STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

CHARLES COMBS,
Petitioner,
vs.
STATE BOARD OF ADMINISTRATION,
Respondent.

DOAH Case No. 15-6633
SBA Case No. 2015-3419

FINAL ORDER

On May 10, 2016, Administrative Law Judge Garnett W. Chisenhall (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 counsel for the Petitioner and upon counsel for the Respondent. Both Petitioner and Respondent filed timely filed Proposed Recommended Orders. Petitioner timely filed exceptions on May 19, 2016. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief, Defined Contribution Programs Officer 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. 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

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). Further, Petitioner's "exception" fails to identify the disputed portions of the Recommended Order by page number or paragraphs and does not include appropriate and specific citations to the record, as required by Section 120.57(1)(k), Florida Statutes. Accordingly, the SBA is not required to rule on the exception.

Even if Petitioner's "exception" satisfied all of the legal requirements for a valid exception, the "exception" still would need to be rejected as the findings in the Recommended Order are supported by substantial competent evidence.

Petitioner seems to be asserting that the crimes to which he pled nolo contendere in no manner are connected to his public employment, since the purchases occurred about ten miles from Petitioner's place of employment when Petitioner was off-duty. However, there is substantial competent evidence to show that there is a sufficient nexus between Petitioner's public employment and the two crimes to which he pled nolo contendere and further to show that these two crimes constitute specified offenses requiring forfeiture as defined in Section 112.3173(2)(e)6., Florida Statutes.

Petitioner is correct in his assertion that not every crime committed by a public officer or employee is a forfeitable offense. Section 112.3173(3), Florida Statutes, states that forfeiture is appropriate only where a public officer or employee commits a "specified offense," as defined by Section 112.3173(2)(e)1. through 7. The purchase of oxycodone is not among the offenses set forth in paragraphs 1. through 5. or 7. of Section 112.3171(2)(e). If forfeiture were appropriate in Petitioner's situation, then all of the conditions of Section 112.3173(2)(e)6., Florida Statutes, the so-called "catch-all" provision, must be satisfied. *See, Bollone v. Dep't of Mgmt. Servs.*, 100 So.3d 1276, 1280 (Fla. 1st DCA 2012). According to the case *Jenne v. State*, 36 So.3d 738, 742 (Fla. 1st DCA 2010), any felony can qualify as a specified offense under Section 112.3173(2)(e)6., Florida Statutes, if all the other conditions set forth in the statutory provision are satisfied. *Jenne* further notes that "all of the remaining conditions" refer to the conduct of the public official or employee and not the definition of the crime. *Id.* at 743 (explaining whether the crime for which a public employee is convicted qualifies as a specified offense "depends on the way in which the crime was committed"). Petitioner argues in his "exception" that Petitioner's testimony during the administrative hearing (and presumably Petitioner's testimony during his deposition- Joint Exhibit 1) cannot be used in the determination as to whether forfeiture is appropriate. (Petitioner's Exception, page 4). However, such argument is not in accord with *Jenne*. Petitioner's own testimony, especially when given under oath, gives context regarding how the Petitioner committed the charged crimes.

Petitioner, a public employee, pled "nolo contendere" to two counts of purchasing oxycodone without a prescription, a second degree felony. (Joint Pre-Hearing Stipulation, ¶V.f; Joint Exhibits 6 and 7). Petitioner did not purchase oxycodone from some random

individual on the street. He made the purchases from one individual, Dylan Hilliard, who was a correctional officer at Florida State Prison, the same facility at which Petitioner worked. (Hearing Transcript, page 33; Respondent's Exhibit R-2b). In fact, Petitioner was Mr. Hilliard's superior officer and Petitioner, on occasion, directly supervised Mr. Hilliard. (Hearing Transcript, pages 31 and 33) But for their public employment, Petitioner and Mr. Hilliard would not have known each other to the degree necessary for them to feel comfortable engaging in drug purchase and sales with each other. (Joint Exhibit 9). The two purchases underlying the charges occurred at a time when both Petitioner and Mr. Hilliard were employed by the Department of Corrections.

The record shows that Petitioner was able to receive a discount on the purchase price of the drugs from Mr. Hilliard. (Hearing Transcript page 40). This is likely due to the fact that Petitioner had a high-ranking position (Major) at Florida State Prison and Mr. Hilliard (as a Correctional Officer 1) may have wanted to curry favor with Petitioner to protect/advance his own career at Florida State Prison. Therefore, Petitioner used the rights and privileges of his public position, including his rank, to purchase drugs at a discount, thereby receiving a profit, gain or advantage. Further, as *Bollone, supra,* at 1281 notes, Section 112.3173(2)(e)6., Florida Statutes, does not state that only economic gain may be considered as being personal gain. Personal gain can include other types of gain, such as filing a false report to protect a fellow police officer who shot a suspect [*Jacobo v. Brd. Of Trustees of Miami Police*, 788 So.2d 363 (Fla. 3d DCA 2001)], or receiving sexual gratification from the felonious conduct [(*Marsland v. Department of Management Services*, 2008 WL 5451423 (Fla. Div. Admin. Hrgs. December 15, 2008)], or having inappropriate contact with a student amounting to child abuse [(Holsberry v. Department of Management

Services, 2009 WL 2237798 (Fla. Div. Admin. Hrgs. July 24, 2009)]. Satisfying a drug addiction can be a further source of gain to Petitioner resulting from using the privileges of his public position as a Major at Florida State Prison to have ready access to illegal drugs.

The record also shows that Petitioner and Mr. Hilliard devised a scheme in an attempt to avoid detection of their drug dealings. When they sent text messages to each other to set up the purchases of oxycodone, they used car part terminology as a code for the different milligram sizes of oxycodone desired. (Joint Exhibit 1, page 32). In addition, the text messages referred to Petitioner as "Chicken-Hawk or "Hawk" rather than his actual name likely in a further attempt to disguise the fact that Petitioner was having drug dealings with Mr. Hilliard. (Hearing Transcript, pp. 35-36, 39-40) Thus, Petitioner and Mr. Hilliard knowingly, willfully and intentionally were involved with illegal drug dealings. Both Petitioner and Mr. Hilliard as sworn corrections officers had an obligation to abide by the law and to report any correctional officers that failed to obey the law. Petitioner failed to meet his obligations as a correctional officer not only by failing to report the criminal activity committed by Mr. Hilliard, but also by furthering such criminal activity. The public has a reasonable right to expect that its sworn Department of Corrections officers, who are charged with the custody and care of prison inmates, will not be involved in criminal activities themselves. And, in fact, by statute, any individual who has pled guilty or nolo contendere to any felony is not eligible to be a correctional officer. *See* Section 943.13(4), Florida Statutes. Thus, Petitioner was found to have defrauded the public from receiving the faithful performance of his duties as a correctional officer by engaging in criminal activity and by failing to report the criminal activity engaged in by Mr. Hilliard.

While Petitioner is arguing he was off duty when the two purchases of oxycodone for which he was charged were made, case law makes it clear that it is possible to demonstrate the gaining of an advantage through the use of the power, rights, privileges and position of one's employment as a law enforcement officer even in the case of an off-duty law enforcement officer. For example, in *Simcox v. Hollywood Police Officers' Ret.*, 988 So.2d 731 (Fla. 4th DCA 2008), a police officer pled guilty to trafficking in drugs when off duty. There was no evidence he wore a uniform, had a badge or carried his service weapon when involved in the criminal activity. He escorted the truck carrying the heroin and apparently encountered no difficulties. The court found forfeiture was appropriate under Section 112.3173(2)(e)6., because Officer Simcox did use the power, rights, privileges, duties, and positon as a police officer by the use of the "...expertise he gained as a law enforcement officer to facilitate the scheme." *Id.* at 734. *See also*, *Newmans v. Division of Retirement*, 701 So.2d 573 (Fla. 1st DCA 1997 (sheriff's use of knowledge and information he obtained through his employment to engage in drug trafficking was found to satisfy the requirement in Section 112.3173(2)(e)6. that the crime had to be related to his public employment). Similarly in the instant situation, Petitioner and Mr. Hilliard, being in such close contact with numerous prisoners, were well aware of how these prisoners got caught and what caused the prisoners to fail in their attempts to conceal their crimes. As such, Petitioner and Mr. Hilliard, using that special knowledge, went to a great of effort to attempt to conceal their activities and their identities in hopes that their crimes would be concealed and that they would not lose their jobs.

There is ample substantial competent evidence in the record to show that Petitioner committed offenses that subject his retirement plan benefits to forfeiture since all of the

elements of Section 112.3173(2)(e)6., Florida Statues are present. The mentioning in the Recommended Order of actions taken by Petitioner that did not form the basis of the charges to which he pled nolo contendere simply was for the purpose of giving additional context concerning how the charges to which Petitioner pled were intimately connected to Petitioner's state employment. Accordingly, Petitioner's "exception" must be rejected.

FINDINGS OF FACT

The State Board of Administration adopts and incorporates in this Final Order the Findings of Fact set forth in the Recommended Order as if fully set forth herein.

CONCLUSIONS OF LAW

The State Board of Administration adopts and incorporates in this Final Order the Conclusions of Law set forth in the Recommended Order as if fully set forth herein.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner has forfeited his Florida Retirement System Investment Plan account benefit under Section 112.3173, Florida Statutes by having pled nolo contendere to two felony counts of violating Section 893.13(2)(a)1., 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 26th day of July, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

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

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

Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by electronic mail to legalmail@frankmaloney.us and by UPS to Frank E. Maloney, Jr., Counsel for Petitioner, Frank E. Maloney, Jr., P.A., 445 East Macclenny Avenue, Macclenny, Florida 32063 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 26th day of July, 2016.

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
STATE BOARD OF ADMINISTRATION

CHARLES COMBS,
Petitioner,

CASE NO. 2015-3419

Vs.

STATE BOARD OF ADMINISTRATION,
Respondent.

STATE OF FLORIDA
DIVISION OF ADMINSITRATIVE HEARINGS

CHARLES COMBS,
Petitioner,

vs.

Case No. 15-6633

STATE BOARD OF ADMINISTRATION,
Respondent.

PETITIONER, CHARLES COMBS, EXCEPTION TO THE RECOMMENDED ORDER

Petitioner, Charles Combs, files this his exceptions to the Recommended Order of the Honorable Carnell Chrisenhall, Administrative Law Judge in this case filed on May 10, 2016. That order found the Petitioner had plead no contest to two crimes that required the forfeiture of his state retirement pursuant to Florida Constitution Article III Sec. 8(1)(d) and Sec. 112.3173 Fla. Stat.

As the Administrative Law Judge found in that order the petitioner plead no contest to the *only two crimes* the State Attorney for the Eighth Judicial Circuit had charged him. Which were the purchase of a controlled substance some ten (10) miles from his place of employment during off duty hours. (Pages 9 -10 recommended order)

The State Attorney for the Eighth Judicial Circuit in and for Bradford County reviewed that arrest warrant and the Bradford County Sheriff's Office investigated and determined not to file a criminal information based on any of the allegations found in the warrant. In fact, a No Information pleading was filed by the State Attorney on four (4) of the allegations, and the remaining two (2) allegations were drastically amended from conspiracy to two (2) simple purchases of oxycodone, see the Criminal Information dated on August 21, 2015.

In determining that the Petitioner's state retirement should be forfeited the Administrative Law Judge had to consider evidence for which the Petitioner was never charged by the State Attorney, a no information was ever file for those acts. Therefore it is obvious that he never plead to any crimes involving those acts referred to in the Recommended Order.

This Honorable Board and the Administrative Law Judge are bound to apply the plain meaning of the language used in Fla. Const. Art. III Sec. 8(1)(d) and Sec. 112.3173 Fla. Statutes, which requires at a minimum the ruling by a circuit judge based on a plea that the state employee had committed the acts charged in the information or indictment. That does not include other acts not in the charging document as found in arrest warrants or interrogations or testimony.

Not every crime committed by a public officer or employee gives rise to forfeiture of FRS rights and benefits under section 112.3173, Florida Statutes. To result in forfeiture, the crime must be a "specified offense" as defined in section 112.3173(2)(e)(1) through 7.

Both the Florida Constitution and Florida Statutes are clear and unambiguous. The statute requires at the minimum a plea of no contest to a felony and *that felony must involve a breach of the public trust for private gain.*

When a statute is clear and unambiguous as it is in this case, this Board must give that clear and plain meaning of the Constitution and Statute and this Board is not allowed to further construe any Statute or the Constitution, see *Curd v. Mosaqic Fertilizer, LLC* 39 So.3rd 1216 (Fla. 2010) headnote 2;

> *"The court looks first to the statue's plain language. When the statue is clear and unambiguous, courts will not look behind the statue's plain language for legislative intent or resort to rules of statutory construction to ascertain intent."*

> *State v. Brock* 138 So3rd 1060 (Fla. App. 4th DCA 2014) page 1062;

>> *"when the statue is clear and unambiguous, courts will not look behind the statue's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. " Borden v. E.-European, Ins., Co., 921 So2d 587, 595 (Fla. 2006) (quoting Daniels v. Fla. Dep't of Health, 898 So2d 61, 64 (Fla. 2005).*

This State Board of Administration is limited and can only rely on the two (2) criminal counts (the indictment) in which Petitioner, Charles Combs plead no contest to forfeit his retirement, a conviction under section 112.3173(2)(e), Florida Statute, *not the allegations in the arrest warrant or recorded interviews, as they are not relevant to what was plead to, to wit: two purchases of oxycodone at a private home in Lawtey, Florida..*

An arrest warrant is merely the authority based on probable cause for the State of Florida to be able to hold a person until the State Attorney for that Circuit can investigate and make a determination if "Formal Charges", a criminal information, will be filed. The Supreme Court in Rule 3.134 Fla. Crim. P. Rule limits the time for the State

Attorney to investigate and file information or the individual shall be released because no formal charging, information, was filed.

> *The state shall file formal charges on defendant in custody by information, or indictment, or in the case of alleged misdemeanors by whatever documents constitute a formal charge, within 30 days from the date on which the defendants are arrested or from the date of service of capiases upon them. If the defendant remains uncharged, the court on the 30th day and with notice to the state shall:*
>
> *(1) Order that the Defendant automatically be released on their own recognizances on the 33rd day unless the state files formal charges by that date; or*
> *(2) If good cause is shown by the state, order that the defendant automatically be released on their own recognizance on the 40th day unless the state files formal charges by that date.*
>
> *In no event shall any defendant remain in custody beyond 40 days unless they have been formally charged with a crime.*

In this case Mr. Combs was never charged with a crime nor plead to a crime within the definitions of Sec. 112.3173 Fla. Statutes. The statute is clear and unambiguous and it requires a finding the state employee had violated his public trust by what he plead to, and not allegations in arrest warrants or recorded interviews or even his testimony at the trial before the Administrative Law Judge. The items relied on by the Administrative Law Judge to recommend the forfeiture of Mr. Comb's state retirement are not crimes for which he has ever been charged or has plead to. In relying on those events as a nexus to his employment the Administrative Law Judge has applied a strained interpretation to the controlling statute and to the Constitution, which requires he be charged and plead to a crime violating the public trust and the purchase of a controlled substance is not such a crime violating the public trust.

WHEREFORE it is respectfully suggested that this Honorable Board reject the proposed order of the ALJ and deny the forfeiture of Mr. Charles Combs state *retirement*.

Submitted this 19th day of May, 2016.

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CERTIFICATE OF SERVICE

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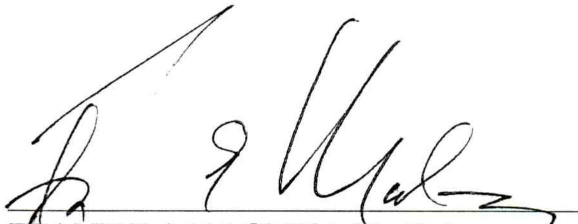

FRANK E. MALONEY, JR., P.A.
Attorney for Petitioner

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES COMBS,

Petitioner,

vs. Case No. 15-6633

STATE BOARD OF ADMINISTRATION,

Respondent.
_______________________________/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on February 26, 2016, in Tallahassee, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Frank E. Maloney, Jr., Esquire
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For Respondent: Brian A. Newman, Esquire
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STATEMENT OF THE ISSUE

The issue is whether, pursuant to section 112.3173, Florida Statutes (2015),[1/] Petitioner forfeited his Florida Retirement System ("FRS") Investment Plan account by entering a nolo

EXHIBIT A

contendere plea to two counts of violating section 893.13(2)(a)1., Florida Statutes, a second-degree felony.

PRELIMINARY STATEMENT

On August 25, 2015, Charles G. Combs ("Mr. Combs" or "Petitioner") pled nolo contendere to two counts of purchasing Oxycodone, a violation of section 893.13(2)(a)1., and a second-degree felony. The Bradford County Circuit Court accepted the plea but withheld adjudication.

Via a letter dated September 3, 2015, the State Board of Administration ("the SBA") notified Mr. Combs that his rights and benefits under the FRS Investment Plan had been forfeited as a result of his nolo contendere plea for acts committed while employed with the Department of Corrections ("DOC"). In support thereof, the SBA noted that Article II, section 8(d), Florida Constitution, provides that "[a]ny 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."

Mr. Combs responded to the SBA's letter by requesting an administrative hearing and asserting that the SBA's determination should be reversed because the allegations to which he pled nolo contendere had nothing to do with his position at DOC. Thus, Mr. Combs asserts there was no breach of the public trust.

The SBA referred the matter to DOAH, and the undersigned scheduled a formal administrative hearing for February 26, 2016.

Mr. Combs filed a Motion in Limine on February 16, 2016, seeking to preclude two of the SBA's proposed exhibits from being accepted into evidence. The proposed exhibits in question were an arrest warrant and a warrant affidavit. With regard to the arrest warrant, Mr. Combs argued it was irrelevant because he had not been convicted of any of the six counts set forth in the arrest warrant. As for the warrant affidavit, Mr. Combs argued that it contained irrelevant hearsay.

On February 23, 2016, Mr. Combs filed a second Motion in Limine seeking to preclude two audio recordings and a deposition from being accepted into evidence. The audio recordings memorialized the Bradford County Sheriff Office's interrogations of Mr. Combs. Mr. Combs asserted that the audio recordings and the deposition were irrelevant and would serve no purpose other than to inflame the finder of fact.

The SBA responded to Mr. Combs' Motions in Limine on February 25, 2016, by noting that hearsay is admissible in administrative proceedings and that "to the extent any hearsay is offered, it should be admitted to support findings based on other direct evidence and in this case is necessary to provide context to the events that led to Mr. Combs' arrest and conviction." As for the relevancy of the exhibits in question, the SBA noted that

there can be no forfeiture of retirement benefits unless there is a nexus between a public employee's crime(s) and his or her state employment. According to the SBA, the exhibits in question pertain "directly to the heart of this matter and will be used to show that a sufficient nexus exists between Petitioner's state employment and his crimes."

The undersigned addressed Mr. Combs' Motions in Limine at the start of the February 26, 2016, hearing. The SBA announced that it was withdrawing the deposition as a potential exhibit, but the SBA still wanted to have the arrest affidavit attached to the deposition accepted into evidence.[2/] After hearing argument from counsel, the undersigned ruled that the two audio recordings were hearsay but noted that hearsay is admissible in administrative proceedings. Nevertheless, it was noted that findings of fact cannot be based on hearsay unless the hearsay supplements or corroborates other non-hearsay evidence. It was also noted that the audio recordings could possibly fall under the hearsay exception in section 90.803(18), Florida Statutes, pertaining to a party's own statement that is offered against that party. See generally State v. Elkin, 595 So. 2d 119, 120 (Fla. 3d DCA 1992)(noting that "[r]elevant, out-of-court statements of a party opponent, as is the statement at issue, are admissible in evidence pursuant to section 90.803(18), Florida

Statutes (1989), and thus are an exception to the hearsay rule.").

With regard to Mr. Combs' assertion that the arrest warrant and the arrest affidavit were irrelevant, the undersigned deferred ruling on their relevancy until they could be considered in context with all of the evidence and testimony to be presented at the final hearing.

Prior to hearing any testimony, the undersigned granted Mr. Combs a standing objection to any testimony regarding alleged wrongdoing by Mr. Combs, other than the two charges to which he pled nolo contendere.

Mr. Combs was the only witness at the final hearing.

As for exhibits at the final hearing, the undersigned accepted Joint Exhibits J-2 through J-9 into evidence. As noted above, the audio recordings marked as Respondent's Exhibits R-2a and R-2b were accepted into evidence. Joint Exhibit 1 (which was marked as J-1 and just consisted of the arrest affidavit) and the arrest warrant, Respondent's Exhibit R-1, were also accepted subject to further consideration of Mr. Combs' relevancy objection.

As explained more fully below, Mr. Combs' objections based on relevancy are overruled. The subjects of his objections pertain to the circumstances associated with the Oxycodone purchases which led to Mr. Combs' nolo contendere plea and the

SBA's subsequent determination that Mr. Combs had forfeited his rights and benefits under the FRS.

The one-volume Transcript was filed on March 30, 2016, and the Parties timely filed their Proposed Recommended Orders. The undersigned gave due consideration to both of those Proposed Recommended Orders.

FINDINGS OF FACT

I. The Events Giving Rise to this Proceeding

1. Mr. Combs began working for DOC on May 25, 2001, as a Correctional Officer Level 1 at the Union Correctional Institution ("Union Correctional") in Raiford, Florida.

2. Union Correctional is a maximum security facility housing approximately 2,000 inmates, and Mr. Combs assisted with their care and custody.

3. In January of 2006, Mr. Combs earned a promotion to Correctional Officer, Sergeant. While his responsibilities were very similar to those of his previous position, Mr. Combs was now supervising other correctional officers.

4. In October of 2011, Mr. Combs earned a promotion to Correctional Officer, Lieutenant, and was responsible for supervising 50 to 70 correctional officers at Union Correctional.

5. In April of 2013, Mr. Combs earned a promotion to Correctional Officer, Captain, and transferred to Florida State Prison in Starke, Florida.

6. A captain is the highest ranking correctional officer on a given shift, and Mr. Combs supervised approximately 50 correctional officers at a time, including sergeants and lieutenants.

7. Like Union Correctional, Florida State Prison is a maximum security facility housing approximately 2,000 prisoners.

8. A colonel manages Florida State Prison, and it has two separate units. One of those units is a work camp housing lower-custody inmates who may work outside the facility, and the main prison is the other unit. Each of the units is run by its own major.

9. In February of 2015, Mr. Combs was promoted to Major and took charge of the work camp at Florida State Prison.

10. At some point in 2014 and prior to his promotion to Major, Mr. Combs had begun taking Oxycodone recreationally.

11. Mr. Combs typically purchased one Oxycodone pill three to four times a week, and Dylan Hilliard (a Correctional Officer 1 at Florida State Prison) was Mr. Combs' primary source of Oxycodone.

12. Mr. Hilliard usually worked at the main prison, but he occasionally worked at the work camp.

13. Mr. Combs knew Mr. Hilliard because of their employment with DOC.

14. Mr. Combs purchased Oxycodone from Mr. Hilliard at the latter's home in Lawtey, Florida. However, some transactions occurred in Mr. Combs' state-issued housing on the grounds of Florida State Prison.

15. Mr. Hilliard charged Mr. Combs $35 for an Oxycodone pill, and that was a discount from the $38 price Mr. Hilliard charged others.

16. Mr. Combs allowed his subordinates (Sergeants Jesse Oleveros and Evan Williams) to leave Florida State Prison during their shifts in order to purchase illegal drugs from Mr. Hilliard.

17. After returning from their transactions with Mr. Hilliard, Mr. Oleveros and Mr. Williams would give Mr. Combs an Oxycodone pill free of charge.

18. Operation Checkered Flag was a joint task force led by the Bradford County Sheriff's Office, and its purpose was to arrest individuals involved with the distribution and use of illegal drugs.

19. The authorities arrested Mr. Hilliard after he engaged in an illegal drug transaction with an undercover agent from the Florida Department of Law Enforcement.

20. A subsequent search of Mr. Hilliard's cell phone revealed text messages between Mr. Hilliard and several other DOC employees, including Mr. Combs.

21. Mr. Hilliard referred to Mr. Combs as "Chicken-Hawk" or "Hawk" in those text messages, and the two of them used car part terminology as a code for different milligram sizes of Oxycodone.

22. Operation Checkered Flag ultimately resulted in the arrest of 10 DOC employees.

23. The authorities arrested Mr. Combs on July 1, 2015, based on allegations that he had committed six felonies relating to the alleged unlawful and illegal purchase and distribution of Oxycodone.

24. DOC fired Mr. Combs on approximately July 1, 2015.

25. Mr. Combs initially denied all of the allegations. However, after spending nearly 56 days in jail, Mr. Combs reached an agreement with the State Attorney's Office in Bradford County that called for his criminal charges to be reduced in exchange for his cooperation with Operation Checkered Flag.

26. During an interview on August 20, 2015, with members of Operation Checkered Flag, Mr. Combs admitted that he had purchased Oxycodone from Mr. Hilliard.

27. In addition, Mr. Combs admitted that on six or seven occasions he allowed Mr. Oleveros and Mr. Williams to leave the prison grounds so that they could purchase Oxycodone from Mr. Hilliard.

28. The State Attorney's Office in Bradford County chose to dismiss most of the charges against Mr. Combs. The Information

ultimately filed against Mr. Combs set forth two counts alleging that he violated section 893.13(2)(a)1., by illegally purchasing Oxycodone on March 23, 2015, and March 31, 2015.

29. Those purchases occurred approximately 10 miles from Florida State Prison at Mr. Hilliard's residence in Lawtey, Florida. Neither Mr. Combs nor Mr. Hilliard was on duty during those transactions.

30. On August 25, 2015, Mr. Combs pled nolo contendere.

31. The Bradford County Circuit Court entered judgment against Mr. Combs based on the two violations of section 893.13(2)(a)1., but withheld adjudication.

32. All of the conduct underlying Mr. Combs' nolo contendere plea occurred while he was employed by DOC.

II. The SBA Determines that Mr. Combs Forfeited his FRS Benefits

33. At all times relevant to the instant case, Mr. Combs was a member of the FRS.

34. The FRS is the legislatively-created general retirement system established by chapter 121, Florida Statutes. See § 121.021(3), Fla. Stat.

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

36. Via a letter dated August 3, 2015, the SBA notified Mr. Combs that a hold had been placed on his FRS account due to

the criminal charges. As a result, no distribution of employer contributions from Mr. Combs' account would be permitted until the SBA had evaluated the final disposition of those criminal charges.

37. Via a letter dated September 3, 2015, the SBA notified Mr. Combs that he had forfeited his FRS benefits as a result of his nolo contendere plea. In support thereof, the SBA cited section 112.3173, Florida Statutes, which provides for the forfeiture of a public employee's FRS retirement benefits upon the entry of a nolo contendere plea to certain types of offenses.

38. The SBA's letter closed by notifying Mr. Combs of his right to challenge the SBA's proposed action through an administrative hearing.

39. Mr. Combs requested a formal administrative hearing and asserted that the crimes for which he was convicted did not fall within the scope of section 112.3173(2)(e). In other words, Mr. Combs argued that his convictions were not associated with his employment at DOC and thus did not amount to a violation of the public trust.

III. Testimony Adduced at the Final Hearing

40. Mr. Combs testified that he was responsible for the work camp and the supervision of the correctional officers

assigned there. He also testified that he would occasionally supervise correctional officers who normally worked in the main prison.

41. Mr. Combs testified that Mr. Hilliard was his primary source of Oxycodone and that Mr. Hilliard occasionally worked at the work camp.

42. Mr. Combs was aware that two Florida State Prison employees who worked directly under him (Sergeant Jesse Oleveros and Sergeant Evan Williams) were purchasing Oxycodone from Mr. Hilliard.

43. Mr. Combs testified that he allowed Mr. Oleveros and Mr. Williams to leave Florida State Prison grounds six or seven times in order to purchase Oxycodone from Mr. Hilliard.

44. Mr. Combs testified that Mr. Oleveros and Mr. Williams would give him an Oxycodone pill after returning from their transactions with Mr. Hilliard.

45. Mr. Combs acknowledged during his testimony that DOC policy prohibits correctional officers from leaving prison grounds during their shift.

46. Mr. Combs acknowledged that it was a violation of DOC policy and Florida law to allow a correctional officer to leave prison grounds during a shift for the purpose of purchasing illegal narcotics.

47. Mr. Combs also acknowledged that it was a violation of DOC policy and Florida law to allow a correctional officer to be on prison grounds with illegal narcotics.

48. Finally, Mr. Combs acknowledged that as a sworn officer with the Department of Corrections, he had an obligation to report any criminal activity committed by a correctional officer working at Florida State Prison, regardless of whether that correctional officer reported to him.

IV. Findings of Ultimate Fact

49. An examination of the circumstances associated with Mr. Combs' Oxycodone purchases from Mr. Hilliard demonstrates that there is a nexus between Mr. Combs' employment as a correctional officer with DOC and his commission of the crimes to which he pled nolo contendere.

50. For instance, Mr. Combs came to know his primary source of Oxycodone (Mr. Hilliard) through their mutual employment with DOC. Indeed, Mr. Combs supervised Mr. Hilliard when the latter was assigned to the work camp at Florida State Prison.

51. Also, Mr. Combs knew that these transactions were illegal. As noted above, he and Mr. Hilliard used a code based on car part references to disguise the actual subject of their communications.

52. Contrary to DOC policy and Florida Law, Mr. Combs allowed two of his subordinates (Mr. Oleveros and Mr. Williams)

to leave Florida State Prison during their duty shifts in order to purchase illegal drugs from Mr. Hilliard. Mr. Combs would then receive a free pill from Mr. Oleveros and Mr. Williams.

53. Mr. Hilliard sold Oxycodone to Mr. Combs at a reduced price. It is reasonable to infer that Mr. Combs received this discount due to his high-ranking position at Mr. Hilliard's place of employment and because Mr. Combs facilitated Mr. Oleveros and Mr. Williams' purchases of Oxycodone from Mr. Hilliard.

54. Mr. Combs willfully violated DOC policy and Florida law by allowing correctional officers to leave prison grounds during a shift for the purpose of purchasing illegal narcotics.

55. Mr. Combs knowingly violated his obligation as a sworn correctional officer by not reporting the criminal activity committed by Mr. Hilliard.

56. Mr. Combs defrauded the public from receiving the faithful performance of his duties as a correctional officer. The public had a right to expect that one of its employees would not purchase drugs from someone he supervised. The public also had a right to expect that Mr. Combs would not use his authority at Florida State Prison to facilitate Mr. Hilliard's illegal drug sales to other DOC employees. In addition, the public had a right to expect that Mr. Combs would not engage in illegal transactions on the grounds of Florida State Prison.

57. Mr. Combs realized a profit, gain, or advantage through the power or duties associated with his position as a Major at DOC. Specifically, Mr. Combs satisfied his Oxycodone habit through purchases made from a DOC employee who he supervised. Also, Mr. Combs used his position to facilitate other sales by Mr. Hilliard, and Mr. Combs' assistance led to him receiving free Oxycodone and a discounted price on his Oxycodone purchases.

58. The findings set forth above in paragraphs 49 through 57 are the only ones needed to establish a nexus between Mr. Combs' public employment and the two counts to which he pled nolo contendere. That nexus is evident from Mr. Combs' testimony, Mr. Combs' Responses to the SBA's Requests for Admissions, and the Stipulated Facts. It was not necessary to consider the exhibits to which Mr. Combs raised objections, i.e., the arrest warrant, the warrant affidavit, and the audio recordings.

CONCLUSIONS OF LAW

59. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1).

60. The FRS is a public retirement system as defined by Florida Law and, as such, the SBA's proposed action to forfeit Petitioner's FRS rights and benefits is subject to administrative review. See § 112.3173(5)(a), Fla. Stat.

61. Article II, section 8, Florida Constitution, titled "Ethics in Government," states in pertinent part:

> 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.

62. Section 112.3173 implements Article II, section 8, Florida Constitution, and is part of the statutory code of ethics for public officers and employees. The statute states in pertinent part:

> (1) INTENT.—It is the intent of the Legislature to implement the provisions of s. 8(d), Art. II of the State Constitution.
>
> (2) DEFINITIONS.—As used in this section, unless the context otherwise requires, the term:
>
> (a) "Conviction" and "convicted" mean an adjudication of guilt by a court of competent jurisdiction; a plea of guilty or of nolo contendere; a jury verdict of guilty when adjudication of guilt is withheld and the accused is placed on probation; or a conviction by the Senate of an impeachable offense.
>
> * * *
>
> (c) "Public officer or employee" means an officer or employee of any public body,

political subdivision, or public instrumentality within the state.

(d) "Public retirement system" means any retirement system or plan to which the provisions of part VII of this chapter apply.

(e) "Specified offense" means:

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.
>
> (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.

63. As the party asserting that Mr. Combs has forfeited his rights and benefits under the FRS pursuant to section 112.3173(3), the SBA bears the burden of proof in this proceeding. <u>See</u> <u>Fla. Dep't of Transp. v. J.W.C. Co.</u>, 396 So. 2d 778 (Fla. 1st DCA 1981). <u>See also</u> <u>Balino v. Dep't of HRS.</u>, 348 So. 2d 349 (Fla. 1st DCA 1977).

64. The statutory forfeiture provision at issue, section 112.3173(3), is not penal and does not involve disciplinary action against a license. Accordingly, the standard of proof in this proceeding is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.; Childers v. Dep't of Mgmt. Servs., Case No. 07-2128 (Fla. DOAH July 17, 2007), modified in part, OGC Case No. 04-03615 (Fla. State Bd. of Admin. Sept. 28, 2007).

65. Not every crime committed by a public officer or employee gives rise to forfeiture of FRS rights and benefits under section 112.3173. To result in forfeiture, the crime must be a "specified offense" as defined in section 112.3173(2)(e)1. through 7.

66. The illegal purchase of Oxycodone is not among the specified offenses enumerated in paragraphs 1. through 5. or 7. of section 112.3173(2)(e). Accordingly, the issue is whether Mr. Combs' crimes fall within section 112.3173(2)(e)6., which has been called the "catch-all" provision of the forfeiture statute. See Bollone v. Dep't of Mgmt. Servs., 100 So. 3d 1276, 1280 (Fla. 1st DCA 2012).

67. Mr. Combs argues that the charges to which he pled nolo contendere do not fall within the "catch-all" provision of the forfeiture statute. In doing so, Mr. Combs argues that the analysis of this issue must be limited to the fact that he illegally purchased Oxycodone on March 23, 2015, and March 31,

2015. Mr. Combs' hearing testimony, the arrest warrant, and the arrest affidavit are supposedly irrelevant. In other words, the undersigned cannot consider the circumstances associated with the Oxycodone purchases. If the analysis is so restricted, Mr. Combs argues that the SBA cannot establish the required nexus between his offenses and his former position as a Major at Florida State Prison.

68. However, Mr. Combs' argument is directly contrary to previous cases dealing with whether an offense falls within the "catch-all" provision. The First District Court of Appeal has concluded that whether a particular crime falls under the "catch-all" provision "depends on the way in which the crime was committed." Jenne v. Dep't of Mgmt. Servs., 36 So. 2d 738, 742 (Fla. 1st DCA 2010)(rejecting the Appellant's contention "that his conviction for conspiracy to commit mail fraud does not meet the definition of a specified offense because the elements required to prove the offense do not match the elements of any of the crimes described in the statute."). See Bollone v. Dep't of Mgmt. Servs., 100 So. 3d at 1280 (citing Jenne and stating "this Court has held that the term 'specified offense' is defined by the conduct of the public official, not by the elements of the crime for which the official was convicted.").

69. Therefore, the circumstances associated with an offense are relevant to evaluating whether that offense amounts to a

specified offense under section 112.3173(2)(e)6. Thus, the required analysis must take into account facts such as the following: (a) Mr. Combs and Mr. Hilliard came to know each other through their employment at DOC; (b) Mr. Combs supervised Mr. Hilliard on the occasions when the latter was assigned to the work camp at Florida State Prison; (c) some of the transactions between Mr. Combs and Mr. Hilliard occurred on the grounds of Florida State Prison; (d) Mr. Combs used his position at Florida State Prison to facilitate other illegal transactions involving Mr. Hilliard and other DOC employees; and (e) Mr. Combs obtained a profit and/or gain by facilitating the aforementioned transactions.

70. To constitute a specified offense under section 112.3173(2)(e)6., the criminal act must be: (a) a felony; (b) committed by a public officer or employee; (c) done willfully and with the intent to defraud the employee's public employer of the right to receive the faithful performance of the employee's duty; (d) done to realize or obtain a profit, gain, or advantage for the employee or some other person; (e) and done through the use of the power, rights, privileges, duties, or position of the employee's public employment. Bollone v. Dep't of Mgmt. Servs., 100 So. 3d at 1280-81.

71. When the above criteria are applied to the circumstances associated with Mr. Combs' purchases of Oxycodone, it is readily apparent that he committed a specified offense.

72. For instance, there is no dispute that Mr. Combs was a public employee when he committed the acts described above. There is also no dispute that Mr. Combs pled nolo contendere to two counts of violating section 893.13(2)(a)1., a second-degree felony. Thus, the first two criteria for a specified offense under section 112.3173(2)(e)6., are satisfied.

73. As for whether Mr. Combs defrauded the public or DOC, this requirement is satisfied if there is evidence of a "nexus between the crimes charged against the public officer and his or her duties and/or position." DeSoto v. Hialeah Police Pension Fund Bd. of Trs., 870 So. 2d 844, 846 (Fla. 3d DCA 2003). The nexus is satisfied where one violates his or her duties as a public officer in failing to safeguard the public's faith in that public office or position. Id.

74. In the instant case, the facts demonstrate there was a nexus between Mr. Combs' purchase of Oxycodone from Mr. Hilliard and Mr. Combs' duties as a correctional officer.

75. For instance, Mr. Combs acknowledged during his testimony that a sworn officer with DOC has an obligation to report criminal activity committed by another correctional officer. Mr. Combs obviously violated that oath by not reporting

Mr. Hillard's illegal activity. That fact (in and of itself) would be sufficient to establish the nexus between Mr. Combs' purchases of Oxycodone and his duties as a public employee. See Zeh v. Bd. of Trs. of the City of Longwood Police Officers' and Firefighters' Pension Trust Fund, Case No. 14-0870, 2014 Fla. Div. Adm. Hear. LEXIS 355 (Fla. DOAH June 30, 2014; Bd. of Trs. Oct. 24, 2014)(evaluating the nexus between petitioner's duties as a police officer and his nolo contendere plea to burglary with assault/battery and aggravated assault and concluding petitioner "testified he took an oath, and he violated such oath upon committing the felonies in question. The acts were committed while he was on duty, in uniform, and in possession of City police officer equipment. Therefore, the nexus between the crimes charged and the duties of the public officer has been met.").

76. Furthermore, there can be no reasonable dispute that Mr. Combs' acted willfully given his acknowledgements during the final hearing that DOC policy and/or Florida law prohibit a correctional officer from: (a) leaving prison grounds during their shift; (b) leaving prison grounds during a shift for the purpose of purchasing illegal narcotics; and from (c) having illegal narcotics on prison grounds.

77. Other circumstances associated with Mr. Combs' purchases of Oxycodone also demonstrate that there is a nexus between his offense and his duties as a public officer.

78. For instance, the public and DOC had a right to expect that Mr. Combs would not engage in criminal activity with his co-workers. See Bollone v. Dep't of Mgmt. Serv., Case No. 11-3274, 2011 Fla. Div. Admin. Hear. LEXIS 259 (Fla. DOAH Oct. 19, 2011; DMS Dec. 28, 2011) (concluding "[t]he public and TCC had a right to expect Mr. Bollone would not use the computer entrusted to him for criminal activity. The public was defrauded when Petitioner used that public property to further his private interest in the possession of child pornography, a crime under the laws of Florida, and a breach of the public trust.").

79. The public and DOC had a right to expect that Mr. Combs would not engage in illegal transactions with Mr. Hillard on the grounds of Florida State Prison.

80. In addition, the public and DOC had a right to expect that Mr. Combs would not knowingly allow his subordinates to leave their work stations (while on duty) in order to purchase illegal narcotics.

81. As for the fourth criterion for a specified offense under section 112.3173(2)(e)6., Mr. Combs' position in the Florida State Prison lead to him receiving a profit and/or gain from his transactions with Mr. Hilliard. Mr. Combs' gain

resulted from the fact that he was able to facilitate his recreational use of illegal narcotics through transactions with Mr. Hilliard. While satisfying one's addiction is not a monetary gain, the personal gain referenced in section 112.3173(2)(e)6., is not limited to finances. See Zeh v. Bd. of Trs., 2014 Fla. Div. Admin. Hear. LEXIS 355, at *10 (rejecting petitioner's argument that respondent failed to demonstrate that the offense was committed to obtain a profit by concluding that "the statute does not provide that only economic gain can be considered personal gain. Bollone v. Dep't of Mgmt. Servs., 100 So. 3d at 1281. Here, the record demonstrates non-monetary personal gains or advantages accruing to Petitioner, who believed that his conduct against Mr. Feld would stop the affair, influence or otherwise persuade his wife to return home, and allow the couple to continue the marriage. Such personal benefits obtained while on duty, in uniform, and while carrying and using a service weapon are the types of profits and intended benefits chapter 112 was enacted to prohibit. Bollone at 1282."); Bollone v. Dep't of Mgmt. Serv., 2011 Fla. Div. Adm. Hear. LEXIS 259, at *22 (noting that "[n]umerous hearings under this forfeiture statute and similar statutes have consistently concluded that sexual gratification constitutes personal gain.").

82. Nevertheless, Mr. Combs did receive a monetary benefit because Mr. Hilliard sold him oxycodone pills for $35 a pill when

others were paying $38 a pill. It is reasonable to infer that Mr. Combs received a discount because he occasionally supervised Mr. Hilliard and facilitated Mr. Hilliard's sales to Mr. Oleveros and Mr. Williams by allowing them to prematurely leave their duty stations.

83. The fifth and final criterion for a specified offense under section 112.3173(2)(e)6., requires that the felonious conduct be done through the use or attempted use of the "powers, rights, privileges, duties, or position of the employee's environment." Bollone v. Dep't of Mgmt. Servs., 100 So. 3d at 1281.

84. In the instant case, Mr. Combs was purchasing Oxycodone from someone he knew through his employment at Florida State Prison. There is no indication in the Record that Mr. Combs would have come into contact with Mr. Hilliard through any other means. See Holsberry v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 09-0087, 2009 Fla. Div. Adm. Hear. LEXIS 933 (Fla. DOAH July 24, 2009; Fla. DMS Oct. 22, 2009)(concluding the petitioner "used or attempted to use the power, rights, privileges, duties, or position of his public office, and his contact with R.D. was made possible only as a result of his position as a teacher."); Marsland v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 08-4385, 2008 Fla. Div. Adm. Hear. LEXIS 294 (DOAH Dec. 15, 2008; Fla. DMS Jan. 20, 2009)(evaluating whether lewd or lascivious

molestation amounts to a specified offense and concluding the petitioner "used or attempted to use the power, rights, privileges, duties, or position of his public office. Petitioner's actions were made possible only as a result of his position as a teacher.").

85. Moreover, it is reasonable to infer that Petitioner received a discount due to his status as a supervisor and/or because of the fact that he facilitated other sales by Mr. Hilliard. See Maradey v. St. Bd. of Admin., Case Number. 13-4172, 2014 Fla. Div. Adm. Hear. LEXIS 21 (Fla. DOAH Jan. 16, 2014; Fla. SBA Apr. 7, 2014); Bollone v. Dep't of Mgmt. Servs., 2011 Fla. Div. Adm. Hear. LEXIS 259, at *22 (concluding that petitioner's "gain or advantage to himself was effected through the use of the power, rights, privileges and position of his employment at TCC. His use of the public computer was a power, right and privilege of his position which he exercised to possess child pornography").

86. Furthermore, while the purchases leading to Mr. Combs' guilty plea were made in Mr. Hillard's private residence, there were occasions when the illegal transactions between Mr. Combs and Mr. Hillard would occur on the grounds of Florida State Prison. See Zeh v. Bd. of Trs., 2014 Fla. Div. Adm. Hear LEXIS 355, at *12 (noting the felonious conduct must be done through the use or attempted use of the powers, rights, privileges,

duties, or position of the employee's employment and concluding that criterion was satisfied because "[t]he record shows that Petitioner committed the felonies while on duty, while in uniform, and while carrying a City-issued firearm. The felonies occurred after he drove a police cruiser to the location of the incident.").

87. In sum, the evidence establishes that Mr. Combs was convicted of felonies; that he was a public employee; that he committed the crimes willfully and with intent to defraud the public of the right to receive the faithful performance of his duty as a public employee; that he realized, obtained, and attempted to realize or obtain, a profit or gain for himself; and that his criminal acts were committed through the use of his public employment position.

88. Accordingly, the offenses to which Mr. Combs pled nolo contendere are "specified offenses" within the meaning of section 112.3173(2)(e)6.

89. As such, all of the requirements in section 112.3173(3) for forfeiture are met. Mr. Combs is deemed to have forfeited all of his rights and privileges in his Florida Retirement System Investment Plan account, except for the return of his accumulated contributions as of the date of his termination. See § 112.3173(3), Fla. Stat.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the State Board of Administration issue a final order finding that Petitioner was a public employee convicted of specified offenses that were committed prior to retirement, and that pursuant to section 112.3173 he has forfeited all of his rights and benefits in his Florida Retirement System Investment Plan account, except for the return of his accumulated contributions as of the date of his termination.

DONE AND ENTERED this 10th day of May, 2016, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of May, 2016.

ENDNOTES

1/ All statutory citations will be to the 2015 version of the Florida Statutes unless indicated otherwise.

[2] The Transcript from the final hearing indicates that the undersigned misspoke by stating that the deposition would be accepted into evidence even though the SBA had withdrawn it as a potential exhibit. The undersigned did not intend to accept the deposition into evidence and notes for the record that the deposition was not considered in the preparation of this Recommended Order. In fact, the undersigned clarified toward the conclusion of the final hearing that only the arrest affidavit attached to the deposition transcript was being moved into evidence.

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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.