

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

THOMAS JACKSON,)
)
 Petitioner,)
)
 vs.)
)
 STATE BOARD OF ADMINISTRATION,)
)
 Respondent.)
 _____)

SBA Case No. 2017-0301

FINAL ORDER

On June 25, 2018, the Presiding Officer submitted her 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 counsel for the Petitioner, and upon counsel for the Respondent. Petitioner and Respondent each timely filed a Proposed Recommended Order. Petitioner timely filed exceptions on July 9, 2018. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs.

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 a Presiding Officer 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 a Presiding Officer'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 Presiding Officer's Recommended Order, the Final Order will be bound by such factual finding.

A review of whether competent substantial evidence supports a given finding "is not done by mechanically combing the transcript for words and phrases of testimony..., but

rather by considering the whole record, including the [Presiding Officer's] findings.”

McDonald v. Dep't of Banking & Finance, 346 So.2d 569, 578-579 (Fla. 1st DCA 1977).

Pursuant to Section 120.57(1)(l), Florida Statutes, a reviewing agency has the general authority to “reject or modify [a Presiding Officer'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 Presiding Officer's application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the Presiding Officer'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. Further, an agency's interpretation of the statutes and rules it administers is entitled to great weight, even if it is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. *See, State Bd. of Optometry v. Fla. Soc'y of Ophthalmology*, 538 So.2d 878, 884 (Fla. 1st DCA 1998). An agency's interpretation will be rejected only where it is proven such interpretation is clearly erroneous or amounts to an abuse of discretion. *Level 3 Communications v. C.V. Jacobs*, 841 So.2d 447, 450 (Fla. 2002); *Okeechobee Health Care v. Collins*, 726 So.2d 775 (Fla. 1st DCA 1998).

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

At the outset, it should be noted that Petitioner’s exceptions mostly involve the applicability of the Eighth Amendment of the United States Constitution, which prohibits excessive fines, to the forfeiture of Petitioner’s Investment Plan benefits. Administrative entities, such as the SBA, lack the power to consider or determine constitutional issues. *See, Florida Hospital v. Agency for Health Care Admin.*, 823 So.2d 844, 849 (Fla. 1st DCA 2002). Similarly, administrative entities cannot declare unconstitutional a statute or an existing rule. *See, e.g., Florida Marine Fisheries Commission (Division of Law Enforcement) v. Pringle*, 736 So.2d 17 (Fla. 1st DCA 1999). In the present case, there is no facial challenge to any statute or rule. Petitioner has alleged a legally recognized, substantial interest in agency action, which Petitioner states amounts to the imposition of an excessive fine. The SBA, and, derivatively, the Presiding Officer, must evaluate Petitioner’s claim, notwithstanding its constitutional predicate.

The courts are available for final disposition of Petitioner’s constitutional claim, if need be. Their consideration can only be enhanced by the making of a complete record of the pertinent facts. *See, Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So.2d 153 (Fla. 1982)(*reh. den.* 1983); *Rice v. Department of Health and Rehabilitative Services*, 386 So.2d 844 (Fla. 1st DCA 1980).

Petitioner's Exception 1: Exception to Final Sentence in Preliminary Statement-

Petitioner objects to the statement that Petitioner made no further filings after his March 22, 2018 Memorandum of Law addressing the issue as to whether a forfeiture of retirement benefits would amount to a "fine" under the Eighth Amendment of the United States Constitution

Petitioner argues that he timely filed his Proposed Recommended Order on May 31, 2018. The SBA's records show that Petitioner's Proposed Recommended Order indeed was timely filed on May 31, 2018. Accordingly, Petitioner's Exception 1 hereby is accepted, and the final sentence in the Preliminary Statement hereby is deleted and replaced with the following: "Petitioner timely filed a Proposed Recommended Order on May 31, 2018." This change hereby is incorporated into the Final Order.

Petitioner's Exception 2: Conclusion of Law Paragraph 9-

Petitioner objects to the conclusion that Article II, Section 8(d) of the Florida Constitution and Section 112.3173, Florida Statutes, mandate forfeiture if a public employee is convicted of a "specified offense" prior to retirement.

Petitioner argues that the forfeiture of retirement benefits still is subject to the Eighth Amendment of the United States Constitution that prohibits excessive fines. As such, if forfeiture would amount to an unconstitutionally excessive fine in violation of the Eighth Amendment, then the SBA cannot proceed with forfeiture.

The SBA notes that applicable case law indicates that a forfeiture of retirement benefits does not constitute a "fine" for purposes of the Eighth Amendment. The United

States Supreme Court has stated that a “fine” includes “a payment to a sovereign as punishment for some offense.” *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989). The Eighth Amendment applies only when “...the payment to the government involves turning over ‘property’ of some kind that once belonged to the defendant”[emphasis added]. *Hopkins v. Oklahoma Public Employees Retirement System*, 150 F.3d 1155 (10th Cir. 1998). *See also, Hames v. City of Miami Firefighters’ & Police Officers’ Trust*, 479 F.Supp.2d 1276, 1288 (S.D. Fla. 2007). For example, the case *Austin v. United States*, 509 U.S. 602, 604, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), which was cited in *Hopkins*, involved the application of the Excessive Fines Clause to *in rem* forfeitures of a drug dealer’s mobile home and business which were used by the drug dealer to facilitate his crimes.

As the Presiding Officer’s Paragraph 13 of the Conclusion of Law notes, Florida courts have held that a forfeiture of retirement benefits enforces a contract rather than constitutes a punishment. That is, the right of a public employee to his or her retirement benefit always is contingent upon the employee not engaging in any forfeitable offenses prior to retirement. *See, e.g., Busbee v. State of Florida, Division of Retirement*, 685 So.2d 914, 916 (Fla. 1st DCA 1996); *Hames v. City of Miami Firefighters’ & Police Officers’ Trust*, 479 F. Supp.2d 1276, 1288 (S.D. Fla. 2007) (“under Florida law, a pension still vests subject to the conditions in the forfeiture statute”). Section 112.3173(3), Florida Statutes, states that if a public employee is convicted of a specified offense prior to retirement then that employee forfeits all rights and benefits under any public retirement system of which that employee is a member. Thus, as the Presiding Officer stated, the Florida Constitution and Section 112.3173, Florida Statutes, do “prescribe mandatory forfeiture” when an

employee is convicted of a specified offense that was committed prior to retirement. *See also, Childers v. Department of Management Services*, 989 So.2d 716 (Fla. 4th DCA 2008). Accordingly, Petitioner's Exception 2 hereby is rejected.

Petitioner's Exception 3: Conclusion of Law Paragraph 13-

Petitioner objects to the Presiding Officer's conclusion that the forfeiture of Petitioner's retirement benefits does not violate the Excessive Fines Clause.

Petitioner argues that because forfeiture requires conviction of a felony, it amounts to a "punishment" for that felony. This exact argument was set forth in paragraphs 6 and 7 of the Petitioner's Memorandum of Law in Opposition to Respondent's Position that was filed on March 22, 2018 (hereafter "Petitioner's Memorandum"). Such argument was considered and rejected by the Presiding Officer in formulating her Recommended Order. As noted previously, the courts have held that a pension always is subject to forfeiture limitations, as an employee has no vested property interest in a pension. *See, e.g., Busbee, supra*, 685 So.2d at 916; and *Hames, supra*, 479 F.Supp. at 1288.

Petitioner cites *United States v. Bajakajian*, 524 U.S. 321 (1998) for the proposition that forfeiture of Petitioner's retirement benefits amounts to a "punishment" and, therefore, a "fine." However, *Bajakajian* involved a situation in which an individual was attempting to leave the United States carrying \$357,144 in currency. Mr. Bajakajian was charged with a violation of 31 U.S.C. Section 5316(a)(1)(A) which requires the reporting of the transporting of more than \$10,000 in currency out of the United States. Thus, the property involved in *Bajakajian* belonged to the defendant before the criminal violation occurred. As *Hames*, notes, the Excessive Fines Clause is implicated only where the fine "constitutes

property that belongs to the defendant.” *Hames, supra* at 1288. Thus, *Bajakajian* has no applicability in the current situation. Accordingly, Petitioner’s Exception 3 hereby is rejected.

Petitioner’s Exception 4: Conclusions of Law Paragraphs 14-15-

Petitioner objects to the conclusion that *Childers v. Dep’t of Mgmt. Servs., Div. of Ret.*, 989

So.2d 716, 719 (Fla. 4th DCA 2008), which held that forfeiture is not a “fine” as the employee has not been ordered to pay anything to the government, is applicable in the instant situation.

Petitioner argues that *Childers* is distinguishable as that case involved a forfeiture of benefits that had not yet been paid out to the employee. In the instant case, Petitioner received his full retirement benefits about five years prior to his conviction of a specified offense. Petitioner made this argument, verbatim, in paragraphs 8, 9 and 11 of the Petitioner’s Memorandum. Such argument was considered and rejected by the Presiding Officer in formulating her Recommended Order. The Presiding Officer noted that whether forfeiture is applicable depends on when *the underlying acts took place, not when the employee received a benefit*. Under Section 112.3173(3), Florida Statutes, “...the time the offense is committed controls forfeiture, not the time of the ultimate conviction” *Garay v. Dep’t of Management Servs., Div. of Ret.*, 46 So.3d 1227 (Fla. 1st DCA 2010). *Garay* involved a situation in which an employee of a Florida Retirement System (“FRS”) participating employer retired and began receiving benefits. After six months, he pled guilty to, and was adjudged guilty of, four crimes of altering his employer’s records while he still was employed in the public trust. The Division of Retirement was not made aware of the conviction until four (4) years after Mr. Garay had retired and began receiving his

pension. The court found that the legislature intended to allow post-retirement forfeiture of benefits when it enacted Section 112.3173(5)(d), Florida Statutes, that “provides for repayment of benefits when FRS discovers that a member’s benefits are subject to forfeiture after the member has retired and begun receiving FRS benefits.” *Id.* at 1228.

In Florida, “a pension vests subject to the conditions in the forfeiture statute.” *Hames, supra*, 479 F.Supp. at 1288. *Hames* also states that courts in other states have rejected the argument broached by Petitioner, “noting the ease with which an employee could avoid statutory forfeiture by favorably timing his retirement.” *Id.* For example, *Horsely v. Philadelphia Bd. of Pensions and Retirement*, stated that “[t]o hold otherwise would unfairly advantage those corrupt and felonious City employees who are fortuitous enough to avoid detection of their crimes until after they leave the City’s employ: a result which would be both absurd and unreasonable.” *Horsely*, 519 Pa. 264, 546 A.2d 1115, 1118 (Pa. 1988). Accordingly, Petitioner’s Exception 4 hereby is rejected.

Petitioner’s Exception 5: Conclusions of Law Paragraphs 16-17-

Petitioner objects to the Presiding Officer’s conclusion that the fact that the amount of the forfeiture is out of proportion to Petitioner’s offense is not relevant. Petitioner argues that forfeiture of his retirement benefits under the facts of his case constitutes a “fine.”

Petitioner made this argument, verbatim, in paragraphs 14, 15 and 16 of the Petitioner’s Memorandum of Law, which argument was considered and rejected by the Presiding Officer in formulating her Recommended Order. The Presiding Officer cited *Busbee, supra*, which states that since forfeiture is not a punishment for the crime causing the forfeiture, but rather is a matter of contract, the dollar amount of the forfeiture is irrelevant under the terms of the contract. Accordingly, Petitioner’s Exception 5 hereby is rejected.

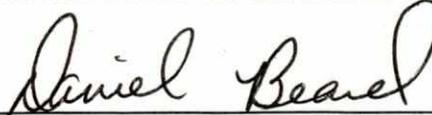
ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety, except as modified above. Petitioner was a public employee convicted of a “specified offense” prior to his retirement and that, therefore, Petitioner has forfeited all the rights and benefits he possessed by virtue of his Florida Retirement System Investment Plan account, except for the amount of his accumulated employee contributions as of the date of his termination of employment.

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 27th day of July, 2018, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Daniel Beard
Chief of Defined Contribution Programs
State Board of Administration
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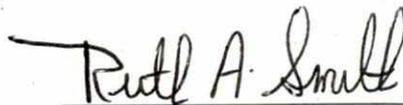
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by electronic mail to molli@mikeserranolaw.com and by US Mail to Molli Gard McGuire, Esq., Counsel for Petitioner, The Law Firm of Michael A. Serrano, Esq., 113 South Monroe Street, First Floor, Tallahassee, Florida 32301; 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 27~~th~~ day of July, 2018.



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STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

THOMAS JACKSON,

Petitioner,

vs.

Case No. 2017-0301

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

Pursuant to the Order Granting Joint Motion to Have Case Heard on Written Record dated May 3, 2018, this cause came on for informal proceedings before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Molli Gard McGuire, Esquire
The Law Firm of Michael A. Serrano, P.A.
115 South Monroe Street, First Floor
Tallahassee, Florida 32301
Counsel for Petitioner

For Respondent: Brandice D. Dickson, Esquire
Pennington, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301
Counsel for Respondent

STATEMENT OF THE ISSUE

The issue is whether Petitioner's Investment Plan benefits should be forfeited due to his conviction of multiple specified offenses committed before he retired from the Florida Retirement System (FRS).

PRELIMINARY STATEMENT

By agreement of the parties, this matter is decided on the written record now before me, including all exhibits filed through May 14, 2018. Respondent filed Exhibits R-1 through R-6 which consist of official court records, the Petitioner's Petition for Hearing, and official correspondence from the SBA to Petitioner. Petitioner's attorney filed no exhibits, but submitted a Memorandum of Law on March 22, 2018 which addresses whether forfeiture of Petitioner's retirement benefits would amount to a fine under the Eighth Amendment to the United States Constitution. Respondent did not respond to this motion but filed a Proposed Recommended Order on May 31, 2018, within the timeframe set out in my order of May 3, 2018 granting the parties' Joint Motion to Have Case Heard on Written Record. Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

1. Petitioner was the Chief of Police for the Longwood Police Department (LPD). By virtue of his employment with the City of Longwood, Petitioner was a member of the FRS defined contribution Investment Plan, and had accrued a substantial retirement benefit.
2. On October 27, 2015, in the U.S. District Court for the Middle District of Florida, Petitioner was found guilty of one count of Conspiracy to Solicit and Accept Bribes in violation of 18 U.S.C. §371 and three counts of Bribery of an Agent of a Local Government Receiving Federal Funds while employed as the Chief of Police of the Longwood Police Department.
3. On February 29, 2016, Petitioner was sentenced to 48 months incarceration in the Federal Bureau of Prisons and one year of supervised release.

4. On May 12, 2017 the verdict against him was affirmed on appeal before U.S. Court of Appeals for the Eleventh Circuit, which held that the Petitioner "received three bribes in exchange for appointing Majzoub [an individual ineligible for a law enforcement position] as an LPD law enforcement officer. Viewed in the light most favorable to the verdict, the evidence at trial demonstrated exactly that." (Ex. R-1, p.14)

5. The acts giving rise to Petitioner's convictions occurred between October 2007 and May 2010, while he was Longwood Chief of Police. Petitioner took distributions from his FRS Investment Plan account totaling \$1,386,441.55 between July 2010 and April 30, 2011. No contemporaneous hold was placed on Petitioner's FRS Investment Plan account because his crimes were unknown to the SBA at the time he took those distributions.

6. Petitioner was notified by Respondent on October 10, 2017 that his FRS Investment Plan benefits had been forfeited due to his criminal conviction, and that benefit distributions to him totaling over 1.3 million dollars had to be returned to the Investment Plan.

7. On October 16, 2017 Petitioner filed a Petition for Hearing with the SBA Office of Defined Contribution Programs, seeking to avoid the forfeiture of his FRS benefits, contending that he committed no crime, that he is seeking a ruling by the United States Supreme Court on a petition for writ of certiorari on his convictions, and that funds he received "were disbursed and no longer exist."

CONCLUSIONS OF LAW

8. 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:

provided by law." ART. II, § 8(d), FLA. CONST. Section 112.3173, Florida Statutes, implements that part of the Florida Constitution and states, in pertinent part:

112.3173. Felonies involving breach of public trust and other specified offenses by public officers and employees; forfeiture of retirement benefits

(1) Intent. – It is the intent of the Legislature to implement the provisions of s. 8(d), Art. II of the State Constitution.

(2) Definitions. – As used in this section, unless the context otherwise requires, the term:

(a) "Conviction" and "convicted" mean an **adjudication of guilty by a court of competent jurisdiction**; a plea of guilty or of nolo contendere; a jury verdict of guilty when adjudication of guilt is withheld and the accused is placed on probation; or a conviction by the Senate of an impeachable offense.

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

...

(e) "Specified offense" means:

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 for 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

(3) Forfeiture.--Any public officer or employee who is convicted of a specified offense committed prior to retirement, or whose office or employment is terminated by reason of his or her admitted commission, aid, or abetment of a specified offense, shall forfeit all rights and benefits under any public retirement system of which he or she is a member, except for the return of his or her accumulated contributions as of the date of termination.

(5) Forfeiture determination.—

(a) Whenever the official or board responsible for paying benefits under a public retirement system receives notice pursuant to subsection (4), or otherwise has reason to believe that the rights and privileges of any person under such system are required to be forfeited under this section, such official or board shall give notice and hold a hearing in accordance with chapter 120 for the purpose of determining whether such rights and privileges are required to be forfeited. If the official or board determines that such rights and privileges are required to be forfeited, the official or board shall order such rights and privileges forfeited.

(b) Any order of forfeiture of retirement system rights and privileges is appealable to the district court of appeal.

§ 112.3173, Fla.Stat. (emphasis added).

9. An employee who is convicted of a “specified offense” committed prior to retirement from the FRS forfeits all rights and benefits under the FRS. Childers v. Department of Management Services, 989 So.2d 716 (Fla. 4th DCA 2008). If this standard is met, Respondent has no discretion as to whether to proceed with forfeiture of a participant’s Investment Plan account; rather, the Constitution and statute prescribe mandatory forfeiture. Forfeiture enforces the terms of the retirement “contract” entered into between the State and the employee. As stated in Childers,

Here, the State entered into a contract with the employee, promising to pay him benefits upon his retirement. That contract included a condition precedent: the employee must refrain from committing specified offenses prior to retirement. The non-occurrence of that condition foreclosed the employee’s right to performance. It is as direct and to the point as that.

...

While forfeiture, in general, has historically been understood as punishment, **courts of this state have recognized that statutes providing for forfeiture of government benefits merely enforce the terms of a contract rather than impose punishment.** This statute does not require a finding of scienter.

989 So.2d 716 (internal citations omitted)(emphasis added).

10. There is no dispute in this case that Petitioner was convicted of three counts of bribery of an agent of a local government, a specified offense, and one count of felony¹ conspiracy. All of these convictions stem from Petitioner's use of his position as Chief of Police in that he accepted money in exchange for the appointment of someone to a law enforcement position who was legally barred from holding that position. Petitioner's conviction resulted from activity he engaged in before he retired from the FRS, and because he was found guilty of offenses specified under Section 112.3173(2)(e)3., Florida Statutes, forfeiture is mandatory. Petitioner's conduct also constitutes a breach of the public trust that requires forfeiture of his retirement benefits under Section 112.3173(2)(e)6, Florida Statutes.

11. The "catch-all" provision within Section 112.3173, Florida Statutes provides for forfeiture upon conviction of:

any felony by a public officer or employee who, willfully and with intent to defraud the public or the public agency for which the public officer or employee acts or in which he or she is employed of the right to receive the faithful performance of his or her duty as a public officer or employee, realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or herself or for some other person through the use or attempted use of the power, rights, privileges, duties, or position of his or her public office or employment position.

§ 112.3173(2)(e)6., Fla. Stat.

¹ The federal conspiracy charged in this case under § 18 U.S.C. § 371 operates as a felony as opposed to a misdemeanor because the underlying substantive charges of bribery under 18 U.S.C. § 666(a)(1)(B) were all punishable by more than one year imprisonment. See United States v. Haim, 218 F. Supp. 922, 927 (S.D.N.Y. 1963.)

12. Where a public employee commits a crime in the course and scope of employment that "defraud[s] the public of the right to receive the faithful performance of his duties as a law enforcement officer" the inquiry into whether it qualifies as an offense for which forfeiture is triggered ends. Henderson v. Dep't of Management Services, Division of Retirement, 2007 WL 2636731 (Fla.Div.Admin.Hrgs. December 7, 2007)(involving officer convicted of federal count of deprivation of rights under color of law and others for assault on arrestee).

13. Petitioner's assertion that this forfeiture results in a violation of the Excessive Fines Clause of the United States Constitution has no apparent merit. See U.S. CONST. AMEND XIII. The United States Supreme Court has held that forfeitures are "fines" if they constitute punishment for an offense. United States v. Bajakajian, 524 U.S. 321, 328, 118 S. Ct. 2028, 2033, 141 L. Ed. 2d 314 (1998). But Florida courts have consistently held that forfeiture of a retirement benefit does not constitute punishment; rather, it enforces a contract. See Childers v. Department of Management Services, 989 So.2d 716 (Fla. 4th DCA 2008), *infra* at ¶ 8 ("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"); Busbee v. State, Div. of Ret., 685 So. 2d 914, 918 (Fla. Dist. Ct. App. 1996)("This is not a prosecution under Florida criminal law for accepting a bribe, and it is not a punishment for accepting a bribe. This is an action to enforce the terms of the pension contract and nothing more"); Newell v. Dep't of Management Services, Div. of Retirement, 2014 WL 2708898, at *5, Division of Admin. Hearings (Final Order May 30, 2014)(a forfeiture proceeding is not a prosecution under Florida criminal law and it is not a form of punishment).

14. Petitioner argues that Childers is inapplicable here because that employee/petitioner was in jeopardy of forfeiting future benefits under the FRS Pension Plan as opposed to having to repay benefits already received under the FRS Investment Plan. See Petitioner's Memorandum of Law in Opposition to Respondent's Position at ¶9. Petitioner points to the portion of Childers that states the forfeiture statute is not a fine because it "merely relieves the State of its duty to pay retirement benefits" thus contemplating forfeiture of future benefits only. 989 So.2d 716 at 719 (Fla. 4th DCA 2008).

15. Petitioner posits that because he managed to effect a total distribution of his FRS Investment Plan account before he was caught and convicted of the crimes he committed as the Chief of Police, it is too late for Respondent to seek forfeiture of his FRS benefit. But whether forfeiture is an available remedy for violation of breach of the public's trust is determined by when the underlying acts took place, not when the employee received a benefit. Stoll v. State Board of Administration, DOAH Case No. 18-0067 (Recommended Order May 23, 2018)(petitioner's claim to any FRS benefit vanished when he committed the crimes). This is true because "[i]n the pension context, courts have found that an employee has no property interest in his or her pension plan for purposes of the Eighth Amendment, where the 'right to [the] pension always was contingent on maintaining honorable service during [plaintiff's] tenure in office.' Austin v. United States, 509 U.S. 602, 604, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993). An employee has no vested property interest in the pension; it is **always** subject to the statutory forfeiture limitations." Id.; see also Busbee v. State of Florida, Div. of Retirement, 685 So.2d 914, 916 (Fla. 1st DCA 1996)(emphasis added).

16. Finally, Petitioner's assertion that the amount of the forfeiture is out of proportion to his offense is not relevant here. As stated in Busbee v. State, Div. of Ret.,

Mr. Busbee asserts that the amount of money he is forfeiting through the loss of his pension is so much greater than the amount of the bribe he has pleaded guilty to accepting that it is unconstitutionally disproportionate. He asserts that his having accepted a bribe in connection with his employment resulted in no measurable harm and that any damage to the faith of citizens in their governmental officials is "ethereal, nebulous [and] unquantifiable." We reject that cynical and self-justifying view of the results of Mr. Busbee's actions, but need not address the proportionality of this harm to the amount of the pension forfeited. The proportionality test is not relevant here because this is not a punishment for Mr. Busbee's crime. This case involves a straightforward question of contract law and the amount of the pension which has been forfeited is irrelevant under the terms of the contract.

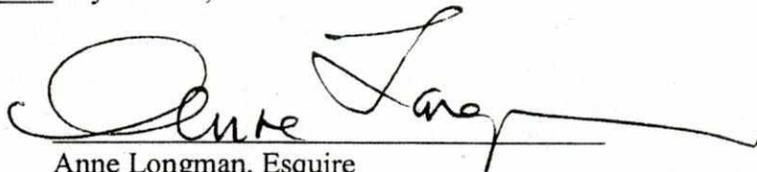
685 So. 2d 914, 918 (Fla. Dist. Ct. App. 1996)

17. In this instance, forfeiture is not only appropriate, it is constitutionally mandated.

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 25th day of June, 2018.



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 Blvd., Suite 100
Tallahassee, FL 32308
Tina.joanos@sbafla.com
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STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

THOMAS JACKSON,

CASE NO.: 2017-0301

Petitioner,

vs.

STATE BOARD OF ADMINISTRATION,

Respondent.

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Petitioner, THOMAS JACKSON, pursuant to Fla. Stat. § 120.57(1)(k) and rule 28-106.217 of the Florida Administrative Code, files the following Exceptions to the Presiding Officer's Recommended Order, dated June 25, 2018:

1. The State Board of Administration may "reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has jurisdiction." Fla. Stat. § 120.57(1)(l). This section further states:

When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

2. *Exception to Final Sentence in Preliminary Statement:* The Recommended Order states that Petitioner made no further filings after filing his Memorandum of Law on March 22, 2018, but Petitioner timely filed his Proposed Recommended Order on May 31, 2018.

3. *Exception to Conclusion of Law, Paragraph 9:* Although Art. II, § 8(d), Fla. Const., and Fla. Stat. § 112.3173 contains language mandating forfeiture if an employee is convicted of a

specified offense, forfeitures pursuant to these sections are still subject to the U.S. Constitution's prohibition of excessive fines.¹ Thus, if forfeiture of Petitioner's retirement benefits violate the Eighth Amendment of the United States Constitution, then forfeiture no longer is mandatory and actually becomes unlawful; thus, the conclusion that the State Board of Administration has no discretion as to whether to proceed with forfeiture of Petitioner's benefits should be rejected.

4. *Exception to Conclusion of Law, Paragraph 13:* The Presiding Officer's conclusion that forfeiture of Petitioner's benefits does not violate the Excessive Fines Clause should be rejected. Although Florida courts have held in other situations that forfeiture of retirement benefits does not constitute punishment, as the United States Supreme Court has explained, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." *United States v. Bajakajian*, 524 U.S. 321, 327 (1998) quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989) (internal quotations omitted). "Forfeitures—payments in kind—are thus 'fines' if they constitute punishment for an offense." *Id.*

We have little trouble concluding that the forfeiture of currency ordered by § 982(a)(1) constitutes punishment. The statute directs a court to order forfeiture as an additional sanction when 'imposing sentence on a person convicted of' a willful violation of § 5316's reporting requirement. The forfeiture is thus imposed at the culmination of a criminal proceeding and *requires conviction of an underlying felony*, and it cannot be imposed upon an innocent owner of unreported currency, but only upon a person who has himself been *convicted* of a § 5316 reporting violation."

Id. (emphasis added)

Pursuant to the United States Supreme Court's reasoning in *Bajakajian*, forfeiture of Petitioner's retirement benefits in this case amounts to a punishment, and therefore, a "fine"

¹ "This Constitution, and the laws of the United States, which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, *anything in the Constitution or laws of any State to the contrary notwithstanding.*" Art. VI, U.S. Const.

subject to the Excessive Fines Clause. Fla. Stat. § 112.3173(3) states, “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...” (emphasis added). As in *Bajakajian*, forfeiture of benefits under Fla. Stat. § 112.3173 may only be ordered *after* a conviction of an enumerated offense.

5. *Exception to Conclusion of Law, Paragraph 14-15:* The State Board of Administration should reject the conclusion that *Childers* is applicable in this case. In *Childers v. Dep’t of Mgmt. Servs., Div. of Ret.*, the Fourth District Court of Appeal of Florida considered whether forfeiture under Fla. Stat. § 112.3173 would amount to a punishment, and therefore a “fine”, under the Excessive Fines Clause: “Forfeiture of the employee’s retirement benefits is not a fine because the employee *has not been ordered to pay anything to the government*. Unlike a criminal forfeiture statute, section 112.3173(3) merely relieves the State of its duty to pay retirement benefits.” 989 So. 2d 716, 719 (Fla. 4th DCA 2008) (emphasis added).

Childers is distinguishable from this case as *Childers* involved the forfeiture of benefits that *had not yet been paid*. In this case, Petitioner received his full retirement benefits by April 30, 2011, approximately five (5) years before his conviction giving rise to this case. Accordingly, forfeiture of Petitioner’s benefits in this case would not “merely relieve the State of its duty to pay retirement benefits,” but would amount to a punitive order to pay over 1.3 million dollars to the State of Florida.

Furthermore, Petitioner’s motives or intentions when he obtained a total distribution of his FRS investment account does not change the nature of the forfeiture when applying the Excessive Fines Clause.

Other courts have applied the Excessive Fines to the forfeiture of retirement benefits even in a contractual context. In *Public Employee Retirement Administration Commission v. Bettencourt*, the Supreme Judicial Court of Massachusetts considered whether a statute calling for the forfeiture of retirement benefits upon conviction of an enumerated crime could amount to a “fine” under the Excessive Fines Clause of the Eighth Amendment *where the lower court had ruled it did not based on contract principles*. 474 Mass. 60 (Mass. 2016). The court concluded that although Mr. Bettencourt’s retirement benefits were contractually contingent on avoidance of certain convictions, the actual forfeiture of benefits was still subject to the United State Supreme Court’s “punishment” test in *Bajakajian*. The court reasoned that because a forfeiture can occur only after the employee’s final conviction of an enumerated offense, the forfeiture qualifies as “punishment”. *Id.* Accordingly, application of the Excessive Fines Clause does not depend on whether the obligation arises as a result of a contract with the state. The Excessive Fines Clause applies to *any* “payment to a sovereign as punishment for some offense”. *Bajakajian* at 327.

6. *Exception to Conclusion of Law, Paragraph 16-17:* Because forfeiture of Petitioner’s retirement benefits constitutes a “fine” under the Excessive Fines Clause, the Presiding Officer’s conclusion that whether the amount to be forfeited is out of proportion to his offense is irrelevant should be rejected. Because Fla. Stat. § 112.3173 clearly operates to punish Petitioner for his convictions, forfeiture of his retirement benefits is a “fine” under the Excessive Fines Clause, regardless of whether the forfeiture is required under contract principles. “The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish...[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.” *Bajakajian*, 524 U.S. 321, 334 (1998).

Petitioner was convicted of one count of conspiracy and three counts of bribery of an agent of a local government receiving federal funds in connection with his acceptance of three payments in the amounts of \$5,500.00, \$5,000.00 and \$6,200.00 (\$16,700.00 total) from Samer Majzoub, whom Petitioner appointed as a Florida law enforcement officer and whom he had been acquaintances with for several years. Petitioner continues to contend that these payments were personal loans. As the Eleventh Circuit Court of Appeals found, the \$5,000.00 and \$6,200.00 payments were used for the purchase of a property in North Carolina, which Petitioner previously presented to Majzoub as an investment opportunity.

Due to the convictions, Respondent has demanded the repayment of \$1,386,411.55 in retirement benefits received by Petitioner. Petitioner faithfully served as the Chief of Police of the Longwood Police Department for over twelve (12) years had been in law enforcement without incident for over thirty-two (32) years before the acts giving rise to his convictions occurred. Requiring forfeiture of the full amount of Petitioner's retirement benefits, over *eighty-three (83) times* the amount Petitioner received from Majzoub, would be *grossly* disproportional to the gravity of his offense considering his over thirty (30) years of faithful law enforcement service.

7. For the foregoing reasons, the Petitioner respectfully requests that the State Board of Administration enter a final order consistent with his Exceptions stated herein and deny forfeiture of Petitioner's retirement benefits as it would result in an excessive fine in violation of the Eighth Amendment of the United States Constitution.

RESPECTFULLY SUBMITTED this 9th day of July, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed and furnished via electronic mail to:

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