STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

MATTHEW J. HALE, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	DOAH Case No. 21-2327

FINAL ORDER

On February 3, 2022, Administrative Law Judge Lawrence P. Stevenson (hereafter "ALJ") submitted his 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 the *pro se* Petitioner, Matthew J. Hale, and upon counsel for the Respondent. Respondent filed timely filed a Proposed Recommended Order. Petitioner's Proposed Recommended Order was filed late. However, the Respondent did not object to the late filing. Petitioner timely filed exceptions on February 14, 2022. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief, Defined Contribution Programs 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.

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact of an Administrative Law Judge ("ALJ") 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 an ALJ'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 ALJ's 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 [an administrative law judge's] 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 ALJ's application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the ALJ'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.

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: Argument that Findings of Fact 26 and 27, and Conclusions of Law 59 and 60 are erroneous.

Petitioner claims that even though Petitioner's alleged victim gave him her email (contact information) while Petitioner still employed by his public employer, the exchange did not occur "…by virtue of his employment."

Petitioner met his purported victim while he was teaching at Bay District Schools during the 2015 through 2016 school year. There is no evidence that he made her acquaintance at some other location such as a church or fast-food restaurant. In fact, Petitioner admitted under oath that he met his purported victim through his public employment. [Transcript, page 58, lines 1-7]. He further admitted under oath during the hearing that he received contact information from his alleged victim while he still was employed. [Transcript, page 60, lines 8-10]. Petitioner further testified that he was not claiming he had a legitimate reason to obtain his purported victim's contact information. [Transcript, page 60, lines 11-22]. Thus, there is ample evidence to support findings that Petitioner met his purported victim through his employment and that, while employed with his public employer, he encouraged a relationship with a student that ultimately would lead to his criminal convictions.

Petitioner argues that the disclosure of contact information "…occurred despite the fact [he] was still under contract [with his employer], not because he was still under contract." This exception does not appear to dispute portions of the cited portions of the Recommended Order but appears to be strictly legal argument.

Accordingly, because the cited facts are supported by substantial competent evidence and because some of the statements in the exception are strictly legal argument, this exception hereby is rejected. *See Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277 (Fla. 1st DCA 1985).

Petitioner's Exception 2: Exception to Finding of Fact 7 and Conclusion of Law 45

Petitioner argues that the proffered evidence does not establish that Petitioner's purported victim was a student at Bay District Schools during the 2016 through 2017 school year. Petitioner states that there may some statements in the trial transcript to establish that she was a student. But, Petitioner argues these statements are inadmissible hearsay.

In administrative proceedings, hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. *See*, Section 120.57(1)(j), Florida Statutes. Here, there was ample record evidence to support the finding that the purported victim was a student at another school in the Bay District School System during the 2016 through 2017 school year. [Respondent's Exhibit 15, Certified Copy of the Trial Transcript, pages 179, 184-186, 216, 266-270, 351-52, 358-385].

Accordingly, Petitioner's exceptions to Finding of Fact 7 and Conclusion of Law Conclusion of Law 45 hereby are rejected.

Petitioner's Exception 3- Exception to Conclusion of Law 39

Petitioner argues that the ALJ's Conclusion of Law 39 finding that the SBA is not required to re-prove Petitioner's criminal conviction is erroneous, as Section 112.3173 "…must be interpreted as requiring the offense to have actually been committed for forfeiture to apply." [emphasis added]

However, Petitioner's view does not comport with the plain meaning of the statutory provision. Section 112.3173(2)(a), Florida Statutes, specifically states that a "conviction" occurs, *inter alia*, whenever there is an adjudication of guilt or a plea of nolo contendere is

made. The statute does not require that the adjudication of guilt be valid. In the case of a nolo plea, it is irrelevant for purposes of the statute whether the public employee or official making a plea of nolo contendere maintains his or her innocence, or the reasons that such a plea is offered or accepted by a prosecutor. The mere fact that a plea of nolo contendere can serve as the basis for a forfeiture demonstrates that it is not necessary in a forfeiture proceeding to "prove," as Petitioner argues, that the felony actually was committed. "Nolo Contendere" is Latin for "I do not wish to contend." Thus, when an individual pleads no contest, he or she is not contesting the charges brought, but he or she also not admitting guilt or innocence. While an individual entering a no contest plea is not admitting to the crimes, a court still can issue that person a punishment for the charges brought.

The cases cited by the ALJ in Conclusion of Law 39 make it clear that an administrative proceeding cannot be used to re-litigate a criminal conviction that has been imposed by a court of competent jurisdiction. *See, e.g., Cabezas v. Corcoran*, 293 So. 3d 602, 604 (Fla. 1st DCA 2020). Petitioner clearly was tried by a court of competent jurisdiction and was found guilty. As such, Petitioner is not entitled to have that guilty conviction re-tried or re-proven in the administrative proceeding. The fact that Petitioner was found guilty alone is sufficient to support a forfeiture of his retirement benefits.

Accordingly, this exception hereby is rejected.

Petitioner's Exception 4: Exception to Conclusion of Law 60

Petitioner argues that the ALJ's conclusion that the SBA has proven by a preponderance of the evidence that Petitioner's retirement benefits are subject to forfeiture under Section 112.3173(2)(e)6., Florida Statutes is erroneous. Petitioner's "exception" is merely a reiteration of the arguments made in Petitioner's Proposed Recommended Order to

attempt refute a conclusion that forfeiture was appropriate in Petitioner's situation, and which were summarily rejected by the ALJ in his recommended order. Under these circumstances, the SBA is not required to respond to the exception. *See, Britt v. Dep't of Prof'l Regulation,* 492 So.2d 697 (Fla. 1st DCA 1986); *Adult World Inc. v. State of Fla., Div. of Alcoholic Beverages & Tobacco,* 408 So.2d 65 (Fla. 5th DCA 1982).

Accordingly, the SBA is not required to rule on this exception.

FINDINGS OF FACT

The Findings of Fact set forth in paragraphs 1 through 20 of the ALJ's Recommended Order hereby are adopted and are specifically incorporated by reference as if fully set forth herein.

The Findings of Fact in paragraph 21 of the Recommended Order are modified slightly to read as set forth below and deleting footnote 5:

21. The SBA contends that Mr. Hale should also be found to have committed the crime alleged in Count II of the Amended Information while an employee of Bay District Schools. The SBA bases this contention on the fact that Count II alleges that Mr. Hale traveled to engage in unlawful sexual conduct with a child "from on or about May 1, 2016 and continuing through on or about October 25, 2016." Mr. Hale worked for Bay District Schools during some portion of the period of May 1, 2016, through October 25, 2016, and therefore should be deemed to have committed the crime alleged in Count II while public employee. Also, Petitioner became acquainted with the student he was charged with abusing on or about May 1, 2016 when he clearly was a public employee and he further obtained her contact information before the end of the 2016 school year. [Transcript, page

58, lines 1-25; page 60, lines 20-22]. This public employment started the series of events that ultimately led to Petitioner's convictions.

The Findings of Fact set forth in paragraphs 22 through 25 of the ALJ's Recommended Order hereby are adopted and are specifically incorporated by reference as if fully set forth herein.

The Findings of Fact set forth in paragraphs 26 through 27 of the ALJ's Recommended Order are modified to read as follows, based on the revised Conclusions of Law below:

26. For reasons more fully explained below, the SBA's argument is correct under the facts of this case.

27. Mr. Hale met the victim while he was an employee at a public high school where the victim was a student. While their interactions up to the end of the school year may have been innocent, they were enough to establish to Mr. Hale and his victim that they were interested in each other. As such, the victim gave Mr. Hale her contact information on or about June 1, 2016, the last day of the school year, while he was still an employee of Bay District Schools. [Transcript, page 60, lines 1-22].

CONCLUSIONS OF LAW

The State Board of Administration adopts and incorporates in this Final Order the Conclusions of Law set forth in paragraphs 28 through 40 of the ALJ's Recommended Order as if fully set forth herein.

The SBA modifies the Conclusions of Law set forth in paragraph 41 as set forth below, finding that the substituted conclusion of law is as or more reasonable than that which was rejected or modified:

41. Mr. Hale argues that he was not a "public employee" at the time he committed his offenses. However, the alleged crimes leading to the charge for Count II of Traveling to Meet a Minor to Commit Unlawful Sexual Conduct occurred on or about May 1, 2016 and continued through October 25, 2016. [Pre. Stip. at 10; Respondent's Exhibit 3 at 13; Respondent's Exhibit 4 at 20; Respondent's Exhibit 15 at 193-95, and 409-410; Petitioner's Exhibit 1 at 6]. Petitioner was employed as a teacher with Bay District Schools during this period and was a teacher at the victim's school from May 1 to June 3, 2016. [Pre. Stip. at 10]. Since Petitioner was convicted of Count II, it was proven beyond a reasonable doubt that Petitioner committed the criminal acts for Count II on or between May 1, 2016 and October 25, 2016. The alleged crime leading to the charge for Count III of Traveling to Meet a Minor to Commit Unlawful Sexual Conduct occurred on October 10, 2016. [Pre. Stip. at 10; Respondent's Exhibit 3 at 13; Respondent's Exhibit 4 at 20; Respondent's Exhibit 15 at 193-95, 409-410. Petitioner clearly was employed as a teacher with Bay District Schools on this date. [Pre. Stip. at 10]. Thus, Petitioner was found guilty of committing the crimes alleged in Counts II and III at a time when the Petitioner was a "public employee."

The State Board of Administration adopts and incorporates in this Final Order the Conclusions of Law set forth in paragraphs 43 through 44 of the ALJ's Recommended Order as if fully set forth herein.

The SBA modifies the Conclusions of Law in paragraph 45, as set forth below, finding that the substituted conclusion of law is as or more reasonable than that which was rejected or modified:

45. Unlike the officer in *DeSoto,* Mr. Hale was not on suspension but was unemployed for about two (2) months during the total time period when his crimes were committed. [Prehearing Stipulation, page 10]. Regardless of this small break in his employment status, however, Mr. Hale, when he clearly was employed as a teacher, met his victim and, for what Mr. Hale himself deemed as no legitimate purpose, accepted his victim's contact information. [Transcript, page 58, lines 1-25; page 59, lines 1-25page 60, lines 1-22]. And,for all periods subsequent to that initial receipt of contact information, Mr. Hale still was a licensed teacher during the entire period when the crimes were committed and had a professional duty to the public to refrain from inappropriate communications and relationships with underage students. The "faithful performance" of a teacher's "duty" does not allow the teacher to have romantic assignations with a student, regardless of whether or where the teacher is employed or where the student is enrolled. Bay District Schools and the public had the right to expect that Mr. Hale would not be convicted of sex crimes based on acts with a student. His actions were inimical to his professional status. Because Mr. Hale violated his direct duty to Bay District Schools as to his offenses and violated his general duty to the public as a licensed teacher by engaging in a romantic relationship with a student, the nexus requirement is satisfied. Factor (c) of the "specified offense" test has been met.

The State Board of Administration adopts and incorporates in this Final Order the Conclusions of Law set forth in paragraphs 46 through 48 of the ALJ's Recommended Order as if fully set forth herein.

. The SBA modifies the Conclusions of Law set forth in paragraph 49 through 60, and replaces them with paragraphs 49 through 58, as set forth below, finding that the

substituted conclusions of law are as or more reasonable than that which was rejected or modified:

49. The *Bollone* court stated, "In fact, but for the power, rights, privileges, or duties of Appellant's public employment, Appellant would not have been able to use his TCC work computer to acquire, possess, or view child pornography." 100 So. 3d at 1282. As indicated by the quote, the case against Mr. Bollone hinged on the fact that Mr. Bollone, because he was an employee of TCC, had the right to access a TCC computer. If he had not been a TCC employee, he would not have had such access.

50. Mr. Hale argues that the SBA has alleged no comparable misuse of his position. He argues that the only direct connection between his crimes and his employment is that he met the student while on the job and had some casual, unobjectionable teacher-student interactions. Mr. Hale claims that his criminal activity only commenced after he ceased being a teacher at the school attended by his victim.

51. The SBA cites several prior DOAH orders as authority for its "but for" argument, correctly noting that in each case the ALJ concluded that but for the fact of public employment, the perpetrator would not have been in a position to commit his crime.

52. *Moran v. State Board of Administration*, Case No. 17-5785 (Fla. DOAH May 15, 2018; Fla. SBA July 3, 2018), involved a Department of Corrections ("DOC") corrections officer convicted of conspiracy to commit the murder of a former inmate. In this case, forfeiture was ordered even though the corrections officer conspired to kill the former inmate after the inmate was released and no longer in custody since Mr. Moran met the former inmate and co-conspirators while he was publicly employed as a corrections officer

at the prison where the former inmate had been housed. Clearly, the crime would not have occurred but for Mr. Moran's public employment.

53. In *Maradey v. State Board of Administration*, Case No. 13-4172 (Fla. DOAH Jan. 16, 2014; Fla. SBA Apr. 4, 2014), the ALJ concluded that "[b]ut for her employment with MDT [Miami-Dade Transit], Petitioner would not have become involved in the criminal activity to which she pled guilty/nolo.contendere...." Maradey at paragraph 45. The facts established that Ms. Maradey used her position to further a criminal scheme.

54. *Holsberry v. Department of Management Services*, Case No. 09-0087 (Fla. DOAH July 24, 2009; Fla. DMS Oct. 19, 2009), involved a teacher who pled guilty to child abuse of a student at the school where he taught. The ALJ concluded that his "contact with [student] R.D. was made possible only as a result of his position as a teacher." *Holsberry* at paragraph 37. [emphasis supplied]

55. Mr. Hale contends that the facts of the instant case do not establish that he was in a position of authority over his victim. He was not the victim's teacher and his only at-school interaction with the victim was some occasional math tutoring in the cafeteria. He claims that nothing inappropriate happened at the school or while Mr. Hale was employed by Bay District Schools, with the exception of the October 10, 2016, incident, by which time Mr. Hale was teaching at a different school.

56. Mr. Hale argues that "it is unreasonable to say the mere act of meeting someone through one's employment means that all future interactions with that person occur through the use of the employment position."

57. But, Mr. Hale gained access to his victim through his public employment. There were interactions between Mr. Hale and his victim while she was a student at the high

school where he taught. He saw her during lunch periods and tutored her. [Transcript, page 58, lines 1-25]. While nothing inappropriate may have actually occurred during the lunch periods and tutoring sessions, the interactions apparently were enough to suggest to his victim that Mr. Hale was interested in her. As a result, such that she gave him a note with her email address on it at the end of the school year while he was still employed by the high school at which the victim was a student. Mr. Hale admitted that there was no legitimate reason for him to obtain his victim's information. [Transcript, page 60, lines 4-22]. Mr. Hale was aware that the student was attracted to him and still chose to give her this encouragement. Despite his denial of any intent to pursue a romantic relationship with the student, Mr. Hale had to know where his actions might lead. If Mr. Hale had maintained a professional distance from the student while he was still in a position of authority at her school, the subsequent disaster might never have occurred. The evidence establishes that that Mr. Hale's crimes were inseparably intertwined with his position as a teacher.

58. It is concluded that factor (e) of the "specific offense" test has been satisfied. The SBA has therefore proved by a preponderance of the evidence that Petitioner has forfeited his FRS retirement benefits under Section 112.3173(2)(e)6, Florida Statutes.

ORDERED

The Recommended Order (Exhibit A), as modified herein, 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 felonies each meeting the criteria of a "specified offense" under Section 112.3173(2)(e)6., Florida Statutes.

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 5th day of May, 2022, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Daniel Beard

Daniel Beard
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 by U.S. Mail to Matthew J. Hale, DC#F90279, Madison Correctional Institution, 382 Southwest MCI Way, Madison, Florida 32340; and by email transmission to Rex Ware (RexWare@FloridaSalesTax.com), Moffa, Sutton & Donnini, P.A., Suite 330 3500 Financial Plaza, Tallahassee, Florida 32312 and Jonathan Taylor (JonathanTaylor@FloridaSalesTax.com), Moffa, Sutton, & Donnini, P.A.,100 West Cypress Creek Road, Suite 930, Fort Lauderdale, FL 33309, this 5th day of May, 2022.

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

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MATTHEW J. HALE,

Petitioner,

vs. Case No. 21-2327

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on November 17, 2021, via Zoom teleconference, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Matthew J. Hale, pro se
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EXHIBIT A

STATEMENT OF THE ISSUE

The issue is whether, by operation of section 112.3173, Florida Statutes,[1] Petitioner has forfeited his Florida Retirement System ("FRS") Investment Plan account by being found guilty of two felony counts of traveling to meet a minor for sexual activity.

PRELIMINARY STATEMENT

On January 30, 2019, Petitioner, Matthew J. Hale, was found guilty by a jury of two counts of "Traveling to Meet a Minor for Unlawful Sexual Conduct," each a second degree felony in violation of section 847.0135(4), Florida Statutes, and two counts of "Committing an Unnatural and Lascivious Act," each a second degree misdemeanor in violation of section 800.02, Florida Statutes. Petitioner was a teacher in the Bay County School District and the victim was a 16-year-old female student whom Petitioner met while teaching at her high school.

On July 7, 2021, Respondent, the State Board of Administration ("SBA"), notified Petitioner that his rights and benefits under the Florida Retirement System Investment Plan had been forfeited based on the felony convictions. In a Petition for Hearing signed by Petitioner on July 15, 2021,[2] Petitioner disputed whether his crimes fell within the scope of section 112.3173. Petitioner contended that he was between contracts with the Bay County School District at the time his crimes were committed and therefore was not a "public officer or employee" as defined in the statute.

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[1] References to the Florida Statutes are to the 2018 edition, the version in effect at the time of Petitioner's conviction. Section 112.3173, the only statute directly involved in this proceeding, has not been amended since 2012.

[2] At all times relevant to this proceeding, Petitioner has been incarcerated at the Madison Correctional Institution. This situation has required the SBA and this tribunal to grant Petitioner some leeway as to compliance with discovery and other deadlines, because Petitioner's incoming and outgoing mail must be screened by prison personnel.

On July 28, 2021, the SBA referred the case to DOAH for the assignment of an ALJ and the conduct of a formal hearing.

The final hearing was scheduled for October 6, 2021. By Order dated September 16, 2021, Respondent's Unopposed Motion to Continue Final Hearing was granted, and the hearing was rescheduled for November 17, 2021, on which date it was convened and completed.

At the hearing, the SBA presented the testimony of Allison Olson, Director of Policy, Risk Management and Compliance for the SBA's Office of Defined Contribution Programs. The SBA's Exhibits 1 through 15 were admitted into evidence.

Mr. Hale testified on his own behalf. Mr. Hale's Exhibits 1 through 3 were admitted into evidence.

The one-volume Transcript of the final hearing was filed with DOAH on December 16, 2021. At the conclusion of the hearing, the parties agreed that 30 days would be allotted for the filing of proposed recommended orders. Respondent timely filed its Proposed Recommended Order on January 14, 2022. Mr. Hale filed his Proposed Recommended Order on January 21, 2022, outside of the agreed time for the filing of proposed orders. Respondent did not object to the late filing and Petitioner's Proposed Recommended Order has therefore been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. The SBA is the governmental entity that administers the FRS Investment Plan, a defined retirement benefits contribution plan. § 121.4501(1), Fla. Stat.

2. Mr. Hale is a former employee of Bay District Schools in Bay County, Florida. As an employee of Bay District Schools, Mr. Hale was eligible to participate in the FRS Investment Plan and, in fact, received distributions from that plan. Mr. Hale received a total distribution of $3,541.27, of which $1,705.80 were his own employee contributions.

3. Mr. Hale was employed by Bay District Schools for the 2015-2016 school year from August 18, 2015, through June 3, 2016. The victim in Mr. Hale's criminal case was a student at the high school where Mr. Hale taught. Mr. Hale met the victim at the school during the 2015-2016 school year.

4. Mr. Hale was never assigned to teach the student, but he did occasionally help the student with math problems while he was on morning "bus duty" in the school cafeteria. Mr. Hale credibly testified that he gave such help to any student who approached him during bus duty.

5. The student made no secret of her attraction to Mr. Hale during the 2015-2016 school year, but he was always quick to stop her flirting and to admonish her to behave in an appropriate manner.

6. Mr. Hale testified that he learned in mid-May 2016 that Bay District Schools would not be renewing his contract.

7. Mr. Hale was eventually re-employed by Bay District Schools for the 2016-2017 school year. He was employed from August 8, 2016, to November 8, 2016. During the 2016-2017 school year, Mr. Hale worked at a middle school. The victim was still enrolled in Bay District Schools during the 2016-2017 school year but did not attend the school at which Mr. Hale was working.

8. Bay District Schools policy 3.141, in effect at all times of Mr. Hale's employment, stated that employees, such as Mr. Hale, had a duty to refrain

from inappropriately associating with students, from engaging in unacceptable relationships with students, and from engaging in unacceptable communications with students. The prohibitions included any sexual behavior or sexual comments and applied regardless of where the teacher was employed, or the student was enrolled.

9. As a teacher, Mr. Hale was also subject to the Principles of Professional Conduct for the Education Profession in Florida, found in Florida Administrative Code Rule 6A-10.081. The Principles of Professional Conduct expressly state that an educator is obligated to "make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety" and to "not exploit a relationship with a student for personal gain or advantage." Fla. Admin. Code R. 6A-10.081(2)(a)1. and 8.[3]

10. Despite these responsibilities, Mr. Hale exchanged contact information with the victim on or about June 1, 2016, the last day of the 2015-2016 school year and two days prior to the expiration of his contract with Bay District Schools. Mr. Hale denied that he made this exchange with any idea of engaging in a romantic or sexual relationship with the student, but he admitted that he had no legitimate reason to exchange personal contact information with the student.

11. Mr. Hale began exchanging text messages with the student. By June 8, 2016, the relationship had progressed to the point where Mr. Hale and the student met in person. Mr. Hale admitted that he kissed the student

[3] Mr. Hale argues that the SBA failed to prove that he was aware of either rule 6A-10.081 or Bay District Schools policy 3.141 at the time he committed his crimes. The general rule is that every person is presumed to know the law and ignorance of the law is no excuse. *Davis v. State*, 928 So. 2d 442, 448 (Fla. 5th DCA 2006). Likewise, a professional should be presumed to know the rules of his profession and an employee should be presumed to know the policies of his employer. The undersigned finds some precedent in professional discipline cases for considering ignorance of the law as a ground for a reduced penalty where the violation was technical, or the professional was acting on advice of counsel. *See, e.g., Fla. Real Estate Comm. v. Royce*, Case No. 76-1181 (Fla. DOAH Oct. 18, 1976; Fla. Real Estate Comm. June 22, 1977). However, the undersigned finds no authority for ignorance of the law as a defense where the offense is *malum in se*, as is the case here.

on that occasion and thereafter began exchanging sexually explicit messages with the student.

12. Mr. Hale credibly testified that the student was the instigator and the aggressor in starting the relationship. He also conceded that as the responsible adult involved, he was at fault for everything that transpired.

13. Mr. Hale testified that he put a halt to the relationship on June 13, 2016, and that he had no further communication with the student until mid-September, after the start of the 2016-2017 school year. At that time, the victim reached out to Mr. Hale and the text messaging between Mr. Hale and the victim recommenced. They met in person and their romantic relationship was rekindled. They remained in contact through at least mid-October 2016.[4]

14. Law enforcement was eventually alerted to the relationship. The cell phones of both Mr. Hale and the victim were obtained by the police, which led to Mr. Hale being criminally charged.

15. In an Amended Information filed by the State Attorney for the Fourteenth Judicial Circuit, Mr. Hale was charged as follows:

> Count I: Matthew Jay Hale, from on or about May 1, 2016 and continuing through on or about October 25, 2016, in the County of Bay and State of Florida, knowingly and unlawfully utilized a computer on-line service, Internet service or local bulletin board service or any other device capable of electronic data storage or transmission to seduce, solicit, lure or entice or attempt to seduce, solicit, lure or entice a child or another person believed by Matthew Jay Hale to be a child to commit any illegal act described in Chapter 794, Chapter 800, or Chapter 827, or to otherwise engage in any other unlawful sexual conduct, contrary to Florida Statute 847.0135(3).
>
> Count II: Matthew Jay Hale, from on or about May 1, 2016 and continuing through on or about October 25, 2016, in the County of Bay and State of

[4] Mr. Hale testified without contradiction in the record that the victim was unaware he had been rehired by Bay District Schools at the time they recommenced their relationship.

Florida, did travel to, from or within this state for the purpose of engaging in any illegal act described in Chapter 794, Chapter 800, or Chapter 827, or to otherwise engage in any other unlawful sexual conduct with a child or with another person believed by Matthew Jay Hale to be a child after using a computer on-line service, Internet service or local bulletin board service or any other device capable of electronic data storage or transmission to seduce, solicit, lure, or entice or attempt to seduce, solicit, lure, or entice a child or another person believed by Matthew Jay Hale to be a child, to engage in any illegal act described in Chapter 794, Chapter 800, or Chapter 827, or to otherwise engage in other unlawful sexual conduct with a child, contrary to Florida Statute 847.0135(4).

Count III: Matthew Jay Hale, on October 10, 2016, in the County of Bay and State of Florida, did travel to, from or within this state for the purpose of engaging in any illegal act described in Chapter 794, Chapter 800, or Chapter 827, or to otherwise engage in any other unlawful sexual conduct with a child or with another person believed by Matthew Jay Hale to be a child after using a computer on-line service, Internet service or local bulletin board service or any other device capable of electronic data storage or transmission to seduce, solicit, lure, or entice or attempt to seduce, solicit, lure, or entice or attempt to seduce, solicit, lure, or entice a child or another person believed by Matthew Jay Hale to be a child, to engage in any illegal act described in Chapter 794, Chapter 800, or Chapter 827, or to otherwise engage in other unlawful sexual conduct with a child, contrary to Florida Statute 847.0135(4).

Count IV: Matthew Jay Hale, from on or about May 1, 2016 and continuing through on or about October 25, 2016, in the County of Bay and State of Florida, did unlawfully engage in sexual activity with ____, a person 12 years of age or older but less than 16 years of age, by penetrating or having

> union with the victim's mouth with his penis, contrary to Florida Statute 800.04(4)(a).
>
> Count V: Matthew Jay Hale, from on or about May 1, 2016 and continuing through on or about October 25, 2016, in the County of Bay and State of Florida, did unlawfully engage in sexual activity with ____, a person 12 years of age or older but less than 16 years of age, by penetrating or having union with the vagina of the victim with the mouth of Matthew Jay Hale, contrary to Florida Statute 800.04(4)(a).
>
> Count VI: Matthew Jay Hale, from on or about May 1, 2016 and continuing through on or about October 25, 2016, in the County of Bay and State of Florida, did unlawfully engage in sexual activity with ____, a person 12 years of age or older but less than 16 years of age, by penetrating or having union with the victim's vagina with his penis, contrary to Florida Statute 800.04(4)(a).

16. Mr. Hale's criminal trial was held on January 30, 2019. Mr. Hale was found guilty as to Counts II and III, Traveling to Meet a Minor to Commit Unlawful Sexual Conduct, each of which was a second degree felony. He was also found guilty of Committing Unnatural and Lascivious Acts, lesser included crimes as to Counts IV and V, each of which was a second degree misdemeanor.

17. Mr. Hale's convictions were affirmed on appeal. *Hale v. State*, 316 So. 3d 679 (Fla. 1st DCA 2021)(*per curiam*).

18. Because of his felony convictions, Mr. Hale was notified by the SBA that his rights and benefits to the FRS Investment Plan were forfeited, except for accumulated contributions.

19. The first defense asserted by Mr. Hale in the instant case is that he was not an employee of Bay District Schools at the time his crimes were committed. His last day of work under his 2015-2016 contract was June 3, 2016, and his first day of work under his 2016-2017 contract was August 8,

2016. Mr. Hale contends that his crimes were committed during the summer interim period when he was out-of-contract. Therefore, the terms of section 112.3173(2)(e)6. would not apply because they require that the felony have been committed "by a public employee."

20. Whatever the legal merit of Mr. Hale's first defense, the facts do not support it. Count III of the Amended Information specifically alleged that Mr. Hale traveled to engage in unlawful sexual conduct with a child on October 10, 2016. Mr. Hale was an employee of Bay District Schools, and thus a "public employee," on October 10, 2016. Mr. Hale was found guilty of committing the crime alleged in Count III.

21. The SBA contends that Mr. Hale should also be found to have committed the crime alleged in Count II of the Amended Information while an employee of Bay District Schools. The SBA bases this contention on the fact that Count II alleges that Mr. Hale traveled to engage in unlawful sexual conduct with a child "from on or about May 1, 2016 and continuing through on or about October 25, 2016." Mr. Hale worked for Bay District Schools during some portion of the period of May 1, 2016, through October 25, 2016, and therefore should be deemed to have committed the crime alleged in Count II while an employee. The undersigned finds this contention unpersuasive. Despite the catch-all form of the allegation in the Amended Information, the evidence produced in both the criminal trial and the hearing in the instant case established that Mr. Hale's physical relationship with the student did not commence until his 2015-2016 contract had expired and he no longer worked for Bay District Schools. He did not travel to engage in unlawful sexual conduct with the victim prior to June 3, 2016. The

October 10, 2016, incident covered by Count III was the only felony that was shown to have occurred during Mr. Hale's employment.[5]

22. Mr. Hale argues that a distinction should be drawn between the time during which he taught at the school attended by his victim and the later time during which he taught at a middle school with no connection to the victim. The statute requires that the public employee use or attempt to use "the power, rights, privileges, duties, or position of his or her public office or employment position" to obtain a forbidden benefit. Mr. Hale argues that he was in a position to use his official authority over the victim only when he worked at the school she attended. Because his romantic relationship with the victim began only after he left that school, Mr. Hale argues that he cannot be found to have used or attempted to use power of his official position to influence the actions of the victim.

23. In support of his argument, Mr. Hale points out that all the meetings between the victim and him occurred off campus and outside of school hours. No school resources were used to advance his relationship with the victim. Mr. Hale held no leverage over the victim that could be attributed to his public employment.

24. Mr. Hale testified that the idea of pursuing a romantic relationship with the student did not occur to him until after his employment at her high school ended. The victim made multiple overtures to Mr. Hale while he was working at the high school, but he consistently declined her advances and advised the victim that such behavior was inappropriate.

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[5] It is not unreasonable to argue, as the SBA does, that the October 10, 2016, incident also brings Mr. Hale's conduct as a "public employee" within the ambit of the broad time period alleged in Count II. The undersigned has declined to accept this argument because, in the context of this forfeiture proceeding, it smacks of punishing Mr. Hale twice for the same incident. Mr. Hale's actions during the summer of 2016 were relevant to his criminal trial and thus justified his conviction under Count II, but those actions do not necessarily lead to a finding that Mr. Hale committed the felony alleged in Count II while he was a "public employee" under section 112.3173(2)(e)6. The result of the instant case is the same whether or not Mr. Hale is found to have committed the crime alleged in Count II while an employee of Bay District Schools.

25. The SBA responds that Mr. Hale, as a teacher with Bay District Schools, had a duty to refrain from inappropriate conduct with students. This duty applied regardless of where the student was enrolled. Mr. Hale's actions with the victim were made possible because of his position as a teacher with Bay District Schools. But for Mr. Hale's public employment with Bay District Schools, he would not have had access to the victim, would not have met the victim, would not have begun a relationship with the victim, and would not have committed the crimes against the victim. The SBA argues that Mr. Hale's convictions stemming from his relationship with the victim are thus "inseparably intertwined" with his position as a teacher. *Newmans v. Div. of Ret.*, 701 So. 2d 573, 577 (Fla. 1st DCA 1997).

26. For reasons more fully explained below, the SBA's argument is correct under the facts of this case. If Mr. Hale were accurate in his assertion that he did nothing more than meet the victim while he was employed at her high school, it would be difficult to find that he committed his crimes "through the use or attempted use of the power, rights, privileges, duties, or position of his or her public office or employment position" as required by section 112.3173(2)(e)6. The undersigned is cognizant of case law stating that a public employee has misused his position to commit a felony if the employee could not have committed the crime "but for the power, rights, privileges, or duties" of his public employment. Nonetheless, the undersigned is unpersuaded that the mere fact of Mr. Hale's meeting the victim at school would be sufficient, standing alone, to meet the requirements of section 112.3176(2)(e)6. The case law implies at least that some overt act leading to or forming part of the crime is required of the public employee to satisfy the "but for" test.

27. However, Mr. Hale did more than merely meet the victim while he was employed at the high school. On or about June 1, 2016, the last day of the school year, while he was still an employee of Bay District Schools, Mr. Hale exchanged personal contact information with the victim. He denied that he

did so with any intention of starting a romantic relationship but he also conceded that he had no legitimate reason to give the victim his contact information. From his dealings with the victim at school, Mr. Hale knew that she was attracted to him and seemed willing to pursue a romantic relationship. He testified that he repeatedly had to "shut down" the student when she began to speak inappropriately. Whatever specific intention he had formed in his mind, Mr. Hale had to know that he was playing with fire by trading contact information and inviting the student to get in touch with him over the summer. The facts establish that Mr. Hale set in motion the sequence of events that led to his imprisonment while he was still employed by Bay District Schools. Mr. Hale's overt acts while still working for Bay District Schools in early June 2016 satisfy the "but for" test urged by the SBA.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action pursuant to sections 120.569, 120.57(1), and 112.3173(5), Florida Statutes.

29. Respondent has the burden of proving by a preponderance of the evidence that Petitioner has forfeited his FRS retirement benefits. *Wilson v. Dep't of Admin., Div. of Ret.*, 538 So. 2d 139 (Fla. 4th DCA 1989).

30. Article II, section 8(d) of the Florida Constitution, provides as follows:

> 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 manner as may be provided by law.

31. This section of the Constitution is implemented in chapter 112, part III, of the Florida Statutes. The applicable version of the pension forfeiture statute is the one in effect on the date of the criminal acts leading to forfeiture. *See Busbee v. State Div. of Ret.*, 685 So. 2d 914, 916-17 (Fla. 1st DCA 1996). As noted in footnote 1, section 112.3173 has not been amended since 2012. Therefore, the version in effect at the time of Mr. Hale's alleged offenses in 2016 is the same as that currently in effect.

32. Because forfeitures are not favored in Florida, the pension forfeiture statute should be strictly construed. *Williams v. Christian*, 335 So. 2d 358, 361 (Fla. 1st DCA 1976).

33. Section 112.3173(3) provides in relevant part:

> (3) FORFEITURE.--Any public officer or employee who is convicted of a specified offense committed prior to retirement . . . 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.

34. Section 112.3173(2)(a) provides that "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.

35. Mr. Hale was found guilty by a jury of two counts of Traveling to Meet a Minor to Commit Unlawful Sexual Conduct, a second degree felony under section 847.0135(4). Mr. Hale's adjudication of guilt constitutes a "conviction" for purposes of section 112.3173(2)(a).

36. Section 112.3173(2)(e) provides:

> (2)(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.

37. The felonies for which Mr. Hale was convicted do not fit the definitions set forth in subparagraphs 1. through 5. or 7. of section 112.3173(2)(e). If Mr. Hale is to be subjected to the forfeiture of his pension, his offense must be

found to meet the conditions of the "catch-all" category set forth in subparagraph 6. of section 112.3173(2)(e). *Jenne v. State*, 36 So. 3d 738, 742 (Fla. 1st DCA 2010).

38. To constitute a "specified offense" under section 112.3173(2)(e)6., the offense in question must meet all of the following elements:

> (a) It is a felony;
>
> (b) It was committed by a public employee;
>
> (c) It was done willfully and with intent to defraud the public or the employee's public employer of the right to receive the faithful performance of the employee's duty;
>
> (d) It was done to obtain a profit, gain or advantage for the employee or some other person; and
>
> (e) It was done through the use or attempted use of the power, rights, privileges, duties, or position of his public employment.

Bollone v. Dep't of Mgmt. Servs., 100 So. 3d 1276, 1280-81 (Fla.1st DCA 2012).

39. The SBA is not required to re-prove the criminal conviction but simply must show that a felony was committed by a public employee and the employee's conduct meets the remaining elements of section 112.3173(2)(e)6. *Cabezas v. Corcoran*, 293 So. 3d 602, 604 (Fla. 1st DCA 2020)(holding that "an administrative proceeding is not the forum to relitigate a criminal conviction imposed by a court of competent jurisdiction."); *Bollone*, 100 So. 3d at 1280 ("'specified offense' is defined by the conduct of the public official, not by the elements of the crime for which the official was convicted")(*citing Jenne*, 36 So. 3d at 742)("any felony could qualify as a specified offense, so long as the remaining conditions in the statute have been met").

40. It is uncontested that Mr. Hale was convicted of two second degree felonies. Therefore, factor (a) of the "specified offense" test has been met.

41. Mr. Hale argues that he was not a "public employee" at the time he committed his offenses. However, as noted above, Count III of the Amended Information specifically alleged that Mr. Hale traveled to engage in unlawful sexual conduct with a child on October 10, 2016. Mr. Hale was an employee of Bay District Schools, and thus a "public employee," on October 10, 2016. Mr. Hale was found guilty of committing the crime alleged in Count III. Factor (b) of the "specified offense" test has been met.

42. Factor (c) requires a determination as to whether Mr. Hale committed the felonies willfully and with intent to defraud the public or his employer of the right to receive the faithful performance of his duty. An instructive case on this factor is *DeSoto v. Hialeah Police Pension Board of Trustees*, 870 So. 2d 844 (Fla. 3d DCA 2003). Mr. DeSoto was a Hialeah police officer who pled guilty to several charges, including conspiracy to possess and distribute cocaine, to commit robbery, and to carry a firearm during a crime of violence, as well as three robberies. In his appeal of the police pension board's decision that his benefits were subject to forfeiture, Mr. DeSoto argued that section 112.3173(2)(e)6. was inapplicable because his crimes were committed while he was on suspension and thus could not be related to his duties as a police officer.

43. The *DeSoto* court itemized Mr. DeSoto's extensive involvement in each crime and ultimately held that whether Mr. DeSoto was on active duty as a police officer was not controlling; rather, the statute requires establishment of "a nexus between the crimes charged against the public officer and his or her duties and/or position." *Id.* at 846. "... DeSoto clearly violated his duty as a public officer to safeguard the public faith in his office. Although suspended for a period of time, DeSoto remained a public servant." *Id.* The court affirmed the pension board's determination that Mr. DeSoto's conviction merited forfeiture of his pension rights.

44. Thus, violating a duty or oath can be sufficient to satisfy the nexus requirement as to factor (c). *See also Simcox v. City of Hollywood Police*

Officers' Ret. Sys., 988 So. 2d 731, 734 (Fla. 4th DCA 2008)("'Faithful performance' of a 'duty' as a police officer under [section 112.3173(2)(e)6.] does not allow an officer to traffic in drugs when off duty.").

45. Unlike the officer in *DeSoto*, Mr. Hale was not on suspension but was unemployed when at least some of his crimes were committed. Regardless of his employment status, however, Mr. Hale was a licensed teacher and had a professional duty to the public to refrain from inappropriate communications and relationships with underage students. The "faithful performance" of a teacher's "duty" does not allow the teacher to have romantic assignations with a student, regardless of whether or where the teacher is employed or where the student is enrolled. Bay District Schools and the public had the right to expect that Mr. Hale would not be convicted of sex crimes based on acts with a student. His actions were inimical to his professional status. Because Mr. Hale violated his direct duty to Bay District Schools as to his October 10, 2016, offense and violated his general duty to the public as a licensed teacher by engaging in a romantic relationship with a student, the nexus requirement is satisfied. Factor (c) of the "specified offense" test has been met.

46. Factor (d) requires a determination as to whether Mr. Hale committed the felonies to obtain a profit, gain, or advantage for himself or some other person. Case law is clear that profit, gain, or advantage is not limited to economic gain. A public employee commits a felony for profit, gain, or advantage, when the felony is committed to satisfy the employee's sexual or emotional gratification. *Cuenca v. State Bd. of Admin.*, 259 So. 3d 253, 259 (Fla. 3d DCA 2018); *Bollone*, 100 So. 3d at 1281-82 (possession of child pornography for personal gratification was "personal gain" for purposes of the statute). There is no question that Mr. Hale committed his offenses for his own sexual or emotional gratification. Factor (d) of the "specific offense" test has been satisfied.

47. Factor (e) requires a determination as to whether Mr. Hale committed the felonies through the use or attempted use of the power, rights, privileges, duties, or position of his public employment. The SBA argues that but for his public employment with Bay District Schools, Mr. Hale would not have met the victim. Mr. Hale's ensuing actions, though having no direct connection to his employment, are traced and attributed to his meeting the victim while he was employed at her school. Thus, the SBA asserts that Mr. Hale's convictions stemming from his relationship with the victim are "inseparably intertwined" with his position as a teacher.

48. At the outset, it is noted that the inquiry under factor (e) is narrower than under factor (c), which considers whether the employee "willfully and with intent to defraud" deprived the public or his employer of the right to receive the "faithful performance" of his duties. Factor (e) does not include language assessing the employee's intent and does not require consideration of the employee's duties to the wider public. Factor (e) focuses on the behavior of the employee *vis à vis* his public employer: did the employee misuse the "power, rights, privileges, duties, or position" of his public employment in the commission of a felony?

49. The *Bollone* court stated, "In fact, but for the power, rights, privileges, or duties of Appellant's public employment, Appellant would not have been able to use his TCC work computer to acquire, possess, or view child pornography." 100 So. 3d at 1282. As indicated by the quote, the case against Mr. Bollone did not hinge entirely on the "but for" statement; he clearly misused property entrusted to him as a public employee to commit criminal acts in the course of his employment.

50. Mr. Hale argues that the SBA has alleged no comparable misuse of his position. He argues that the only direct connection between his crimes and his employment is that he met the student while on the job and had some casual, unobjectionable teacher-student interactions. The criminal activity

occurred after Mr. Hale was in any position to misuse his status as a teacher in the school attended by his victim.

51. The SBA cites several prior DOAH orders as authority for its "but for" argument, correctly noting that in each case the ALJ concluded that but for the fact of public employment, the perpetrator would not have been in a position to commit his crime. However, in none of these cases was the mere fact that the public employee met a victim while on the job found sufficient to establish that the employee used the "power, rights, privileges, duties, or position of his public employment" to commit his crime.

52. *Moran v. State Board of Administration*, Case No. 17-5785 (Fla. DOAH May 15, 2018; Fla. SBA July 3, 2018), involved a Department of Corrections ("DOC") corrections officer convicted of conspiracy to commit the murder of a former inmate. The SBA contends that this case supports its "but for" argument because the forfeiture was ordered even though the corrections officer conspired to kill the former inmate after the inmate was released and no longer in custody.

53. *Contra* the SBA, the deciding factor is not the location of the victim or his proximity to the public employee's workplace. The deciding factor is whether the public employee used his position in furtherance of the felony he committed. In *Moran*, the corrections officer was found to have conspired with other DOC employees to commit the crime. He was also found to have used his position to ensure that the crime would occur when Officer Thomas Driver, whose grudge against the former inmate inspired the conspiracy, would be at work and thereby have an alibi. *Moran* at ¶ 18. Mr. Hale argues that the record in the instant case is bare of similar facts showing him using his position to facilitate his crimes.

54. In *Maradey v. State Board of Administration*, Case No. 13-4172 (Fla. DOAH Jan. 16, 2014; Fla. SBA Apr. 4, 2014), the ALJ concluded that "[b]ut for her employment with MDT [Miami-Dade Transit], Petitioner would not have become involved in the criminal activity to which she pled guilty/nolo

contendere...." *Maradey* at ¶ 45. The facts established that Ms. Maradey used her position to recruit fellow MDT bus drivers to participate in an insurance fraud scheme in which a medical provider paid patients kickbacks from insurance payments. She exploited her knowledge of her fellow employees' physical and financial conditions to recruit them for the medical provider. She was promised additional payments for this recruitment of her fellow bus drivers. Mr. Hale contends that there is no evidence in the instant case of him exploiting his position to further a criminal scheme.

55. *Holsberry v. Department of Management Services,* Case No. 09-0087 (Fla. DOAH July 24, 2009; Fla. DMS Oct. 19, 2009), involved a teacher who pled guilty to child abuse of a student at the school where he taught. The ALJ concluded that his "contact with [student] R.D. was made possible only as a result of his position as a teacher." *Holsberry* at ¶ 37. The facts established in *Holsberry* are not detailed but do make it clear that whatever went on between Mr. Holsberry and the student occurred at the school where he was teaching, thus distinguishing that case from the instant proceeding.

56. Mr. Hale contends that the facts of the instant case do not establish that he was in a position of authority over his victim. He was not the victim's teacher and his only at-school interaction with the victim was some occasional math tutoring in the cafeteria. Nothing inappropriate happened at the school or while Mr. Hale was employed by Bay District Schools, with the exception of the October 10, 2016, incident, by which time Mr. Hale was teaching at a different school.

57. Mr. Hale argues that "it is unreasonable to say the mere act of meeting someone through one's employment means that all future interactions with that person occur through the use of the employment position." Mr. Hale presented a hypothetical to illustrate the unreasonableness of the SBA's position. A public employee meets someone in the course of his work. The two people pursue the relationship while the employee is off duty and they eventually get married. After twenty years of

marriage, the employee is convicted of a felony against the spouse, entirely unrelated to his role as a public employee. Following the SBA's logic, the employee's retirement benefits would be forfeited because the employee would never have met the spouse but for his public employment, despite the fact that such meeting was the sole connection between the crime and the place of employment.

58. The undersigned agrees that it is unreasonable to say that merely meeting someone on the job means that all future interactions are attributable to the use of the employment position. The undersigned agrees that merely making the victim's acquaintance while at work is too slender a thread with which to establish that Mr. Hale's crimes were "inseparably intertwined" with his position as a teacher. *Newmans*, 701 So. 2d at 577. The case law cited above supports the idea that the "but for" test requires some overt act by the employee over and above simply meeting the victim at work.

59. Unfortunately for Mr. Hale, the facts of this case demonstrate that he undertook such an overt act by exchanging personal contact information with the victim while he was still employed by the high school at which the victim was a student. Mr. Hale admitted there was no legitimate reason to do this. He was aware that the student was attracted to him and still chose to give her this encouragement. Despite his denial of any intent to pursue a romantic relationship with the student, Mr. Hale had to know where his actions might lead. If Mr. Hale had maintained a professional distance from the student while he was still in a position of authority at her school, the subsequent disaster might never have occurred. This was the act that began the cascade of events that led to Mr. Hale's disgrace, criminal conviction, imprisonment, and loss of career, and it occurred while Mr. Hale was a public employee. This was the act that satisfied the "but for" test and established that Mr. Hale's crimes were inseparably intertwined with his position as a teacher.

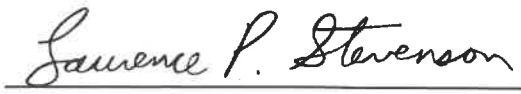
60. It is concluded that factor (e) of the "specific offense" test has been satisfied. The SBA has therefore proved by a preponderance of the evidence

that Petitioner has forfeited his FRS retirement benefits under section 112.3173(2)(e)6.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the State Board of Administration enter a final order determining that Matthew J. Hale forfeited all his rights and benefits under the Florida Retirement System, except for the return of any accumulated contributions, when he was convicted of "specified offenses" committed during employment.

DONE AND ENTERED this 3rd day of February, 2022, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of February, 2022.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

State of Florida
Division of Administrative Hearings

Matthew J. Hale,

Petitioner,

vs. Case No. 21-2327

State Board of Administration,

Respondent.
_____/

Petitioner's Exceptions to Recommended Order

Petitioner, Matthew J. Hale, hereby files the following exceptions to the Recommended Order in this proceeding, dated February 3, 2022. Petitioner received the Order from DOAH February 10, 2022 through the legal mail service at Madison Correctional Institution. He is submitting these exceptions to counsel for the SBA as advised in the attached letter (Exhibit A).

Respectfully submitted this 14th day of February, 2022,

Matthew J. Hale
DC# F90279
Madison Correctional Institution
382 SW MCI Way
Madison, FL 32340

Exception 1

Subject: Finding of fact and conclusion of law that Hale committed the crimes through the use of his position because he was still under contract when contact information was exchanged.

Paragraphs at issue: 26, 27, 59, 60

Basis for exception: The evidence failed to establish that "but for" Hale's employment June 1-3, Hale would not have communicated with the alleged victim on social media, exchanged phone numbers, and committed the crimes in question. Thus, the findings were not based on the evidence of the record (120.57(1)(j), Fla. Stat.) and the resulting legal conclusions – that "the SBA's argument is correct under the facts of this case," (para. 26) and that "factor (e) of the "specified offense" test has been satisfied," (para. 60) – are in error.

Analysis:

The Recommended Order correctly finds that "making the victim's acquaintance while at work is too slender a thread with which to establish that Mr. Hale's crimes were 'inseparably intertwined with his position as a teacher," and that "the 'but for' test requires some overt act," (para. 58). The Order then finds, as the sole nexus between the alleged crimes and Hale's employment, that Hale exchanging contact information while still under contract was the overt act which satisfies the "but for" test (para. 59). This is in error.

In order for the exchange of contact information to provide this nexus, it must have occurred through Hale's employment. While the exchange may have occurred during the period of his employment, it did not occur by virtue of his employment; the Recommended Order erroneously equates the two.

The key question is not whether Hale was still employed when the information was exchanged, but whether "but for" Hale's employment status on June 1-June 3 the information would have been exchanged. The evidence clearly showed that the exchange occurred despite the fact that Hale was still under contract, not because he was still under contract. Had Hale's employment ended at the end of school June 1, prior to the social media contact and exchange of contact information, there is no reasonable argument to be made that the events would have transpired any differently.

Hale's last interaction with the alleged victim in his official capacity occurred at school on June 1, before Hale provided any contact information to her. The exchange of contact information occurred through social media at some point between June 1 and June 3, after the end of school (T. 59; PE 2, 26-27)(the Recommended Order indicates that Hale "invited" the alleged victim to contact him over the summer (para. 27); this assertion is (loosely) supported only by her deposition which is hearsay inadmissible to support such a finding and is inconsistent with Hale's version of events in which he stated he believed she initiated contact through Instagram after finding his account through a friend (T. 62); regardless of who initiated contact, the record clearly shows that it occurred after the end of school on June 1).

There is simply no indication in the record that the social media contact or exchange of contact information occurred because of Hale's employment. Access on social media is clearly not provided by virtue of being a teacher and the social media contact occurred outside of any school context. The Recommended Order makes note of Hale's statement that he had "no legitimate" reason to exchange contact information with her (para. 10, 59).

The context of that statement makes it clear that he was referring to a school-related reason (T. 60). So, the contact on Instagram and the subsequent exchange of contact information did not occur until after Hale's final interactions with her as a teacher, did not occur in a school context or for a school related reason, and would have occurred whether or not Hale was still under contract.

The Recommended Order appears to suggest that only had the exchange occurred after the end of his contract, the nexus would not be satisfied. However, the exchange in that case would have occurred in the same context; whether his contract expired before or after the exchange of information would not have played a role in whether or not the exchange occurred. The suggestion that the two would not have communicated on social media and exchanged contact information had Hale's contract already expired is absurd and has no basis in the record.

Had Hale's contract expired at the end of school June 1, the later exchange of information still would have occurred, had the initial contact on Instagram occurred on June 4, after his contract expired, the exchange still would have occurred. His employment status June 1 - June 3 was entirely immaterial to whether or not the two would have exchanged contact information, and it cannot be said that "but for" Hale's employment, the contact information would not have been exchanged (and to say that the two would not have exchanged contact information had it not been for their previous acquaintance at school merely adds a step and ultimately relies on the same argument rejected by the Recommended Order, that meeting through his employment attributes future interactions to the employment). Therefore, the "but for" test applied in the

Recommended Order is not satisfied and the resulting conclusions are in error.

Exception 2

Subject: Finding of fact that the alleged victim was a student in Bay District Schools during the 2016-2017 school year.

Paragraphs at issue: 7, 45

Basis for exception: The evidence did not establish that the alleged victim was a student, particularly at a Bay District school, during the 2016-2017 school year (or at any point after the end of school June 1, 2016). Thus, the finding was not based on the evidence of the record (120.57(1)(j), Fla. Stat.) and the resulting legal conclusion – that Hale acted with the intent to defraud Bay District Schools and the public of the faithful performance of his duty (para. 45) – is in error.

Analysis: The Recommended Order finds that "[t]he victim was still enrolled in Bay District Schools during the 2016-2017 school year..." (para. 7). This assertion is not supported by competent, substantial evidence.

There is ample evidence in the record that the alleged victim was a student at the school Hale was employed at, a Bay District school, until the end of the 2015-2016 school year (T. 20, 75-76). The 2015-2016 school year ended June 1, 2016 for students (RE 12), and presumably, the alleged victim was not enrolled as a student in a Bay District school program in the days following June 1 (T. 64).

There are some statements in the reading of the texts from the trial transcript from which an inference could be made that she was a student of some sort in the fall of 2016 (RE 15 359), but those statements do not indicate that it was at the same

school as the previous year or at a Bay District school at all. More importantly, those statements are hearsay which would not be admissible over objection in a civil action, and cannot provide the basis for that finding. There is no evidence which is allowable for that purpose which establishes that fact.

Because there is no evidence which can establish that she was a student after June 1, 2016, the conclusions based on that finding must be discarded. The Recommended Order's finding that Hale defrauded Bay District Schools and the public of the faithful performance of his duty (para. 45) relied exclusively on a teacher's duty with respect to their dealings with students. Because the conclusion rests on the alleged victim's supposed status as a student, it must be found that Hale did not defraud Bay District Schools of the faithful performance of his duty or act with the intent to do so.

Exception 3

Subject: Conclusion of law regarding "re-proving" the crimes underlying the conviction

Paragraph at issue: 39

Basis for exception: Section 112.3173 must be interpretted as requiring the offense to have actually been committed for forfeiture to apply. Therefore, it is an element which must be proved by the SBA and it is proper to address in this proceeding.

Analysis:

The Recommended Order concludes that the "SBA is not required to re-prove the criminal conviction," (Para. 39), rejecting Petitioner's argument that section 112.3173 requires the crime in question to have been committed, making that an element to be proven by the agency. The order relies on Cabezas v. Corcoran, 293 So. 3d 602, 604 (Fla. 1st DCA 2020) and Ballone v. Dep't of Mgmt. Servs., 100 So. 3d 1276, 1280-81 (Fla. 1st DCA 2012) to support this conclusion. That reliance is misplaced.

As to Ballone, the quote which appears in the Recommended Order is simply taken out of context and has no bearing on the issue at hand. The Court in Ballone (and Jenne v. State of Fla., Dep't of Mgmt Svcs., Div. of Ret., 36 So. 3d 738 (Fla. 1st DCA 2010) which it cites) is addressing whether ~~"specified offense"~~ the elements of a "specified offense" must be present in the elements of the crime as convicted, or whether the elements of a "specified offense" can be determined by more broadly examining the circumstances and context of the crime. This is not the issue here. If anything, Ballone undermines the conclusion in paragraph 39 as the

Order rejects a broader look into the circumstances surrounding the alleged crime, unlike Bollone and Jeune (but, as noted, those cases address an entirely different issue and in reality do not bear on the current issue).

As to Cabezas, the statute underlying the proceeding in that case differs significantly from the statute in the instant case, rendering it inapplicable in this case. In Cabezas, the relevant statute (section 1012.795(1)(f), Fla. Stat.) provides for discipline when the person has "been convicted or found guilty of... a misdemeanor, felony, or any other criminal charge other than a minor traffic violation. The statute clearly and expressly authorizes the discipline based solely on the conviction; the commission of the crime is immaterial. This is also the case in McGraw v. Dep't of State, Div. of Licensing, 491 So. 2d 1193, (Fla. 1st DCA 1986), which Cabezas cites. In that case, the action was authorized when the licensee has been "found guilty of the commission of a crime which directly relates to the business for which the license is held..." Like Cabezas, the statute underlying McGraw clearly and unambiguously provides for administrative action based solely on the conviction. In those circumstances, it is certainly improper to relitigate the criminal conviction as the conviction itself provides the sole basis for the action at issue; the statute requires nothing further.

However, if a statute authorizes an administrative action based on the committing of certain acts, and the truth of those acts are in dispute, then it falls on the administrative proceeding to make a determination on whether the acts occurred, regardless of any determination made in a prior criminal proceeding; it is not improper to "relitigate" the allegations underlying the criminal conviction when the authority for the administrative action does

not rely solely on the conviction.

Had Cabezas been disciplined under provision (1)(d) of section 1012.795 instead of provision (1)(f) for the same actions, the agency would have been required to prove he committed the acts despite the conviction (section 1012.795(1)(d) provides for discipline when the person "[h]as been guilty of gross immorality or an act involving moral turpitude..."), Bush v. Brogan, 725 So. 2d 1237, (Fla. 2d DCA 1999)(where the ALJ did not decline to relitigate the events underlying the criminal conviction, but rather adopted the testimony as his factual findings as to what occurred in the incident), McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996)(where the individual was acquitted of charges related to his touching of an undercover police officer, but the administrative proceeding made its own factual findings about the event in question).

Likewise, in Kelly v. Dep't of Health and Rehab Srvcs., 610 So. 2d 1375 (Fla. 2d DCA 1992), an individual was convicted (through a plea of nolo contendre) of child abuse and subsequently placed on an abuse registry as a confirmed offender. Kelly challenged his status on the registry in an administrative proceeding. The court found that the statute underlying the placement on the registry "does not provide that a conviction of child abuse will be deemed conclusive proof that such abuse actually took place. Nor is it provided anywhere in chapter 415 that an alleged perpetrator's name will be entered into the abuse registry simply upon a conviction of child abuse." The court reversed HRS's decision to place Kelly on the registry as a confirmed offender because they failed to prove the crimes underlying his conviction at the administrative hearing.

So, it is clear that it is not inherently improper to "relitigate" and examine the truth of the allegations underlying a conviction* in an administrative proceeding in every case, but rather it is dependent on the requirements of the statute underlying the proceeding and whether it places the conviction itself solely at issue or if the actions or crimes on which the conviction is based are also at issue. The question in the instant proceeding, then, is whether section 112.3173 relies solely on the conviction (and is therefore subject to Cabezas) or if it also requires a determination of whether the crimes occurred (and therefore subject to Kelly).

Section 112.3173 provides for forfeiture only when a public officer or employee is "convicted of a specified offense committed prior to retirement..." [emphasis supplied]. This wording requires that the specified offense for which the employee was convicted actually be committed. The legislature could have easily made forfeiture reliant solely on the conviction by wording the statute "Any public officer or employee who is convicted of committing a specified offense prior to retirement," or "... convicted of committing, prior to retirement, a specified offense." Either would maintain the requirement that the offense be prior to retirement but only require that the individual be "convicted of committing" an offense rather than be convicted of an "offense committed."

When dealing with statutory constructions courts "are required to give significance and effect to every word or phrase in a statute." Polite v. State, 973 So. 2d 1107, (Fla. 2007). Effect must be given to the word "committed" as emphasized above. As shown by the statutes in Cabezas and McGraw, the legislature is more than capable of constructing statutes authorizing administrative actions clearly and unambiguously based solely on a criminal conviction (in fact, the statute underlying McGraw is phrased in a way very similar to the suggestion above that the legislature could have made

forfeiture reliant solely on the conviction by phrasing section 112.3173(3) "... convicted of committing a specified offense...") To say that the offense is not required to have been committed so long as the employee was convicted is to disregard the legislature's phrasing of the statute and to fail to give significance and effect to a word in the statute. And if the offense is required to have been committed, then it is an element required to have been proven by the SBA, as in Kelly.

Most significantly, Petitioner is unaware of any case law which applies Cabezas or a comparable case to section 112.3173 with regards to contesting the facts underlying the conviction. The SBA has not pointed to such case law, nor does the Recommended Order cite any. On the contrary, there is case law incorporating Kelly's treatment of that question into proceedings under section 112.3173. In Rivera v. Bd. of Trustees, City of Tampa's Gen. Emp. Ret. Fund, 189 So. 3d 207 (Fla. 2d DCA 2016), the court ~~suggests that~~ incorporates Kelly and suggests that the agency seeking forfeiture does indeed have the burden to prove that the crimes were actually committed, finding:

> "the Board established the first three elements of its case for forfeiture under section 112.3173(2)(e)(7). Mr. Rivera's status as a public employee was not disputed. The certified copies of his guilty pleas and the judgments and sentences proved that he had committed seven of the requisite offenses. See Kelly v. Dep't of Health and Rehab Srvcs., 610 So. 2d 1375, 1377 (Fla. 2d DCA 1992) (stating that where a judgment and sentence is based upon a guilty plea, "a defendant is estopped from denying his guilt of the subject offense in a subsequent civil action.)" [emphasis supplied]

The reference to Kelly and the quoted portion of the

opinion from that case make it clear that the court's use of the word "committed" was intentional and not used interchangeably with "convicted of." In other words, the court did not equate a conviction with having actually committed the crime, and it found that the commission of the crime was an element of this forfeiture statute.

Because the commission of the specified offense is an element of the statute, the SBA was required to prove the offense was actually committed; they failed to do so. The Recommended Order does not make a finding as to whether Hale committed the offenses (although it does acknowledge the credibility of Hale's testimony that the alleged victim was the aggressor (para. 12), supporting one of Hale's key defenses at the criminal trial that he did not solicit the alleged victim, but instead responded to her solicitations, negating an element of the crimes at issue here). The record in this proceeding, however, does not sustain a finding through competent, substantial evidence that Hale traveled for the purpose of sexual conduct, the crimes underlying this proceeding.

~~(RE 15, 183)~~

~~The alleged victim's trial testimony~~ deposition, ~~and the reading of the texts from the~~

The alleged victim's trial testimony (RE 15, 183-233) and deposition (PE 2) and the reading of the pair's texts from the trial transcript (RE 15, 266-385) are all hearsay which would be inadmissible in a civil proceeding and cannot sustain a finding in this proceeding. The only competent, substantial evidence regarding the events in question are Hale's testimony from the criminal trial and the final hearing in this proceeding; in both he adamantly stated that he never met with the alleged victim for the purpose of sexual conduct (RE 15, 403; T. 72). The SBA presented no competent evidence to the contrary. It must be found that the SBA failed to prove this element of the forfeiture statute.

Exception 4

Subject: Conclusion of law that Hale has forfeited his retirement benefits.

Paragraph at issue: 60

Basis for exception: The conclusion that Hale was subject to forfeiture under section 112.3173(2)(e)6 was based on the erroneous findings of fact and conclusions of law detailed in exceptions 1-3.

Analysis:

Because the SBA failed to establish that the crime was committed through the use of Hale's employment position (Exception 1), or that he acted with the intent to defraud of the faithful performance of his duty (Exception 2), the alleged crimes were not "specified offenses" under section 112.3173(2)(e)6. The SBA also failed to prove the offenses were committed as required by section 112.3173(3). (Exception 3). For these reasons, Hale's retirement benefits are not subject to forfeiture.

Exhibit A

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January 14, 2022

Matthew J. Hale, DC #F90279
Madison Correctional Institution
382 SW MCI Way
Madison, Florida 32340

Re: Matthew J. Hale, Petitioner, v. State Board of Administration, Respondent
Division of Administrative Hearings Case Number 21-002327

Dear Mr. Hale:

Enclosed please find a copy of the SBA's proposed recommended order. A copy of the proposed recommended order has also been filed with the Division of Administrative Hearings.

To the extent that you have exceptions to the Administrative Law Judge's Recommended Order, please timely mail any exceptions to my attention, and we will provide them to the SBA.

Thank you for your consideration of this matter, and please let me know if you have any questions or concerns.

Sincerely,

/s/ Jonathan W. Taylor
Jonathan W. Taylor

CC:

Client.