

**BEFORE THE BOARD OF TRUSTEES
TEACHERS' RETIREMENT SYSTEM OF THE STATE OF ILLINOIS**

In the Matter of)
)
)
Larry Albaugh,)
)
Petitioner)

**RECOMMENDED DECISION OF THE CLAIMS HEARING COMMITTEE
IN THE ADMINISTRATIVE REVIEW OF LARRY ALBAUGH**

Introduction

Pursuant to the provisions of 80 Ill. Adm. Code 1650.650, an administrative review hearing was held on May 21, 2008 in Springfield, Illinois, to consider Cross Motions for Summary Judgment in the administrative review of Larry Albaugh, a member of the Teachers' Retirement System of the State of Illinois (TRS or the System). Present were Presiding Hearing Officer Todd Turner, Claims Hearing Committee Chairman Cynthia O'Neill, and Claims Hearing Committee members Jan Cleveland and Jim Bruner. By agreement of the parties, the matter was heard solely upon the hearing record.

Petitioner Larry Albaugh filed the instant administrative review to challenge the forfeiture of his TRS benefits pursuant to 40 ILCS 5/16-199 due to his felony conviction for Indecent Solicitation of a Child under 720 ILCS 5/11-6 (Macon County Case No. 05-CF-44). Specifically, Albaugh makes the following arguments in support of his request for benefit reinstatement.

- a) He was denied due process because he was not given a pre-termination hearing before his benefits were terminated.
- b) The System can only terminate a pension for a felony conviction that involves a crime in which employment as a teacher is an element of the crime.

- c) The TRS Claims Hearing Committee sits as an appellate tribunal and cannot conduct a *de novo* hearing.
- d) He should not lose his pension because he could have used any computer to commit his crime; it is irrelevant that he used the school computer on school property.

The Claims Hearing Committee has carefully considered Albaugh's arguments and finds them to be unpersuasive. It is clear to the Committee that Albaugh's use of a school computer in the commission of his crime and the commission of said crime on school property causes his felony to be related to and connected with his teaching service. Furthermore, Mr. Albaugh was given a full and fair hearing in this matter pursuant to statute and TRS administrative rules. Mr. Albaugh was not denied due process, as will be more fully explained in this decision.

Background

Between September 2004 and January 2005, while employed by Monticello Community Unit School District #25 as a high school teacher and coach, Larry Albaugh utilized a computer that belonged to the Monticello School District to solicit a person he believed to be a minor for sex.

On December 16, 2005, Albaugh pleaded guilty to Indecent Solicitation of a Child, a Class 3 Felony.

On December 30, 2005, TRS notified Albaugh by certified letter that his TRS benefits were suspended as of December 16, 2005 under the provisions of 40 ILCS 5/16-199, based on Albaugh's felony conviction in Macon County Case No. 05-CF-44 and a subsequent determination by TRS staff that his conviction related to, arose out of or was connected to his service as a teacher. The written notice of suspension provided Albaugh with fifteen days to file any relevant documentation demonstrating why his felony conviction was not related to, arising out of, or connected with his service as a teacher.

On January 17, 2006, TRS notified Albaugh by certified letter that his pension benefits were terminated effective December 16, 2005 under the provisions of 40 ILCS 5/16-199, based on Albaugh's felony conviction in Macon County Case No. 05-CF-44 and a determination by TRS staff that his conviction related to, arose out of or was connected to his service as a teacher.

On July 3, 2006, Albaugh timely filed his request for administrative review.

Decision

This case is very simple. Larry Albaugh utilized a school computer on school property to commit the crime of Indecent Solicitation of a Child (a Class 3 Felony) to which he pleaded guilty.

Through his attorney’s initial pleadings¹, failure to respond to requests to admit, and court records, the underlying facts of this case are well documented. Albaugh’s guilty plea in open Court before the Honorable Theodore Paine, on December 16, 2005, sets forth all the relevant details:

“THE COURT: Larry Albaugh, CF-44.

* * *

MR. SIMPSON: It’s a plea presentation, Your Honor . . .

THE COURT: . . . People present by Ms. Dobson.
Defendant present with Mr. Simpson.

* * *

MS. DOBSON: Your Honor, this applies to Count II of the Information. The defendant will agree to plead guilty to Count II, Indecent Solicitation of a Child, a Class 3 felony.

* * *

THE COURT: Factual basis, Ms. Dobson.

* * *

¹ The Committee is concerned that Albaugh filed an affidavit that he did not use his school computer to commit his crime and then later “remembered” that he did. The Committee finds this to be incredulous.

MS. DOBSON: Your Honor, Detective Ron Borowczyk of the Decatur Police Department, juvenile investigations division, began the investigation for this case in September, 2004, while acting in an undercover capacity as a 15-year-old female subject, 'Melissa', and using Yahoo chat and instant message networks to make contact with individuals.

One of the persons responding to these contacts was identified with a screen name Bluejacket 445 in a user-created chat room called 'younger girls for older boyfriends'

While communicating with Bluejacket 445, Detective Borowczyk was able to obtain internet protocol or 'IP' address information through the use of specialized software. The IP address used by Bluejacket 445 was controlled by the Illinois Century Network in Springfield, Illinois. Records there were subpoenaed and *Detective Borowczyk confirmed that the IP belonged to the Monticello School District in Monticello, Illinois.*

Communications with Bluejacket 445 continued and culminated in December, 2004, with Bluejacket 445 provided a number and a specific extension for the call. 'Melissa' asked what she should call him and Bluejacket responded 'Thomas.'

Detective Janette Carlton, also of the juvenile investigations division of the Decatur Police Department, acted in an undercover capacity as a 15-year-old subject, 'Melissa'. She placed a phone call to the number and extension provided. *The recorded message indicated that a call had been placed to Monticello School District.* The extension was entered and a male voice responded. 'Melissa' asked if he was 'Thomas' and he indicated, 'yes'.

Conversation then ensued of a sexual nature, including 'Thomas' asking when she would turn 16, asking about

her sexual experiences, including masturbation, and whether she would perform identified sexual acts with him which would be Class 2 felonies if 'Melissa' was a real child.

Upon completion of the phone call, communication via Yahoo internet messages continued. During one of the communications with Bluejacket 445, he activated a web-based video camera that allowed for real-time video transmission. *During the transmission, Bluejacket 445 showed his face, stood up revealing that he was wearing a Monticello High School athletics T-shirt and then focused the camera on his genital area. He then pulled his pants down revealing underwear. He then grabbed his sex organ through the underwear, pulled his pants up and sat down at a desk with a Monticello school calendar on it and ended the video transmission.*

Facial image of Bluejacket was captured and Detective Borowczyk checked the Monticello High School website and viewed faculty listings and found an image of Larry T. Albaugh. The image was then printed and Piatt County Deputy, Dave Hunt, was contacted. Deputy Hunt came to the Decatur Police Department and viewed the captured video transmission of Bluejacket 445 and the school image, both of Larry Albaugh, identified him as a person he knew, on sight, as a high school teacher in Monticello.

Defendant, on another occasion, activated the web cam for live video transmission. *During this second live transmission, the defendant was wearing clothing indicating affiliation with Monticello High School. He stood up during the video transmission, lowered his pants and underwear, exposed his sex organ and appeared to masturbate. At the conclusion of the video transmission, the defendant and 'Melissa' agreed to meet for the purpose of sexual intercourse.*

On January 7th of 2005 a communication was received from the defendant indicating that he was going to travel to Decatur on that date. The message included directions for 'Melissa' to be on Decatur Street in Decatur, Illinois, at 4:15 p.m.

At 5:27 p.m., the defendant sent another IM message to 'Melissa' indicating that he had driven to Decatur and had seen 'Melissa' walking on the street. The defendant described the clothing items being worn by Inspector Reda. *The instant message traced to the protocol number belonging, again, to the Monticello School System.*

January 11th of 2005, Detective Borowczyk and others went to the Monticello High School, and with the cooperation of school officials, served a search warrant for the computer and web camera. Detective Carlton recognized the defendant's office as the area from which the web cam transmission came. Computer and web camera were recovered from the defendant's office, and the defendant was taken into custody and advised of Miranda rights.

Subsequently at the Decatur Police Department, the defendant gave a statement to Detective Borowczyk and Senior Special Agent Michael Mitchell of the Department of Homeland Security. The defendant admitted that he had engaged in inappropriate sexual communications with 15-year-old 'Melissa' and acknowledged that he had driven to Decatur in his green pick-up truck to meet 'Melissa'. Agent Mitchell, then, an expert witness in computer forensics conducted a forensic examination of the computer that was seized from the school pursuant to the warrant and recovered the chat between the defendant and Detective Borowczyk as 'Melissa'.

* * *

THE COURT: The defendant is examined in open court. Finding by the Court the plea is knowingly, voluntarily, and intelligently made. Further finding there is a factual basis for the plea. Acceptance and judgment on the plea.

Mr. Albaugh, you do have a right to appeal from the sentence I have just imposed placing you on probation....

If you file a motion asking to withdraw your plea of guilty, the motion would be scheduled for a hearing. If it were allowed, the charge which was dismissed as a part of the agreement in this case could be reinstated and both of the charges against you could be rescheduled for trial.

Do you have any questions about those rights to appeal, Mr. Albaugh?

* * *

THE DEFENDANT: No, Your Honor” (emphasis added; *see* transcript attached as “Appendix 8” to petitioner’s December 6, 2007 response and supplement).

The Committee finds that staff accurately stated the law governing pension forfeiture in its initial motion for summary judgment: “In a case applying the TRS felony forfeiture statute to a teacher who committed sexual misconduct involving children, *Goff v. Teachers’ Retirement System of the State of Illinois*, 305 Ill. App. 3d 190 (1999), the TRS member argued that the required nexus did not exist between his crime and his service as a teacher.” Mr. Goff, a school principal, was convicted of sexually abusing two minors as a scoutmaster. He argued that his conviction was not connected to his service as a teacher, because he was not acting as school principal when the crimes occurred.

The court rejected Mr. Goff’s argument, at page 195:

Goff is attempting to elude the provisions of this statute by claiming that the felonies to which he pleaded guilty were not connected with, were not related to, and did not arise out of his "service" as a teacher.

*Goff would have this court believe that his pension can only be revoked if the felonies actually took place on school time or school grounds or during an extracurricular activity for which Goff was serving as a school chaperon. Such a construction is far too narrow. Courts often employ terms such as "incidental to" or "connected with" when defining the phrase "arising out of". Lynch Special Services v. Industrial Comm'n, 76 Ill. 2d 81, 86, 389 N.E.2d 1146, 27 Ill. Dec. 738 (1979). The statutory phrases "relating to", "arising out of", and "in connection with" are very broad terms. "An injury can be said to arise out of one's employment if its origin is in **some way** connected with the employment so that there is a casual connection between the employment and the *** injury". (Emphasis added.) Consolidated Rail Corp. v. Liberty Mutual Insurance Co., 92 Ill. App. 3d 1066, 1068-69, 416 N.E.2d 758, 48 Ill. Dec. 485 (1981). Applying these standards, we believe that the record amply supports the conclusion that the abuse in question was related to, arose out of, and was connected with Goff's service as a principal.*

More recently, in *Bauer v. State Employees' Retirement System of Illinois, et al.*, 852 N.E.2d 497 (1st Dist. 2006), the former Inspector General of the Illinois Secretary of State's Office claimed that his felony conviction for obstruction of justice did not relate to or arise out of or in connection with his service because he gave his former secretary instructions to destroy documents nine months after he left the position.

In rejecting Mr. Bauer's argument and in applying the State Employees' Retirement System's felony forfeiture statute which is similar to the TRS felony forfeiture statute, the court articulated:

For the reasons previously discussed, we find that there was a nexus between Bauer's obstructing justice by intending to persuade Carlson to dispose of the documents and his employment status as Inspector General. The nexus required by the Pension Code was present because Bauer's obstruction of justice was a product of his status as Inspector General. See Devony, 199 Ill. 2d at 423. Thus, the facts satisfy the "but for" test articulated by the majority in Devoney because but for the fact that Bauer had been Inspector General, he would not have been in a position to obstruct the federal investigation of the Secretary of State's office. See Devoney, 199 Ill. 2d at 423.

The TRS Claims Hearing Committee recently enforced the TRS felony forfeiture provision in the *Administrative Review of Philip Roffman*. Roffman argued, like Albaugh, that his felony conviction for theft did not relate to or arise out of or in connection with his teaching. Roffman claimed that he was acting as a private citizen, not as a teacher, when he used theater tickets purchased with school activity funds for his own personal use. Roffman's argument was rejected by this Committee, which concluded that Roffman had access to the school activity funds because he was a teacher.

Albaugh's claim that there was no connection between his crime and his service as a teacher is even more tenuous than Roffman's claim. Albaugh used the school computer to which he had access because of his teaching position. The connection is unmistakable.

The penalty of felony forfeiture for abusing the public trust is harsh indeed. However, the Claims Hearing Committee lacks discretion to consider the harsh result compelled by the statute. In *Wells v. Board of Trustees of the Illinois Municipal Retirement Fund, et al*, 361 Ill. App. 3d 716 (2005), a case which applied the nearly identical felony forfeiture statute of the Illinois Municipal Retirement Fund, the court stated at p. 721:

The operation of the statute as written by the legislature is automatic. A person convicted of a felony that either arises out of or is connected to his or her employment loses his or her pension benefits. Undeniably, the statute is harsh, leaving no room for the consideration of equitable matters or the granting of lenity.

The Claims Hearing Committee must apply the felony forfeiture statute as written. The Committee is bound to enforce the felony forfeiture law, and does not have discretion to consider the harsh result of losing one's pension. The statute clearly and unambiguously intends and compels this result.

With regard to Albaugh's arguments for reinstatement, the Committee finds the following:

- a) There is no statutory requirement for pre-termination hearing. Albaugh was provided the hearing process required by law as set forth in 80 Ill. Adm. Code 1650.620 et seq.

- b) Albaugh confuses the law on felony forfeiture. The felony forfeiture statute does not require that one of the elements of the crime must be employment as a teacher. Rather, the law requires pension forfeiture if the member is convicted of a crime connected with his teaching service. 40 ILCS 5/16-199 is clear in its requirements:

None of the benefits provided for in this Article shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his or her service as a teacher.

- c) A hearing before the Claims Hearing Committee is not an appellate proceeding, and a staff determination is not a hearing. Albaugh's claim is not supported by law, 80 Ill. Adm. Code 1650.620 et seq. Under Albaugh's interpretation of the law, the Board of Trustees and its Claims Hearing Committee would forfeit its administrative review function.
- d) The "Albaugh could have used any computer" argument asks the Committee to ignore reality. Albaugh used a school computer to commit his crime. He committed his crime on school property. To interpret §16-199 as Albaugh asks would totally negate its application. This the Committee cannot do.

Conclusion

The TRS staff was correct in terminating Albaugh's pension. The felony forfeiture statute compels this result.