

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

JULIO GARCIA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	SBA Case No. 2014-2995
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
_____	)	

**FINAL ORDER**

On October 13, 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, Julio Garcia, 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 October 28, 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, Julio Garcia, has forfeited his rights and benefits under the Florida Retirement System Investment Plan pursuant to Section 112.3173(2)(e)4., Florida Statutes, by having pled nolo contendere to two counts of Official Misconduct which are felonies under

Section 838.022, Florida Statutes. The SBA has no authority to consider Petitioner's allegations that he was treated unfairly by his employer or that he was not properly advised by his counsel that a plea of nolo contendere would result in forfeiture of his Florida Retirement System employer-paid benefits.

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 30<sup>th</sup> 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

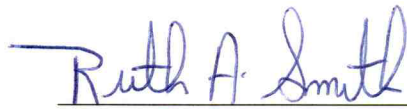
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

  
\_\_\_\_\_  
Tina Joanos  
Agency Clerk

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order was sent to Julio Garcia, pro se, both by email transmission,

\_\_\_\_\_ and by email transmission to Brian Newman, Esq. ([brian@penningtonlaw.com](mailto:brian@penningtonlaw.com)) and Brandice Dickson, Esq., ([brandi@penningtonlaw.com](mailto:brandi@penningtonlaw.com)) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 30<sup>th</sup> 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

JULIO GARCIA,

Petitioner,

vs.

Case No. 2014-2995

STATE BOARD OF ADMINISTRATION,

Respondent.

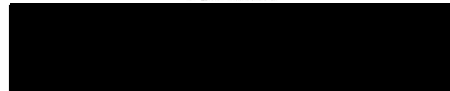
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**RECOMMENDED ORDER**

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 August 12, 2015, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: Julio Garcia, pro se



For Respondent: Brandice D. Dickson, Esquire  
Pennington, P.A.  
Post Office Box 10095  
Tallahassee, Florida 32302-20

**EXHIBIT A**

### **STATEMENT OF THE ISSUE**

The issue is whether Petitioner's Investment Plan account was rightly determined by Respondent to have been forfeited as a result of his *nolo contendere* plea to felonies involving a breach of the public trust, specifically to violations of s. 838.022, 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-5, which were pre-filed, and Petitioner's Exhibits P-1 through P2 which were submitted after the hearing, were admitted into 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 other than the exhibits referenced above.

### **MATERIAL UNDISPUTED FACTS**

1. Petitioner is a member of the Florida Retirement System (FRS) Investment Plan by virtue of his former employment with the Polk County Sheriff's Office.

2. On February 26, 2014, the State of Florida Commission on Ethics notified Respondent that Petitioner had criminal proceedings instituted against him which could result in forfeiture of his FRS Investment Plan account. Specifically, Petitioner was charged with six felony counts, two of which were felony counts of Official Misconduct (Counts 5 and 6 of the Information) in violation of Section 838.022, Florida Statutes.



3. As a result of the charges, Petitioner was notified by Respondent on February 28, 2014 that a hold had been placed on his FRS Investment Plan pending the outcome of the case.

4. On December 19, 2014 Petitioner pled *nolo contendere* to Counts 5 and 6 of the Information against him. The other four counts were nolle prossed by the State.

5. Based on his plea, Petitioner was found to have forfeited his FRS rights and benefits.

6. Petitioner filed a Petition for Hearing seeking reversal of the forfeiture because he “was never convicted.” He also asserted, in essence, that he was treated unfairly in that other Polk County Sheriff’s Office deputies allegedly engaged in criminal activities and were allowed to resign rather than being charged, resulting in damage to their reputations and eventual loss of their retirement benefits.

### CONCLUSIONS OF LAW

7. The Florida Constitution provides 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 guilty 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.

(b) "Court" means any state or federal court of competent jurisdiction which is exercising its jurisdiction to consider a proceeding involving the alleged commission of a specified offense.

...

(e) "Specified offense" means:

...

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

...

(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. (2014)(emphasis added).

8. An employee who is convicted of a "specified offense" committed prior to retirement from the FRS forfeits all rights and benefits. *Childers v. Department of Management*

*Services*, 989 So.2d 716 (Fla. 4th DCA 2008). The statutory definition of “convicted,” cited above, includes a plea of *nolo contendere*. Petitioner was convicted of two felony counts under section 838.022, Florida Statutes.

9. Respondent has no discretion as to whether to proceed with forfeiture of a participant’s Investment Plan account when the standards set out by statute are met. Forfeiture is characterized as enforcing 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).

10. Petitioner here has been convicted of an enumerated specified offense (Official Misconduct) and has thus forfeited his right to a retirement benefit under the Florida Retirement System. Respondent must follow the dictates of the Florida Constitution and laws as to all Investment Plan participants. There is no jurisdiction in this forum to consider Petitioner’s assertions that he was treated unfairly by his employer or that he was not advised by his attorney of the consequences of his plea of *nolo contendere* on his FRS retirement assets.

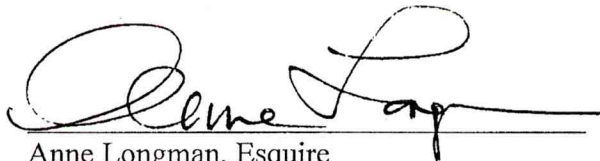


11. Florida Statutes creating and governing the Florida Retirement System, and Petitioner's rights and responsibilities under them, are clear and the SBA cannot deviate from them. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL517476 (Fla.Div.Admin.Hrgs.).

**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 13<sup>th</sup> day of October, 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**

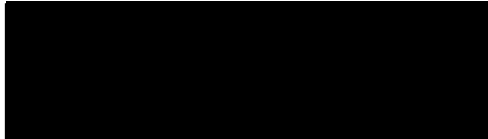
All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions must be filed with the Agency Clerk of the State Board of Administration and served on opposing counsel at the addresses shown below. The SBA then will enter a Final Order which 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](mailto:Tina.joanos@sbafla.com)  
[mini.watson@sbafla.com](mailto:mini.watson@sbafla.com)  
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Julio Garcia



Petitioner

and via electronic mail only to:

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



Counsel for Respondent