful for a public servant, such as Ms. Phillips, to disclose active criminal investigative or intelligence information "with intent to obstruct, impede, or prevent a criminal investigation" if the information is not available to the general public and was obtained by reason of the public employment. This is the "specified offense" the Retirement Fund relies upon to forfeit Ms. Phillips' retirement benefits.

20. "Criminal investigative information" means information about an identifiable person compiled by a criminal justice agency in the course of a criminal investigation of a specific act. § 119.011(3)(b), Fla. Stat. (2011). The information about Mr. Preston being the subject of an undercover investigation was "criminal investigative information." By asking Ms. Harvin to

tell Mr. Preston about the alert, Ms. Phillips acted to disclose "criminal investigative information" to an unauthorized person.

21. Determining that Ms. Phillips' retirement benefits should be terminated requires two conclusions. The first is that she disclosed information about the alert to Mr. Preston. The second is that when Ms. Phillips asked Ms. Harvin to communicate the information to Mr. Preston, Ms. Phillips intended to "obstruct, impede, or prevent a criminal investigation."

22. The following testimony from Kimberly Marple, Employee Relations Specialist Supervisor for Tampa's Human Resources Division, on page 26 of the Transcript, is the evidence that Ms. Harvin conveyed the information to Mr. Preston as Ms. Phillips requested.

Q: Do you know if Ms. Phillips admitted to these allegations that are contained with this document, Exhibit 5?

A: Yes she did.

23. Exhibit 5 is the Notice of Disciplinary Action. It contains the following statement: "You then took a picture of the bulletin from the computer screen with your personal cell phone and sent it to Beverly Harvin. Beverly Harvin then contacted her relative and advised him of the information on the bulletin." Testimony about Ms. Phillips' confirmation of the statements in the Notice of Disciplinary Action and the statements themselves are admissible under the hearsay exception

for admissions created by section 90.803(18), Florida Statutes (2016). This evidence may be and is the basis of the finding that Ms. Harvin told Mr. Preston that he was the subject of an investigation as Ms. Phillips intended. § 120.57(1)(c), Fla. Stat. (2016). This means that Ms. Phillips disclosed information about the criminal investigation to Mr. Preston.

24. The remaining question is, did Ms. Phillips intend to impede or obstruct the criminal investigation? Intent is a question of fact.

The trier of fact has the opportunity to observe the witnesses. From that observation, the trier of fact may determine the believability of that witness and the weight to be given his testimony. The demeanor of the witness, his frankness, or lack of frankness, his intelligence, his interest in the outcome of the case, and the reasonableness of the testimony presented, in the light of all the evidence in the case, are but a few of those factors which may play a part in making that determination.

State v. Franchi, 746 So. 2d 1126, 1128-29 (Fla. 4th DCA 1999).

25. Ms. Phillips intended to disclose the information to Mr. Preston and intended to take each action that led to the disclosure. She also intended for disclosure of the information to affect the investigation. The most likely, if not only, effect would be to impede or obstruct the investigation. The police did not need assistance contacting Mr. Preston. They knew how to do that. Mr. Preston was not wanted. So there was no

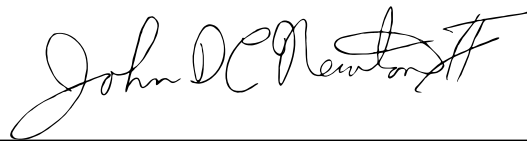
reason to turn himself in. The facts establish a violation of section 838.21.

26. Section 112.3173(3) requires forfeiture of Ms. Phillips' retirement benefits.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, City of Tampa General Employees Retirement Fund, enter a final order finding that the employment of Respondent, Priscilla Phillips, with the City of Tampa was terminated because of her admission to committing the commission of a "specified offense" as identified in section 112.3173, Florida Statutes, and that she forfeited her rights and benefits under the General Employees Retirement Fund.

DONE AND ENTERED this 30th day of March, 2017, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of March, 2017.

ENDNOTE

^{1/} The record does not reveal whether Ms. Harvin would have received the alert had she been at work.

COPIES FURNISHED:

Priscilla Phillips
1719 West St. Joseph Street
Tampa, Florida 33607

Luis A. Santos, Esquire
Ford & Harrison LLP
Suite 900
101 East Kennedy Boulevard
Tampa, Florida 33602
(eServed)

Natasha Wiederholt, CPA, GE
Pension Plan Supervisor
General Employees Retirement Fund
City of Tampa
7th Floor East
306 East Jackson Street
Tampa, Florida 33602

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.