

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

WILLIAM F. DAVIS, JR.,

Petitioner,

vs.

Case No. 20-4311

VILLAGE OF PALM SPRINGS GENERAL
EMPLOYEES' PENSION PLAN, BOARD OF
TRUSTEES,

Respondent

and

VILLAGE OF PALM SPRINGS,

Intervenor.

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case by video conference via Zoom on January 26, 2021, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Craig A. Boudreau, Esquire
2161 Palm Beach Lakes Boulevard, Suite 204
West Palm Beach, Florida 33409-6611

For Respondent: Glenn E. Thomas, Esquire
Lewis, Longman & Walker, P.A.
315 South Calhoun Street, Suite 830
Tallahassee, Florida 32301

Bonni Spatara Jensen, Esquire
Klausner, Kaufman, Jensen & Levinson
7080 Northwest 4th Street
Plantation, Florida 33317

For Intervenor: David Clayton Miller, Esquire
Elizabeth W. Neiberger, Esquire
Bryant Miller Olive, P.A.
One Southeast Third Avenue, Suite 2200
Miami, Florida 33131

STATEMENT OF THE ISSUES

Whether Petitioner’s rights, privileges, and benefits to which he is, or may be entitled to, or has previously received from the Village of Palm Springs General Employee’s Pension Fund should be forfeited pursuant to section 112.3173, Florida Statutes.

PRELIMINARY STATEMENT

On August 19, 2020, the Village of Palm Springs General Employees’ Pension Plan, Board of Trustees (“Respondent” or “Pension Board”), emailed a Notice of Proposed Agency Action (“Proposed Action”) to William F. Davis, Jr.’s (“Petitioner” or “Davis”) counsel to inform Petitioner that his rights and benefits under the pension plan were forfeited pursuant to section 112.3173.

Petitioner filed a timely Petition for Formal Administrative Hearing (“Petition”). Subsequently, the case was referred to DOAH. The Petition was assigned to the undersigned administrative law judge.

By Order dated October 29, 2020, Village of Palm Springs (“Intervenor” or “Village”) was permitted to intervene in the proceedings.

The case was noticed for hearing on December 4 and 8, 2020. The parties stipulated to continue the final hearing. Pursuant to notice, the final hearing proceeded as rescheduled on January 26, 2021.

The parties filed a Joint Pre-hearing Stipulation in which they identified stipulated facts for which no further proof would be necessary, and the

relevant facts stipulated therein are accepted and made part of the Findings of Fact below.

At the final hearing, Petitioner was the only witness to testify. Petitioner's Exhibits numbered 1 through 11 were admitted into evidence. Respondent's Exhibits numbered 1 through 5 and 7 through 15 were admitted into evidence. Intervenor's Exhibits numbered 1 through 9 were admitted into evidence.

At the conclusion of the hearing, the parties agreed to file their proposed recommended orders within 15 days of the filing of the transcript. The proceedings were recorded and transcribed. A one-volume Transcript of the hearing was filed at DOAH on February 9, 2021. The parties filed timely proposed recommended orders, which the undersigned has considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Village of Palm Springs General Employees' Pension Plan ("Pension Plan") is a defined benefit plan, supported in whole or part by public funds.
2. The Pension Plan was created in 1970.
3. The Pension Plan is a public retirement system or plan to which the provisions of part VII of chapter 112 apply.
4. The Pension Board is charged with governing, managing, and administering the Pension Plan on behalf of the Village.
5. The Village is a public body, political subdivision, or public instrumentality within the State of Florida.
6. In 1976, the Florida Constitution was amended to add Article 2, Section 8, titled "Ethics in Government," which provided for pension

forfeiture for public employees convicted of a felony involving breach of the public trust.

7. In 1984, the Florida Legislature first enacted section 112.3173.

8. On September 6, 1989, Davis started his employment with the Village and also initiated his participation as a member in the Pension Plan.

9. While employed for the Village, Davis maintained his membership in the Pension Plan.

10. On March 2, 2005, Davis was promoted from Assistant Public Works Director to Public Works Director. His duties included overseeing several departments including maintenance, sanitation, water, plants, and building.

11. On April 10, 2015, Davis's employment with the Village ended.

12. On June 1, 2015, Davis started receiving his retirement benefits from the Pension Plan.

13. On or about November 29, 2016, Davis was charged, by Information, in the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, with eight counts of unlawful compensation for official behavior and one count of petit theft in Case Number 50-2016-CF011665.

14. At the times relevant to the charges in the Information, Davis was actively employed with the Village and served as Director of Public Works. The charges were also related to Davis's employment with the Village.

15. The Information for Case No. 50-2016-CF011665 detailed the charges and alleged in relevant part, the following:

COUNT 1: WILLIAM FRANK DAVIS, on or about July 6, 2010, in the County of Palm Beach and State of Florida, did knowingly and intentionally request, solicit, accept or agree to accept, any pecuniary or other benefit not authorized by law, for the past, present, or future performance, nonperformance, or violation of any act or omission which AKA SERVICES and/or LUIGI BASILE, believed to have been, or WILLIAM FRANK DAVIS, JR, a public servant represented as having been, either within his official discretion, in

violation of a public duty, or in performance of a public duty, contrary to Florida Statute 838.016(1) and (4). (2 DEG FEL)

[COUNT 2 ...] accept, any pecuniary or other benefit not authorized by law, for the past, present, or future performance, nonperformance, or violation of any act or omission which AKA SERVICES and/or LUIGI BASILE, believed to have been, or WILLIAM FRANK DAVIS, JR, a public servant represented as having been, either within his official discretion, in violation of a public duty, or in performance of a public duty, contrary to Florida Statute 838.016(1) and (4). (2 DEG FEL)¹

COUNT 9: WILLIAM FRANK DAVIS, on or between July 6, 2010 and December 2, 2013, in the County of Palm Beach and State of Florida, did engage in a scheme to defraud constituting a systematic, ongoing course of conduct with intent to defraud one or more persons, or with intent to obtain property from one or more persons, by false or fraudulent pretenses, representations, or promises, or willful misrepresentations of a future act and did obtain property from one or more of such persons, contrary to Florida Statutes, 817.034(4)(a)3. (3 DEG FEL.)

16. On or about November 30, 2017, Davis pled guilty to two felony counts of unlawful compensation for official behavior and one misdemeanor count of petit theft in Case No. 50-2016-CF011665.

17. That same day, Davis was sentenced in Case No. 50-2016-CF011665. He was adjudicated guilty of section 812.014, Florida Statutes, for a single petit theft count and adjudication was withheld for the two section 838.016, Florida Statutes, counts of unlawful compensation for official behavior.

¹ The quote is incomplete because the Information cut off the complete language for Count 2.

18. Afterwards, Davis attempted to get the judgment vacated. On August 3, 2018, Davis filed a Verified Motion for Postconviction Relief (“Motion”) before the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, requesting the circuit court to set aside the judgement and sentence imposed in Case No. 50-2016-CF011665.

19. Davis maintained in his Motion that his guilty plea in Case No. 50-2016-CF011665 was unlawfully induced or not made voluntarily with an understanding of the nature of the charge and the consequences of the plea.

20. On May 21, 2019, Judge Joseph Marx of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, held an evidentiary hearing on Petitioner’s Motion.

21. By order signed June 10, 2019, and filed on June 12, 2019, Judge Joseph Marx denied Petitioner’s Motion.

22. Davis appealed the State’s Order Denying Defendant’s Verified Motion for Postconviction Relief Following Evidentiary Hearing (“Order Denying Verified Motion”) to the Fourth District Court of Appeal.

23. On March 12, 2020, the Fourth District Court of Appeal affirmed, per curiam, the circuit court’s Order Denying Verified Motion. A Mandate was issued by the Fourth District Court of Appeal on April 8, 2020.

24. Davis did not appeal the Fourth District Court of Appeal’s Mandate.

25. On August 4, 2020, after the Pension Board received notice that Davis pled guilty to section 838.016, the Board unanimously voted to forfeit Davis’s rights and benefits pursuant to section 112.3173.

26. Davis was notified by email dated August 19, 2020, of the Pension Board’s proposed action to forfeit his rights and benefits.

27. Davis timely contested the notice and challenged the forfeiture.

Ultimate Findings of Fact

28. Petitioner’s acts that were alleged in the Information formed the basis for the charges against Petitioner to which he pled guilty to the two violations of section 838.016, unlawful compensation for official behavior, and a single

violation of section 812.014, petit theft, in Case No. 50-2016-CF011665. Each violation occurred during and was related to Petitioner's employment with the Village.

CONCLUSIONS OF LAW

29. DOAH has jurisdiction over the subject matter and the parties to this action pursuant to sections 120.57(1) and 112.3173(5), Florida Statutes.

30. Respondent has the burden of proving by a preponderance of the 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).

31. Article II, section 8(d) of the Florida Constitution sets forth the ethical standards for public officers and employees in government and provides, in pertinent part:

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.

32. Section 112.3173 provides, in relevant part:

(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.

33. Section 112.3173(2)(a) provides, in relevant part:

(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.

34. The Florida Legislature enacted section 112.3173(2)(e) and entitled it “Felonies involving breach of public trust and other specified offenses by public officers and employees; forfeiture of retirement benefits.” Section 112.3173(2)(e)4., as it relates to this matter, defines “specified offense” and includes “[a]ny felony specified in chapter 838, except ss. 838.15 and 838.16.”

Impairment of Contract

35. Petitioner alleges the Pension Plan is a contract predating section 112.3173 and that the Pension Plan has not been amended to incorporate section 112.3173, so any attempt by the Pension Board to enforce section 112.3173 against Petitioner is an impairment of contract. Petitioner’s contention that the Village Board has to take formal action and agree to be governed by the general laws of the State of Florida is without merit. Article VI, section 6.02 of the Village Charter, which was enacted in 1980, prior to Petitioner’s employment, sets the standards of ethics for employees and provides, in relevant part:

All elected officials and employees of the village shall be subject to the standards of conduct set by general law for public officers and employees in addition, the council may, by ordinance, establish a code of ethics for officials and employees of the village which may be supplemental to general law, but in no case may such ordinance diminish the provisions of general law.

36. By specifically setting the parameters of conduct according to general law, the Village Charter is incorporating and applying section 112.3173 to all

its employees. The Supreme Court has held that general law controls local law by determining that municipal ordinances are inferior to state laws. *Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1993). Therefore, section 112.3173 is applicable general law providing authority regarding forfeiture for the Pension Board in this matter.

37. It is also important to note that a member of a public retirement plan has a vested right of contract when he or she retires or satisfies the requirements necessary for retirement. *City of Daytona Bch. v. Caradonna*, 456 So. 2d 565, 567 (Fla. 5th DCA 1984). However, if the member is not retired, subsequent legislation can alter the member's benefits. See *Caradonna*, 456 So. 2d at 567 (citing *Fla. Sheriff's Ass'n v. Dep't of Admin., Div. of Ret.*, 408 So. 2d 1033 (Fla. 1981))("The legislature can alter retirement benefits of active employees."). In this matter, Petitioner's employment was terminated with the Village on April 10, 2015, and Petitioner has been receiving the rights, benefits, and privileges under the Pension Plan since June 1, 2015. Therefore, since section 112.3173 was enacted in 1984, prior to Petitioner's retirement, the Pension Board's Proposed Action is not an impairment of Petitioner's contract rights.

Voluntary Nature of Petitioner's Guilty Plea

38. Petitioner also maintains that his plea entered into was involuntary as the result of misleading legal advice, a claim similar to ineffective assistance of counsel. Such an argument is misplaced regarding the forfeiture issue in this matter. The undersigned only has the authority provided by statute. Chapter 120 and chapter 112 both lack any statutory authority for an administrative law judge to overturn a judicial decision. *Fla. Elections Comm'n v. Davis*, 44 So 3d 1211, 1215 (Fla. 1st DCA 2010)(The Division of Administrative Hearings is no exception to the rule that "[a]dministrative agencies are creatures of statute and have only such powers as statutes confer.")(quoting *Greenb[e]rg v. Fla. State Bd. of Dentistry*, 297 So. 2d 628,

634 (Fla. 1st DCA 1974)). Therefore, DOAH lacks jurisdiction to negate the effect of Petitioner's plea.

Constitutional Arguments

39. Petitioner also contends there are constitutional grounds that prohibit forfeiture in this matter. As with any agency, DOAH is an executive agency created by section 120.65 and it does not possess the authority to determine the constitutionality of statutes. *Lennar Homes, Inc. v. Dep't of Bus. & Prof'l Reg.*, 888 So. 2d 50, 53 (Fla. 1st DCA 2004); *Dep't of Admin. v. Div. of Admin. Hearings*, 326 So. 2d 187, 189 (Fla. 1st DCA 1976). Therefore, on this point, the undersigned has no jurisdiction to make any determinations on Petitioner's claims based on constitutional arguments.

40. In this matter, the parties stipulate that Petitioner pled guilty to two felony counts of unlawful compensation for official behavior in violation of section 838.016 in the Fifteenth Judicial Circuit Case No. 50-2016-CF011665. Such a "plea of guilty" constitutes a conviction pursuant to section 112.3173(2)(a) and meets the criteria for a specified offense under section 112.3173(2)(e)4. Additionally, the acts to which Davis pled guilty occurred during and were related to his public employment by the Village. Accordingly, section 112.3173 requires forfeiture for Petitioner's felony convictions of unlawful compensation for official behavior in violation of section 838.016.

41. The Florida Legislature has also directed that a person who receives benefits from the public retirement system in excess of his or her accumulated contributions because of forfeiture shall pay them back. Section 112.3173(5)(d) provides, in relevant part, that "such person shall pay back to the system the amount of the benefits received in excess of his or her accumulated contributions." Accordingly, Petitioner shall repay any retirement benefits received from the pension plan in excess of his accumulated employee contributions.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Village of Palm Springs General Employees' Pension Plan, Board of Trustees, enter a final order finding that:

1. Petitioner was a public employee convicted of specified offenses committed prior to retirement and while employed with the Village pursuant to section 112.3173, Florida Statutes, and directing the forfeiture of his rights and benefits; and
2. Petitioner be required to pay back to the Pension Plan an amount equal to the sum of all benefits paid by the Pension Plan to Petitioner, less the amount of Petitioner's employee contribution to the Pension Plan.

DONE AND ENTERED this 26th day of March, 2021, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of March, 2021.

COPIES FURNISHED:

Craig A. Boudreau, Esquire
Suite 204
2161 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409-6611

Bonni Spatara Jensen, Esquire
Klausner, Kaufman, Jensen & Levinson
7080 Northwest 4th Street
Plantation, Florida 33317

Glenn E. Thomas, Esquire
Lewis, Longman & Walker, P.A.
Suite 830
315 South Calhoun Street
Tallahassee, Florida 32301

David Clayton Miller, Esquire
Bryant Miller Olive, P.A.
Suite 2200
One Southeast Third Avenue
Miami, Florida 33131

Elizabeth W. Neiberger, Esquire
Bryant Miller Olive, P.A.
Suite 2200
One Southeast Third Avenue
Miami, Florida 33131

Village of Palm Springs Pension Plan,
Board of Trustees
c/o Bonnie Spatara Jensen, Esquire
Klausner, Kaufman, Jensen & Levinson
7080 Northwest 4th Street
Plantation, Florida 33317

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.