

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

KEVIN CUNNINGHAM,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2016-3729
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On May 10, 2017, 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, Kevin Cunningham, and upon counsel for the Respondent. This matter was decided on after an informal hearing. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions to the Recommended Order which were due on May 25, 2017. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

ORDERED

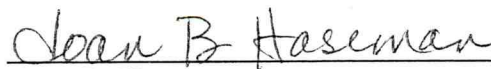
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner has forfeited his Florida Retirement System Investment Plan account benefit under Section 112.3173, Florida Statutes by having pled guilty to the felony of corruption by threat against a public servant, as set forth in Section 838.021(3)(b), Florida Statutes.

The felony clearly was connected to Petitioner's public employment and was committed prior to Petitioner's retirement. It is immaterial for purposes of the forfeiture statute that adjudication was withheld. The fact that Petitioner pled guilty to the felony is sufficient, of itself, to establish that he was "convicted" for purposes of the forfeiture law.

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.

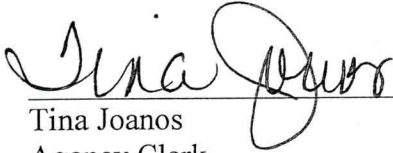
DONE AND ORDERED this 30th day of May, 2017, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



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

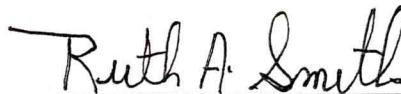
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Kevin Cunningham, pro se, both by email transmission, [REDACTED] and by U.P.S. to [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 30th day of May, 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

KEVIN CUNNINGHAM,

Petitioner,

v.

CASE NO.: 2016-3729


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 March 7, 2017, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Kevin Cunningham, pro se


For Respondent: Brandice D. Dickson, 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 benefit was properly forfeited by Respondent.

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 1 through 5 were admitted into evidence without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties. The parties 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 a member of the Florida Retirement System Investment Plan as an employee of Orange County.
2. Petitioner was arrested for making a threat of harm against Pam Bondi, Attorney General of the State of Florida.
3. By letter dated August 16, 2016 from the General Counsel to the Florida Commission on Ethics to Mini Watson with the Office of Defined Contributions, State Board of Administration, Respondent was notified that Petitioner had criminal proceedings against him and that he was a member of the FRS Investment Plan.
4. By letter dated December 7, 2016, Respondent notified Petitioner that his FRS Investment Plan benefit was forfeited due to his guilty plea to commission of a violation of Section 838.021(3)(b), Florida Statutes, a third degree felony. The forfeiture applies only to employer contributions, not to his employee contributions to his account.

5. Section 838.021(3)(b), Florida Statutes states:

838.021. Corruption by threat against public servant

(b) Whoever threatens unlawful harm to any public servant or to any other person with whose welfare the public servant is interested shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 838.021(3)(b), Fla.Stat. (2016)

6. A Final Judgment was entered against Petitioner on September 8, 2016 in the Ninth Judicial Circuit, in and for Orange County, Florida on Petitioner's guilty plea to violation of Section 838.021(3)(b), Florida Statutes.

7. Petitioner pled guilty to the charge and states that this was in accordance with his attorney's recommendation that a guilty plea was in his best interests. Petitioner further states that it was never his intent to inflict actual harm on the Attorney General by his posting of an angry email on a website. Petitioner also testified that his attorney advised him that his plea deal would not be considered a conviction, presumably because adjudication was withheld.

8. On December 13, 2016, Petitioner filed a Petition for Hearing contesting the forfeiture.

CONCLUSIONS OF LAW

9. 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.

(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.

(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:

...

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.

(4) **Notice.**--

...

(d) The Commission on Ethics shall forward any notice and any other document received by it pursuant to this subsection to the governing body of the public retirement system of which the public officer or employee is a member or from which the public officer or employee may be entitled to receive a benefit. When called on by the Commission on Ethics, the Department of Management Services shall assist the commission in identifying the appropriate public retirement system.

(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, Fla.Stat. (2016)(emphasis added)

10. 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). Respondent has no discretion as to whether to proceed with forfeiture of a participant’s Investment Plan benefit as the forfeiture is mandatory under the Constitution and statute. Forfeiture is regarded 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).

11. Because Petitioner pled guilty to a charge of Threatening a Public Servant with the Intent to Influence a Public Duty in violation of Section 838.021(3)(b), Florida Statutes, a specified offense under Section 112.3173(2)(e)4., Florida Statutes, no further analysis is required or appropriate here.

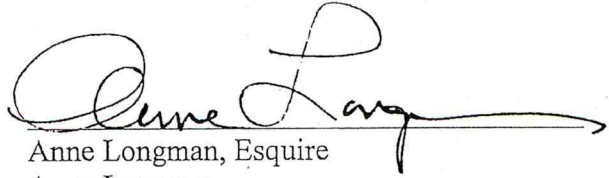
12. That adjudication was withheld does not change the analysis. *Byrd v. Department of Management Services, Division of Retirement*, 2008 WL 164132 (Fla.Div.Admin.Hrgs)(Recommended Order January 16, 2008)(plea of nolo contendere where adjudication was withheld results in “conviction” under forfeiture statute); *Lacey v. Department of Management Services, Division of Retirement*, 1994 WL 1027863 (Fla.Div.Admin.Hrgs.)(Recommended Order March 25, 1994); *City of Tampa General Employees Retirement Fund v. Boyd*, 2017 WL 750771 (Fla.Div.Admin.Hrgs.)(Recommended Order February 22, 2017).

13. 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.). It is not clear if Petitioner's attorney wrongly advised him about the effect of a guilty plea on his retirement benefit or simply did not address the fact that the definition of “conviction” in section 112.3173(2) includes pleas of guilty or nolo contendere, meaning that his plea would result in this forfeiture. But there is no jurisdiction in this proceeding to consider this question.

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 10th day of May, 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

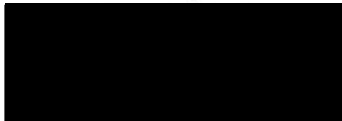
NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

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 Boulevard, Suite 100
Tallahassee, Florida 32308
Tina.joanos@sbafla.com
mini.watson@sbafla.com
Nell.Bowers@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Kevin Cunningham



Petitioner

and via electronic mail only to:

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Brandice D. Dickson, Esquire
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Tallahassee, Florida 32301
slindsey@penningtonlaw.com
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Counsel for Respondent