

STATE OF FLORIDA  
DEPARTMENT OF MANAGEMENT SERVICES

RICKY BRANDENBERGER,  
Petitioner,

Final Order No. DMS - 07-00235

vs.

DOAH Case No. 06-3659  
OGC Case No. 06-07106

STATE OF FLORIDA,  
DEPARTMENT OF MANAGEMENT SERVICES,  
DIVISION OF RETIREMENT,

Respondent.

FINAL ORDER

The above styled and numbered cause came before me for the purpose of issuing a final agency order.

APPEARANCES

For Petitioner:	Edward R. Gay, Esq. 1516 East Concord Street Orlando, Florida 32803-5459
For Respondent:	Geoffrey M. Christian, Esq. Assistant General Counsel Department of Management Services Office of the General Counsel 4050 Esplanade Way, Suite 160 Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

Whether Petitioner, by pleading guilty to a charge of possession with intent to distribute and distribution of Methylenedioxymethamphetamine (MDMA), commonly known as "ecstasy", and marihuana, in violation of 21 U.S.C. § 841(a)(1), committed a "specified offense" under Section 112.3173, Florida Statutes, such that he must forfeit his rights and benefits under the Florida Retirement System (FRS).

FILED  
07 MAY -4 AM 10:03  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

PRELIMINARY STATEMENT

On November 10, 2005, Respondent approved the forfeiture of Petitioner's rights and benefits under the FRS pursuant to Section 112.3173, Florida Statutes. The agency action was premised on Petitioner's entry of a plea in a federal court proceeding wherein he had been charged with possession with intent to distribute and distribution of MDMA and marihuana, in violation of 21 U.S.C. § 841(a) (1).

On November 10, 2005, Respondent notified Petitioner, by agency action letter, of the forfeiture of his rights and benefits under the FRS and afforded Petitioner with a point of entry to challenge its decision and to request an administrative review of the issues.

Petitioner timely filed his request for an administrative hearing. Thereafter, the matter was transferred to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing pursuant to Section 120.57(1), Florida Statutes. The matter was ultimately heard on November 15, 2006.

At the hearing, Petitioner testified on his own behalf. Petitioner's Exhibit 1 was received into evidence without objection. Respondent presented the testimony of Ira Gaines, a Benefits Administrator at its Bureau of Calculations. Respondent's Exhibits 1 through 4, and 6, were received into evidence without objection. Respondent requested and was granted official recognition of the matters addressed in its pleadings

filed October 2, 2006, November 1, 2006, and November 7, 2006. Respondent's motion to deem matters admitted, with the exception of Request Number 13, was granted. Respondent's motion to relinquish jurisdiction was denied.

The transcript of the proceeding was filed with the Division of Administrative Hearings on December 15, 2006. The parties requested and were granted an extension of time until January 12, 2007 to file proposed recommended orders. The parties' proposed recommended orders were timely filed and were duly considered by the Administrative Law Judge in preparing his Recommended Order.

The Administrative Law Judge submitted a Recommended Order and all exhibits offered into evidence to the Division. A copy of the Recommended Order is attached hereto and made a part hereof. In addition, Petitioner submitted a list of exceptions to the Recommended Order. Petitioner's exceptions have been duly considered in preparing this final agency order.

#### STANDARD OF REVIEW

Subsection 120.57(1)(1), Florida Statutes (2005), provides that an agency reviewing a Division of Administrative Hearings recommended order may reject or modify the findings of fact of an Administrative Law Judge if "the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." Florida law defines "competent substantial evidence" as

"such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1975). However, an agency may not create or add to findings of fact because it is not the trier of fact. See Friends of Children v. Department of Health and Rehabilitative Services, 504 So. 2d 1345, 1347, 1348 (Fla. 1<sup>st</sup> DCA 1987).

Subsection 120.57(1)(1), Florida Statutes (2005), provides that an agency may reject or modify an Administrative Law Judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction" whenever the agency's conclusions or interpretations are "as or more reasonable" than the conclusions or interpretations made by the Administrative Law Judge. Florida courts have consistently applied this subsection's "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the Administrative Law Judge's application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the Administrative Law Judge's interpretation of a statute or rule over which the Legislature has provided the agency administrative authority. See Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1141-42 (Fla. 2<sup>nd</sup> DCA 2001); Barfield v. Department of Health, 805 So. 2d 1008, 1011 (Fla. 1<sup>st</sup> DCA 2001). Further, an agency's interpretation of the statutes and rules that it administers is entitled to great weight, even if it is not the sole possible

interpretation, the most logical interpretation, or even the most desirable interpretation. See State Board of Optometry v. Florida Society of Ophthalmology, 538 So. 2d 878, 884 (Fla. 1<sup>st</sup> DCA 1998).

#### PETITIONER'S EXCEPTIONS

The Department hereby finds Petitioner's exceptions to the Recommended Order to be without merit.

##### Exception 1

1. Petitioner takes exception with the Finding of Fact in paragraph 11 of the Recommended Order which states "The Petitioner's attempt to assert that he received no compensation for the delivery of the illegal substances to inmates lacked credibility and is rejected."

2. As an initial matter, the plea agreement clearly outlines the factual basis for Petitioner's guilty plea and provides as follows:

Defendant is pleading guilty because defendant is in fact guilty. The defendant certifies that defendant does hereby admit that the facts set forth below are true, and were this case to go to trial, the United States would be able to prove these specific facts and others beyond a reasonable doubt:

#### FACTS

In October 2002, FBI task force officers received information from the Orange County Corrections Department alleging that inmates were involved in the sale of drugs such as heroin, cocaine, and marihuana in the Orange County correctional facility, and that corrections officers were bringing the drugs into the jail. Follow-up interviews with several inmates implicated defendant RICHARD

BRANDENBERGER in smuggling illegal drugs into the facility for delivery to inmates. One inmate indicated that defendant was also smuggling ecstasy (MDMA) into the jail to inmates. The inmates would have someone outside the jail supply the drugs to defendant, who would bring the drugs into the jail for a fee. The inmates used their inmate accounts at the jail to fund these deals.

An inmate who was cooperating with investigators set up a meeting between an undercover officer and BRANDENBERGER outside the jail so the undercover officer could provide MDMA and marihuana to defendant for delivery to the inmate in the jail. On July 2, 2003, the undercover officer called defendant and arranged to meet him in a parking lot in Orlando, Florida, to accomplish the drug transaction. During this meeting, which was videotaped, the undercover officer gave fifty MDMA pills and one ounce of marihuana to defendant. The drugs were clearly visible to defendant, and the officer told defendant that the bags contained marihuana and ecstasy. The officer told defendant to deliver the marihuana and pills to the inmate, to which defendant replied, "I got to take care of my boys."

In a later interview, BRANDENBERGER admitted his involvement in this offense.

(Emphasis supplied). See Respondent's Exhibit 3. Petitioner admitted that the facts stated in the plea agreement were true and could be proven beyond a reasonable doubt. The plea agreement, which Petitioner signed voluntarily, shows that Petitioner received compensation for the delivery of the illegal substances to inmates.

3. Secondly, while Petitioner testified that he received no payment for smuggling drugs into the jail, he did acknowledge that he received \$50 from an inmate's girlfriend on one occasion

to purchase gas. When directly asked by the Administrative Law Judge the reason for which the girlfriend would have given him the money, Petitioner responded:

I guess because I'm delivering the pills - excuse me, not the pills, the weed, to her boyfriend.

See page 44 of the Hearing Transcript, lines 1-3.

4. Finally, Petitioner is reminded that it is the Administrative Law Judge's function to consider all of the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence. If, as is often the case, the evidence presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide the issue one way or the other. The Division may not reject or modify the Administrative Law Judge's finding unless there is no competent substantial evidence from which the finding could reasonably be inferred. See Heifetz v. Department of Business Regulation, 475 So.2d 1277 (Fla. 1985).

5. For these reasons, I find the Finding of Fact in paragraph 11 of the Recommended Order to be supported by competent substantial evidence. Therefore, Petitioner's first exception to the Recommended Order is denied.

#### Exception 2

6. Petitioner's second exception to the Recommended Order merely restates his first exception arguments. Accordingly,

Petitioner's second exception to the Recommended Order is denied for the reasons stated in Paragraphs 1-5 above. See Heifetz.

Exception 3

7. Petitioner takes exception with the Conclusions of Law in paragraphs 20-22 of the Recommended Order. Contrary to arguments advanced by Petitioner, Respondent is not authorized or required to include Petitioner in its preliminary decision-making process regarding whether to implement forfeiture proceedings. Respondent's November 10, 2005 letter to Petitioner provided notice of Respondent's intended action and accorded with requirements of Chapter 120, Florida Statutes. Finally, contrary to arguments advanced by Petitioner, Section 121.091(5)(j), Florida Statutes, requires Respondent to stop paying FRS benefits to a retiree pending resolution of criminal charges against such retiree if the resolution of such charges could require the forfeiture of such benefits. Accordingly, Petitioner's third exception to the Recommended Order is denied.

FINDINGS OF FACT

The Division hereby adopts and incorporates by reference the Findings of Fact set forth in the Recommended Order.

CONCLUSIONS OF LAW

The Division hereby adopts and incorporates by reference the Conclusions of Law set forth in the Recommended Order.


Based upon the foregoing it is,

ORDERED and DIRECTED that Petitioner, by pleading guilty to a charge of possession with intent to distribute and distribution



of Methylenedioxyamphetamine (MDMA), commonly known as "ecstasy", and marihuana, in violation of 21 U.S.C. § 841(a)(1), committed a "specified offense" under Section 112.3173, Florida Statutes, such that he must forfeit his rights and benefits under the Florida Retirement System.

DONE and ORDERED on this 1 day of May, 2007.

  
LINDA H. SOUTH, Secretary  
Department of Management Services  
4050 Esplanade Way, Suite 285  
Tallahassee, Florida 32399

Copies to:

Judge William F. Quattlebaum  
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NOTICE OF RIGHT TO APPEAL

UNLESS EXPRESSLY WAIVED BY A PARTY SUCH AS IN A STIPULATION OR IN OTHER SIMILAR FORMS OF SETTLEMENT, ANY PARTY SUBSTANTIALLY AFFECTED BY THIS FINAL ORDER MAY SEEK JUDICIAL REVIEW BY FILING AN ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF MANAGEMENT SERVICES, AND A COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE CLERK OF THE APPROPRIATE DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER, IN ACCORDANCE WITH RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, AND SECTION 120.68, FLORIDA STATUTES.

Certificate of Clerk:

Filed in the Office of the Agency Clerk of the Department of Management Services on this SECOND day of MAY, 2007.

  
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Agency Clerk