

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JAVIER CUENCA,

Petitioner,

vs.

Case No. 17-1318

STATE BOARD OF ADMINISTRATION,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 9, 2017, by video teleconference at sites in Miami and Tallahassee, Florida, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: James C. Casey, Esquire  
Law Offices of Slesnick and Casey, LLP  
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Coral Gables, Florida 33134

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

Whether Petitioner forfeits his rights and benefits under the Florida Retirement System Investment Plan.

PRELIMINARY STATEMENT

By letter dated February 7, 2017, the State Board of Administration ("SBA") notified Javier Cuenca ("Cuenca" or "Petitioner") that his rights and benefits under the Florida Retirement System were "forfeited as a result of your plea of nolo contendere in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, for acts committed while employed with the Miami-Dade County School Board."

Petitioner filed a timely Petition for Hearing contesting the notice. Subsequently, the case was referred to the Division of Administrative Hearings ("DOAH"). Pursuant to notice, a final hearing was scheduled for May 17, 2017. After several continuances for good cause, the matter proceeded to hearing on October 9, 2017.

At the final hearing, Petitioner testified on his own behalf and presented two witnesses: Idolidia Baluja and Kimberly Gaines. Petitioner's Exhibits numbered 1 through 24 were admitted into evidence.

Respondent presented the testimony of Laura Adams; Mini Watson; Idolidia Baluja; and Kimberly Gaines. Respondent's Exhibits numbered 1 through 12 were admitted into evidence. Petitioner objected to the admissibility of Respondent's Exhibit 1 and Exhibit 5 based on hearsay. The undersigned notes

that both were admitted over objection. However, neither Exhibit 1 nor Exhibit 5 were considered and used to find any fact in this matter.

The one-volume Transcript was filed on October 27, 2017, and the parties timely filed their proposed recommended orders, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. In 2003, Petitioner started his employment with Miami-Dade County Public Schools ("MDCPS" or "District") as a part-time substitute teacher.

2. Since his initial employment with MDCPS, Petitioner has held positions that were part-time and full-time, as well as held hourly teacher positions, teacher positions, a Community School Act Leader III position, and assistant basketball coach positions.

3. Petitioner took a leave of absence from MDCPS from August 23, 2010, to August 15, 2012.

4. While on leave of absence the first year, Petitioner worked at Mater Academy Charter School as a middle school math teacher from September 2010 to August 2011.

5. During the 2010-2011 school year, Cuenca worked for his private tutoring company, Professional Tutors Academy. Cuenca

also was a part-time assistant basketball coach at Hialeah Gardens Senior High School from October 2011 through March 2012.

6. From August 2012 through September 2012, MDCPS assigned Petitioner to Hammocks Middle School full-time, while he took and exhausted all of his sick and personal leave.

7. From October 2012 to February 2013, Petitioner worked part-time as an assistant basketball coach for the varsity team at Hialeah Gardens Senior High School.

8. Petitioner's employment made him eligible to participate in the Florida Retirement System ("FRS") Investment Plan.

9. In 2014, Petitioner was arrested and charged with felonies, which included charges of "lewd and lascivious molestation on a child 12-16 years/attempt or lewd & lascivious on child over 16 by defendant over 18".

10. Laura Adams ("Adams"), chief of Sexual Battery and Child Abuse Unit for Miami-Dade State Attorney's Office was assigned to prosecute Petitioner who ended up with four cases. Adams charged each case by information based on her victims, four former male basketball players, that each claimed Petitioner coached and sexually harassed and/or assaulted them.

11. On October 4, 2016, Adams negotiated a plea agreement with Petitioner and his two attorneys for all four cases. Adams and Petitioner reached a compromise to resolve the charges that Petitioner had inappropriate contact with the four students. The

agreement included that the state would dismiss two of the four cases and Petitioner would plea to two felony battery charges, one felony battery for victim D.F. and one felony battery for victim O.Q.<sup>1/</sup>

12. At Petitioner's plea hearing before Judge Milton Hirsch, Adams consolidated all of Petitioner's four cases into a single case with four counts on one charging document. During the hearing, Adams orally reduced count 2 and count 4 of the lewd and lascivious molestation on a child 12-16 years/attempt charges each to a felony battery and dismissed count 1 and count 3.

13. Adams also wrote the negotiated plea terms on the information and agreed to supplement the file for the clerk later. The initialed handwritten information provided:

[1]. . . .amended to felony battery  
784.03  
Nolle pros LA 10/4/16  
2. Lewd + Lascivious Mol on Child < 16  
but older than 12 F2 (14-25627)  
vic. D.F.  
Felony Battery 784.03 LA  
3. Lewd + Lascivious  
Conduct On Child < 16 by Adult  
F2 (vic D.N.) (F14-25629)  
Nolle pros 10/4/16 LA  
4. Lewd + Lascivious Molest.  
On child < 16 by older  
Then 12 (vic. O.Q>)  
(F16-14811)  
Felony Battery 784.03  
LA 10/4/16

14. Petitioner pled to the negotiated settlement at the plea hearing. Judge Hirsch placed Petitioner under oath and went

over the plea agreement with Petitioner in detail including informing Cuenca that:

[Y]our attorney has worked out a plea for your benefit pursuant to which cases F14-25627 and F16-14-14811 have been joined by the office of the state attorney in a single charging document now charging two counts of felony battery.

15. The judge also ordered Petitioner not to have any unsupervised contact with minors, not to reside with minors, nor teach or coach minors.

16. Petitioner accepted the negotiated plea to two felony battery charges and informed the judge that he understood the terms and conditions.<sup>2/</sup>

17. Neither the Petitioner nor his attorneys objected when Adams waived the defects in the charging document<sup>3/</sup> relating to the two felony battery charges.

18. After Petitioner's plea hearing, Judge Hirsch issued a written Order dated October 4, 2016, finding Petitioner guilty of two felony battery charges,<sup>4/</sup> which were outlined in the Order as:

COUNT	CRIME	DEGREE
2	BATTERY/FELONY	3/F
4	BATTERY/FELONY	3/F

19. On October 11, 2016, Adams filed a typewritten amended information in the Miami-Dade Circuit Court docket to supplement the record as she had been instructed to do by the clerk during

Petitioner's plea hearing on October 4, 2016. The amended information lists count 2 was reduced to BATTERY/FELONY 784.041 Fel 3D and that count 4 was reduced to BATTERY/FELONY 784.041 Fel 3D.

20. In the information, Adams provided the time period for victim D.F.'s allegations as: "And the aforesaid Assistant State Attorney, under oath, further information makes Javier Alejandra Cuenca, on or between August 01, 2012 and December 31, 2012. . . ."

21. To date no post-conviction pleadings have been filed to vacate the plea.

22. D.F. was a student and varsity basketball player at Hialeah Gardens High School during the 2012-2013 school year.

23. Petitioner was the varsity assistant basketball coach and coached D.F. at Hialeah Gardens High School during the 2012-2013 school year.

24. Petitioner received wages in August, October, and December of 2012, but not in November 2012. Petitioner also earned credible service from August 2012 through December 2012 because he was employed with MDCPS.

25. During Petitioner's employment, he utilized sick and personal leave from August 2012 to September 2012. Subsequently, basketball season started on October 10, 2012, and ended February 2013. Petitioner worked as a part-time employee

coaching D.F.'s varsity basketball team during the basketball season, even though Petitioner did not receive any wages in November 2012.

26. Petitioner was paid a lump sum in the amount of \$1,473.00 in March 2013 for his services of coaching the varsity team D.F. played on during the 2012-2013 basketball season.

27. Even though Petitioner was a part-time assistant basketball coach for the varsity basketball team, Petitioner earned credible service for all the months he coached, October 2012 through February 2013.

28. Petitioner is the same Javier Cuenca that is the Defendant in Miami-Dade Circuit Court, case F14025627.

29. FRS credible service is calculated based on an employee's position and the days worked, not whether the employee is paid wages. Employees can earn service credit even if not receiving wages during a particular month because the employee is employed that month.

30. In October 2014, Petitioner withdrew all of his investment plan funds from his account and he has never reported that he was overpaid or contested the amount received.

31. Mini Watson ("Watson"), director of Compliance over Investment Plans for the SBA, reviewed Petitioner's payroll reports and credible service report to ensure that he received the service credit to which he was entitled.



32. Watson determined that Petitioner's coaching stipend was a salary after evaluating how MDCPS utilized its discretion as an agency and determined that Petitioner's part-time coaching position qualified for FRS. Watson also concluded MDCPS properly reported credible service for Petitioner from August 2012 through December 2012.

33. After the review, SBA concluded that Petitioner's rights and benefits should be "forfeited as a result of [his] plea of nolo contendere in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, for acts committed while employed with the Miami-Dade County School Board" and informed Petitioner by letter dated February 7, 2017. Petitioner is protesting Respondent's notice of forfeiture letter.

#### Findings of Ultimate Fact

34. Upon careful consideration of the entire record, it is determined that the competent evidence at hearing demonstrates that Petitioner was an employee of MDCPS from August 2012 to December 2012 because he received credible service during that period.

35. Specifically, the record supports that Petitioner was an employee when he was utilizing his sick and personal leave during August 2012 and September 2012 or he would not have been able to take the leave.<sup>5/</sup> Watson's nearly 30 years of experience

verifying agencies' compliance in reporting FRS members for determination of service credit entitlement allowed her to credibly assess that MDCPS properly categorized Petitioner's part-time assistant coach position as a FRS-eligible or credible service position from October 2012 to December 2012. Moreover, no competent evidence was presented to demonstrate Petitioner's lump sum salary paid in March 2013 was a bonus as asserted by Petitioner. Therefore, Respondent has proven that Petitioner occupied an FRS-eligible position during the time period that Petitioner's information alleged his conduct took place for the underlying felony conviction.

36. The undersigned further finds the compelling evidence as a whole demonstrates that Petitioner was found guilty of two felony battery charges, and count 2 related to the victim, student D.F. Specifically, the handwritten information, plea colloquy, Order, and amended information substantiate Petitioner pled to two counts of felony battery.

#### CONCLUSIONS OF LAW

37. DOAH has jurisdiction over the subject matter of the proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes.

38. The FRS is a public retirement system as defined by Florida law and, as such, SBA's proposed action to forfeit

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

39. Respondent has the burden of proving by a preponderance of the evidence that Petitioner has forfeited his FRS retirement benefits. Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139 (Fla. 4th DCA 1989).

40. 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.

41. This section of the Constitution is codified in chapter 112, Part III, of the Florida Statutes. Section 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 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.

42. Section 112.3173(2)(a) provides in relevant part:

"Conviction" and "convicted" mean an adjudication of guilty 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.

43. In this matter, Petitioner pled nolo contendere in circuit court to two felony battery counts. He was adjudicated guilty by the judge. This constitutes being "convicted" pursuant to section 112.3173(2)(a).

44. 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.

45. A "specified offense" is defined in the forfeiture statute in part as certain felonies under chapter 838, Florida Statutes, as well as certain felonies relating to bribery, embezzlement, and theft of public funds or an impeachable offense. See § 112.3173(2)(e)1.-5., Fla. Stat. Petitioner was not convicted of any of these offenses.

46. The forfeiture statute also contains a so-called "catch-all" provision which can subject a public officer or employee to the forfeiture of his or her rights and benefits.

The undersigned must consider section 112.3173(2)(e)6., which further defines a "specified offense" and provides:

(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.

47. In other words, to constitute a specified offense under section 112.3173(2)(e)6., the criminal act must be (a) any felony; (b) committed by a public employee; (c) willfully and with intent to defraud the public or the employee's public employer of the right to receive the faithful performance of the employee's duty; (d) to obtain a profit, gain or advantage for the employee or some other person; and (e) by use of the power, rights, privileges, duties, or position of the employment position.

48. By this language, any felony can qualify as a specified offense so long as the remaining conditions in the statute have been met. Based on the facts herein, the record shows that

Petitioner was a public employee working as a coach for the school district, a member of the FRS, and that prior to retirement, Petitioner pled no contest and was adjudicated guilty to two felony battery counts. Therefore, the issue here is whether the other conditions of section 112.3173(2)(e)6. have been met.

49. 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). 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.").

50. Respondent contends in its Proposed Recommended Order that the nexus requirement has been established for forfeiture in this matter because Petitioner's position as a basketball coach provided him access to student victim, D.F., and the crime was committed on a student on school property. The undersigned rejects such an assertion because it is unsubstantiated. The record lacks competent substantial evidence of Petitioner's conduct, the circumstances, and location associated with Petitioner's crimes.

51. Contrarily, Petitioner relies on Rivera v. Board of Trustees of the City of Tampa's General Employment Retirement Fund, 189 So. 3d 207 (Fla. 2d DCA 2016), in its Proposed Recommended Order and maintains that in this case no factual basis for Petitioner's plea exists and therefore Respondent cannot meet its burden of proof. Such reliance on Rivera is persuasive.

52. The record demonstrates Petitioner was a public employee for MDCPS who coached the victim, student D.F., and varsity basketball during the 2012-2013 basketball season. The basketball season aligns with the time period the information indicated the substantive offenses occurred. And, Petitioner had a duty to the public to safeguard students. However, the record fails to meet the statutory requirement and demonstrate any nexus between the crimes charged against Petitioner and his duties as a coach because no factual basis was established in this case between the offenses committed and Petitioner's position as a coach. In this proceeding, no witnesses with first-hand testimony provided either evidence regarding details or the circumstances associated with the offense(s). Furthermore, the record lacks any admissions to any facts regarding the underlying charges. Additionally, during the plea colloquy when Petitioner's four criminal cases were merged into one

information, no statement of facts was provided for Petitioner's plea.

53. Hence, in this matter, the record is void of any competent evidence to substantiate how and where the offense(s) were committed and accordingly the evidence is insufficient to demonstrate any credible nexus. As such, the requirements in section 112.3173(2)(e)6. are not met. Accordingly, the felony battery, to which Petitioner pled no contest is not a "specified offense" within the meaning of section 112.3173(2)(e)6. Therefore, Petitioner's rights and benefits under the FRS are not forfeited.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the State Board of Administration enter a order finding that Petitioner pled to two felony counts, which are not specified offenses under section 112.3173(2)(e)6. and do not require forfeiture of his FRS rights and benefits pursuant to section 112.3173(3).



DONE AND ENTERED this 9th day of January, 2018, in  
Tallahassee, Leon County, Florida.

*June C. McKinney*

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JUNE C. MCKINNEY  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 9th day of January, 2018.

ENDNOTES

<sup>1/</sup> Petitioner asserts that he pled to a misdemeanor battery and a felony battery. The undersigned rejects such assertion based on the handwritten information, Order, plea colloquy, and amended information that all indicate he pled to two felony battery counts as Adams credibly testified.

<sup>2/</sup> Petitioner's contention that he never agreed to felony battery but agreed to a misdemeanor battery is not persuasive because the compelling evidence of the plea colloquy states clearly that he pled to two felony battery charges.

<sup>3/</sup> Waiving the defects in the information is the terminology used when the state attorney and defense attorney agree to set aside the underlying facts, and accept a plea to a different charge from the initial charge, even though the facts do not meet the elements of the new charge for the agreed upon plea.

<sup>4/</sup> The undersigned finds Judge Hirsch's Order, which specifically lists two third degree felony battery charges, very compelling persuasive evidence that Petitioner pled to two felony battery charges, not the misdemeanor battery charge Petitioner contends he pled to on October 4, 2016.

<sup>5/</sup> Individuals who are not employees are not entitled to leave. Petitioner was only allowed to take the sick and annual leave because he was an employee assigned to Hammocks Middle School during August 2012 and September 2012.

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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.