STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

CHARLES COMBS, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	DOAH Case No. 15-6633 SBA Case No. 2015-3419

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DIVISION OF ADMINISTRATIVE HEARINGS

FINAL ORDER

On May 10, 2016, Administrative Law Judge Garnett W. Chisenhall (hereafter "ALJ") submitted his Recommended Order to the State Board of Administration (hereafter "SBA") in this proceeding. A copy of the Recommended Order indicates that copies were served upon counsel for the Petitioner and upon counsel for the Respondent. Both Petitioner and Respondent filed timely filed Proposed Recommended Orders. Petitioner timely filed exceptions on May 19, 2016. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief, Defined Contribution Programs Officer for final agency action.

STATEMENT OF THE ISSUE

The State Board of Administration adopts and incorporates in this Final Order the Statement of the Issue in the Recommended Order as if fully set forth herein.

PRELIMINARY STATEMENT

The State Board of Administration adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order as if fully set forth herein.

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact of an Administrative Law Judge ("ALJ") cannot be rejected or modified by a reviewing agency in its final order "...unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings were not based upon competent substantial evidence...." *See* Section 120.57(1)(l), Florida Statutes. *Accord, Dunham v. Highlands Cty. School Brd*, 652 So.2d 894 (Fla 2nd DCA 1995); *Dietz v. Florida Unemployment Appeals Comm*, 634 So.2d 272 (Fla. 4th DCA 1994); *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122 (Fla. 1st DCA 1987). A seminal case defining the "competent substantial evidence" standard is *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957), in which the Florida Supreme Court defined it as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred" or such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached."

An agency reviewing an ALJ's recommended order may not reweigh evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of administrative law judges as the triers of the facts. *Belleau v. Dept of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Maynard v. Unemployment Appeals Comm.*, 609 So.2d 143, 145 (Fla. 4th DCA 1993). Thus, if the record discloses any competent substantial evidence supporting finding of fact in the ALJ's Recommended Order, the Final Order will be bound by such factual finding.

Pursuant to Section 120.57(1)(l), Florida Statutes, however, a reviewing agency has the general authority to "reject or modify [an administrative law judge's] conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over

which it has substantive jurisdiction." Florida courts have consistently applied the "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 or rule over which the Legislature has provided the agency with 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). When rejecting or modifying any conclusion of law, the reviewing agency must state with particularity its reasons for the rejection or modification and further must make a finding that the substituted conclusion of law is as or more reasonable than that which was rejected or modified. Further, an agency's interpretation of the statutes and rules it administers is entitled to great weight, even if it is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. *See, State Bd. of Optometry v. Fla. Soc'y of Ophthalmology*, 538 So.2d 878, 884 (Fla. 1st DCA 1998). An agency's interpretation will be rejected only where it is proven such interpretation is clearly erroneous or amounts to an abuse of discretion. *Level 3 Communications v. C.V. Jacobs*, 841 So.2d 447, 450 (Fla. 2002); *Okeechobee Health Care v. Collins*, 726 So.2d 775 (Fla. 1st DCA 1998).

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides that "...an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

RULINGS ON PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

Petitioner's "exception" is merely a reiteration of the arguments made in Petitioner's Proposed Recommended Order to attempt refute a conclusion that forfeiture was appropriate in Petitioner's situation, and which were summarily rejected by the ALJ in his recommended order. Under these circumstances, the SBA is not required to respond to the exception. *See, Britt v. Dep't of Prof'l Regulation,* 492 So.2d 697 (Fla. 1st DCA 1986); *Adult World Inc. v. State of Fla., Div. of Alcoholic Beverages & Tobacco,* 408 So.2d 65 (Fla. 5th DCA 1982). Further, Petitioner's "exception" fails to identify the disputed portions of the Recommended Order by page number or paragraphs and does not include appropriate and specific citations to the record, as required by Section 120.57(1)(k), Florida Statutes. Accordingly, the SBA is not required to rule on the exception.

Even if Petitioner's "exception" satisfied all of the legal requirements for a valid exception, the "exception" still would need to be rejected as the findings in the Recommended Order are supported by substantial competent evidence.

Petitioner seems to be asserting that the crimes to which he pled nolo contendere in no manner are connected to his public employment, since the purchases occurred about ten miles from Petitioner's place of employment when Petitioner was off-duty. However, there is substantial competent evidence to show that there is a sufficient nexus between Petitioner's public employment and the two crimes to which he pled nolo contendere and further to show that these two crimes constitute specified offenses requiring forfeiture as defined in Section 112.3173(2)(e)6., Florida Statutes.

Petitioner is correct in his assertion that not every crime committed by a public officer or employee is a forfeitable offense. Section 112.3173(3), Florida Statutes, states that forfeiture is appropriate only where a public officer or employee commits a "specified offense," as defined by Section 112.3173(2)(e)1. through 7. The purchase of oxycodone is not among the offenses set forth in paragraphs 1. through 5. or 7. of Section 112.3171(2)(e). If forfeiture were appropriate in Petitioner's situation, then all of the conditions of Section 112.3173(2)(e)6., Florida Statutes, the so-called "catch-all" provision, must be satisfied. *See, Bollone v. Dep't of Mgmt. Servs.*, 100 So.3d 1276, 1280 (Fla. 1st DCA 2012). According to the case *Jenne v. State*, 36 So.3d 738, 742 (Fla. 1st DCA 2010), any felony can qualify as a specified offense under Section 112.3173(2)(e)6., Florida Statutes, if all the other conditions set forth in the statutory provision are satisfied. *Jenne* further notes that "all of the remaining conditions" refer to the conduct of the public official or employee and not the definition of the crime. *Id.* at 743 (explaining whether the crime for which a public employee is convicted qualifies as a specified offense "depends on the way in which the crime was committed"). Petitioner argues in his "exception" that Petitioner's testimony during the administrative hearing (and presumably Petitioner's testimony during his deposition- Joint Exhibit 1) cannot be used in the determination as to whether forfeiture is appropriate. (Petitioner's Exception, page 4). However, such argument is not in accord with *Jenne*. Petitioner's own testimony, especially when given under oath, gives context regarding how the Petitioner committed the charged crimes.

Petitioner, a public employee, pled "nolo contendere" to two counts of purchasing oxycodone without a prescription, a second degree felony. (Joint Pre-Hearing Stipulation, ¶V.f; Joint Exhibits 6 and 7). Petitioner did not purchase oxycodone from some random

individual on the street. He made the purchases from one individual, Dylan Hilliard, who was a correctional officer at Florida State Prison, the same facility at which Petitioner worked. (Hearing Transcript, page 33; Respondent's Exhibit R-2b). In fact, Petitioner was Mr. Hilliard's superior officer and Petitioner, on occasion, directly supervised Mr. Hilliard. (Hearing Transcript, pages 31 and 33) But for their public employment, Petitioner and Mr. Hilliard would not have known each other to the degree necessary for them to feel comfortable engaging in drug purchase and sales with each other. (Joint Exhibit 9). The two purchases underlying the charges occurred at a time when both Petitioner and Mr. Hilliard were employed by the Department of Corrections.

The record shows that Petitioner was able to receive a discount on the purchase price of the drugs from Mr. Hilliard. (Hearing Transcript page 40). This is likely due to the fact that Petitioner had a high-ranking position (Major) at Florida State Prison and Mr. Hilliard (as a Correctional Officer 1) may have wanted to curry favor with Petitioner to protect/advance his own career at Florida State Prison. Therefore, Petitioner used the rights and privileges of his public position, including his rank, to purchase drugs at a discount, thereby receiving a profit, gain or advantage. Further, as *Bollone, supra,* at 1281 notes, Section 112.3173(2)(e)6., Florida Statutes, does not state that only economic gain may be considered as being personal gain. Personal gain can include other types of gain, such as filing a false report to protect a fellow police officer who shot a suspect [*Jacobo v. Brd. Of Trustees of Miami Police*, 788 So.2d 363 (Fla. 3d DCA 2001)], or receiving sexual gratification from the felonious conduct [(*Marsland v. Department of Management Services*, 2008 WL 5451423 (Fla. Div. Admin. Hrgs. December 15, 2008)], or having inappropriate contact with a student amounting to child abuse [(Holsberry v. Department of Management

Services, 2009 WL 2237798 (Fla. Div. Admin. Hrgs. July 24, 2009)]. Satisfying a drug addiction can be a further source of gain to Petitioner resulting from using the privileges of his public position as a Major at Florida State Prison to have ready access to illegal drugs.

The record also shows that Petitioner and Mr. Hilliard devised a scheme in an attempt to avoid detection of their drug dealings. When they sent text messages to each other to set up the purchases of oxycodone, they used car part terminology as a code for the different milligram sizes of oxycodone desired. (Joint Exhibit 1, page 32). In addition, the text messages referred to Petitioner as "Chicken-Hawk or "Hawk" rather than his actual name likely in a further attempt to disguise the fact that Petitioner was having drug dealings with Mr. Hilliard. (Hearing Transcript, pp. 35-36, 39-40) Thus, Petitioner and Mr. Hilliard knowingly, willfully and intentionally were involved with illegal drug dealings. Both Petitioner and Mr. Hilliard as sworn corrections officers had an obligation to abide by the law and to report any correctional officers that failed to obey the law. Petitioner failed to meet his obligations as a correctional officer not only by failing to report the criminal activity committed by Mr. Hilliard, but also by furthering such criminal activity. The public has a reasonable right to expect that its sworn Department of Corrections officers, who are charged with the custody and care of prison inmates, will not be involved in criminal activities themselves. And, in fact, by statute, any individual who has pled guilty or nolo contendere to any felony is not eligible to be a correctional officer. *See* Section 943.13(4), Florida Statutes. Thus, Petitioner was found to have defrauded the public from receiving the faithful performance of his duties as a correctional officer by engaging in criminal activity and by failing to report the criminal activity engaged in by Mr. Hilliard.

While Petitioner is arguing he was off duty when the two purchases of oxycodone for which he was charged were made, case law makes it clear that it is possible to demonstrate the gaining of an advantage through the use of the power, rights, privileges and position of one's employment as a law enforcement officer even in the case of an off-duty law enforcement officer. For example, in *Simcox v. Hollywood Police Officers' Ret.*, 988 So.2d 731 (Fla. 4th DCA 2008), a police officer pled guilty to trafficking in drugs when off duty. There was no evidence he wore a uniform, had a badge or carried his service weapon when involved in the criminal activity. He escorted the truck carrying the heroin and apparently encountered no difficulties. The court found forfeiture was appropriate under Section 112.3173(2)(e)6., because Officer Simcox did use the power, rights, privileges, duties, and positon as a police officer by the use of the "...expertise he gained as a law enforcement officer to facilitate the scheme." *Id.* at 734. *See also*, *Newmans v. Division of Retirement*, 701 So.2d 573 (Fla. 1st DCA 1997 (sheriff's use of knowledge and information he obtained through his employment to engage in drug trafficking was found to satisfy the requirement in Section 112.3173(2)(e)6. that the crime had to be related to his public employment). Similarly in the instant situation, Petitioner and Mr. Hilliard, being in such close contact with numerous prisoners, were well aware of how these prisoners got caught and what caused the prisoners to fail in their attempts to conceal their crimes. As such, Petitioner and Mr. Hilliard, using that special knowledge, went to a great of effort to attempt to conceal their activities and their identities in hopes that their crimes would be concealed and that they would not lose their jobs.

There is ample substantial competent evidence in the record to show that Petitioner committed offenses that subject his retirement plan benefits to forfeiture since all of the

elements of Section 112.3173(2)(e)6., Florida Statues are present. The mentioning in the Recommended Order of actions taken by Petitioner that did not form the basis of the charges to which he pled nolo contendere simply was for the purpose of giving additional context concerning how the charges to which Petitioner pled were intimately connected to Petitioner's state employment. Accordingly, Petitioner's "exception" must be rejected.

FINDINGS OF FACT

The State Board of Administration adopts and incorporates in this Final Order the Findings of Fact set forth in the Recommended Order as if fully set forth herein.

CONCLUSIONS OF LAW

The State Board of Administration adopts and incorporates in this Final Order the Conclusions of Law set forth in the Recommended Order as if fully set forth herein.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner has forfeited his Florida Retirement System Investment Plan account benefit under Section 112.3173, Florida Statutes by having pled nolo contendere to two felony counts of violating Section 893.13(2)(a)1., Florida Statutes.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the State Board of Administration in the Office of the General Counsel, State Board of Administration, 1801

Hermitage Boulevard, Suite 100, Tallahassee, Florida, 32308, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days from the date the Final Order is filed with the Clerk of the State Board of Administration.

DONE AND ORDERED this 26th day of July, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Joan B Haseman

Joan B. Haseman
Chief of Defined Contribution Programs
State Board of Administration
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FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Tina Joanos

Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by electronic mail to legalmail@frankmaloney.us and by UPS to Frank E. Maloney, Jr., Counsel for Petitioner, Frank E. Maloney, Jr., P.A., 445 East Macclenny Avenue, Macclenny, Florida 32063 and by email transmission to Brian Newman, Esq. (brian@penningtonlaw.com) and Brandice Dickson, Esq., (brandi@penningtonlaw.com) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 26th day of July, 2016.

Ruth A. Smith

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