

STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

JOHN F. KOONS,

Petitioner,

vs.

Case No. 10-10704

DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,

Final Order No. DMS - 11-0086

Respondent.

FINAL ORDER

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

APPEARANCES

For the Division of
Administrative Hearings:

Judge Robert E. Meale
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

For the Petitioner:

Mark A. Emanuele, Esq.
Panza, Maurer & Maynard, P.A.
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For the Respondent:

Geoffrey M. Christian, Esq.
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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 (hereinafter the "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 pursuant to Section 112.3173, Florida Statutes (2010).¹ 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 (hereinafter "ALJ") to conduct a formal hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

The matter was ultimately heard on May 18, 2011. Petitioner presented the testimony of two witnesses and submitted six exhibits for admission into evidence. Respondent presented the testimony of one witness and submitted fourteen 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

¹ All statutory references are to the 2010 Florida Statutes, except as otherwise indicated. The applicable version of the Chapter 112 forfeiture statute is the one that is in effect at the time a FRS member commits his or her crime(s). See Childers v. State, 989 So.2d 716, 720 (Fla. 4th DCA 2008) (citing Busbee v. State, 685 So.2d 914, 916-17 (Fla. 1st DCA 1996)). Petitioner's crime was committed in 2010. See Recommended Order, at 9-11; Respondent's Exhibit 10, at 2-5; Respondent's Exhibit 11, at 1.

Administrative Hearings on June 22, 2011. Following two extensions, the parties' proposed recommended orders were timely filed. The proposed recommended orders were duly considered by the ALJ in the preparation of his recommended order.

On August 9, 2011, the ALJ submitted his recommended order, the hearing transcript, 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. Neither party filed written exceptions. The recommended order, hearing transcript, and all hearing exhibits have been carefully reviewed in the preparation of this final agency order.

STANDARD OF REVIEW

Subsection 120.57(1)(1), Florida Statutes, provides that an agency may reject or modify an ALJ's findings of fact only 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." The Florida Supreme Court has defined "competent substantial evidence" to mean "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). An agency may not create or add to findings of fact because it is not the

trier of fact. See Heifetz v. Dep't of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco, 475 So.2d 1277, 1281-82 (Fla. 1st DCA 1985); Greseth v. Dep't of Health & Rehabilitative Servs., 573 So.2d 1004, 1006 (Fla. 4th DCA 1991).

Subsection 120.57(1)(1), Florida Statutes, provides that an agency may reject or modify an ALJ's conclusions of law over which the agency has "substantive jurisdiction." When rejecting or modifying such conclusions of law, an agency must state with particularity its reasons for rejecting or modifying such conclusions of law and must make a finding that its substituted conclusions of law are "as or more reasonable" than those which were rejected or modified. § 120.57(1)(1), Fla. Stat. Florida courts have consistently applied this subsection's "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the ALJ's application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the ALJ's interpretation of a statute 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. 2d DCA 2001); Barfield v. Dep't of Health, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001). An agency's interpretation of the statutes that it administers is entitled to great deference, 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, 885 (Fla. 1st DCA 1998).

FINDINGS OF FACT

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

2. With the exception of the fifth sentence of recommended finding of fact 2, the remainder of that recommended finding of fact is hereby accepted. Upon review of the entire record, the fifth sentence of recommended finding of fact 2 is hereby modified because it is not supported by the competent substantial evidence of record. The competent substantial evidence of record shows that Petitioner tendered his resignation from the County Commission on August 3, 2010, *before* he pled guilty to, and was adjudicated guilty of, the crime of extortion. See Respondent's Exhibit 7, at 8; Transcript at 51: 13-16, 129: 13-22, 131: 4-7.

14. With the exception of the second and third sentences of recommended finding of fact 14, the remainder of that recommended finding of fact is hereby accepted. Upon review of the entire record, the second sentence of recommended finding of fact 14 is hereby rejected because it is not supported by the competent substantial evidence of record. The competent substantial evidence of record shows that Commissioners Douglas, Mitchell, Muoio and Robinson voted in favor of authorizing the Mayor of the City of Palm Beach to execute a license to Palm Beach County to construct on city property the ramp and stairs connecting to the

South Cove Islands Boardwalk and that Commissioner Moss abstained. See Petitioner's Exhibit 5, at 4-5. Upon review of the entire record, the third sentence of recommended finding of fact 14 is hereby modified because it is not supported by the competent substantial evidence of record. The competent substantial evidence of record shows that within a few days after the vote of the City of Palm Beach, the board of the Florida Inland Navigation District was scheduled to consider Palm Beach County's application for \$1.275 million to fund the South Cove Restoration Project. See Transcript at 91: 16-21; Respondent's Exhibit 9, at 41: 1, 42, 1-19; Respondent's Exhibit 10, at 2.

16. The first sentence of recommended finding of fact 16 is hereby accepted ("Shortly after this voicemail, Petitioner instructed a county employee to visit the Flagler Center Properties' site and photograph dead trees and the property's stormwater outfall.") Upon review of the entire record, the first clause of the second sentence of recommended finding of fact 16 ("The record is not reliably developed on these points, ...") is hereby rejected because it is not supported by the competent substantial evidence of record. To the contrary, the second sentence of recommended finding of fact 16 continues "except to the extent these two issues are mentioned in Petitioner's next voicemail to the Johnson family attorney, which took place after the photographs were taken," (emphasis added) which voicemail the ALJ then quotes, in its entirety, in the next finding of fact. See Recommended Order, at 10-11. Furthermore,

Petitioner admitted under oath during his interview with representatives from the Palm Beach County State Attorney's Office that these particular facts were true. See Respondent's Exhibit 9, at 28: 11-25, 29: 1-25, 30: 1-25, 31: 1-25, 32: 1-25, 33: 1-8, 92: 16-25, 93: 1-23; Respondent's Exhibit 10, at 4-5. In addition, Petitioner admitted under oath at his plea hearing that these particular facts, as stated in the probable cause affidavit, were true. See Respondent's Exhibit 13, at 5: 7-13; Respondent's Exhibit 10, at 4-5. The competent substantial evidence of record does *not* support a finding that the record was *not* reliably developed on these points.

20. The first sentence of recommended finding of fact 20 is hereby accepted. Upon review of the entire record, the second sentence of recommended finding of fact 20 is hereby rejected to the extent that it states "the record does not support a finding that [Petitioner] engaged in this extortion for his personal political gain." This finding is not supported by the competent substantial evidence of record.² Upon review of the entire

² See Transcript, at 51: 9-12, 55: 21-25, 65: 1-25, 66: 1-25, 67: 1-20, 68: 10-20, 69: 3-11, 70: 8-14, 72: 8-21, 74: 18-24, 75: 4-9, 76: 19-25, 77: 1-21, 78: 1-25, 79: 1-25, 80: 1-9, 17-20, 81: 5-25, 82: 18-25, 83: 1-25, 85: 9-25, 86: 1-6, 88: 16-25, 89: 1-4, 11-20, 96: 1-13, 106: 25, 107: 1-5, 108: 4-18, 112: 14-22; 113: 22-25; 114: 10-12; 126: 6-25, 127: 4-20, 133: 1-4; Respondent's Exhibit 9, at 7: 18-23, 8: 21-25, 9: 1-3, 19-22, 10: 2-20, 12: 17-25, 13: 1-9, 14: 6-16, 18: 10-25, 20: 13-17, 21: 4-7, 34: 21-25, 35: 1-4, 37: 3-25, 38: 1-3, 41: 14-21, 42: 1-20, 46: 19-22, 54: 8-16, 69: 5-25, 70: 1-6, 71: 15-25, 72: 1-6, 73: 1-5, 74: 9-23, 97: 1-9, 100: 12-25, 101: 1-13, 108: 4-8, 25, 109: 1-25, 110: 1-14; Respondent's Exhibit 10, at 3-6; Respondent's Exhibit 13, at 5: 7-13, 7: 14-20, 8: 5-8, 9: 2-4, 10-14.

record, the third sentence of recommended finding of fact 20 is hereby rejected to the extent that it states "[t]here is no evidence whatsoever that Petitioner engaged in this extortion for any other personal purposes ...". This finding is not supported by the competent substantial evidence of record.³

21. With the exception of the first and second sentences of recommended finding of fact 21, the remainder of that recommended finding of fact is hereby accepted. Upon review of the entire record, the first sentence of recommended finding of fact 21 is hereby rejected to the extent that it states "it is difficult to find that Petitioner engaged in this extortion to cement some sort of personal legacy." This finding is not supported by the competent substantial evidence of record.⁴ Upon review of the entire record, the second sentence of recommended finding of fact 21 is hereby rejected to the extent that it states "[t]he South Cove Restoration Project is not an exceptionally large project, in terms of water quality impacts." (emphasis added). This finding, to the extent it is even relevant or material, is not supported by the competent substantial evidence of record. See Petitioner's Exhibit 2, at 48.

22. The first sentence of recommended finding of fact 22 is hereby accepted. Upon review of the entire record, the second sentence of recommended finding of fact 22 is hereby rejected to the extent that it states "this vote ... concerned an

³ See supra note 2.

⁴ See supra note 2.

inconsequential matter." This finding is not supported by the competent substantial evidence of record.⁵ Upon review of the entire record, the third sentence of recommended finding of fact 22 is hereby rejected. This finding does not constitute competent substantial evidence of record because it is both irrelevant and immaterial.

23. The second sentence of recommended finding of fact 23 is hereby accepted. Upon review of the entire record, the first sentence of recommended finding of fact 23 is hereby rejected to the extent that it states "[a]lmost all that is left to explain the extortion is Petitioner's characterization of his acts ...". While the Department does not disagree with Petitioner's own characterization of his criminal acts, this finding is otherwise unsupported by the competent substantial evidence of record.⁶ Upon review of the entire record, the third sentence of recommended finding of fact 23 is hereby rejected to the extent that it states "[b]ut nothing else [is left to explain Petitioner's criminal acts of extortion] ...". This finding is not supported by the competent substantial evidence of record.⁷

Upon review of the entire record, the Department concludes that the ALJ's findings of fact in the recommended order, as modified above, are supported by the competent substantial

⁵ See supra note 2.

⁶ See supra note 2. See also Respondent's Exhibits 1-4; Petitioner's Exhibit 1, at 16; Petitioner's Exhibit 2, at 5, 15, 41, 42, 44, 46, 48, 54, 55; Petitioner's Exhibit 3; Petitioner's Exhibit 5, at 2-3.

⁷ See supra note 6.

evidence of record and that the proceedings upon which the findings are based comply with the essential requirements of law. Consequently, the Department hereby adopts the ALJ's findings of fact, as modified.

CONCLUSIONS OF LAW

The Department hereby rejects the ALJ's conclusions of law set forth in the recommended order and makes the following substitutions. The Department hereby finds that its substituted conclusions of law are as or more reasonable than those of the ALJ which the Department rejects. Accordingly, the following conclusions of law are substituted and adopted:

1. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. See §§ 120.569 and 120.57(1), Fla. Stat.

2. The FRS is codified in Chapter 121, Florida Statutes.

3. Respondent is charged with managing, governing, and administering the FRS. § 121.1905, Fla. Stat.

4. Petitioner is a member of the FRS. §§ 121.051(1)(a) and 121.021(12), Fla. Stat.

5. Respondent's proposed action to forfeit Petitioner's FRS rights and benefits is subject to administrative review. See § 112.3173(5)(a), Fla. Stat.

6. The burden of proof in administrative proceedings is on the party asserting the affirmative of an issue. Wilson v. Dep't of Admin., Div. of Ret., 538 So.2d 139, 141-42 (Fla. 4th DCA 1989); Dep't of Transp. v. J.W.C. Co., 396 So.2d 778, 788 (Fla.

1st DCA 1981). Respondent bears the burden of proof in this proceeding.

7. The standard of proof in administrative proceedings is a preponderance of evidence. § 120.57(1)(j), Fla. Stat.

8. The Florida Constitution sets forth ethical mandates designed to protect the people of Florida from abuses of the trust they have placed in their public officers and employees. See Fla. Const., art. II, § 8. This constitutional provision, entitled "Ethics in government," was adopted by a 4-1 vote of the Florida electorate in the general election of November of 1976 and represented the first successful attempt to amend the constitution by citizen initiative. Williams v. Smith, 360 So.2d 417, 419 (Fla.1978); West's F.S.A. Const. art. 2, § 8, Commentary to 1976 Addition & Historical Notes. The provision is popularly known as the "Sunshine Amendment." Williams at 418.

9. The Sunshine Amendment reflects the declared policy of the state of Florida vis-à-vis its public officers and employees:

[P]ublic officers and employees, state and local, are agents of the people and hold their positions for the benefit of the public. They are bound to uphold the Constitution of the United States and the State Constitution and to perform efficiently and faithfully their duties under the laws of the federal, state, and local governments. Such officers and employees are bound to observe, in their official acts, the highest standards of ethics ... regardless of personal considerations, recognizing that promoting the public interest and maintaining the respect of the people in their government must be of foremost concern.

§ 112.311(6), Fla. Stat. As a public officer for Palm Beach County, Petitioner was subject to this provision.

10. In addition, as a public officer for Palm Beach County, Petitioner was subject to the Palm Beach County Code of Ethics under Article XIII, Section 2-441, of the Palm Beach County Ordinances, which Code, according to the Palm Beach County Charter, must be "at least as stringent as Chapter 112, Part III, Florida Statutes ..." PALM BEACH, FLA., CHARTER § 8.1 (2010). The Palm Beach County Code of Ethics does not authorize or permit any conduct or activity that is in violation of Chapter 112, Part III, Florida Statutes. PALM BEACH, FLA., ORDINANCES art. XIII, § 2-441 (2010).

11. It is a "breach of the public trust" to violate any provision of the Florida Constitution or Chapter 112, Florida Statutes, "which establishes a standard of ethical conduct, a disclosure requirement, or a prohibition applicable to public officers or employees in order to avoid conflicts between public duties and private interests ..." § 112.312(3), Fla. Stat. A "breach of the public trust" includes any violation of the Sunshine Amendment. Id.

12. Article II, Section 8(d), of the Florida Constitution provides:

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.

The language of Article II, Section 8(d), is considered "plain and unambiguous." Williams, 360 So.2d at 420. Further, the mandate of the people to act in this area is considered "clear and forceful." Id. at 421, n.9.

13. Petitioner is a former public officer. Petitioner is a member of a public retirement system or pension plan. Petitioner pled guilty to a felony. These issues are undisputed. The issues then are whether Petitioner was "convicted" of a felony "involving a breach of the public trust."

14. In Williams, 360 So.2d at 418, the Supreme Court held that Article II, Section 8(d), of the Florida Constitution was "not a self-executing provision" and that "in the absence of implementing legislation, it did not operate to invoke a forfeiture." Thus, in 1984 the Legislature codified Article II, Section 8(d), in Chapter 112, Part III, of the Florida Statutes. See § 112.3173, Fla. Stat. (Supp. 1984) (hereinafter the "Chapter 112 forfeiture statute").⁸

15. Respondent, as the state agency responsible for paying benefits under the FRS, has the authority to determine whether a member's FRS rights and benefits are required to be forfeited

⁸ Subsection 112.3173(1) provides "[i]t is the intent of the Legislature to implement the provisions of s. 8(d), Art. II of the State Constitution." § 112.3173(1), Fla. Stat. (Supp. 1984).

pursuant to the Chapter 112 forfeiture statute. See § 112.3173(5)(a), Fla. Stat. (2010); accord Hames v. City of Miami Firefighters' & Police Officers' Trust, 980 So.2d 1112, 1114 (Fla. 3d DCA 2008).

16. Subsection 112.3173(3), Florida Statutes, provides in relevant part:

(3) FORFEITURE.--Any public officer or employee who is convicted of a specified offense committed prior to retirement ... shall forfeit all rights and benefits under any public retirement system⁹ of which he or she is a member, except for the return of his or her accumulated contributions as of the date of termination.

Petitioner is a former public officer, is a member of a public retirement system, and pled guilty to a felony committed prior to retirement while he was serving in the office of County Commissioner. Petitioner's guilty plea constitutes a conviction under the Chapter 112 forfeiture statute. § 112.3173(2)(a), Fla. Stat. These issues are undisputed. The issue then is whether Petitioner committed a felony "involving breach of public trust" or some other "specified offense" as enumerated and described in the Chapter 112 forfeiture statute.

⁹ The term "public retirement system" means any retirement system or plan to which the provisions of Chapter 112, Part VII apply. § 112.3173(2)(d), Fla. Stat. Chapter 112, Part VII applies to "any and all units, agencies, branches, departments, boards, and institutions of state, county ... governments which participate in, operate, or administer a retirement system or plan for public employees, funded in whole or in part by public funds." § 112.62, Fla. Stat. The FRS is a public retirement system.

17. A "specified offense" is particularly defined in the Chapter 112 forfeiture statute to include any felony under Chapter 838, Florida Statutes (except Sections 838.15 and 838.16), as well as certain offenses relating to bribery, embezzlement and theft of public funds, impeachable offenses, lewd or lascivious offenses committed upon or in the presence of persons less than sixteen (16) years of age, or sexual batteries upon persons less than eighteen (18) years of age. See § 112.3173(2)(e)1.-5. and 7., Fla. Stat. Petitioner did not plead guilty to any of these "specified" offenses.

18. The Chapter 112 forfeiture statute also contains a "catch-all" provision which can subject a public officer or employee to the forfeiture of his or her rights and benefits and states as follows:

(2)(e) "Specified offense" means:

* * *

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.

§ 112.3173(2)(e)6., Fla. Stat.

19. The felony of extortion to which Petitioner pled guilty does not in and of itself constitute one of the "specified" offenses under the Chapter 112 forfeiture statute. Rather, the statutory conditions of the "catch all" provision must be examined and applied to Petitioner's criminal conduct in making this determination. See Jenne v. State, 36 So.3d 738, 742 (Fla. 1st DCA 2010).

20. To support forfeiture under Subsection 112.3173(2)(e)6., the criminal acts must (a) be a felony; and (b) have been committed by a public officer or employee. The crime of extortion is a second degree felony. § 836.05, Fla. Stat. Petitioner was a public officer at the time he committed his criminal acts. These issues are undisputed. In addition, the public officer or employee must have (a) acted 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; (b) realized or obtained, or attempted to realize or obtain, a profit, gain, or advantage for himself or herself or for some other person; and (c) used or attempted to use the power, rights, privileges, duties, or position of his or her public office or employment position.

21. In paragraph 30 of the recommended order, the ALJ states "it is unclear how Petitioner, a county commissioner, threatened to use his office to punish the Johnson family, if they did not drop their opposition to the [South Cove Restoration

Project] and pay public homage to Petitioner." The ALJ concludes "[b]ut this element is tenuous, as nothing in Petitioner's threats particularly depends on his status as a county commissioner ..."¹⁰ As an initial matter, the correct statement of the issue is whether Petitioner used or attempted to use the power, rights, privileges, duties, or position of his public office. Upon review of the ALJ's findings of fact, as modified, and the entire record, the Department disagrees with the ALJ's conclusion.¹¹ Paragraphs 2, 4, 5, 7, 8, 12, 13, 14, 15, 16, 17, and 18 of the ALJ's findings of fact, as modified, provide in relevant part:

2. ... [Petitioner] was elected and reelected commissioner of the Board of County Commissioners of Palm Beach County. Petitioner was prevented by term limits from serving beyond his second four-year term, which was due to end in December 2010. ...

* * *

4. In the final year of his final term in public office, Petitioner busied himself with--or, perhaps more aptly, obsessed over--one major piece of unfinished business: the South Cove Restoration Project. The South Cove Restoration Project is an ecological restoration project in the Lake Worth Lagoon in downtown West Palm Beach.

* * *

¹⁰ If this conclusion of law is simply a mislabeled finding of fact, then the Department submits, upon review of the entire record, that such finding of fact is not supported by the competent substantial evidence of record.

¹¹ The Department notes that the ALJ elected not to resolve this issue in the recommended order and thus the Department considers the ALJ's conclusion dicta. See Recommended Order at 15-16. The Department will now resolve this issue.

5. The Lake Worth Lagoon is a 20-mile long body of water in central Palm Beach County. Located just east of Flagler Drive and north of the Royal Park Bridge, the South Cove Restoration Project's primary sponsor is Palm Beach County, although the state has provided funds and the City of West Palm Beach and the Florida Inland Navigation District are also identified as project "partners."

* * *

7. ... For a couple of years, Petitioner had served as the county representative to, and chair of, a consortium of governmental entities that had formed the Lake Worth Lagoon Initiative (Initiative). Members of the Initiative have been drawn from the Florida Department of Environmental Protection, the South Florida Water Management District, the Palm Beach County chapter of the League of Cities, and Palm Beach County.

8. The mission of the Initiative is to restore water quality in the lagoon by obtaining and providing funding from various sources for projects to address such issues as water quality, habitat, and pollution-control. The Initiative has supported the South Cove Restoration Project ...

* * *

12. Members of the Johnson family own Flagler Center Properties. ... [A]t least certain members of the Johnson family with ownership interests in Flagler Center Properties have opposed at least certain aspects of the South Cove Restoration Project.

13. The extortion occurred late in the approval process for the South Cove Restoration Project. The two acts of extortion took place in the six weeks before a vote by [Palm Beach] city commissioners to allow a fourth wheelchair-ramp access to be constructed from the existing sidewalk, over the seawall, and onto the boardwalk.

14. ... Within a few days after the city vote, the last project sponsor to commit funds--the board of the Florida Inland Navigation District--approved its [\$1.275] million contribution. ...

15. In anticipation of the city vote, on May 6, 2010, at 9:14 a.m., Petitioner called the Johnson family attorney to discuss the Johnson family's continued objection to the [South Cove Restoration Project], especially the boardwalk. Petitioner failed to reach the attorney, so he left a voicemail. After a brief greeting, Petitioner demanded that the attorney send Petitioner immediately a memo outlining the remaining objections of the Johnson family to the South Cove Restoration Project.

[A]nd if you don't get it to me I'm going to do a public records request to the City of West Palm Beach on this.

And Dean, just a little heads up. You're a friend of mine. I'm going to work as hard as I've ever worked in twenty years of public service to take the Johnsons through the ringer on this if they don't support the City of West Palm Beach. I'll have kids picketing at the building and what I'm going to say is they want a marina instead of an island. This has gotten -- I told you this is very personal for me, OK? This is something I really, really want. After 20 years I want the Johnsons to step away and congratulate me personally and all the work I've done. OK?

I have no idea why they have gotten so fucking on this deal but this is very personal. I'm going to work five hours a day [sic] for the next six weeks. I'm going to leverage every possible person, program, and project I have to get a 5-0 vote out of the City Commission. It's very personal Dean.

So I can't understand why they want to do it but ultimately I want them to say we'd love to have this project. I'm going to go door to door to every tenant in their building and throw them under the fucking bus. I'm going to say they want a marina out here versus a public island. I'm going to go to the FBI who's, who's in their building. I'm going to go to the Quantum Foundation. I'm going to go to every tenant in that building. I'm gonna see if I've got a banking relationship with anybody in there. I want this done and it's a personal thing for me.

16. Shortly after this voicemail, Petitioner instructed a county employee to visit the Flagler Center Properties' site and photograph dead trees and the property's stormwater outfall. ... [T]hese two issues are mentioned in Petitioner's next voicemail to the Johnson family attorney, which took place after the photographs were taken.

17. To dispel any doubt of his seriousness, Petitioner called the Johnson family attorney again on June 9, 2010, at 6:18 pm:

Hey, it's Koons. Just wondering, are the Johnsons still fighting that island on the maintenance issue? I was just wondering because I don't know if you noticed the dead trees that they have in their building in downtown West Palm Beach. Can't even take care of their own property with the dead trees. I don't know why they're worrying about maintenance on something else [the South Cove Restoration Project].

Anyway, also, do you have a map of where their stormwater goes? I was just trying to think if they were ever under a pre-treatment of their stormwater that goes off, I think,

right where that island is going to be. Anyway, just let me know. Let me know if you want me to call Code Enforcement or what you want me to do. Thanks.

18. By Information dated August 3, 2010, the State of Florida alleged that Petitioner "on or between May 6, 2010, and June 17, 2010, . . . did either verbally or by a written or printed communication, maliciously threaten an injury to the reputation of [the Johnson family] with intent to compel the persons so threatened . . . to do any act or refrain from doing any act against their will, contrary to Florida Statute 836.05 (2 DEG FEL). . . . (all emphasis added).

Thus, between the dates of May 6, 2010, and June 17, 2010, Petitioner made extortionate threats, both expressly and implicitly connected with his public office, toward the Johnson family to force them to drop their opposition to the South Cove Restoration Project. Subsequent to the threats being verbally communicated, Petitioner followed up on the threats by engaging in conduct clearly connected with his public office designed to punish the Johnson family for not dropping their opposition to the South Cove Restoration Project. Subsequent to Petitioner's criminal acts, neither the Johnson family, whom Petitioner extorted, nor their attorney appeared at the June 17, 2010, meeting of the West Palm Beach City Commission to voice their objections to the South Cove Restoration Project. See Recommended Order, at 4; Respondent's Exhibit 9, at 97: 1-9; Respondent's Exhibit 10, at 5. Thus, upon review of the ALJ's findings of fact, as modified, and the entire record, the Department hereby concludes that Petitioner used or attempted to

use the power, rights, privileges, duties, or position of his public office. There is nothing "tenuous" about it. The Department hereby finds that this substituted conclusion of law is as or more reasonable than that of the ALJ which the Department rejects.

22. In paragraph 31 of the recommended order, the ALJ states "it is unclear whether there is an intent to defraud the public or the county commission of the right to the faithful performance of [Petitioner's] duties as a county commissioner."¹² However, the ALJ then concedes that "Petitioner used means that would not be endorsed by the County Commission" but apparently dismisses Petitioner's criminal acts because Petitioner and the County Commission "both were pursuing the same goal." This is simply incorrect. As an initial matter, the correct statement of the issue is whether Petitioner acted willfully and with intent to defraud the public for which he acted or the public agency in which he was employed of the right to receive the faithful performance of his duty as a public officer or employee. Upon review of the ALJ's findings of fact, as modified, and the entire record, the Department disagrees with the ALJ's conclusion.¹³

¹² If this conclusion of law is simply a mislabeled finding of fact, then the Department submits, upon review of the entire record, that such finding of fact is not supported by the competent substantial evidence of record.

¹³ The Department notes that the ALJ elected not to resolve this issue in the recommended order and thus the Department considers the ALJ's conclusion dicta. See Recommended Order at 15-16. The Department will now resolve this issue.

Paragraphs 2, 4, 5, 7, 8, 12, 13, 14, 15, 16, 17, and 18 of the ALJ's findings of fact, as modified, provide in relevant part:

2. ... [Petitioner] was elected and reelected commissioner of the Board of County Commissioners of Palm Beach County. Petitioner was prevented by term limits from serving beyond his second four-year term, which was due to end in December 2010. ...

* * *

4. In the final year of his final term in public office, Petitioner busied himself with--or, perhaps more aptly, obsessed over--one major piece of unfinished business: the South Cove Restoration Project. The South Cove Restoration Project is an ecological restoration project in the Lake Worth Lagoon in downtown West Palm Beach.

* * *

5. The Lake Worth Lagoon is a 20-mile long body of water in central Palm Beach County. Located just east of Flagler Drive and north of the Royal Park Bridge, the South Cove Restoration Project's primary sponsor is Palm Beach County ...

* * *

7. ... For a couple of years, Petitioner had served as the county representative to, and chair of, a consortium of governmental entities that had formed the Lake Worth Lagoon Initiative (Initiative). Members of the Initiative have been drawn from the Florida Department of Environmental Protection, the South Florida Water Management District, the Palm Beach County chapter of the League of Cities, and Palm Beach County.

8. The mission of the Initiative is to restore water quality in the lagoon by obtaining and providing funding from various sources for projects to address such issues as water quality, habitat, and pollution-

control. The Initiative has supported the South Cove Restoration Project ...

* * *

12. Members of the Johnson family own Flagler Center Properties. ... [A]t least certain members of the Johnson family with ownership interests in Flagler Center Properties have opposed at least certain aspects of the South Cove Restoration Project.

13. The extortion occurred late in the approval process for the South Cove Restoration Project. The two acts of extortion took place in the six weeks before a vote by [Palm Beach] city commissioners to allow a fourth wheelchair-ramp access to be constructed from the existing sidewalk, over the seawall, and onto the boardwalk.

14. ... Within a few days after the city vote, the last project sponsor to commit funds--the board of the Florida Inland Navigation District--approved its [\$1.275] million contribution. ...

15. In anticipation of the city vote, on May 6, 2010, at 9:14 a.m., Petitioner called the Johnson family attorney to discuss the Johnson family's continued objection to the [South Cove Restoration Project], especially the boardwalk. Petitioner failed to reach the attorney, so he left a voicemail. After a brief greeting, Petitioner demanded that the attorney send Petitioner immediately a memo outlining the remaining objections of the Johnson family to the South Cove Restoration Project.

[A]nd if you don't get it to me I'm going to do a public records request to the City of West Palm Beach on this.

And Dean, just a little heads up. You're a friend of mine. I'm going to work as hard as I've ever worked in twenty years of public service to take the Johnsons through the

ringer on this if they don't support the City of West Palm Beach. I'll have kids picketing at the building and what I'm going to say is they want a marina instead of an island. This has gotten -- I told you this is very personal for me, OK? This is something I really, really want. After 20 years I want the Johnsons to step away and congratulate me personally and all the work I've done. OK?

I have no idea why they have gotten so fucking on this deal but this is very personal. I'm going to work five hours a day [sic] for the next six weeks. I'm going to leverage every possible person, program, and project I have to get a 5-0 vote out of the City Commission. It's very personal Dean.

So I can't understand why they want to do it but ultimately I want them to say we'd love to have this project. I'm going to go door to door to every tenant in their building and throw them under the fucking bus. I'm going to say they want a marina out here versus a public island. I'm going to go to the FBI who's, who's in their building. I'm going to go to the Quantum Foundation. I'm going to go to every tenant in that building. I'm gonna see if I've got a banking relationship with anybody in there. I want this done and it's a personal thing for me.

16. Shortly after this voicemail, Petitioner instructed a county employee to visit the Flagler Center Properties' site and photograph dead trees and the property's stormwater outfall. ... [T]hese two issues are mentioned in Petitioner's next voicemail to the Johnson family attorney, which took place after the photographs were taken.

17. To dispel any doubt of his seriousness, Petitioner called the Johnson family attorney again on June 9, 2010, at 6:18 pm:

Hey, it's Koons. Just wondering, are the Johnsons still fighting that island on the maintenance issue? I was just wondering because I don't know if you noticed the dead trees that they have in their building in downtown West Palm Beach. Can't even take care of their own property with the dead trees. I don't know why they're worrying about maintenance on something else [the South Cove Restoration Project].

Anyway, also, do you have a map of where their stormwater goes? I was just trying to think if they were ever under a pre-treatment of their stormwater that goes off, I think, right where that island is going to be. Anyway, just let me know. Let me know if you want me to call Code Enforcement or what you want me to do. Thanks.

18. By Information dated August 3, 2010, the State of Florida alleged that Petitioner "on or between May 6, 2010, and June 17, 2010, . . . did either verbally or by a written or printed communication, maliciously threaten an injury to the reputation of [the Johnson family] with intent to compel the persons so threatened . . . to do any act or refrain from doing any act against their will, contrary to Florida Statute 836.05 (2 DEG FEL). . . . (all emphasis added).

Thus, between the dates of May 6, 2010, and June 17, 2010, Petitioner made extortionate threats, both expressly and implicitly connected with his public office, toward the Johnson family to force them to drop their opposition to the South Cove Restoration Project. Subsequent to the threats being verbally

communicated, Petitioner followed up on the threats by engaging in conduct clearly connected with his public office designed to punish the Johnson family for not dropping their opposition to the South Cove Restoration Project. Subsequent to Petitioner's criminal acts, neither the Johnson family, whom Petitioner extorted, nor their attorney appeared at the June 17, 2010, meeting of the West Palm Beach City Commission to voice their objections to the South Cove Restoration Project. See Recommended Order, at 4; Respondent's Exhibit 9, at 97: 1-9; Respondent's Exhibit 10, at 5. The Department concludes that, while Petitioner and the remaining members of the County Commission may have been "pursuing the same goal," the remaining members of the County Commission, as well as the public, would have drawn the line at committing felony extortion and breaching the public trust. The Department does as well. Thus, upon review of the ALJ's findings of fact, as modified, and the entire record, the Department hereby concludes that Petitioner acted willfully and with intent to defraud the public for which he acted or the public agency in which he was employed of the right to receive the faithful performance of his duty as a public officer. The Department hereby finds that this substituted conclusion of law is as or more reasonable than that of the ALJ which the Department rejects.

23. Ultimately, the ALJ's decision rests solely on his conclusions of law in paragraphs 32-34 of the recommended order that "Petitioner's acts of extortion did not produce any profit,

gain[,] or advantage for himself or anyone else."¹⁴ As an initial matter, the correct statement of the issue is whether Petitioner realized or obtained, or attempted to realize or obtain, a profit, gain, or advantage for himself or herself or for some other person. Upon review of the ALJ's findings of fact, as modified, and the entire record, the Department disagrees with the ALJ's conclusion. Paragraphs 4, 5, 6, 7, 8, 9, 13, 14, and 15 of the ALJ's findings of fact, as modified, provide in relevant part:

4. In the final year of his final term in public office, Petitioner busied himself with--or, perhaps more aptly, obsessed over--one major piece of unfinished business: the South Cove Restoration Project. The South Cove Restoration Project is an ecological restoration project in the Lake Worth Lagoon in downtown West Palm Beach.

* * *

5. The Lake Worth Lagoon is a 20-mile long body of water in central Palm Beach County. Located just east of Flagler Drive and north of the Royal Park Bridge, the South Cove Restoration Project's primary sponsor is Palm Beach County, although the state has provided funds and the City of West Palm Beach and the Florida Inland Navigation District are also identified as project "partners."

* * *

6. The project consists of the creation of two acres of mangrove/spartina habitat, 3.5 acres of potential seagrass habitat, and one acre of rock revetment/oyster reef. The project also includes a 565-foot elevated

¹⁴ If this conclusion of law is simply a mislabeled finding of fact, then the Department submits, upon review of the entire record, that such finding of fact is not supported by the competent substantial evidence of record.

boardwalk running from the sidewalk along Flagler Drive to the largest mangrove island and a 16-foot square observation deck. Lastly, the project includes the capping of an old dredge hole with clean sand. This will reduce turbidity in the adjacent water column by preventing the continual resuspension of fine-grained particles that tend to collect in the dredge hole.

7. For many years, water-quality issues in the Lake Worth Lagoon have received the attention of state, regional, and local officials, including Petitioner. For a couple of years, Petitioner had served as the county representative to, and chair of, a consortium of governmental entities that had formed the Lake Worth Lagoon Initiative (Initiative). Members of the Initiative have been drawn from the Florida Department of Environmental Protection, the South Florida Water Management District, the Palm Beach County chapter of the League of Cities, and Palm Beach County.

8. The mission of the Initiative is to restore water quality in the lagoon by obtaining and providing funding from various sources for projects to address such issues as water quality, habitat, and pollution-control. The Initiative has supported the South Cove Restoration Project, which is located to the south of a larger project recently undertaken by the City of West Palm Beach to dredge the Intracoastal Waterway adjacent to Flagler Drive as part of extensive renovations of an old city marina. The dredge spoil from the city marina project will provide the fill for the dredge hole in the South Cove Restoration Project.

9. The South Cove Restoration Project was first identified in 1997 as a Surface Water Improvement and Management project. In August 2008, the Department of Environmental Protection proposed to issue the permits necessary for the project's construction and operation.

* * *

13. The extortion occurred late in the approval process for the South Cove Restoration Project. The two acts of extortion took place in the six weeks before a vote by [Palm Beach] city commissioners to allow a fourth wheelchair-ramp access to be constructed from the existing sidewalk, over the seawall, and onto the boardwalk.

14. ... Within a few days after the city vote, the last project sponsor to commit funds--the board of the Florida Inland Navigation District--approved its [\$1.275] million contribution. ...

15. In anticipation of the city vote, on May 6, 2010, at 9:14 a.m., Petitioner called the Johnson family attorney to discuss the Johnson family's continued objection to the [South Cove Restoration Project], especially the boardwalk. Petitioner failed to reach the attorney, so he left a voicemail. After a brief greeting, Petitioner demanded that the attorney send Petitioner immediately a memo outlining the remaining objections of the Johnson family to the South Cove Restoration Project.

[A]nd if you don't get it to me I'm going to do a public records request to the City of West Palm Beach on this.

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As the above-emphasized language from the ALJ's findings of fact, as modified, clearly indicates, and upon review of the entire record, there is no question that Petitioner realized or obtained, or attempted to realize or obtain, a profit, gain, or advantage, not only for himself but also for the visitors to and residents of Palm Beach County. Competent substantial evidence of either satisfies the element of the statute which requires that Petitioner realize or obtain, or attempt to realize or obtain, a profit, gain, or advantage, for either himself or for some other person.

In paragraph 32 of the recommended order, the ALJ rejects Respondent's argument that the profit, gain, or advantage was "some combination of aesthetic and ecological benefits for the residents of West Palm Beach." While the ALJ's description of Respondent's argument is incomplete, the ALJ describes Respondent's position as "painting with an excessively broad brush" and dismissively concludes that "one hopes that most acts of an elected public official are for the benefit of her [sic] constituents." While the Department naturally agrees with the ALJ's expressed "hope", the Department must, however, necessarily draw the line when an elected public official commits criminal acts of felony extortion for the "benefit" of his or her constituency. As the ALJ clearly concedes, Petitioner committed criminal acts in his capacity as an elected public official and, in so doing, realized or obtained, or attempted to realize or obtain, a profit, gain, or advantage (benefit) for his constituents.

In paragraphs 33 and 34 of the recommended order, the ALJ appears to read into the final statutory element a qualifier that the profit, gain, or advantage must be "meaningful or measurable" or at least "transient." See Recommended Order, at 17. Although unnecessary, the Department concludes, upon review of the entire record, that the "profit, gain, or advantage" derived by Petitioner and the visitors to and residents of Palm Beach County from the successful city vote and funding of the South Cove Restoration Project was *both* "meaningful" and "measurable."

However, such is not the proper standard. The subject statutory language is not qualified in any manner. The statute does not require that the profit, gain, or advantage be meaningful, measurable, or transient. The statute does not require that the profit, gain, or advantage be economic or financial. The statute does not even require that the profit, gain, or advantage be improper. If any of these had been intended by the Legislature, it would have included such qualifying language in the statute. However, all the statute requires is that there be some kind of "profit, gain, or advantage" for the public officer or employee or for some other person. The language of the statute is plain and unambiguous in this regard.

Finally, in his proposed recommended order, Petitioner appears to argue that Subsection 112.3173(2)(e)6. is ejusdem generis of the other specified offenses found in the Chapter 112 forfeiture statute and therefore the profit, gain, or advantage must be of an economic or financial nature. See Petitioner's Proposed Recommended Order, at 9-20. Under the doctrine of ejusdem generis, where an enumeration of specific things is followed by some more general word, the general word will usually be construed to refer to things of the same kind or species as those specifically enumerated. See, e.g., Green v. State, 604 So.2d 471, 473 (Fla.1992). However, it is well settled in law that the doctrine of ejusdem generis is applicable only where there is some ambiguity or inconsistency in the statute. See Pottsburg Utilities, Inc. v. Daugharty, 309 So.2d 199, 201 (Fla.

1st DCA 1975). Because Subsection 112.3173(2)(e)6. is neither vague nor ambiguous, it does not require statutory construction and the doctrine of ejusdem generis is not applicable. Jacobo v. Bd. of Trustees of Miami Police, 788 So.2d 362, 364 (Fla. 3d DCA 2001).

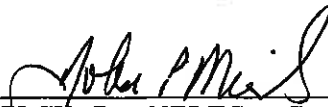
Accordingly, upon review of the ALJ's findings of fact, as modified, and the entire record, the Department hereby concludes that Petitioner "realized or obtained, or attempted to realize or obtain, a profit, gain, or advantage for himself ... or for some other person." The Department hereby finds that this substituted conclusion of law is as or more reasonable than that of the ALJ which the Department rejects.

24. In summary, the Department hereby concludes that Petitioner pled guilty to committing a felony which constitutes a breach of the public trust as contemplated by the Chapter 112 forfeiture statute. Respondent has met its burden. When Petitioner pled guilty to committing a felony which constitutes a breach of the public trust, he forfeited all of his FRS rights and benefits. Respondent is without statutory authority to permit otherwise. See § 112.3173(3), Fla. Stat. Respondent is required to act on said forfeiture at this time.

Based upon the foregoing it is,

ORDERED and DIRECTED that Petitioner pled guilty to committing a felony which constitutes a breach of the public trust and thus Respondent must forfeit Petitioner's FRS rights and benefits as directed by Section 112.3173, Florida Statutes.

DONE and ORDERED on this 9th day of November, 2011.



JACK P. MILES, Secretary
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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 9th day of November, 2011.

Debbie Shoup
Agency Clerk