

STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

MARK G. BOLLONE,
Petitioner,

Final Order No. DMS - 11-0124

vs.

Case No. 11-3274

DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,

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 F. Scott Boyd
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

For the Petitioner:

H.B. Stivers, Esq.
Levine & Stivers, L.L.C.
245 E. Virginia Street
Tallahassee, Florida 32301

For the Respondent:

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

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

PRELIMINARY STATEMENT

The Division notified 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 certain criminal offenses. The notice afforded Petitioner a point of entry to challenge the Division'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 sections 120.569 and 120.57(1), Florida Statutes. By order dated August 8, 2011, the Division was granted official recognition of the Arrest/Probable Cause Affidavit, the Amended Information, the Plea and Acknowledgment of Rights, the transcript of the Plea and Sentencing Hearing, and the Judgment filed in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, in the case styled and numbered State v. Bollone, Case 10-CF-3018.

The matter was ultimately heard on September 14, 2011. Petitioner presented the testimony of one witness and submitted two exhibits for admission into evidence. The Division presented the testimony of four witnesses and submitted thirteen exhibits

¹ All statutory references are to the 2010 Florida Statutes, except as otherwise indicated.

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 September 30, 2011. The parties' proposed recommended orders were timely filed and were duly considered by the administrative law judge in the preparation of his recommended order.

On October 19, 2011, the administrative law judge 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 administrative law judge'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 administrative law judge'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 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 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

Upon review of the entire record, the Department concludes that the administrative law judge's findings of fact in the recommended order are supported by the competent substantial evidence of record and that the proceedings upon which the findings are based comply with the essential requirements of law. The Department hereby adopts and incorporates by reference the findings of fact set forth in the recommended order.

CONCLUSIONS OF LAW

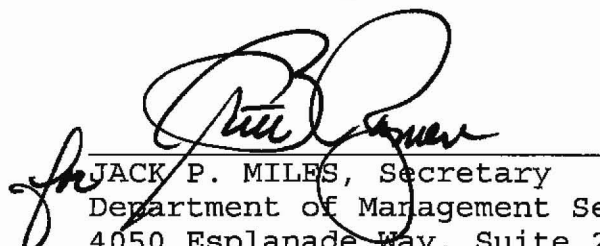
The Department hereby adopts and incorporates by reference the conclusions of law set forth in the recommended order.

Based upon the foregoing it is,

ORDERED and DIRECTED that Petitioner was a public employee convicted of a specified offense committed prior to retirement pursuant to section 112.3173, Florida Statutes, and has forfeited all of his FRS rights and benefits, except for the return of his accumulated contributions, if any, as of the date of termination.

DONE and ORDERED on this 22 day of December,

2011.


JACK P. MILES, Secretary
Department of Management Services
4050 Esplanade Way, Suite 285
Tallahassee, Florida 32399

Copies to:

Mr. Mark G. Bollone
c/o H.B. Stivers, Esq.
Levine & Stivers, L.L.C.
245 E. Virginia Street
Tallahassee, Florida 32301

Judge F. Scott Boyd
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

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 22nd day of December, 2011.

Pebbi Shoup
Agency Clerk