

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

VICTOR FRANCIS,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2017-3764
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On August 29, 2017, 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, Victor Francis, and upon counsel for the Respondent. This matter was decided on after an informal hearing. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions to the Recommended Order which were due on September 13, 2017. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner has forfeited his Florida Retirement System (“FRS”) Investment Plan account benefit under Section 112.3173, Florida Statutes by having pled *nolo contendere* to felony specified in Chapter 838, Florida Statutes, that occurred by virtue of his

employment with an FRS participating employer. The felony clearly was connected to Petitioner's public employment and was committed prior to Petitioner's retirement.

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.

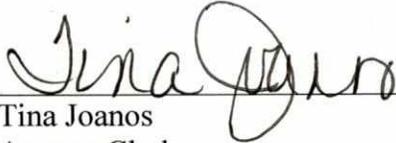
DONE AND ORDERED this 9th day of October, 2017, in Tallahassee, Florida.

**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 to Victor Francis, pro se, both by email transmission, [REDACTED] and by U.S. Mail to [REDACTED] 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 9th day of October, 2017.



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

VICTOR FRANCIS,

Petitioner,

vs.

CASE NO. 2017-3764

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 June 8, 2017, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Victor Francis, pro se


Petitioner

For Respondent: Brandice D. Dickson, Esquire
Pennington, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

EXHIBIT A

STATEMENT OF THE ISSUE

The issue is whether Petitioner's Investment Plan benefits must be forfeited due to his conviction of a felony enumerated in Chapter 838, Florida Statutes, committed before he retired from the Florida Retirement System (FRS).

PRELIMINARY STATEMENT

Petitioner attended the hearing in person, testified on his own behalf, and presented no other witnesses. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits 1 through 6 were admitted into evidence without objection, although Petitioner disputes the accuracy of R-2, a newspaper article.

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 thirty days after that filing. Respondent filed a proposed recommended order; Petitioner made no further filings.

MATERIAL UNDISPUTED FACTS

1. Petitioner is a member of the FRS Investment Plan by virtue of his former employment with the Leon County Sheriff's Department.
2. Petitioner was arrested on one count of Smuggling Contraband into a Detention Facility in violation of Section 951.221, Florida Statutes and one count of Bribery of or by Public Servant in violation of Section 838.015, Florida Statutes, for taking contraband into the Leon County Jail in August 2016 while employed as a Leon County Correctional Officer.
3. On March 23, 2017, Petitioner pled nolo contendere to both of the charged felonies. The Court accepted the plea, withheld adjudication, and sentenced Petitioner to 36 months of probation.

4. Petitioner was notified by Respondent SBA on April 3, 2017 that his FRS Investment Plan benefits had been forfeited due to his criminal conviction. Petitioner's employee contributions made after he joined the Investment Plan are not subject to forfeiture, but the balance of his FRS Investment Plan account is.

5. Petitioner filed a Petition for Hearing seeking to avoid the forfeiture of his FRS benefits, citing his need for the funds to pay his bills, and stating that he entered a nolo contendere plea only to be able to get a job and resolve the charges against him.

6. Petitioner was represented by counsel during the criminal proceeding, but states he did not confer with her about the effect of his plea on his retirement benefits.

7. Petitioner was in the defined benefit Pension Plan with a previous FRS employer, switched to the defined contribution Investment Plan, then changed employers to become a Leon County Corrections Officer. Ms. Watson testified that he is entitled only to return of the employee contributions he made to the Investment Plan, some \$2,000 of his \$34,000 account. The rest is forfeited.

CONCLUSIONS OF LAW

8. Under the Florida Constitution, "[a]ny public officer or employee who is convicted of a felony involving a breach of the public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan in such manner as may be provided by law." ART. II, § 8(d), FLA. CONST. Section 112.3173, Florida Statutes, implements that part of the Florida Constitution and states, in pertinent part:

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

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

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

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

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

...

(e) “Specified offense” means:

1. The committing, aiding, or abetting of an embezzlement of public funds;
2. The committing, aiding, or abetting of any theft by a public officer or employee from his or her employer;
3. Bribery in connection with the employment of a public officer or employee;
4. **Any felony specified in chapter 838, except for ss. 838.15 and 838.16;**
5. The committing of an impeachable offense;
6. The committing of any felony by a public officer or employee who, willfully and with intent to defraud the public or the public agency for which the public officer or employee acts or in which he or she is employed of the right to receive the faithful performance of his or her duty as a public officer or employee, realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or herself or for some other person through the use or attempted use of the power, rights, privileges, duties, or position of his or her public office or employment position; or

...

(3) Forfeiture.--Any public officer or employee who is convicted of a specified offense committed prior to retirement, or whose office or employment is terminated by reason of his or her admitted commission, aid, or abetment of a specified offense, shall forfeit all rights and

benefits under any public retirement system of which he or she is a member, except for the return of his or her accumulated contributions as of the date of termination.

...

(5) Forfeiture determination.—

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

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

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

9. An employee convicted of a “specified offense” committed prior to retirement from the FRS forfeits 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; the Constitution and applicable statute are mandatory. Forfeiture is viewed as enforcing the terms of the retirement “contract” entered into between the State and the employee. As stated in Childers,

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

...
While forfeiture, in general, has historically been understood as punishment, courts of this state have recognized that statutes

providing for forfeiture of government benefits merely enforce the terms of a contract rather than impose punishment. This statute does not require a finding of scienter.

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

10. Petitioner here was convicted of an enumerated felony that constitutes a specified offense and that was committed before he retired from the FRS. Because Petitioner pleaded nolo contendere to a specified offense under Section 112.3173(2)(e)4., Florida Statutes, forfeiture is mandatory without further analysis.

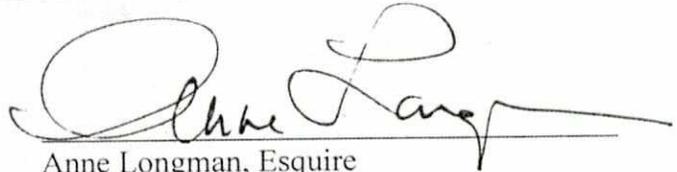
11. Neither a nolo contendere plea nor a withheld adjudication affects the conclusion that Petitioner was “convicted” as that term is defined under the forfeiture statute cited above. *Byrd v. Department of Management Services, Division of Retirement*, 2008 WL 164132 (Fla.Div.Admin.Hrgs.)(Recommended Order January 16, 2008)(plea of nolo contendere where adjudication was withheld results in “conviction” under forfeiture statute); *Lacey v. Department of Management Services, Division of Retirement*, 1994 WL 1027863 (Fla.Div.Admin.Hrgs.)(Recommended Order March 25, 1994); *City of Tampa General Employees Retirement Fund v. Boyd*, 2017 WL 750771 (Fla.Div.Admin.Hrgs.)(Recommended Order February 22, 2017).

12. The Respondent may not deviate from the Florida Statutes creating and governing the Florida Retirement System. *Balezentis v. Department of Management Services, Division of Retirement*, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). Forfeiture here is constitutionally mandated, and in keeping with prior precedent.

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 29th day of August, 2017.

A handwritten signature in black ink, appearing to read "Anne Longman", written over a horizontal line.

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

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions must be filed with the Agency Clerk of the State Board of Administration and served on opposing counsel at the addresses shown below. The SBA then will enter a Final Order which will set out the final agency decision in this case.

Filed via electronic delivery with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
Tina.joanos@sbafla.com
nell.bowers@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:
Victor Francis



Petitioner

and via electronic mail only to:

Brandice D. Dickson, Esquire
Pennington, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301
slindsey@penningtonlaw.com

Counsel for Respondent