

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

JOHNNY LAMART HERNANDEZ,)
)
 Petitioner,)
)
 vs.)
)
 STATE BOARD OF ADMINISTRATION,)
)
 Respondent.)
)
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)
 _____)

SBA Case No. 2012-2364

FINAL ORDER

On July 26, 2013, the Presiding Officer submitted her Recommended Order to the State Board of Administration in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Johnny Lamart Hernandez, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Petitioner submitted what he deemed a "Proposed Recommendation." On July 30, 2013, Petitioner timely filed Exceptions to the Recommended Order. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Senior Defined Contribution Programs Officer for final agency action.

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."

The findings of fact 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)(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."

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 this section's "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the administrative law judge's application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the administrative law judge'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).

RULINGS ON EXCEPTIONS

In his exceptions, the Petitioner does not does not clearly identify the disputed portion of the recommended order by page number or paragraph, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record.

Petitioner's exceptions merely re-argue his position that the felony to which he pled nolo contendere, "aggravated assault", is not a "specified offense" under Section 112.3173, Florida Statutes, because the statute fails to specifically list that felony by name. Unlike the Recommended Order, Petitioner does not discuss or address Section 112.3173(2)(e)6, Florida Statutes, informally known as the "catch all" provision. *See, Mark G. Bollone v. Dept. of Mgmt. Serv., Div. of Ret.*, 100 So.3d 1276 (Fla. 1st DCA 2012); *Kenneth C. Jenne v. State of Florida, Dept. of Mgmt. t Serv., Div. of Ret.*, 36 So.3d 738 (Fla. 1st DCA 2010); *Simcox v. City of Hollywood Police Officers' Ret. Sys.*, 988 So.2d 731 (Fla. 4th DCA 2008). Section 112.3173(2)(e)6, Florida Statutes, brings within the definition of "specified offense" for purposes of forfeiture under Section 112.3173, Florida Statutes: a. any felony; b. committed by a public employee; c. willfully and with intent to defraud the public or the employee's public employer of the right to receive faithful performance of the employee's duty; d. to obtain a profit, gain or advantage for the employee or some other person; and e. by the use of the power, rights, privileges, duties, or employment position. *See Bollone*, 100 So.3d at 1280. Thus, while the count of aggravated assault to which the Petitioner pled nolo contendere would not in and of itself constitute a "specified offense," it is clear that any felony, such as aggravated assault, committed by a public officer or employee can qualify as a specified

offense under Section 112.3173(2)(e)6, Florida Statutes, as long as all of the other conditions set forth in the statutory provision have been satisfied. For purposes of Section 112.3173(2)(e)6, Florida Statutes, 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. *Bollone*, 100 So.3d at 1280; *Jenne*, 36 So. 3d at 741-43 (explaining that whether the crime for which the former public officer was convicted qualifies as a specified offense “depends on the way in which the crime was committed”).

Section 784.021, Florida Statutes provides aggravated assault, the crime to which Petitioner pled nolo contendere, is a “felony of the third degree,” and involves an assault with an intent to commit another felony. The record evidence demonstrates that Petitioner had pled nolo contendere to a felony which involved an assault with an intent to commit lewd and lascivious battery on a minor. As a former public school resource officer Petitioner was a public employee. With respect to the other three elements of the catch all provision set forth above, the record evidence reflects that the conduct giving rise to the assault charge occurred while the Petitioner, a school resource officer, was on duty. The lewd and lascivious battery was allegedly committed by Petitioner upon a student that the Petitioner was obligated, by virtue of his employment duties, to protect. Such conduct would be contrary to the faithful performance of Petitioner’s duties. The public has a right to expect that Petitioner would not commit an aggravated battery on a student that Petitioner was obligated to protect.

The record evidence shows that Petitioner realized or obtained a profit, gain, or advantage for himself or some other person through his conduct. Section 112.3173(2)(e)

6, Florida Statutes does not restrict personal gain to only economic gain. *See, Bollone*, 100 So.3d at 1282 (affirming the forfeiture of FRS benefits in a case in which the public employee possessed the child pornography for his own personal sexual gratification via use of his work-issued computer); *Jacobo v. Bd. of Trustees of Miami Police*, 788 So.2d 362, 363 (Fla. 3d DCA 2001) (affirming the forfeiture of FRS benefits in a case involving a felony conviction for official misconduct in light of police officer's false reporting in an arrest affidavit); *Newmans v. State of Fla., Div. of Ret.*, 701 So.2d 573, 573 (Fla. 1st DCA 1997) (affirming the forfeiture of FRS benefits where the public employee pled guilty to conspiracy to obstruct justice); *Marsland v. Dept. of Management Serv.*, 2008 WL 5451423 (Fla. Div. Admin. Hrgs., December 15, 2008) (affirming the forfeiture of FRS benefits where the public school teacher committed sexual battery on a student on school property). The record establishes Petitioner used his position of trust and authority to gain contact with a minor for his own personal sexual gratification. Thus, Petitioner realized or obtained a profit, gain, or advantage for himself by the conduct underlying the aggravated assault charge. The presiding officer concluded based on the record evidence that Petitioner's sensitive position of trust and authority resulting from his public employment as a school resource officer brought him into contact with vulnerable minors and thereby allowed him the opportunity to engage in aggravated assault on a minor to further his own interests.

There is substantial competent evidence in the record to support the conclusions in the Recommended Order that the felony to which Petitioner pled nolo contendere was a "specified offense" within the meaning of Section 112.3173, Florida Statutes because of

the manner in which the conduct of Petitioner that formed the basis of Petitioner's felony charge was committed. Accordingly, Petitioner's exceptions hereby are denied.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner has forfeited his right to a retirement benefit under the Florida Retirement System (FRS) pursuant to Section 112.3173, 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 7th day of October, 2013, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



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

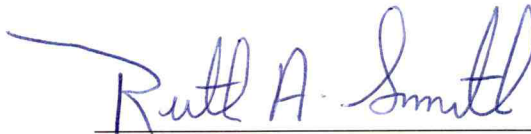
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Tina Joanos
Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by U.S. mail to Johnny Lamart Hernandez, pro se, [REDACTED] Florida 32307, and by U.S. mail to Brian Newman and Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 7th day of October, 2013.



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

JOHNNY LAMART HERNANDEZ,

Petitioner,

vs.

Case No. 2012-2364

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 21, 2013, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Johnny Lamart Hernandez,, pro se



For Respondent: Brian A. Newman, Esquire
Pennington, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue is whether Respondent correctly determined that Petitioner's rights and benefits under the Florida Retirement System (FRS) Investment Plan account should be forfeited.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented the testimony of Daniel Beard, Director of Policy, Risk Management, and Compliance, State Board of Administration. Petitioner offered no exhibits. Respondent's Exhibits 1 through 5 were admitted into evidence without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties, who were invited to submit proposed recommended orders within 30 days. Respondent filed a proposed recommended order; Petitioner made no further filings.

MATERIAL UNDISPUTED FACTS

1. On February 13, 2012, Petitioner was notified by Respondent that a hold had been placed on his Investment Plan account as a result of criminal charges brought against him.
2. On March 5, 2013, an Amended Information was filed in Case Number 04-2012-CF-000088-A, Circuit Court of the Eighth Judicial Circuit, in and for Bradford, Florida. That Amended Information charged Petitioner as follows:

[T]hat JOHNNY LAMART HERNANDEZ, in Bradford County, Florida, between November 1, 2010 and January 31, 2011, did then and there unlawfully make an assault upon in that he intentionally threatened by word or act to do violence to A.C. coupled with an apparent ability to do so, and did some act which created in A.C. a well founded fear that violence was imminent, and in making said assault intended to commit a felony, to-wit: Lewd and Lascivious Battery, contrary to Section 784.021, Florida Statutes.

(Emphasis added.)

On the same day, Petitioner entered into an agreement to plead *nolo contendere* to the above charges, and a Judgment was entered against him. The Judgment adjudicated Petitioner guilty of Aggravated Assault with Intent to Commit a Felony, in violation of section 784.021(1)(b), Florida Statutes, a third degree felony.

3. The alleged wrongful conduct underlying the criminal charge to which Petitioner pled occurred while Petitioner was employed as the school resource officer for Bradford High School, and stemmed from an allegation that he engaged in sexual conduct with a female student of Bradford High School on a school day, at his home, while he was on duty. The Offense Report noted that Petitioner used his marked patrol vehicle to transport himself and the student from the school grounds to his home.

4. On March 20, 2013, Petitioner was notified by Respondent that his Investment Plan account had been forfeited because of his plea of *nolo contendere* on March 5, 2012. Petitioner filed a petition for hearing to challenge this agency decision and this administrative proceeding followed.

5. Petitioner asserts that he is not guilty of any crime, that he has not been convicted of any offense specified in Section 112.3173(2)(e), Florida Statutes (the forfeiture statute), that he was locked up without the ability to post bond for 364 days, that he took the plea deal he was offered to gain release from jail, that the other offenses with which he was charged were *nolle prosequi*, that the alleged victim in the case was 18 years old, and that there is additional evidence which would establish his innocence.

CONCLUSIONS OF LAW

6. 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.

7. 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.

* * *

(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.

* * *

(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....

§ 112.3173, Fla. Stat. (2012) (Emphasis added.)

8. The above statute requires that any employee who is convicted of a “specified offense” committed prior to retirement from the FRS must forfeit all rights and benefits. *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, forfeiture is mandatory.

9. Section 112.3173(2)(e)6., Florida Statutes, has been referred to as the “catch-all” provision in the forfeiture statute. The “catch-all” section of the statute requires forfeiture for acts that are not otherwise included in the list of “specified offenses” in Section 112.3173(2)(e) 1. – 5. and 7., when a sufficient nexus is shown between the position held by the public employee and the commission of the crime. *Holsberry v. Department of Management Services*, 2009 WL 2237798 (Fla. Div. Admin. Hrgs. July 24, 2009).

10. The “catch-all” provision has been held applicable when a public employee has abused his/her position of authority for the purpose of engaging, or attempting to engage, minor students in sexual activity. See, *Marsland v. Department of Management Services*, 2008 WL 5451423 (Fla. Div.Admin.Hrgs. December 15, 2008)(catch-all provision required forfeiture for

conviction of felony involving sexual battery by teacher on a student where sex occurred at the school).

11. Petitioner, as a school resource officer, was placed in an extremely sensitive position of trust and authority by virtue of his public employment, which brought him into contact with many vulnerable minors. This creates the nexus between his position and the crime to which he pled. A breach of the public trust occurs the moment a resource officer attempts to engage a student in sexual activity. Respondent is not required to prove that Petitioner engaged, or attempted to engage a student in sexual activity, because Petitioner has pled *nolo contendere* to, and was adjudicated guilty of, an assault involving lewd and lascivious battery upon a student with whom he came in contact through his public position at Bradford High School. § 112.3173(2)(a), and (3) Fla. Stat. (2012).

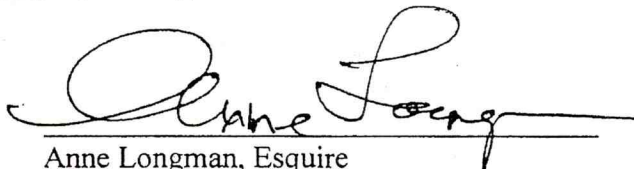
12. It is possible that Petitioner is not guilty of the offense to which he pled *nolo contendere* as part of a plea agreement, and that neither his privately retained counsel nor his public defender informed him of the effect of this plea on his retirement assets. But even if this is the case, this tribunal has no jurisdiction to look behind the judgment duly entered against him.

13. The Florida Statutes creating and governing the Florida Retirement System, and Petitioner's rights and responsibilities under them are clear, and the SBA cannot deviate from them. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). 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 26th day of July, 2013.



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

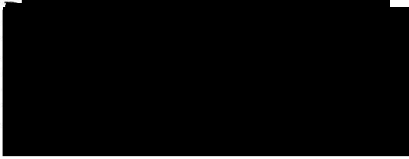
All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions must be filed with the Agency Clerk of the State Board of Administration and served on opposing counsel at the addresses shown below. The SBA then will enter a Final Order which 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
Daniel.Beard@sbafla.com
(850) 488-4406

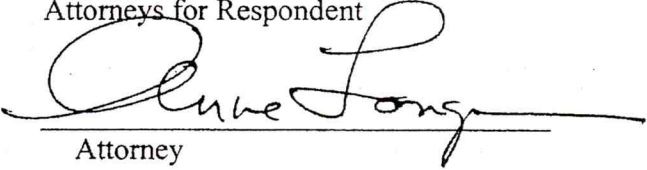
This 26th day of July, 2013.

Copies furnished to:

Via Regular Mail
Johnny Lamart Hernandez



Via electronic mail:
Brian A. Newman, Esquire
Brandice D. Dickson
Pennington, P.A.
Post Office Box 10095
Tallahassee, FL 32302-2095
slindsey@penningtonlaw.com
Attorneys for Respondent


Attorney

Joanos Tina "Petitioner's Exceptions to Recommended Order"

From: Johnny Hernandez [REDACTED]
Sent: Tuesday, July 30, 2013 11:24 AM
To: Beard_Daniel; Joanos_Tina; alongman@llw-law.com; lschneider@llw-law.com
Subject: Petitioners response to hearing officers request Case 2012-2364

Johnny Lamart Hernandez
Petitioner

vs.

State Board Of
Administration
Respondent

Case No. 2012-2364

An informal hearing was convened on May 21, 2013 pursuant to section 120.57(2), Florida Statutes, before Anne Longman, a hearing officer appointed by the Respondent. Mrs. Longman made her recommendation to deny me my benefits on July 26, 2013.

I am challenging the extent to which a state pension can be forfeited because of a criminal conviction that is not listed as one of the 'SPECIFIED OFFENSES'. I plead Nolo Contendere to an Aggravated Assault Charge and it is not listed. I challenge the forfeiture of the full amount of my pension. I am arguing that the statute is unconstitutional as applied to the part that they are trying to use to forfeit my benefits. The facts in this case are in dispute. I believe that I should be judged on what I plead Nolo Contendere to instead of what I was arrested on February 7, 2012.

The section that the State Board of Administration is using is Florida Statutes 112.3173, which deals with Felonies involving breach of public trust and other specified offenses by public officers and employees. I plead Nolo Contendere to an Aggravated Assault Charge. I was originally arrested on charges of having sex with a minor (17). These charges were dropped and I plead Nolo Contendere to an Aggravated Assault Charge. Aggravated Assault is not one of the felonies listed, so I should be entitled to receive my benefits. Just because I plead Nolo Contendere to a Felony Charge, I should be judged on what I plead Nolo Contendere to not from what I was arrested on. It doesn't state anywhere in the Florida Constitution that a person can have their benefits taken away because of a charge that is not listed. People are charged with crimes all the time, if there is evidence that the crime occurred then that person gets charged with it, when there is no evidence then they offer you plea deals or you take the risk of going to trial and getting a bunch of time. I choose the plea deal but the charged had nothing to do with what I was arrested on. So If I am going to be judged, judge me on what was entered into the courts on March 5, 2013, not what I was arrested on February 7, 2012.

The Respondent didn't produce any evidence of a felony specified in Chapter 838, Florida Statutes, they produce evidence of charges that I was not convicted of. They clearly stated that they are basing their ruling on charges that I was arrested on.

The State Board of Administration is using the case CHILDERS V. DEPARTMENT OF MANAGEMENT SERVICES, 989 So.2d 716 (Fla.4th DCA 2008, as an example in my case. This is not an example to my case because in this case Childers was convicted of bribery and unlawful compensation or reward for official behavior. His conviction was one of the ones listed under FS 112.3173. To effectuate these constitutional provisions, the Florida Legislature enacted section 112.3173, which provides that "[a]ny public officer or employee who is convicted of a 'SPECIFIED OFFENSE' committed prior to retirement . . . shall forfeit all rights and benefits under any public retirement system of which he or she is a member, except for the return of

his or her accumulated contributions as of the date of termination. My point again is that Aggravated Assault is not one of the SPECIFIED OFFENSES LISTED.

All of these examples of cases that the State Board of Administration are using in reference to my case is not the same as my case. In these cases these people were convicted of crimes that were listed under FS 112.3173. Jacobo v Board of Trustees of the Miami Police, he was arrested and convicted of a crime that was listed, Maryland v. Department of Management Services, he was arrested and convicted for sexual battery. Pleading guilty to a felony that is not listed should not be grounds to withhold my benefits. Is it fair to say that if I was convicted of simple battery, a misdemeanor, that I would have still had my retirement benefits taken away because the charges stemmed from allegations of a felony listed?

Based on the fact that I plead Nolo Contendere to a felony that is not listed as a specified offense, I should be entitled to receive my benefits. Allegations that stemmed from something should never be grounds to take my benefits or anyone else's. What should count is what is listed in the Courthouse on March 5, 2013, not what I was arrested on. I am asking that the recommendation of Hearing Officer Anne Longman be reversed and that I be rewarded my full retirement wages.

Thank You
Johnny Hernandez