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OF FLORIDA

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July 3, 2018

Hetal Desai
Administrative Law Judge
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

Re: Final Order – David Moron vs. State Board of Administration
Case No. 17-5785 / SBA Case No. 2015-3304

Dear Judge Desai:

Attached please find the Final Order including Petitioner's Exceptions to Recommended Order in reference to the above case pursuant to the requirement by Section 120.57 (1) (m), Florida Statutes.

Please let me know should you need anything further.

Regards,

Tina Joanos
Agency Clerk
State Board of Administration of Florida

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

DAVID MORAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	DOAH Case No. 17-5785
	)	SBA Case No. 2015-3304
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

On May 15, 2018, Administrative Law Judge Hetal Desai (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. Respondent timely filed a Proposed Recommended Order. Petitioner did not timely file a Proposed Recommended Order, but since no objection was made to the late filing, it was considered by the ALJ in formulating her Recommended Order. Petitioner timely filed exceptions on May 30, 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.

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 "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.

A review of whether competent substantial evidence supports a given finding "is not done by mechanically combing the transcript for words and phrases of testimony..., but rather by considering the whole record, including the [ALJ's] findings." *McDonald v. Dep't of Banking & Finance*, 346 So.2d 569, 578-579 (Fla. 1st DCA 1977).

Pursuant to Section 120.57(1)(l), Florida Statutes, 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

Summary of the Argument

Petitioner's Exceptions begin with an approximately two (2) page summary. This summary does not clearly identify the disputed portions of the Recommended Order by page number(s) or paragraph(s) and does not include appropriate and specific citations to the record. As such, it is not necessary to rule on the Summary of Legal Argument. Section 120.57(1)(k), Florida Statutes. However, it does not appear that Petitioner is actually asking for a ruling on the summary, since specific exceptions follow. The summary appears to be Petitioner's effort to supply context to his exceptions and to the legal argument following the exceptions.

Petitioner's Exception 1: Finding of Fact 7-

Petitioner objects to the statement that all of Department of Correction Employees at the Reception and Medical Center at Lake Butler ("Center") knew about the altercation between Inmate Mr. Warren Williams and DOC Corrections Officer Thomas Driver

Petitioner argues that Federal Agent Vaughn provided testimony that there was no indication that Petitioner knew who Mr. Williams was. However, paragraph 17 of

Petitioner's own Proposed Recommended Order states that: "Moran found out about an assault on Driver by an inmate [Warren Williams] either by **Driver** telling Moran or by just hearing about it as everyone at the Facility probably heard about it" [emphasis added]. Further, during the DOAH hearing, Petitioner agreed, under oath, that the transcript from his conspiracy trial sets forth the fact that Petitioner had responded in the affirmative when asked if he knew about the fight Mr. Driver had with Mr. Williams. [DOAH Hearing Transcript, p. 55, lines 18-25; p. 56, lines 1-21; R-6, page 1003, lines 1-25, p. 1004, lines 1-3; page 1036, lines 20-24] At no point either during the conspiracy trial or the DOAH hearing did Petitioner state that while he knew about the altercation, he had no idea as to the identity of the inmate involved in the altercation with Mr. Driver. The best evidence as to what Petitioner knew or did not know would come from Petitioner himself, not what someone else, such as Federal Agent Vaughn, thought Petitioner knew or did not know. Further, the SBA cannot reweigh evidence since this evidentiary matter is within the purview of the ALJ. *See, 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).

This is a situation in which Petitioner is mechanically combing the transcript for words and phrases of testimony to support his position, rather than by "...considering the whole record, including the [ALJ's] findings." *McDonald v. Dep't of Banking & Finance*, 346 So.2d 569, 578-579 (Fla. 1st DCA 1977).

There is substantial competent evidence to show Petitioner did know who Mr. Williams was. Accordingly, Exception 1 hereby is rejected.

Petitioner's Exception 2: Finding of Fact 8-

Petitioner objects to the finding that Petitioner, Mr. Driver and Mr. Newcomb believed inmate Williams had a contagious medical condition and intentionally bit Mr. Driver to infect him.

Petitioner again argues that sworn testimony of Federal Agent Vaughn was that Petitioner did not know who Mr. Williams was. However, as noted in the response to Exception 1, based on a consideration of the entire record, there is substantial competent evidence in the record to show that Petitioner did know who Mr. Williams was. In addition, there is competent substantial record evidence showing that Petitioner and his purported co-conspirators did believe Mr. Williams had a contagious medical condition. Mr. Driver referred to Mr. Williams as being "dirty" and stated that Mr. Williams tried to pass on that condition to him. [R-13, page 2, lines 13-24]. Petitioner stated during a conversation on January 30, 2015 with Mr. Moore and Mr. Newcomb that Mr. Williams was "Hepatitis and aids and HIV." [R-11, page 14, lines 24-25].

There is competent, substantial evidence to support this Finding of Fact. Accordingly, Petitioner's Exception 2 hereby is rejected.

Petitioner's Exception 3: Finding of Fact 10-

Petitioner argues that the race of Petitioner and his alleged co-conspirators was not established.

Petitioner argues that the race of Joe Moore, Mr. Driver and Petitioner was never established in the record and that this "fact" was "...based upon innuendo."

However, the Recommended Order does not conclude what the race of Petitioner, Mr. Moore and Mr. Driver actually is. The Recommended Order simply notes that the race

of such individuals is "not apparent from the record." That statement is true and Petitioner even agrees with that finding when Petitioner notes in his exception that the race of the named individuals was "never established in the record." Finding of Fact 10 does note that all three named individuals were "members of a local KKK chapter," but does not make any specific conclusions from the fact of their membership. And, in fact, Petitioner testified during the DOAH hearing that the particular faction of the KKK to which Petitioner and his alleged co-conspirators belonged did not believe that the white race is a superior race. [DOAH Hearing Transcript, page 64, lines 3-14]. Further, Petitioner affirmatively stated that he would not belong to an organization that was a "racist organization." [DOAH Hearing Transcript, page 64, lines 15-20]. There is substantial competent evidence in the record to support the conclusion that Petitioner, Mr. Moore and Mr. Driver were indeed members of a local KKK chapter. [DOAH Hearing Transcript, page 45, lines 1-11; page 64; R-1, paragraph 8].

It further should be noted that Endnote #4 of the ALJ's Recommended Order states that whether Petitioner was a member of the KKK or a racist, and whether the KKK is a white supremacy group, "... has no bearing on whether he violated section 112.3173(2)(e)." The ALJ states that Petitioner made the KKK "the focus of his defense," so that is why the Recommended Order even mentioned the KKK.

There is competent, substantial evidence to support this finding of fact in paragraph 10. Accordingly, Petitioner's Exception 3 hereby is rejected.

Petitioner's Exception 4: Finding of Fact 14-

Petitioner argues the entire finding is mere speculation.

Petitioner objects to the statements in this finding of fact that state Mr. Driver and Petitioner both showed Mr. Moore a picture of an African-American male on an 8x10 paper that appeared to have been generated by a database. Petitioner further objects to the finding that Mr. Moore believed the picture was of an inmate that Petitioner and Mr. Driver wanted him to kill.

During the conspiracy trial, Mr. Moore testified that on December 6, 2014, he went to a KKK meeting that was attended by Driver, Newcomb and Petitioner. [R-6, page 415, lines 5-25; page 416, lines 1-20]. At that meeting, Driver and Moran were standing together, and both were about four or five feet away from Newcomb, when a photograph was proffered to Moore. Petitioner told Moore that Driver had a situation and asked Driver to tell the story. [R-6, page 417, line 11, lines 19-25]. Driver did pull out a photograph, while standing next to Petitioner, after Petitioner told him to tell the story. In response, Moore "...asked them specifically what are you bringing this [the photograph] to me for." [emphasis supplied] [R-6, page 420, lines 4-7]. Obviously, an eight by ten inch photograph does not have to be physically handled by more than one person at a time- that is, it is not an unwieldly document. However, it was clear to Moore that both Petitioner and Driver wanted Moore to do something to the person in the photograph that was presented to him. [R-6, page 420, lines 9-25; page 421, lines 1-23]. Moore testified that when he took a look at the picture, he saw "... a picture of an inmate." [R-6, page 419, lines 13-19]. In response to a question from Moore to Petitioner and Driver as to whether they wanted the person in the photograph "six feet under," Moore testified: "[t]hey look at each other and say yes." [R-6, page 422, lines 14-15, emphasis added]. Thus, both Petitioner and Driver wanted Moore to see the photograph so Moore would know whom they wanted him to kill or at least harm.

There is substantial competent record evidence to support the findings of fact in paragraph 14. Accordingly, Petitioner's Exception 4 hereby is rejected.

Petitioner's Exception 5: Finding of Fact 17-

Petitioner claims that the finding that Petitioner met with Mr. Newcomb and Mr. Moore at a prearranged location and time for the purpose of taking a drive to the area of Mr. Williams' home is inaccurate.

The transcript of the January 30, 2015 meeting starts with Mr. Newcomb mentioning that Petitioner had overslept and would be on his way. [R-11, page 1, lines 6-11]. Thus, Petitioner was going to be attending a pre-arranged meeting among him, Mr. Moore and Mr. Newcomb and he was concerned about running late. In fact, Petitioner apologized for running late because the alarm clock on his cell phone did not go off. [R-11, page 11, lines 16-22]. When Petitioner arrived to the prearranged meeting with his co-conspirators, he asked how long they were going to be gone and then he said: "Let's ride brother." [R-11, page 10, lines 16-23]. As the parties are getting into Newcomb's vehicle, he specifically asked if they were "... going to grab him, go grab him now." [R-11, page 13, lines 1-8]. Thus, it is clear that Petitioner was aware that they were going to go on a ride at least to try to do something to Mr. Williams. When Newcomb talks about setting up a fishing pole that he had brought along and placing Mr. Williams beside it after giving Mr. Williams a few shots of insulin, Petitioner asks if Mr. Williams actually does go fishing since the staged scene might appear suspicious otherwise. [R-11, page 15, lines 1-15]. Petitioner further asks if Mr. Williams lives in "government subsidized housing" [R-11, page 16, lines 2-22]. The co-conspirators read off house numbers once they arrived at their destination and they

determined the location of house "219." Thus, they did "kind of know" where Mr. Williams lived after their January 30, 2015 car ride. [R-6, page 488, lines 17-25; page 489, lines 1-3; R-12, page 10, lines 1-3]. In response to a question from his own counsel at the DOAH Hearing, Petitioner testified he believed that Mr. Newcomb and Mr. Moore knew where Mr. Williams lived, even if he did not. [DOAH Hearing Transcript, page 47, lines 9-12].

There is substantial competent evidence to support the findings in Finding of Fact 17. Petitioner's Exception 5 hereby is rejected.

Exception 6: Finding of Fact 18-

Petitioner argues this finding "mischaracterizes" the transcript of the January 30, 2015 car ride

Petitioner argues that the finding that Petitioner made assurances that Mr. Driver was working the night shift on January 30, 2015 was incorrect. Petitioner argues that Petitioner did not know when Driver would actually be working. However, Petitioner does not cite the entire relevant portion of the transcript. On page 19, lines 1-4 of R-11, Newcomb asked Petitioner whether Driver would be working that night. Petitioner responded in the affirmative. Newcomb concludes with: "[h]e'll be working at 6:00 o'clock tonight." *Id.* There is substantial competent evidence to support a conclusion that Petitioner had knowledge of Driver's work schedule and that the work schedule was important to the planning of the murder since there was a significant amount of discussion about Driver's work schedule.

There is competent, substantial evidence to support this Finding of Fact. Accordingly, Petitioner's Exception 6 hereby is rejected.

Petitioner's Exception 7: Finding of Fact 19-

Petitioner objects to the finding that Petitioner knew the purpose of the drive was to attempt to kill Mr. Williams.

On January 30, 2015, before Petitioner joined Mr. Newcomb and Mr. Moore, Mr. Newcomb had discussed putting insulin in an ice chest since they did not want it to get warm and thereby be ineffective. [R-11, page 5, lines 15-25]. Newcomb stated during the drive with Petitioner in the car that he brought insulin to inject into Mr. Williams if the opportunity presented itself. [R-11, page 13, lines 1-8]. Petitioner responded that "we should send a message." [R-11, page 13, lines 11-14]. Newcomb mentions he has three masks if they are able to capture Williams, take him to the river, and shoot him up with insulin. [R-11, page 14, lines 14-23]. The purpose of the masks was to protect the co-conspirators from the transmission of any blood borne disease(s) because Petitioner noted Williams was "...hepatitis and aids and HIV." [R-11, page 14, lines 24-25]. Petitioner mentions if they want to do a "complete disposal," it will be necessary to "chop up the body." [R-11, page 15, lines 13-15].

Thus, there is substantial competent evidence to show that the drive was to provide the opportunity to the co-conspirators, including Petitioner, to kill Mr. Williams if they could do so without being observed. They took along a means by which to kill Mr. Williams (i.e., insulin) and they brought along a means to protect themselves from any communicable diseases that Mr. Williams had. The co-conspirators simply were not going on a ride for solely observation purposes.

There is competent, substantial evidence to support the findings of fact in paragraph 19. Accordingly, Petitioner's Exception 7 hereby is rejected.

Petitioner's Exception 8: Finding of Fact 19-

Petitioner claims Petitioner did not know who Mr. Williams was or that he had a contagious disease.

Petitioner objects to the finding that Petitioner knew Mr. Williams had a contagious infection or disease, because Petitioner states that based on the testimony of a federal agent, Petitioner did not know who Mr. Williams was. However, as stated on the response to Petitioner's Exceptions 1 and 2, there is substantial competent evidence in the record to show that Petitioner did know who Mr. Williams was. Paragraph 17 of Petitioner's own Proposed Recommended Order states that: "Moran found out about an assault on Driver by an inmate [Warren Williams] either by Driver telling Moran or by just hearing about it as everyone at the Facility probably heard about it." Further, during the DOAH hearing, Petitioner agreed, under oath, that the transcript from his conspiracy trial sets forth the fact that Petitioner responded in the affirmative when asked if he knew about the fight Mr. Driver had with Mr. Williams. [DOAH Hearing Transcript, p. 55, lines 18-25; p. 56, lines 1-21; R-6, page 1003, lines 1-25, p. 1004, lines 1-3; page 1036, lines 20-24] At no point either during the conspiracy trial or the DOAH hearing did Petitioner state that while he knew about the altercation, he had no idea as to the identity of the inmate involved in the altercation with Mr. Driver. In fact, Petitioner testified that, during the January 30, 2015 car ride, either Mr. Moore or Mr. Newcomb brought up the name of Warren Williams when they were in the truck and on their way to look for Warren Williams and to perhaps kill him. [DOAH Hearing Transcript, page 46, lines 24-25; page 47, lines 1-2; see also, Petitioner's Proposed Recommended Order, paragraph 37]. The best evidence as to what Petitioner

knew or did not know would come from Petitioner himself, not what someone else, such as Federal Agent Vaughn, thought Petitioner knew or did not know.

Further, the SBA cannot reweigh evidence since this evidentiary matter is within the purview of the ALJ. *See, 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).

In addition, there is record evidence showing that Petitioner and his purported co-conspirators did believe Mr. Williams had a contagious medical condition. Mr. Driver referred to Mr. Williams as being "dirty" and stated that Mr. Williams tried to pass on that condition to him. [R-13, page 2, lines 13-24]. Petitioner stated during a conversation on January 30, 2015 with Mr. Moore and Mr. Newcomb that Mr. Williams was "Hepatitis and aids and HIV." [R-11, page 14, lines 24-25].

There is competent, substantial evidence in the record to support this Finding of Fact. Accordingly, Petitioner's Exception 8 hereby is rejected.

Petitioner's Exception 9: Finding of Fact 22-

Petitioner objects to the finding that Petitioner agreed to pull Mr. William's photo from the prison database.

After it was clear that the co-conspirators were not going to see Mr. Williams during the January 30, 2015 car ride, Mr. Newcomb indicated that he wanted to get a picture of Mr. Williams and asked Petitioner to "...go to work and pull up his recent picture when he got out of the pen." [R-12, page 10, lines 15-18]. While Petitioner may not have actually pulled up Mr. Williams' picture at work, he acknowledged he would be willing to do so if needed.

The finding that Petitioner agreed to pull up Mr. Williams' photograph from Petitioner's place of work data base is supported by competent, substantial evidence. Accordingly, Petitioner's Exception 9 hereby is rejected.

Petitioner's Exception 10: Finding of Fact 30-

Petitioner argues the findings that Petitioner offered to bring along a gun on the January 30, 2015 ride, offered advice on how to set up an attack on Mr. Williams and to dispose of Mr. Williams' body are distortions of the transcript.

When Petitioner met with Moore and Driver right before the car ride, he asked if he needed anything. Moore responded, "[t]hat's up to you, entirely up to you. Um He's got some things and we got something put together so--." Petitioner pulled out a nine-millimeter gun that had been borrowed by a co-worker, and inquired whether such an item would be needed. Petitioner had the weapon and would bring it along if requested. Thus, Petitioner did offer to bring along the gun. [R-11, pages10, lines 5-21]. When the car ride was going on, Newcomb told the group that they could grab Williams, give him some shots of insulin (that had been placed in a cooler so it would not spoil), place Williams by a river and set up a fishing pole. Petitioner asked if Williams does go fishing and indicated that whether Williams actually did fish "matters" because the placement of Williams would look suspicious otherwise. [R-11, page 15, lines 1-15]. Petitioner then noted if the group had wanted to do a "complete disposal" of Mr. Williams' body, they would have to "chop up the body." [R-11, lines 13-15].

There is substantial competent evidence to support the findings in paragraph 30, when the record evidence is viewed as a whole, rather than picking out certain words and

phrases of testimony. *See, McDonald v. Dep't of Banking & Finance*, 346 So.2d 569, 578-579 (Fla. 1st DCA 1977). Accordingly, this exception hereby is rejected.

Petitioner's Exception 11: Finding of Ultimate Fact 37-

Petitioner argues that he did not realize a profit, gain or advantage from his conduct

Petitioner claims there is nothing in the record to reflect that the Petitioner knew "informant Moore" was going to kill Mr. Williams or that he wanted camaraderie from Mr. Driver.

However, testimony of Mr. Moore during the conspiracy trial indicated as early as December 6, 2014, Petitioner and co-conspirator Newcomb had approached Mr. Moore and has told him they wanted Williams "six feet under." [R-6, pages 415-422; page 456]. The transcript of the conversations among Petitioner, Mr. Moore and Mr. Newcomb during the January 30, 2015 car ride shows that Petitioner was a willing participant in the discussions with Mr. Newcomb and Mr. Moore as to the available methods for killing Mr. Williams, such as overdosing him with insulin and laying him face down in the river, chopping up Mr. Williams' body, and removing Mr. Williams' "thinking cap." [R-11, page 14, lines 1-21; page 18, lines 1-3]. Further, Petitioner told his alleged co-conspirators that the murder should "send a message." [R-11, page 13, lines 11-14]. On February 16, 2015, Driver told Moore he wanted to "stomp [Mr. Williams'] larynx closed" because Mr. Williams had bitten him and he therefore had to endure nine months of blood work because Mr. Williams was "dirty." [R-13, page 2, lines 14-25; page 3, lines 1-22]. Because of what Williams had done to Driver, and how Driver felt about what had happened to him, Petitioner was willing to engage in the murder or attempted murder of Mr. Williams. [R-11; R-12; R-14]. To protect Driver from suspicion, Petitioner and his alleged other co-conspirators ensured that

they knew Driver's work schedule so that Mr. Driver would have an alibi if they were able to effectuate the murder of Williams. [R-11, page 19, lines 1-4]. Petitioner's conduct in trying to effectuate the murder of Mr. Williams and in trying to ensure Driver would not be suspected would cause Petitioner to violate the oath he took as a sworn law enforcement officer. [DOAH Hearing Transcript, page 59, 22-25; page 60, lines 1-11].

On March 19, 2015, when Moore showed Petitioner a staged photograph that made it appear as if Mr. Williams had been murdered, Petitioner expressed gratification from the crime. Petitioner indicated he was happy with the murder and how it played out. He also verified that the murder was a group effort. Petitioner stated that: "[t]his was me, you [Moore] and Brother Thomas [Driver] and I guess Charles [Newcomb]. [R-17, pages 2-3].

Thus, there is substantial competent evidence from the record that Petitioner wanted Mr. Moore to be involved with the murder of Mr. Williams because of what Mr. Williams had done to his acquaintance, Driver, and that Petitioner wanted the murder to "send a message" presumably to other inmates that if they took similar action against a corrections officer, they might end up harmed or dead.

Accordingly, Petitioner's Exception 11 hereby is rejected.

Petitioner's Exception 12: Finding of Ultimate Fact 38:

Petitioner objects to the statement that he used the rights, powers, privilege and knowledge to facilitate the crime for which he was convicted.

Petitioner knew Driver and Newcomb from work. They all were correctional officers that either were working, or had worked, at the same prison at the time of the alleged conspiracy. As noted above in response to Petitioner's Exception 11, Driver told Moore he wanted to "stomp [Mr. Williams'] larynx closed" because Mr. Williams had

bitten him when Mr. Williams was incarcerated and, therefore, Driver had to endure nine months of blood work because Mr. Williams was "dirty." [R-13, page 2, lines 14-25; page 3, lines 1-22]. Because of what Williams had done to Driver, and how Driver felt about what had happened to him, Petitioner was willing to engage in the murder or attempted murder of Mr. Williams with his alleged co-conspirators. [R-11; R-12; R-14]. To protect Driver from suspicion, Petitioner and his alleged other co-conspirators ensured that they knew Driver's work schedule so that Mr. Driver would have an alibi if they were able to effectuate the murder of Williams. [R-11, page 19, lines 1-4].

Mr. Newcomb had asked Petitioner to obtain a recent picture of inmate Williams so they could be sure they were attempting to kill the correct individual. Newcomb told Petitioner to go to work and "...pull up his recent picture when he got out of the pen." [R-12, page 10, lines 15-18]. While Petitioner may not have actually pulled up Mr. Williams' picture at work, he acknowledged he would be willing and able to do so if needed.

Petitioner and his co-conspirators knew personal medical information about Mr. Williams from the fact of their employment. This knowledge facilitated their commission of the crime since they knew to take precautions so that they would not be infected if they succeeded and the killing was bloody. This confidential medical information is not something to which the general public, including members of the KKK, would have access. When Petitioner went on the January 30, 2015 ride with Moore and Newcomb, Mr. Newcomb stated he had three masks if they could "grab" Williams. Petitioner stated in response: "[b]ecause you know he's – he's Hepatitis and aids and HIV." [R-11, page 14, lines 4-25]. Later, Petitioner mentioned that when he had told Newcomb the other day about removing Williams' "thinking cap" he was concerned as there would be a lot of blood and

Williams was "hepatitis C." [R-11, page 18, lines 1-3]. Petitioner had testified during the DOAH Hearing that, as a correctional officer, he had been physically attacked, spit upon and bitten, and that such types of attacks were "... an every day occurrence." [DOAH Hearing Transcript, page 44, lines 2-13]. Petitioner testified that he had been exposed to tuberculosis and had to "... take the cocktail. [R-6, page 1002, lines 14-16]. Petitioner noted that whenever a corrections officer is attacked, the officer may have a physical or be transported to the hospital." [R-6, page 1002, lines 20-24]. Thus, it would seem that their employer would have an obligation to let them know of any contagious medical conditions that inmates have and that could be passed on to the corrections officers so that they could take appropriate precautions and get timely, effective treatments. In fact, Driver did undergo treatment for hepatitis after having been bitten by Williams. The hospital told Driver and the other corrections officers that Williams was "dirty." [R-13, page 2, lines 12-24].

Accordingly, there is substantial competent record evidence that Petitioner used rights, powers, privilege and knowledge to facilitate the crime for which he was convicted. As such, Petitioner's Exception 12 hereby is denied.

Petitioner's Exception 13: Finding of Ultimate Fact 33-

Petitioner objects to the finding of a nexus between his public employment and the crime for which he was convicted.

Petitioner emphasizes the testimony of two federal FBI agents in response to a question as to whether the crime of conspiracy to commit murder had "anything to do with" Petitioner's and Mr. Driver's employment. [See, Petitioner's Exhibit 6, page 81, lines 13-22]. That question could mean anything- that is, it could mean whether the specific duties

of their DOC employment involved activities that could ultimately lead to conspiracy to commit murder. The testimony was not unequivocal. When asked if the co-conspirators utilized their employment to assist the criminal activity, Agent Campbell replied: "Not specifically." [P-6, page 81, lines 13-16]. When asked if the conspiracy was related to KKK activities, the response was: "I **guess** you could say that." [P-6, page 81, lines 17-22]. The agents never were asked to respond to the question as to whether a criterion of the Florida forfeiture statute was met by Petitioner's actions; namely, whether Petitioner's alleged crime was committed "through the use or attempted use of the power, rights, privileges, duties, or position of his ... public office or employment position." *See*, Section 112.3173(2)(e)6., Florida Statutes.

Petitioner never qualified either federal agent as an expert on Florida law, and especially on the forfeiture statute, Section 112.3173, Florida Statutes. The affidavit of Agent Campbell stated that he engages in the "prevention, detection, investigation or prosecutions of Federal criminal law" and further for "enforcing Federal Criminal Statutes under the jurisdiction of the FBI." [R-1, page 1, emphasis added].

Petitioner argues that the transcript of the January 30, 2015 car ride simply showed some "tough talk" among a "bunch of guys" and that there was no real plan to kill Williams [DOAH Hearing Transcript, page 53, 13-25; page 54, lines 1-4; page 62, lines 6-25]. However, Petitioner admitted that he knew that particular car ride was connected to something that his co-conspirators wanted to do to Warren Williams. [DOAH Hearing Transcript, page 46, lines 24-25; page 47, lines1]. During that car ride, Petitioner and Mr. Newcomb specifically discussed how the murder of Mr. Williams could be effectuated, such as by overdosing him with insulin, placing him face down in the river and staging the scene

to make it appear as if Mr. Williams had a medical event while fishing; or by removing Mr. Williams' "thinking cap;" or by "chopping up" Mr. Williams' body. [R-11, pages 14-15; page 18, lines 1-3]. A cooler containing insulin and some needles was brought along to use in the murder if the opportunity presented itself, as well as a fishing pole to aid in staging the murder. [R-11, page 5, lines 15-25; page 7, lines 8-25; page 8, lines 1-4]. In addition, because Mr. Williams may have had one or more blood-borne diseases, a fact that Petitioner and his co-conspirators only knew because of Mr. Williams' incarceration, the co-conspirators took the precaution of bringing along masks to protect them from disease if the killing was bloody. [R-11, page 14, lines 22-25].

The reason expressed by Petitioner during the car ride for the attempt to kill Mr. Williams was to "send a message" since Williams, while incarcerated, attacked and attempted to transmit a disease to Mr. Driver. [R-11, page 13, lines 11-14]. Petitioner knew Driver because of his employment as a corrections officer at the same facility at which Petitioner worked. [DOAH Hearing Transcript, pages 54 and 56].

Petitioner argues that Mr. Williams was not incarcerated at the time the alleged conspiracy to commit murder took place. However, at a minimum, it would violate the oath that Petitioner and his co-conspirators took as corrections officers to murder a prison inmate and to conceal the murder in the prison facility. Also, due to the presence of other corrections officers in the same facility, all of whom took an oath under the DOC Code of Conduct, it is likely at least some of the other corrections officers would have tried to stop the murder of Mr. Williams by Petitioner and his co-conspirators and would be obligated to report an attempted murder at the facility. [Recommended Order, Endnote 2, DOC Code of Conduct]. It should be noted, though, that while Mr. Williams was not an inmate at the time

the co-conspirators plotted his murder, he was under DOC supervised release. [R-1, paragraph 8].

While Petitioner again argues that the attempted killing was a private matter by a member of the KKK, the ALJ found in Endnote #4 of her Recommended Order that whether Petitioner was a member of the KKK or a racist, and whether the KKK is a white supremacy group, "... has no bearing on whether he violated section 112.3173(2)(e)." Petitioner specifically had testified that he was not a racist and that the KKK chapter to which he belonged is not a racist organization. [DOAH Hearing Transcript, page 64, lines 3-20].

The SBA cannot reweigh evidence since this evidentiary matter is within the purview of the ALJ. *See, 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). The ALJ had the testimony of the two federal agents available when she formulated her Recommended Order as well as all other documents produced during the hearing and the testimony of Petitioner. There is substantial competent evidence to support the findings in paragraph 33. According, this exception hereby is rejected.

Petitioner's Exception 14:

Petitioner objects to Findings of Fact 8, 14, 16, 17, 19, 20, 22, 23, 24, 27, 28, 29 and 30 to the extent such findings set forth any knowledge the Petitioner had concerning Mr. Williams.

Petitioner makes the statement there is no evidence to support any findings that imply Petitioner knew Williams, what he knew about Mr. Williams and when he knew it. However, as discussed previously, in the response to Petitioner's Exceptions 1, 2 and 8, there is substantial competent evidence in the record, using Petitioner's own testimony, to

show Petitioner did know who Mr. Williams is, that Mr. Williams was an inmate at the correctional facility at which Petitioner and his fellow co-conspirators were employed and that Mr. Williams was involved in an altercation with Mr. Newcomb, one of Petitioner's co-conspirators.

Accordingly, Petitioner's Exception 14 hereby is denied.

Argument

The statements contained in the first two paragraphs of Petitioner's "Argument" have been addressed in the various responses to Petitioner's fourteen enumerated exceptions and will not be re-addressed here.

Petitioner then states that his case is "analogous" to the case *Rivera v. Board of Trustees of the City of Tampa's General Employment Retirement Fund*, 189 So.3d 207 (Fla. 2d DCA 2016). Presumably, this legal argument is intended to apply to the fourteen enumerated exceptions. Petitioner states that, as in *Rivera*, the record evidence in his case "... is replete with misstatements of the record, speculation and impermissible stacking of inferences regarding what Petitioner knew or didn't know, when he did or did not know it, about whom and what information, if any, he obtained from his employment at DOC."

However, such reliance on *Rivera* is misplaced as the facts and circumstances involved in *Rivera* are vastly different from those involved in the instant matter.

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. Further, there is no evidence that any of the duties and responsibilities of Mr. Rivera's public position involved the care and custody of minors.

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.

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 the instant situation in which Petitioner was a guard at a prison in which Mr. Williams had been physically present as an inmate and at which Petitioner's acquaintance, and alleged co-conspirator, was attacked. Petitioner testified that his job duties at the correctional facility were the "[c]are, custody and control of inmates." [DOAH Transcript, page 43, lines 18-20].

The court in *Rivera* 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.

In the instant situation, there was testimony produced as well as recordings of conversations between Petitioner and his co-conspirators, that showed the interactions these individuals had concerning an orchestrated retaliation against an inmate, Mr. Williams, who had been in the exact same corrections facility where the co-conspirators worked or had worked. One of the co-conspirators had been attacked in that facility by Mr. Williams and perhaps was infected with a communicable disease carried by Mr. Williams. While

Petitioner argues that no action to harm Mr. Williams was attempted while Mr. Williams was an actual inmate, Mr. Williams was on supervised release when the plotting of the murder by Petitioner and his co-conspirators occurred. [R-1, paragraph 8].

It might have been difficult for Petitioner and his co-conspirators to carry out a murder or attempted murder of an inmate at the correctional facility at which they worked or had worked. However, just because the conspiracy to commit murder occurred off the employer's premises, does not mean that forfeiture would not be appropriate. 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 actual 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 Law Judge 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).

In this matter, Petitioner conspired to commit murder to retaliate against an inmate for an altercation that occurred at the correctional facility at which Petitioner worked. Petitioner wanted the inmate killed to "send a message." [R-11, page 13, lines 11-14].

Based on record evidence, the ALJ specifically stated that "[w]hether Petitioner was racist or a member of the KKK, or whether the KKK is a white supremacy group is irrelevant and has no bearing on whether he violated section 112.3173(2)(e)." [Recommended Order, page 23, Endnote #4].

There is competent substantial 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.

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 Conclusions of Law set forth in paragraphs 39 through 51 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 paragraph 52 of the Recommended Order hereby are modified to correct some typographical errors, to read as follows:

52. In Zeh,, Petitioner committed his crime for passion, not money; he believed his conduct would stop the affair between his wife and the victim of his crime, and save his marriage. Such personal benefits obtained while employed as a law enforcement officer "are the types of profits and intended benefits chapter 112 was enacted to prohibit." *Id.* citing *Bollone*, *supra*, 100 So.3d at 1282. [The Recommended order in *Bollone* noted that: "[n]umerous hearings under this forfeiture statute and similar statutes have consistently concluded that sexual gratification constitutes personal gain." *Bollone v. Dept. of Mgmt. Servs.*, DOAH Case No. 11-3274, Recommended Order, October 19, 2011, page 20, paragraph 78, citations omitted; Final Order DMS-11-0124, December 22, 2011, 2011 WL 6917641]. Here, based on his reaction to the photograph of Mr. Williams' body, it is reasonable to infer that Petitioner received gratification; and that he also may have benefitted in his relationships with Mr. Driver and Mr. Newcomb.

The State Board of Administration adopts and incorporates in this Final Order the Conclusions of Law set forth in paragraph 53 of the Recommended Order as if fully set forth herein.

54. The case name "Maryland v. Dep't of Mgmt. Servs., Div. of Ret." set forth in Conclusion of Law 54 hereby is corrected to read: "Marsland v. Dep't of Mgmt. Servs., Div. of Ret." The remainder of Conclusion of Law set forth in paragraph 54 remains unchanged.

The Conclusions of Law set forth in paragraphs 55 through 59 of the Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety, except as modified above. Petitioner was a public employee convicted of a "specified offense" prior to his retirement and that, therefore, Petitioner has forfeited all the rights and benefits he possessed by virtue of his Florida Retirement System Investment Plan account, except for the amount of his accumulated employee contributions as of the date of his termination of employment.

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 3rd day of July, 2018, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Daniel Beard

Daniel Beard
Chief of Defined Contribution Programs
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
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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 robert@robertarushpa.com and by UPS to Robert A. Rush, Esq., Counsel for Petitioner, Robert A. Rush, P.A., 11 SE Second Avenue, Gainesville, Florida 32601; 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 3rd day of July, 2018.

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