STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RUSSELL S. LAWLER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-2192
	)	
DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT,	)	
	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This cause came on for formal proceeding and hearing, as noticed, in Jacksonville, Florida, on August 22, 2007, before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings. The appearances were as follows:

APPEARANCES

For Petitioner: Geoffrey M. Christian, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950

For Respondent: Thomas A. Delegal, III, Esquire
Delegal Law Offices, P.A.
424 East Monroe Street
Jacksonville, Florida 32202

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioner's rights and benefits under the Florida Retirement System (FRS), should be forfeited for the reasons alleged in the Notice of Forfeiture of Retirement Benefits dated March 12, 2007.

PRELIMINARY STATEMENT

This cause has its origin in a Notice of Forfeiture of Retirement Benefits issued on March 12, 2007, by the Respondent, Department of Management Services, Division of Retirement (Division). In that Notice the above-named Petitioner was advised that the Respondent had decided to forfeited his rights and benefits under the FRS pursuant to the provisions of Section 112.3173, Florida Statutes (2003).[1/] The Agency action at issue was based upon the Respondent learning that the Petitioner may have been convicted in a state court proceeding of a certain third degree felony. On April 1, 2007, the Petitioner filed a timely request for administrative hearing to contest the proposed agency action. The initial Petition filed by the Petitioner was dismissed without prejudice to re-filing an Amended Petition concerning certain insufficiencies in the Petition. Petitioner thereupon filed an Amended Petition on April 26, 2007, and the matter was transferred to the Division of Administrative Hearings for formal proceeding. The case was duly assigned to the undersigned Administrative Law Judge for formal proceeding and conducting of a formal hearing pursuant to Section 120.57(1), Florida Statutes.

The cause came on for hearing as noticed. The Petitioner called no witnesses, but offered Petitioner's Exhibits one through five which were received in evidence. The Respondent, with the burden of proof, presented the testimony of one witness and offered seven exhibits for admission into evidence.

Respondent's Exhibits one and two, the Arrest and Booking Report, and the Criminal Information by the state attorney for the (Fourth Circuit), Duval County, were not admitted on grounds of being irrelevant and hearsay, and not coming within any recognized hearsay exception raised by the Respondent's counsel. Respondent's exhibits one and two are irrelevant since they refer to an arrest made by a law enforcement officer and charges filed by the state attorney. They are not evidence of any conviction of a crime for purposes of the issue of forfeiture of benefits as contemplated by Section 112.3173, Florida Statutes. Concerning the hearsay character of the two exhibits, it was determined that they were obtained and maintained in contemplation of litigation and no sufficient foundation was offered to show that they complied with the business records exception to the hearsay rule, which had been asserted by Respondent's counsel in response to objection. Thus, they are hearsay. Ruling on that issue was reserved until it could be determined if competent, non-hearsay testimony or evidence was adduced whereby the two exhibits could be considered corroborative hearsay, as contemplated by Section 120.57(1)(c), Florida Statutes. Since the only evidence of which they could be corroborative or explanatory is Respondent's Exhibit seven, the deposition of Deputy Sheriff Lavalley, and since, for reasons delineated below, that deposition cannot be admitted

into evidence, Respondent's Exhibits one and two are not admitted for any purpose offered. Because they are irrelevant the question of the quality of their hearsay character is immaterial in any event.

The previously reserved ruling on Respondent's exhibits one and two is now entered and, after consideration of post-hearing written arguments, they are excluded from evidence. The Respondent's exhibits one and two are not admissible for the further reason that they did not come within the ambit of the public records or government record exception to the hearsay rule contained at Section 90.803.(8), Florida Statutes. Initially it is pointed out that this statutory section specifically excludes, in criminal cases, matters observed by police officers and other law enforcement personnel and that police reports in such proceedings are not admissible against a defendant. The limitation is based on the belief, according to Professor Charles Earhardt in Florida Evidence that observations by officers at the scene of a crime or when a defendant is arrested are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant. See United States v. Puente, 826 F.2d 1415, 1418 (5th Cir. 1987). Although these two exhibits are not offered under the public records exception herein in a criminal proceeding, but rather an

administrative one, the inherent flaw in reliability potentially present in the reports of law enforcement officers which prevents them under the above statutory section from being admitted as a public record exception to the hearsay rule would have the same unreliable quality attached in this proceeding, as in a criminal proceeding. Moreover, however, under the Florida Evidence Code at Section 90.803(8), Florida Statutes, records of a public body that rely upon information supplied from outside sources or records which contain evaluations or statements of opinion by a public official are inadmissible hearsay under the Florida Evidence Code. See Lee v. Department of Health and Rehabilitative Services, 698 So. 2d 1194, 1201 (Fla. 1997), wherein it was held that a written report of an HRS employee who investigated an incident was inadmissible under the above section of the evidence code as being a record supplied by outside sources, or which contained evaluations or statements of opinion by a public official and which are inadmissible under the public records exception under Section 90.803(8), Florida Statutes. The court said in that case: ". . . in Florida, rather than offering this type of record, a witness must be called who has personal knowledge of the facts." Here the arrest report, as well as the state attorney's information, in addition to being irrelevant because they don't provide probative evidence that the Petitioner herein sustained a

conviction of a felony enumerated in the operative statute involved in this proceeding, clearly contain evaluations or opinions of a public official. Therefore, under the referenced authority, they cannot be admitted into evidence under the public records exception to the hearsay rule either.

Respondent's Exhibit three is a plea of guilty and negotiated sentence. An objection to that exhibit was made on the basis of hearsay and authenticity. The parties given an opportunity to brief the question of its admissibility in terms of the hearsay issue. Concerning the objection to authentication, the document was determined to be permissibly authenticated because, although not certified, as would normally be required, the circumstances depicted on the face of the document, and surrounding its obtaining and sponsorship by the Respondent's counsel, show circumstantial authenticity such that it was deemed authentic pursuant to Section 90.901, Florida Statutes. Further, under the germane case law, a plea of guilty in a prior criminal proceeding is admissible in a subsequent proceeding as an admission by a party opponent. See Boshnack v. Worldwide Rent-A-Car, Inc., 195 So. 2d 216, 218-19 (Fla. 1967) and Stevens v. Duke, 42 So. 2d 361, 363 (Fla. 1949). The court in Stevens went on to say, however, that such a plea of guilty is not conclusive, but may be explained by the party against whom it is offered in the subsequent proceeding and that the

basis of admissibility is that it is a declaration against interest, rather than the conviction serving as independent objective evidence. So, on this basis, Respondent's exhibit three, the plea of guilty, although not certified, is admitted on the basis of being a party admission for purposes of Section 90.803.(18)(a), Florida Statutes.

Respondent's Exhibit four is the Judgment of Conviction. The Judgment is a certified copy and meets the test for authentication. The Respondent contends that the Judgment of Conviction is a public record and is admissible under that exception to the hearsay rule. However, it has been determined in Napoli v. State, 596 So. 2d 782, 786 (Fla. 1st DCA 1992) that a Judgment of Conviction is not a public record for purposes of Section 90.803(8), Florida Statutes. The Florida Evidence Code does not contain an exception to the hearsay rule for judgments of prior convictions. Under Florida law a conviction is not admissible in subsequent litigation to prove the truth of some essential element in the conviction. See also Boshnick v. Worldwide Rent-A-Car, supra. "The law is well established that a Judgment of Conviction of a criminal offense, whether based on a plea of guilty or nolo contendere, is not admissible in a subsequent civil proceeding as proof of the facts on which it is based." See also Nunez v. Gonzalez, 456 So. 2d 1336, 1338 (Fla. 2nd DCA 1984). ("It is well settled that a Judgment of

Conviction cannot be introduced into evidence in a civil action to establish the truth of the facts upon which it was rendered").

Respondent's Exhibit five is the Judgment and Restitution Order. It is not certified and could be determined to not be properly authenticated. The undersigned determined at the hearing, however, that the circumstances of its proffer and possession by the Respondent, together with the circumstances depicted on the face of the judgment, showed sufficient circumstantial indicia of authentication to allow it to be circumstantially authenticated pursuant to Section 90.901, Florida Statutes.

The problem remains, however, that the Judgment and Restitution Order is hearsay. It does not come within the public record exception to the hearsay rule, and thus, in view of the authority cited above with regard to Respondent's exhibit four, as well as Charles Ehrhardt: Florida Evidence 2005 edition, Section 803.22(a), it is determined that therefore, Respondent's exhibits four and five, (after reviewing the arguments of the parties submitted in writing, post-hearing), are not admissible into evidence for proof of the truth of the facts upon which they were rendered. Respondent's Exhibit six was admitted.

Petitioner's Exhibit seven is the deposition of Duval

County Sheriff's Deputy Lavalley. It has been offered into evidence as "former testimony" for purposes of Section 90.803(22) and 90.804(2), Florida Statutes. After consideration of arguments of the parties submitted, it is determined that the deposition is not admitted into evidence. This is based on the fact that there was no showing that the deputy was an unavailable witness, and on authority of Grabau v. Department of Health, 816 So. 2d 701, 709 (Fla. 1st DCA 2002). That decision held that Section 90.803.(22), Florida Statutes, is unconstitutional based upon a violation of the Separation of Powers Doctrine, as an infringement on the Florida Supreme Court's authority to establish rules of procedure for courts. This is treated in more detail in the Conclusions of Law infra.

Upon conclusion of the hearing the parties elected to have the record of the hearing transcribed and to submit proposed recommended orders, upon an extended schedule, including the opportunity to brief and argue the evidentiary issues concerning the exhibits referenced. The Proposed Recommended Orders have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Division of Retirement (Division) is an Agency of the State of Florida charged with the responsibility of managing, governing and administering the Florida Retirement System (FRS) on behalf of the Department of Management Services.

2. The FRS is a public retirement system as defined in Florida law. It provides benefits to local and state employees, including teachers, state legislators, local public officials, and public employees employed by local or state agencies which are members of the FRS.

3. The Petitioner, Russell S. Lawler, was employed as a state employee by the Department of Health from August 1983 until he resigned his position in January 2004. Because he was employed by the Department of Health, the Petitioner became a participant in the FRS public retirement system as of August 1983. His benefits in the FRS became vested after 10 years, or in August 1993.

4. On March 12, 2007, the Respondent Agency sent the Petitioner a Notice of Action to Forfeit Retirement benefits, in evidence as Respondent's exhibit six. The Division thus advised the Petitioner that it was proceeding under Section 112.3173(3), Florida Statutes, which provides that a public employee who is convicted of specified offenses committed prior to retirement, or who is terminated by reason of admitted commission, aid, or abetment of a specified offense, will forfeit all rights and benefits under the FRS. The Notice went on to list the six specified offenses in Section 112.3173(2)(e), Florida Statutes, which provide for the forfeiture of retirement benefits. The specified offenses include the committing, aiding, or abetting of embezzlement of public funds; of theft by a public officer or employee from his or her employer; bribery in connection with public employment; any felony specified in Chapter 838, except

Sections 838.15 and 838.16, Florida Statutes; the committing of an impeachable offense, or

> The committing of any felony by a public officer or employee who, willfully and with intent to defraud the public or the public agency for which the public officer or employee acts or in which he or she is employed of the right to receive the faithful performance of his or her duty as a public officer or employee, realizes or obtains, or attempt to realize or obtain, a profit, gain, or advantage for himself or herself or for some other person through the use or attempted use of the power, rights, privileges, duties, or position of his or her public office or employment position.

Ultimately, through the testimony of the Respondent's sole witness, Mr. Gaines and through Respondent's concession in its Proposed Recommended Order, the Division elected to proceed against the Petitioner solely under Section 112.3173(2)(e)6., Florida Statutes, the above-quoted statutory provision, which is the so-called "catch all" provision.

5. After receiving this Notice from the Division the Petitioner submitted a timely Petition challenging the forfeiture of his retirement benefits on April 2, 2007. On April 26, 2007, the Petitioner submitted an Amended Petition to the Division, which was ultimately referred to the Division of Administrative Hearings and the undersigned Administrative Law Judge, who conducted the hearing on the above date.

6. The Respondent Division, in essence, maintains that the Petitioner, who was employed as a pharmacist by the Department of Health, stole certain controlled substances or drugs from the Department of Health pharmacy where he was employed, and was

convicted of illegal possession of controlled substances. It contends that such conduct constitutes violation of paragraph six of the above-quoted statutory provision, is the commission of a felony violative of that provision, and that forfeiture of his retirement benefits is appropriate.

7. At the hearing the Respondent sought to introduce the following documents into evidence: the arrest and booking report dated December 31, 2003, (Respondent's Exhibit one); the state attorney's information dated January 16, 2004, as Respondent's Exhibit two; the plea of guilty entered by the Petitioner in that underlying criminal case, and the negotiated sentence, which is one document, dated March 14, 2004, as Respondent's Exhibit three; the Judgment of Conviction dated March 15, 2004, as Exhibit four and the related Judgment and Restitution Order of April 5, 2004, as Respondent's exhibit five.

8. The Respondent was not the custodian of the records for the Respondent's Exhibits one, two, three, four, and five, which were obtained from the Clerk of Circuit Court in and for Duval County, Florida, and not from the Respondent's own maintained records. No foundation was laid for their admission under the business records exception to the hearsay rule, because no witness was called who could lay such a foundation. Moreover, they were clearly and admittedly acquired by the Respondent Division solely for the purpose of pursuing the forfeiture action against the Petitioner, the instant litigation. They were not shown to be business records maintained in the regular course of business by an appropriate foundation witness. They are also

proffered as being admissible within the public records exception to the hearsay rule contained in Section 90.803(4), Florida Statutes, and as party admissions and, for that reason, admissible over hearsay objection.

9. The admissibility issues are dealt with in the Preliminary Statement and in the Conclusions of Law below. Respondent's Exhibits one and two are inadmissible for the reasons delineated herein. Respondent's Exhibits three, four, and five have limited admissibility. Exhibit three, the Plea of Guilty and Negotiated Sentence is admissible as a party admission. The Judgment of Conviction, Respondent's Exhibit four, and the related Judgment and Restitution Order, Respondent's Exhibit five, are deemed, under Florida law, to be inadmissible under the public records exception to the hearsay rule contained in Section 90.803(4), Florida Statutes. They are not admissible to show the underlying facts upon which they are based or rendered. As judgments they have specific limited statutory admissibility under Section 92.05, Florida Statutes, merely to show that they were entered and they are valid. There is also limited authority to the effect that the Judgment of Conviction, to the extent that it is based upon the Guilty Plea, and therefore subsumes it, presumably can be admitted as a party admission. Since the guilty plea in the underlying criminal case related to this proceeding has been admitted as a party admission, such in this case is a distinction without any evidential or legal difference.

10. The Respondent also proffered into evidence the deposition transcript of Deputy Chris Lavalley who is an officer of the Duval County Sheriff's Office. The deposition was noticed on July 19, 2007, with the deposition to be conducted (which it was) on August 13, 2007. The notice advised the Petitioner that the deposition was being taken for purposes of discovery, for use at trial, or for any other purpose for which it may be used under the applicable laws of Florida. On July 23, 2007, the Respondent noticed its serving of Answers to the Petitioner's Interrogatories in which the Respondent did not list Deputy Lavalley as a witness in that discovery response. During the deposition and thereafter the Respondent never notified the Petitioner's counsel that Detective Lavalley would not be called or available as a witness at the hearing, which was scheduled for August 22, 2007.

11. Detective Lavalley was the author of the arrest and booking report contained in Respondent's exhibit one and was the arresting officer in the underlying criminal proceeding related to this forfeiture proceeding. The Respondent and Respondent's counsel made no showing before, during, or after the hearing in this case that Detective Lavalley was an unavailable witness as a predicate to an attempted introduction of Detective Lavalley's deposition (Respondent's Exhibit seven). The record reflects that Detective Lavalley is, or was, at times pertinent, an officer of the Duval County Sheriff's Office and this hearing was conducted in Jacksonville, in Duval County, Florida. There was no showing that he was beyond 100 miles from the hearing site or

any other reason why he would be an unavailable witness. 12. The Respondent presented as its sole witness Mr. Ira Gaines, a benefits administrator in the Division's Bureau of Benefits Calculation. Mr. Gaines had no personal knowledge or competency to testify concerning any facts underlying the acts for which the Petitioner received the felony conviction at issue. He was not the custodian of the records of the Duval County Clerk or Circuit Court. He did establish he validly had access to the Division's own records in the pursuit of his regular duties and business for the Division and his bureau. He thus was able to establish that the name of the Petitioner and the Petitioner's Social Security number in the records of the Division, of which he had direct knowledge and access to, were the same as those depicted on the Respondent's exhibits. It was thus established that the defendant in the underlying criminal proceeding at issue is the same Russell S. Lawler as the Petitioner in this case, who is subject to this forfeiture proceeding.

13. Mr. Gaines testified that in order for a retiree's benefits to be subject to forfeiture, that the retiree must be convicted of "a felony that related with the employment of that employer . . ." He also established, as the Respondent has conceded, that Section 112.3173(2)(e)6., Florida Statutes, is the specific and only offense for which forfeiture of the Petitioner's retirement benefits is sought in this proceeding.

14. The Petitioner pled guilty to possession, actual or constructive, of a controlled substance (codeine) and is shown by the related judgment of conviction to be convicted of a third-

degree felony in violation of Section 893.13(6)(a), Florida Statutes. Exhibit four shows that he was adjudicated guilty of such. The plea of guilty and negotiated sentence contained in Respondent's Exhibit three also shows that the court was to reserve jurisdiction for restitution. Respondent's Exhibit five, the Judgment and Restitution Order, shows restitution in the amount of $860.00 was to be made to the Department of Health and the Victim Compensation Trust Fund of the Office of the Attorney General.

15. The above findings are all that the Respondent's evidence shows concerning the felony of which the Petitioner was convicted. The Respondent did not adduce any substantial, persuasive evidence or witnesses concerning the nature of the Petitioner's duties at the Department of Health or how those duties had any relationship to the crime the Respondent alleges to be the basis for the forfeiture action herein.

16. The above admissible evidence does not show, for instance, where the Petitioner obtained the illegal controlled substances, possession of which, actual or constructive, he was convicted of, nor is there preponderant, persuasive evidence to show that, even though the order in exhibit five requires restitution to the Department of Health, what the restitution was for or for what purpose it was to be made. To presume more facts than shown on the face of that order would be speculation, and would not be based on admissible evidence. It could be for a number of reasons, such as to pay investigative costs to the

Department of Health, or for other reasons, since it was based on a negotiated plea and restitution.

17. Even if Exhibit five could be deemed to show that the Department of Health was a victim of a crime committed by the Petitioner, there was no preponderant, persuasive evidence by which it might be found that the Petitioner actually deprived his employer of anything of value, or acted at any time with the intent to defraud his employer, the public, and the Department of Health of the right to receive the faithful performance of his duties as a public officer or employee. There was no preponderant, persuasive evidence to show that the Petitioner realized, obtained, or attempted to realize or obtain a profit, gain, or advantage for himself or for some other person, by the use or attempted use of the power, rights, privileges, duties, or position of his public office or employment position.

18. There was simply no evidence adduced to show what his duties were or to show how the function of his duties or his employment position might have a relationship to the crime for which he pled guilty and was convicted. Thus, there is no preponderant, persuasive, admissible evidence which is competent to show that a specified offense, as contemplated in Section 112.3173(2)(e)1-6, Florida Statutes, was committed.

19. The Petitioner has filed a Motion for Attorney's Fees pursuant to Section 57.105, Florida Statutes, and provided the Respondent notice of his intent to seek attorney's fees under that section.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2007).

21. Article II, Subsection 8(d), Florida Constitution (1976), provides in pertinent part:

> SECTION 8: Ethics in government.--A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:
>
> * * *
>
> (d) Any public officer or employee who is convicted of a felony involving a breach of public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan in such manner as may be provided by law.

22. Section 112.311, provides in pertinent 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 an adjudication of guilt by a court of competent jurisdiction; a plea of guilty or of nolo contendere; a jury verdict of guilty when adjudication of guilt is withheld and the accused is placed on probation; or a conviction by the Senate of an impeachable offense.
>
> (b) 'Court' means any state of 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 a 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:

* * *

1. The committing , aiding, or abetting of an embezzlement of public funds;

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

3. bribery, in connection with the employment of a public officer or employee;

4. Any felony specified in Chapter 838, except ss. 838.15 and 838.16;

5. The committing of an impeachable offense; or

6. The committing of any felony by a public officer or employee who, willfully and with intent to defraud the public or the public agency for which the public officer or employee acts or in which he or she is employed of the right to receive the faithful performance of his or her duty as a public officer or employee, realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or herself or for some other person through the use or attempted use of the power, rights,

> privileges, duties, or position of his or her public office or employment position.
>
> (3) FORFEITURE.--Any public officer or employee who is convicted of a specified offense committed prior to retirement, or whose office or employment is terminated by reason of his or her admitted commission, aid, or abetment of a specified offense, 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.

23. The Division contends that all of Mr. Lawler's rights and benefits under the FRS must be forfeited pursuant to Section 112.3173(2)(e)6. It asserts that Mr. Lawler was convicted of a felony as a public employee whereby he willfully and with intent to defraud the public or the public agency for which he was employed of the " . . . right to receive the faithful performance of his her or duty as a public officer or employee," and that he realized, obtained or attempted to realize or obtain a profit, gain, or advantage for himself through the use or attempted use of the power, rights, privileges, and duties of his employment position. The Division has taken the position during the testimony at hearing, and in its proposed recommended order, that it is proceeding under sub-paragraph six of the above-quoted statutory definitions of "specified offense," the so-called "catch all provision." It is not contending that the

Petitioner has committed a felony involving the offenses listed in paragraph 1-5 of the above-quoted statute.

24. The Division, as the party asserting that Mr. Lawler's rights and benefits under the FRS should be forfeited bears the burden of proof during this proceeding. See Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981)("In accordance with the general rule, applicable in court proceedings, 'the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.' Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977)").

25. The statutory forfeiture provision at issue in this case is not penal and does not involve disciplinary action against a licensee. See Busbee v. State, Division of Retirement, 685 So. 2d 914, 918 (Fla. 1st DCA 1986)(Statutory FRS pension forfeiture provision does not impose punishment or involve disciplinary action). The standard of proof, therefore, is "preponderance of the evidence." See § 120.57(1)(j), Fla. Stat. (2007) ("Findings of fact should be based upon a preponderance of the evidence, except in penal and licensure disciplinary proceedings or except as otherwise provided by statute . . .").

26. The Respondent agency has failed to meet that burden and prove facts which would demonstrate that the Petitioner has committed a specified offense, as enumerated and described in the above statutory authority under which the Respondent is proceeding. This is because, after allowing the parties to brief the hearsay, relevance and authentication issues, raised by

objection as to the Respondent's exhibits, or most of them, the Respondent's Exhibits one, two, and seven are deemed inadmissible based upon being inadmissible hearsay or irrelevant. Exhibits four and five, the judgments, are not admissible for proof of the truth of the facts underlying the rendition of the judgments. Petitioner's Exhibit three, the Plea of Guilty and Negotiated Sentence is deemed admissible based on being a party admission, as an exception of the hearsay rule. The reasons are delineated below:

Detective Lavalley's deposition (Respondent's Exhibit 7)

27. Detective Lavalley's deposition, the deposition of the arresting officer concerning the underlying criminal matter is inadmissible hearsay. The Florida Rules of Civil Procedure, 1.330(a)(3), prohibits the introduction of a deposition at a trial or hearing unless the witness is unavailable or upon other exceptional circumstances. See State of Florida Agency for Health Care Administration, Board of Medicine v. Peter Alagona, M.D., DOAH Case No. 95-2467 (1996). The circumstances whereby a deposition may be permitted under Florida Rule of Civil Procedure 1.330(a)(3) concern witness unavailability due to illness, age, and infirmity, or imprisonment, or if "the witness is at a greater distance than 100 miles from the place of trial or hearing." Moreover, a deposition is admissible under this rule only insofar as it is admissible under the rules of evidence. The deposition is hearsay and must comport with the

two hearsay exceptions contained in Section 90.804(2)(a), Florida Statutes, and 90.803(22), Florida Statutes, concerning when the deposition might be admissible as "Former Testimony."

28. Pursuant to Section 90.804(2)(a), a deposition may be introduced into evidence only upon a showing that the witness is unavailable. Conversely, Section 90.803(22) requires no showing of witness unavailability before a deposition may be admitted as former testimony, but both hearsay rules apply to a deposition taken in the same or another proceeding and require that the party against whom the deposition is offered be identical to the party with the same interest in the prior proceeding or deposition or its successor in interest, and that it had "an opportunity or similar motive to develop the testimony by direct, cross, or re-direct examination."

29. In the case of Grabau v. Department of Health, Board of Psychology, 816 So. 2d 701, 709 (Fla. 1st DCA 2002), the court found that Section 90.803(22), is unconstitutional because it violates the separation of powers by usurping the Florida Supreme Court's constitutional authority to implement rules of procedure for courts. Thus, the court held that the introduction of a deposition as former testimony in a hearing without a showing of the witness's unavailability, would violate due process of law because of conflict with Florida Rules of Civil Procedure 1.330. The Florida courts have also ruled that

depositions violative of Rule 1.330 are inadmissible in civil proceedings. See Jones v. R.J. Reynolds Tobacco Co., 830 So. 2d 854, 855 (Fla. 2d DCA 2002)(trial court did not err in finding depositions introduced under hearsay rule 90.803(22) inadmissible in a civil trial); Collins v. Timber, 536 So. 2d 351, 352 (Fla. 1st DCA 1988)(error for court to rely upon deposition testimony where deponent's absence at hearing "not shown to be excused" by Rule 1.330(a)(3); Friedman v. Friedman, 764 So. 2d 754, 755 (Fla. 2d DCA 2000)(discovery deposition inadmissible as substantive evidence unless it satisfies requirements of Rule 1.330(a)(3), which governs former testimony hearsay rule 90.803(22).

30. Detective Lavalley's deposition is not admissible because Section 90.803(22) has been determined to violate the Florida Constitutional provision that rules of procedure have to be adopted by the Florida Supreme Court. See Grabau, 816 So. 2d 709 ("amended statute is unconstitutional as an infringement on the authority conferred on the Florida Supreme Court . . . and denies due process"); Jones, 830 So. 2d 855, citing In Re: Amendments to the Florida Evidence Code, 782 So. 2d 339, 342 (Fla. 2000)(supreme court "refus[ed] to adopt section 90.803(22) as a rule of evidence, expressing 'grave concerns' about the statute's constitutionality"). Since evidence in an administrative proceeding may support a finding of fact only if

admissible in Florida courts over objection, the unconstitutionality of 90.803(22), as applied to the circumstances surrounding the proffer of the deposition, would prevent Detective Lavalley's deposition from being relied upon as evidence by the administrative law judge in this proceeding.

31. In this case, the deposition of Detective Lavalley's was introduced by the Respondent without any showing that the detective was unavailable under Rule 1.330(a)(3). Moreover, although the deposition was reportedly noticed by the Respondent for "purposes of discovery, for use at trial . . . " neither Respondent's counsel nor Detective Lavalley indicated during the deposition or afterward that he would not or could not be made available at the hearing. In fact, the Respondent did not show that any attempt was made to procure the appearance of Detective Lavalley at the hearing, even though the hearing took place in Jacksonville and Detective Lavalley at times pertinent hereto has been a member or officer of the Jacksonville sheriff's office, located in Duval County, well within 100 miles of the hearing site. As of the time that Detective Lavalley was deposed, Respondent had failed to name him as a witness in its responses to interrogatories requesting the names of each witness whom the Respondent expected to testify. See Petitioner's Exhibit 3. The Respondent's responses to interrogatories were served four days before the Respondent

issued the notice of Detective Lavalley's deposition, issued on July 19, 2007. It is not necessary that a witness deposed for discovery purposes also be used at trial, since deposition testimony may also be used solely for impeachment or rebuttal of a witness or in cases where the witness is unavailable. Thus, the Respondent's noticing of the deposition for "purposes of discovery, for use at trial . . ." did not give adequate notice to the Petitioner that it did not plan to produce Detective LaValley as a witness at the hearing.

32. Inasmuch as the Petitioner's counsel was not informed that Detective Lavalley would be unavailable or that the Respondent's counsel did not intend to call him in person for the hearing, the Petitioner's counsel is deemed to have lacked the same "motive" to cross-examine him as he would have had in circumstances where he knew that Detective Lavalley would be unavailable at the hearing. See Bobby C. Billie and Shannon Larsen v. St. Johns River Water Mgmt. Dist. and Marshall Creek Cmty, Dev. Dist., DOAH Case No. 03-1881 (2004)(party unaware that expert witness would be unavailable at trial lacked same motive to question expert as in circumstances where party seeks to preserve testimony for trial); Friedman, 764 So. 2d 755 ("attorney taking a discovery deposition does not approach the examination of a witness with the same motive as one taking a deposition for purpose of presenting testimony at trial"); Okan,

Inc., d/b/a Choice Pharmacy v. Agency for Health Care Admin., DOAH Case No. 00-0113MPI (2002)(where deponent gave no indication he would be unavailable for hearing, unsworn attorney statements may be insufficient predicate for introduction of deposition testimony); Paul Corbiey and Barbara Corbiey v. Action Instant Concrete, LLC and Dep't of Envtl. Protec., DOAH Case No. 05-2891 (2006)(discovery deposition insufficient to support finding where no predicate laid for unavailability of witness under Rule 1.330(a)(3)(b) and both former testimony hearsay exceptions require similar motive to develop deponent's testimony on direct or cross-examination).

33. Therefore, the introduction of Detective Lavalley's deposition testimony, as former testimony, conflicts with Rule 1.330(a)(3), Florida Rules of Civil Procedure, and, if allowed, would amount to an unconstitutional employment of the hearsay exception contained in Section 90.803(22), Florida Statutes, based upon the interpretation of the court in the Grabau decision. It would violate the Petitioner's due process right to a fair hearing.

34. Since Detective Lavalley's deposition is inadmissible, Respondent's Exhibits one, two, three, four, and five cannot be corroborative or explanatory hearsay, based upon the now-determined inadmissibility of Detective Lavalley's testimony. The admissibility of Exhibits one, two, three, four, and five

under the circumstances of the objections as to hearsay concerning the public records exception, business records exception, and the party admission or statement exception to the hearsay rule, as well as the issues of relevancy and authentication will next be addressed. It is noted that these exhibits cannot be corroborative or explanatory hearsay pendant to the testimony of Respondent's witness Gaines either, since witness Gaines had no competency as a witness to testify to the matters depicted in Respondent's Exhibits one, two, three, four, and five or to those contained in Detective Lavalley's deposition testimony in Respondent's Exhibit seven. Witness Gaines only knew of these matters through obtaining the documents which constitute these exhibits, when preparation for the subject agency action was commenced at the agency during the "free-form" stage of this proceeding. Witness Gaines had no direct or personal knowledge of such matters.

Petitioner's Exhibits 1 and 2 - the Arrest and Booking Report and the State Attorney's Information

35. In an administrative hearing "irrelevant, immaterial, or unduly repetitious evidence" should be excluded. § 120.569(2)(g), Fla. Stat. (2007). Under the subject forfeiture statute, quoted above, an employee's pension may only be forfeited for a conviction or plea to a specified offense under that statute. Thus, documents such as the Petitioner's Arrest

and Booking Report and the charges, embodied in the state attorney's Information, from the underlying criminal case, which were offered into evidence are irrelevant in establishment of the Petitioner's ultimate plea or conviction, concerning which the Respondent is proceeding in this case. See Metropolitan Dade v. Wilkey, 414 So. 2d 269, 271 (Fla. 3d DCA 1982), citing Stevens v. Duke, 42 So. 2d 361 (Fla. 1949)("The fact that charges were filed . . . was irrelevant to the issue of civil liability for actions upon which the charges were originally founded. If a guilty verdict cannot be introduced as evidence to prove liability and the plea of guilty may be used only because it is an admission against interest, it then falls that nothing less substantial, i.e., indictment and dismissal, can be entered as evidence of liability.") Thus, the Arrest and Booking Report in Respondent's Exhibit one and the Information in Respondent's Exhibit two are irrelevant and immaterial in establishing the relevant plea or conviction of any specified offense under which forfeiture is sought in this proceeding.

36. The documents contained in Respondent's exhibits one and two further are inadmissible hearsay. Though offered as exceptions to the hearsay rule under the public records exception contained in Section 90.803(8), Florida Statutes, they do not qualify under that exception. In Florida, in criminal cases at least, matters observed by police officers or other law enforcement personnel are not admissible under the public records exception to the hearsay rule. The limitation is based on the belief by courts that observations by officers at the scene of a

crime or when a defendant is arrested are not as reliable as observations by public officials in other cases or categories because of the adversary nature of the confrontation between the police and the defendant on such occasions. Be that as it may, the more germaine reason the Respondent's Exhibits one and two are inadmissible in this non-criminal proceeding, under the public records exception to the hearsay rule is embodied in the third reason, referenced in Ehrhardt, Florida Evidence, 2005 Edition, Section 803.8, p. 784, specifically and intentionally omitted from the hearsay exception in Section 90.803(8) of the Florida Evidence Code. Thus, records of a public body that rely upon information supplied by outside sources, or records which contain evaluations or statements of opinion by a public official are inadmissible hearsay under the Florida Evidence Code. See Lee v. Department of Health and Rehabilitative Services, 698 So. 2d 1194, 1201 (Fla. 1987)(In an action alleging negligence of HRS, a written report of HRS employee who investigated the incident was inadmissible under Section 90.803(8):

> Records that rely on information supplied by outside sources or that contain evaluations or statements of opinion by a public official are inadmissible under . . . [Section 90.803(8)]. 'In Florida, rather than offering this type of record, a witness must be called who has personal knowledge of the facts.' (Quoting text).

Therefore, in addition to being irrelevant and immaterial, Respondent's Exhibits one and two are inadmissible hearsay because they contain an official's evaluations or statements of

opinion and do not qualify for admission under the public records exception to the hearsay rule contained in Section 90.803(8), Florida Statutes. The exhibits are not admissible under the business records exception for the reasons determined in the Preliminary Statement above.

37. Respondent's Exhibit three consists of the plea of guilty and negotiated sentence. The document consisting of Respondent's exhibit three was not actually properly authenticated because it was not certified by the clerk of the circuit court for Duval County, custodian of that record. The administrative law judge, however, exercised discretion and ruled at the hearing that the circumstances appearing on the face of the document, and the circumstances concerning how it was obtained by the Respondent for offer into evidence, shows circumstantial authenticity, sufficient to rule that the document is authentic for propose of Section 90.901, Florida Statutes. The plea of guilty and negotiated sentence is admissible as an exception to the hearsay rule since it constitutes a statement of a party or a party admission for purposes of Section 90.803(18)(a), Florida Statutes.

38. Respondent's Exhibit four consists of the Judgment of Conviction entered in the underlying criminal case. That Judgment was entered pursuant to the guilty plea of the Petitioner herein. Under Florida law, a conviction is not

admissible in subsequent litigation to prove the truth of some essential element in the conviction. The Judgment of Conviction is hearsay and the evidence code does not contain an exception to the hearsay rule. See § 90.803(22)(a), Fla. Stat.; Charles Ehrhardt, Florida Evidence, 2005 Edition (no hearsay exception is recognized in Florida for judgments of conviction). See Boshnack v. Worldwide Rental Car, 195 So. 2d 216, 218 (Fla. 1967)("A judgment of conviction in a criminal prosecution cannot be given in evidence in an action to establish the truth of the facts on which it is rendered . . . ."); Williams v. Castor, 613 So. 2d 97, 99 (Fla. 1st DCA 1993) ("The law is well established that a judgment of conviction of a criminal offense, whether based on a plea of guilty or nolo contendere, is not admissible in a subsequent civil proceeding as proof of the facts on which it is based."); Nunez v. Gonzales, 456 So. 2d 1336, 1338 (Fla. 2d DCA 1984)(In suit to cover proceeds of insurance policy, evidence of beneficiaries' guilty plea to manslaughter of insured was inadmissible: "It is well settled that a judgment of conviction cannot be introduced into evidence in a civil action to establish the truth of the facts upon which it was rendered."). Thus, the judgment of conviction in exhibit four and the related judgment and restitution order in exhibit five are hearsay and cannot be admitted in this proceeding for proof of the facts underlying the entry of the judgments. Under

Section 92.05, Florida Statutes (2007), however, as a final judgment or decree they are admissible only as prima facie evidence of the entry and validity of the judgments.

39. Therefore, at most, the judgment of conviction shows that the Petitioner was convicted of the original Count II in the information filed in the underlying criminal proceeding, which was simply actual or constructive possession of a controlled substance, shown on the Judgment to be a third-degree felony and in violation of Section 893.13(c)(a), Florida Statutes. The judgment and restitution order in exhibit five shows the Petitioner's name as defendant, his race, sex, and social security number and shows that restitution in the amount of $860.00 was ordered paid as "restitution costs" for the benefit of the Department of Health. Thus, these judgments stand, at most, for what it is depicted on the face of them, without them constituting proof of any underlying facts concerning the conviction and restitution order. Therefore, at most, they show that the Petitioner was convicted of the third-degree felony referenced and that restitution was ordered to the Department of Health. There are no facts in this record to show why restitution was ordered to the Department of Health. In the negotiated plea process it may even have been a situation where investigation costs were being reimbursed.

40. In any event, neither of these judgments, or any other

admissible evidence of record, shows that the Petitioner perpetrated acts which amount to facts showing that the above-referenced statute, under which the Division is proceeding, has been violated. He has been shown to have committed the third-degree felony referenced, but there is no showing that he had any intent or motivation to defraud the public or the public agency for whom he was employed of the right to receive the "faithful performance of his . . . duty" as a public officer or employee, or that he realized or obtained, or attempted to realize or obtain, a profit, gain or advantage for himself or some other person. There is no actual showing by competent, admissible evidence that the Petitioner took drugs unlawfully from an employer or at the very least that he took them from the Department of Health or the Department of Health's pharmacy. He could have, for instance, been dually employed at some other pharmacy, as well, and could have taken the drugs in question (codeine) from such location or opportunity. There is no admissible evidence as to who purloined the drugs from the Department of Health or any other location for that matter. It is worth noting that he was convicted of "actual or constructive possession," to which he pled guilty. If he was charged with actual or constructive possession it might even be the case that some other person took the drugs and he was apprehended with them in his vehicle or in some other way deemed to have them in

his constructive possession. The preponderant, persuasive evidence of record simply does not prove facts to show that he is in violation of Section 112.3173(2)(e)6., Florida Statutes, under which the division is proceeding, nor, in a parenthetical sense, that he committed any violation of paragraph 1-5 of that statutory subsection because there are no facts established by credible, persuasive evidence showing that he committed any theft; bribery certainly was not at issue, nor was embezzlement.

41. As the party seeking forfeiture of the Petitioner's retirement benefits, the Respondent has the burden of producing preponderant, credible evidence of a competent nature to prove that the forfeiture is warranted. See Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996). As forfeiture is considered a harsh remedy, the Florida courts have consistently stated that forfeiture statutes must be strictly construed, with doubt being resolved in favor of the one who's rights are sought to be forfeited. Williams v. Christian, 335 So. 2d 358, 361 (Fla. 1st DCA 1976). See also Cabrera v. Department of Natural Resources, 478 So. 2d 454, 455-456 (Fla. 3d DCA 1985). Under this principle, the Respondent has failed to present preponderant, credible evidence that the Petitioner's pension should be forfeited.

42. Under the above-referenced statute, an employee's pension may only be forfeited for a "specified offense" as

defined in the statute. It is not the crime with which a person is arrested or charged that determines if the pension should be forfeited, but rather the crime for which the Defendant pled guilty or for which he was convicted, or the conduct which he admitted committing. Other than a felony offense under Section 112.3173(2)(e)6., which relates to a public official or employee's duties, the specified offenses for which a person's pension can be forfeited are embezzlement, theft, bribery, and an impeachable offense, or certain felonies contained in Chapter 838, Florida Statutes (Bribery or misuse of public office). In this case, the Respondent did not present any competent evidence that the Petitioner has been convicted of, pled guilty to, or committed any of those specified offenses set forth in Subsection 112.3173(2)(e)1-5, and has conceded it is not proceeding under paragraph 1-5 of that subsection.

43. Moreover, because the Respondent is proceeding, by its own admission, only under Section 112.3173(2)(e)6., as the basis for forfeiture, the Respondent had the burden of proving by a preponderance of evidence that the conduct and conviction of the Petitioner satisfied all elements of Section 112.3173(2)(e)6. In addition to not proving that the Petitioner had the necessary intent to defraud the public or the public agency for which he acted or by which he was employed of the right to receive the faithful performance of his duties, and in addition to failing

to prove that the Petitioner realized, obtained, or attempted to realize or obtain any profit, gain or advantage for himself or another through the use or attempted use of the powers and duties of his employment position, the Respondent has failed to present any credible, persuasive evidence of the Petitioner's job duties or responsibilities. Thus, a nexus between those duties and the relevant acts for which he was convicted has not been proven.

44. The Petitioner's job duties were not identified, nor how he breached them. It was proved, at most, that the Petitioner was a pharmacist employed by the Department of Health, and was convicted of illegal drug possession and that restitution was ordered. The Respondent did not establish specifically where he was employed, or in what location his duties were to be performed, or how he came into possession of the codeine vis a vis his employment. The Respondent did not establish that the Petitioner had the intent to defraud the public or a public agency and the Respondent failed to meet the statutory requirement of proof of a nexus between the crime and the duties of his position. See Magyari v. City of Starke, DOAH Case No. 06-3701 (2007); Page v. Department of Management Services, Division of Retirement, DOAH Case No. 05-0532 (2005); Ellis v. Division of Retirement, DOAH Case No. 97-1357 (1997); and Warshaw v. City of Miami Firefighters and Police Officers

Retirement Trust, 885 So. 2d 892 (Fla. 3d DCA 2004) (concerning the statutory requirement of proof of a nexus between the crimes committed or convicted and a public employee and his duties and position).

45. The Respondent did not adduce any persuasive evidence that the Petitioner deprived his employer of something of value as required by the statute. The admissible evidence presented by the Respondent simply did not make that connection. The Respondent did not prove with any substantial, persuasive evidence that the Petitioner acted "willfully with an intent to defraud" the public or his employer, as is explicitly required by the statute under which the Respondent is proceeding.

46. The Respondent's only witness, Mr. Gaines, a division benefits administrator, was not in a position to competently testify regarding the Petitioner's duties at the Department of Health and how his alleged crime related to those duties, nor could he testify as to the Petitioner's conduct or how it deprived the Department of Health of the right to "receive the faithful performance of his duties." Mr. Gaines was unable to testify as to the motives of the Petitioner and whether he acted "willfully" or "with intent to defraud" his employer or the public. The Respondent failed to put forth in any other admissible evidence or witness who could testify regarding these necessary statutory elements.

"Challenge" to the unpromulgated rule

47. In its petition and its proposed recommended order, the Petitioner raises the argument that the potential breadth of the "catchall" provision (Section 112.3173(2)(e)6, Florida Statutes), is "enormous" and without agency clarification would permit the agency, in its unbridled discretion, to "forfeit pensions for virtually any felony imaginable." The Petitioner then contends that an agency rule should have been promulgated to address the parameters of agency discretion and that the failure to promulgate a rule or rules renders the agency without legitimate legal authority to take action on the subject either directly or through the adjudicatory process, citing Kerper v. Department of Environmental Protection, 894 So. 2d 1006, 1010 (Fla. 5th DCA 2005).

48. The Petitioner cites Section 120.54(1)(a), Florida Statutes (2007), for the proposition that rulemaking is not a matter of discretion for the agency and that each "agency statement" defined as a rule in Section 120.52, Florida Statutes, shall be adopted by rulemaking as soon as "feasible and practicable." The Petitioner contends that if the agency neglects to act on its rulemaking power and attempts to promulgate policy of general applicability on an ad hoc basis, by orders in particular cases, then rulemaking must be a predicate for further action and, if necessary, agency action

should be invalidated if taken without rulemaking. The Petitioner cites General Dev. Corp. v. Division of State Planning, Department of Administration, 353 So. 2d 1199, 1209 (Fla. 1st DCA 1977), in furtherance of this argument.

49. The Petitioner cannot prevail on this position for several reasons. First, the Petitioner has not proven that the agency here is seeking to implement or proceed under any "agency statement of general applicability" in prosecuting this case and in carrying out its duties under Section 112.3173(2)(3)6., Florida Statutes. It is not operating in this proceeding on an ad hoc basis, seeking to promulgate a policy of general applicability. Rather, the agency's position in this case, regarding the statute it is attempting to enforce, is specific to the facts it believed with regard to the Petitioner and his employment position and duties, and the particular felony of which he was convicted. There is no attempt here to establish, employ, or apply any agency statement or policy of "general applicability," so what the agency was attempting in this proceeding does not constitute a rule, which would place the duty on the agency to embark on rulemaking before enforcing such.

50. Moreover, this is not a properly pled and noticed rule challenge proceeding. Although the Petitioner raised this argument in its amended petition, and although it is possible to

hear a rule challenge proceeding in conjunction with Section 120.57 and Section 120.569 proceeding, the jurisdiction of the Division of Administrative Hearings is different between the two types of proceeding, the former requiring a final order on a petition filed directly with the Division of Administrative Hearings and the latter requiring a recommended order, with the final order being entered by the referring agency.

51. Even if the purported rule challenge allegation raised in the amended petition could be deemed to be at issue herein, with proper notice in this 120.57(1) proceeding, (which was without objection) and even though it is possible to hear the rule challenge and the "substantial interest" proceeding on a consolidated record and to carve out the rule challenge issue for entry of a separate final order, such is unnecessary. The Petitioner failed to adduce any evidence whatever in support of its position regarding the agency purportedly acting in this proceeding based upon an unpromulgated policy of general applicability. No evidence whatever was presented to show any such policy being in existence or employed in this case. The agency was simply acting with the factual evidence it believed it could advance in order to attempt to show that the statutory elements referenced above could be established. There is no attempt by the agency to advance any generally applicable policy shown by the evidence in this record.

52. In spite of its argument in the proposed recommended order to the contrary, the failure to advance any substantial evidence of such a policy results in the effective abandonment of this argument or allegation by the Petitioner. A rule challenge must be initiated by the filing of a separate petition, directly with the Division of Administrative Hearings. It triggers its own discreet timeline for notice, hearing and entry of a final order. Jurisdiction of an unpromulgated rule challenge was not properly invoked.

53. The Petitioner has moved for an award of attorney's fees and costs pursuant to Section 57.105, Florida Statutes, and has given the Respondent notice of such. In order for an award of attorney's fees and costs to be at issue, stemming from a proceeding such as this, the Petitioner must first become a "prevailing party" under that section. That cannot occur in this case until a final order has been entered by the Respondent agency, and/or by an appellate court. Thus, the motion for attorney's fees and costs pursuant to Section 57.105, Florida Statutes (2007), must be the subject of a separate petition filed once the Petitioner becomes a prevailing party, if he does, upon conclusion of this proceeding.

54. For purposes of the attorney's fee request or argument regarding Section 120.569(2)(e), Florida Statutes, there has been no proof that any pleading, motion or paper in this

proceeding has been filed or interposed for an improper purpose, such as to harass or to cause unnecessary delay or for frivolous purpose or for needlessly increasing the cost of litigation. The motion for fees and costs pursuant to Section 120.569(2)(e), Florida Statutes, is denied.

55. Further, to the extent the Petitioner seeks an award of attorney's fees and costs under Section 120.595(4)(a), Florida Statutes, there has been no substantial evidence to show that such should be awarded. That statutory provision provides that if, upon entry of a final order, all or part of an agency statement violates 120.54(1)(a), Florida Statutes, then the administrative law judge shall award reasonable costs and a reasonable attorney's fee to the Petitioner. Even had a Section 120.54(1)(a) challenge been filed by appropriate petition, there has been no proof that there is any agency statement of general applicability being employed in this proceeding and therefore no evidence to show that an unpromulgated, non-rule policy has been used to support the forfeiture of retirement benefits. Therefore, the request for attorney's fees for purposes of Section 120.595(4), Florida Statutes (2007), is denied.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and

demeanor of the witnesses, and the pleadings and the arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Management Services, Division of Retirement, finding that the Petitioner's retirement benefits should not be forfeited and that all such benefits be restored.

DONE AND ENTERED this 30th day of January, 2008, in Tallahassee, Leon County, Florida.

S

_____
P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with Clerk of the
Division of Administrative Hearings
this 30th day of January, 2008.

ENDNOTE

1/ All statutory references are to Florida Statutes (2003), unless otherwise noted.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.