STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

PAUL G. TILLIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2009-1581
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent	)	
	)	
______________________________	)	

FINAL ORDER

On January 27, 2010, 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 counsel for the Petitioner and upon counsel for the Respondent. Respondent and Petitioner both filed a Proposed Recommended Order. Neither party filed Exceptions which were due on February 11, 2010. 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.

MODIFICATIONS TO RECOMMENDED ORDER

Paragraph 22 is modified by deleting the last sentence thereof, and substituting the following:

The Henderson case does not use the standard asserted by Respondent; the administrative law judge there found, without any discussion, that the record evidence demonstrated that the federal felonies committed by the officer constituted Florida felonies involving breaches of the public trust and fell within the definition of a

"specified offense" set forth in subsection 112.3173(2)(e)6., Florida Statutes (the "catch-all" provision). Id.

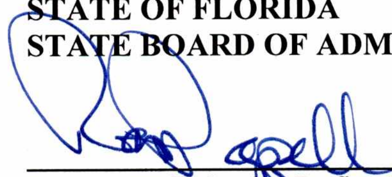
ORDERED

The Recommended Order (Exhibit A), subject to the modification stated above hereby is adopted in its entirety. The Petitioner's has not forfeited his rights and benefits under the Florida Retirement System 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 200, 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.

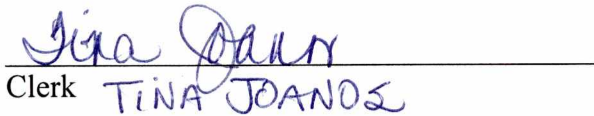
DONE AND ORDERED this 19th day of April, 2010, in Tallahassee, Florida.

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

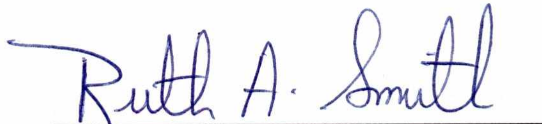
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Clerk TINA JOANOS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by US Mail to G. "Hal" Johnson, Counsel for Petitioner, 300 East Brevard Street, Tallahassee, Florida 32301, and by UPS to Therese Misita-Truelove, Counsel for Petitioner, 4510 NW 6th Place, 3rd Floor, Gainesville, Florida 32607-6121, 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 19th day of April, 2010.



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

PAUL G. TILLIS,

Petitioner,

vs. CASE NO. 2009-1581

STATE BOARD OF ADMINISTRATION,

Respondent.
_______________________________________/

RECOMMENDED ORDER

Pursuant to agreement of the parties, this case was submitted to the undersigned in an informal proceeding. The appearances were as follows:

APPEARANCES

For Petitioner: G. "Hal" Johnson
300 East Brevard Street
Tallahassee, Florida 32301

and

Therese Misita-Truelove
4510 NW 6th Place, 3rd Floor
Gainesville, Florida 32607-6121

RECEIVED
STATE BOARD OF ADMIN
10 JAN 28 PM 3:43
GENERAL COUNSEL'S OFFICE

EXHIBIT A

For Respondent: Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue is whether Petitioner has forfeited his right to a retirement benefit under the Florida Retirement System (FRS) pursuant to Section 112.3173, Florida Statutes.

PRELIMINARY STATEMENT

By letter of July 21, 2009, Respondent notified Petitioner, a former corrections officer with the Florida Department of Corrections (FDOC), that his right to retirement benefits under the FRS was forfeited in accordance with Section 112.3173, Florida Statutes. A Petition for Hearing contesting this determination was filed with the State Board of Administration (SBA), which administers the Public Employee Optional Retirement Program (commonly known as the Investment Plan) portion of the FRS, as Petitioner was a part of this Plan. Petitioner received a total distribution of his Investment Plan account in the amount of [redacted] on January 21, 2009, and the SBA asserted a right to return of this amount.

Pursuant to section 120.57(2), Florida Statutes, the parties agreed to informal proceedings in this matter and agreed further to have the issue decided on written submissions after filing a Joint Stipulation setting out undisputed material facts, the issue to be determined and agreed joint exhibits. Both parties filed proposed recommended orders.

UNDISPUTED MATERIAL FACTS

The Joint Stipulation sets out, verbatim, the following facts as agreed by the parties to be

material and undisputed:

1. Paul G. Tillis was employed by the Florida Department of Corrections. He resigned effective April 25, 2008 while serving as a correctional sergeant.

2. As a member of the FDOC, Mr. Tillis was eligible for, and did in fact participate in, the Florida Retirement System's Investment Plan.

3. On July 23, 2008, Mr. Tillis was indicted by the U.S. Attorney's Office for the alleged violation of Title 18 U.S.C. § 242, for the deprivation of rights under color of law. The basis of the criminal charge was an allegation by an inmate at Florida State Prison that in August, 2005, Sergeant Tillis had poured hot, scalding water on him while he was in his assigned cell.

4. On July 25, 2008, Mr. Tillis pled not guilty to the charge. Subsequently, at a trial on the criminal charge, Mr. Tillis testified and denied the criminal and factual allegation that he had poured hot, scalding water on an inmate. A transcript of Mr. Tillis's testimony from that trial is attached hereto as a Joint Exhibit. On January 16, 2009, Mr. Tillis was found guilty by a jury of having violated 18 U.S.C. § 242.

5. On January 23, 2009, Mr. Tillis received a total distribution of his investment plan account in the amount of [redacted] The funds were distributed to Mr. Tillis before the SBA learned of his conviction. A copy of the cashed check for the distribution is attached hereto as a Joint Exhibit.

6. On July 6, 2009, Mr. Tillis was adjudicated guilty of the offense of deprivation of rights under color of law. He was sentenced to prison for a total term of thirty-six (36) months. The judgment is attached hereto as a Joint Exhibit. The jury instruction for a violation of 18 U.S. C. § 242 is attached hereto as a Joint Exhibit.

7. The SBA notified the Petitioner on July 21, 2009 that he had taken an invalid distribution due to his forfeiture of retirement benefits upon having been found guilty of the deprivation of rights under color of law. He was advised that he would have to return the funds in full to the SBA no later than August 31, 2009. Those funds have not been returned.

8. On August 10, 2009, Mr. Tillis filed a petition for hearing with the SBA contesting the forfeiture of retirement benefits.

CONCLUSIONS OF LAW

9. The FRS is a public retirement system as defined by Florida law and, as such, Respondent's proposed action to forfeit Petitioner's FRS rights and benefits in his Investment Plan account is subject to administrative review. See § 112.3173(5)(a), Fla. Stat. (2008).

10. Respondent has the burden of proving by a preponderance of the evidence that Petitioner should forfeit his FRS retirement benefits. Holsberry v. Department of Management Services, 2009 WL 2237798 at *4 (Fla. Div. Admin. Hrgs. July 24, 2009); Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139, 141-142 (Fla. 4th DCA 1989); Department of Transp. v. J.W.C. Co., 396 So. 2nd 778, 788 (Fla. 1st DCA 1981).

11. Article II, Section 8(d) of the Florida Constitution provides:

> SECTION 8. Ethics in government.—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.

12. Chapter 112, Part III, of the Florida Statutes, implements this part of the Florida Constitution in Section 112.3173, which provides in relevant 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 guilty by a court of competent jurisdiction; a plea of guilty or if nolo contender; 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 employed position. (Emphasis added.)
7. The committing on or after October 1, 2008, of any felony defined in §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.

13. The proposed recommended orders submitted by Petitioner and Respondent are in agreement that the specific legal issue in this case is whether the actions for which Petitioner was

convicted fall within the "catch-all" provision of Section 112.3173(2)(e)6, Florida Statutes, cited above, the elements of which are: 1. any felony; 2. committed by a public employee; 3. willfully and with intent to defraud the public or the public's employer of the right to receive the faithful performance of the employee's duty; 4. to obtain a profit, gain or advantage for the employee or some other person; and 5. by use of the power, rights, privileges, duties, or position of the employment position. Holsberry at *5; Marsland v. Department of Management Services, 2008 WL 5451423 at *7 (Fla. Div.Admin.Hrgs. December 15, 2008).

14. As none of the offenses proscribed in Section 112.3173(2)(e)1.-5. apply, Respondent bears the burden of showing that, based on the stipulated undisputed facts of record, each of the above elements of Section 112.3173(2)(e)6, Florida Statutes, has been satisfied, or forfeiture may not occur.

15. It is clear that Petitioner was a public employee at the time he committed the offense at issue, that his actions were a willful misuse of the power he was given as a corrections officer and deprived the public of the right to receive the faithful performance of his duties and that the offense he committed, deprivation of rights under color of law, is a felony under federal law.

16. Petitioner asserts that his conviction of a felony under federal law does not mean that he has, necessarily, committed a felony under Florida law. The general rule in the Florida case law is that a federally adjudicated crime is cause for forfeiture if it otherwise satisfies the specifications of the statute. See, Shields v. Smith, 404 So.2d 1106, 1109 (Fla. 1st DCA 1981). In other words, would the acts committed by Petitioner constitute and support a Florida conviction of a felony? As stated by the First District Court of Appeal: "While this laborious process of

matching up elements of a foreign crime with those of a Florida felony is more difficult than simply determining that under foreign law the offense was a felony, this process is more likely to ensure that disabilities are imposed only for conduct the forum considers reprehensible." Id. at 1112. More recent cases follow this same process. See, Hames v. Miami Firefighters' and Police Officers' Trust, 980 So.2d 1112 (Fla. 3d DCA 2008), Jenne v. Dept. of Mgmt. Services, 2009 WL 570988 (Fla. Div. Admin. Hrgs. March 3, 2009).

17. Petitioner's analysis of the matching process required by case law concludes that the actions for which he was found guilty of a federal felony would not be a felony in Florida, because those actions do not include two elements: malicious intent and great bodily harm. He points to two different Florida Statutes for his matching analysis: Section 784.03(1)(a), providing that it is a first degree misdemeanor to actually or intentionally touch or strike another person against that person's will or to intentionally cause bodily harm to another person; and Section 944.35(3)(a)1, providing that it is a misdemeanor of the first degree for an employee of the Department of Corrections to commit a battery upon an inmate with malicious intent. He points out as well that the employee commits a felony of the third degree under Section 944 only when the battery results in great bodily harm, permanent disability or permanent disfigurement to the inmate. §944.35(3)(a)2, Fla. Stat.

18. The jury instruction given in Petitioner's federal case for the required element of bodily injury required only that the victim have suffered bodily injury, which need not have been intentional and which included any injury, no matter how minor or temporary. (Exhibit E, Jury Instruction No. 10, page 16.)

19. Respondent has not addressed Petitioner's argument that his actions were not

necessarily a felony under Florida law, or proposed any Florida felony which matches the federal felony as set out in the record. I have reviewed the statutes cited by Petitioner and agree with his analysis. It does not appear that the stipulated facts of this case would support a felony battery conviction under either Section 784.03 (second or subsequent battery is a felony) or Section 784.041 (battery causing great bodily harm, permanent disability or permanent disfigurement is a felony) Florida Statutes. The statute which most closely matches the stipulated facts of this case, Florida Corrections Code Section 944.35, addresses when an employee of the Department of Corrections is authorized to apply physical force, and makes an express distinction between simple battery on an inmate (a misdemeanor, §944.35(3)(a)1) and a battery on an inmate where great bodily harm is caused (a felony, §944.35(3)(a)2). In the absence of citation to any other Florida felony statute which would match with the actions for which Petitioner was found guilty, I cannot find that those actions would constitute a felony under Florida law.

20. Even if Petitioner's actions did amount to a Florida felony, there is nothing in the record to show the element that requires that Petitioner realized or obtained, or attempted to realize or obtain, "a <u>profit, gain, or advantage for himself or herself or for some other person</u> through the use or attempted use of the power, rights, privileges, duties or position of his or her public office or employment position." §112.3173(2)(e)6, Fla. Stat. (Emphasis added.)

21. Some acts which might not at first appraisal seem to result in gain to the participant facing forfeiture have been found to do so. Personal gain is not limited to economic benefit. See, <u>Marsland</u> (personal sexual gratification); <u>Holsberry</u> (inappropriate contact with student, child abuse). The action at issue here is Petitioner's pouring scalding water on an inmate. Respondent has not stated in its proposed recommended order how this action did result

or could have resulted in Petitioner obtaining some benefit for himself or another. While the action is reprehensible, particularly by one who had custodial control of a person who is incarcerated, and is clearly not consistent with the public trust invested in state corrections officers, I cannot find, based on this limited record, that it was to his personal profit, gain or advantage.

22. Respondent asserts that, "Where the employee commits a crime in the course and scope of employment that 'defraud[s] the public of the right to receive the faithful performance of his duties as a law enforcement officer' the inquiry into whether it qualifies as an offense for which forfeiture is triggered ends," citing Henderson v. Dep't of Management Services, Division of Retirement, 2007 WL 2636731 (Fla.Div.Admin.Hrgs. December 7, 2007)(officer convicted of willful assault depriving a person of his civil rights under color of law, engaging in misleading conduct toward another person with intent to hinder the communication of information relating to a federal offense and willfully making a false statement to a federal agent). The Henderson case does not use the standard asserted by Respondent; the administrative law judge there expressly found, on the record before him, that the felonies committed constituted a "specified offense" as defined in Subsection 112.3173(2)(e)6., Florida Statutes, the "catch-all" provision. Id.

23. I note that Article II, Section 8(d) of the Florida Constitution, is not self executing, as it provides, "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". (Emphasis added.) Section 112.3173, Florida Statutes specifically implements this constitutional provision,

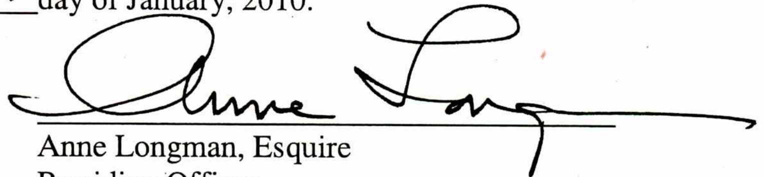
and forfeitures such as the one at issue here may be effected only in conformity with that statute.

24. The record before me does not support a finding as a matter of law that the federal felony for which Petitioner was convicted matches up with a Florida felony or that Mr. Tillis obtained or attempted to obtain a profit, gain, or advantage for himself or herself or for some other person through the actions constituting his offense. As such, two of the essential elements to a finding of forfeiture under Subsection 112.3173(2)(e)6., Florida Statutes, the "catch-all" provision, are missing and therefore Petitioner's crime is not a "specified offense" for which forfeiture under Subsection 112.3173(3), Florida Statutes may be found.

RECOMMENDATION

Having considered the law and the undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order granting the relief requested.

RESPECTFULLY SUBMITTED this 27th day of January, 2010.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
P.O. Box 16098
Tallahassee, FL 32317

NOTICE: 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, which 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 with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
(850) 488-4406

This 27th day of January, 2010.

Copies furnished to:

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Tallahassee, Florida 32301

Therese Misita-Truelove
4510 NW 6th Place, 3rd Floor
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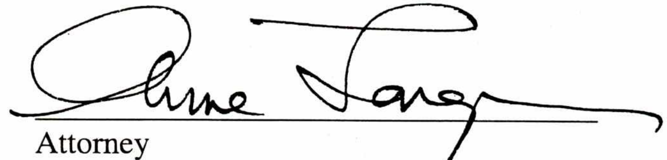
Attorneys for Respondent



Attorney