STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

JAVIER CUENCA,

Petitioner,

vs.

STATE BOARD OF ADMINISTRATION,

Respondent.

DOAH Case No. 17-1318

FINAL ORDER

On January 9, 2018, Administrative Law Judge June C. McKinney (hereafter "ALJ") submitted her 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 timely filed Proposed Recommended Orders. Neither party filed exceptions to the Recommended Order which were due January 24, 2018. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs 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 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 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 presiding officer'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).

FINDINGS OF FACT

The Findings of Fact set forth in paragraphs 1 through 23 of the ALJ's Recommended Order hereby are adopted and are specifically incorporated by reference as if fully set forth herein.

The Findings of Fact in paragraph 24 of the Recommended Order hereby are modified to replace the word "credible" with the word "creditable," and to add the statutory citation for the definition of creditable service, as follows:

24. Petitioner received wages in August, October, and December of 2012, but not in November 2012. Petitioner also earned creditable service, as defined by Section 121.021(17), Florida Statutes, from August 2012 through December 2012, because he was employed with MDCPS.

The Findings of Fact set forth in paragraphs 25 and 26 of the ALJ's Recommended Order hereby are adopted and are specifically incorporated by reference as if fully set forth herein.

The Findings of Fact in paragraph 27 of the Recommended Order hereby are modified to correct the typographical error, to read as follows:

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

The Findings of Fact set forth in paragraph 28 of the ALJ's Recommended Order hereby are adopted and are specifically incorporated by reference as if fully set forth herein.

The Findings of Fact in paragraph 29 of the Recommended Order hereby are modified to correct the typographical error, to read as follows:

29. FRS creditable 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.

The Findings of Fact set forth in paragraph 30 of the ALJ's Recommended Order hereby are adopted and are specifically incorporated by reference as if fully set forth herein.

The Findings of Fact in paragraphs 31 and 32 of the Recommended Order hereby are modified to correct some typographical errors, to read as follows:

31. Mini Watson ("Watson"), Director of Compliance for Office of Defined Contribution Programs, State Board of Administration, reviewed Petitioner's payroll reports and creditable service reports to ensure Petitioner 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 the FRS. Watson also concluded MDCPS properly reported creditable service or Petitioner from August 2012 through December 2012.

The Findings of Fact set forth in paragraph 33 of the ALJ's Recommended Order hereby are adopted and are specifically incorporated by reference as if fully set forth herein.

The Findings of Ultimate Fact in paragraphs 34 and 35 of the Recommended Order hereby are modified to correct some typographical errors, to read as follows:

34. Upon careful consideration of the entire record, it is determined that the competent evidence produced at the hearing demonstrates that Petitioner was an employee of MDCPS from August 2012 to December 2012 because he received creditable 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. Watson's substantial 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 an FRS-eligible or creditable 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.

The Findings of Ultimate Fact set forth in paragraph 36 of the ALJ's Recommended Order hereby are adopted and are specifically incorporated by reference as if fully set forth herein.

CONCLUSIONS OF LAW

The Conclusions of Law set forth in paragraphs 37 through 49 of the Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

The Conclusions of Law set forth in Paragraphs 50 through 53 are rejected in toto. This Final Order substitutes and adopts the following Conclusions of Law for those four paragraphs and adds seven additional paragraphs as follows:

50. School teachers and coaches occupy a unique position with respect to minors, as they act in loco parentis to the students and players that they teach or coach. Schools assume custody of students and, at the same time, the students are deprived of the protection of their parents. In effect, the schools act in place of the parent or instead of the parent—"in loco parentis." When a student is inside the school, the institution takes on his/her responsibility. While conducting any sports activity, the minors' coach is expected to take proper

precautions and to exercise reasonable care to ensure the physical safety of all players and to not do them any harm. A teacher or coach whose inability to observe generally accepted standards of socially acceptable behavior has frequent opportunities, as an authority figure acting in loco parentis, to corrupt or harm the school children in his or her charge. *See, John Rolle v. Charlie Christ, as Commissioner of Education*, DOAH Case No. 01-2644 (Recommended Order December 14, 2001); *Filippi v. Eric J. Smith, as Commissioner of Education*, DOAH Case No. 07-4628 (Recommended Order, June 20, 2008). Thus, Petitioner, as a basketball coach acting in loco parentis, was an authority figure who had ample opportunities to engage in inappropriate contact with the students he coached because of his public position.

51. Additionally, but for the powers, rights, privileges and duties of the public position Petitioner occupied as a teacher/coach of the alleged victim(s), he would not have been able to have access to the purported victims for his own personal sexual gratification. *See, Bollone v. Dept. of Mgmt. Servs., Div. of Retirement*, 100 So.3d 1276, 1282 (Fla. 1st DCA 2012) [Public employee used his work issued computer to acquire, possess and view child pornography]; *Marsland v. Dept. of Mgmt. Servs., Div. of Retirement*, 2008 WL 5451423 (Fla. Div. Admin. Hrgs. December 15, 2008) [County school board employee had sexual relations with a student in a classroom after school hours]. And, in fact, part of Petitioner's negotiated plea was that he was ordered not to teach or coach minors. Petitioner has not filed any post-conviction proceedings to attempt to vacate this plea including its restrictions on his contact with minors.

52. Petitioner, in his Proposed Recommended Order, 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), and maintains that in his case, no factual basis for his plea exists and, therefore, the Respondent cannot meet its burden of proof. Such reliance on *Rivera* is misplaced as the facts and circumstances involved in *Rivera* are vastly different from those involved in the instant matter.

53. *Rivera* involved a public employee of a city's Wastewater Department who pled guilty to unlawful sexual contact with minors. The conduct allegedly occurred on city-owned property. There was no evidence that any of the minors allegedly abused by Mr. Rivera were children of his co-workers. The case held that Mr. Rivera did not commit the offense(s) through the use or attempted use of his powers, rights, duties or position—that is, there was no "nexus" between the offense(s) and Mr. Rivera's public position. *Id.* at 211.

54. An employee of a city wastewater department does not have access to minors by virtue of his public position. No duties and responsibilities of such a position entail interacting with, protecting or supervising minors. Such an individual's employer does not entrust minors to his oversight and care. Minors are not ordinarily present at city wastewater treatment facilities. Contrast that situation to that of a teacher or coach whose employer, as well as the parents of the minors, entrust such an individual to the supervision and care of minors. In the case of Mr. Rivera, the only manner in which the crimes for which he was found guilty could be connected (or have a nexus) to his public employment would be if there was proof that the crimes actually occurred on city property to which he had access.

55. The *Rivera* case notes that the transcript of the plea colloquy between Mr. Rivera and the trial court was not produced during the forfeiture hearing. The court stated that "[a] statement of the factual basis for the pleas ... in the plea colloquy might have included

information about how and where the offenses were committed." *Id.* at 212. The court noted that there was no non-hearsay evidence proffered that would prove Mr. Rivera's crimes occurred on city property. As noted previously, such proof as to where the crimes occurred was critical to finding that forfeiture would be appropriate, as it was the only link between the alleged crimes and Mr. Rivera's public employment.

56. In the instant situation, a transcript of the plea colloquy was produced during the hearing. *See,* Respondent's Exhibit R-6. The document indicates Petitioner was placed under oath. Petitioner was informed he was to have no contact with the four alleged victims. Petitioner acknowledged he knew who the victims were. In addition, during the forfeiture hearing, Petitioner testified that he knew a specific alleged victim and that he had coached this victim while employed by MDCPS. [Hearing Transcript, page 68, lines 20-25; page 69, lines1-25; page 70, lines 1-11]. There was direct testimony from the prosecutor in Petitioner's criminal matter that she was told by an alleged victim that Petitioner had inappropriate contact with him and that the incident occurred on school property. [Hearing Transcript, page 44, lines 20-25; page 45, lines 1-6; page 46, lines 19-25]. Thus, there is ample substantial competent evidence to show how and where the offenses(s) were committed.

57. Further, it is unclear why Petitioner believes that the location of the alleged crime(s) was determinative as to whether forfeiture is appropriate under the specific facts and circumstances of his particular case. There is nothing in Section 112.3173(2)(e)6., Florida Statutes, that requires a specified offense to occur at the public employee's place of employment. The statute only requires that the public employee realizes an advantage,

profit or gain "... through the use or attempted use of the power, rights, privileges, duties or position..." of his or her public employment. *Id.*

58. There have been numerous cases that have found a sufficient nexus between the crime and public employment to require forfeiture where the specified offense did not occur at the public employee's place of employment. For example, *Michael Lander v. State Board of Administration*, Case No. 2013-2912, Final Order issued January 5, 2015; *per curiam affirmed*, Case No. 1D15-468, 175 So.2d 289 (Table), (Fla. 1st DCA 2015), involved a situation in which a public school teacher, Mr. Lander, convinced the mother of one of his fifth grade students that the student needed significant tutoring and that it would be better if the child lived with him and his wife at their home during the tutoring sessions. Once the child moved into his home, Mr. Lander resigned his public position and began sexually abusing the child. The Final Order found that because Mr. Lander used his public employment to gain access to the student and to aide in the commission of the charged felonies of Sexual Activity while in Custodial Authority, there was sufficient nexus between the public employment and the crime committed.

Charles Bullock v. State Board of Administration, DOAH Case No. 14-2616, SBA Final Order issued, December 10, 2014; *per curiam affirmed*, Case No. 1D14-5806, 177 So.3d 352 (Table), (Fla. 1st DCA 2015) involved a situation in which a deputy sheriff with the Sheriff's Civil Process Unit routinely met other deputies in a shopping mall for the convenience of the unit to discuss business. The deputies received full compensation for these meetings. The meetings were located near a food court bathroom that Mr. Bullock frequented and utilized to engage in the sexual abuse of a minor who spent time in the mall after school while waiting for his mother to end her workday. Because Mr. Bullock

received full compensation and benefits and was able to use the regularly-scheduled business meetings required of someone in his position as an opportunity to go to the shopping mall in his patrol car to have access to a minor who was also at the mall at or about the same time as the meetings were occurring, Mr. Bullock was found to have used the power, rights and privileges of his particular positon with the Sheriff's office to realize the personal gain, benefit or advantage of sexual gratification. Thus, a sufficient nexus was found to have existed between Mr. Bullock's public employment and the offense committed.

Maradey v. State Board of Administration, DOAH Case No. 13-4172, 2014 WL 212169 (Recommended Order, Fla. Div. Admin. Hrgs. January 16, 2014), adopted by the SBA Final Order issued April 4, 2014, 2014 WL 1391038, involved the situation in which a bus driver of Miami-Dade Transit ("MDT") solicited her fellow bus drivers to engage in insurance fraud by having treatments at a clinic located near their place of employment and by receiving kickbacks from, and referring others to, that clinic for money. While the actual crime of insurance fraud occurred away from Maradey's place of employment, the Administrative LawJudge found that but for Maradey's public employment, she "...would not have become involved in the criminal activity to which she pled guilty/nolo contendere, and she would not have had access to, or enjoyed relationships with, the other MDT employees whom she recruited as part of her engagement in the criminal activity" (i.e., insurance fraud and patient brokering).

59. In this matter, Petitioner by virtue of his public employment exercised a position of authority over the minor victim he taught and coached. There is no evidence that Petitioner coached the purported victim(s) at any time other than when Petitioner was

employed by MDCPS. There is no evidence that Petitioner knew any of the purported victims from any other activities (such as, for example, Sunday School) apart from those connected to his public employment as a teacher and coach.

60. The evidence is sufficient to establish a nexus between the offense(s) to which Petitioner pled and Petitioner's public employment. As such, the requirements of Section 112.3173(2)(e)6., Florida Statutes, are satisfied, and Petitioner's rights and benefits under the FRS Investment Plan must be forfeited.

ORDERED

The Petitioner, Javier Cuenca, has forfeited his rights and benefits under the Florida Retirement System Investment Plan pursuant to Section 112.3173(2)(e)6., Florida Statutes by having pled nolo contendere to, and being found guilty of, two felony counts of battery.

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 28th day of March, 2018, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Joan B. Haseman

Joan B. Haseman
Chief of Defined Contribution Programs
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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,
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 James C. Casey, Esq., Counsel for Petitioner, jimcasey@scllp.com, and by UPS to: Law Offices of Slesnick and Casey, LLP, 2701 Ponce de Leon Boulevard, Suite 200, Coral Gables, Florida 33134; and by electronic mail to Brian Newman and Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, brian@pennington.com and brandi@pennington.com, this 28th day of March, 2018.

Ruth A. Smith

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