

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

DAVID MORAN,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2015-3304
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On July 31, 2015, the Presiding Officer submitted her Recommended Order to the State Board of Administration in this proceeding. A copy of the Recommended Order indicates that copies were served upon the Petitioner’s counsel and upon counsel for the Respondent. This matter was decided after an informal proceeding. Both parties timely filed Proposed Recommended Orders. Petitioner timely filed exceptions. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending, for final agency action, before the Senior Defined Contribution Programs Officer.

STATEMENT OF THE ISSUE

The State Board of Administration (“SBA”) adopts and incorporates in this Final Order the Statement of the Issue in the Recommended Order.

PRELIMINARY STATEMENT

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

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact set forth in a Recommended Order cannot be rejected or modified by a reviewing agency in its final order "...unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings were not based upon competent substantial evidence...." See Section 120.57(1)(I), 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."

Pursuant to Section 120.57(1)(I), Florida Statutes, however, a reviewing agency has the general authority to "reject or modify 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 this section's "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 administrative authority. See, *Deep Lagoon Boat Club, Ltd. v.*

Sheridan, 784 So.2d 1140, 1141-42 (Fla. 2nd DCA 2001); *Barfield v. Dept. of Health*, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001).

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 exceptions do not clearly identify the disputed portions of the Recommended Order by page number or paragraph. Further, the exceptions do not include appropriate and specific citations to the record. As such, the SBA is not required on that basis alone to rule on any of Petitioner's exceptions.

The issue involved in the case is whether it is appropriate for the SBA to continue to place a hold on Petitioner's Florida Retirement System ("FRS") Investment Plan account pending a resolution of certain criminal charges that have been filed against Petitioner. Petitioner is arguing that the hold is inappropriate since the SBA has not determined that all of the elements of the "catch all" provisions of Section 112.3173(2)(e)6., Florida Statutes, have been fully satisfied.

Section 121.091(5)(k), Florida Statutes, which is made applicable to the FRS Investment Plan through Section 121.012, Florida Statutes, provides that benefits are not to be paid to a member pending the resolution of criminal charges filed against such member if the resolution of such charges could require the forfeiture of benefits. There is no statutory requirement that a determination must be made that forfeiture is appropriate at the hold stage. Rule 19-11.008(2)(b)-(d), F.A.C., which implements the statutory

provision, provides that a hold will be placed by the SBA on a member's retirement plan account when the SBA becomes aware of "any accusation of criminal wrongdoing," and that hold will remain "...until a determination is made on whether charges have been filed and whether the charges are for a forfeitable offense." If the SBA is notified by an appropriate law enforcement agency that the charges against a member are not pursued and are dropped, then the hold will be released. The SBA has determined that the charges against Petitioner are still pending and that these charges could result in a conviction, depending on how the incidents were committed. The purported victim of the crimes for which Petitioner is being charged was an inmate at a correctional facility where Petitioner and his co-defendants worked as correctional officers. This purported victim engaged in a physical altercation with one of Petitioner's fellow correctional officers while incarcerated at Petitioner's place of employment. Thus, it appears that a forfeitable offense could have been committed, depending on what evidence is eventually established. However, until the evidence has been established during the course of Petitioner's criminal proceeding, it is unclear if Petitioner will actually be convicted of a crime, and, if convicted, exactly what crime will serve the basis of the conviction. The SBA has no statutory authority to adjudicate Petitioner's criminal charges. It only can wait to see what a court eventually determines in order to ascertain whether the Petitioner has been "convicted" of a forfeitable offense. Until the conviction occurs, the SBA is authorized by law to maintain a hold on Petitioner's retirement plan account.

Accordingly, Petitioner's exceptions, which would, in order to allow a hold on Petitioner's retirement plan account to continue, impose a duty on the SBA to determine

that Petitioner's actions have satisfied all of the elements of the "catch all" provisions of Section 112.3173(2)(e)6., Florida Statutes, hereby are rejected.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The hold the SBA has placed on Petitioner's FRS Investment Plan account is appropriate and will remain until the criminal charges against Petitioner have been resolved.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the State Board of Administration in the Office of the General Counsel, State Board of Administration, 1801 Hermitage Boulevard, Suite 100, Tallahassee, Florida, 32308, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days from the date the Final Order is filed with the Clerk of the State Board of Administration.

DONE AND ORDERED this 21st day of October, 2015, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



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

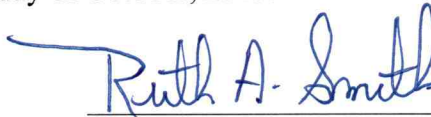
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Petitioner's counsel, Robert A. Rush, both by email transmission, (robert@robertarushpa.com) and by U.P.S. to Robert A. Rush, PA, 11 SE Second Avenue, Gainesville, Florida 32601, 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 21st day of October, 2015.



Ruth A. Smith
Assistant General Counsel
State Board of Administration of Florida
1801 Hermitage Boulevard
Suite 100
Tallahassee, FL 32308

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

DAVID MORAN,

Petitioner,

vs.

Case No. 2015-3304

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on May 20, 2015, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Therese Misita Truelove, Esquire
4510 NW 6th Place, 3rd Floor
Gainesville, Florida 32607

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

STATEMENT OF THE ISSUE

The issue is whether the SBA can place a hold on Petitioner's Investment Plan account pending the resolution of criminal charges that have been filed against him.

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner's attorney attended the informal hearing in person, as did counsel for the Respondent. Respondent's Exhibits 1 through 8 were admitted into evidence at the hearing.

A transcript of the informal hearing was made, filed with the agency, and provided to the parties. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. Both parties timely filed proposed recommended orders. The following recommendation is based upon the undersigned's consideration of the complete record in this case and all materials submitted by the parties.

MATERIAL UNDISPUTED FACTS

1. Petitioner is a member of the Florida Retirement System (FRS) defined contribution Investment Plan by virtue of his former employment with the Florida Department of Corrections.

2. Petitioner has been charged with conspiracy to commit first degree murder in violation of sections 777.04(3), (4)(a), (4)(b) and 782.04(1)(a), Florida Statutes. The charge is a felony. The alleged victim is a former inmate of the Department of Corrections who was known to Petitioner as an inmate at the Lake Butler correctional facility where Petitioner worked as a correctional officer for the Department of Corrections.

3. Petitioner allegedly conspired to murder the former inmate because of a physical altercation that occurred between the former inmate and one of Petitioner's fellow correctional officers while the inmate was incarcerated at the Lake Butler facility.

CONCLUSIONS OF LAW

4. The Florida Constitution provides 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 this provision of the Florida Constitution and provides for the forfeiture of retirement benefits upon conviction of a qualifying crime that constitutes a breach of the public trust.

5. Rule 19-11.008(2)(b)–(d), Florida Administrative Code provides:

(b) When the SBA becomes aware of any accusation of criminal wrongdoing against any member of the FRS Investment Plan, the SBA will put a hold on the member's account to preclude the member from removing any money from the account, until a determination is made on whether charges have been filed and whether the charges are for a forfeitable offense.

(c) If the charges against the member are not pursued and are dropped by law enforcement officials, the hold on the member's account will be released upon receipt of notification from the proper law enforcement agency.

(d) If the member is indicted and convicted or pleads guilty or pleads nolo contendere, the SBA will acquire a certified copy of the judgment and will contact the member to advise the member that the Investment Plan benefit is forfeited and that the member has the right to a hearing to contest the forfeiture. The hold on the member's account will remain in place until:

1. The time to request a hearing has passed and no request for a hearing is made, or
2. The conclusion of the hearing and any appeal of the final order issued after the conclusion of the hearing.

6. A plain meaning reading of the above rule is that Respondent SBA is authorized to put a hold on the account of an Investment Plan member "when it becomes aware of any accusation of criminal wrongdoing" against that member. This hold remains until: 1) a determination is made on whether charges have been filed and 2) whether the charges are for a forfeitable offense. Under section 19-11.008(2)(d), if the member is convicted, the SBA obtains a certified copy of the judgment, advises the member that his Investment Plan benefit is

forfeited, and that he has a right to a hearing to contest the forfeiture. The hold on his account remains until after hearing, if one is requested, and appeal of any final order.

It does not appear that the above rule prescribes a hearing at the current point in Petitioner's case – that is, after the SBA has become aware of the accusation against him, but before it has received a certified copy of a judgment against him. Under rule 19-11.008(2)(b), only one part of the determination required has been made – the determination that charges have been filed. Under section 11.008(2)(c), if the charges are dropped, the hold on Petitioner's account is released. If this does not occur, section 11.008(2)(d) calls for a hearing after a judgment is entered.

7. Regardless of what the rule provides, the Petitioner here has been afforded a hearing, prior to any finding as to his guilt or innocence, and this may be appropriate given that forfeiture is a disfavored remedy and that a hold on a member's Investment Plan account could cause financial hardship at a time when funds may be very scarce for a member accused of a crime. But the jurisdiction of this tribunal is limited; it does not extend to determining disputes of fact, and at this point may only decide whether, as a matter of law, the charges brought are for a crime for which forfeiture could be necessary and whether those charges are still pending. It would be inappropriate for me to make any finding as to whether the various elements of an offense had occurred, much less the circumstances under which they occurred. Both of these fact findings could be crucial and perhaps dispositive of issues that could arise during a forfeiture proceeding, where a determination may be required as to whether there is a nexus between the crime committed and the duties or position of the member's public employment. See Maradey v. SBA, 2014 WL 212169 (Fla. Div. Admin. Hrgs., January 16, 2014.) This is particularly true when the basis for forfeiture is that the specified offense falls under the catch-all provision of

section 112.3173(2)(e)6, Florida Statutes, rather than under one of the charges set out by reference to specific statutory sections or crimes.

8. As the party asserting that Petitioner forfeited his benefits, Respondent here has the burden of proof. See Florida Dept. of Trans. V. J.W.C. Co., 396 So.2d 778 (Fla.1st DCA 1981.) But my reading of Rule 19-11.008 says that what must here be proved is very little; only that the charges are still pending and that they are for crimes which could result in forfeiture.

9. Although the hold on Petitioner's Investment Plan funds may cause a hardship, I note that those funds are created to be used for retirement, and may not even be used for financial emergencies. See § 121.591, Fla. Stat. (benefits may not be paid for employee hardships, emergencies, loans, medical expenses.) The purpose of the hold is to prevent a member from accessing and disposing of funds to which he may not be entitled, and thereby entirely frustrating the purpose of the forfeiture that is required by the Florida Constitution and statutes, when criminal activity that violates the public trust has occurred.

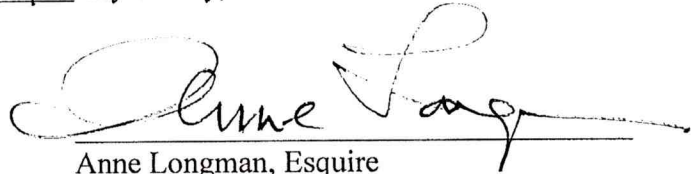
10. Thus, the SBA is not required to establish all of the elements of forfeiture at this time in order to continue the hold on Petitioner's account. Under the rule, the Respondent has demonstrated that the hold is appropriate, as it has made an initial showing that the Petitioner been charged with a forfeitable offense (a felony involving breach of the public trust) which is still pending.

11. If Petitioner is "convicted" of a qualifying offense within the definition of section 112.3173, Florida Statutes, which includes adjudication of guilt, plea of guilty or nolo contendere, etc., he will have the opportunity to contest the forfeiture of his retirement benefits at that time. If the charges are dropped, the hold will be released. § 19-1.008(2)(c) and (d), Florida Administrative Code.

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 3rd day of July, 2015.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
315 South Calhoun Street, Suite 830
Tallahassee, FL 32301-1872

NOTICE 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
mini.watson@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Thérèse Misita Truelove
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Gainesville, FL 32607
therese@tmtruelovelaw.com
Petitioner's Attorney

and via electronic mail only to:

Brian A. Newman, Esquire
Brandice D. Dickson, Esquire
Pennington, P.A.
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Tallahassee, Florida 32301
slindsey@penningtonlaw.com

Counsel for Respondent

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

DAVID MORAN,

Petitioner,

vs.

Case No.: 2015-3304

STATE BOARD OF ADMINISTRATION,

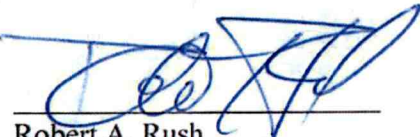
Respondent.

NOTICE OF APPEARANCE ON BEHALF OF PETITIONER

PLEASE TAKE NOTICE of undersigned counsel's appearance on behalf of the Petitioner, David Moran. All future pleadings and other documents in this case should be served upon Robert A. Rush, Esq. at the address and/or email addresses listed below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to Therese M. Truelove, Esq. at therese@tmtruelovelaw.com and Brian A. Newman, Esq. at slindsey@penningtonlaw.com this 10th day of August 2015.



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11 SE Second Avenue
Gainesville, FL 32601
Tel: (352) 373-7566
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Attorney for Petitioner

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

DAVID MORAN,

Petitioner,

vs.

Case No.: 2015-3304

STATE BOARD OF ADMINISTRATION,

Respondent.

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

The Petitioner, DAVID MORAN, by and through his undersigned attorney, pursuant to §120.57, *Florida Statutes*, files his written exceptions to the Recommended Order submitted on July 31, 2015 as follows:

Petitioner has objected to the State Board of Administration placing a hold on Petitioner's investment plan account. Section 112.3173, *Florida Statutes* set forth the specific offenses that would allow forfeiture of benefits as well as any authority to place a hold on those benefits. Section 112.3173(2)(e), under specified offenses, lists seven (7) provisions. It is undisputed that provisions one (1) through five (5) do not apply in this case. As stated in the Recommended Order, the only basis for forfeiture, if any, therefore, would be the catch-all provision for specified offense, specifically 112.3173(e)(6).

The Respondent has the burden of proof that the conduct alleged falls under, or meets, the definition of one of the specified offenses. *Florida Dept. of Transportation v. J.W.C. Co*, 396 So.2d 778 (Fla. 1st DCA 1981).

The Petitioner has been charged with conspiracy to commit first degree murder. That is not a specified offense under subparagraph 6 of the “catch-all” provision of the statute.

Specifically, there is no evidence of the following:

a. 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 which he has the right to receive the faithful performance of his or her duties as a public officer or employee... There is no evidence, whatsoever, of a willful intent to defraud.

The “catch-all” goes on to say...”realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or herself...” Again, there is no evidence, whatsoever, nor an allegation that the Petitioner attempted or did realize any gain, profit or advantage for himself. The paragraph goes on to state “...through the use or attempted use of the power, rights, privileges, duties, or position of his or her public office or employment.” There is no allegation or evidence that the criminal allegation had anything to do with the Petitioner’s position as a correctional officer.

The facts alleged if taken as true in the light most favorable to the State Board of Administration would show that the Petitioner is alleged to conspire with two other people to kill a person who was a former prisoner with the Department of Corrections. That person was not in the Department of Corrections when this alleged conspiracy occurred. The Petitioner does not know this person, has had no direct contact with that person, nor is there any evidence to support that.

In *Jenne v. State of Florida Dept. of Management Services*, 36 So.3d 738 (Fla. 1st DCA 2010), the court specifically reviewed §112.3173(2)(e), specified offense, and specifically

subparagraph 6, the “catch-all” provision. The court stated that “catch-all” provision requires that the manner in which the crime was committed must involve “using the power of his office to gain a benefit for himself.” In this case, there is absolutely no evidence that any actions were taken with the intent to defraud for the purpose of personal gain.

The Petitioner must meet all elements of subparagraph 6. The only portion they have is the allegation that the employee was arrested for committing a felony. There is no evidence that this was done at his place of employments, through the use of his employment or result of his employment as a correctional officer in the Department of Corrections.

WHEREFORE the Petitioner respectfully requests an order entered granting the Petitioner’s request to a release a hold on the Petitioner’s investment plan account.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to Therese M. Truelove, Esq. at therese@tmtruelovelaw.com and Brian A. Newman, Esq. at slindsey@penningtonlaw.com this 10th day of August 2015.



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