



STATE BOARD OF ADMINISTRATION
OF FLORIDA

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ATTORNEY GENERAL

ASH WILLIAMS
EXECUTIVE DIRECTOR & CIO

August 1, 2018

Lynne A. Quimby-Pennock
Administrative Law Judge
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

Re: Final Order – Heike Stoll vs. State Board of Administration
DOAH Case No. 18-0067

Dear Judge Pennock:

Pursuant to the requirement by Section 120.57 (1) (m), Florida Statutes, attached please find the Final Order including exceptions filed by Petitioner in reference to the above case.

Please let me know should you need anything further.

Regards,

Tina Joanos
Agency Clerk
State Board of Administration of Florida

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DIVISION OF
ADMINISTRATIVE HEARINGS

FILED

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

HEIKE STOLL,)

Petitioner,)

vs.)

STATE BOARD OF ADMINISTRATION,)

Respondent.)

DOAH Case No. 18-0067

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DIVISION OF
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FINAL ORDER

On May 23, 2018, Administrative Law Judge Lynne A. Quimby-Pennock (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. Petitioner and Respondent each timely filed a Proposed Recommended Order. Petitioner timely filed exceptions on June 6, 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. Dep't 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

Petitioner’s Exception 1: Conclusion of Law 19-

Petitioner objects to the statement that once Mr. Bybee was convicted of the felonies that constituted “specified offenses” under Section 112.3173(2)(e), Florida Statutes, the terms of his pension contract were broken and Mr. Bybee’s retirement benefits were forfeited.

Petitioner argues that Section 112.3173(5)(c), Florida Statutes, states that if the felony conviction(s) giving rise to forfeiture is (are) appealed, and the conviction(s) is (are) reversed, then no forfeiture will occur. Petitioner noted that Mr. Bybee has appealed his felony convictions and that appeal still is pending. Petitioner complains that the Recommended Order does not contain any provision for a stay pending the outcome of the appeal.

First, in order to seek some form of administrative relief, a party must have standing. The courts have determined that standing exists if a party can prove: “(1) injury in fact of sufficient immediacy, and (2) [that] the injury is of a type the proceeding is designed to protect, commonly referred to as the ‘zone of interest’ test.” *North Ridge General Hospital, Inc. v. NME Hospitals, Inc.*, 478 So.2d 1138, 1139 (Fla. 1st DCA 1985). As will be

discussed in detail below, Petitioner does not have any rights to Mr. Bybee's FRS retirement benefits so she has no standing to raise any issues as to the forfeiture determination.

Second, while Mr. Bybee may have filed an appeal, it is unclear whether he will appeal all of the convictions of the offenses giving rise to the forfeiture. He declined to contest the forfeiture even though he was given ample opportunity to do so.

Third, the applicable statute states: "the **payment of retirement benefits ordered forfeited** ... shall be stayed pending an appeal as to a felony conviction" [emphasis added]. Thus, a determination may be made that forfeiture is appropriate before all appeals have been concluded. If the appeals process reverses all convictions, then the retirement benefits will be paid to the employee. If the appeals process upholds the convictions, then the forfeiture process will be completed.

Accordingly, Petitioner's Exception 1 hereby is denied.

Petitioner's Exception 2: Finding of Fact 8-

Petitioner argues that either her Petition for Dissolution of Marriage, dated May 9, 2017, her voluntary Marital Settlement Agreement, that contains the signatures of both Petitioner and her former husband as of November 30, 2017, or the Final Judgment of Dissolution of Marriage dated April 16, 2018, served to distinguish any interest Mr. Bybee had in his retirement plan account since forfeiture has not yet been ordered in this matter.

Section 121.591(5), Florida Statutes, tracks the language of Internal Revenue Code Section 401(a) and the regulations thereunder that pertain to the fact that all tax qualified retirement plans, such as the Florida Retirement System Investment Plan **must** contain an

"anti-alienation" clause, such that retirement benefits cannot be assigned or alienated. The only exceptions to the anti-alienation clause are for "qualified domestic relations orders by a court of competent jurisdiction, income deduction orders as provided in s. 61.1301, and federal income tax levies." *Id.* Neither the voluntary Marital Settlement Agreement entered into by the parties nor the Final Judgment of Dissolution of Marriage constitutes a qualified domestic relations order or an income deduction agreement, and, thereby, could not serve to transfer any of Mr. Bybee's retirement benefits to Petitioner.

Secondly, Petitioner appears to be arguing that since forfeiture has not been ordered in this situation, then any rights Mr. Bybee had to his Investment Plan account were extinguished when either the Petition for Dissolution of Marriage, the voluntary Marital Settlement Agreement or the Final Judgment of Dissolution of Marriage were filed. However, the crimes for which Mr. Bybee was found guilty occurred in December 2016 through January 2017 [Respondent's Exhibit 3- Probable Cause Affidavit; Respondent's Exhibit 4- 5th Amended Information]. Whether forfeiture is applicable depends on when *the underlying acts took place, not when the employee is to receive a benefit.* Under Section 112.3173(3), Florida Statutes, "...the time the offense is committed controls forfeiture, not the time of the ultimate conviction" *Garay v. Dep't of Management Servs., Div. of Ret.*, 46 So.3d 1227 (Fla. 1st DCA 2010); *Busbee v. State, Div. of Retirement*, 685 So.2d 914, 916-917 (Fla. 1st DCA 1996). In Florida, "a pension vests subject to the conditions in the forfeiture statute." *Hames v. City of Miami Firefighters' & Police Officers' Trust*, 479 F.Supp.2d 1276, 1288 (S.D. Fla. 2007).

Here, the underlying crimes took place, and forfeiture became applicable, between December 2016 and January 2017, well before any of the cited documents were filed by Petitioner and her former spouse.

Accordingly, Petitioner's Exception 2 hereby is denied.

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

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. Petitioner is not entitled to her former husband's FRS retirement benefits 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.

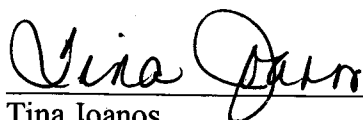
DONE AND ORDERED this 1st day of August, 2018, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Daniel Beard
Chief of Defined Contribution Programs
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

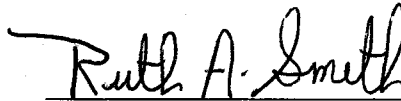
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was US Mail to Lynne A. Quimby-Pennock, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, FL 32399-1550; by electronic mail to matt@mysarasota.lawyer and by UPS to W. Matthew Kowtko, Esq., Kowtko Law Group, P.A., 1800 2nd Street, Suite 882, Sarasota, Florida 34236; 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 15th day of August, 2018.



Ruth A. Smith
Assistant General Counsel
State Board of Administration of Florida
1801 Hermitage Boulevard
Suite 100
Tallahassee, FL 32308

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HEIKE BYBEE,
Petitioner,

vs

STATE BOARD OF ADMINISTRATION,
Respondent.

Case No.: 18-0067

DIVISION OF
ADMINISTRATIVE HEARINGS

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EXCEPTIONS TO RECOMMENDED ORDER

COMES NOW, the Petitioner, HEIKE BYBEE, n/k/a HEIKE STOLL, by and through her undersigned attorney, who files these exceptions to the Recommended Order of this Court rendered on May 23rd, 2018 and would show:

1. That this Court rendered its Recommended Order on May 23rd, 2018, therefore the instant exceptions are timely.
2. Pursuant to Section 120.57(1)(1), Florida Statutes, 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".
3. That Page Three of the Recommended Order cites the case number for FRANKIE EUGENE BYBEE and references the relevant convictions in this matter and the date of filing of the Judgment adjudicating Mr. Bybee's guilt, to wit, "2017CF001018".
4. That Page Two of the parties Pre-Hearing Stipulation lists certain documents originating from the criminal case of FRANKIE EUGENE BYBEE.
5. That on the same day as filing of the Notice of Forfeiture, to wit, November 9th, 2017, FRANKIE EUGENE BYBEE filed a Notice of Appeal as to his entire Judgment and Sentence and said appeal remains pending before the Second District Court of Appeal for the State of Florida, to wit, 2D17-4515. A true and correct copy of the Notice of Appeal is attached hereto as Exhibit "A".
6. That Page Ten, Paragraph Nineteen of the Recommended Order provides "Once Mr. Bybee was convicted, the terms of his contract were broken, and Mr. Bybee forfeited his retirement benefits under the contract".
7. However, Section 112.3173(5)(c) provides as follows:
The payment of retirement benefits ordered forfeited, except payments drawn from non-employer contributions to the retiree's account, shall be stayed pending an appeal as to a felony conviction. If such conviction is reversed, no retirement benefits shall be forfeited. If such conviction is affirmed, retirement benefits shall be forfeited as ordered in this section.

8. That this Court departed from the essential requirements of the law in entering its Recommended Order since the Recommended Order does not contain any provision for a stay of proceedings pending said appeal and instead recommends forfeiture.

9. That the Petitioner referenced the filing of her Petition for Dissolution of Marriage during the hearing on this matter. See Transcript of Hearing at 15 and 24. The Petitioner's Pretrial Statement contains reference to said Petition being filed on May 9th, 2017. Petitioner contends that Section 61.075(7), Florida Statutes is the cut-off date for determining the marital assets and liabilities of the Petitioner and Mr. Bybee and therefore on May 9th, 2017, the retirement benefits accrued by Mr. Bybee during the marriage were deemed to be a marital asset subject to equitable distribution. Id. Thus, Mr. Bybee's legal interest in the FRS account was extinguished prior to forfeiture either on the date filing of the Petition for Dissolution of Marriage, the date of filing of the parties' Marital Settlement Agreement, or the rendition of the Final Judgment of Dissolution of Marriage; all of which occurred prior to forfeiture, since forfeiture has not yet been ordered in this matter.

10. That Page Five of the Recommended Order finds that on February 26th, 2018, the Petitioner and FRANKIE EUGENE BYBEE executed a Marital Settlement Agreement which provided that the Petitioner shall receive the entirety of the retirement benefits at issue as her sole and separate property and further granted the Petitioner the ability to pursue such legal or equitable claims, causes of action, or remedies related in any manner as it relates to said pension and/or retirement account. Respondent's Exhibit R-8

11. That Page Six of the Recommended Order finds that on April 16th, 2018, the Circuit Court in and for Manatee County, Florida rendered its Final Judgment of Dissolution of Marriage which ratified, adopted, and incorporated the Marital Settlement Agreement. Petitioner's Exhibit P-2

12. That Page Eleven of the Recommended Order finds that Mr. Bybee did not have any FRS benefits to transfer to Ms. Stoll, marital agreement or not, because he was not entitled to the benefits.

13. However, the Marital Settlement Agreement contains the signatures of both FRANKIE EUGENE BYBEE and Petitioner as of November 30th, 2017 and not February 26th, 2018.

14. That Page Four of the Recommended Order found that Petitioner filed her Petition for Hearing on December 8th, 2017.

15. That Page Fifteen of the hearing transcript contains the Petitioner's contention that she was entitled to her marital share of the retirement benefits at issue by the execution of the parties' Marital Settlement Agreement.

16. That even though the Petitioner was essentially "innocent" of any wrongdoing as it relates to the underlying acts constituting the basis for Mr. Bybee's proposed forfeiture, the recommendation of the ALJ was that the retirement benefits at issue be forfeited on the basis that the Petitioner's right to said retirement benefits were derivative to that of FRANKIE EUGENE BYBEE. See Transcript of Hearing.

17. However, the Petitioner contends that she is also forced to forfeit her entitlement to said retirement benefits of which she is entitled to said retirement benefits by law.

18. Petitioner concedes that the forfeiture statute does not contain an innocent spouse exception, however, the statute does not address whether benefits may be subject to forfeiture once they are conveyed, pledged, or assigned to a spouse during dissolution of marriage proceedings.

19. Petitioner is entitled to the retirement benefits at issue as a matter of law pursuant to Section 61.075, Florida Statutes, to which she is entitled to the full amount of said retirement benefits pursuant to the parties' Marital Settlement Agreement, or at minimum, her equitable, marital portion of same.

20. The Recommended Order departs from the essential requirements of the law, since statutes imposing forfeiture must be strictly construed in a manner such as to avoid the forfeiture and will be liberally construed to avoid and relieve from forfeiture and **where a forfeiture was not clearly required by statute, no forfeiture should be inferred.** Eaves v. Div. of Ret., 704 So. 2d 140, 143 (Fla. 2nd DCA 1997); Williams v. Christian, 335 So.2d 358, 361 (Fla. 1st DCA 1976); Ireland v. Thomas, 324 So.2d 146, 147 (Fla. 1st DCA 1975). [emphasis added]

21. For the foregoing reasoning, the Petitioner should not be subject to forfeiture.

WHEREFORE, the Petitioners prays this Court grant the instant exceptions, to enter its Final Order adopting the exceptions of the Petitioner, and any other relief which this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of June, 2018, a true and correct copy of the foregoing has been furnished to: Brian A. Newman, Esq., Pennington, P.A., 215 S. Monroe Street, Suite 200, Tallahassee, Florida 32302, brian@penningtonlaw.com and State Board of Administration, Ruth Smith, Attorney-at-Law, PO Box 13300, Tallahassee, Florida 32317, Ruth.smith@sbfla.com, and Ash Williams, Executive Director and Chief Investment Officer, State Board of Administration, 1801 Hermitage Boulevard, Suite 100, Post Office Box 13300, Tallahassee, Florida 32317-3300.

Respectfully submitted,
W. Matthew Kowtko, Esq.
W. Matthew Kowtko, Esq.
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Florida Bar No.: 111142
Attorney for Petitioner

IN THE CIRCUIT COURT OF THE TWELTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA,

v.

Case No.: 2017-CF-001018

FRANKIE EUGENE BYBEE,

Division

Defendant.

DEFENDANT'S NOTICE OF APPEAL

Notice is hereby given that FRANKIE EUGENE BYBEE, pursuant to Fla.R.App.P. 9.141(b) by and through undersigned counsel, hereby takes and enters this appeal to the District Court of Appeal, Second District, Lakeland, Florida, to review the Order of the Circuit Court in and for Sarasota County, Florida, bearing the date of November 9, 2017, entered in the above-styled cause.

The nature of the order appealed from is:

JUDGMENT AND SENTENCE

All parties in this cause are called upon to take notice of the entry of this appeal.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the Office of the Attorney General, Department of Legal Affairs, Concourse Center #4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, on this the 9th day of November, 2017.

Respectfully submitted,

/s/ Ronald J. Kurpiers, II
Ronald J. Kurpiers, II, Esq.
Florida Bar. No.: 0567140
Lakin Robinson Durham Kane Kurpiers, PA
100 S. Ashley Drive, Suite 800
Tampa, FL 33602
Tel: 813-892-8501
Fax: 813-936-4773
Attorney for Defendant

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DIVISION OF
ADMINISTRATIVE HEARINGS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the above has been filed via E-Portal and sent by regular U.S. Mail to mail to the Office of the Attorney General, Department of Legal Affairs, Concourse Center #4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607; Law Offices of the Public Defender, 12th Judicial Circuit, Appeals Department and Assistant State Attorney Karen Fraivillig, Esq. Office of the State Attorney, 2071 Ringling Blvd. Sarasota, Florida 34237 on this 9th day of November 2017.

Respectfully submitted,

/s/ Ronald J. Kurpiers, II
Ronald J. Kurpiers, II, Esq.
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