

STATE OF FLORIDA  
DEPARTMENT OF MANAGEMENT SERVICES

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DIVISION OF  
ADMINISTRATIVE  
SERVICES

BARBARA F. BOONE,  
Petitioner,

Final Order No. DMS - 07-0124

vs.

Case No. 07-0890

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

Respondent.

FINAL ORDER

This cause came before the undersigned for the purpose of issuing a final agency order.

APPEARANCES

For Petitioner: Henry M. Coxe III, Esq.  
Bedell, Dittmar, DeVault, Pillins &  
Coxe, P.A.  
101 East Adams Street  
Jacksonville, Florida 32202

For Respondent: Geoffrey M. Christian, Esq.  
Assistant General Counsel  
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STATEMENT OF THE ISSUE

Whether Petitioner, by pleading no contest to four counts of petit theft, in violation of Section 812.014(2)(e), Florida Statutes, must forfeit her rights and benefits under the Florida Retirement System (FRS), pursuant to Section 112.3173, Florida Statutes.

PRELIMINARY STATEMENT

By notice dated August 21, 2006, Respondent advised Petitioner of its decision to forfeit her FRS rights and benefits pursuant to Section 112.3173, Florida Statutes. The proposed agency action was premised on Petitioner's plea in a state court proceeding wherein she had been charged with certain criminal offenses. The notice afforded Petitioner a point of entry to challenge Respondent's action and to request an administrative review of the issues. Petitioner timely filed a request for an administrative hearing.

The matter was transferred to the Department of Management Services for the assignment of hearing officer to conduct an informal hearing pursuant to Section 120.57(2), Florida Statutes. The matter was ultimately heard on February 19, 2007. Petitioner testified on her own behalf and submitted three exhibits for admission into evidence. Respondent presented the testimony of one witness and submitted seven exhibits for admission into evidence. The hearing officer found that certain material facts remained in dispute between the parties and ordered the matter 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.

In lieu of a formal hearing, the parties agreed to submit nine joint exhibits, a joint stipulation of facts, and proposed recommended orders, all of which were timely filed. The administrative law judge submitted a recommended order and all

exhibits offered into evidence to the State of Florida, Department of Management Services ("Department"). A copy of the recommended order is attached hereto and made a part hereof.

#### STANDARD OF REVIEW

Section 120.57(1)(1), Florida Statutes (2007), provides that an agency reviewing a recommended order may reject or modify an administrative law judge's findings of fact 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 Servs., 504 So.2d 1345, 1347, 1348 (Fla. 1<sup>st</sup> DCA 1987).

Section 120.57(1)(1), Florida Statutes (2007), provides that an agency reviewing a recommended order 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 Bd. of Optometry v. Florida Society of Ophthalmology, 538 So.2d 878, 884 (Fla. 1<sup>st</sup> DCA 1998).

#### FINDINGS OF FACT

The Department hereby adopts and incorporates by reference the findings of fact set forth in the recommended order with the exception of the following:

1. The Department rejects finding of fact 13 to the extent it is not based on competent substantial evidence. The record reveals that at no point during the plea dialogue with the Circuit Court Judge did Petitioner state that she was innocent of all charges. Instead, the record shows that Petitioner merely affirmed to the Court that she was entering the plea because she

believed it to be in her best interest and that such plea was freely, willingly and voluntarily entered. (Joint Exhibit 4, Circuit Court Hearing Transcript, pages 5-13).

2. The Department rejects finding of fact 14 to the extent it relies on an incorrect statement of law. Contrary to finding of fact 14, a Circuit Court judge is not required to inquire and determine if there is a factual basis for the charges. Rule 3.170(k), Florida Rules of Criminal Procedure, provides, in relevant part, that "[n]o plea of ... nolo contendere shall be accepted by a court without the court first determining ... that there is a factual basis for the plea ...." [Emphasis added]. Likewise, Rule 3.172(a), Florida Rules of Criminal Procedure, provides, in relevant part, that "[b]efore accepting a plea of ... nolo contendere, the trial judge shall determine that ... a factual basis for the plea exists." [Emphasis added]. The record shows that the Court properly inquired as to whether there were sufficient factual bases to support Petitioner's pleas and concluded that there were. (Joint Exhibit 4, Circuit Court Hearing Transcript, pages 9-13).

3. The Department rejects finding of fact 17 to the extent it misstates the competent substantial evidence. The record shows that the State, in accordance with the terms of the plea agreement, entered a code 30 nolle prosequi as to counts 4 through 22 of the third amended information. (Joint Exhibit 2, Plea of No Contest and Negotiated Sentence, page 1; Joint Exhibit

3, Judgment, page 1; Joint Exhibit 4, Circuit Court Hearing Transcript, page 13).

4. The Department rejects finding of fact 21 to the extent it is not supported by competent substantial evidence. The record shows that Petitioner's plea was made, not for health reasons, but due to certain civil proceedings that arose from the same matter:

THE COURT: And you're entering a plea of no contest because there are civil proceedings that spring from this matter?

MR. COXE: There are, Your Honor. Rule 3.172(d)(2) of the Rules of Criminal Procedure allows for a guilty plea while also maintaining your innocence as a matter of convenience because, as the Court points out, there is civil litigation. We're entering a plea of no contest while maintaining this innocence. The Court is correct.

[Emphasis added]. (Joint Exhibit 4, Circuit Court Hearing Transcript, pages 4-5). Furthermore, at no point during the plea dialogue was Petitioner's health cited as a reason for her plea. The only time Petitioner's health was mentioned was in response to the Court's questions regarding whether she was under the influence of medication:

THE COURT: Are you currently under the influence of either drugs, alcohol or medication?

THE DEFENDANT: Just medication for my cancer, but other than that, no, sir.

THE COURT: And what medication do you take for that?

THE DEFENDANT: Femara.

THE COURT: And that's been prescribed to you by a medical doctor?

THE DEFENDANT: My oncologist, yes, sir.

THE COURT: And do you take it on a daily basis?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Have you taken it this morning pursuant to your normal schedule?

THE DEFENDANT: No, sir, I didn't.

THE COURT: Now, are you supposed to take it this morning?

THE DEFENDANT: I just take it before 12 noon.

THE COURT: Now, does that medication or lack thereof affect your ability to understand or communicate with your lawyer, Mr. Coxe?

THE DEFENDANT: No, sir.

THE COURT: Does it affect your capacity to understand what was on the plea of no contest and negotiated sentence form that you read and signed?

THE DEFENDANT: No, sir.

THE COURT: And has it affected your capability to understand what we are doing in court this morning?

THE DEFENDANT: No, sir.

(Joint Exhibit 4, Circuit Court Hearing Transcript, pages 8-9).

5. The Department rejects finding of fact 23 to the extent it is not supported by competent substantial evidence. The record shows Respondent presented evidence which refuted Petitioner's sworn informal hearing testimony. As discussed in paragraph 4. above, Petitioner's sworn Circuit Court hearing

testimony clearly conflicts with her sworn informal hearing testimony. (Joint Exhibit 4, Circuit Court Hearing Transcript, pages 4-5). Such evidence clearly refutes Petitioner's testimony.

6. The Department also rejects finding of fact 23 to the extent that it relies on an incorrect statement of law. Respondent was not burdened with presenting evidence of Petitioner's "guilt". Respondent's only burden was to prove by a preponderance of the evidence that Petitioner, a public employee, pled no contest to the commission, prior to retirement, of a specified offense under Section 112.3173, Florida Statutes. The competent substantial evidence shows Respondent met its burden.

#### CONCLUSIONS OF LAW

The Division hereby adopts and incorporates by reference the conclusions of law set forth in the recommended order with the exception of conclusions 26 through 42, which are hereby rejected as incorrect. Contrary to the conclusions offered by the Administrative Law Judge, Section 112.3173 is neither disciplinary in nature nor does it convert a no contest plea into a criminal conviction. Therefore, based on the record evidence, the following conclusions of law are substituted and adopted:

26. Sections 112.311(5) and (6), Florida Statutes (2001), provide, in relevant part:

(5) It is hereby declared to be the policy of the state that no officer or employee of a state agency or of a county, city, or other political subdivision of the state, and no member of the Legislature or legislative



employee, shall have any interest, financial or otherwise, direct or indirect; engage in any business transaction or professional activity ... which is in substantial conflict with the proper discharge of his or her duties in the public interest. To implement this policy and strengthen the faith and confidence of the people of the state in their government, there is enacted a code of ethics setting forth standards of conduct required of state, county, and city officers and employees, and of officers and employees of other political subdivisions of the state, in the performance of their official duties. It is the intent of the Legislature that this code shall serve not only as a guide for the official conduct of public servants in this state, but also as a basis for discipline of those who violate the provisions of this part.

(6) It is declared to be the policy of the state that public officers and employees, state and local, are agents of the people and hold their positions for the benefit of the public. They are bound to uphold the Constitution of the United States and the State Constitution and to perform efficiently and faithfully their duties under the laws of the federal, state, and local governments. Such officers and employees are bound to observe, in their official acts, the highest standards of ethics consistent with this code and the advisory opinions rendered with respect hereto regardless of personal considerations, recognizing that promoting the public interest and maintaining the respect of the people in their government must be of foremost concern.

27. Section 112.312(3), Florida Statutes (2001), provides, in relevant part:

"Breach of the public trust" means a violation of a provision of the State Constitution or this part which establishes a standard of ethical conduct ... or a prohibition applicable to public officers or employees in order to avoid conflicts between public duties and private interests,

including, without limitation, a violation of s. 8, Art. II of the State Constitution or of this part.

28. Section 112.3173, Florida Statutes (2001), provides, 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.

(2) DEFINITIONS.--As used in this section, unless the context otherwise requires, the term:

(a) "Conviction" and "convicted" mean ... a plea of guilty or of nolo contendere; ...

(b) "Court" means any state or federal court of competent jurisdiction which is exercising its jurisdiction to consider a proceeding involving the alleged commission of a specified offense.

(c) "Public officer or employee" means an officer or employee of any public body, political subdivision, or public instrumentality within the state.

(d) "Public retirement system" means any retirement system or plan to which the provisions of part VII of this chapter apply.

(e) "Specified offense" means:

\* \* \*

2. The committing, aiding, or abetting of any theft by a public officer or employee from his or her employer;

\* \* \*

(3) FORFEITURE.--Any public officer or employee who is convicted of a specified offense committed prior to retirement ... 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.

\* \* \*

(6) FORFEITURE NONEXCLUSIVE.-

(a) The forfeiture of retirement rights and privileges pursuant to this section is supplemental to any other forfeiture requirements provided by law.

\* \* \*

29. Section 121.011(3)(d), Florida Statutes (2001), provides, in relevant part:

As of July 1, 1974, the rights of members of the retirement system established by this chapter are declared to be of a contractual nature, entered into between the member and the state, and such rights shall be legally enforceable as valid contract rights ...

30. As heretofore noted in the findings of fact, Petitioner is a former public officer or employee, is a member of the FRS, and pled no contest to four counts of petit theft, in violation of Sections 812.014(2)(e), Florida Statutes (2001). Further, Petitioner was ordered to pay \$8,260 in restitution to the Town of Callahan. The crimes to which Petitioner pled no contest were committed prior to retirement and constitute specified offenses under Section 112.3173(2)(e)2., Florida Statutes (2001). Respondent has met its burden in this case.

31. Petitioner contends that, because she steadfastly maintained her innocence of the crimes to which she pled no contest, her FRS rights and benefits should not be subject to forfeiture and, further, that she should be allowed to present

reasons and circumstances in mitigation of her plea. In support, Petitioner cites a series of holdings in disciplinary actions brought by professional regulatory agencies, to wit: The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla.1984) (concerning a lawyer who, in addition to other offenses for which he could be disbarred, pled nolo contendere to two misdemeanors for which adjudication was withheld); Molinari v. Department of Bus. & Prof'l Regulation, 688 So.2d 388 (Fla. 4<sup>th</sup> DCA 1997) (construing 489.129(1)(b), Florida Statutes, in a construction contractor disciplinary proceeding); Clark v. School Bd. of Lake County, 596 So.2d 735 (Fla. 5<sup>th</sup> DCA 1992) (construing Section 231.36(4)(c), Florida Statutes, with regard to a teacher's contract); Son v. Florida Department of Prof'l Regulation, Div. of Real Estate, 608 So.2d 75 (Fla. 3<sup>rd</sup> DCA 1992) (construing Section 475.25(1)(f), Florida Statutes, in a broker disciplinary proceeding); Kinney v. Department of State, Div. of Licensing, 501 So.2d 129 (Fla. 5<sup>th</sup> DCA 1987) (construing Section 493.319(1)(j), Florida Statutes, which sets forth grounds for disciplinary action against a private investigator); and Ayala v. Department of Prof'l Regulation, 478 So.2d 1116 (Fla. 1<sup>st</sup> DCA 1985) (construing Section 458.331(a)(c), Florida Statutes, which sets forth grounds for disciplinary action against members of the medical profession).

32. Petitioner's reliance on these cases is misplaced. These cases construe statutes providing for the regulation of professions and occupations, specifically those providing for the

discipline of professionals, typically through revocation or suspension of their licenses, by their regulating agencies. However, the statutory forfeiture provision is not a punishment for Petitioner's crime. The statutory forfeiture provision is part of a pension contract between the employee and the state, and to the extent that an employee's rights vest, they vest subject to that provision. Accordingly, an action to enforce the statutory forfeiture provision against an employee is not disciplinary in nature, nor a punishment, but a straightforward question of contract law. Section 121.011(3)(d), Florida Statutes (2001); Busbee v. State, Div. of Retirement, 685 So.2d 914, 918 (Fla. 1<sup>st</sup> DCA 1996).

33. Section 112.3173, Florida Statutes, as worded, does not permit the consideration of factors that might mitigate the forfeiture. The statute predicates forfeiture simply upon a plea of no contest to an operative offense. Accordingly, under the statute, the fact that Petitioner maintained her innocence, while pleading no contest to an operative offense, is of no import. Cf. Robert T. Lacey v. Department of Management Servs., Div. of Retirement, DOAH Case No. 93-3968 (Final Order dated May 3, 1994). Furthermore, the maintenance of one's innocence is an integral component in making such a plea. See Rule 3.172(e), Florida Rules of Criminal Procedure, which provides, in relevant part, that "[b]efore the trial judge accepts a ... nolo contendere plea, the judge must determine that the defendant ...

acknowledges that he or she feels the plea to be in his or her best interest, while maintaining his or her innocence."

34. The words of the statutory forfeiture provision are unambiguous. All of the statutory elements are present in this case. Since it is presumed that the Legislature knows the meaning of the words it uses and to convey its intent by the use of specific terms, the undersigned must apply the plain meaning of those words if they are unambiguous. See M.W. v. Davis, 756 So.2d 90 (Fla.2000) (when statute's language is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation and construction as statute must be given its plain and obvious meaning); McLaughlin v. State, 721 So.2d 1170 (Fla.1998); Holly v. Auld, 450 So.2d 217 (Fla.1984); Osborne v. Simpson, 114 So. 543 (Fla.1927) (where statute's language is plain, without ambiguity, it fixes legislative intention and interpretation and construction are not needed).


35. Petitioner, by pleading no contest to four counts of petit theft, was convicted of the commission of a specified offense under Section 112.3173, Florida Statutes, such that she must forfeit her FRS rights and benefits. Respondent is without statutory authority to permit otherwise. See City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So.2d 493, 495-96 (Fla.1973) ("All administrative bodies created by the Legislature are not constitutional bodies, but, rather, simply mere creatures of statute. This, of course, includes the Public Service

Commission ... As such, the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State ... Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof ... and the further exercise of the power should be arrested."); Sun Coast Int'l, Inc. v. Department of Bus. Regulation, 596 So.2d 1118, 1121 (Fla. 1<sup>st</sup> DCA 1991) ("[A] legislative direction as to how a thing shall be done is, in effect, a prohibition against its being done in any other way."); Schiffman v. Department of Prof'l Regulation, Bd. of Pharmacy, 581 So.2d 1375, 1379 (Fla. 1<sup>st</sup> DCA 1991) ("An administrative agency has only the authority that the legislature has conferred it by statute."). Therefore, Respondent is required to act.

Based upon the foregoing it is,

ORDERED and DIRECTED that, pursuant to Section 112.3173, Florida Statutes, Petitioner must forfeit her rights and benefits under the Florida Retirement System, as a result of her plea of no contest to four counts of petit theft, in violation of Section 812.014(2)(e), Florida Statutes.

DONE and ORDERED on this 19 day of Oct, 2007.

  
LINDA H. SOUTH, Secretary  
Department of Management Services  
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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 22 day of October, 2007.

  
Agency Clerk