STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

JONATHAN BLEIWEISS,

Petitioner,

v. **Case No.:** 16-0524

DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT DMS Final Order No. DMS – 16-0099

Respondent,
_____/

FINAL ORDER

On June 7, 2016, an Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) submitted a Recommended Order (RO) to the Department of Management Services (DMS or Department). A copy of the RO is attached to this Final Order as Exhibit A. Pursuant to section 120.57(1)(b), Florida Statutes, and the notice provided in the RO, parties were allowed to file written exceptions to the RO. Respondent timely filed exceptions to the RO. Petitioner Jonathan Bleiweiss neither filed a response to Respondent's exceptions nor filed his own exceptions.

BACKGROUND

In a Notice of Action to Forfeit Retirement Rights and Benefits, dated November 24, 2015, Respondent notified Petitioner of its intent to deem his rights and benefits under the Florida Retirement System (FRS) forfeited as a result of criminal convictions for armed imprisonment, a crime committed while he was on duty as a deputy sheriff.

Petitioner timely filed a petition, requesting a formal hearing regarding the preliminary forfeiture determination.

The matter was filed with the Division of Administrative Hearings on January 29, 2016, and a formal hearing was conducted by an ALJ via telephone conference call on March 15, 2016.

THE RECOMMENDED ORDER

In the RO, the ALJ recommends that the Department enter a final order finding that Respondent failed to prove all of the statutory elements and restoring Petitioner's rights and benefits under the FRS and paying Petitioner for any past due benefits with interest. (RO pp. 14, 16)

RULINGS ON EXCEPTIONS

In determining how to rule upon a party's exceptions and whether to adopt the ALJ's RO, in whole or in part, the Department must follow Section 120.57(1)(l), Florida Statutes. This law prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ "unless 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." In accordance with these standards, and after having considered the pleadings, the transcript of the proceedings, exhibits admitted into evidence, and the exceptions filed by Respondent, the undersigned makes the following rulings on Respondent's exceptions:

Exception 1

Paragraph 3 of the RO states that the Amended Information "sets forth the ultimate facts underlying each of the false imprisonment charges to which Bleiweiss entered a plea of guilty." "Ultimate facts" are merely all the facts necessary to be found in a given case in order that the determination of the right of the parties shall become a pure question of law. Brown v. Griffin, 229

So. 2d 225, 227 (1969). Thus, this first phrase of paragraph 3 of the RO does nothing more than state that the Amended Information of one of the underlying criminal cases comprised all the facts necessary to arrive at a determination of law for those cases. In its first exception, Respondent asserts that the Amended Information mentioned in paragraph 3 does not set forth *all* of the ultimate facts. Because ultimate facts are not merely "all the facts which are proven," the ALJ's paragraph 3 of the Recommended Order is accurately written.

Moreover, the facts that Respondent requests to be added – "the facts and charges to which Petitioner pled guilty to in open court," found on pages 23 and 24 of Respondent's exhibit 9 – are expressly adopted as factual findings of the RO. The Administrative Law Judge discusses that passage specifically, and, in paragraph 4 of the RO, finds the following:

> At the plea colloquy, Bleiweiss stipulated to a few additional facts, agreeing that if the 'cases were to proceed to trial the State would prove that . . . while working as a Broward Sheriff's deputy while dressed in full police uniform and driving a marked police vehicle [Bleiweiss] did forcibly by threat or secretly confine certain individuals whose initials are AL, JM, SG, MP, LS AP, and JH against their will and in the court thereof . . . exhibited a firearm.' **These undisputed factual grounds are adopted as findings, as well**. (emphasis added)

Paragraph 3 is accurately stated, the facts which Respondent believes to be ultimate facts are adopted as findings of fact of the Recommended Order, and the ALJ's finding is based on competent substantial evidence. Respondent's Exception 1 is therefore rejected.

Exception 2

In its second exception, Respondent maintains that the ALJ failed to provide the entire context of Petitioner's plea hearing. In support of this argument, Respondent request the undersigned substitute the entire plea hearing verbatim with the ALJ's selection of excerpts, quoted above. While Respondent's version does contain a few additional sentences, the ALJ is

free to arrive at his own findings of fact as long as they are based on competent substantial evidence. See Walker v. Bd. of Prof'l Eng'rs, 946 So. 2d 604, 605 (Fla 1st DCA) (stating if there is competent substantial evidence to support an ALJ's findings of fact, it is not appropriate to reject the ALJ's findings of fact, modify them, substitute them or make new findings of fact.) The ALJ's finding of fact with respect to Petitioner's plea hearing is supported by competent substantial evidence. Petitioner's second exception is denied.

Exception 3

Petitioner's third exception attacks the ALJ's finding that Respondent failed to offer non-hearsay evidence to establish that Petitioner had sought or secured personal gain or advantage. While Respondent argues that the transcript falls under the public records exception to the hearsay rule, Respondent's argument ultimately fails because the transcript does not provide evidence during the commission of the felonies to which he pled guilty that he sought or secured any "personal gain or advantage in the form of sexual gratification or elsewhere."

This exception fails to recognize the distinction between the statutory requirement under the "specified offense" statute of *obtaining* an *advantage* ("done to obtain a profit, gain or advantage for the employee") and the notion of *taking advantage*. Respondent's Exception 3 states:

> But for Petitioner's position as a uniformed police officer who exhibited a firearm and who drove a marked police vehicle, Petitioner would not have been in the position to touch individuals against their will, nor to harass and to follow them in a willful, malicious, or repeated fashion. It must be noted that because Petitioner was a uniformed police officer, the individuals he initially detained were required to heed his direction to stop. However, Petitioner used this obvious advantage to break the law, by committing [the crimes].

As paragraph 15 of the RO states, "an advantage a public employee enjoys by virtue of the power, rights, privileges, or duties of his position cannot be the advantage realized or sought as the object of a 'specified offense.'" Because there is competent substantial evidence to support the Administrative Law Judge's factual findings with respect to this exception, and the ALJ's related legal conclusions are more reasonable, Respondent's third exception is rejected.

Exception 4

In the fourth exception, Respondent argues that "Petitioner displayed untoward intentions by touching individuals against their will, and by willfully, maliciously, and repeatedly following and harassing those individuals." Thus, Respondent argues, by touching individuals against their will and by following and harassing them, Petitioner has evidenced "untoward intentions" which supports the statutory element of personal gain or advantage. The administrative law judge, however, found no evidence supporting "untoward intention" that might have served as a surrogate for personal gain or advantage. This factual finding was supported by competent, substantial evidence, and the Agency may not supplement the ALJ's finding with this additional fact. Respondent's Exception 4 is rejected.

Exception 5

Respondent's fifth exception generally challenges paragraph 9 of the RO arguing that the Amended Information, Respondent's Exhibit 4, is nonhearsay, and falls under the public records exception to the hearsay rule. Regardless of whether Exhibit 4 is hearsay, the evidence does not support a finding that Petitioner obtained a profit, gain, or advantage for himself during the commission of the crimes. Respondent's Exception 5 is rejected.

Exception 6

Respondent's sixth exception challenges paragraph 10 of the RO generally, and states that Respondent presented more than sufficient evidence to satisfy its burden. In addition to noting that Respondent carried the burden of proof in this case, paragraph 10 of the RO concludes that the ALJ was limited to the "Basic Facts" – a reference to the facts established through the Petitioner's plea hearing and acknowledged in other parts of the RO – in determining whether Petitioner committed a specified offense. In paragraph 14 of the RO, the ALJ explains that he cannot infer additional facts:

> The upshot is that while there is a little more here, factually speaking, than the bare elements of false imprisonment to consider, the circumstantial evidence is yet insufficient to persuade the undersigned to find, by inference, that Bleiweiss intended to defraud the public or his employer, so as to make it appear that he was faithfully discharging his duties when he was not. On the instant record, the undersigned can only speculate that this was the case——and that is not enough.

With respect to Respondent's suggestion that Respondent has met its burden of proof, the Agency's review of exceptions does not allow for the reweighing of evidence. Rogers v. Dep't of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2005). Because there was competent substantial evidence in the record to support the findings of fact as expressed in paragraph 10 of the RO, Respondent's exception 6 is rejected.

Exception 7

Respondent's seventh exception challenges paragraphs 11 and 13 of the RO and argues that the evidence presented was more than sufficient to prove Respondent's case. Respondent compares this case to the facts of Bollone v. Dept' Mgmt Servs., 100 So.3d 1276 (Fla 1st DCA 2012), in which a college professor used his school-issued computer to access child pornography. In upholding the forfeiture of Appellant Bollone's FRS rights and benefits, the Florida First

District Court of Appeal found that the public "had a right to expect [Appellant] would not use the computer entrusted to him for criminal activity . . . and was defrauded when [Appellant] used that public property to further his private interest in the possession of child pornography . . . in breach of the public trust." This case, however, is distinguishable in that Respondent failed to prove fraudulent intent. The RO states, in paragraph 13:

> Police officers are called upon in the proper exercise of their duties to detain or restrain persons, forcibly or by threat, against their will. The only fact that distinguishes a lawful arrest from an act of criminal false imprisonment is the presence of 'lawful authority,'. . . [F]alse imprisonment, which, to repeat, is a general intent crime . . . can be committed without the intent to unlawfully detain the victim – even while intending to perform his official duties faithfully.

Paragraphs 11 and 13 of the RO are supported by competent, substantial evidence. Importantly, and as previous noted, the Agency's review of exceptions does not allow for the reweighing of evidence. Rogers, supra. Respondent's seventh exception is therefore rejected.

Exception 8

Respondent's eighth exception further challenges paragraphs 11 and 13 of the RO by arguing that it has satisfied its burden with non-hearsay evidence. As noted previously, the Agency's review of exceptions does not allow the reweighing of evidence. Rogers, supra. There is competent, substantial evidence to support the ALJ's findings of fact contained in paragraphs 11 and 13. As such, Respondent's Exception 8 is rejected.

Exception 9

Respondent's ninth exception states, in its entirety:

> Respondent takes exception with Paragraph 14 of the Recommended Order. Respondent has satisfied its burden of proof with non-hearsay evidence that obviates the need for attenuated inferences to be drawn.

As noted previously, the Agency's review of exceptions does not allow the reweighing of evidence. Rogers, supra. There is competent, substantial evidence to support the ALJ's findings of fact contained in paragraph 14. Respondent's Exception 9 is rejected.

Exceptions 10 and 11

In Respondent's tenth and eleventh exceptions, Respondent disagrees with paragraphs 15 and 22 of the RO respectively. These exceptions reiterate the argument that Respondent has provided sufficient non-hearsay evidence to satisfy the elements of forfeiture. As noted previously, the Agency's review of exceptions does not allow for the reweighing of evidence. Rogers, supra. There is competent, substantial evidence to support the ALJ's findings of fact contained in paragraphs 15 and 22. Accordingly, Exceptions 10 and 11 are rejected.

Exceptions 12, 13, and 14

Respondent argues in Exceptions 12, 13, and 14 that the ALJ should not have relied on Rivera v. Bd. of Trustees of Tampa's General Employment Retirement Fund, ostensibly because no plea colloquy was introduced in that case. The plea colloquy introduced in this case, however, did not provide sufficient detail to demonstrate all of the elements of the specified offense statute. Therefore, the ALJ's comparison of Rivera is appropriate and these exceptions are rejected.

Exception 15

Respondent's fifteenth exception disputes the ALJ's recommendation to restore to Petitioner the rights and benefits under the FRS and provide him payment of any past due benefits with interest at the statutory rate. In light of the findings of fact, conclusions of law and the rulings on exceptions as stated herein, the ALJ's recommendation is appropriate and Respondent's Exception 15 is rejected.

Exception 16

Respondent's sixteenth exception challenges Footnote 7 of the Recommended Order and reiterates arguments which have already been addressed in this Final Order concerning sufficient evidence to prove the Petitioner committed a specified offense. Agency's review of exceptions does not allow the reweighing of evidence. Rogers, supra. There is competent, substantial evidence to support the ALJ's findings of fact contained in Footnote. Respondent's Exception 16 is accordingly rejected.

Exceptions 17 and 18

Respondent's Exceptions 17 and 18 challenge the ALJ's references to two cases, which Respondent claims are not analogous to the present matter. These references are merely examples of cases that involve a traffic stop without reasonable suspicion and a warrantless arrest without probable cause. They are appropriate for the purpose in which they are being used. Respondent's Exceptions 17 and 18 are therefore rejected.

Exception 19

Exception 19 reiterates Respondent's argument that it has satisfied its burden of proof. As previously stated, Respondent did not satisfy its burden and therefore this exception is rejected.

Exception 20

Respondent's final exception challenges footnote 12 of the RO. That footnote reads:

> Because the relevant statutory provisions are clear and unambiguous, there is neither need nor room for interpretation of them. Thus, the Division's invocation of the deference doctrine is misplaced. See Resp.'s PRO at 7. Even if the statute were ambiguous, however, administrative law judges (unlike courts) are under no obligation to defer to an agency's interpretation of any statute or rule, nor should they, given that de novo administrative hearings (unlike judicial proceedings conducted under the constitutional powers of a separate governmental branch) "are designed to give affected parties an opportunity to change the agency's

> mind." E.g., Couch Constr. Co. v. Dep't of Transp., 361 So. 2d 172, 176 (Fla. 1st DCA 1978). Would an agency to whose legal opinions every judge must yield really be likely to keep an open mind about the correctness of its decisions? The undersigned doesn't think so either. See, e.g., The Public Health Trust of Miami-Dade Cnty. v. Dep't of Health, Case No. 15-3171, 2016 Fla. Div. Adm. Hear. LEXIS 102, 82-85 (Fla. DOAH Feb. 29, 2016).

Respondent argues that it satisfied the elements of the forfeiture statute and that its interpretation was "far from clearly erroneous." The ALJ's finding that the deference doctrine is inapplicable has merit because the statute itself is sufficiently clear.

While the first two sentences of Footnote 12 are sound, the undersigned does not agree with the remainder of the footnote. Administrative law judges are required to accord deference to an agency interpretation of a rule or statute which it administers. The assertion in footnote 12 that administrative law judges are under no obligation to defer to agency interpretation of statute and rule is inconsistent with Chapter 120 and numerous Division of Administrative Hearings orders. See e.g., Oliphant v. Florida Elections Commission, Case No., 06-2886, at ¶ 15 (DOAH Oct. 24, 2006) ("*the administrative law judge* is obligated to accept the agency's interpretation of its own rule unless the agency's interpretation is clearly erroneous or unreasonable.") (emphasis added); Merkury Corp. v. Dep't of Management Servs., Case No. 05-4454BID, at ¶ 26 (DOAH July 10, 2006) (stating that during a bid protest, if the validity of the protester's objection to the proposed agency action turns on the meaning of the subject statute or rule, then the agency's interpretation should be accorded deference, and the challenged action should stand unless the agency's interpretation is clearly erroneous); See also, Dep't of Community Affairs v. Clark, Case No. 92-2957, at ¶ 20 (DOAH Dec. 30 1992).

In view of the foregoing, footnote 12 should be amended to read, in its entirety:

"Because the relevant statutory provisions are clear and unambiguous, there is neither need nor room for interpretation of them. Thus, the Division's invocation of the deference doctrine is misplaced. See Resp.'s PRO at 7."

CONCLUSION

Having considered the applicable law and being otherwise duly advised, it is **ORDERED** that:

The Recommended Order (Exhibit A), including all Findings of Fact, Conclusions of Law, with the exception of the amendment made to footnote 12 as set forth in the discussion related to Respondent's Exception 20, and the Recommendation, is adopted in its entirety and incorporated herein by reference.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 9th day of September, 2016.

STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

CHAD POPPELL
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NOTICE OF RIGHT TO APPEAL

This order constitutes final agency action. Judicial review of this proceeding may be instituted by filing a notice of appeal with the filing fee prescribed by law in the District Court of Appeal, pursuant to Section 120.68, Florida Statutes, and a copy with the Agency Clerk of the Department of Management Services, 4050 Esplanade Way, Tallahassee, Florida 32399-3000. Such notice must be filed within thirty (30) calendar days of the date this order is filed in the official records of the Department of Management Services, as indicated in the Certificate of Clerk. Review proceedings shall be conducted in accordance with the Florida Rules of Appellate Procedure.

Certificate of Clerk:

Filed in the office of the
Clerk of the Department of
Management Services on this 12th
day of September, 2016.

C Southall, Deputy Clerk
Diane Wint, Agency Clerk

Copies furnished to:

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