IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

PENSION BOARD FOR THE CONSOLIDATED RETIREMENT PLAN FOR EMPLOYEES OF THE CITY OF MARIETTA, GEORGIA,	CASE NO: 19100849
Petitioner,	
v.	Appeal from the Office of State Administrative Hearings Order of Jan. 3, 2019 (Docket No. 1833447-OSAH-PRS-GMEBS-33-Kennedy).
DEBBIE BAILEY a/k/a DEBBIE BROWN,	
Respondent.	

ORDER GRANTING PETITION FOR JUDICIAL REVIEW AND REVERSING FINAL DECISION OF THE OFFICE OF STATE ADMINISTRATIVE HEARINGS

This matter is before the Court on the Pension Board for the Consolidated Retirement Plan for Employees of the City of Marietta, Georgia's ("Pension Board") Petition for Judicial Review.

INTRODUCTION

Pursuant to O.C.G.A. § 50-13-19, the Pension Board seeks judicial review of the January 3, 2019 Final Decision of an Administrative Law Judge with the Office of State Administrative Hearings ("OSAH"), Docket No. 1833447-OSAH-PRS-GMEBS-33-Kennedy, dismissing proceedings initiated by the Pension Board against the above-named Respondent. The administrative proceedings in question were commenced pursuant to O.C.G.A. § 47-1-25 for purposes of determining the

economic impact of a public employment-related crime committed by Respondent for purposes of the relief authorized by O.C.G.A. § 47-1-22(b).[1] The proceedings were subsequently dismissed upon the Administrative Law Judge's determination that the crime for which Respondent was convicted does not constitute a "public employment related crime" within the meaning of O.C.G.A. § 47-1-20, et seq. For the reasons that follow, this Court disagrees with the Administrative Law Judge's determination and therefore REVERSES the January 3, 2019 Final Decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The record establishes the following:

Respondent is a former employee of the City of Marietta ("City"), where she worked in the City's Section 8 Housing Choice Voucher Program. As such, she is a participant in a public retirement system established by the City called the Consolidated Retirement Plan for Employees of the City of Marietta, Georgia. The Pension Board serves as the board of trustees for the Plan. (Petition, ¶¶ 1-2, 4-6.)

Commencing no later than 2010, Respondent and another employee of the City's Section 8 Program, Shantel Bowens,[2] conspired to implement a fraudulent

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[1] In pertinent part, this statute provides as follows: "If a public employee commits a public employment related crime in the capacity of a public employee and is convicted for the commission of such crime, upon final conviction such person's benefits under a public retirement or pension system, ... shall be reduced by an amount equal to three times the economic impact of the crime, ..."

[2] Ms. Bowens is the Respondent in Case No. 19100848.

scheme to commit theft of Section 8 funds in the City's control designated for housing assistance payments for the benefit of its eligible residents. Several years later, after a City audit and a subsequent criminal investigation conducted by the Marietta Police Department exposed the scheme and compiled evidence establishing the theft of more than $235,000, Respondent was indicted by a federal grand jury and charged with seven criminal counts including Conspiracy to Commit Theft from an Organization Under a Federal Program, Theft from an Organization Receiving Federal Funds, and Receiving Stolen Federal Funds. Respondent ultimately pleaded guilty to Conspiracy to Commit Theft from an Organization Under a Federal Program and was sentenced to fourteen (14) months' incarceration followed by three (3) years' supervised release. She did not appeal her conviction or sentence. (Petition, ¶¶ 7-10 & Exh. B, C.)

Subsequent to the Pension Board's commencement of the aforementioned administrative proceedings against Respondent pursuant to O.C.G.A. § 47-1-20, et seq., the Administrative Law Judge dismissed the proceedings on the grounds that, because she was convicted of a federal crime, Respondent did not commit a "public employment related crime" within the meaning of O.C.G.A. § 47-1-20, et seq. This Court disagrees.

In relevant part, the term "public employment related crime" is defined as "any one or more of the following crimes: ... any felony provided for in Article 1 of

Chapter 10 of Title 16, relating to abuse of governmental office [or] conspiracy to defraud the state or a political subdivision as provided in Code Section 16-10-21 ...." O.C.G.A. § 47-1-20(6). The Court finds that the crime committed by Respondent meets this definition. While she ultimately was not charged or convicted under any of the referenced code sections, this was simply a function of the federal government's decision to assume the prosecution of the matter and has no bearing on the nature of the crime committed. It is sufficient for purposes of O.C.G.A. § 47-1-20(6) that Respondent committed one or more of the referenced crimes – which the record establishes she did. (Petition, Exh. C.)[3]

Moreover, had the Legislature intended to deny a public pension fund recourse under O.C.G.A. § 47-1-20, et seq. when a plan participant engages in criminal activity violative of O.C.G.A. § 16-10-21 (or one or more of the other enumerated criminal statutes) but has the good fortune of being prosecuted by the U.S. Attorney's Office for an analogous federal crime, it would have required a conviction under the State criminal statute(s). *See Inland Paperboard & Packaging, Inc. v. Ga. Dept. of Revenue*, 274 Ga. App. 101, 104, 616 S.E. 2d 873 (2005)

[3] By the same token, had Respondent been prosecuted by the District Attorney and convicted in Superior Court for violations of "Article 1 of Chapter 10 of Title 16, relating to abuse of governmental office [and/or for] conspiracy to defraud the state or a political subdivision as provided in Code Section 16-10-21," O.C.G.A. § 47-1-20(6), the fact that her actions also constituted federal crimes would likewise be irrelevant to whether a "public employment related crime" was committed.

(legislature's failure to include restriction or limitation in statute is presumed to be a matter of considered choice); *Evans v. State*, 300 Ga. 271, 280, 794 S.E. 2d 40 (2016) (similar).[4] Instead, while both a "conviction" and a "final conviction" are prerequisites to obtaining relief under O.C.G.A. § 47-1-20, et seq., these terms are defined separately from "public employment related crime" and include no requirement that they be entered in any particular court.[5] The Administrative Law Judge's construction of O.C.G.A. § 47-1-20(6) ignores this statutory bifurcation of key definitions, which the Court finds must be given effect.[6] *See, e.g., Berryhill v.*

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[4] In addition to leading to unreasonable and absurd results, reading such a restriction or limitation into O.C.G.A. § 47-1-20, et seq. would be inconsistent with its underlying public policy of providing a remedy to a public retirement system whose governmental sponsor suffers economic damage due to the job-related criminal activity of a plan participant. *See, e.g., State v. Mulkey*, 252 Ga. 201, 204, 312 S.E. 2d 601 (1984) ("It is the duty of the court to consider the results and consequences of any proposed construction and not so construe a statute as will result in unreasonable or absurd consequences not contemplated by the legislature."). *See also* O.C.G.A. § 1-3-1(a) ("In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy."); *Mulkey*, 252 Ga. at 204 ("In arriving at the intention of the legislature, it is appropriate for the court to look to the old law and the evil which the legislature sought to correct in enacting the new law and the remedy provided therefor.").

[5] The term "conviction" is defined as "a judgment of conviction for the commission of a crime which is entered upon a verdict or plea of guilty," O.C.G.A. § 47-1-20(1), while the term "final conviction" is defined as "a conviction which has been upheld after the convicted person has exhausted all appeals of the conviction." O.C.G.A. § 47-1-20(3).

[6] In light of the statutory framework utilized by the Legislature, there is simply no basis for viewing Respondent's federal conviction for conduct constituting a

Ga. Community Support & Solutions, Inc., 281 Ga. 439, 441, 638, S.E. 2d 278 (2006) (courts should give a sensible and intelligent effect to every part of a statute and not render any language superfluous).

Finally, by denying relief against a plan participant – like Respondent – whose crime attracted the attention of the federal government due to the substantial economic damage they caused, while allowing such relief against a plan participant who committed the same or similar crime but was prosecuted by the District Attorney because the economic damage she caused was inadequate to attract the attention of federal authorities, the Administrative Law Judge's construction of the statute would lead to unreasonable and absurd results, in contravention of public policy, legislative intent, and common sense. *See, e.g., Mulkey*, 252 Ga. at 204, 312 S.E. 2d 601 (1984) ("It is the duty of the court to consider the results and

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federal crime as somehow precluding a determination that the same conduct also constitutes one or more of the relevant state law crimes. To the contrary, the definition of "public employment related crime" focuses on the nature of the plan participant's job-related criminal conduct without regard to prosecution or conviction. And, as just noted, while both a conviction and a final conviction are required, the Legislature placed no jurisdictional limitations on those terms. The Administrative Law Judge erred in ignoring this important context. *See, e.g., Rite–Aid Corp. v. Davis*, 280 Ga. App. 522, 524, 634 S.E. 2d 480 (2006) ("In order to discern the meaning of the words of a statute, the reader must look at the context in which the statute was written, ..."); *May v. State*, 295 Ga. 388, 391-392, 761 S.E. 2d 38 (2014) (when construing a statute, the structure of the whole statute provides useful context). *See also Peachtree-Cain Co. v. McBee*, 254 Ga. 91, 93 (1985); *Chan v. Ellis*, 296 Ga. 838, 839, 770 S.E. 2d 851 (2015).

consequences of any proposed construction and not so construe a statute as will result in unreasonable or absurd consequences not contemplated by the legislature.").

More importantly, it would also lay a foundation for a potential constitutional challenge to the validity of O.C.G.A. § 47-1-20, et seq. under the equal protection clauses of the state and federal constitutions. By way of illustration, the record reveals that Respondent's co-conspirator, Ms. Bowens, conceived of the criminal scheme, was more involved in its operation, and recruited Respondent to join her. As such, federal prosecutors easily could have decided to only prosecute and convict Ms. Bowens, leaving the lesser-culpable Respondent to be prosecuted by the District Attorney. Had this occurred, under the Administrative Law Judge's interpretation, only Respondent – and not her substantially more culpable co-conspirator – would have been subject to the pension forfeiture provisions of O.C.G.A. § 47-1-22.

The Court finds that the above-described scenario – which could reasonably develop as a logical extension of the Administrative Law Judge's construction of O.C.G.A. § 47-1-20(6) – would give rise to a colorable challenge by Respondent based on a violaton of her equal protection rights given that she – like the Pension Board – also lacked any control or influence over which authority would prosecute her for her criminal conduct. Under this scenario, Respondent and Ms. Bowens would be similarly situated individuals, both charged with, prosecuted for, and

convicted of the same criminal conduct, but the less culpable of the two – Respondent – would be subject to pension forfeiture under O.C.G.A. § 47-1-20, et seq. while her far more culpable co-conspirator would escape pension forfeiture due solely to the federal government's unilateral decision to assume the prosecution. *See Reed v. Reed*, 404 U.S. 71, 75, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971) (absent a rational basis or legitimate government purpose justifying disparate treatment, the Equal Protection Clause requires that similarly situated individuals be treated similarly).

The Administrative Law Judge did not attempt to identify a rational basis or legitimate government purpose served by such a selective application of O.C.G.A. § 47-1-20, et seq., and none is otherwise apparent to this Court. *See Bd. of Pub. Educ. for City of Savannah v. Hair*, 276 Ga. 575, 576, 581 S.E.2d 28 (2003) (when a statute can be read in both a constitutional and unconstitutional manner, the courts apply the construction that upholds the law's constitutionality."); *see also Jennings v. Rodriguez*, 583 U.S. ___, 138 S. Ct. 830, 836, 200 L. Ed. 2d 122 (2018) ("[u]nder the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious

constitutional doubts and instead may adopt an alternative that avoids those problems.").[7]

CONCLUSION

Having read and considered the Petition for Judicial Review and all matters of record, the Court finds that the Pension Board's substantial rights have been prejudiced because the January 3, 2019 Final Decision of the Administrative Law Judge, Docket No. 1833447-OSAH-PRS-GMEBS-33-Kennedy, is in violation of constitutional or statutory provisions and is affected by other error of law. *See*

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[7] The Administrative Law Judge based her construction of O.C.G.A. § 47-1-20(6) in part on a 2008 amendment to the statute which added the following language to the definition of public employment related crime: "Any felony conviction for any of the crimes specified in subparagraphs (A) through (E) of this paragraph under the laws of any other state or the United States; provided, however, that the provisions of this subparagraph shall apply to persons who first or again become members of a public retirement system on or after July 1, 2008." O.C.G.A. § 47-1-20(6)(G). According to the Administrative Law Judge, the inclusion of the language "under the laws of ... the United States" in 2008 supports the conclusion that the pre-2008 version of the statute did not include federal crimes; otherwise, the 2008 amendment served no purpose. The Court disagrees. First, the Court has previously determined that the pre-2008 version of the statute encompasses federal convictions for criminal conduct that also constitutes a violation of one or more of the state criminal statutes referenced in O.C.G.A. § 47-1-20(6), thereby making this aspect of the 2008 amendment a clarification. *See Anderson v. State*, 261 Ga. App. 716, 719 (2003) ("[T]he Legislature may clarify or make explicit that which the statutory provision had previously made only implicit."). Second, the 2008 amendment includes at least two other provisions modifying the statute's definition of public employment related crime by including violations of the criminal laws of other states and by requiring that the crimes be felonies. Thus, the 2008 amendment to O.C.G.A. § 47-1-20(6) definitely served a purpose and is by no means nullified by this Court's construction of the pre-2008 version of the statute.

O.C.G.A. §50-13-19(h)(1, 4). Accordingly, the Court hereby REVERSES the January 3, 2019 Final Decision holding that Respondent did not commit a public employment related crime as defined by O.C.G.A. § 47-1-20(6) and REMANDS this matter to OSAH for appropriate proceedings to determine the economic impact of Respondent's public employment related crime and the appropriate relief for same. *See* O.C.G.A. §§ 47-1-22(b); 47-1-25.

SO ORDERED, this 1 day of October, 2019.

S. Lark Ingram

Honorable S. Lark Ingram
Judge, Superior Court of Cobb County

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