

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

DARRIN MCCRAY,)	
)	
Petitioner,)	
)	
vs.)	
)	SBA Case No. 2008-1266
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On July 14, 2017, the presiding officer submitted her Recommended Order to the State Board of Administration (hereafter "SBA") in this proceeding. A copy of the Recommended Order indicates that copies were served upon counsel for the Petitioner and upon counsel for the Respondent. Both Petitioner and Respondent filed timely filed Proposed Recommended Orders. Petitioner timely filed exceptions on July 29, 2017. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief, Defined Contribution Programs Officer for final agency action.

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

The State Board of Administration adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order as if fully set forth herein, with the exception of the last sentence which hereby is modified to read as follows:

“On June 26, 2017, both Petitioner and Respondent timely filed Proposed Recommended Orders.”

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact of a presiding officer 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 a presiding officer’s recommended order may not reweigh evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of administrative law judges as the triers of the facts. *Belleau v. Dept of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Maynard v. Unemployment Appeals Comm.*, 609 So.2d 143, 145 (Fla. 4th DCA 1993). Thus, if the record discloses any competent substantial evidence supporting finding of fact in the Recommended Order, the Final Order will be bound by such factual finding.

Pursuant to Section 120.57(1)(l), Florida Statutes, however, a reviewing agency has the general authority to “reject or modify conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction.” Florida courts have consistently applied the “substantive jurisdiction limitation” to prohibit an agency from reviewing conclusions of law that are based upon the presiding officer’s application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the presiding officer’s interpretation of a statute or rule over which the Legislature has provided the agency with administrative authority. *See Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140, 1141-42 (Fla. 2d DCA 2001); *Barfield v. Dep’t of Health*, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001). When rejecting or modifying any conclusion of law, the reviewing agency must state with particularity its reasons for the rejection or modification and further must make a finding that the substituted conclusion of law is as or more reasonable than that which was rejected or modified. Further, an agency’s interpretation of the statutes and rules it administers is entitled to great weight, even if it is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. *See, State Bd. of Optometry v. Fla. Soc’y of Ophthalmology*, 538 So.2d 878, 884 (Fla. 1st DCA 1998). An agency’s interpretation will be rejected only where it is proven such interpretation is clearly erroneous or amounts to an abuse of discretion. *Level 3 Communications v. C.V. Jacobs*, 841 So.2d 447, 450 (Fla. 2002); *Okeechobee Health Care v. Collins*, 726 So.2d 775 (Fla. 1st DCA 1998).

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: Exception to the Statement of the Issue

Petitioner takes exception to the “Statement of the Issue,” by asserting that it should be revised to set forth a second issue; namely, whether the matter needs to be abated in view of the fact that Petitioner has filed one or more motions for post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure. However, the Statement of the Issue set forth in the Recommended Order, which is whether forfeiture was appropriate, would encompass such a consideration, as forfeiture would not be appropriate or proper if an actual appeal of the felony conviction remains outstanding. As such, Petitioner’s Exception 1 hereby is rejected.

Petitioner’s Exception 2: Exception to Conclusions of Law 18, 19 and 20

Petitioner’s Exception 2, takes exception with Conclusions of Law 18, 19 and 20 of the Recommended Order. Petitioner states that such paragraphs are “conclusory” and “unsupported” when they state that a motion for post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure, does not constitute an “appeal.” However, Petitioner fails to provide any solid legal argument or authority to substantiate Petitioner’s claim that post-conviction relief does constitute an appeal. Rule 3.850(c), Florida Rules of Criminal Procedure, states that: “[t]his rule does not authorize relief based on grounds that could have or should have been raised at trial **and, if properly preserved, on direct appeal**

of the judgment and sentence.” [emphasis added]. Thus, Rule 3.850(c), Florida Rules of Criminal Procedure, specifically provides that post-conviction relief is something other than appeal.

An “appeal” is a proceeding that reviews the judgment or order of a lower tribunal based on the record made before the lower tribunal. *See, Ellsworth v. Insurance Co. of North America*, 508 So.2d 395 (Fla. 1st DCA 1987). An appeal is a continuation of the original proceeding. *Pennsylvania Ins. Guaranty Ass’n v. Sikes*, 590 So.2d 1051 (Fla. 1st DCA 1991) [emphasis added]. Whenever an appeal is taken, the action still is pending until its final disposition. *Wilson v. Clark*, 44 So.2d 526 (Fla. 1st DCA 1982). Thus, when an appeal is filed, a trial court will not have jurisdiction to hear a post-conviction motion until after the appeal is concluded.

As the Presiding Officer notes in the Recommended Order, Section 112.3173(5), Florida Statutes, provides that the payment of retirement benefits ordered forfeited shall be stayed pending an appeal. If the conviction is affirmed on appeal, then retirement benefits are to be forfeited. The statute does not allow for a further stay if the individual whose benefits are being forfeited elects to pursue post-conviction relief.

In *John L. Winn, as Commissioner of Education v. Ronald Rosen*, 2010 WL 883691 (Fla.Div.Admin.Hrgs, Final Order issued June 22, 2010), an Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) was asked to consider whether the Respondent’s educator certificate should be revoked where Respondent was adjudicated guilty of lewd and lascivious molestation of minor students. The Respondent had appealed his guilty verdict and his conviction was affirmed. The Florida Supreme Court declined

discretionary review of Respondent's appeal. Respondent then had filed a motion for post-conviction relief under Rule 3.850, Florida Rules of Criminal Procedure, alleging ineffective assistance of counsel. Respondent had requested that the DOAH case continue to be held in abeyance until the post-conviction efforts had been exhausted. The ALJ allowed the case to proceed and found that the Petitioner had demonstrated that Respondent was convicted of a felony involving moral turpitude and had failed in his appeal to overturn his conviction. Pursuant to state law, such a guilty verdict allows permanent revocation of an educator's certificate. The ALJ found that no additional conclusions were necessary, and issued a Recommended Order recommending the Respondent's teaching certificate be permanently revoked.

Similarly, in the instant situation, the Presiding Officer found Petitioner had been convicted of a felony allowing forfeiture of retirement benefits under law, and that conviction was upheld on appeal. As in the *Rosen* case, *supra*, the Presiding Officer properly determined that the impact of the outstanding motion(s) for post-conviction did not need to be addressed since Respondent did not provide any legal authority that would allow a further stay. Accordingly, Petitioner's Exception 2 hereby is denied.

Petitioner's Exception 3: Exception to the Preliminary Statement

Petitioner states that the Presiding Officer's Preliminary Statement erroneously states that Petitioner did not file a Proposed Recommended Order. As set forth above, this Final Order already has revised the last sentence of the Preliminary Statement to indicate that Petitioner did timely file a Proposed Recommended Order. Thus, Petitioner's Exception 3 is accepted.

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. The Petitioner has forfeited his Florida Retirement System Investment Plan account benefit under Section 112.3173, Florida Statutes by having been found guilty of nine felony counts of Official Misconduct under Section 838.022, Florida Statutes, which convictions were affirmed on appeal.

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 10th day of October, 2017, in Tallahassee,
Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

Joan B. Haseman

Joan B. Haseman
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

Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Gary E. Lippman, Esq., counsel for Petitioner, both by electronic mail to garylippman@gmail.com and by UPS to Gary E. Lippman, 4231 Quill Circle, Lake Worth, Florida 33467; 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 10th day of October, 2017.



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

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

DARRIN MCCRAY,

Petitioner,

vs.

Case No.: 2008-1266

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

By agreement of the parties and the May 24, 2017 Order for Hearing on Written Record this case came before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA). The appearances were as follows:

APPEARANCES

For Petitioner: Gary E. Lippman
4231 Quill Circle
Lake Worth, FL 33467
garylippman@gmail.com

For Respondent: Brandice Dickson, Esq.
Pennington, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue is whether Petitioner's Florida Retirement System (FRS) Investment Plan benefit was properly deemed forfeited by Respondent.

EXHIBIT A

PRELIMINARY STATEMENT

By agreement of the parties and the May 24, 2017 Order for Hearing on Written Record this case came before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA). The Order granting the Joint Motion to Have Case Heard on Written Record advised the parties that Proposed Recommended Orders were due on or before June 26, 2017.

On May 18, 2017, Petitioner filed Petitioner's Exhibit 1 and adopted Respondent's Exhibits 1-6 as his own. Respondent's Exhibits 1 through 6 were filed March 1, 2017. All exhibits have been accepted.

On June 26, 2017, Respondent filed its Proposed Recommended Order; Petitioner made no additional filings.

MATERIAL UNDISPUTED FACTS

1. Petitioner was a member of the Florida Retirement System ("FRS") Investment Plan.
2. Petitioner's Investment Plan account was placed on hold in 2008 as a result of criminal charges having been brought against him alleging a breach of the public trust by a public officer.
3. On November 21, 2008, Petitioner was found guilty by a Fifteenth Judicial Circuit jury in and for Palm Beach, Florida of one count of Organized Scheme to Defraud and nine counts of Official Misconduct.
4. Petitioner appealed his conviction to the Fourth District Court of Appeal which reversed the conviction for the one count of Organized Scheme to Defraud, but affirmed the

convictions on the nine counts of Official Misconduct brought under Section 838.022, Florida Statutes. *McCray v. State*, 121 So.3d 603 (Fla. 4th DCA 2013).

5. On July 3, 2014, the Florida Supreme Court denied review of the state's appeal of the Fourth's DCA's reversal of the Organized Scheme to Defraud conviction. *State v. McCray*, 147 So.3d 527 (Fla. 2014).

6. On October 20, 2014, the Florida Supreme Court denied Petitioner's writ of mandamus and prohibition as to the Fourth DCA affirmance of the convictions for nine counts of Official Misconduct. *McCray v. State*, 153 So.3d 907 (Fla. 2014).

7. On November 10, 2014 Petitioner was notified that his FRS rights and benefits were forfeited.

8. On December 3, 2014, Petitioner filed a Petition for Hearing contesting the forfeiture.

9. On May 18, 2017, Petitioner filed a Combined Rule 3.800 and 3.850 Motion for Post-Conviction Relief. That motion is pending.

CONCLUSIONS OF LAW

10. The Florida Constitution makes plain that "[a]ny public officer or employee who is convicted of a felony involving a breach of the public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan in such manner as may be provided by law." ART. II, § 8(d), FLA. CONST. Section 112.3173, Florida Statutes, implements that part of the Florida Constitution and states, in pertinent part:

112.3173. Felonies involving breach of public trust and other specified offenses by public officers and employees; forfeiture of retirement benefits

(1) Intent. – It is the intent of the Legislature to implement the provisions of s. 8(d), Art. II of the State Constitution.

(2) Definitions. – As used in this section, unless the context otherwise requires, the term:

(a) “Conviction” and “convicted” mean an adjudication of guilt by a court of competent jurisdiction; a plea of guilty or of nolo contendere; a jury verdict of guilty when adjudication of guilt is withheld and the accused is placed on probation; or a conviction by the Senate of an impeachable offense.

...

(e) “Specified offense” means:

...

4. Any felony specified in chapter 838, except ss. 838.15 and 838.16;

...

6. The committing of any felony by a public officer or employee who, willfully and with intent to defraud the public or the public agency for which the public officer or employee acts or in which he or she is employed of the right to receive the faithful performance of his or her duty as a public officer or employee, realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or herself or for some other person through the use or attempted use of the power, rights, privileges, duties, or position of his or her public office or employment position.

(3) Forfeiture.--Any public officer or employee who is convicted of a specified offense committed prior to retirement, or whose office or employment is terminated by reason of his or her admitted commission, aid, or abetment of a specified offense, *shall forfeit all rights and benefits* under any public retirement system of which he or she is a member, except for the return of his or her accumulated contributions as of the date of termination.

...

(5) Forfeiture determination.—

(a) Whenever the official or board responsible for paying benefits under a public retirement system receives notice pursuant to subsection (4), or otherwise has reason to believe that the rights and privileges of any person under such system are required to be forfeited under this section, such official or board shall give

notice and hold a hearing in accordance with chapter 120 for the purpose of determining whether such rights and privileges are required to be forfeited. If the official or board determines that such rights and privileges are required to be forfeited, the official or board shall order such rights and privileges forfeited.

- (b) Any order of forfeiture of retirement system rights and privileges is appealable to the district court of appeal.

...

§ 112.3173, Fla.Stat. (2006)(emphasis added).

11. An employee who is convicted of a “specified offense” committed prior to retirement from the FRS shall forfeit all rights and benefits. *Childers v. Department of Management Services*, 989 So.2d 716 (Fla. 4th DCA 2008). If this standard is met, Respondent has no discretion as to whether to proceed with forfeiture of a participant’s Investment Plan benefit; under the Constitution and statute forfeiture is mandatory. Forfeiture is deemed to enforce the terms of the retirement “contract” entered into between the State and the employee. As stated in *Childers*,

Here, the State entered into a contract with the employee, promising to pay him benefits upon his retirement. That contract included a condition precedent: the employee must refrain from committing specified offenses prior to retirement. The non-occurrence of that condition foreclosed the employee’s right to performance. It is as direct and to the point as that.

...

While forfeiture, in general, has historically been understood as punishment, courts of this state have recognized that statutes providing for forfeiture of government benefits merely enforce the terms of a contract rather than impose punishment. This statute does not require a finding of scienter.

989 So.2d 716 (internal citations omitted)(emphasis added).

12. Because Petitioner was convicted of nine counts of Official Misconduct in violation of Section 838.022, Florida Statutes, a specified offense under Section 112.3173(2)(e)4., Florida Statutes, forfeiture is mandatory without further analysis.

13. Even absent a specified offense, forfeiture in this case is mandatory under Section (2)(e)(6) as well. Section 112.3173(2)(e)6., Florida Statutes, has been referred to as the “catch-all” provision in the forfeiture statute. *Holsberry v. Department of Management Services*, 2009 WL 2237798 (Fla. Div. Admin. Hrgs. July 24, 2009). That “catch-all” section of the statute has been construed to require forfeiture for acts that were otherwise not included in the list of “specified offenses” in Section 112.3173(2)(e) 1. – 5. and 7. when a sufficient nexus is shown between the position held by the public employee and the commission of the crime such that a breach of the public trust is proven without more. *Jenne v. Dep’t of Management Services, Div. of Retirement*, 36 So.3d 738 (Fla. 1st DCA 2010)(catch-all provision required forfeiture for conviction of felony for conspiracy to commit mail fraud where sheriff used his position and ability to award contracts to gain benefit for himself where illegal payments to him were made via the mail); *Holsberry*, 2009 WL 2237798 at *3 (catch-all provision required forfeiture for conviction of felony child abuse by a teacher where teacher testified he would not have met the child but for his position as a teacher at her school); *Marsland v. Department of Management Services*, 2008 WL 5451423 (Fla. Div.Admin.Hrgs. December 15, 2008)(catch-all provision required forfeiture for conviction of felony involving sexual battery by teacher on a student where sex occurred at the school and teacher testified but for his position he would not have had an opportunity to have had sex with the student); *Jacobo v. Board of Trustees of the Miami Police*, 788 So.2d 362 (Fla. 3d DCA 2001)(catch-all provision required forfeiture for conviction of “Official Misconduct” where officer falsified an arrest affidavit); *DeSoto v. Hialeah Police Pension Fund Bd. of Trustees*, 870 So.2d 844 (Fla. 3d DCA 2003)(catch-all provision required forfeiture for conviction of felonies including conspiracy to possess and distribute cocaine, commit robbery, and carry a firearm during robbery by a police officer while on suspension).

14. Here, Petitioner has been convicted of nine offenses where he sought a personal gain (overtime pay) through the use of his position (administrative rights to override computer program due to his position of Lieutenant) that resulted in a breach of the public trust. Thus, under *Jenne, Holsberry, Marsland, Jacobo, and DeSoto*, he has forfeited his right to a retirement benefit under the Florida Retirement System. Specifically, Petitioner exploited his authority as a public officer by using his position as a Lieutenant to assign himself over 100 lucrative overtime hospital duty shifts. Accordingly, his conduct constitutes a breach of the public trust that requires forfeiture of his retirement benefits under section 112.3173(2)(e)6., Florida Statutes.

15. Florida Statutes creating and governing the Florida Retirement System, and Petitioner's rights and responsibilities under them, are clear and the SBA cannot deviate from them. *Balezentis v. Department of Management Services, Division of Retirement*, 2005 WL 517476 (Fla.Div.Admin.Hrgs.).

16. Petitioner has cited no authority for the further abatement of forfeiture proceedings pending the outcome of his Rule 3.800 and 3.850 Motion for Post-Conviction Relief.

17. The statute governing forfeitures states, in relevant part:

(5) Forfeiture determination.--

(a) Whenever the official or board responsible for paying benefits under a public retirement system receives notice pursuant to subsection (4), or otherwise has reason to believe that the rights and privileges of any person under such system are required to be forfeited under this section, such official or board shall give notice and hold a hearing in accordance with chapter 120 for the purpose of determining whether such rights and privileges are required to be forfeited. If the official or board determines that such rights and privileges are required to be forfeited, the official or board shall order such rights and privileges forfeited.

(b) Any order of forfeiture of retirement system rights and privileges is appealable to the district court of appeal.

(c) The payment of retirement benefits ordered forfeited, except payments drawn from nonemployer 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.

§ 112.3173(5), Fla.Stat.

18. As stated in the above statute, a stay of payment of benefits pending an appeal is the only stay contemplated by the Legislature. A stay of proceedings leading to the forfeiture determination is not contemplated.

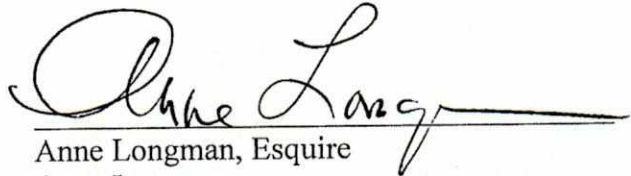
19. Additionally, the stay contemplated by Section 112.3173(5), Florida Statutes applies by its terms to an "appeal." Petitioner has already filed an appeal of his conviction, and that conviction was affirmed. Petitioner has cited no authority for the proposition that a motion for post-conviction relief is an appeal as referenced by Section 112.3173(5).

20. Petitioner has not demonstrated that he is entitled to a stay of the proceedings beyond the *de facto* stay he has already enjoyed.

RECOMMENDATION

Having considered the law and the undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order denying the relief requested.

RESPECTFULLY SUBMITTED this 14th day of July, 2017.



Anne Longman, Esquire
Anne Longman
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
315 South Calhoun Street, Suite 830
Tallahassee, FL 32301-1872

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions must be filed with the Agency Clerk of the State Board of

Administration and served on opposing counsel at the addresses shown below. The SBA then will enter a Final Order which will set out the final agency decision in this case.

Filed via electronic delivery with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
Tina.joanos@sbafla.com
nell.bowers@sbafla.com
(850) 488-4406

COPIES FURNISHED electronic mail to:

Gary E. Lippman, Esq.
4231 Quill Circle
Lake Worth, FL 33467
garylippman@gmail.com
Attorney for Petitioner

Brian A. Newman, Esquire
Brandice D. Dickson, Esquire
Pennington, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301
slindsey@penningtonlaw.com

Counsel for Respondent

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

DARRIN MCCRAY,

Petitioner,

vs.

CASE NO.: 2008-1266
Presiding Officer: Anne Longman, Esq.

STATE BOARD OF ADMINISTRATION,

Respondent.

PETITIONER McCRAY'S EXCEPTIONS TO RECOMMENDED ORDER

Petitioner DARRIN MCCRAY, by and through undersigned counsel and pursuant to Fla. Stat. 120.57(1)(k) submits his written exceptions to the July 14, 2017 Recommended Order in this matter, and identifies the disputed portions of said Order as follows:

1. By her "Statement of the Issue" the Presiding Officer for the State Board of Administration ("the Board") recounted only "[t]he issue [of] whether Petitioner's Florida Retirement System (FRS) Investment Plan benefit was properly deemed forfeited by Respondent;" albeit, two (2) issues were identified in the proceeding. By her March 6, 2017 Order Continuing Hearing, the Presiding Officer for the Board specifically ruled that she "will hear Petitioner's Motion to Abate filed February 27 2017 in conjunction with the rescheduled hearing."

2. The Recommended Order failed to address Petitioner's Motion to Abate apart from a conclusory and unsupported assertion in the final two paragraphs that Section 112.3173(5), Florida Statutes' reference to an "appeal" does not include a motion

for post-conviction relief. See Recommended Order at paragraphs 19 and 20, in pertinent part (“Petitioner has cited no authority for the proposition that a motion for post-conviction relief is an appeal as referenced by Section 112.3173(5)).” *But see* Florida Rule of Criminal Procedure 3.850(f) (in pertinent part) (emphasis added) (providing for disposition “intended to result in a single, final **appealable** order[.]”); *see also id.* at 3.850(f)8(C) (in pertinent part) (emphasis added) (“The order . . . shall be considered the final order for purposes of **appeal**.”); *id.* at 3.850(k), “Appeals;” *id.* at 3.850(l), “Belated Appeals and Discretionary Review.”

3. By her “Preliminary Statement,” the Presiding Officer erroneously declared: “On June 26, 2017, Respondent filed its Proposed Recommended Order; Petitioner made no additional filings.” On June 26, 2017 Petitioner filed and served Petitioner Darrin McCray’s Proposed Recommended Order. A true and correct copy of said Proposed Order, with its Certificate of Service showing its electronic service and filing June 26, 2017 is accompanying this transmission.

WHEREFORE, for the foregoing reasons excepting to the Recommended Order in this cause, and pursuant to Fla. Stat. 120.57(1)(l), Petitioner requests the Board: reject and/or modify the Recommended Order’s Statement of the Issue and Preliminary Statement so as to accurately conform to the records herein; reject the Recommended Order’s Conclusions of Law at paragraphs 19 and 20 and, therefore, paragraph 18 in consequence of said rejections as unreasonable; substitute its more reasonable conclusions of law; and grant Petitioner’s Motion to Abate pending the disposition of his Rule 3.850 Motion, together with such other relief as the Board deems supported by competent substantial evidence on the record and consistent with proceedings complying with the essential requirements of law.

RESPECTFULLY SUBMITTED this 29th day of July, 2017.



Gary E. Lippman, Esquire
Fla. Bar No. 79121
Counsel for Petitioner
4231 Quill Circle
Lake Worth, FL 33467
Tel. 561-722-0264
garylippman@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER McCRAY'S EXCEPTIONS TO RECOMMENDED ORDER has been furnished this 29th day of July, 2017 to:

Filed by electronic delivery with:

Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, FL 32308
Tina.joanos@sbafl.com
Mini.watson@sbafla.com

Copies Furnished by electronic mail only to:

Brian A. Newman, Esq.
brian@penningtonlaw.com
Brandice D. Dickson, Esq.
brandi@penningtonlaw.com
Counsels for Respondent
Pennington, P.A.
215 S. Monroe Street, Suite 200
P.O. Box 10095
Tallahassee, FL 32301
slindsey@penningtonlaw.com



Gary E. Lippman

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

DARRIN MCCRAY,
Petitioner,

vs.

STATE BOARD OF ADMINISTRATION,
Respondent.

CASE NO.: 2008-1266
Presiding Officer: Anne Longman, Esq.

PETITIONER DARRIN McCRAY'S PROPOSED RECOMMENDED ORDER

Petitioner DARRIN MCCRAY, by and through undersigned counsel and pursuant to the Presiding Officer's May 24, Order for Hearing on Written Record files his Proposed Recommended Order as follows:

APPEARANCES

For Petitioner: Gary E. Lippman, Esquire
4231 Quill Circle
Lake Worth, Florida 33467

For Respondent: Brandice D. Dickson, Esquire
and
Brian A. Newman, Esquire
Pennington P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32302

STATEMENT OF THE ISSUES

There are two (2) issues presented in this proceeding: Whether the within forfeiture proceedings to determine if Petitioner has forfeited his right to a retirement benefit under FRS should be held in abeyance pending disposition of Petitioner McCray's Combined Defendant's Motion for Post-Conviction Relief Rule 3.800 and

Amended Rule 3.850 ("Rule 3.850 Motion") currently before the Circuit Court for the Fifteenth Judicial Circuit in and for Palm Beach County, Florida; and, if his motion to abate is denied, whether Petitioner has forfeited his right to a retirement benefit under the Florida Retirement System (FRS) pursuant to Section 112.3173, Florida Statutes.

PRELIMINARY STATEMENT

By letter dated May 29, 2008, Respondent notified Petitioner, a former corrections officer lieutenant with the Palm Beach County Sheriff's Office, that a hold had been placed on his FRS Investment Plan account pursuant to Section 121.091(5)(j), Florida Statutes, and that distributions from his account "will not be permitted until the State Board of Administration (SBA) receives and analyzes the final disposition on all relevant criminal charges." Thereafter, by letter dated November 10, 2014 Respondent notified Petitioner that he had no further rights in the Florida Retirement System because "the Florida Supreme Court declined to hear [his] case."

On December 3, 2014 Petitioner timely filed a FRS Investment Plan Petition for Hearing pursuant to Chapter 120, Florida Statutes, and the Uniform Rules of Procedure, codified as Chapters 28-101 through 28-110, Florida Administrative Code.

On February 27, 2017 Petitioner filed a Motion to Abate requesting these proceedings be held in abeyance, and the SBA continue the hold on his FRS account until the circuit court has decided his Rule 3.850 Motion.

On May 23, 2017, the Parties filed a Joint Motion to Have Case Heard on Written Record, which Motion was granted by Order for Hearing on Written Record dated May 24, 2017. Both parties have filed proposed recommended orders.

UNDISPUTED MATERIAL FACTS

1. Darrin McCray was employed by the Palm Beach County Sheriff's Office as a Corrections Lieutenant and, therefore, was eligible for and did in fact participate in the Florida Retirement System's Investment Plan.

2. On November 21, 2008 Mr. McCray was found guilty by a jury in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, of "Organized Scheme To Defraud" (One Count), and "Official Misconduct" (Nine Counts). Respondent's Exhibit 2 (R-2).¹

3. By decision dated August 7, 2013 the Fourth District Court of Appeal reversed Mr. McCray's conviction for organized scheme to defraud, determining as it had in a fellow defendant's case, "that no statutory violation occurred because the alleged 'lost . . . opportunity for other deputies to work for overtime pay . . . simply does not fit the definition of property traditionally used in criminal prosecutions' Likewise, McCray's conduct does not support a conviction for organized scheme to defraud." R-3, *McCray v. State of Florida*, Case No. 4D09-530 (citation omitted); see *Dent v. State*, 125 So.3d 205 (Fla. 4th DCA 2013) ("While Dent's manipulation of the sign-up system for overtime duty may have violated the **policies** of the department, and may be grounds for discipline or termination, she did not obtain 'property' traditionally used in criminal prosecutions. . . .") (emphasis added).

4. The Fourth District Court of Appeal decision left undisturbed the official misconduct convictions.

¹ By Petitioner's Notice of Filing Exhibits and Witness List, Petitioner adopted all of Respondent's Exhibits R-1 through R-6, among other things. Accordingly, all of Respondent's Exhibits are considered Joint Exhibits in this proceeding; albeit, for ease of reference they will be referred to as R-1 through R-6.

5. Petitioner's conduct for which the jury convicted him of official misconduct arose from the same facts it used to convict him and Kathy Dent of the organized scheme to defraud; i.e., "from allegations that McCray and other Sheriff's employees manipulated the overtime assignment computer system and obtained more hospital guard assignments than allowable under the Sheriff's *policy*." *See id.* (emphasis added).

6. Within the brief page and one-half Fourth District Court of Appeal decision, the words "policy," "policies" and "procedures" appear five (5) times. *Id.*

7. After the Fourth District Court of Appeal decision affirming the official misconduct conviction, beginning on September 16, 2014 Mr. McCray filed with the Florida Supreme Court petitions (for prohibition and for mandamus) and motions addressed to his sentencing, among other things. R-6, Florida Supreme Court Case Docket regarding *Darrin L. McCray vs. State of Florida*, Case Number SC14-1810.

8. The Florida Supreme Court Case Docket shows an entry thereon reflecting that Mr. McCray's petitions and motions were denied on October 20, 2014. *Id.*

9. By letter dated November 10, 2014 Respondent advised Mr. McCray that he had no further rights in the Florida Retirement System because the Fourth District Court of Appeal had affirmed his conviction for official misconduct; which conviction "stands" because "[o]n July 3, 2014, the Florida Supreme Court declined to hear your case." R-4, Notice of Forfeiture of Retirement Benefits. ²

² Respondent's Exhibit R-6 reflects docket entries beginning more than two months later, "09/16/2014." Neither party submitted any records in support of or to contest the declarations of fact in the Respondent's November 10, 2014 Notice of Forfeiture of Retirement Benefits. Therefore it is without dispute on this record that the Florida Supreme Court declined to hear Mr. McCray's appeal(s) and, accordingly, made no findings or decisions pertaining to his conviction for official misconduct.

10. By facsimile transmission December 3, 2014 Petitioner timely filed a FRS Investment Plan Petition for Hearing pursuant to Chapter 120, Florida Statutes, and the Uniform Rules of Procedure, codified as Chapters 28-101 through 28-110, Florida Administrative Code. R-5.

11. By his Petition for Hearing, Mr. McCray submitted that his case "is going to be appealed through the Florida Supreme Court;" that he believes "the case will be overturned by the appeals process;" he requested the SBA "allow the State Supreme Court to make its findings prior to taking action;" and he requested the SBA "allow the process (appeal) to convene prior to making any decisions." *Id.*

12. There currently is pending before the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, Petitioner's aforementioned Rule 3.850 Motion for Post-Conviction Relief. Petitioner's Exhibit 1 (P-1).

13. "The Florida Supreme Court declined to hear" Petitioner's appeal and, therefore, made no findings. *See* R-4 and R-5.

14. By Petitioner's Rule 3.850 Motion he avers violations of substantive and due process rights entitling him to be relieved of his convictions, among other things including his purported erroneous conviction of official misconduct at Count II of the Information which had been brought not against him, but against another defendant. *See e.g., id.* at pages 16 – 17.

15. By Petitioner's Motion to Abate he has identified the Rule 3.850 Motion as the final "appeal" available to him to challenge the official misconduct convictions upon which these forfeiture proceedings are predicated.

CONCLUSIONS OF LAW

16. The FRS is a public retirement system as defined by Florida law and, as such, Respondent's proposed action to forfeit Petitioner's rights and benefits in his Investment Plan account is subject to administrative review. See § 112.3173(5)(a), Fla. Stat.

17. Respondent has the burden of proving by a preponderance of the evidence that Petitioner should forfeit his FRS retirement benefits. *Holsberry v. Department of Management Services*, 2009 WL 2237798 at *4 (Fla. Div. Admin. Hrgs. July 24, 2009); *Wilson v. Dept. of Admin., Div. of Ret.*, 538 So.2d 139, 141-142 (Fla. 4th DCA 1989); *Department of Transp. v. J.W.C. Co.*, 396 So.2d 778, 788 (Fla. 1st DCA 1981).

18. Article II, Section 8 of the Florida Constitution provides in pertinent part:

SECTION 8. Ethics in government. -- A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:

* * *

(d) Any public officer or employee who is convicted of a felony involving a breach of public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan in such a manner as may be provided by law.

19. Chapter 112, Part III, of the Florida Statutes implements Article II, Section 8(d) of the Florida Constitution in Section 112.3173. Section 112.3173(2)(e), Florida Statutes provides for the forfeiture of retirement benefits, in pertinent part, for conviction of a "specified offense" as defined therein to mean:

* * *

4. Any felony specified in chapter 838, except ss. 838.15 and 838.16:

20. Section 112.3173(3), FORFEITURE, provides:

Any public officer or employee who is convicted of a specified offense committed prior to retirement, or whose office or employment is terminated by reason of his or her

admitted commission, aid, or abetment of a specified offense, shall forfeit all rights and benefits under any public retirement system of which he or she is a member, except for return of his or her accumulated contributions as of the date of the termination.

21. Because there is no evidence that petitioner was terminated by reason of his "admitted commission, aid, or abetment of a specified offense," the within forfeiture proceedings are based entirely upon Fla. Stat. 112.3173(2)(e)4; the conviction for official misconduct in violation of Fla. Stat. 838.022 remaining undisturbed by the Fourth District Court of Appeal's reversal of his conviction for organized scheme to defraud.

22. Petitioner's Rule 3.850 Motion pending before the circuit court alleges matters pertaining to the State's misuse of evidence in violation of his *Garrity* rights, in violation of *Brady*, prosecutorial misconduct, and that the conduct for which he was convicted may not have even constituted the "policy" violations subject of testimony at his trial, among other things he avers would relieve him of the conviction upon which these forfeiture proceedings are predicated; which matters properly are pending where the adjudication of guilt was entered and, in any event, are beyond the jurisdiction of the SBA to decide.

23. Petitioner's Rule 3.850 Motion is the final "appeal" available to challenge the convictions upon which this administrative proceeding for forfeiture is predicated; and, its disposition in the Circuit Court will exhaust the remedies available to Petitioner under Florida Law and the Florida Rules of Criminal Procedure.

24. I note that the facts in this matter remain unchanged since the Petitioner's December 3, 2014 Petition for Hearing "requesting the SBA to allow the process (appeal) to convene prior to making any decisions" to go forward with forfeiture. See R-5. The Respondent has been willing to hold these proceedings in abeyance for 2½

years. By declining to "hear" his case the Florida Supreme Court made no "findings;" a court of competent jurisdiction to decide his remaining "appeal" has not as yet, but will, "convene" to address the merits of his "appeal" for the first time since December, 2014 in consequence of his Rule 3.850 Motion.

25. Respondent can show no prejudice to it by awaiting a disposition of the Rule 3.850 Motion regarding Petitioner's conviction.

RECOMMENDATION

Having considered the law and the undisputed facts of record, I recommend that Respondent, State Board of Administration issue an order granting Petitioner Darrin McCray's Motion to Abate, and directing him to advise it immediately upon the court's decision in Case No. 2008-CF-007611FXX. Based upon the foregoing recommendation, the second issue presented, of whether the Petitioner has forfeited his right to a retirement benefit, is moot at this time.

RESPECTFULLY SUBMITTED this 26th day of June, 2017.



Gary E. Lippman, Esquire
Fla. Bar No. 79121
Counsel for Petitioner
4231 Quill Circle
Lake Worth, FL 33467
Tel. 561-722-0264
garylippman@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER
DARRIN McCRAY'S PROPOSED RECOMMENDED ORDER has been furnished this
26th day of June, 2017 by electronic mail to:

Anne Longman, Esq.
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
315 South Calhoun Street, Suite 830
Tallahassee, FL 32301-1872
alongman@llm-law.com

Filed by electronic delivery only with:

Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, FL 32308
Tina.joanos@sbafl.com
Mini.watson@sbafla.com

Copies Furnished by electronic mail only to:

Brian A. Newman, Esq.
brian@penningtonlaw.com
Brandice D. Dickson, Esq.
brandi@penningtonlaw.com
Counsels for Respondent
Pennington, P.A.
215 S. Monroe Street, Suite 200
P.O. Box 10095
Tallahassee, FL 32301
slindsey@penningtonlaw.com

Darrin McCray
Petitioner




Gary E. Jippman