

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES COMBS,

Petitioner,

vs.

Case No. 15-6633

STATE BOARD OF ADMINISTRATION,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on February 26, 2016, in Tallahassee, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Frank E. Maloney, Jr., Esquire
Frank E. Maloney, Jr., P.A.
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Macclenny, Florida 32063

For Respondent: Brian A. Newman, Esquire
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STATEMENT OF THE ISSUE

The issue is whether, pursuant to section 112.3173, Florida Statutes (2015),^{1/} Petitioner forfeited his Florida Retirement System ("FRS") Investment Plan account by entering a nolo

contendere plea to two counts of violating section 893.13(2)(a)1., Florida Statutes, a second-degree felony.

PRELIMINARY STATEMENT

On August 25, 2015, Charles G. Combs ("Mr. Combs" or "Petitioner") pled nolo contendere to two counts of purchasing Oxycodone, a violation of section 893.13(2)(a)1., and a second-degree felony. The Bradford County Circuit Court accepted the plea but withheld adjudication.

Via a letter dated September 3, 2015, the State Board of Administration ("the SBA") notified Mr. Combs that his rights and benefits under the FRS Investment Plan had been forfeited as a result of his nolo contendere plea for acts committed while employed with the Department of Corrections ("DOC"). In support thereof, the SBA noted that Article II, section 8(d), Florida Constitution, provides that "[a]ny 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."

Mr. Combs responded to the SBA's letter by requesting an administrative hearing and asserting that the SBA's determination should be reversed because the allegations to which he pled nolo contendere had nothing to do with his position at DOC. Thus, Mr. Combs asserts there was no breach of the public trust.

The SBA referred the matter to DOAH, and the undersigned scheduled a formal administrative hearing for February 26, 2016.

Mr. Combs filed a Motion in Limine on February 16, 2016, seeking to preclude two of the SBA's proposed exhibits from being accepted into evidence. The proposed exhibits in question were an arrest warrant and a warrant affidavit. With regard to the arrest warrant, Mr. Combs argued it was irrelevant because he had not been convicted of any of the six counts set forth in the arrest warrant. As for the warrant affidavit, Mr. Combs argued that it contained irrelevant hearsay.

On February 23, 2016, Mr. Combs filed a second Motion in Limine seeking to preclude two audio recordings and a deposition from being accepted into evidence. The audio recordings memorialized the Bradford County Sheriff Office's interrogations of Mr. Combs. Mr. Combs asserted that the audio recordings and the deposition were irrelevant and would serve no purpose other than to inflame the finder of fact.

The SBA responded to Mr. Combs' Motions in Limine on February 25, 2016, by noting that hearsay is admissible in administrative proceedings and that "to the extent any hearsay is offered, it should be admitted to support findings based on other direct evidence and in this case is necessary to provide context to the events that led to Mr. Combs' arrest and conviction." As for the relevancy of the exhibits in question, the SBA noted that

there can be no forfeiture of retirement benefits unless there is a nexus between a public employee's crime(s) and his or her state employment. According to the SBA, the exhibits in question pertain "directly to the heart of this matter and will be used to show that a sufficient nexus exists between Petitioner's state employment and his crimes."

The undersigned addressed Mr. Combs' Motions in Limine at the start of the February 26, 2016, hearing. The SBA announced that it was withdrawing the deposition as a potential exhibit, but the SBA still wanted to have the arrest affidavit attached to the deposition accepted into evidence.^{2/} After hearing argument from counsel, the undersigned ruled that the two audio recordings were hearsay but noted that hearsay is admissible in administrative proceedings. Nevertheless, it was noted that findings of fact cannot be based on hearsay unless the hearsay supplements or corroborates other non-hearsay evidence. It was also noted that the audio recordings could possibly fall under the hearsay exception in section 90.803(18), Florida Statutes, pertaining to a party's own statement that is offered against that party. See generally State v. Elkin, 595 So. 2d 119, 120 (Fla. 3d DCA 1992) (noting that "[r]elevant, out-of-court statements of a party opponent, as is the statement at issue, are admissible in evidence pursuant to section 90.803(18), Florida

Statutes (1989), and thus are an exception to the hearsay rule.”).

With regard to Mr. Combs’ assertion that the arrest warrant and the arrest affidavit were irrelevant, the undersigned deferred ruling on their relevancy until they could be considered in context with all of the evidence and testimony to be presented at the final hearing.

Prior to hearing any testimony, the undersigned granted Mr. Combs a standing objection to any testimony regarding alleged wrongdoing by Mr. Combs, other than the two charges to which he pled nolo contendere.

Mr. Combs was the only witness at the final hearing.

As for exhibits at the final hearing, the undersigned accepted Joint Exhibits J-2 through J-9 into evidence. As noted above, the audio recordings marked as Respondent’s Exhibits R-2a and R-2b were accepted into evidence. Joint Exhibit 1 (which was marked as J-1 and just consisted of the arrest affidavit) and the arrest warrant, Respondent’s Exhibit R-1, were also accepted subject to further consideration of Mr. Combs’ relevancy objection.

As explained more fully below, Mr. Combs’ objections based on relevancy are overruled. The subjects of his objections pertain to the circumstances associated with the Oxycodone purchases which led to Mr. Combs’ nolo contendere plea and the

SBA's subsequent determination that Mr. Combs had forfeited his rights and benefits under the FRS.

The one-volume Transcript was filed on March 30, 2016, and the Parties timely filed their Proposed Recommended Orders. The undersigned gave due consideration to both of those Proposed Recommended Orders.

FINDINGS OF FACT

I. The Events Giving Rise to this Proceeding

1. Mr. Combs began working for DOC on May 25, 2001, as a Correctional Officer Level 1 at the Union Correctional Institution ("Union Correctional") in Raiford, Florida.

2. Union Correctional is a maximum security facility housing approximately 2,000 inmates, and Mr. Combs assisted with their care and custody.

3. In January of 2006, Mr. Combs earned a promotion to Correctional Officer, Sergeant. While his responsibilities were very similar to those of his previous position, Mr. Combs was now supervising other correctional officers.

4. In October of 2011, Mr. Combs earned a promotion to Correctional Officer, Lieutenant, and was responsible for supervising 50 to 70 correctional officers at Union Correctional.

5. In April of 2013, Mr. Combs earned a promotion to Correctional Officer, Captain, and transferred to Florida State Prison in Starke, Florida.

6. A captain is the highest ranking correctional officer on a given shift, and Mr. Combs supervised approximately 50 correctional officers at a time, including sergeants and lieutenants.

7. Like Union Correctional, Florida State Prison is a maximum security facility housing approximately 2,000 prisoners.

8. A colonel manages Florida State Prison, and it has two separate units. One of those units is a work camp housing lower-custody inmates who may work outside the facility, and the main prison is the other unit. Each of the units is run by its own major.

9. In February of 2015, Mr. Combs was promoted to Major and took charge of the work camp at Florida State Prison.

10. At some point in 2014 and prior to his promotion to Major, Mr. Combs had begun taking Oxycodone recreationally.

11. Mr. Combs typically purchased one Oxycodone pill three to four times a week, and Dylan Hilliard (a Correctional Officer 1 at Florida State Prison) was Mr. Combs' primary source of Oxycodone.

12. Mr. Hilliard usually worked at the main prison, but he occasionally worked at the work camp.

13. Mr. Combs knew Mr. Hilliard because of their employment with DOC.

14. Mr. Combs purchased Oxycodone from Mr. Hilliard at the latter's home in Lawtey, Florida. However, some transactions occurred in Mr. Combs' state-issued housing on the grounds of Florida State Prison.

15. Mr. Hilliard charged Mr. Combs \$35 for an Oxycodone pill, and that was a discount from the \$38 price Mr. Hilliard charged others.

16. Mr. Combs allowed his subordinates (Sergeants Jesse Oleveros and Evan Williams) to leave Florida State Prison during their shifts in order to purchase illegal drugs from Mr. Hilliard.

17. After returning from their transactions with Mr. Hilliard, Mr. Oleveros and Mr. Williams would give Mr. Combs an Oxycodone pill free of charge.

18. Operation Checkered Flag was a joint task force led by the Bradford County Sheriff's Office, and its purpose was to arrest individuals involved with the distribution and use of illegal drugs.

19. The authorities arrested Mr. Hilliard after he engaged in an illegal drug transaction with an undercover agent from the Florida Department of Law Enforcement.

20. A subsequent search of Mr. Hilliard's cell phone revealed text messages between Mr. Hilliard and several other DOC employees, including Mr. Combs.

21. Mr. Hilliard referred to Mr. Combs as "Chicken-Hawk" or "Hawk" in those text messages, and the two of them used car part terminology as a code for different milligram sizes of Oxycodone.

22. Operation Checkered Flag ultimately resulted in the arrest of 10 DOC employees.

23. The authorities arrested Mr. Combs on July 1, 2015, based on allegations that he had committed six felonies relating to the alleged unlawful and illegal purchase and distribution of Oxycodone.

24. DOC fired Mr. Combs on approximately July 1, 2015.

25. Mr. Combs initially denied all of the allegations. However, after spending nearly 56 days in jail, Mr. Combs reached an agreement with the State Attorney's Office in Bradford County that called for his criminal charges to be reduced in exchange for his cooperation with Operation Checkered Flag.

26. During an interview on August 20, 2015, with members of Operation Checkered Flag, Mr. Combs admitted that he had purchased Oxycodone from Mr. Hilliard.

27. In addition, Mr. Combs admitted that on six or seven occasions he allowed Mr. Oleveros and Mr. Williams to leave the prison grounds so that they could purchase Oxycodone from Mr. Hilliard.

28. The State Attorney's Office in Bradford County chose to dismiss most of the charges against Mr. Combs. The Information

ultimately filed against Mr. Combs set forth two counts alleging that he violated section 893.13(2)(a)1., by illegally purchasing Oxycodone on March 23, 2015, and March 31, 2015.

29. Those purchases occurred approximately 10 miles from Florida State Prison at Mr. Hilliard's residence in Lawtey, Florida. Neither Mr. Combs nor Mr. Hilliard was on duty during those transactions.

30. On August 25, 2015, Mr. Combs pled nolo contendere.

31. The Bradford County Circuit Court entered judgment against Mr. Combs based on the two violations of section 893.13(2)(a)1., but withheld adjudication.

32. All of the conduct underlying Mr. Combs' nolo contendere plea occurred while he was employed by DOC.

II. The SBA Determines that Mr. Combs Forfeited his FRS Benefits

33. At all times relevant to the instant case, Mr. Combs was a member of the FRS.

34. The FRS is the legislatively-created general retirement system established by chapter 121, Florida Statutes. See § 121.021(3), Fla. Stat.

35. The SBA is the governmental entity that administers the FRS Investment Plan, a defined retirement benefits contribution plan. § 121.4501(1), Fla. Stat.

36. Via a letter dated August 3, 2015, the SBA notified Mr. Combs that a hold had been placed on his FRS account due to

the criminal charges. As a result, no distribution of employer contributions from Mr. Combs' account would be permitted until the SBA had evaluated the final disposition of those criminal charges.

37. Via a letter dated September 3, 2015, the SBA notified Mr. Combs that he had forfeited his FRS benefits as a result of his nolo contendere plea. In support thereof, the SBA cited section 112.3173, Florida Statutes, which provides for the forfeiture of a public employee's FRS retirement benefits upon the entry of a nolo contendere plea to certain types of offenses.

38. The SBA's letter closed by notifying Mr. Combs of his right to challenge the SBA's proposed action through an administrative hearing.

39. Mr. Combs requested a formal administrative hearing and asserted that the crimes for which he was convicted did not fall within the scope of section 112.3173(2)(e). In other words, Mr. Combs argued that his convictions were not associated with his employment at DOC and thus did not amount to a violation of the public trust.

III. Testimony Adduced at the Final Hearing

40. Mr. Combs testified that he was responsible for the work camp and the supervision of the correctional officers

assigned there. He also testified that he would occasionally supervise correctional officers who normally worked in the main prison.

41. Mr. Combs testified that Mr. Hilliard was his primary source of Oxycodone and that Mr. Hilliard occasionally worked at the work camp.

42. Mr. Combs was aware that two Florida State Prison employees who worked directly under him (Sergeant Jesse Oleveros and Sergeant Evan Williams) were purchasing Oxycodone from Mr. Hilliard.

43. Mr. Combs testified that he allowed Mr. Oleveros and Mr. Williams to leave Florida State Prison grounds six or seven times in order to purchase Oxycodone from Mr. Hilliard.

44. Mr. Combs testified that Mr. Oleveros and Mr. Williams would give him an Oxycodone pill after returning from their transactions with Mr. Hilliard.

45. Mr. Combs acknowledged during his testimony that DOC policy prohibits correctional officers from leaving prison grounds during their shift.

46. Mr. Combs acknowledged that it was a violation of DOC policy and Florida law to allow a correctional officer to leave prison grounds during a shift for the purpose of purchasing illegal narcotics.

47. Mr. Combs also acknowledged that it was a violation of DOC policy and Florida law to allow a correctional officer to be on prison grounds with illegal narcotics.

48. Finally, Mr. Combs acknowledged that as a sworn officer with the Department of Corrections, he had an obligation to report any criminal activity committed by a correctional officer working at Florida State Prison, regardless of whether that correctional officer reported to him.

IV. Findings of Ultimate Fact

49. An examination of the circumstances associated with Mr. Combs' Oxycodone purchases from Mr. Hilliard demonstrates that there is a nexus between Mr. Combs' employment as a correctional officer with DOC and his commission of the crimes to which he pled nolo contendere.

50. For instance, Mr. Combs came to know his primary source of Oxycodone (Mr. Hilliard) through their mutual employment with DOC. Indeed, Mr. Combs supervised Mr. Hilliard when the latter was assigned to the work camp at Florida State Prison.

51. Also, Mr. Combs knew that these transactions were illegal. As noted above, he and Mr. Hilliard used a code based on car part references to disguise the actual subject of their communications.

52. Contrary to DOC policy and Florida Law, Mr. Combs allowed two of his subordinates (Mr. Oleveros and Mr. Williams)

to leave Florida State Prison during their duty shifts in order to purchase illegal drugs from Mr. Hilliard. Mr. Combs would then receive a free pill from Mr. Oleveros and Mr. Williams.

53. Mr. Hilliard sold Oxycodone to Mr. Combs at a reduced price. It is reasonable to infer that Mr. Combs received this discount due to his high-ranking position at Mr. Hilliard's place of employment and because Mr. Combs facilitated Mr. Oleveros and Mr. Williams' purchases of Oxycodone from Mr. Hilliard.

54. Mr. Combs willfully violated DOC policy and Florida law by allowing correctional officers to leave prison grounds during a shift for the purpose of purchasing illegal narcotics.

55. Mr. Combs knowingly violated his obligation as a sworn correctional officer by not reporting the criminal activity committed by Mr. Hilliard.

56. Mr. Combs defrauded the public from receiving the faithful performance of his duties as a correctional officer. The public had a right to expect that one of its employees would not purchase drugs from someone he supervised. The public also had a right to expect that Mr. Combs would not use his authority at Florida State Prison to facilitate Mr. Hilliard's illegal drug sales to other DOC employees. In addition, the public had a right to expect that Mr. Combs would not engage in illegal transactions on the grounds of Florida State Prison.

57. Mr. Combs realized a profit, gain, or advantage through the power or duties associated with his position as a Major at DOC. Specifically, Mr. Combs satisfied his Oxycodone habit through purchases made from a DOC employee who he supervised. Also, Mr. Combs used his position to facilitate other sales by Mr. Hilliard, and Mr. Combs' assistance led to him receiving free Oxycodone and a discounted price on his Oxycodone purchases.

58. The findings set forth above in paragraphs 49 through 57 are the only ones needed to establish a nexus between Mr. Combs' public employment and the two counts to which he pled nolo contendere. That nexus is evident from Mr. Combs' testimony, Mr. Combs' Responses to the SBA's Requests for Admissions, and the Stipulated Facts. It was not necessary to consider the exhibits to which Mr. Combs raised objections, i.e., the arrest warrant, the warrant affidavit, and the audio recordings.

CONCLUSIONS OF LAW

59. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1).

60. The FRS is a public retirement system as defined by Florida Law and, as such, the SBA's proposed action to forfeit Petitioner's FRS rights and benefits is subject to administrative review. See § 112.3173(5)(a), Fla. Stat.

61. Article II, section 8, Florida Constitution, titled "Ethics in Government," states in pertinent part:

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.

62. Section 112.3173 implements Article II, section 8, Florida Constitution, and is part of the statutory code of ethics for public officers and employees. The statute states in pertinent part:

(1) INTENT.—It is the intent of the Legislature to implement the provisions of s. 8(d), Art. II of the State Constitution.

(2) DEFINITIONS.—As used in this section, unless the context otherwise requires, the term:

(a) "Conviction" and "convicted" mean an adjudication of guilt by a court of competent jurisdiction; a plea of guilty or of nolo contendere; a jury verdict of guilty when adjudication of guilt is withheld and the accused is placed on probation; or a conviction by the Senate of an impeachable offense.

* * *

(c) "Public officer or employee" means an officer or employee of any public body,

political subdivision, or public instrumentality within the state.

(d) "Public retirement system" means any retirement system or plan to which the provisions of part VII of this chapter apply.

(e) "Specified offense" means:

1. The committing, aiding, or abetting of an embezzlement of public funds;
2. The committing, aiding, or abetting of any theft by a public officer or employee from his or her employer;
3. Bribery in connection with the employment of a public officer or employee;
4. Any felony specified in chapter 838, except ss. 838.15 and 838.16;
5. The committing of an impeachable offense;
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; or
7. The committing on or after October 1, 2008, of any felony defined in s. 800.04 against a victim younger than 16 years of age, or any felony defined in chapter 794 against a victim younger than 18 years of age, by a public officer or employee through

the use or attempted use of power, rights, privileges, duties, or position of his or her public office or employment position.

(3) FORFEITURE.—Any public officer or employee who is convicted of a specified offense committed prior to retirement, or whose office or employment is terminated by reason of his or her admitted commission, aid, or abetment of a specified offense, shall forfeit all rights and benefits under any public retirement system of which he or she is a member, except for the return of his or her accumulated contributions as of the date of termination.

* * *

(5) FORFEITURE DETERMINATION.— (a) Whenever the official or board responsible for paying benefits under a public retirement system receives notice pursuant to subsection (4), or otherwise has reason to believe that the rights and privileges of any person under such system are required to be forfeited under this section, such official or board shall give notice and hold a hearing in accordance with chapter 120 for the purpose of determining whether such rights and privileges are required to be forfeited. If the official or board determines that such rights and privileges are required to be forfeited, the official or board shall order such rights and privileges forfeited.

63. As the party asserting that Mr. Combs has forfeited his rights and benefits under the FRS pursuant to section 112.3173(3), the SBA bears the burden of proof in this proceeding. See Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981). See also Balino v. Dep't of HRS., 348 So. 2d 349 (Fla. 1st DCA 1977).

64. The statutory forfeiture provision at issue, section 112.3173(3), is not penal and does not involve disciplinary action against a license. Accordingly, the standard of proof in this proceeding is a preponderance of the evidence.

§ 120.57(1)(j), Fla. Stat.; Childers v. Dep't of Mgmt. Servs., Case No. 07-2128 (Fla. DOAH July 17, 2007), modified in part, OGC Case No. 04-03615 (Fla. State Bd. of Admin. Sept. 28, 2007).

65. Not every crime committed by a public officer or employee gives rise to forfeiture of FRS rights and benefits under section 112.3173. To result in forfeiture, the crime must be a "specified offense" as defined in section 112.3173(2)(e)1. through 7.

66. The illegal purchase of Oxycodone is not among the specified offenses enumerated in paragraphs 1. through 5. or 7. of section 112.3173(2)(e). Accordingly, the issue is whether Mr. Combs' crimes fall within section 112.3173(2)(e)6., which has been called the "catch-all" provision of the forfeiture statute. See Bollone v. Dep't of Mgmt. Servs., 100 So. 3d 1276, 1280 (Fla. 1st DCA 2012).

67. Mr. Combs argues that the charges to which he pled nolo contendere do not fall within the "catch-all" provision of the forfeiture statute. In doing so, Mr. Combs argues that the analysis of this issue must be limited to the fact that he illegally purchased Oxycodone on March 23, 2015, and March 31,

2015. Mr. Combs' hearing testimony, the arrest warrant, and the arrest affidavit are supposedly irrelevant. In other words, the undersigned cannot consider the circumstances associated with the Oxycodone purchases. If the analysis is so restricted, Mr. Combs argues that the SBA cannot establish the required nexus between his offenses and his former position as a Major at Florida State Prison.

68. However, Mr. Combs' argument is directly contrary to previous cases dealing with whether an offense falls within the "catch-all" provision. The First District Court of Appeal has concluded that whether a particular crime falls under the "catch-all" provision "depends on the way in which the crime was committed." Jenne v. Dep't of Mgmt. Servs., 36 So. 2d 738, 742 (Fla. 1st DCA 2010) (rejecting the Appellant's contention "that his conviction for conspiracy to commit mail fraud does not meet the definition of a specified offense because the elements required to prove the offense do not match the elements of any of the crimes described in the statute."). See Bollone v. Dep't of Mgmt. Servs., 100 So. 3d at 1280 (citing Jenne and stating "this Court has held that the term 'specified offense' is defined by the conduct of the public official, not by the elements of the crime for which the official was convicted.").

69. Therefore, the circumstances associated with an offense are relevant to evaluating whether that offense amounts to a

specified offense under section 112.3173(2)(e)6. Thus, the required analysis must take into account facts such as the following: (a) Mr. Combs and Mr. Hilliard came to know each other through their employment at DOC; (b) Mr. Combs supervised Mr. Hilliard on the occasions when the latter was assigned to the work camp at Florida State Prison; (c) some of the transactions between Mr. Combs and Mr. Hilliard occurred on the grounds of Florida State Prison; (d) Mr. Combs used his position at Florida State Prison to facilitate other illegal transactions involving Mr. Hilliard and other DOC employees; and (e) Mr. Combs obtained a profit and/or gain by facilitating the aforementioned transactions.

70. To constitute a specified offense under section 112.3173(2)(e)6., the criminal act must be: (a) a felony; (b) committed by a public officer or employee; (c) done willfully and with the intent to defraud the employee's public employer of the right to receive the faithful performance of the employee's duty; (d) done to realize or obtain a profit, gain, or advantage for the employee or some other person; (e) and done through the use of the power, rights, privileges, duties, or position of the employee's public employment. Bollone v. Dep't of Mgmt. Servs., 100 So. 3d at 1280-81.

71. When the above criteria are applied to the circumstances associated with Mr. Combs' purchases of Oxycodone, it is readily apparent that he committed a specified offense.

72. For instance, there is no dispute that Mr. Combs was a public employee when he committed the acts described above. There is also no dispute that Mr. Combs pled nolo contendere to two counts of violating section 893.13(2)(a)1., a second-degree felony. Thus, the first two criteria for a specified offense under section 112.3173(2)(e)6., are satisfied.

73. As for whether Mr. Combs defrauded the public or DOC, this requirement is satisfied if there is evidence of a "nexus between the crimes charged against the public officer and his or her duties and/or position." DeSoto v. Hialeah Police Pension Fund Bd. of Trs., 870 So. 2d 844, 846 (Fla. 3d DCA 2003). The nexus is satisfied where one violates his or her duties as a public officer in failing to safeguard the public's faith in that public office or position. Id.

74. In the instant case, the facts demonstrate there was a nexus between Mr. Combs' purchase of Oxycodone from Mr. Hilliard and Mr. Combs' duties as a correctional officer.

75. For instance, Mr. Combs acknowledged during his testimony that a sworn officer with DOC has an obligation to report criminal activity committed by another correctional officer. Mr. Combs obviously violated that oath by not reporting

Mr. Hillard's illegal activity. That fact (in and of itself) would be sufficient to establish the nexus between Mr. Combs' purchases of Oxycodone and his duties as a public employee. See Zeh v. Bd. of Trs. of the City of Longwood Police Officers' and Firefighters' Pension Trust Fund, Case No. 14-0870, 2014 Fla. Div. Adm. Hear. LEXIS 355 (Fla. DOAH June 30, 2014; Bd. of Trs. Oct. 24, 2014) (evaluating the nexus between petitioner's duties as a police officer and his nolo contendere plea to burglary with assault/battery and aggravated assault and concluding petitioner "testified he took an oath, and he violated such oath upon committing the felonies in question. The acts were committed while he was on duty, in uniform, and in possession of City police officer equipment. Therefore, the nexus between the crimes charged and the duties of the public officer has been met.").

76. Furthermore, there can be no reasonable dispute that Mr. Combs' acted willfully given his acknowledgements during the final hearing that DOC policy and/or Florida law prohibit a correctional officer from: (a) leaving prison grounds during their shift; (b) leaving prison grounds during a shift for the purpose of purchasing illegal narcotics; and from (c) having illegal narcotics on prison grounds.

77. Other circumstances associated with Mr. Combs' purchases of Oxycodone also demonstrate that there is a nexus between his offense and his duties as a public officer.

78. For instance, the public and DOC had a right to expect that Mr. Combs would not engage in criminal activity with his co-workers. See Bollone v. Dep't of Mgmt. Serv., Case No. 11-3274, 2011 Fla. Div. Admin. Hear. LEXIS 259 (Fla. DOAH Oct. 19, 2011; DMS Dec. 28, 2011) (concluding "[t]he public and TCC had a right to expect Mr. Bollone would not use the computer entrusted to him for criminal activity. The public was defrauded when Petitioner used that public property to further his private interest in the possession of child pornography, a crime under the laws of Florida, and a breach of the public trust.").

79. The public and DOC had a right to expect that Mr. Combs would not engage in illegal transactions with Mr. Hillard on the grounds of Florida State Prison.

80. In addition, the public and DOC had a right to expect that Mr. Combs would not knowingly allow his subordinates to leave their work stations (while on duty) in order to purchase illegal narcotics.

81. As for the fourth criterion for a specified offense under section 112.3173(2)(e)6., Mr. Combs' position in the Florida State Prison lead to him receiving a profit and/or gain from his transactions with Mr. Hilliard. Mr. Combs' gain

resulted from the fact that he was able to facilitate his recreational use of illegal narcotics through transactions with Mr. Hilliard. While satisfying one's addiction is not a monetary gain, the personal gain referenced in section 112.3173(2)(e)6., is not limited to finances. See Zeh v. Bd. of Trs., 2014 Fla. Div. Admin. Hear. LEXIS 355, at *10 (rejecting petitioner's argument that respondent failed to demonstrate that the offense was committed to obtain a profit by concluding that "the statute does not provide that only economic gain can be considered personal gain. Bollone v. Dep't of Mgmt. Servs., 100 So. 3d at 1281. Here, the record demonstrates non-monetary personal gains or advantages accruing to Petitioner, who believed that his conduct against Mr. Feld would stop the affair, influence or otherwise persuade his wife to return home, and allow the couple to continue the marriage. Such personal benefits obtained while on duty, in uniform, and while carrying and using a service weapon are the types of profits and intended benefits chapter 112 was enacted to prohibit. Bollone at 1282."); Bollone v. Dep't of Mgmt. Serv., 2011 Fla. Div. Adm. Hear. LEXIS 259, at *22 (noting that "[n]umerous hearings under this forfeiture statute and similar statutes have consistently concluded that sexual gratification constitutes personal gain.").

82. Nevertheless, Mr. Combs did receive a monetary benefit because Mr. Hilliard sold him oxycodone pills for \$35 a pill when

others were paying \$38 a pill. It is reasonable to infer that Mr. Combs received a discount because he occasionally supervised Mr. Hilliard and facilitated Mr. Hilliard's sales to Mr. Oleveros and Mr. Williams by allowing them to prematurely leave their duty stations.

83. The fifth and final criterion for a specified offense under section 112.3173(2)(e)6., requires that the felonious conduct be done through the use or attempted use of the "powers, rights, privileges, duties, or position of the employee's environment." Bollone v. Dep't of Mgmt. Servs., 100 So. 3d at 1281.

84. In the instant case, Mr. Combs was purchasing Oxycodone from someone he knew through his employment at Florida State Prison. There is no indication in the Record that Mr. Combs would have come into contact with Mr. Hilliard through any other means. See Holsberry v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 09-0087, 2009 Fla. Div. Adm. Hear. LEXIS 933 (Fla. DOAH July 24, 2009; Fla. DMS Oct. 22, 2009) (concluding the petitioner "used or attempted to use the power, rights, privileges, duties, or position of his public office, and his contact with R.D. was made possible only as a result of his position as a teacher."); Marsland v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 08-4385, 2008 Fla. Div. Adm. Hear. LEXIS 294 (DOAH Dec. 15, 2008; Fla. DMS Jan. 20, 2009) (evaluating whether lewd or lascivious

molestation amounts to a specified offense and concluding the petitioner "used or attempted to use the power, rights, privileges, duties, or position of his public office. Petitioner's actions were made possible only as a result of his position as a teacher.").

85. Moreover, it is reasonable to infer that Petitioner received a discount due to his status as a supervisor and/or because of the fact that he facilitated other sales by Mr. Hilliard. See Maradey v. St. Bd. of Admin., Case Number. 13-4172, 2014 Fla. Div. Adm. Hear. LEXIS 21 (Fla. DOAH Jan. 16, 2014; Fla. SBA Apr. 7, 2014); Bollone v. Dep't of Mgmt. Servs., 2011 Fla. Div. Adm. Hear. LEXIS 259, at *22 (concluding that petitioner's "gain or advantage to himself was effected through the use of the power, rights, privileges and position of his employment at TCC. His use of the public computer was a power, right and privilege of his position which he exercised to possess child pornography").

86. Furthermore, while the purchases leading to Mr. Combs' guilty plea were made in Mr. Hillard's private residence, there were occasions when the illegal transactions between Mr. Combs and Mr. Hillard would occur on the grounds of Florida State Prison. See Zeh v. Bd. of Trs., 2014 Fla. Div. Adm. Hear LEXIS 355, at *12 (noting the felonious conduct must be done through the use or attempted use of the powers, rights, privileges,

duties, or position of the employee's employment and concluding that criterion was satisfied because "[t]he record shows that Petitioner committed the felonies while on duty, while in uniform, and while carrying a City-issued firearm. The felonies occurred after he drove a police cruiser to the location of the incident.").

87. In sum, the evidence establishes that Mr. Combs was convicted of felonies; that he was a public employee; that he committed the crimes willfully and with intent to defraud the public of the right to receive the faithful performance of his duty as a public employee; that he realized, obtained, and attempted to realize or obtain, a profit or gain for himself; and that his criminal acts were committed through the use of his public employment position.

88. Accordingly, the offenses to which Mr. Combs pled nolo contendere are "specified offenses" within the meaning of section 112.3173(2)(e)6.

89. As such, all of the requirements in section 112.3173(3) for forfeiture are met. Mr. Combs is deemed to have forfeited all of his rights and privileges in his Florida Retirement System Investment Plan account, except for the return of his accumulated contributions as of the date of his termination.

See § 112.3173(3), Fla. Stat.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the State Board of Administration issue a final order finding that Petitioner was a public employee convicted of specified offenses that were committed prior to retirement, and that pursuant to section 112.3173 he has forfeited all of his rights and benefits in his Florida Retirement System Investment Plan account, except for the return of his accumulated contributions as of the date of his termination.

DONE AND ENTERED this 10th day of May, 2016, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of May, 2016.

ENDNOTES

^{1/} All statutory citations will be to the 2015 version of the Florida Statutes unless indicated otherwise.

^{2/} The Transcript from the final hearing indicates that the undersigned misspoke by stating that the deposition would be accepted into evidence even though the SBA had withdrawn it as a potential exhibit. The undersigned did not intend to accept the deposition into evidence and notes for the record that the deposition was not considered in the preparation of this Recommended Order. In fact, the undersigned clarified toward the conclusion of the final hearing that only the arrest affidavit attached to the deposition transcript was being moved into evidence.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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