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ATTORNEY GENERAL

State of Louisiana

DEPARTMENT OF JUSTICE

P.O. BOX 94005

BATON ROUGE

70804-9005

DEC 13 2013
OPINION 13-0188

109 - STATE-Employees & Departments
16-A CRIMINAL LAW PROCEDURE

La. R.S. 42:1414; La. C.Cr.P. art. 893; La. Const. art. X, §25.1; La. R.S. 42:1411.

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Louisiana Revised Statute 42:1414 requires the removal an employee of "the state, district, parish, ward, or municipality" upon a conviction of a felony during employment. Although La. C.Cr.P. art. 893 allows a judge to set aside a conviction under certain conditions in the future, a final conviction of a felony under La. C.Cr.P. art. 893 during public employment requires termination of employment.

Dear Mr. Waitz:

This office is in receipt of your request for an opinion of the Attorney General asking whether termination of employment is required by La. R.S. 42:1414 where the employee pled guilty to a felony pursuant to La. C.Cr.P. art. 893.

According to your request, in July of 2013 the Fire Chief of the Grand Caillou Fire Department ("Fire Chief") pled guilty to a felony pursuant to La. C.Cr.P. art. 893 and had his sentence deferred pending several conditions. Your request indicates that the Fire Chief's sentence was deferred pending a probationary period that will last until mid-2014, at which time the district court has the authority under article 893 to set aside his conviction.¹

In light of this scenario, you requested an opinion to answer the following questions. First, does the requirement to terminate public employment for conviction of a felony under La. R.S. 42:1414 apply to a plea entered into under the provisions of article 893? Second, assuming termination is required, when must employment be terminated?

Your first question is whether a felony plea under article 893 qualifies as a "conviction," as that term is used in La. R.S. 42:1414.

Louisiana Revised Statutes 42:1414 provides, in pertinent part:

¹ Louisiana Code of Criminal Procedure article 893(E)(2) ("Upon motion of the defendant, if the court finds at the conclusion of the probationary period that the probation of the defendant has been satisfactory, the court may set the conviction aside and dismiss the prosecution.")

The employee-employer relationship existing between a state, district, parish, ward, or municipal employee, whether classified or unclassified, and the state, district, parish, ward, or municipality, as applicable, shall be terminated and such employee shall be removed from his position of employment with the state, district, parish, ward, or municipality, as applicable, upon conviction, during his employment, of a felony as defined by the laws of this state or by the laws of the United States. Within ten days after a conviction is final and all appellate review of the original trial court proceedings is exhausted, the appointing authority of the employing agency shall terminate any state, district, parish, ward, or municipal employee who is convicted of a felony and is holding a position of employment with such agency. . .

In a previous opinion, our office concluded that a guilty plea entered into under La. C.Cr.P. art. 893 qualifies as a conviction, requiring termination pursuant to La. R.S. 42:1414:

La. C.Cr.P. art. 893 makes it clear that the probation [imposed] is based upon a "conviction." The judgment of conviction is being executed by the defendant by his being given a definitive period of probation of one to five years. Additionally, despite ultimate setting aside of the conviction with the effect of acquittal, La. C.Cr.P. art. 893 notes that the "conviction" may serve as a basis for charging an individual as a multiple offender.

Thus, it is the opinion of [the Louisiana Attorney General] that, La. R.S. 42:1414 mandates effectuation of the termination of the employee...

La. Att'y Gen. Op. No. 93-50.²

² Since the issuance of the 1993 Attorney General opinion referenced above, the Louisiana Supreme Court decided *AFSCME v. State ex rel. Dep't of Health & Hospitals*, which held La. R.S. 42:1414 unconstitutional as applied to "classified" state employees because the statute violated separation of powers. 2001-0422 (La. 06/29/01), 789 So.2d 1263, 1267-70. The doctrine of separation of powers is established in La. Const. art. II, §2 and provides: "Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others." (Emphasis added). One year after the *AFSCME* decision was rendered, the Louisiana State Constitution was amended to add La. Const. art. X, §25.1. That constitutional provision specifically provides for removal for both classified and unclassified employees. Therefore, it is unnecessary to determine whether the fire chief is a classified employee. See also La. Att'y Gen. Op. No. 11-0218 (La. R.S. 42:1414

According to La. C.C. art. 9, "When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." Louisiana Code of Criminal Procedure 893(A) states "After a first or second conviction" the court may suspend the imposition or execution of the sentence, under certain conditions. (Emphasis added). Therefore, in order to obtain the suspension of a sentence under article 893, there must first be a conviction. The article, La. C.Cr.P. art. 893(E)(2), states "the court may set the conviction aside" upon the satisfactory completion of the probationary period. In order to set aside a conviction, a conviction must exist in the first place or else there would be nothing to set aside. The clear and unambiguous words of La. C.Cr.P. art. 893 recognize that a conviction has occurred, and there is no language suggesting that the possibility of the setting aside of that conviction at some point in the future would negate the operation of La. R.S. 42:1414 at the time of the conviction. Louisiana Code of Criminal Procedure 893(E)(2) simply provides for the possibility that a conviction may be "set aside" and given "the same effect as acquittal..." (Emphasis added). It does not necessarily prevent all convictions obtained under article 893 from becoming final. The mere speculative possibility that a person's conviction may be set aside does not exempt that person from the requirement of removal under La. R.S. 42:1414. See La. Att'y Gen. Op. No. 11-0007 (a conviction *actually set aside* by La. C.Cr.P. art. 893 still qualifies as a conviction pursuant to La. R.S. 17:15, requiring the dismissal of a school teacher.).

Article X, §25.1 of the Louisiana State Constitution is relevant as well because it requires the state legislature to provide by general law for the removal of public employees upon conviction of a felony. That constitutional provision specifically defines the term "[c]onviction" as "a conviction that is final [where] all appellate review of the original trial court proceedings is exhausted." See also La. R.S. 42:1414 (requiring termination to occur within ten days after the conviction becomes final). Under both the constitutional and statutory provisions, a felony conviction must be "final" with respect to the possibility of direct appellate review. See La. C.Cr.P. arts. 912, 914, and 922.³ When an individual has pled guilty to a felony under La. C.Cr.P. art. 893, this decision is generally not subject to direct appellate review.⁴ The Fire Chief is employed by the "state, district, parish, ward,

"operates as a specific exception to any civil service protections that might otherwise be available to the employee.") (Citing La. Const. art. X, §25.1).

³ The finality of direct review is contemplated by La. R.S. 42:1414 as this would be "all appellate review of the original trial court proceedings..."

⁴ By pleading guilty the defendant waives his right to an appeal unless either a jurisdictional defect has occurred or the defendant specifically reserved an issue for review when the plea was taken. See *State v. Crosby*, 338 So.2d 584, 586-88 (La. 1976); See also *State v. Starks*, 2001-

or municipality” as contemplated by La. R.S. 42:1414, and it is the opinion of this office that the Fire Chief’s employment must be terminated consistent with this statute within ten days of the finality of his conviction.

Your second question asks when employment must be terminated for convictions obtained under La. C.Cr.P. art. 893. However, the Fire Chief referenced in your opinion request has resigned from his position, rendering the timing of his termination moot. Therefore it is not necessary for us to answer this question with respect to the Fire Chief. However, we note that under La. R.S. 42:1414, employment must be terminated within ten days of a conviction becoming final and under La. R.S. 42:1411(B), the public officer is immediately suspended without pay upon the conviction of a felony.

Your opinion request references La. R.S. 42:1414 as the applicable statute; however, we note the potential applicability of La. R.S. 42:1411(A) to this scenario, which provides, in part, that “[a] public officer shall be removed from office for conviction, during his term of office, of a felony.”⁵ Additionally, we note that La. R.S. 42:1411(B) provides for an automatic suspension upon conviction, without the necessity of the conviction first becoming final. Regardless of whether the appropriate statute is La. R.S. 42:1414 or La. R.S. 42:1411, the conclusion reached is the same: such conviction is cause for termination. Therefore, we simply note the potential applicability of this provision.

Finally, this opinion is limited to the factual scenario presented and does not address whether this former Fire Chief could return to public employment in the future. See *generally* La. Att’y Gen. Op. No. 11-0089; La. Att’y Gen. Op. No. 82-907.

In conclusion, La. R.S. 42:1414 requires removal of a public employee within ten days of that conviction becoming final, regardless of the fact that a felony conviction was obtained under La. C.Cr.P art. 893 and that such conviction may be set aside in the future. We trust that this adequately answer the questions that

1078 (La. 03/28/02), 812 So.2d 638 (A “guilty plea waive[s] all nonjurisdictional defects in proceedings leading to the plea...” (citations omitted).

⁵ Louisiana Revised Statute 42:1411 applies to a “public officer.” A “public officer” is a person holding a “public office,” meaning “any state, district, parish or municipal office, elective or appointive, or any position as member on a board or commission, elective or appointive, when the office or position is established by the constitution or laws of this state.” La. R.S. 42:1. Fire chiefs which are a part of “fire protection districts” constitute appointive positions established by law. La. R.S. 33:2541.2(A); See *also* La. R.S. 33:2531. The Grand Caillou Volunteer Fire Department appears to be a part of Terrebonne Parish Fire Protection District Number 4-A in Houma, Louisiana. However, our office does not have sufficient information to conclude whether such position qualifies as a “public office,” and thus do not make provide an opinion on such, as this does not change the result reached in this opinion.

you have posed. Should you have any further questions, or concerns, please do not hesitate to contact this office.

Very truly yours,

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

BY:

A handwritten signature in black ink, appearing to read "Colin Clark", written over a horizontal line.

COLIN CLARK
BERNADETTE TOMENY
ASSISTANT ATTORNEYS GENERAL