

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

SARAH THOMPSON,)
)
 Petitioner,)
)
vs.)
)
STATE BOARD OF ADMINISTRATION,)
)
 Respondent.)
)
_____)

Case No. 2010-1731

FINAL ORDER

On October 17, 2011, 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 counsel for the Petitioner, Sarah Thompson, and upon counsel for the Respondent. By joint motion of the parties, this case was determined on the written record only. Petitioner timely filed exceptions on October 31, 2011. Petitioner then filed amended exceptions on November 1, 2011.

A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Senior Defined Contribution Programs Officer for final agency action.

PRELIMINARY STATEMENT

The State Board of Administration adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order.

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." The findings of fact in a recommended order 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."

RULINGS ON PETITIONER'S EXCEPTIONS TO THE RECOMMENDED

ORDER

Petitioner's Exceptions to the Recommended Order

Petitioner's Exceptions to the Recommended Order filed on October 31, 2011, which object to the Recommended Order on the basis that the Recommended Order fails

to determine whether mental illness applies to the forfeiture provisions as an exception or as a mitigating factor, and also fails to address whether the Petitioner suffered from a mental illness that affected her judgment or intent, are not addressed. The Exceptions fail to identify the disputed portion of the Recommended Order by page number or paragraph, fail to identify the legal basis for the exception, and fail to include appropriate and specific citations to the record.

Petitioner's Amended Exceptions 1 through 3

Petitioner's three objections to the Recommended Order all are made on the grounds that the Recommended Order fails to make certain findings of fact, or, in the alternative, fails to address certain testimony. In Exceptions 1 and 2, the Petitioner excepts to the Recommended Order on the grounds it failed to make findings of fact, and/or fails to address the testimony of Dr. Christopher Kye that Petitioner suffered from bipolar disorder, and that Petitioner's mental illness impaired her judgment thereby making her actions not willful. In Exception 3, Petitioner excepts to the Recommended Order on the grounds that it fails to make findings of fact, and/or fails to address that Petitioner was incorrectly medicated for sleep disturbances.

In all three exceptions, Petitioner fails to identify any legal basis for the exceptions. Further, the words of the statutory forfeiture provision, Section 112.3173, Florida Statutes, are unambiguous. The statute mandates forfeiture upon conviction of a specified offense committed prior to retirement. The statute does not permit Respondent to consider any factors that might mitigate forfeiture. The record shows that Petitioner pled guilty to, and was adjudicated guilty of, several counts of a felony charge. The Probable Cause Affidavit made it clear that Petitioner committed the felony while acting

as a law enforcement officer. Petitioner obtained an advantage (possession of a controlled substance for her own use) through her privileges, position and duties as a law enforcement officer in violation of the duties owed to the public and the public agency for which she acted and was employed. *See, Simcox v. Hollywood Police Officers Retirement System*, 988 So.2d 731, 734 (Fla. 4th DCA 2008). The recent case, *Kenneth C. Jenne v. State of Florida, Department of Management Services, Division of Retirement*, 36 So.3d 738 (Fla. 1st DCA 2010), held that under Section 112.3173(2)(e)6, Florida Statutes, any felony can qualify as a “specified offense” if the manner in which the felony is committed constitutes a misuse of public office. Based on record evidence, the Presiding Officer found that Petitioner pled guilty to a felony that was committed intentionally and that this felony was committed by Petitioner in a manner that involved the misuse of her public office. As such, the felony is a specified offense pursuant to Section 112.3173, Florida Statutes, and therefore forfeiture is mandated. The testimony of Dr. Kye as to Petitioner’s mental impairment, taken after Petitioner’s plea and adjudication of guilt was not proffered as a defense to the felony for which Petitioner was convicted. This testimony is not material to the outcome of this case and, therefore, is not a Finding of Fact the Presiding Officer was required to make. Accordingly, Amended Exceptions 1 through 3 to the Recommended Order hereby are denied *in toto*.

ORDERED

The Recommended Order (Exhibit A) hereby is adopted in its entirety. The Petitioner’s plea of guilt and adjudication of guilt, to a felony committed in a manner that constitutes a misuse of her public office require forfeiture of Petitioner’s FRS Investment Plan 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.

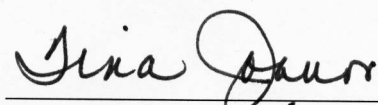
DONE AND ORDERED this 21st day of November, 2011, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Ron Poppell, 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.

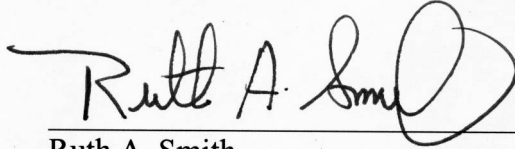


Agency Clerk

TINA JOANOS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by U.S. mail to Richard A. Sicking, Esq., Richard Sicking, P.A., 1313 Ponce De Leon Blvd., Suite 300, Coral Gables, Florida 33134, and by U.S. mail to Brian Newman and Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 21st day of November, 2011.

A handwritten signature in black ink, appearing to read "Ruth A. Smith", written over a horizontal line.

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

SARAH THOMPSON,

Petitioner,

v.

CASE NO.: 2010-1731

STATE BOARD OF ADMINISTRATION,

Respondent.

EXCEPTIONS TO RECOMMENDED ORDER

Sarah Thompson files these exceptions to the recommended order of Anne Longman, dated October 17, 2011:

1. The recommended order does not determine the legal question whether mental illness applies to the "catchall" forfeiture statute either as an exception or as a mitigating factor with respect to the words: "willfully and with intent to defraud the public".

2. The recommended order does not find as fact whether Sarah Thompson suffered from a mental illness or whether such mental illness affected her judgment or intent with respect to the "catchall" forfeiture statute, particularly with respect to the words: "willfully and with intent to defraud the public".

Respectfully submitted,

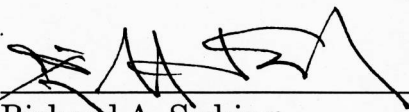
RICHARD A. SICKING, ESQ.
Attorney for Petitioner, Thompson
1313 Ponce De Leon Blvd., Suite #300
Coral Gables, Florida 33134
Telephone: (305) 446-3700
Florida Bar No. 073747



RICHARD A. SICKING

Certificate of Service

I CERTIFY that a copy hereof has been furnished to Brian A. Newman, Esquire, Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., counsel for respondent, P.O. Box 10095, Tallahassee, Florida 32302-2095, by mail this 21st day of October, 2011.



Richard A. Sicking

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

SARAH THOMPSON,

Petitioner,

v.

CASE NO.: 2010-1731

STATE BOARD OF ADMINISTRATION,

Respondent.

AMENDED EXCEPTIONS TO RECOMMENDED ORDER

Sarah Thompson files these amended exceptions to the recommended order of Anne Longman, dated October 17, 2011:

1. The recommended order does not make findings of fact nor address the undisputed testimony of Dr. Christopher Kye that Sarah Thompson suffered from a recognized mental illness, bipolar disorder, which is genetic in origin and is characterized by alternating states of anxiety and depression which adversely impair judgment. (Depo. Kye 5-7, 13-14, 16-21, 23.)

2. The recommended order does not make findings of fact nor address the undisputed testimony of Dr. Christopher Kye that Sarah Thompson's mental illness impaired her judgment so that obtaining the oxycodone was not willful. (Depo. Kye 19-20, 23, 26.)

3. The recommended order does not make findings of fact nor address that Sarah Thompson's shift change before the occurrences for which she was charged and convicted affected her sleep pattern for which she consulted a physician but was medicated incorrectly so that her judgment was impaired. (Depo. Kye 9-14, 16-21, 23.)

Wherefore, the recommended order should be rejected or, alternatively, the case referred to DOAH for hearing in order to afford the respondent an opportunity to address Sarah Thompson's mental illness.

Respectfully submitted,


RICHARD A. SICKING, ESQ.
Attorney for Petitioner, Thompson
1313 Ponce De Leon Blvd., Suite #300
Coral Gables, Florida 33134
Telephone: (305) 446-3700
Florida Bar No. 073747



RICHARD A. SICKING

Certificate of Service

I CERTIFY that a copy hereof has been furnished to Brian A. Newman, Esquire, Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., counsel for respondent, P.O. Box 10095, Tallahassee, Florida 32302-2095, by mail this 1st day of November, 2011.



Richard A. Sicking

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

SARAH THOMPSON,

Petitioner,

vs.

CASE NO. 2011-1731

STATE BOARD OF ADMINISTRATION,

Respondent.

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GENERAL COUNSEL'S OFFICE

RECOMMENDED ORDER

This case came before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) after the parties jointly requested that the issues presented be resolved on the written record without a hearing. The appearances were as follows:

APPEARANCES

For Petitioner: Richard A. Sicking, Esquire
Richard A. Sicking, P.A.
1313 Ponce De Leon Blvd.
Suite 300
Coral Gables, Florida 33134

For Respondent: Brian A. Newman, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue is whether Petitioner's guilty plea and adjudication of guilt to certain crimes subjects her Florida Retirement System (FRS) benefits to forfeiture.

PRELIMINARY STATEMENT

Pursuant to a joint motion of the parties, by order of August 29, 2011, I directed that this matter be determined on the written record only. The parties stipulated that this record would include the stipulated facts set forth verbatim below and the deposition testimony of Petitioner's psychiatrist, Christopher Kye, M.D.

MATERIAL UNDISPUTED FACTS

1. The Petitioner was employed as a deputy sheriff by her FRS-participating employer, the Palm Beach County Sheriff's Department. Petitioner is a member of the Investment Plan.
2. Petitioner was arrested in February, 2010 for possession of Oxycodone with intent to purchase.
3. The events leading to Petitioner's arrest are memorialized in the Probable Cause Affidavit filed against Petitioner on February 18, 2010. According to the Probable Cause Affidavit, Petitioner made several purchases of Roxycodone tablets from a confidential informant with the stated purpose of using the drugs as evidence in an undercover operation. The Petitioner also offered to write letters for the confidential information documenting her work to help satisfy conditions of her probation. The Probable Cause Affidavit states in pertinent part that:

Deputy Thompson used a subject identified as a Confidential Informant (CI) to purchase Roxycodone 30mg pills. Thompson expressed to the CI that Thompson was acting as a Law Enforcement officer during these separate deals. During each deal Thompson made no attempt to obtain any information about who, what or where the drugs were coming from. Thompson never searched anything. Thompson told the CI that funds being used to purchase the pills were being supplied by the Palm Beach County Sheriffs Office. Captain Durr of the PBSO regulates all funds that are given to divisions within the PBSO for drug purchases. Captain Durr advised that as of 02-17-10 that no funds from the

PBSO have been given to Deputy Thompson to make purchases of anything. As of 02-17-10, Deputy Thompson has not received a case number in reference to these documented deals nor has Deputy Thompson put any of the described Roxycodone 30mg pills that have been supplied into evidence.

4. On August 9, 2010, Petitioner pled guilty to, and was adjudicated guilty of three counts of the purchase or possession of a controlled substance with intent to purchase in violation of Section 893.13(2)(a)1., Florida Statutes (a second degree felony); one count of knowingly making a false statement in writing to a law enforcement officer in violation of Section 837.06, Florida Statutes (a second degree misdemeanor); and petit theft in violation of Section 812.014(1) and (3)(a), Florida Statutes (a second degree misdemeanor). These convictions were based upon Petitioner's conduct as set forth in the February 18, 2010, Probable Cause Affidavit.

5. Petitioner was notified by the SBA on February 24, 2011 that her rights and benefits under the Florida Retirement System would be forfeited due to the commission of multiple felonies that were committed with the misuse of the power, rights, privileges, and duties she enjoyed as a public law enforcement officer.

6. A petition for hearing was filed on Petitioner's behalf to contest the intended forfeiture of her retirement benefits, and this administrative proceeding followed.

CONCLUSIONS OF LAW

7. The Florida Constitution at Article II, Section 8 mandates that a "public office is a public trust," and that the "people shall have the right to secure and sustain that trust against abuse." To that end, "[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." Id. at (d).

8. Section 112.3173(3), Florida Statutes implements this provision and states:

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.

9. One of the specified offenses for which Florida retirement benefits must be forfeited is,

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.

§ 112.3173(2)(e)6., Fla. Stat. (2010)

10. Petitioner has been convicted of multiple counts of a felony charge which includes an intent element. The convictions were based upon her pleading guilty to offenses arising from the purchase of controlled substances from a confidential informant for the stated purpose of participating in a non-existent undercover investigation. Petitioner exploited her authority as a public officer by writing letters of support to the confidential informant's probation officer in exchange for selling her the controlled substances. One or more of the illegal purchases were made by Petitioner while she was in a marked Palm Beach County patrol car and/or while she was wearing her deputy's uniform. Her conduct constitutes a breach of the public trust.

11. Petitioner asserts that forfeiture statutes must be strictly construed, that the

applicable statute, section 112.3173(2)(e)6, requires an offense to have been committed “willfully and with intent,” and that she lacked this intent due to her mental state. She offers the testimony of her psychiatrist, Christopher Kye, M.D., as support for this position.

12. There is no dispute here that Petitioner pled guilty to, and was adjudicated guilty of a crime that is a felony. The underlying circumstances of the crime demonstrate that she abused her public office in the commission of that felony. Petitioner's position appears to be that the willful intent requirement of section 112.3173(2)(e)6. (which is the category of specified offense known as the catch-all provision) is separate from and additional to the elements of the underlying offense which were admitted when she entered her plea of guilty. Neither party has cited any cases which are directly on point, or discussed the cases that deal directly with this forfeiture section.

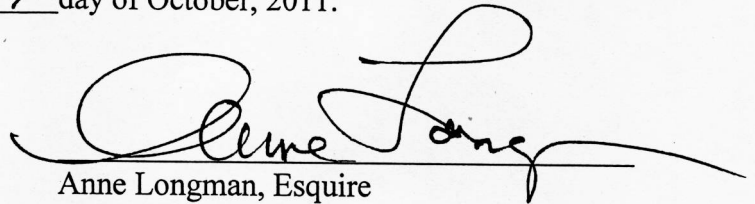
13. In Jenne v. State Dept. of Management Services, DOR, 36 So.3d 738 (Fla.1st DCA 2010), the First District Court of Appeal analyzed the forfeiture of a former sheriff's retirement benefits based on a federal conviction for conspiracy to commit mail fraud. Jenne asserted that his federal conviction did not qualify as a specified offense because the elements of the federal crime did not match the elements of any of the crimes described in the statute. The court rejected this argument and found that the catch-all provision defined the specified offense by the conduct of the public officer, not by the elements of the crime for which he was convicted. This meant that ‘any felony could qualify as a specified offense, so long as the remaining conditions in the statute have been met.’ Id. at 742. The court in Jenne did not look beyond the statute in its analysis, and I see no need to do so here, although the facts of this case present the inverse situation. Here Petitioner pled guilty to a felony which included willful intent as a necessary element, and the circumstances of the crime show that it resulted in the public being defrauded of faithful performance of her public duties – it is therefore a matter of public record that her crime was committed in a way that made it

a specified offense, and forfeiture under the Florida Constitution and applicable statutes is required. Petitioner cannot now raise her mental state as a defense to either the conviction or this resulting forfeiture.

RECOMMENDATION

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

RESPECTFULLY SUBMITTED this 15th day of October, 2011.



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: 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, which 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 with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
(850) 488-4406

This 15th day of October, 2011.

Copies furnished to:

Sarah Thompson



Petitioner

Richard Sicking, Esquire
1313 Ponce DeLeon Blvd., #300
Coral Gables, FL 33134-3343
Attorney for Petitioner

Brian A. Newman, Esquire
Brandice D. Dickson
Pennington, Moore, Wilkinson Bell & Dunbar
Post Office Box 10095
Tallahassee, FL 32302-2095
Attorneys for Respondent

A handwritten signature in black ink, appearing to read "Richard Sicking", written over a horizontal line. The signature is stylized and cursive.

Attorney