

**West Palm Beach Police Pension Fund
2100 North Florida Mango Road
West Palm Beach, Florida 33409**

Minutes

September 16, 2014
8:30 AM

CALL THE MEETING TO ORDER

Mr. Frost called to order the West Palm Beach Police Pension Fund Meeting on September 16, 2014 at 8:35 AM, in the main conference room of the Ernest George Building of the Palm Beach County Police Benevolent Association.

Present at the meeting: Jonathan Frost, Chairman, Troy Marchese, Board Secretary, Craig Kahle, Board Trustee and Wilton White, Board Trustee.

Also present: Jeff Green, City Administrator – City of West Palm Beach; Wanda Good, Court Reporter; Dewitt McDonald, Vested Member; Lindsey Wagner, Counsel for Mr. McDonald; Gary Lippman, PBA Counsel; Pedro Herrera & Dustin Watkins, Special Counsel for the Board of Trustees; Bonni Jensen, Board Attorney, Law Offices of Perry & Jensen; Dave Williams, Plan Administrator.

PUBLIC COMMENT

No comments provided.

ATTORNEY'S REPORT

No report provided.

ADMINISTRATOR'S REPORT

No Report provided.

Dewitt McDonald– Hearing (Pursuant to Florida State Statute 112.3173)

These minutes are a summary of the event(s) that took place. The official record was prepared by Ms. Good, Court Reporter.

Mrs. Jensen began her presentation by stating this meeting was set at a short timeframe and wanted to ensure that Ms. Wagner, was ready to proceed. Ms. Wagner affirmed her position that as counsel for Mr. McDonald she was ready to carry on.

Mrs. Jensen outlined the procedures to all parties. Mr. Herrera made his opening statement: Based on our review of these records, including, without limitation, the governing plan document, records from the criminal proceeding, the Notice of Proposed Agency Action, and relevant Florida case law, we conclude that the Board is correct to find that Mr. McDonald's pension benefits are subject to forfeiture under § 112.3173, Fla. Stat. The plan document, as restated in Chapter 2012-259, Laws of Florida, incorporates the forfeiture statute by reference at Section (24)(b).

Factual Background: Mr. McDonald is a former police officer with the City of West Palm Beach Police Department. On April 11, 2014, Mr. McDonald was charged with knowingly carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). This is a felony crime punishable by a five-year minimum sentence. On April 30, 2014, Mr. McDonald and his attorney, Michael Salnick, entered into a Stipulated Statement of Facts with the government. According to the admitted Stipulated Statement of Facts, Mr. McDonald established and operated Prime Performance Wellness Centers, Inc., located in Lake Worth, Florida. This business provided clients with testosterone therapy, human growth hormone therapy, and nutrition consultation.

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Mr. McDonald later established Prime Health and Rejuvenation Clinic (“Prime HRC”), located in Wellington, Florida. Both clinics offered similar services and both hired licensed medical doctors to examine patients and write prescriptions. Mr. McDonald used these two businesses to illegally obtain certain controlled substances, including Deca-Durabolin® (“Deca”) and testosterone, in order to illegally sell them to others without a prescription. Deca and testosterone are anabolic steroids that are Schedule III controlled substances within the meaning of 21 C.F.R. § 1308.13. Mr. McDonald carried out this illegal steroid trafficking scheme from at least as early as September, 2011 continuing through April, 2013. The Stipulated Statement of Facts state that Mr. McDonald referred another West Palm Beach Police Officer to Prime HRC, but the doctor who examined him did not prescribe Deca. Instead, Mr. McDonald illegally obtained and sold Deca to this other police officer. On or about March 5, 2013, while on duty as a police officer and while carrying his service issued Smith and Wesson MP40 pistol, Mr. McDonald sold 250 mg of Deca and 250 mg of testosterone to this other police officer. Simultaneous with signing the Statement of Stipulated Facts, Mr. McDonald pled guilty to the charge of carrying a firearm during a drug trafficking offense. The court imposed Mr. McDonald’s sentence on August 7, 2014. Mr. McDonald is scheduled to self-surrender by 2 p.m. on September 18, 2014.

APPLICABLE STATUTES

Article II, Section 8(d) of the Constitution of the State of Florida states, “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.”(emphasis added)

Section 112.3173, Fla. Stat. states, in relevant part:

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

* * *

(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.

§ 112.3173(1), (2), Fla. Stat. Specified offenses include, among other things: 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; ... § 112.3173(2)(e)(6), Fla. Stat. A “conviction” is defined as one or more of the following:

... 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.

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§ 112.3173(2)(a), Fla. Stat. “Felony” is defined as “any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by death or imprisonment in a state penitentiary.” § 775.08(1), Fla. Stat.

ANALYSIS: The determination of Mr. McDonald’s forfeiture consists of three necessary elements: 1) the conviction of a felony; 2) the use of a public office in committing the felony; and 3) realized profit, gain, or advantage. Mr. McDonald has satisfied all three requisite elements and is therefore subject to the forfeiture of his pension benefits.

THE CONVICTION OF A FELONY –

With respect to the first element, Mr. McDonald pled guilty and he was sentenced for the crime charged. The definition of “conviction” under the forfeiture statute includes the act of pleading guilty. § 112.3173(2)(a), Fla. Stat. Further, there is no question that Mr. McDonald was convicted of a felony. It is a felony to knowingly carry a firearm during and in relation to a drug trafficking crime. 18 U.S.C. § 924(c)(1)(A). The fact that Mr. McDonald was convicted of a federal felony rather than a state felony is immaterial. In *Hames v. City of Miami Firefighters’ and Police Officers’ Trust*, the court upheld a pension board’s forfeiture order where a police officer was convicted strictly under federal statutes. Noting that the forfeiture statute defined “felony” as “any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by death or imprisonment in a state penitentiary,” the court held that the federal crimes for which he was convicted were indeed “punishable” under state law for a term of imprisonment. Therefore, forfeiture is still appropriate and necessary where, as here, a plan participant is convicted of solely federal crimes. Anabolic steroids are Schedule III controlled substances under Florida Law. § 893.03(3)(d), Fla. Stat. The unauthorized sale of a Schedule III controlled substance is punishable as a felony of the third degree under Florida law. § 893.13(1)(a)2

Indeed, the elements of the crimes for which Mr. McDonald was convicted are also immaterial. Forfeiture is necessary for “any felony by a public officer or employee who, willfully and with intent to defraud the public ... of the right to receive the faithful performance of his or her duty ... realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or herself ... through the use or attempted use of the power, rights, privileges, duties, or position of his or her public office.”

§ 112.3173(2)(e)(6), Fla. Stat. According to the court in *Jenne v. State Department of Management Services, Division of Retirement*, “By this language, any felony could qualify as a specified offense, so long as the remaining conditions in the statute have been met. All of the remaining conditions refer to the conduct of the official, not the definition of the crime.”(emphasis added)

THE USE OF A PUBLIC OFFICE (i.e. “...conduct of the official”) –

Mr. McDonald clearly used his public office in committing the felony. By meeting another personally known police officer and selling him a controlled substance while on duty, Mr. McDonald abused his public office for personal profit and gain. In *Bollone v. Department of Management Services, Division of Retirement*, the court upheld a forfeiture order where the convicted participant had downloaded child pornography onto computers provided for the purpose of public work.

The court held that the unlawful use of a public computer constituted sufficient nexus between the plan participant and his public duties to justify forfeiture: “[t]he public and [the public employer] had a right to expect [Appellant] would not use the computer entrusted to him for criminal activity” and “[t]he public was defrauded when [Appellant] used that public property to further his private interests in the possession of child

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pornography ...” So too is the public trust broken when Mr. McDonald used his position as a police officer, and while on the public’s time, to sell controlled substances to another police officer all while carrying his service issued weapon.

The public was defrauded when Mr. McDonald used time on duty, his intimate knowledge of police surveillance and detection, and his professional contacts within the West Palm Beach Police Department to solicit and actively conduct illegal steroid sales. Thus, ample sufficient nexus to his public office exists here to warrant the forfeiture of Mr. McDonald’s pension benefits. As a police officer, Mr. McDonald was under a duty to safeguard the public faith in his office at all times. His drug trafficking activities while on duty deprived the public of that trust. Therefore, he has forfeited all of his pension benefits, except for a return of contributions without interest, by operation of law.

Furthermore, in *Desoto v. Hialeah Police Pension Fund Board of Trustees*, the court upheld a forfeiture order where a police officer committed a specified offense while on suspension. Despite Desoto’s commission of a specified offense while not on active duty, the court noted that “DeSoto clearly violated his duty as a public officer to safeguard the public faith in his office. Although suspended for a period of time, DeSoto remained a public servant.” The court upheld his forfeiture of pension benefits and found no significant distinction between on-duty, off duty, active or suspended leave when establishing the requisite nexus between a felonious crime and a public office. Consequently, “use of [...] public office” extends not just to activities while on duty, but also to the use of any advantage afforded by the public trust held by public officials such as Mr. McDonald. Here, in committing a felony in breach of that trust while on duty, Mr. McDonald is subject to forfeiture.

REALIZED PROFIT, GAIN, OR ADVANTAGE –

Finally, Mr. McDonald clearly realized a personal profit, gain, or advantage. He received money from making an illegal steroid sale while on duty. The court that sentenced Mr. McDonald even ordered him to pay restitution to the government. However, as the court in *Bollone* held, realized profit, gain, and advantage need not even be pecuniary in order to justify forfeiture. It need only lead to the participant’s benefit or gratification. Therefore, it is irrelevant how much profit, gain, or advantage Mr. McDonald realized. The threshold is certainly met as the only factor to consider is that Mr. McDonald certainly realized such a “benefit or gratification” from the commission of his crimes.

CONCLUSION

Mr. McDonald has forfeited his pension with the West Palm Beach Police Pension Fund by operation of law. The statute and the factual circumstances at hand compel you to order the forfeiture of Mr. McDonald’s benefits and return his employee contributions without any interest.

Mr. Herrera did not present any witness testimony for the Board to consider.

Ms. Wagner presented her opening statement to the Board of Trustees.

On or about September 13, 2013, Mr. McDonald’s employment was terminated from the City of West Palm Beach Police Department. Mr. McDonald served as a Police Officer with the City of West Palm Beach for over 19 years. His position did not involve crime. Mr. McDonald’s termination was for reasons unrelated to his offense. Subsequently, and after his termination with the City, Mr. McDonald was charged with the offense of Carrying a Firearm During a Drug Trafficking Offense. The offense did not involve the general public, and Mr. McDonald did not realize any profit from the action. On or about April 30, 2014, Mr. McDonald pled guilty to the charges, and entered into a Plea Agreement, which contained Stipulated Statement of Facts.

On or about September 12, 2014, the West Palm Beach Police Pension Fund Board of Trustees held a meeting, and voted to allow Mr. McDonald the opportunity to be heard at a hearing as it relates to the determination of forfeiture of his retirement benefits.

Pursuant to Fla. Stat. 112.3173, which addresses felonies involving breach of public trust and other specified offenses by public officers and employees; forfeiture of retirement benefits, “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.” [Emphasis added].

The Conviction Occurred After Retirement.

Here, Mr. McDonald’s termination was not due to a criminal offense, but rather for issues regarding the rules. Now, we are to examine whether his situation falls into the provision of “a public officer or employee who is convicted of a specified offense committed prior to retirement.”

First, we note that Mr. McDonald’s conviction of the offense did not occur until after his retirement. As such, as per the plain language of the statute, he does not fall into this definition because the conviction did not occur prior to his retirement.

The Conviction Was Not for a Specified Offense as Anticipated in the Statute

Secondly, Mr. McDonald’s conviction did not involve a specified offense as anticipated under the statute. Specifically, the specific offenses are defined as follows:

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

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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.

Based on the charges against Mr. McDonald, he does not fit into any of these categories. While the City may argue that Mr. McDonald's charges are encompassed in #6, this is simply incorrect. Specifically, there is no factual support that the actions of Mr. McDonald as they relate to his conviction involved his "use or attempted use of the power, rights, privileges, duties, or position of his or her public office or employment position." While in the stipulated statement of facts, McDonald admitted he was on duty during the time the crime occurred, he was on a frolic of his own, and outside the scope of his employment and/or his duties, power, rights, privileges, and position of his position.

While the City has argued that this element is satisfied because Mr. McDonald was carrying his service weapon at the time of the incident, there are no allegations, or stipulated facts, that he used his service weapon in order to carry out the actions.

Dissimilar to this case, *Simcox v. City of Hollywood Police Officers' Ret. System*, the 4th DCA concluded a police officer's conviction of conspiracy to possess heroin with intent to distribute fell under the specific offense. 988 So. 2d 731 (Fla. 4th Dist. App. 2008). In reaching this decision, the court noted that the officer had to have used his experience gained as a police officer to work out the conspiracy scheme; therefore, it fell into the definition. Conversely, Mr. McDonald's situation was not a conspiracy – and may have not even reached the level of felony had he not been carrying a firearm at the time. There were no elaborate plans or details made when committing the crime, and thus, a civilian could have been just as successful with progressing the crime – no police knowledge or expertise was necessary. As such, it is clear that the crime does not fall within the definition.

In fact, nearly every case interpreting the provisions of "specific offense" deal with situations explicitly intertwined with the individual's position, such as "altering agency records and diverting funds for his own use" *Garay v. Dept. of Mgt. Services*, 46 So. 3d 1227, 1228 (Fla. 1st Dist. App. 2010), and "bribery and unlawful compensation or reward for official behavior" *Childers v. State, Dept. of Mgt. Services, Div. of Ret.*, 989 So. 2d 716, 718 (Fla. 4th Dist. App. 2008). Here, the drug conviction of Mr. McDonald had nothing to do with his duties of his position, and therefore, should not be found to fit into the specified offense anticipated under the definition.

Ms. Wagner did not present any witness testimony for the Board to consider.

After each party presented their respective cases, the Board began to debate the matter amongst themselves. Each Trustee outlined his thoughts and cited various aspects of the matter.

During the discussion Mr. White reflected that he would like additional time to consider the totality of circumstances. By consensus all Trustees concurred. Ms. Wagner had no opposition with a deferral.

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ADJOURNMENT

Mr. Marchese made a motion to adjourn the Meeting. Mr. Kahle seconded the motion. All Trustees voted yes. All Trustees voted yes, and the motion was passed 4-0 at 9:16 AM.

RECONVENED

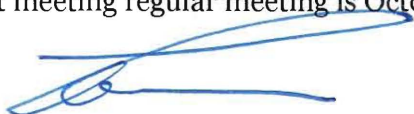
Mrs. Jensen went back on record while all parties were present. She wanted the record to be clear that there were four (4) Trustees present for today's Hearing. She asked Ms. Wagner if she was opposed to having the Matter heard by four (4) Trustees instead of five (5) Trustees. Ms. Wagner voiced her opposition to the Matter being heard by less than a full Board. With that being said, Mrs. Jensen indicated that the case would have to be re-heard at a future date, when a full Board is present.

Mr. Frost asked Mrs. Jensen to review the Law in this situation for the Board to consider.

RE-ADJOURNMENT

Mr. Marchese made a motion to adjourn the Meeting. Mr. Kahle seconded the motion. All Trustees voted yes. All Trustees voted yes, and the motion was passed 4-0 at 9:21 AM.

The next meeting regular meeting is October 10, 2014 at 8:30 AM.



Troy Marchese, Board Secretary