STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

SUSAN PAINTER,

Petitioner,

Final Order No. DMS – 18-0232

vs.

CASE NO.: 18-0054

STATE OF FLORIDA, DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT,

Respondent,

_____/

**FINAL ORDER**

**Preliminary Statement**

On September 25, 2018, an Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) submitted a Recommended Order (RO) to the Department of Management Services (DMS or Department). A copy of the RO is attached as Exhibit A. Pursuant to section 120.57(3)(e), Florida Statutes, and the notice provided in the RO, parties were allowed to file written exceptions to the RO. The Respondent filed exceptions to the RO on October 15, 2018. This matter is now on administrative review before the Secretary of the Department for final agency action.

The Petitioner filed a response to the Respondent's exceptions on October 25, 2018, which included a Motion to Strike the Respondent's exceptions as untimely filed outside the 15-days set forth in section 120.57(1)(k), Florida Statutes, and Rule 28-106.217, Florida Administrative Code. Both the cited statute and rule state exceptions to be filed with the agency responsible for rendering final agency action will be within 15 days of entry of the recommended

order, which was October 10, 2018. The main office of DMS located in Tallahassee, Florida, however, was closed by order of the Governor of the state of Florida on October 9, 2018, and remained closed through October 12, 2018, as a result of Hurricane Michael. Respondent's exceptions were filed with DMS on the first day the DMS main office was re-opened, October 15, 2018. Given these extraordinary circumstances, and the failure of the Petitioner to clearly demonstrate the Respondent waived the opportunity to file exceptions, an outright striking of the Respondent's exceptions is not warranted without providing the Respondent with a notice of intent to strike the exceptions and the opportunity to respond. See *Hamilton County Bd. of County Comm'rs v. State Dep't of Environmental Regulation*, 587 So. 2d 1378, 1390, (Fla. 1st DCA 1991); see also *Department of Environmental Regulation v. Puckett Oil Co., Inc.*, 577 So. 2d 988, 991 (Fla. 1st DCA 1991). Where the petitioner has not suffered any prejudice from the delay, to facilitate a timely Final Order is issued within the 90 days required by section 120.569(2)(l), Florida Statutes, and to ensure a complete review in the event this final order is appealed, the Department will rule on the merits of the exceptions.

## BACKGROUND

The Petitioner challenges the Respondent's decision issued on October 27, 2016, to forfeit the Petitioner's rights and benefits under the Florida Retirement System (FRS). The basis for the forfeiture of the Petitioner's rights resulted from a plea of nolo contendere to one count of grand theft, a felony committed prior to the Petitioner's retirement, in violation of section 812.014, Florida Statutes, for acts committed in connection with the Petitioner's employment with Gulf Coast State College (Gulf Coast), an FRS-participating employer. The formal hearing was held before DOAH from June 20, 2018, through June 21, 2018, in Tallahassee, Florida. The issue before the ALJ was whether the Petitioner committed a

specified offense under section 112.3173(2)(e), Florida Statutes, to support a forfeiture of the Petitioner's FRS benefits pursuant to section 112.3173(3), Florida Statutes.

## THE RECOMMENDED ORDER

In the RO, the ALJ found the Respondent failed to prove by a preponderance of the evidence all of the elements set forth in section 112.3173(2)(e)6., Florida Statutes, to support a finding that the Petitioner had been convicted of a specified offense. RO, 15. The ALJ concluded the Petitioner had not forfeited her FRS benefits and rights and held the Department should enter a final order restoring the Petitioner's rights and benefits under FRS and providing payment of any past due benefits, together with interest at the statutory rate. RO, 15.

## STANDARD OF REVIEW FOR MODIFICATION OF RECOMMENDED ORDER

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law."

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health,* 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997). If there is competent substantial evidence to support an ALJ's findings of fact, an agency may not reject them, modify them, substitute its findings, or make new findings. *See, e.g., Pillsbury v. Dep't of Health*, 744 So. 2d 1040, 1041 (Fla. 2d DCA 1999); *Fonte v. Dep't of Envtl. Regulation*, 634 So. 2d 663 (Fla. 2d DCA 1994). In regard to whether an ALJ's finding of fact is supported by competent substantial evidence, it is irrelevant

that there may also be competent substantial evidence supporting a finding contrary to the administrative law judge's findings of fact. *See, e.g., Arand Construction Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So. 2d 622, 623 (Fla. 1st DCA 1986). An agency may not substitute its judgment for that of the hearing officer by taking a different view of, or placing greater weight on the same evidence. *Wash & Dry Vending Co. v. State, Dep't of Business Regulation, Div. of Alcoholic Bevs. & Tobacco*, 429 So. 2d 790, 792-793 (Fla. 3d DCA 1983).

Agencies do not have jurisdiction to modify or reject rulings on evidentiary matters. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with policy considerations," are the prerogative of the finder of fact and are not matters over which the agency has "substantive jurisdiction." *Martuccio v. Department of Professional Regulation, Bd. of Optometry*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993). "It is for the hearing officer to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence." *Id.*

Further, section 120.57(1)(l), Florida Statutes, provides an agency in its final order "may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction" when the agency finds its substituted conclusion of law "is as or more reasonable than that which was rejected or modified."

## FINDINGS OF FACT

The Findings of Fact set forth in paragraphs 1 through 4, 7 through 12, 14, and 18 through 21 of the Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

The Finding of Fact in paragraph 6 of the Recommended Order is modified to the extent it misstates the competent substantial evidence. The Recommended Order lists the date which the Petitioner's employment contract with Gulf Coast expired as June 20, 2014. Based on a review of the entire record, this particular finding of fact was not based on competent substantial evidence. Petitioner exhibit 18 entered into evidence, along with the Petitioner's testimony during the administrative hearing, demonstrates the Petitioner's employment contract with Gulf Coast expired on June 30, 2014. Transcript, pg. 163.

The Finding of Fact in paragraph 13 of the Recommended Order is modified to the extent it misstates the competent substantial evidence. The Recommended Order lists the beginning date of the Gulf Coast softball trip to Las Vegas as January 31, 2014. Based on a review of the entire record, this particular finding of fact was not based on competent substantial evidence. Petitioner exhibits 5 and 6, both entered into evidence, along with the Petitioner's testimony during the administrative hearing, demonstrate the Gulf Coast athlete game travel began on January 30, 2014. Transcript, pg. 94-95.

The remaining Findings of Fact, which the Respondent takes exception to, are subsequently addressed below.

## CONCLUSIONS OF LAW

The Conclusions of Law set forth in paragraphs 22 through 30 and paragraphs 32 through 33 of the Recommended Order are adopted and are specifically incorporated by

reference as if fully set forth herein. The remaining Conclusions of Law, which the Respondent takes exception to, are subsequently addressed below.

## RULINGS ON EXCEPTIONS FILED BY RESPONDENT

Having considered the DOAH pleadings, the transcript of the proceedings, exhibits entered into evidence, the exceptions filed by the Respondent, and the responses to the exceptions, the undersigned finds as follows with regard to the exceptions filed by the Respondent:

**Exception 1 (Paragraph 5)**

Respondent takes exception to Finding of Fact 5 regarding the original charging information which included one count of grand theft. The Respondent's exception suggests additional information should be included in this Finding of Fact, specifically that the information charged the Petitioner with one count of grand theft from Gulf Coast.

In ruling on exceptions, a final order shall include an explicit ruling on each exception. Pursuant to section 120.57(1)(l), Florida Statutes, "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." Here, the Respondent's exception to Finding of Fact 5 fails to identify a legal basis for this exception and does not include the appropriate citations to the record in support of this exception. Review and ruling on this exception is therefore not required by the Agency.

A review of the record, however, does support the Department rejecting Finding of Fact 5 in totality as this Finding of Fact is not supported by competent substantial evidence. Section

120.57(1)(f), Florida Statutes, sets forth the information which may be considered as part of the record in a case with disputed issues of material fact which includes:

> "1. All notices, pleadings, motions, and intermediate rulings.
> 2. Evidence admitted.
> 3. Those matters officially recognized.
> 4. Proffers of proof and objections and rulings thereon.
> 5. Proposed findings and exceptions.
> 6. Any decision, opinion, order, or report by the presiding officer.
> 7. All staff memoranda or data submitted to the presiding officer during the hearing or prior to its disposition, after notice of the submission to all parties, except communications by advisory staff as permitted under s. 120.66(1), if such communications are public records.
> 8. All matters placed on the record after an ex parte communication.
> 9. The official transcript."
>
> §120.57(1)(f), Fla. Stat.

The documents contained in the DOAH record are devoid of information regarding the original charging document listing Ms. Painter as being charged with one count of grand theft. Although the Petitioner acknowledges the existence of this original information in the Petitioner's Proposed Recommended Order filed with the Department, the original charging information was not submitted by either party to become part of the record to support Finding of Fact 5. A judge may take judicial notice of court records, including the original information charging the Petitioner with one count of grand theft, pursuant to section 90.202, Florida Statutes. The ALJ did not, however, make such a finding on the record to support a conclusion that the original charging document was judicially noticed by the ALJ. The hearing transcript, pleadings, motions, and evidence introduce and entered into the record all contain references to the January 9, 2015, information charging the Petitioner with seven counts of grand theft, but none include the original information filed against the Petitioner with the one count of grand theft. As this Finding of Fact was not

supported by substantial competent evidence, the Agency may reject the finding. *Resnick v. Flagler County Sch. Bd.*, 46 So. 3d 1110, 1112-1113 (Fla. 5th DCA 2010).

**Exception 2 (Paragraphs 15 and 17)**

The Respondent takes exception to Findings of Fact 15 and 17 and appears to suggest that these Findings of Fact 15 and 17 would be refuted by the deposition testimony of the Gulf Coast Athletic Director, which the Respondent asserts the ALJ improperly excluded from evidence during the administrative proceeding. Pursuant to section 120.57(1)(l), Florida Statutes, the Department need not rule on these exceptions as both fail to identify the legal basis for the exception and both do not include the appropriate and specific citations to the record.

Even in reviewing these Findings of Fact and the Respondent's exceptions, however, there is no basis to support the Respondent's exception to either Finding of Fact 15 or Finding of Fact 17. The Respondent's exceptions to these Findings of Fact are premised on the argument that the ALJ erred in failing to include deposition testimony which allegedly would have altered the ALJ's Findings of Fact. The Agency does not have jurisdiction to modify or reject rulings on the admissibility of evidence and the Agency's review of exceptions does not allow for the reweighing of evidence. *Rogers, supra*. Evidentiary rulings are matters within the ALJ's sound "prerogative ... as the finder of fact" and may not be reversed on agency review. *See Martuccio,* 622 So. 2d at 609. Moreover, there is competent substantial evidence to support the ALJ's Findings of Fact 15 and 17 and the Agency will not reweigh the evidence or attempt to resolve conflicts. *Heifetz*, 475 So. 2d 1277 at 1281.

Neither of the Respondent's exceptions provide the Department with a sufficient legal basis for rejecting or modifying the ALJ's Findings of Fact under section 120.57(1)(l), Florida Statutes, and where there was competent substantial evidence to support the ALJ's Findings of

Fact, the Department may not reject or modify Findings of Fact 15 and 17. Based on the foregoing, the Respondent's Exceptions to Findings of Fact 15 and 17 are denied.

**Exception 3 (Paragraph 16)**

The Respondent takes exception to Finding of Fact 16 which restates the Petitioner's administrative hearing testimony where she maintained her innocence and provided a justification for entering a plea of nolo contendere to the grand theft charge. The Respondent's exception argues this Finding of Fact is not material under section 112.3173, Florida Statutes. The Department need not rule on this exception as it fails to identify the legal basis for the exception and does not include the appropriate and specific citations to the record.

Even in reviewing this Finding of Fact and the Respondent's exception, there is no basis to support the Respondent's exception to Finding of Fact 16. The Respondent cites to *Boone v. Dep't of Mgmt. Servs*, Case No. 07-0890 (Fla. DOAH Jul. 31, 2007; F.O. Oct. 19, 2007) in support of the assertion that the Finding of Fact 16 improperly relied on the Petitioner's testimony wherein she maintained her innocence. The Respondent does not assert that Finding of Fact 16 was not based on competent substantial evidence, but rather attempts to argue the evidence should not have been considered by the ALJ as such assertions were found in *Boone* to have no significance when an individual pleads nolo contendere to a specified offense.

The *Boone* case is factually distinguishable from this matter and does not support an exception to Finding of Fact 16 where the charging information in *Boone* set forth the factual basis for a theft of property belonging to Boone's employer. Here, the factual basis for the charge of grand theft to which the Petitioner entered a plea of nolo contendere listed the theft of meal money from softball players rather than the Petitioner's employer, Gulf Coast. Additionally, the reviewing agency does not have the jurisdiction to review rulings on the

admissibility of evidence and the agency may not substitute its judgment for that of the hearing officer by taking a different view of, or placing greater weight on the same evidence. *Wash & Dry Vending Co. v. State, Dep't of Business Regulation, Div. of Alcoholic Bevs. & Tobacco*, 429 So. 2d 790, 792-793 (Fla. 3d DCA 1983). There is competent substantial evidence to support the ALJ's Findings of Fact 16 and the Agency will not reweigh the evidence, attempt to resolve conflicts, or judge the credibility of witnesses. *Heifetz*, 475 So. 2d 1277 at 1281.

The Respondent has failed to provide the Department with a sufficient legal basis for rejecting or modifying the ALJ's Findings of Fact 16 under section 120.57(1)(l), Florida Statutes. Based on the foregoing, the Respondent's Exception to Finding of Fact 16 is denied.

**Exception 4 (Paragraph 31, 34, 35, 36, and 37)**

In this exception to the ALJ's Conclusions of Law, the Respondent attempts to relitigate the issue of whether the Petitioner's conviction fits the definition of a specified offense under section 112.3173(2)(e)6., Florida Statues. For the first time during this proceeding, the Respondent also asserts the Petitioner's actions constitute a specified offense under section 112.3173(2)(e)2., Florida Statutes, which defines a specified offense as the "committing, aiding, or abetting of any theft by a public officer or employee from his or her employer."

Conclusion of Law 31 holds the Petitioner's nolo contendere plea to a felony grand theft does not fit the definitions set forth in section 112.3173(2)(e), Florida Statutes, subparagraphs 1 through 5 and 7. The Respondent takes exception to this conclusion and asserts the Petitioner's conviction fits within subsection 2 of the definition of a specified offense, "committing, aiding, or abetting of any theft by a public officer or employee from his or her employer." §112.3173(2)(e)2., Fla. Stat. In support of this assertion, the Respondent cites to the case *Boone v. Dep't of Mgmt. Servs*, Case No. 07-0890 (Fla. DOAH Jul. 31, 2007; F.O. Oct. 19, 2007) and

argues the Petitioner maintaining her innocence while entering a plea of nolo contendere has no relevance in determining whether a specified offense occurred. As set forth above, the *Boone* case is factually distinguishable and does not support an exception to Conclusion of Law 31 where the Petitioner's plea to Count IV of grand theft did not include a factual basis that the theft was from the Petitioner's employer.

The Respondent has the burden to prove by a preponderance of the evidence that the Petitioner as a public employee was convicted of a specified offense. The Respondent cites to Finding of Fact 15 which states the Petitioner returned $132 in unspent meal money to the athletic department, Finding of Fact 13 which states the Petitioner was given $4,752 in cash to pay for meals during the Las Vegas trip, and Finding of Fact 11 which states the Petitioner was ordered to pay $4,400 in restitution and was directed to have no contact with Gulf Coast or the Petitioner's former softball players. The Findings of Fact made by the ALJ did not, however, include a finding of whether the funds given to the Petitioner for meals during the Las Vegas trip was the property of Gulf Coast. In considering the Respondent's exception, the Respondent would have to have proved that the Petitioner pled nolo contendere to a theft from the Petitioner's employer. Count IV of the amended information, to which the Petitioner entered a plea of nolo contendere, listed the softball players as the victims of the grand theft rather than the Petitioner's employer, Gulf Coast. The Respondent has not demonstrated that the substituted conclusion of law is as or more reasonable that the ALJ's conclusion to support a rejection or modification of Conclusion of Law 31, so the ALJ's conclusion should stand.

Conclusions of Law 34, 35, 36, and 37 set forth the ALJ's conclusions about the various elements of section 112.3113(2)(e)6., Florida Statutes, and cite to the lack of evidence demonstrating (1) the Petitioner acted willfully with intent to defraud the public or the public

employer of the right to receive faithful performance of the Petitioner's duties; (2) that the Petitioner obtained a profit through her actions; and (3) that the Petitioner used her power, rights, privileges, duties or position of her employment in the commission of the offense. The ALJ concluded, based on the Respondent's failure to establish all the factors set forth in section 112.3113(2)(e)6., Florida Statutes, that the Petitioner cannot have been found to have been convicted of a specified offense. The Respondent's exceptions do not, however, identify the legal basis for the exceptions and the Department need not rule on these exceptions.

Even in reviewing the Respondent's exception, there is no basis to support these exceptions where the Respondent is simply attempting to reargue the weight of the evidence presented at DOAH, which is beyond the jurisdiction of the Department. *Rogers,* 920 So. 2d at 30. To support a ruling that the Respondent's exception is as or more reasonable than the ALJ's Conclusion of Law, the reviewing agency would have to engage in additional fact finding regarding the elements of section 112.3113(2)(e)6., Florida Statutes. "It is for the hearing officer to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence." *Martuccio v. Department of Professional Regulation, Bd. of Optometry,* 622 So. 2d 607, 609 (Fla. 1st DCA 1993). The Respondent has not demonstrated that the substituted conclusions of law are as or more reasonable to support a rejection or modification of Conclusions of Law 34 through 37.

Based on the foregoing, the Respondent has failed to provide the Department with a sufficient legal basis for rejecting or modifying the ALJ's Conclusion of Law under section 120.57(1)(l), Florida Statutes, and the Respondent's exceptions to Conclusions of Law 31, 34, 35, 36, and 37 are denied.

## CONCLUSIONS

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

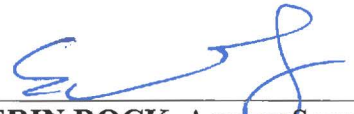
A. The Recommended Order (Exhibit A) is adopted in part and rejected in part as set forth above. The adopted portion of the Recommended Order is incorporated herein by reference.

B. The Respondent's exceptions to the cited Findings of Fact and Conclusions of Law are hereby denied.

C. The Petitioner has not forfeited her rights and benefits under the Florida Retirement System and the Petitioner's rights and benefits are to be restored to the Petitioner.

D. If any payments of benefits under the Florida Retirement System are past due, the Petitioner shall be paid any amounts past due, together with interest at the statutory rate.

**DONE AND ORDERED** this 21st day of December, 2018, in Tallahassee, Leon County, Florida.



**ERIN ROCK,** Agency Secretary
Department of Management Services
4050 Esplanade Way, Suite 285
Tallahassee, Florida 32399

## NOTICE OF RIGHT TO APPEAL

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

Certificate of Clerk:

Filed in the Office of the Agency
Clerk of the Department of Management
Services on this 21st day of
December, 2018.

Diane Wint
Diane Wint, Agency Clerk

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