STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

FILED
2009 OCT 22 P 1:52
DIVISION OF ADMINISTRATIVE HEARINGS

JOHNSON HOLSBERRY, JR.,

Petitioner,

Final Order No. DMS – 09-0081

vs.

Case No. 08-15304

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: Mary F. Aspros, Esq.
Meyer, Brooks, Demma, Aspros and Blohm, P.A.
P.O. Box 1547
Tallahassee, Florida 32302

For Respondent: Geoffrey M. Christian, Esq.
Department of Management Services
Office of the General Counsel
4050 Esplanade Way, Suite 160
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STATEMENT OF THE ISSUE

The issue in this cause is whether Petitioner has forfeited his rights and benefits under the Florida Retirement System (FRS) pursuant to Section 112.3173, Florida Statutes.

PRELIMINARY STATEMENT

Pursuant to notice, Respondent advised Petitioner of its decision to forfeit his FRS rights and benefits under Section 112.3173, Florida Statutes. The proposed agency action was

premised on Petitioner's plea of guilty in a state court proceeding wherein he had been charged with a certain criminal offense. 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. The matter was ultimately heard on May 8, 2009.

The parties submitted seventeen joint stipulations of facts. Petitioner presented the testimony of no witnesses and submitted no exhibits for admission into evidence. Respondent presented the testimony of two witnesses and submitted nine exhibits for admission into evidence. The identity of the witnesses and exhibits, and the rulings regarding each, are reported in the transcript of the proceeding filed with the Division of Administrative Hearings on May 15, 2009. Following an extension of time, the parties' proposed recommended orders were filed on June 16, 2009. The proposed recommended orders were duly considered by the administrative law judge in the preparation of her recommended order.

On July 24, 2009, 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. Both parties had the right to submit written exceptions to the Department within 15 days from the date

of the recommended order (i.e., on or before August 10, 2009). On September 29, 2009, Petitioner submitted, by electronic and U.S. Mail, an amended motion for leave to late file exceptions along with three exceptions to the conclusions of law in the recommended order. Copies of Petitioner's amended motion and exceptions are attached hereto and made a part hereof.

STANDARD OF REVIEW

Section 120.57(1)(l), Florida Statutes (2009), 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 (2009), 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).

ORDER ON AMENDED MOTION FOR LEAVE TO LATE FILE EXCEPTIONS

On September 29, 2009, Petitioner filed, by electronic and U.S. Mail, an amended motion for leave to late file exceptions along with three exceptions to the conclusions of law in the recommended order. The recommended order had been filed sixty-six (66) days earlier on July 24, 2009. According to the uniform rules of administrative procedure, a party may file exceptions to

findings of fact and conclusions of law contained in a recommended order with the agency responsible for rendering final agency action within 15 days of entry of the recommended order. Fla. Admin. Code R. 28-106.217. Based on a plain reading of the applicable rule, and in the absence of a showing of excusable neglect, each of Petitioner's exceptions should be summarily rejected as being untimely. Redfern vs. Dep't of Prof'l Regulation, 498 So.2d 1313, 1314-15 (Fla. 1st DCA 1986); Hamilton County Bd. of County Comm'rs v. State, Dep't of Envtl. Regulation, 587 So.2d 1378, 1390 (Fla. 1st DCA 1991). The Department finds that Petitioner has waived his right to file exceptions to the conclusions of law in the recommended order. Wherefore, the Department hereby denies Petitioner's amended motion for leave to late file exceptions and rejects each of Petitioner's exceptions as untimely.

PETITIONER'S EXCEPTIONS TO CONCLUSIONS OF LAW

Notwithstanding the foregoing determinations, in order to facilitate a complete review of this proceeding in the event of a subsequent appellate proceeding, the Department hereby rules on Petitioner's three exceptions to the conclusions of law in the recommended order as follows:

1. Petitioner's first exception submits that there are insufficient facts in the record to support the conclusion of law set forth in paragraph 36 of the recommended order, specifically that Petitioner intended to defraud the public or his public employer or acted for his own profit, gain or advantage. To the

contrary, however, it is uncontested that, as a teacher, Petitioner was subject to the Code of Ethics of the Education Profession in Florida, found in Rule 6B-1.001, Florida Administrative Code, as well as the Principles of Professional Conduct for the Education Profession in Florida, found in Rule 6B-1.006, Florida Administrative Code. See recommended order, paragraphs 5 and 6; joint stipulation in compliance with pre-hearing order, paragraphs 5 and 6. The evidence further shows that Petitioner did not contest the allegations of misconduct that were made in an administrative complaint filed by the Commissioner of Education seeking disciplinary sanctions against his license for certain statutory and rule violations. See recommended order, paragraphs 22 and 23; Respondent's exhibits 6 and 7; transcript at pp. 23-36. Specifically, Petitioner elected not to contest the charges that he (a) violated the Principles of Professional Conduct for the Education Profession in Florida prescribed by the State Board of Education; (b) failed to make reasonable effort to protect a student from conditions harmful to learning and/or to the student's mental health and/or physical safety; (c) intentionally exposed a student to unnecessary embarrassment or disparagement; (d) exploited a relationship with a student for personal gain or advantage; and (e) used institutional privileges for personal gain or advantage. Id. This record evidence supports the conclusion of law found in paragraph 36 of the recommended order and Petitioner's first exception is denied.

2. Petitioner's second exception submits that there are insufficient facts in the record to support the conclusion of law set forth in paragraph 37 of the recommended order, specifically that Petitioner's "contact with R.D. was made possible <u>only</u> as a result of his position as a teacher." (emphasis added). It appears that Petitioner has an issue with the use of the word "only". At hearing, Petitioner testified that R.D. was in his classroom a few times and that he would "maybe, probably no[t]" have met R.D. but for his position as a teacher in her school. <u>See</u> recommended order, paragraphs 18 and 20; transcript at pp. 12, 36-37. Although these findings would appear to support the use of the word "only", the Department finds that its use appears irrelevant to the conclusion of law in paragraph 37 and not at all germane to the ultimate disposition of this proceeding. Accordingly, the Department hereby deletes the word "only" but leaves unchanged the remainder of the conclusion of law set forth in paragraph 37 of the recommended order. Petitioner's second exception is granted.

3. Petitioner's third exception submits that there are insufficient facts in the record to support the conclusion of law set forth in paragraph 39 of the recommended order, specifically that the "plea colloquy in this case, by itself, clearly fails to provide enough information about the underlying conduct to support the requisite nexus" between the crimes charged and the public duties and/or position. Petitioner appears to suggest that the recommended order is based solely on the plea colloquy

in evidence in this case. However, the order does not, either expressly or implicitly, support any contention that its recommendation is based solely on the plea colloquy. Furthermore, the plea colloquy, even if it were to be considered by itself, provides ample evidence of the existence of a nexus between the crime with which Petitioner was charged and his job duties and/or job position. The plea colloquy provided that, in Palm Beach County, Florida, between the dates of January 1, 1999 and December 31, 1999, Petitioner, "while teaching in a position of parental responsibility," was alleged to have had contact with R.D. and "did act in such a manner such as to cause mental injury to said child." See Respondent's exhibit 4, at p. 4. Petitioner's third exception is denied.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

With the single exception noted above, the Department hereby adopts and incorporates by reference the conclusions of law set forth in the recommended order.

Based upon the foregoing it is,

ORDERED and DIRECTED that Petitioner was convicted of a crime which requires the forfeiture of his FRS rights and benefits pursuant to Sections 112.3173, Florida Statutes.

DONE and ORDERED on this 19th day of Oct,

2009.

LINDA H. SOUTH, Secretary
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Copies to:

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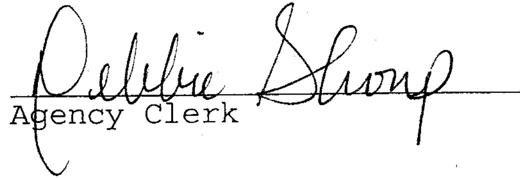
NOTICE OF RIGHT TO APPEAL

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 twenty-first day of October, 2009.



Agency Clerk