

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

DOUGLAS GRIFFITH,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2015-3234
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
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FINAL ORDER

On August 24, 2015, the Presiding Officer submitted her Recommended Order to the State Board of Administration in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Douglas Griffith, and upon counsel for the Respondent. This matter was decided after an informal proceeding. Respondent filed a Proposed Recommended. Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions to the Recommended Order which were due on September 8, 2015. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending, for final agency action, before the Senior Defined Contribution Programs Officer.

ORDERED

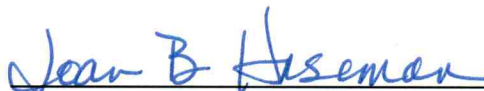
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner, Douglas Griffith, has forfeited his rights and benefits under the Florida Retirement System Investment Plan pursuant to Section 112.3173(2)(e)6., Florida

Statutes by having pled guilty in Alabama to three felonies, at least one of which was committed through the use of Petitioner's work-issued cell phone during work hours.

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.

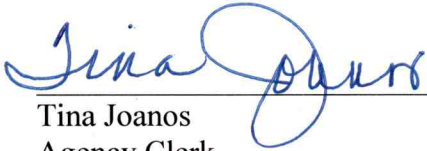
DONE AND ORDERED this 21st day of October, 2015, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Joan B. Haseman
Senior Defined Contribution Programs Officer
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

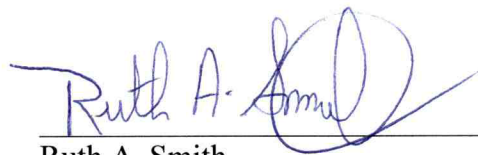
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Douglas Griffith, [REDACTED] and [REDACTED] 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 21st day of October, 2015.



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

DOUGLAS GRIFFITH,

Petitioner,

v.

Case No.: 2015-3234

STATE BOARD OF ADMINISTRATION,


Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on June 24, 2015, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Douglas Griffith, pro se

For Respondent: 
Brian A. Newman, Esquire
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 benefits must be forfeited due to his conviction of an offense specified in section 112.3173, Florida Statutes, and particularly whether the use of an employer-issued cellphone for

commission of the subject crimes requires forfeiture under the “catch all” provision of section 112.3173(2)(e)6, Florida Statutes.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on his own behalf, and presented no other witnesses. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Respondent’s exhibits R-1 through R-8, R-10 and R-11 were received in evidence without objection.

A transcript of the informal hearing was made, filed with the agency, and provided to the parties, who were invited to submit proposed recommended orders within thirty days after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings.

MATERIAL UNDISPUTED FACTS

1. Petitioner was employed with the Escambia County Board of County Commissioners (“Escambia County”), an FRS-covered agency, and was a member of the Florida Retirement System Investment Plan.
2. He worked as an inspector of roadway and drainage for the Escambia County Engineering Department for approximately 20 years.
3. On May 16, 2014, he was arrested by the Escambia County Sheriff’s Office on warrants issued by the State of Alabama for felony charges of Transmitting Obscene Material (two counts) and Electronic Solicitation, in violation of the Code of Alabama sections 13A-006-011 and 13A-006-122. These charges arose out of Petitioner’s response to inquiries placed on

Craig's List by the Henry County Alabama sheriff's office, posing as a 14 year old girl.

4. On October 27, 2014, Petitioner pled guilty to the three charged felonies. He was sentenced to eight years confinement for each count, running concurrently, and a probation hearing was set for November 25, 2014.

5. On November 25, 2014, Petitioner's sentence was suspended and he was placed on probation for five years.

6. On January 30, 2015, Respondent notified Petitioner that his FRS Investment Plan account had been placed on hold pending its analysis of the charges against him. Ms. Watson testified that the SBA learned of the charges against Petitioner from an article in the Pensacola News Journal which was forwarded to her by the Division of Retirement.

7. On March 4, 2015, Respondent notified Petitioner that his FRS Investment Plan account had been forfeited due to the acts he committed while employed in an FRS-covered position with Escambia County. These acts were described in the indictments as follows:

COUNT 1. TRANSMISSION OF OBSCENE MATERIAL

The Grand Jury of said county charge that, before the finding of this indictment, DOUGLAS SCOTT GRIFFITH, whose name is otherwise unknown to the Grand Jury, did transmitt obscene material by means of a computer communication system allowing the input, output, examination or transfer of computer programs from one computer to another, obscene material, to-wit: SENT A PICTURE OF PENIS SHAFT AND SROTUM, which, in whole or in part, depicts actual or simulated nudity, sexual conduct, or sadomasochistic abuse to a child who is under 16 years of age, and said acts done for the purpose of initiating or engaging in sexual acts with the child, in violation of 13A-6-111 of the Code of Alabama, against the peace and dignity of the State of Alabama.

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COUNT 1. ELECTRONIC SOLICITATION

The Grand Jury of said county charge that, before the finding of this indictment, DOUGLAS SCOTT GRIFFITH, whose name is otherwise unknown to the Grand Jury, did knowingly with the intent to commit an unlawful sexual act, enticed, induced, persuaded, seduced, prevailed, advised, coerced, lured or ordered, or attempted such, by means of a computer, on-line service, internet service or bulletin board service, weblog, cellular phone, video game system, personal data assistant, telephone, facsimile machine, camera, universal serial bus drive, writable compact disc, magnetic storage device, a child at least three years younger than the defendant or another person believed by the defendant to be a child at least three years younger than the defendant to meet with the defendant or any person for the purpose of engaging in sexual performance, or sexual conduct for his or her benefit or for the benefit of another, to-wit: DOUGLAS SCOTT GRIFFITH in violation of 13A-006-122 of the Code of Alabama, against the peace and dignity of the State of Alabama.

The record reflects that as to at least one of the charges to which Petitioner pled guilty, his work cell phone was used. Respondent's attorney also stated during the hearing that this use was during work hours, and this statement was not contradicted by Petitioner.

CONCLUSIONS OF LAW

8. Article II, section 8 of the Florida Constitution, titled "Ethics in Government," states in pertinent part:

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 manner as may be provided by law.

9. Section 112.3173, which implements this constitutional provision, is part of the statutory code of ethics for public officers and employees. The statute states in pertinent part:

(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.

* * *

(c) "Public officer or employee" means an officer or employee of any public body, political subdivision, or public instrumentality within the state.

(d) "Public retirement system" means any retirement system or plan to which the provisions of part VII of this chapter apply.

(e) "Specified offense" means:

1. The committing, aiding, or abetting of an embezzlement of public funds;
2. The committing, aiding, or abetting of any theft by a public officer or employee from his or her employer;
3. Bribery in connection with the employment of a public officer or employee;
4. Any felony specified in chapter 838, except ss. 838.15 and 838.16;
5. The committing of an impeachable offense;
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; or
7. The committing on or after October 1, 2008, of any felony defined in s. 800.04 against a victim younger than 16 years of age, or any felony defined in chapter 794 against a victim younger than 18 years of age, by a public officer or employee through the use or attempted use of 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.

10. As the party asserting that Petitioner has forfeited his rights and benefits under the FRS pursuant to section 112.3173(3), Respondent bears the burden of proof in this proceeding. See Florida Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); see also Balino v. Dep't of Health and Rehab. Servs., 348 So. 2d 349 (Fla. 1st DCA 1977) (party asserting the affirmative of an issue bears the burden of proof).

11. The standard of proof in this proceeding is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.; Childers v. Dep't of Mgmt. Servs., Case No. 07-2128 (Fla. DOAH July 17, 2007), modified in part, OGC Case No. 04-03615 (Fla. State Bd. of Admin. Sept. 28, 2007).

12. Petitioner's plea of guilty establishes that he was convicted of the referenced charges within the meaning of "conviction" under section 112.3173(2)(a).

13. Not every crime committed by a public officer or employee gives rise to forfeiture of FRS rights and benefits under section 112.3173. To result in forfeiture, the crime must be a "specified offense" as defined in section 112.3173(2)(e)1. through 7.

14. Respondent asserts that Petitioner's Investment Plan account must be forfeited pursuant to section 112.3171(2)(e)6., which has been called the "catch-all" provision of the forfeiture statute. See Bollone v. Dep't of Mgmt. Servs., 100 So. 3d 1276, 1280 (Fla. 1st DCA

2012). Respondent has not sought forfeiture under section 112.3173(2)(e)7, which refers specifically to underage sex offenses.

15. To constitute a specified offense under section 112.3171(2)(e)6., the criminal act must be: 1) a felony; 2) committed by a public officer or employee; 3) done willfully and with intent to defraud the public or the public employer of the right to receive the faithful performance of the officer's or employee's duty as a public officer or employee; 4) done to realize or obtain, or attempt to realize or obtain, a profit, gain, or advantage for the officer or employee or some other person; and 5) done through the use of or attempted use of the power, rights, privileges, duties, or position of the officer's or employee's public employment. Id. at 1280-81.

16. To determine whether section 112.3171(2)(e)6. applies to a particular offense, the statutory conditions must be examined and applied in light of the employee's conduct. Id. at 1280. Whether a particular crime meets the definition of a "specified offense" under this provision depends on the way in which the crime was committed. Jenne v. Dep't. of Mgmt. Servs., 36 So. 2d 738, 742 (Fla. 1st DCA 2010). In other words, as long as the offense is a felony, it is the conduct of the employee, not the elements of the crime, that must be examined under section 112.3173(3)(e)6.

17. If an employee is convicted of a "specified offense" committed prior to retirement from the FRS, he forfeits all rights and benefits. Childers v. Department of Management Services, 989 So.2d 716 (Fla. 4th DCA 2008). Respondent has no discretion as to whether to proceed with forfeiture of a participant's Investment Plan account; the forfeiture is mandatory, as it enforces 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.)

18. The "catch-all" section of the statute has been construed to require forfeiture for acts that are 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. Dept. of Mgmt. Servs., 36 So.3d 738 (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 and illegal payments to him were made via the mail); Holsberry v. Dep't of Mgmt. Servs., 2009 WL 2237798 (Fla. Div. Admin. Hrgs. July 24, 2009) (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. Dep't of Mgmt. Servs., 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); Bollone v Dep't of Mgmt. Servs., 100 So.3d 1276 (Fla. 1st DCA 2012) (catch all applied where teacher used work computer to access child pornography.)

19. My review of the elements necessary to establish forfeiture is as follows:

1) The offense Petitioner pled to is a felony. The fact that the offense is charged in Alabama is not relevant, as the Jenne case requires examination of the wrongful conduct, not the charges.

2) Petitioner was a public employee.

3) Petitioner's use of his employer-issued cell phone was willful.

4) Petitioner's actions were for his own gain or advantage as sexual gratification was found in the Bollone case to be a profit or advantage as required by statute.

5) Petitioner used his right to operate an employer-issued cell phone to commit the crimes to which he pled guilty, and thus one of the privileges of his employment, the cell phone, was an instrumentality of the crime.

20. With regard to element number three above, requiring intent to defraud or deprive, additional analysis is necessary. In Bollone, the case most apposite here, a community college teacher was convicted of possessing and accessing child pornography on his school issued computer. The court examined whether there was competent substantial evidence to support the requirement that the offending acts were willful and done with intent to defraud, were done to obtain a profit or advantage, and were done using the power or privileges of employment, and found:

The record evidence reflects that Appellant had the exclusive right to use his computer, that he did not share his faculty office with anyone else, and that he kept his faculty office door locked when he was not there. TCC assigned him a work computer, owned by TCC, to use for work, and LimeWire was not located on the computer until after Appellant received it for work. Child pornography was downloaded onto the computer after Appellant received it for work, and it was discovered in a LimeWire folder. Neither LimeWire nor the images could have been accidentally downloaded onto Appellant's computer; instead, they could only be downloaded with a user's consent. While Appellant's letter to TCC's President did not state what his addictive behaviors were, he was clearly referring to his computer-related activities, and he admitted that he made mistakes. During the evidentiary hearing, Appellant stated that the addictive behaviors he was referring to in the letter were on-line "fantasy" behaviors related to sexual identity issues which he had been dealing with. Appellant was aware that use of his TCC computer to acquire or view child pornography was a violation of TCC policies. Appellant's intentional possession of child pornography on his TCC computer was contrary to TCC's policies and contrary to the faithful performance of his duties.

Id. At 1281 (emphasis added.)

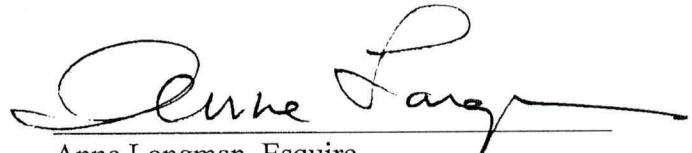
21. The recitation of facts in the Bollone case highlights some of the differences here. This Petitioner has testified that Escambia County had no policy regarding personal use of his employer-issued cell phone, and this testimony was not contradicted. The Petitioner had a personal cell phone which he also used to make illicit communications, and it is possible that he became confused as to which cell phone he was using. If he was allowed to use his employer cell phone for personal communications, there is no necessary implication that his use affected his duties as an inspector, and under these circumstances, whether he had the necessary intent to defraud the public of the right to receive the faithful performance of his duties is a close question. He did, however, clearly use an employer-issued cell phone to commit the crimes to

which he pled guilty. Under the Bollone case, this would seem to be sufficient to require forfeiture here, even in the absence of an employee use policy.

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 2th day of August, 2015.



Anne Longman, Esquire
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
mini.watson@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Douglas Griffith


Petitioner

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Counsel for Respondent