DOAH

STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

KENNETH C. JENNE,

Petitioner,

vs.

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

Respondent.
_____/

Final Order No. DMS – 09-0018

Case No. 08-1829

FINAL ORDER

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

APPEARANCES

For Petitioner:
Mark Herron, Esq.
Thomas M. Findley, Esq.
Messer, Caparello & Self, P.A.
P.O. Box 15579
Tallahassee, Florida 32317-5579

For Respondent:
Clifford A. Taylor, Esq.
Barbara M. Crosier, Esq.
Geoffrey M. Christian, Esq.
Department of Management Services
Office of the General Counsel
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

Whether Petitioner has forfeited his rights and benefits under the Florida Retirement System (FRS) pursuant to Sections 112.3173 and 121.091(5)(f), Florida Statutes.

PRELIMINARY STATEMENT

Pursuant to notice, Respondent advised Petitioner of its decision to forfeit his FRS rights and benefits under Sections

112.3173 and 121.091(5)(f), Florida Statutes. The agency action was premised on Petitioner's convictions in an U.S. District Court proceeding wherein he had been charged with certain criminal offenses. The notice afforded Petitioner a point of entry to challenge Respondent's proposed action and to request an administrative review of the issues.

Petitioner timely filed a 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 formal hearing was scheduled for October 14 and 15, 2008. However, on October 9, 2008, during a teleconference with the administrative law judge, the parties agreed, in lieu of a formal hearing, to submit joint exhibits and a joint stipulation of facts to be considered in the preparation of a recommended order.

The joint exhibits and facts were accordingly filed on November 10, 2008. In addition, the parties agreed to file proposed recommended orders on or before November 17, 2008. Respondent requested, and was granted, official recognition of certain relevant case law. The parties' proposed recommended orders were timely filed. The administrative law judge submitted her recommended order and all exhibits offered into evidence to the Department. A copy of the recommended order is attached hereto and made a part hereof. Petitioner submitted exceptions

to the recommended order, which have been duly considered in preparing this final agency order.

STANDARD OF REVIEW

Section 120.57(1)(l), Florida Statutes (2008), 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." De Groot 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. Dep't of Health & Rehabilitative Servs., 504 So.2d 1345, 1347-48 (Fla. 1st DCA 1987).

Section 120.57(1)(l), Florida Statutes (2008), 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 section'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. 2nd DCA 2001); Barfield v. Dep't of Health, 805 So.2d 1008, 1011 (Fla. 1st 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. Fla. Soc'y of Ophthalmology, 538 So.2d 878, 884 (Fla. 1st DCA 1998).

PETITIONER'S EXCEPTIONS TO CONCLUSIONS OF LAW

1. Petitioner's first exception submits that paragraph 44 of the recommended order misstates the "matching test" first articulated in Shields v. Smith, 404 So.2d 1106 (Fla. 1st DCA 1981). The Department notes that paragraph 49 of the recommended order adopts the conclusions of law set forth in Respondent's proposed recommended order as the standard of law applicable to this case. Respondent's proposed conclusions of law not only provide an analysis of the Shields case but also other subsequently developed case law relevant to this case, to wit: Hames v. City of Miami Firefighters' & Police Officers' Trust,

980 So.2d 1112 (Fla. 3rd DCA 2008); Simcox v. City of Hollywood Police Officers' Ret. Sys., 988 So.2d 731 (Fla. 4th DCA 2008); Warshaw v. City of Miami Firefighters' & Police Officers' Ret. Trust, 885 So.2d 892 (Fla. 3rd DCA 2004); DeSoto v. Hialeah Police Pension Fund Bd. of Trustees, 870 So.2d 844 (Fla. 3rd DCA 2003); Newmans v. State, Div. of Ret., 701 So.2d 573 (Fla. 1st DCA 1997). The legal conclusions reached in the recommended order are not based solely on the Shields test as stated in paragraph 44. Petitioner's first exception is denied.

2. Petitioner's second exception must be addressed in two parts. The first two sentences of this exception raise the same issues raised in its first exception to paragraph 44. Accordingly, the first two sentences of this exception are denied for the same reasons stated in paragraph 1 above. The remainder of this exception merely reiterates conclusions of law presented in Petitioner's proposed recommended order and which were summarily rejected by the administrative law judge in her recommended order. Under these circumstances, the Department is not obligated to respond to these exceptions. Britt v. Dep't of Prof'l Regulation, 492 So.2d 697 (Fla. 1st DCA 1986); Adult World Inc. v. State of Fla., Div. of Alcoholic Beverages & Tobacco, 408 So.2d 605 (Fla. 5th DCA 1982). Accordingly, the remainder of Petitioner's second exception is denied.

3. To the extent Petitioner's third exception restates exceptions he has previously raised, it is denied. Otherwise, the remainder of Petitioner's third exception amounts to no more

than naked assertions, unsupported by law. See, e.g., Newmans v. State, Div. of Ret., 701 So.2d 573 (Fla. 1st DCA 1997). Accordingly, Petitioner's third exception is denied.

4. Petitioner's fourth exception merely reiterates conclusions of law presented in his proposed recommended order and which were summarily rejected by the administrative law judge in her recommended order. Under these circumstances, the Department is not obligated to respond to this exception. Britt; Adult World Inc. Petitioner's fourth exception is denied.

5. Petitioner's fifth exception objects to paragraph 50 of the recommended order and restates exceptions previously raised with regard to paragraph 44. Petitioner's fifth exception is denied for the same reasons provided in paragraph 1 above.

FINDINGS OF FACT

The Department hereby adopts and incorporates by reference the findings of fact set forth in the recommended order.

CONCLUSIONS OF LAW

The Department hereby adopts and incorporates by reference the conclusions of law set forth in the recommended order, noting, however, that the applicable versions of the relevant forfeiture statutes are the ones in effect on the date(s) Petitioner's criminal acts occurred. See Busbee v. State, Div. of Ret., 685 So.2d 914, 916-17 (Fla. 1st DCA 1996).

Based upon the foregoing it is,

ORDERED and DIRECTED that Petitioner was convicted of crimes which require the forfeiture of his rights and benefits under the FRS pursuant to Sections 112.3173 and 121.091(5)(f), Florida Statutes.

DONE and ORDERED on this 26th day of May, 2009.

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

Copies to:

Mark Herron, Esq.
Thomas M. Findley, Esq.
Messer, Caparello & Self, P.A.
P.O. Box 15579
Tallahassee, Florida 32317-5579

Judge J.D. Parrish
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

Clifford A. Taylor, Esq.
Barbara M. Crosier, Esq.
Geoffrey M. Christian, Esq.
Department of Management Services
Office of the General Counsel
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950

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 27th day of May, 2009.

Debbie Stump
Agency Clerk

STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES
DIVISION OF RETIREMENT

KENNETH JENNE

Petitioner,

vs. DOAH Case No. 08-1829

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

Respondent.

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Petitioner, Kenneth Jenne, pursuant to Section 120.57(1)(k), Fla. Stat. and Rule 28-106.217, Fla. Admin. Code, hereby files the following exceptions to the Recommended Order ("RO") entered on March 3, 2009, by J. D. Parrish, Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH) in the above-styled case. Petitioner, Kenneth Jenne (Jenne) files these exceptions without waiver of any of the previous arguments made.

Standard of Review

Section 120.57(1)(*l*), Fla. Stat., sets forth the standards which should be followed in considering the Recommended Order:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or

> interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify findings of fact unless 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. The agency may accept a recommended penalty in the recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record and justifying the action.

An agency's review of a recommended order is analogous to the standard of review in an appellate proceeding. It is not the time or place to retry the case; nor to ask the agency head to reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses.[1] Rather, the issues before the agency are the sufficiency of the evidence to support the findings of fact and the correctness of the legal conclusions over which the agency has substantive jurisdiction.[2] It is within this context of this standard for review that the Commission must consider and act on the original RO and the

---

[1] Heifitz v. Dept. of Business and Professional Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

[2] Florida Dept. of Transportation v. J.W.C. Company, 396 So.2d 778 (Fla. 1st DCA 1981).

exceptions filed by the parties in this case.

Exceptions

EXCEPTION NO. 1. Mr. Jenne excepts to the conclusion of law in paragraph forty-four (44) at page 21 of the RO. The ALJ's legal test is incorrect. The legal test is not to match the underlying "acts" committed by the employee with the elements of a Florida crime, as stated by the ALJ. Instead, the test is to match "the **elements** of the foreign crime with those of a Florida felony" that qualifies for forfeiture. *Shields v. Smith*, 404 So.2d 1106, 1112 (Fla. 1st DCA 1981)(emphasis added). Thus, it is the matching of legal elements, not the matching of "acts" which might underlie a federal offense, which controls whether the federal offense is the equivalent of a qualifying offense under the forfeiture statute.

EXCEPTION NO. 2. Mr. Jenne excepts to the conclusion of law in paragraph forty-five (45) at page 22 of the RO. Contrary to the ALJ's position, the *Shields* Court did not look to the "underlying acts" but instead looked to the technical legal "elements" of the federal offense. The *Shields* Court actually held that Mr. Jenne's crime of conviction for **conspiracy** did not match the legal elements of a qualifying offense for forfeiture of benefits under Florida law. To the contrary, the First District held:

> We disregard Shields' conspiracy conviction because the crime of conspiracy as interpreted by the federal courts under the Hobbs Act lacks essential elements of Chapter 838 felonies.

Id. at 1110. The *Shields* Court further held:

> The general statute proscribing conspiracy to commit an

> offense against the United States, 18 U.S.C. s 371 (1976), and accompanying case law require only proof of an agreement between two or more persons to commit the specific offense and an overt act in furtherance of the conspiracy [citations omitted].

Id. at 1110, n. 3. Although the *Shields* Court upheld a forfeiture of benefits based on a substantive Hobbs Act extortion count, the Court held that the conspiracy offense was not a Chapter 838 offense. Here, the legal elements of the conspiracy count also lack essential elements of Chapter 838 felonies.

EXCEPTION NO. 3. Mr. Jenne excepts to the conclusion of law in paragraph forty-six (46) at page 22 of the RO. Admissions of fact are not adequate to prove violations of non-charged state statutes triggering forfeiture of retirement benefits. Although convictions for federal offenses may be sufficient, that is true if and only if the legal elements match the elements of a state offense justifying forfeiture. The ALJ has no authority to examine anything other than the legal elements of the federal offense of conviction.

EXCEPTION NO. 4. Mr. Jenne excepts to the conclusion of law in paragraph forty-nine (49) at page 23 of the RO. The First District's analysis in *Shields* is not consistent with the ALJ's approach. The legal approach of *Shields* is not only the more logical approach, but also the approach required by Article II, Section 8(d), of the Florida Constitution, which allows for forfeiture of benefits *only* if one is "convicted of a felony involving a breach of public trust." Because mail fraud conspiracy and filing false tax returns are not felonies "involving a breach of public trust," as required by

Article II, Section 8(d) of the Florida Constitution, as implemented in Section 112.3173, Florida Statutes, the Respondent's construction would lead to an unconstitutional application of the controlling statutes. Here, the ALJ mentions specifically unlawful compensation and official misconduct as equivalent of the federal offense of conviction. Yet, the federal offense of mail fraud conspiracy does not have as one of its essential elements that the defendant acted "corruptly." The offense of unlawful compensation for official behavior set forth in Section 838.016, on the other hand, requires that the actions be done "corruptly." In addition, the official misconduct statute requires "corrupt intent."

In the *Shields* case, the Court analyzed the element of corruptness under the Hobbs Act count, because Hobbs Act was charged in *Shields*. In this case, no Hobbs Act count was charged. The *Shields* Court found in reference to the substantive Hobbs Act count: "The 'wrongfulness' [implicit in corruptness] element of the federal crime is implicitly included in the concept of 'under color of official right' when accompanied by charges of knowing and willing conduct." *Id.* at 1111. Here, on the other hand, the offense of mail fraud conspiracy does not require that one be acting under color of official right. Therefore, under the analysis of *Shields*, mail fraud conspiracy would not qualify as a specified offense under the forfeiture statute, not only because conspiracy is not a Chapter 838 offense, but also because mail fraud conspiracy requires no corrupt intent.[3] Moreover, in this case, the underlying allegation was that Petitioner conspired

[3] On this point, *Newmans v. State, Division of Retirement*, 701 So. 2d 573 (Fla. 1st DCA 1997) is distinguishable, because the offense alleged that Newmans "corruptly

to defraud third parties out of payments by concealing the destination of payments. The charge did not require an allegation or proof of any corrupt intent. [4] To the extent that the ALJ relies on improprieties in the ethics disclosures at issue, this construction fails because no equivalent federal offense was charged for such conduct and also because an ethics violation by itself cannot constitute grounds for the criminal charge of official misconduct.[5]

EXCEPTION NO. 5. Mr. Jenne excepts to the conclusion of law in paragraph fifty (50) at page 23-24 of the RO. The legal approach of *Shields* requires a comparison of the legal elements of the offense of conviction with the specified offense under the forfeiture statute. Therefore, the ALJ's approach of examining all facts involved in the case, irrespective of the legal elements of the federal offense of conviction, does not

---

persuaded" others to obstruct justice. *Id.* at 575 (quoting Indictment). On the same point, *Hames v. City of Miami Firefighters' and Police Officers' Trust*, 980 So. 2d 1112 (Fla. 3d DCA 2008) is distinguishable as the offense of conviction in that case related to a violation of 18 U.S.C. §242, which requires proof of a deprivation of rights "under color of law."

[4] If the federal government intended to prove this type of corrupt conduct or official misconduct, it could have charged Petitioner with a Hobbs Act violation, a substantive count of mail fraud to deprive the public of honest services, federal bribery or the federal offense of the acceptance of illegal gratuities. None of these offenses were charged, however, precisely because the acts for which Petitioner was convicted centered on defrauding third parties into believing that their payments were not intended for Petitioner.

[5] On this final point, if the Respondent is contending that the false ethics disclosure by itself is an act of official misconduct, the theory would raise an unconstitutional construction of the official misconduct statute. *See State v. DeLeo*, 356 So. 2d 306 (Fla. 1978). In *DeLeo*, the Supreme Court of Florida held that enforcement of the official misconduct criminal statute against officials simply for violating a rule applicable to him, which might carry no criminal penalty on its own, would be unconstitutional.

comport with Article II, Section 8(d), of the Florida Constitution, which allows for forfeiture of benefits *only* if one is "convicted of a felony involving a breach of public trust." Mail fraud conspiracy and filing false tax returns are not felonies "involving a breach of public trust," as required by Article II, Section 8(d) of the Florida Constitution and the controlling statutes.

WHEREFORE, Petitioner, Kenneth Jenne, requests that the Department enter a final order rejecting the Recommended Order as exceeding the scope of the controlling statutes and the Florida Constitution.

Respectfully submitted this 18th day of March, 2009.

Mark Herron
Email: mherron@lawfla.com
Florida Bar No.: 199737
Thomas M. Findley
Email: tfindley@lawfla.com
Florida Bar No.: 0797855
MESSER, CAPARELLO & SELF, P.A.
Post Office Box 1876
Tallahassee, FL 32302-1876
(850) 222-0720 Telephone
(850) 224-4359 Facsimile
Counsel for Petitioner, Kenneth Jenne

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Notice of Filing Proposed Recommended Order has been furnished by Electronic Transmission to: Geoffrey M. Christian, Esq., Department of Management Services, Office of the General Counsel, 4050 Esplanade Way, Suite 160, Tallahassee, Florida 32399-0950, this 18th day of March, 2009.

Mark Herron
Florida Bar Number: 199737
Thomas M. Findley
Florida Bar Number: 0797855
MESSER, CAPARELLO & SELF, P.A.
Post Office Box 15579
Tallahassee, FL 32317
(850) 222-0720 (telephone)
(850) 224-4359 (facsimile)