

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF TAMPA GENERAL EMPLOYEES
RETIREMENT FUND,

Petitioner,

vs.

Case No. 17-2481

MARIO PEREZ,

Respondent.

_____ /

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016), on June 22, 2017, by video teleconference sites in Tallahassee and Tampa, 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 matter is whether Respondent has forfeited his rights and benefits under the City of Tampa General Employees

Retirement Fund pursuant to section 112.3173, Florida Statutes (2015).^{1/}

PRELIMINARY STATEMENT

On April 24, 2017, Petitioner, City of Tampa General Employees Retirement Fund (the "Fund"), referred this matter to the Division of Administrative Hearings ("DOAH") to conduct a chapter 120 evidentiary hearing. At issue is whether Respondent, Mario Perez, forfeited his rights and privileges to retirement benefits under the Fund pursuant to section 112.3173.

The final hearing was held on June 22, 2017. At the final hearing, the Fund offered the testimony of Kimberley Marple. The Fund's Exhibits 1 through 12 were admitted into evidence. Respondent did not appear at the hearing.

A court reporter recorded the final hearing. A one-volume Transcript of the final hearing was filed with DOAH on July 24, 2017. At the close of the hearing, Petitioner was advised of a ten-day timeframe following receipt of the hearing Transcript at DOAH to file a post-hearing submittal. The Fund filed a Proposed Recommended Order, which was duly considered in preparing 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 employees of the City of Tampa (the "City").

2. Respondent was most recently employed by the City beginning on October 31, 2005. Respondent worked as a Fleet Mechanic Supervisor I for the City's Logistics and Asset Management/Fleet Management department. The City terminated Respondent on January 21, 2015, based on theft of City property.

3. By reason of his employment with the City, Respondent was enrolled in the pension plan administered by the Fund. After six years of employment, Respondent vested in the pension plan.

4. According to the Notice of Disciplinary Action, dated January 21, 2015, the City terminated Respondent based on his admission to stealing certain property belonging to the City. On January 5, 2015, Respondent was interviewed by the Tampa Police Department ("TPD") as part of an investigation into stolen property. During this interview, Respondent confessed to stealing a set of tires owned by the City and installing them on his personal vehicle.

5. After the City learned of Respondent's admission to the theft of City property, the City terminated Respondent's employment.

6. Kimberley Marple, an Employee Relations Specialist Supervisor for the City, testified on behalf of the City and explained that the City maintains a zero tolerance policy for removal of or taking City property for personal use.

Consequently, when the City learned of Respondent's admission to TPD, he was fired.

7. Based on the evidence and testimony presented at the final hearing, the preponderance of the evidence establishes that the City terminated Respondent's employment by reason of his admission to theft of City property. Therefore, the Fund met its burden of proving a legal basis under section 112.3173 for Respondent's forfeiture of all rights and benefits to the Fund's pension plan.

CONCLUSIONS OF LAW

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

9. The Fund initiated this action to determine whether Respondent's pension benefits must be forfeited under section 112.3173(3) based on the termination of his employment by reason of his admission to committing theft from the City.

10. The Florida Constitution and statutes provide the framework for forfeiture of public retirement benefits. Simcox v. City of Hollywood Police Officers' Ret. Sys., 988 So. 2d 731, 733 (Fla. 4th DCA 2008). Forfeiture proceedings are based on article II, section 8 of the Florida Constitution, which provides for forfeiture of an employee's rights and privileges under a

public retirement system when that employee violates the public trust.

11. Forfeiture is codified in section 112.3173(3), which 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.

12. Section 112.3173(2)(e)2. defines "specified offense" to include, "[t]he committing, aiding, or abetting of any theft by a public officer or employee from his or her employer." See also Newmans v. Div. of Ret., 701 So. 2d 573, 574 (Fla. 1st DCA 1997) (a "specified offense" for purposes of forfeiture includes embezzlement, theft, and bribery).

13. Forfeiture statutes are not favored in Florida. "They are considered harsh exactions, odious, and to be avoided when possible. Statutes imposing forfeiture will be strictly construed in a manner such as to avoid the forfeiture and will be liberally construed so as to avoid and relieve from forfeiture." Williams v. Christian, 335 So. 2d 358, 361 (Fla. 1st DCA 1976). Forfeiture statutes "are strictly construed in favor of the party against whom the penalty is sought to be imposed." Cabrera v. Dep't of Nat. Res., 478 So. 2d 454, 456 (Fla. 3d DCA 1985).

14. Respondent, as the plan beneficiary, bears the burden of proving his entitlement to pension benefits. However, in this matter, where Respondent's eligibility to participate in the pension plan is not disputed, the Fund has the burden of proving that Respondent forfeited all rights to his retirement benefits. Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139 (Fla. 4th DCA 1989). See also Rivera v. Bd. of Trs. of Tampa's Gen. Empl. Ret. Fund, 189 So. 3d 207, 210 (Fla. 2d DCA 2016) (the Fund had the burden of proving that the former employee's retirement benefits should be forfeited).

15. The preponderance of the evidence standard is applicable to this case. See § 120.57(1)(j), Fla. Stat.; and Dep't of Banking & Fin., Div. of Sec. & Investor Prot. 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. v. RLI Live Oak, LLC, 139 So. 3d 869, 872 (Fla. 2014).

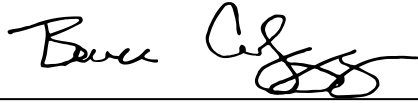
16. Applying the statutory framework to this matter, the Fund is required to prove: (1) that Respondent was a public employee; (2) that Respondent admitted to committing a "specified offense" under section 112.3173(2)(e); and (3) that the City terminated Respondent's employment by reason of his admission. See Rivera, 189 So. 3d at 210.

17. Based upon the competent substantial evidence in the record, the Fund met its burden of proving, by a preponderance of the evidence, that Respondent forfeited his right to participate in the Fund's pension plan under section 112.3173(3). It is undisputed that Respondent was a public employee. The evidence presented at the final hearing also established that Respondent admitted to TPD that he had taken, without permission, certain property that belonged to the City, and intended to appropriate that property for his own use (i.e., he committed theft^{2/}). Finally, the City credibly demonstrated that it terminated Respondent's employment based on his admission that he committed theft, a "specified offense" under section 112.3173(2)(e)2. Accordingly, the City established that Respondent forfeited all rights to pension benefits from the Fund.

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 finding that Respondent, Mario Perez, was a public employee who, by reason of his admitted commission of a "specified offense" under section 112.3173(2)(e), forfeited all rights and benefits in the pension plan administered by the Fund.

DONE AND ENTERED this 23rd day of August, 2017, in
Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
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 23rd day of August, 2017.

ENDNOTES

^{1/} Unless otherwise noted, all references to the Florida Constitution and Statutes are to the 2015 versions. See Busbee v. State Div. of Ret., 685 So. 2d 914, 916-17 (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).

^{2/} See Section 812.014, Florida Statutes, which states:

(1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit from the property.

(b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

COPIES FURNISHED:

Mario Perez
18910 Holden Drive
Spring Hill, Florida 34610

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.