

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HEIKE STOLL,

Petitioner,

vs.

Case No. 18-0067

STATE BOARD OF ADMINISTRATION,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 7, 2018, by video teleconference at sites in Sarasota and Tallahassee, Florida, before Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: William Matthew Kowtko, Esquire
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For Respondent: Brian A. Newman, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner, Heike Stoll (f/k/a Heike Bybee), has standing to assert a claim or right to any portion of her former

husband's Florida Retirement System ("FRS") benefits as an "innocent spouse" pursuant to Article II, Section 8(d) of the Florida Constitution, and section 112.3173, Florida Statutes (2017).^{1/}

PRELIMINARY STATEMENT

By letter dated November 9, 2017, the State Board of Administration ("SBA") notified Frankie Bybee that his rights and benefits under the FRS were "forfeited as a result of [his] plea of guilty in the Circuit Court of the Twelfth Judicial Circuit, in and for Sarasota County, Florida, for acts committed while employed with [the] Sarasota County Sheriff's Office." Mr. Bybee was found guilty of certain felony charges and is currently incarcerated. Ms. Stoll filed an "FRS Investment Plan Petition for Hearing" contesting the notice asserting that she "did not commit the crimes that caused my husband's Retirement Benefits to be forfeited" and that she was entitled to "a marital interest in these Retirement Benefits through my 23 years years (sic) of marriage and my husband is the father of our three children." Subsequently, the case was referred to DOAH. Pursuant to notice, a final hearing was scheduled for and held on March 7, 2018.

On February 26, 2018, the parties filed a Pre-hearing Stipulation that contained ten stipulated facts. As warranted,

these statements have been incorporated into the Findings of Fact set forth below.

At the final hearing, Petitioner testified on her own behalf. Petitioner requested and Respondent did not object to keeping the record open to allow Petitioner's Exhibit 2, the "Final Judgment of Dissolution of Marriage" to be filed. The undersigned granted the request, and on April 18, 2018, Petitioner's Exhibit 2 was filed. The hearing record was then closed.

Respondent's Exhibits 1 through 8 were admitted into evidence. Respondent did not present any witnesses, but did cross-examine Ms. Stoll.

The one-volume Transcript was filed on April 25, 2018, and the parties timely filed their proposed recommended orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Mr. Bybee is a member of the FRS Investment Plan by virtue of his former employment as a deputy with the Sarasota County Sheriff, an FRS participating employer.

2. On October 6, 2017, in Sarasota County Circuit Court Case Number 2017CF001018, Mr. Bybee was found guilty by jury verdict of the following felonies under Florida law: Kidnap-Commit or Facilitate Commission of Felony; Crimes Against

Person-Exploitation Elderly or Disabled Adult \$20,000 to \$100,000 dollars; Fraudulent Use of Personal Identifying Information (8 counts); and Computer Crime to Defraud or Obtain Property (3 Counts) (referred to collectively as the "felony convictions").

3. On October 6, 2017, judgment was entered against Mr. Bybee adjudicating him guilty of the felony convictions.

4. The SBA notified Mr. Bybee that his felony convictions required forfeiture of his FRS benefits under section 112.3173(2)(e), Florida Statutes. Mr. Bybee did not file a petition for hearing to challenge the Notice of Forfeiture or otherwise assert that his felony convictions did not warrant forfeiture of his FRS benefits under the forfeiture statute.

5. Mr. Bybee's interest in his FRS benefits is subject to forfeiture due to his commission of the crimes, and his felony convictions.

6. Ms. Stoll was married to Mr. Bybee on August 27, 1994.

7. On or about May 9, 2017, Ms. Stoll filed her Petition for Dissolution of Marriage in Manatee County (Circuit Court Case Number 2017-DR-2067) asserting her interest in, inter alia, Mr. Bybee's FRS benefits.

8. On December 8, 2017, Ms. Stoll filed an "FRS Investment Plan Petition for Hearing" asserting her claim of entitlement to

her spousal share of Mr. Bybee's FRS benefits as an "innocent spouse."

9. On February 26, 2018, Mr. Bybee and Ms. Stoll executed a Marital Settlement Agreement. As to retirement accounts, Mr. Bybee and Ms. Stoll agreed to the following:

Retirement Accounts/Pension. Wife shall receive as her sole property, and all equity and value therein, all retirement accounts and/or pensions in the Husband's sole name, in the joint name of the parties, and/or in the Wife's sole name, free and clear of any claims or interest which Husband may have thereto. Specifically, Husband has a pension and/or retirement account through the County of Sarasota Sheriff's Department, State of Florida. Wife shall receive as her sole property, and all equity and value therein, in said pension and/or retirement account, free and clear of any claims or interest which Husband may have thereto. Further, Husband assigns, transfers, and relinquishes any legal or equitable claims, causes of action, or remedies of any nature against the pension and/or retirement account through the County of Sarasota Sheriff's Department, State of Florida; and Husband shall fully cooperate with Wife in any and all respects as necessary for Wife to pursue any such legal or equitable claims, causes of action, or remedies related any manner said pension and/or retirement account.

10. Ms. Stoll was not charged with or convicted of any crimes related to Mr. Bybee's felony convictions. Ms. Stoll's testimony was credible that she was unaware of Mr. Bybee's crimes, and had not benefited from them in any fashion.

11. On April 16, 2018, a Final Judgement of Dissolution of Marriage was entered in Manatee County Circuit Court Case Number 2017-DR-2067 that "approved, ratified and incorporated" the marital settlement agreement.

CONCLUSIONS OF LAW

12. DOAH has jurisdiction over the subject matter of the proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes.

13. The FRS is a public retirement system as defined by Florida law and, as such, SBA's proposed action, to forfeit Mr. Bybee's FRS rights and benefits (including the hearing involving Ms. Stoll), is subject to administrative review. See § 112.3173(5) (a), Fla. Stat.

14. The FRS was created effective December 1, 1970. As stated above, Mr. Bybee became a member of the FRS by virtue of his employment with the county sheriff's office. The pension obligation is a contract which is governed by statute. The forfeiture provision has been part of the governing statute since its inception. See Busbee v. State, Div. of Ret., 685 So. 2d 914 (Fla. 1st DCA 1996).

15. Article II, section 8, Florida Constitution, titled "Ethics in Government," states in pertinent part:

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.

16. Section 112.3173 implements Article II, section 8, Florida Constitution, and is part of the statutory code of ethics for public officers and employees. The statute states in pertinent part:

(1) INTENT.—It is the intent of the Legislature to implement the provisions of s. 8(d), Art. II of the State Constitution.

(2) DEFINITIONS.—As used in this section, unless the context otherwise requires, the term:

(a) "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.

* * *

(c) "Public officer or employee" means an officer or employee of any public body, political subdivision, or public instrumentality within the state.

(d) "Public retirement system" means any retirement system or plan to which the

provisions of part VII of this chapter apply.

(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.

(3) FORFEITURE.—Any public officer or employee who is convicted of a specified offense committed prior to retirement, or 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.

* * *

(5) FORFEITURE DETERMINATION.—

(a) Whenever the official or board responsible for paying benefits under a public retirement system receives notice pursuant to subsection (4), or otherwise has reason to believe that the rights and privileges of any person under such system are required to be forfeited under this section, such official or board shall give notice and hold a hearing in accordance with chapter 120 for the purpose of determining whether such rights and privileges are required to be forfeited. If the official or board determines that such rights and privileges are required to be forfeited, the official or board shall order such rights and privileges forfeited.

17. The statutory forfeiture provision at issue, section 112.3173(3), is not penal in nature. Therefore, the standard of proof in this proceeding is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.; Combs v. State Bd. of Admin., Case No. 15-6633, 2016 Fla. Div. Admin. Hear. LEXIS 262, at *21 (Fla. DOAH May 10, 2016; SBA July 26, 2016).

18. The SBA bears the burden of proof in this proceeding to establish that the FRS benefits have been forfeited. See Fla. Dep't of Trans. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977).

19. The facts demonstrate that Mr. Bybee did not challenge the SBA's notice of intent to forfeit his FRS benefits. There is a stipulation that Mr. Bybee's felony convictions require forfeiture of his FRS benefits. Once Mr. Bybee was convicted, the terms of the contract were broken and Mr. Bybee forfeited his retirement benefits under the contract. As provided in Childers v. Dep't of Mgmt. Servs., Div. of Ret., 989 So. 2d 716 (Fla. 4th DCA 2008), the court found:

Here, the State entered into a contract with the employee, promising to pay him benefits upon his retirement. That contract included a condition precedent: the employee must refrain from committing specified offenses prior to retirement. The non-occurrence of that condition foreclosed the employee's right to performance. It is as direct and to the point as that. There simply is no violation of the Excessive Fines Clause. "This is not a prosecution under Florida criminal law for accepting a bribe, and it is not a punishment for accepting a bribe. This is an action to enforce the terms of the pension contract and nothing more." Busbee, 685 So. 2d at 917.

20. Ms. Stoll argues that she is entitled to her former husband's FRS benefits through an "innocent spouse" theory. An

exhaustive review of chapter 112, part III, the Code of Ethics for Public Officers and Employees, including section 112.3173, fails to provide support for that theory. The SBA's authority is limited by the statute it applies. The SBA cannot add an exception to the FRS forfeiture statute that does not exist. See State, Dep't of Env'tl. Reg. v. Puckett Oil Co., 577 So. 2d 988, 991 (Fla. 1st DCA 1991).

21. Mr. Bybee's claim to any FRS retirement benefits vanished when he committed the crimes. See Garay v. Dep't of Mgmt. Servs., Div of Ret., 46 So. 3d 1227 (Fla. 1st DCA 2010). Mr. Bybee did not have any FRS benefits to transfer to Ms. Stoll, marital agreement or not, because he was not entitled to the benefits.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the State Board of Administration issue a final order finding that Petitioner is not entitled to her former husband's retirement benefits, because he was a public employee convicted of specified offenses; and pursuant to section 112.3173, he forfeited all of his rights and benefits in his Florida Retirement System Investment Plan account upon committing the crimes.

DONE AND ENTERED this 23rd day of May, 2018, in
Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of May, 2018.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2017),
unless otherwise noted.

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.