

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SUSAN PAINTER,

Petitioner,

vs.

Case No. 18-0054

DEPARTMENT OF MANAGEMENT  
SERVICES, DIVISION OF  
RETIREMENT,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

A formal hearing was conducted in this case on June 20 and 21, 2018, in Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Steven R. Andrews, Esquire  
Ryan Andrews, Esquire  
Brian O. Finnerty, Esquire  
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For Respondent: Thomas E. Wright, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether Petitioner has forfeited her rights and benefits under the Florida Retirement System ("FRS") pursuant to section 112.3173, Florida Statutes (2017).<sup>1/</sup>

PRELIMINARY STATEMENT

In a certified letter dated October 27, 2016, Respondent, Department of Management Services, Division of Retirement (the "Department"), notified Petitioner Susan Painter, the former softball coach at Gulf Coast State College ("Gulf Coast"), that her rights and benefits under the FRS were forfeited as a result of her no contest plea to one count of grand theft, in violation of section 812.014, Florida Statutes, "for acts committed in connection with" her employment at Gulf Coast. The certified mail receipt indicated that Ms. Painter received the letter on January 14, 2017.

In an Order of Waiver entered on October 3, 2017, the Department found that Ms. Painter had failed to exercise her right to request a hearing within 21 days of receiving the certified letter. The Order of Waiver made final the Department's preliminary decision to find that Ms. Painter had forfeited her rights and benefits under the FRS.

The Department entered an Order Rescinding Final Order on December 11, 2017, finding that an "error in communication" between Ms. Painter's attorney and the Department had prevented

Ms. Painter's timely petition from being received by the Department.

On January 5, 2018, the Department referred the case to the Division of Administrative Hearings ("DOAH") for assignment of an Administrative Law Judge and the conduct of a formal evidentiary hearing. The case was initially scheduled for hearing on March 21 and 22, 2018. On February 22, 2018, an Order was entered granting Petitioner's consented motion for continuance. The case was rescheduled for June 20 and 21, 2018, on which dates it was convened and completed.

The parties submitted a Joint Pre-hearing Stipulation. The stipulated facts from that document are included in the Findings of Fact in this Recommended Order.

At the hearing, the Department presented the testimony of Ms. Painter and of Allison Olson, a Benefits Administrator in the Division of Retirement's Bureau of Retirement Calculations. The Department's Exhibits 1 through 3 and 6 were entered into evidence. The Department recalled Ms. Olson as a rebuttal witness. Petitioner presented the testimony of Ms. Painter. Petitioner's Exhibits 1 through 12 and 14 through 18 were entered into evidence.

At the close of the hearing, the parties stipulated that their proposed recommended orders would be filed within 20 days of the filing of the Transcript at DOAH. The two-volume

Transcript of the hearing was filed at DOAH on July 24, 2018. Both parties timely filed their Proposed Recommended Orders on August 13, 2018.

FINDINGS OF FACT

Based on the record in this proceeding, including the evidence presented at the formal hearing and the stipulation of the parties in the Joint Response to Pre-hearing Order, the following Findings of Fact are made:

1. The FRS is a public retirement system as defined by Florida law.

2. The Florida Division of Retirement is charged with managing, governing, and administering the FRS on behalf of the Florida Department of Management Services.

3. For over 21 years, Ms. Painter was the head softball coach for Gulf Coast, an FRS-participating employer. By virtue of her employment, Ms. Painter was enrolled in the FRS.

4. On May 5, 2014, the Bay County Sheriff's Office commenced an investigation into allegations that Ms. Painter had misappropriated cash that had been provided to her to pay for players' meals during a softball tournament in Las Vegas and that Ms. Painter was collecting and keeping rent money from softball players who were on full room-and-board scholarships and had their rent paid by the college.

5. In the summer of 2014, Ms. Painter was charged by information with one count of grand theft, a third-degree felony.

6. Gulf Coast did not terminate Ms. Painter's employment. Gulf Coast allowed Ms. Painter's employment contract to expire on June 20, 2014.

7. On January 9, 2015, the information was amended to include seven counts of grand theft, each constituting a third degree felony under section 812.014(1) and (2)(c), Florida Statutes (2014). Though some counts dealt with other allegations, for the purposes of this proceeding, the essential charges involved the meal money and the rental payments.

8. Ms. Painter ultimately entered a plea of nolo contendere to one count of grand theft. During the hearing before the court, the state attorney specified that Ms. Painter was pleading to Count IV, which alleged theft of the meal money. The contemporaneous notes taken by the court clerk state that Ms. Painter was pleading to "Count 4." The order of probation states that she pled to "Count 4."

9. However, the actual written "Plea, Waiver and Consent" signed by Ms. Painter and the attorneys shows the numeral "1" under the heading, "Count." It is unclear from the document whether Ms. Painter was pleading nolo contendere to one count of grand theft, or to Count I of the information. Count I involved

the allegation that Ms. Painter had improperly collected rent from one of the scholarship players, Megan Griffith.

10. At the circuit court hearing, no mention was made of the specific factual allegations in the count to which Ms. Painter was pleading. The court made no findings of fact. Ms. Painter was not required to allocute to any facts.<sup>2/</sup>

11. Upon entry of the nolo contendere plea, the court withheld adjudication. Ms. Painter was given two years' probation and ordered to make restitution of \$4,400, perform 100 hours of community service, and was directed to have no contact with Gulf Coast or her former players.

12. The undersigned finds that the understanding of all parties, including the court, was that Ms. Painter was pleading nolo contendere to Count IV of the information. The amount of restitution ordered is roughly consistent with the amount of meal money that was at issue in Count IV. The numeral "1" on the plea document is either a misprint or was intended to convey that Ms. Painter was pleading to a single count of grand theft.

13. At the final hearing, Ms. Painter testified that she was given \$4,752 in cash to pay for meals during the Las Vegas trip, which began on January 31, 2014, and ended on February 4, 2014. Ms. Painter testified that if the girls were splitting up to eat at different restaurants, she would dole out cash to each group. If everyone was eating at the same restaurant, all the

girls would place their orders, and Ms. Painter would pay the entire tab.

14. Ms. Painter testified that this had been her practice on team trips for some time. She stated that she used to give each girl her portion of the total meal money at the start of a trip. However, some girls would inevitably spend all of their money before the end of the trip and Ms. Painter would have to pay for their meals out of her own pocket. By doling out the money one meal at a time, Ms. Painter ensured that it would last the entire five days.

15. Ms. Painter denied keeping any of the meal money for herself. She admitted that she did not keep receipts from each meal she purchased, but testified that meal receipts were not required on multiple day trips, such as the Las Vegas tournament. Nothing she did on this trip was different than her usual practice. At the end of the trip, she returned \$132 in unspent meal money to the athletic department.

16. Ms. Painter testified that her nolo contendere plea was made for financial and emotional reasons. The case had dragged on for 17 months. The ordeal was humiliating and exhausting. She stated that accepting the plea deal was the hardest decision she had ever made, but that she did not in fact take any of the meal money from her softball players.

17. The Department offered no admissible direct evidence to contradict Ms. Painter's version of events. The undersigned did not admit the deposition of Gulf Coast Athletic Director Gregg Wolfe because it was a discovery deposition taken in Ms. Painter's criminal case. The undersigned did admit the Bay County Sheriff's Office case file on Ms. Painter's criminal case, which included witness interviews and Ms. Painter's bank statements. However, the case file was admitted on the understanding that it was a hearsay document that could only be used to supplement or explain other evidence. In the absence of competent non-hearsay evidence, or any showing by the Department that elements of the case file would be admissible over objection in a civil trial, the case file was of no utility.

18. The Department's only witness aside from Ms. Painter was its employee Allison Olson, the benefits administrator in the Bureau of Retirement Calculations. Ms. Olson's knowledge of the case was gleaned purely through her review of the paper record, including the case file and the transcripts of depositions taken in the criminal proceeding. She had no first-hand knowledge of any of the events in question.

19. Ms. Painter offered the deposition testimony of Joanne Booker, a member of Ms. Painter's softball team at the time of the Las Vegas trip and currently an assistant basketball coach for Gulf Coast. In most essentials, Ms. Booker corroborated



Ms. Painter's testimony. Ms. Booker did not recall many particulars as to how the meals were purchased, but testified that at each meal the players were either given cash by Ms. Painter or had their meals paid for by Ms. Painter. Ms. Booker recalled no problems as to meals and recalled no one complaining about food on the Las Vegas trip.

20. Even if it were found that Ms. Painter's plea was actually entered as to Count I, the findings would be much the same. Ms. Painter testified that the "rent" she was accused of collecting and pocketing from the scholarship players was actually a voluntary contribution toward the rent of the non-scholarship players, to enable the entire team to live together in the same apartment complex. Ms. Painter testified that any money she collected was turned over to the lessor of the apartments.

21. Again, the Department offered no admissible direct evidence to contradict Ms. Painter's version of events. Ms. Painter's testimony was at least credible enough to be accepted in the absence of any competent non-hearsay evidence to the contrary.

#### CONCLUSIONS OF LAW

22. 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.

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

24. Article II, section 8(d) of the Florida Constitution provides as follows:

SECTION 8: Ethics in government.--A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:

\* \* \*

(d) 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.

25. This section of the Constitution is implemented in chapter 112, part III, of the Florida Statutes. 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).<sup>3/</sup>

26. Because forfeitures are not favored in Florida, the pension forfeiture statute should be strictly construed. Williams v. Christian, 335 So. 2d 358, 361 (Fla. 1st DCA 1976).

27. Section 112.3173(3) provides in relevant part:

(3) FORFEITURE.--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.

28. Section 112.3173(2) (a) provides that "conviction" and "convicted" mean an adjudication of guilt by a court of competent jurisdiction; a plea of guilty or of nolo contendere; a jury verdict of guilty when adjudication of guilt is withheld and the accused is placed on probation; or a conviction by the Senate of an impeachable offense.

29. Ms. Painter pled nolo contendere to one count of grand theft, a felony of the third-degree under section 812.014(1) and (2) (c), Florida Statutes (2014). Ms. Painter's plea constitutes a "conviction" for purposes of section 112.3173(2) (a).

30. Section 112.3173(2) (e) provides:

(2) (e) "Specified offense" means:

1. The committing, aiding, or abetting of an embezzlement of public funds;
2. The committing, aiding, or abetting of any theft by a public officer or employee from his or her employer;
3. Bribery in connection with the employment of a public officer or employee;

4. Any felony specified in chapter 838, except ss. 838.15 and 838.16;

5. The committing of an impeachable offense;

6. 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; or

7. The committing on or after October 1, 2008, of any felony defined in s. 800.04 against a victim younger than 16 years of age, or any felony defined in chapter 794 against a victim younger than 18 years of age, by a public officer or employee through the use or attempted use of power, rights, privileges, duties, or position of his or her public office or employment position.

31. The grand theft felony to which Ms. Painter pled nolo contendere does not fit the definitions set forth in subparagraphs 1. through 5. or 7. of section 112.3173(2)(e). If Ms. Painter is to be subjected to the forfeiture of her pension, her offense must be found to meet the conditions of the "catch-all" category set forth in subparagraph 6. of section 112.3173(2)(e). Jenne v. State, 36 So. 3d 738, 742 (Fla. 1st DCA 2010).

32. To constitute a "specified offense" under section 112.3173(2)(e)6., the offense in question must meet all of the following elements:

- (a) It is a felony;
- (b) It was committed by a public employee;
- (c) It was done willfully and with intent to defraud the public or the employee's public employer of the right to receive the faithful performance of the employee's duty;
- (d) It was done to obtain a profit, gain or advantage for the employee or some other person; and
- (e) It was done through the use or attempted use of the power, rights, privileges, duties, or position of her public employment.

Bollone v. Dep't of Mgmt. Servs., 100 So. 3d 1276, 1280-81 (Fla. 1st DCA 2012).

33. It is uncontested that Ms. Painter was a public employee and that she pled no contest to one count of grand theft, a third-degree felony. Therefore, the issue is whether the other three stated elements of the "catch-all" provision have been met.

34. No showing was made that Ms. Painter acted willfully and with intent to defraud the public or the public employer of the right to receive faithful performance of her duties. Ms. Painter denied actually committing the offense, testifying that her plea was entered in order to end the financial and

emotional burden of defending herself. The transcript of the proceeding in circuit court shows that the court made no findings of fact and that Ms. Painter was not required to allocute to any specific facts. The bare fact of the no contest plea does not establish Ms. Painter's intent. The Department presented no competent evidence tending to prove Ms. Painter's willful intent to defraud Gulf Coast of its right to receive the faithful performance of her duties.

35. No showing was made that Ms. Painter obtained a profit through her actions. The case file included many pages of Ms. Painter's bank records, but the Department presented no witness to authenticate or explain them in any way, let alone correlate them to the money Ms. Painter was alleged to have stolen. Ms. Painter steadfastly denied taking and keeping any money. Her testimony was credible enough to be accepted in the absence of any competent evidence to the contrary.

36. In the absence of evidence establishing the specific facts of Ms. Painter's offense, it cannot be said that she used or attempted to use the power, rights, privileges, duties, or position of her employment in the commission of the offense.

37. In summary, the Department carried its burden as to factors (a) and (b) set forth in Conclusion of Law 32, supra, but failed to present evidence to establish that Ms. Painter's actions met the grounds set forth in factors (c), (d), and (e).

Therefore, Ms. Painter cannot be found to have been convicted of a "specified offense" under section 112.3173(3), and has not forfeited her rights and benefits under the FRS.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Management Services, Division of Retirement, enter a final order restoring to Susan Painter her rights and benefits under the Florida Retirement System and providing for payment to her of any past due benefits, together with interest at the statutory rate.

DONE AND ENTERED this 25th day of September, 2018, in Tallahassee, Leon County, Florida.



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LAWRENCE P. STEVENSON  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 25th day of September, 2018.

ENDNOTES

<sup>1/</sup> Citations shall be to Florida Statutes (2018) unless otherwise specified.

<sup>2/</sup> The official transcript of the court hearing was attached as an exhibit to Petitioner's Second Motion in Limine, filed June 19, 2018. Both parties based arguments on the transcript. The Department did not contest its genuineness, accuracy, or completeness. The undersigned has therefore deemed it prudent and in the interest of justice to take judicial notice of the transcript.

<sup>3/</sup> Section 112.3173 has not been amended since 2012. Therefore, the version in effect at the time of Ms. Painter's alleged offenses in 2014 is the same as that currently in effect.

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.