STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

NANCY MARADEY, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	DOAH Case No. 13-4172 SBA Case No. 2012-2573

FINAL ORDER

On January 16, 2014, Administrative Law Judge Cathy M. Sellers (hereafter "ALJ") submitted her 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 Proposed Recommended Orders. Petitioner timely filed exceptions on January 31, 2014. 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.

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 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 a Division of Administrative Hearings ("DOAH") 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 19932). 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."

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 1: Exception to Finding of Fact 26

Petitioner argues that there is no evidence in the record to show that Petitioner's relationships with those co-workers that she referred to AZJ Medical Center ("AZJ") for medical treatment "developed through her employment at MDT." However, Petitioner admitted during her testimony that during her employment at MDT, she was approached by another co-worker regarding AZJ Medical Center and that she was told by that co-worker that Petitioner could go to AZJ for therapy and receive money from the clinic for doing so. [Hearing Transcript, page 24, lines 14-23; page 25, lines 1-12]. She further directly testified that she had been informed by this co-worker that if she sent other individuals to AZJ, that she would get money and that she then told "several co-workers" to go to AZJ so that they could get money as well. Petitioner noted that she was an MDT employee at the time she told her co-workers about AZJ and the potential for them also to receive money for going there. She further stated that she was physically present in the MDT bus garage at the time she told her co-workers that they could get money from AZJ. Petitioner further noted that she told her co-workers that it was easy to go to AZJ because it was right across the street

from the bus garage. [Hearing Transcript, page 28, lines 24-25; page 29, lines 1-10, lines 22-25; page 30, lines 1-18]. Petitioner admitted that she did not tell anyone who did not work at MDT to go to AZJ so they could get money. [Hearing Transcript, page 36 , lines 23-25]. In response to questions from her own counsel, Petitioner testified that the people she referred to AZJ were in the MDT bus garage when she told them about the clinic, that she would "hang out" with those "bus drivers" after her morning route, and that she told the other bus drivers they could get money if they went to AZJ. [Hearing Transcript, page 52, lines 22-25; page 54, lines 23-25; page 55, lines 15-17]. In his closing argument, Petitioner's counsel stated that evidence was produced during the hearing that during Petitioner's off hours, Petitioner told "other bus drivers who were injured" about AJZ and that they could get help there as well as "kickbacks" as a "bonus." [Hearing Transcript, page 68, lines 8-12]. At no point during her testimony did Petitioner ever refer to any individuals that either introduced her to the AZJ or that she introduced to AZJ as anyone other than a "co-worker." Petitioner did not testify that any of these individuals were, for example, co-workers and friends, or co-workers and people she went bowling with, etc. All discussions Petitioner had with others concerning AZJ occurred on MDT property. Thus, a review of the entire record demonstrates that this finding of fact was based on competent substantial evidence. Further, Petitioner does not identify the legal basis for the exception. Therefore, Petitioner's Exception 1 hereby is rejected.

Petitioner's Exception 2: Exception to Finding of Fact 27

This exception is similar to Petitioner's Exception 1, in that Petitioner is arguing there is no reason to believe Petitioner did not already know other MDT employees before her employment with MDT or that she did not have other access to them. However, as

noted in the response to Petitioner's Exception 1, above, Petitioner throughout her testimony only referred to the individuals she sent to AZJ as "co-workers." Petitioner testified that all discussions she had with these individuals occurred at their place of employment. Petitioner further testified she did not tell anyone who did not work at MDT to go to AZJ so they could get money. Thus, there is sufficient evidence to establish a substantial basis of fact from which to infer that Petitioner developed her relationships with the individuals she referred to AZJ through access she gained while she was present at her place of employment- MDT. Thus, a review of the entire record demonstrates that this finding of fact was based on competent substantial evidence. Further, Petitioner does not identify the legal basis for the exception. Therefore, Petitioner's Exception 2 hereby is rejected.

Petitioner's Exception 3: Exception to Conclusion of Law 45

As in the case of the other two exceptions she has proffered, Petitioner again argues that there is no evidence to show that but for Petitioner's employment, she would not have become involved with the criminal activity in which she had engaged and she would not have had access to other MDT employees to help her to continue to engage in the activity. However, as noted under the response to Petitioner's Exception 1, above, Petitioner clearly admitted during her testimony that during her employment at MDT, she was approached by another co-worker regarding AZJ Medical Center and that she was told by that co-worker that she could go to AZJ and receive money from the clinic for doing so. [Hearing Transcript, page 24, lines 14-23; page 25, lines 1-12]. Also, as discussed in the responses to Exceptions 1 and 2 above, Petitioner only referred "co-workers" to AZJ. She specifically admitted she did not refer to AZJ anyone other than individuals who worked for MDT. [Hearing Transcript, page 36, lines 23-25]. Also, as discussed previously, all discussions

concerning AZJ with the individuals she referred there occurred on the property of MDT, specifically in the MDT bus garage. Petitioner admitted the bus garage was across the street from AZJ, so it was convenient for her co-workers to go there, get their treatment and a payment of money. Thus, Petitioner was introduced to the criminal activity through an individual she agreed was a "co-worker." And she continued the criminal activity through access to MDT employees that, the record clearly indicates, occurred only on MDT property. And, the criminal activity was facilitated due to the fact that access to AZJ was quick and easy for all of the individuals that Petitioner referred there. Even if Petitioner did have a prior relationship with any of the individuals she referred to AZJ, the record shows that it was not until these individuals became her co-workers at MDT and she had ready access to them at the MDT garage between routes that Petitioner decided to inform them about AZJ the potential for them to receive money for treatments that they received. Further, Petitioner does not identify the legal basis for the exception. Therefore, Petitioner's Exception 3 hereby is 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 her Florida Retirement System Investment Plan account benefit under Section 112.3173, Florida Statutes by having pled guilty/nolo contendere to felony counts of insurance fraud, grand theft and patient brokering.

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 4th day of April, 2014, 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,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Marc Chattah, Counsel for Petitioner, 815 Ponce de Leon Boulevard, Suite 203, Coral Gables, Florida 33134 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 4th day of April, 2014.

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

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NANCY MARADEY,

Petitioner,

vs.

STATE BOARD OF ADMINISTRATION,

Respondent.

_____/

Case No. 13-4172

PETIONER'S EXCEPTIONS TO RECOMMENDED ORDER

COMES NOW MARC CHATTAH, Attorney for Petitioner Nancy Maradey, and files the following Exceptions to the Recommended Order:

1. Petitioner takes exception to Paragraph 26. There is no evidence in the record that Petitioner's relationships "developed through her employment at MDT . . . ." Petitioner may have developed these relationships prior to her employment at MDT or through some other venue or activity. Respondent bears the burden of proving how these relationships developed.
2. Petitioner takes exception to Paragraph 27. There is no reason to believe that Petitioner did not already know the other MDT employees before her employment or have access to them or prior knowledge of their physical conditions.
3. Petitioner takes exception to Paragraph 45. Respondent failed to provide any evidence that "but for [Petitioner's] employment with MDT, Petitioner would not have become involve in the criminal activity . . . and she would not have had access to, or enjoyed

relationships with, the other MDT employees . . . ." Respondent failed to provide any evidence that Petitioner did not have prior relationships with other MDT employees.

Respectfully submitted,

MARC CHATTAH

BY: _____

Marc Chattah
Attorney for the Petitioner
Florida Bar #27586
815 Ponce de Leon Blvd. Ste. 203
Coral Gables, Florida 33134
(305) 873-3349

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the above was furnished to Brandice D. Dickson, Pennington, P.A., 215 S. Monroe Street, Suite 200, Post Office Box 10095, Tallahassee, FL 32302-2095, Brandi@penningtonlaw.com by E-Mail on this 29th day of January, 2014.

_____

Marc Chattah
Attorney for the Petitioner

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NANCY MARADEY,

Petitioner,

vs. Case No. 13-4172

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2013), before Cathy M. Sellers, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on December 9, 2013, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Marc Chattah, Esquire
815 Ponce de Leon Boulevard
Suite 203
Coral Gables, Florida 33134

For Respondent: Brandice P. Dickson, Esquire
Pennington, Moore, Wilkinson, Bell and Dunbar, P.A.
215 South Monroe Street
Second Floor
Post Office Box 10095
Tallahassee, Florida 32302-2095

EXHIBIT A

STATEMENT OF THE ISSUE

The issue in this case is whether, pursuant to section 112.3173, Florida Statutes (2012),[1/] Petitioner forfeited her Florida Retirement System ("FRS") Investment Plan account by having pled guilty/nolo contendere to felony counts of insurance fraud, grand theft, and patient brokering.

PRELIMINARY STATEMENT

On or about July 22, 2013, Respondent, the State Board of Administration of Florida ("SBA"), notified Petitioner, Nancy Maradey, that pursuant to section 112.3173, she had forfeited her rights and benefits under the FRS as a result of having pled guilty to insurance fraud, grand theft in the second degree, and patient brokering for acts committed while employed with Miami-Dade County. Petitioner timely requested an administrative hearing and the matter was referred to DOAH for assignment of an Administrative Law Judge ("ALJ") and conduct of a hearing pursuant to sections 120.569 and 120.57(1).

The final hearing was held on December 9, 2013. Respondent presented Petitioner's testimony in its case-in-chief. Petitioner did not call any witnesses in her case-in-chief. Joint Exhibits 1, 2, and 3 were admitted into evidence pursuant to the parties' stipulation. Respondent's Exhibit 1 was admitted into evidence without objection and Respondent's Exhibit 2 was admitted into evidence over objection.

Petitioner's Exhibit 2, a late-filed exhibit, was admitted into evidence without objection. Petitioner's Exhibit 1, also a late-filed exhibit, was not filed with the court and therefore was not admitted into evidence.

The one-volume Transcript was filed on December 27, 2013, and the parties were given ten days, until January 6, 2014, in which to file their proposed recommended orders. The parties timely filed their Proposed Recommended Orders, which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. Petitioner, Nancy Maradey, was employed as a bus driver by Miami-Dade Transit ("MDT"), a unit of Miami-Dade County government, between January 2003 and July 2012.

2. Respondent, SBA, is the entity of Florida state government that administers the FRS Investment Plan, a defined retirement benefits contribution plan.[2/] § 121.4501(1), Fla. Stat.

II. Events Giving Rise to this Proceeding

3. While Petitioner was employed at MDT, she participated in the FRS Investment Plan through her employment with MDT.[3/]

4. Petitioner worked a split shift at MDT. This meant that she would punch in her time card in the morning, drive a route, return to the bus station, punch out her time card,

return in the afternoon, punch in her time card again, and drive another route.

5. While Petitioner was employed at MDT, a co-worker approached her regarding obtaining treatment at AJZ Medical Center ("AJZ"), a clinic located in close proximity to the MDT bus station. This co-worker told Petitioner that if she went to AJZ, she could receive therapy and be paid money for it.

6. Petitioner claimed that she experienced back pain due to having undergone gastric bypass surgery.

7. She sought and received treatment, consisting of massage and electric shock or stimulation, at AJZ on numerous occasions.[4/]

8. It was Petitioner's understanding that AJZ billed an insurance company[5/] for the treatments. When the insurance company paid AJZ, AJZ then paid kickbacks to Petitioner.

9. Petitioner estimated that she received between $5,000 and $6,000 in kickbacks from AJZ for receiving the treatments.

10. An AJZ employee told Petitioner that if she referred others to AJZ for treatment, she would receive additional money from AJZ for those referrals.

11. As a result of that communication, Petitioner referred her co-workers at MDT to AJZ for treatment. She told them that if they were treated at AJZ, they would receive money.

12. Petitioner testified that it is common for bus drivers to have back and knee pain. Petitioner referred to AJZ only co-workers who she knew had injuries.

13. On one occasion, Petitioner accompanied a co-worker to AJZ and informed AJZ personnel that the co-worker was there to receive treatment.

14. Petitioner recruited only her co-workers to receive treatment at AJZ. She did not recruit anyone for treatment at AJZ who was not one of her co-workers at MDT.

15. Petitioner claims that despite being told she would receive money for referring others to AJZ, in fact she did not receive any money for the referrals.[6/]

16. Petitioner and her co-workers were in the MDT bus station when they had discussions during which she referred them to AJZ.[7/] Petitioner told her co-workers it would be easy for them to seek treatment at AJZ because it was close to the bus station.

17. Petitioner was arrested in August 2012 and charged with felony counts of insurance fraud, grand theft, and patient brokering.

18. All of Petitioner's conduct underlying the criminal charges took place while she was employed at MDT.

19. On February 19, 2013, Petitioner entered into a plea agreement in Case No. F-12-20328G,[8/] under which she pled guilty

to felony counts of insurance fraud, grand theft in the second degree, and patient brokering for her actions in seeking treatment and receiving kickbacks from, and referring others to, AJZ for money.

20. One of the conditions of the plea agreement was that Petitioner not seek future employment with state, county, or municipal government.

21. As a condition of the plea agreement, adjudication would be withheld on these offenses if Petitioner cooperated with the State in investigating the matter.

22. On July 22, 2013, Respondent formally notified Petitioner that as a result of her having pled guilty to felony counts of insurance fraud, grand theft, and patient brokering, she violated section 112.3173, which provides for forfeiture of the right to retirement benefits under the FRS upon a plea of guilty or nolo contendere to a specified offense.

23. Petitioner's guilty plea was changed to a plea of nolo contendere on October 17, 2013.[9/]

24. Petitioner admitted that she knew, at the time she committed the offenses to which she pled guilty/nolo contendere, that her actions were wrong.

III. Findings of Ultimate Fact

25. The evidence establishes the existence of a nexus between Petitioner's employment as a bus driver with MDT and her

participation in the crimes to which she pled guilty/nolo contendere.

26. Specifically, Petitioner used the personal and professional relationships with her co-workers that she had developed through her employment at MDT and her consequent knowledge of their conditions—i.e. back and neck pain—to recruit them for participation in the insurance fraud scheme by referring them to AJZ. She recruited only her co-workers at MDT for participation in the scheme, and specifically recruited only those who she knew had pain issues. She went so far as to accompany one of her co-workers to AJZ and inform the staff at AJZ that her co-worker was there for treatment. She engaged in conversations with her co-workers while physically present on the MDT premises during which she recruited them for participation in the scheme by referring them to AJZ.

27. But for her employment with MDT, Petitioner would not have had access to, or enjoyed the relationships with, the other MDT employees she recruited for participation in the criminal scheme, and she would not have had the knowledge of their conditions which made them targets for her recruitment efforts.

28. Throughout all of this, Petitioner knew that her actions were wrong; nonetheless, she continued to engage in those actions. Her actions were thus done willfully and with intent to defraud the public of her faithful performance of her

duties as a bus driver employed by MDT, her public employer. Plainly put, the public had a right to expect that one of its employees would not use the relationships, knowledge, and physical access to public premises and other public employees that she gained through her public employment to commit crimes. The public was defrauded when Petitioner used the relationships, knowledge, and access that she gained through her public employment position to commit crimes.

29. The evidence further establishes that through Petitioner's use of her public employment position, she realized, obtained, and attempted to realize or obtain, a profit and gain. As discussed above, Petitioner was recruited by a fellow co-worker to seek and obtain treatments from AJZ in exchange for monetary kickbacks. Through her employment, she became involved in the insurance fraud scheme and realized financial profit and gain by receiving the kickbacks. She also used her position as an MDT employee to recruit other MDT employees for involvement in the scheme by referring them to AJZ; she did this for the specific purpose of realizing and obtaining financial profit and gain through payments from AJZ in exchange for referring co-workers for treatment.

CONCLUSIONS OF LAW

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

31. In this proceeding, Respondent asserts that Petitioner has forfeited her rights and benefits under the FRS pursuant to section 112.3173.

32. Article II, section 8 of the 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.

33. Section 112.3173, which implements this constitutional provision, 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.

34. As the party asserting that Petitioner has forfeited her rights and benefits under the FRS pursuant to section 112.3173(3), Respondent bears the burden of proof in this proceeding. See Florida Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); see also Balino v. Dep't of Health and Rehab. Servs., 348 So. 2d 349 (Fla. 1st DCA 1977)(party asserting the affirmative of an issue bears the burden of proof).

35. The statutory forfeiture provision at issue in this proceeding, 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).

36. 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.

37. The crimes to which Petitioner pled guilty/nolo contendere are not among the specified offenses enumerated in paragraphs 1. through 5. or 7. of section 112.3171(2)(e).

Accordingly, the issue is whether Petitioner's crimes fall within section 112.3171(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).

38. To constitute a specified offense under section 112.3171(2)(e)6., the criminal act must be: a felony; committed by a public officer or employee; done willfully and with intent to defraud the public or the officer's or employee's public employer of the right to receive the faithful performance of the officer's or employee's duty as a public officer or employee; done to realize or obtain, or attempt to realize or obtain, a profit, gain, or advantage for the officer or employee or some other person; and done through the use of or attempted use of the power, rights, privileges, duties, or position of the officer's or employee's public employment. Id. at 1280-81.

39. To determine whether section 112.3171(2)(e)6. applies to a particular offense, these statutory conditions must be examined and applied in light of the employee's conduct. Id. at 1280. Whether a particular crime meets the definition of a "specified offense" under this 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).

40. There is no dispute that Petitioner was a public employee at the time she committed the acts described above. There also is no dispute that Petitioner pled guilty/nolo contendere to insurance fraud, grand theft in the second degree, and patient brokering; thus, by operation of section 112.3173(2)(a), she is deemed as having been convicted of these offenses, which are felonies. It also is undisputed that Petitioner committed these criminal acts to realize or obtain a profit or gain—specifically, the kickbacks that she received as a result of having treatments at AJZ, and the promise of monetary payments in exchange for referring others to receive treatment at AJZ.[10/]

41. Petitioner contends that two elements of the "catch-all provision" are not satisfied in this case: the requirement that she committed the offenses willfully and with intent to defraud the public or her public employer of the right to receive the faithful performance of her employment duty; and the requirement that the profit, gain, or advantage she realized or obtained, or attempted to realize or obtain, was through the use of the power, rights, privileges, duties, or position of her public employment position.

42. With respect to the first of these disputed elements, Petitioner argues that the only connection between Petitioner's crimes and her employment was that she told other bus drivers,

while at the bus station, that they could receive kickbacks from AJZ for obtaining treatment. Petitioner asserts that she committed the crimes while not working and that her employment as a bus driver was not necessary for the completion of her crimes.[11/] Petitioner argues that under these circumstances, neither the public nor her employer was deprived of her faithful performance of her duty as a bus driver. Petitioner further contends that because the offenses she committed were not "inseparably intertwined" with her position as a bus driver, her employment was incidental to the commission of the crimes and not necessary to successful commission of any criminal act. Thus, Petitioner argues, she did not obtain a profit by use of her position. Neither of these arguments is tenable.

43. For the reasons discussed in detail above, the evidence establishes that Petitioner's actions were done willfully and with intent to defraud the public of the faithful performance of her duties as a public employee. Also as discussed in detail above, the evidence demonstrates a clear connection between Petitioner's employment as a bus driver with MDT, the crimes to which she pled guilty/nolo contendere, and the profit or gain she realized and obtained through committing these crimes. Accordingly, these elements of section 112.3173(2)(e)6., which Petitioner disputed, are satisfied.

44. The circumstances in this case are comparable to those in Bollone v. Dep't of Mgmt. Servs., Case No. 11-3274 (Fla. DOAH Oct. 19, 2011; Fla. DMS Dec. 22, 2011), aff'd , 100 So. 3d 1276 (Fla. 1st DCA 2012). In Bollone, a community college instructor used his work computer to access and download child pornography. As a result of these actions, he pled no contest to possession of child pornography. The Department of Management Services ("DMS") determined that Bollone had forfeited his rights and benefits under the FRS pursuant to section 112.3173(2)(e)6., and Bollone challenged that determination. In his Recommended Order,[12/] the ALJ found that Bollone knew that use of his work computer to access and download child pornography was wrong and violated the college's policies. Thus, Bollone's actions in using the computer to commit the crime were done willfully and with intent to defraud the public and community college of the right to receive the faithful performance of his public duty. The ALJ found that the public and college had a right to expect that Bollone would not use his work computer for criminal activity, and that in doing so, Bollone had breached the public trust. The ALJ also found that Bollone was able to possess child pornography on the computer only through the power, rights, privileges, and position of his employment at the college. Accordingly, Bollone realized or obtained a profit, gain, or advantage to himself through the use of the power,

rights, privileges, duties, or position of his public employment.

45. Here, through her employment with MDT, Petitioner had access to, and developed personal and professional relationships with, other MDT bus drivers. She used these relationships and her knowledge of her co-workers' conditions to engage in criminal activity. Petitioner knew that her actions were wrong, but she did them anyway; in doing so, she willfully, and with intent, defrauded the public of her faithful performance of her duties as a bus driver employed by MDT, her public employer. But for her employment with MDT, Petitioner would not have become involved in the criminal activity to which she pled guilty/nolo contendere, and she would not have had access to, or enjoyed the relationships with, the other MDT employees whom she recruited as part of her engagement in the criminal activity.[13/] Further, Petitioner used her access to, knowledge of, and relationships with other MDT employees specifically to realize and obtain financial profit and gain by receiving kickbacks from AJZ for fraudulent insurance billing, and she attempted to realize or obtain a profit or gain for referring other MDT employees to AJZ in exchange for money. As in Bollone, Petitioner's offenses satisfy all elements of section 112.3173(2)(e)6. and, thus, constitute a "specified offense,"

conviction of which constitutes grounds for forfeiture of her FRS rights and benefits under section 112.3173(3).

46. The conclusion that Petitioner's crimes constitute "specified offenses" pursuant to section 112.3173(2)(e)6. is also supported by other case law. In Newmans v. Division of Retirement, 701 So. 2d 573 (Fla. 1st DCA 1997), the court held that a sheriff's use of the knowledge and information he obtained through his employment to engage in drug trafficking satisfied the requirement in section 112.3173(2)(e)6. that his crime be related to his public employment position. Similarly, in Simcox v. City of Hollywood Police Officers' Retirement System, 988 So. 2d 731 (Fla. 4th DCA 2008) and DeSoto v. Hialeah Police Pension Fund Board of Trustees, 870 So. 2d 844 (Fla. 3d DCA 2003), police officers used knowledge and information they had gained through their employment positions to commit crimes; in both of these cases, the use of this knowledge to commit crimes was deemed sufficient to establish the nexus between the crimes charged and the officer's employment position required by section 112.3173(2)(e)6. Likewise, here Petitioner used the relationships, knowledge, and access she gained through her employment with MDT to engage in the crimes to which she pled guilty/nolo contendere. Pursuant to this authority, it is determined that a nexus exists between Petitioner's employment

position and the crimes she committed sufficient to satisfy section 112.3173(2)(e)6.

47. In sum, the evidence in this case establishes that Petitioner was convicted (by pleading guilty/nolo contendere) of felonies; that she was a public employee; that she committed the crimes willfully and with intent to defraud the public of the right to receive the faithful performance of her duty as a public employee; that she realized, obtained, and attempted to realize or obtain, a profit and gain for herself; and that her criminal acts were committed through the use of her public employment position.

48. Accordingly, the offenses to which Petitioner pled guilty/nolo contendere in this case are "specified offenses" within the meaning of section 112.3173(2)(e)6.

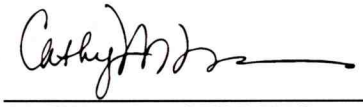
49. As such, all requirements in section 112.3173(3) for forfeiture are met. Petitioner is deemed to have forfeited all of her rights and privileges under the FRS Investment Fund, except for the return of her accumulated contributions as of the date of her termination. See § 112.3173(3), Fla. Stat.

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 she has forfeited all of her rights and benefits under the FRS Investment Fund, except for the return of her accumulated contributions as of the date of her termination.

DONE AND ENTERED this 16th day of January, 2014, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of January, 2014.

ENDNOTES

[1/] SBA took proposed agency action regarding Petitioner's retirement account on July 22, 2013, prior to publication of the 2013 version of Florida Statutes. Section 112.3173 was not amended during the 2013 Legislative Session.

[2/] The FRS is the legislatively-created general retirement system established by chapter 121, Florida Statutes. See § 121.021(3), Fla. Stat. Participants in the FRS include employees of counties. See §§ 121.021(10), 121.051, Fla. Stat.

[3/] The FRS Investment Plan is a defined contribution program for members of the FRS. The employer and employee each make contributions to the FRS Investment Plan Trust Fund to fund the employee's retirement benefits. See § 121.4501, Fla. Stat.

[4/] Petitioner could not recall the precise number of times she received therapy, but estimated that it was more than 50.

[5/] Petitioner believes that AvMed was the insurance company billed for the treatments she received at AJZ.

[6/] It is immaterial that Petitioner was not actually paid for referring her co-workers to AJZ. The persuasive evidence established that she referred co-workers specifically so she would receive money in exchange for the referrals. Section 113.3173(2)(e)6., expressly includes as an element of the "catch all" provision the attempt to realize or obtain a profit, gain, or advantage.

[7/] Petitioner's testimony that she was always "off the clock" when she had conversations with co-workers in which she referred them to AJZ was not credible, but, in any event, was immaterial. As discussed herein, Petitioner's use of the relationships, knowledge, and access that she obtained through her employment as a bus driver for MDT to commit the crimes is determinative in this case.

[8/] The plea agreement was entered in the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida.

[9/] Section 112.3173(2)(a) defines the term "conviction" or "convicted" to include a plea of guilty or nolo contendere.

[10/] See supra note 6.

[11/] Petitioner notes that there is no evidence in the record that she stole passenger fares or failed to complete any requirements associated with her job as a bus driver. For the reasons discussed herein, this is not material to, or determinative of, whether she used her public employment position to realize a profit or gain.

[12/] DMS adopted the Recommended Order in toto as its Final Order. The final order was affirmed on appeal.

[13/] Here, as in Bollone, Petitioner's employment provided the necessary means for her to commit the crimes.

COPIES FURNISHED:

Marc Chattah, Esquire
Suite 203
815 Ponce de Leon Boulevard
Coral Gables, Florida 33134

Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell and Dunbar, P.A.
215 South Monroe Street, Second Floor
Post Office Box 10095
Tallahassee, Florida 32302-2095

Ash Williams, Executive Director and Chief
Investment Officer
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Post Office Box 13300
Tallahassee, Florida 32317-3300

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.