STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

DAVID MORAN, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	DOAH Case No. 17-5785 SBA Case No. 2015-3304

FINAL ORDER

On May 15, 2018, Administrative Law Judge Hetal Desai (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. Respondent timely filed a Proposed Recommended Order. Petitioner did not timely file a Proposed Recommended Order, but since no objection was made to the late filing, it was considered by the ALJ in formulating her Recommended Order. Petitioner timely filed exceptions on May 30, 2018. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs.

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 "ALJ" 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 an ALJ's 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 1993). 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.

A review of whether competent substantial evidence supports a given finding "is not done by mechanically combing the transcript for words and phrases of testimony..., but rather by considering the whole record, including the [ALJ's] findings." *McDonald v. Dep't of Banking & Finance*, 346 So.2d 569, 578-579 (Fla. 1st DCA 1977).

Pursuant to Section 120.57(1)(l), Florida Statutes, 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 the "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the ALJ's application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the ALJ's interpretation of a statute or rule over which the Legislature has provided the agency with administrative authority. *See Deep Lagoon Boat Club, Ltd. v. Sheridan,* 784 So.2d 1140, 1141-42 (Fla. 2d DCA 2001); *Barfield v. Dep't of Health*, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001). When rejecting or modifying any conclusion of law, the reviewing agency must state with particularity its reasons for the rejection or modification and further must make a finding that the substituted conclusion of law is as or more reasonable than that which was rejected or modified. Further, an agency's interpretation of the statutes and rules it administers is entitled to great weight, even if it is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. *See, State Bd. of Optometry v. Fla. Soc'y of Ophthalmology*, 538 So.2d 878, 884 (Fla. 1st DCA 1998). An agency's interpretation will be rejected only where it is proven such interpretation is clearly erroneous or amounts to an abuse of discretion. *Level 3 Communications v. C.V. Jacobs*, 841 So.2d

447, 450 (Fla. 2002); *Okeechobee Health Care v. Collins*, 726 So.2d 775 (Fla. 1st DCA 1998).

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

Summary of the Argument

Petitioner's Exceptions begin with an approximately two (2) page summary. This summary does not clearly identify the disputed portions of the Recommended Order by page number(s) or paragraph(s) and does not include appropriate and specific citations to the record. As such, it is not necessary to rule on the Summary of Legal Argument. Section 120.57(1)(k), Florida Statutes. However, it does not appear that Petitioner is actually asking for a ruling on the summary, since specific exceptions follow. The summary appears to be Petitioner's effort to supply context to his exceptions and to the legal argument following the exceptions.

Petitioner's Exception 1: Finding of Fact 7-

Petitioner objects to the statement that all of Department of Correction Employees at the Reception and Medical Center at Lake Butler ("Center") knew about the altercation between Inmate Mr. Warren Williams and DOC Corrections Officer Thomas Driver

Petitioner argues that Federal Agent Vaughn provided testimony that there was no indication that Petitioner knew who Mr. Williams was. However, paragraph 17 of

Petitioner's own Proposed Recommended Order states that: "Moran found out about an assault on Driver by an inmate [Warren Williams] either by **Driver** telling Moran or by just hearing about it as everyone at the Facility probably heard about it" [emphasis added]. Further, during the DOAH hearing, Petitioner agreed, under oath, that the transcript from his conspiracy trial sets forth the fact that Petitioner had responded in the affirmative when asked if he knew about the fight Mr. Driver had with Mr. Williams. [DOAH Hearing Transcript, p. 55, lines 18-25; p. 56, lines 1-21; R-6, page 1003, lines 1-25, p. 1004, lines 1-3; page 1036, lines 20-24] At no point either during the conspiracy trial or the DOAH hearing did Petitioner state that while he knew about the altercation, he had no idea as to the identity of the inmate involved in the altercation with Mr. Driver. The best evidence as to what Petitioner knew or did not know would come from Petitioner himself, not what someone else, such as Federal Agent Vaughn, thought Petitioner knew or did not know. Further, the SBA cannot reweigh evidence since this evidentiary matter is within the purview of the ALJ. *See, 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 1993).

This is a situation in which Petitioner is mechanically combing the transcript for words and phrases of testimony to support his position, rather than by "...considering the whole record, including the [ALJ's] findings." *McDonald v. Dep't of Banking & Finance*, 346 So.2d 569, 578-579 (Fla. 1st DCA 1977).

There is substantial competent evidence to show Petitioner did know who Mr. Williams was. Accordingly, Exception 1 hereby is rejected.

Petitioner's Exception 2: Finding of Fact 8-

Petitioner objects to the finding that Petitioner, Mr. Driver and Mr. Newcomb believed inmate Williams had a contagious medical condition and intentionally bit Mr. Driver to infect him.

Petitioner again argues that sworn testimony of Federal Agent Vaughn was that Petitioner did not know who Mr. Williams was. However, as noted in the response to Exception 1, based on a consideration of the entire record, there is substantial competent evidence in the record to show that Petitioner did know who Mr. Williams was. In addition, there is competent substantial record evidence showing that Petitioner and his purported co-conspirators did believe Mr. Williams had a contagious medical condition. Mr. Driver referred to Mr. Williams as being "dirty" and stated that Mr. Williams tried to pass on that condition to him. [R-13, page 2, lines 13-24]. Petitioner stated during a conversation on January 30, 2015 with Mr. Moore and Mr. Newcomb that Mr. Williams was "Hepatitis and aids and HIV." [R-11, page 14, lines 24-25].

There is competent, substantial evidence to support this Finding of Fact. Accordingly, Petitioner's Exception 2 hereby is rejected.

Petitioner's Exception 3: Finding of Fact 10-

Petitioner argues that the race of Petitioner and his alleged co-conspirators was not established.

Petitioner argues that the race of Joe Moore, Mr. Driver and Petitioner was never established in the record and that this "fact" was "...based upon innuendo."

However, the Recommended Order does not conclude what the race of Petitioner, Mr. Moore and Mr. Driver actually is. The Recommended Order simply notes that the race

of such individuals is "not apparent from the record." That statement is true and Petitioner even agrees with that finding when Petitioner notes in his exception that the race of the named individuals was "never established in the record." Finding of Fact 10 does note that all three named individuals were "members of a local KKK chapter," but does not make any specific conclusions from the fact of their membership. And, in fact, Petitioner testified during the DOAH hearing that the particular faction of the KKK to which Petitioner and his alleged co-conspirators belonged did not believe that the white race is a superior race. [DOAH Hearing Transcript, page 64, lines 3-14]. Further, Petitioner affirmatively stated that he would not belong to an organization that was a "racist organization." [DOAH Hearing Transcript, page 64, lines 15-20]. There is substantial competent evidence in the record to support the conclusion that Petitioner, Mr. Moore and Mr. Driver were indeed members of a local KKK chapter. [DOAH Hearing Transcript, page 45, lines 1-11; page 64; R-1, paragraph 8].

It further should be noted that Endnote #4 of the ALJ's Recommended Order states that whether Petitioner was a member of the KKK or a racist, and whether the KKK is a white supremacy group, "... has no bearing on whether he violated section 112.3173(2)(e)." The ALJ states that Petitioner made the KKK "the focus of his defense," so that is why the Recommended Order even mentioned the KKK.

There is competent, substantial evidence to support this finding of fact in paragraph 10. Accordingly, Petitioner's Exception 3 hereby is rejected.

Petitioner's Exception 4: Finding of Fact 14-

Petitioner argues the entire finding is mere speculation.

Petitioner objects to the statements in this finding of fact that state Mr. Driver and Petitioner both showed Mr. Moore a picture of an African-American male on an 8x10 paper that appeared to have been generated by a database. Petitioner further objects to the finding that Mr. Moore believed the picture was of an inmate that Petitioner and Mr. Driver wanted him to kill.

During the conspiracy trial, Mr. Moore testified that on December 6, 2014, he went to a KKK meeting that was attended by Driver, Newcomb and Petitioner. [R-6, page 415, lines 5-25; page 416, lines 1-20]. At that meeting, Driver and Moran were standing together, and both were about four or five feet away from Newcomb, when a photograph was proffered to Moore. Petitioner told Moore that Driver had a situation and asked Driver to tell the story. [R-6, page 417, line 11, lines 19-25]. Driver did pull out a photograph, while standing next to Petitioner, after Petitioner told him to tell the story. In response, Moore "...asked them specifically what are you bringing this [the photograph] to me for." [emphasis supplied] [R-6, page 420, lines 4-7]. Obviously, an eight by ten inch photograph does not have to be physically handled by more than one person at a time- that is, it is not an unwieldly document. However, it was clear to Moore that both Petitioner and Driver wanted Moore to do something to the person in the photograph that was presented to him. [R-6, page 420, lines 9-25; page 421, lines 1-23]. Moore testified that when he took a look at the picture, he saw "... a picture of an inmate." [R-6, page 419, lines 13-19]. In response to a question from Moore to Petitioner and Driver as to whether they wanted the person in the photograph "six feet under," Moore testified: "[t]hey look at each other and say yes." [R-6, page 422, lines 14-15, emphasis added]. Thus, both Petitioner and Driver wanted Moore to see the photograph so Moore would know whom they wanted him to kill or at least harm.

There is substantial competent record evidence to support the findings of fact in paragraph 14. Accordingly, Petitioner's Exception 4 hereby is rejected.

Petitioner's Exception 5: Finding of Fact 17-

Petitioner claims that the finding that Petitioner met with Mr. Newcomb and Mr. Moore at a prearranged location and time for the purpose of taking a drive to the area of Mr. Williams' home is inaccurate.

The transcript of the January 30, 2015 meeting starts with Mr. Newcomb mentioning that Petitioner had overslept and would be on his way. [R-11, page 1, lines 6-11]. Thus, Petitioner was going to be attending a pre-arranged meeting among him, Mr. Moore and Mr. Newcomb and he was concerned about running late. In fact, Petitioner apologized for running late because the alarm clock on his cell phone did not go off. [R-11, page 11, lines 16-22]. When Petitioner arrived to the prearranged meeting with his co-conspirators, he asked how long they were going to be gone and then he said: "Let's ride brother." [R-11, page 10, lines 16-23]. As the parties are getting into Newcomb's vehicle, he specifically asked if they were "... going to grab him, go grab him now." [R-11, page 13, lines 1-8]. Thus, it is clear that Petitioner was aware that they were going to go on a ride at least to try to do something to Mr. Williams. When Newcomb talks about setting up a fishing pole that he had brought along and placing Mr. Williams beside it after giving Mr. Williams a few shots of insulin, Petitioner asks if Mr. Williams actually does go fishing since the staged scene might appear suspicious otherwise. [R-11, page 15, lines 1-15]. Petitioner further asks if Mr. Williams lives in "government subsidized housing" [R-11, page 16, lines 2-22]. The co-conspirators read off house numbers once they arrived at their destination and they

determined the location of house "219." Thus, they did "kind of know" where Mr. Williams lived after their January 30, 2015 car ride. [R-6, page 488, lines 17-25; page 489, lines 1-3; R-12, page 10, lines 1-3]. In response to a question from his own counsel at the DOAH Hearing, Petitioner testified he believed that Mr. Newcomb and Mr. Moore knew where Mr. Williams lived, even if he did not. [DOAH Hearing Transcript, page 47, lines 9-12].

There is substantial competent evidence to support the findings in Finding of Fact 17. Petitioner's Exception 5 hereby is rejected.

Exception 6: Finding of Fact 18-

Petitioner argues this finding "mischaracterizes" the transcript of the January 30, 2015 car ride

Petitioner argues that the finding that Petitioner made assurances that Mr. Driver was working the night shift on January 30, 2015 was incorrect. Petitioner argues that Petitioner did not know when Driver would actually be working. However, Petitioner does not cite the entire relevant portion of the transcript. On page 19, lines 1-4 of R-11, Newcomb asked Petitioner whether Driver would be working that night. Petitioner responded in the affirmative. Newcomb concludes with: "[h]e'll be working at 6:00 o'clock tonight." *Id.* There is substantial competent evidence to support a conclusion that Petitioner had knowledge of Driver's work schedule and that the work schedule was important to the planning of the murder since there was a significant amount of discussion about Driver's work schedule.

There is competent, substantial evidence to support this Finding of Fact. Accordingly, Petitioner's Exception 6 hereby is rejected.

Petitioner's Exception 7: Finding of Fact 19-

Petitioner objects to the finding that Petitioner knew the purpose of the drive was to attempt to kill Mr. Williams.

On January 30, 2015, before Petitioner joined Mr. Newcomb and Mr. Moore, Mr. Newcomb had discussed putting insulin in an ice chest since they did not want it to get warm and thereby be ineffective. [R-11, page 5, lines 15-25]. Newcomb stated during the drive with Petitioner in the car that he brought insulin to inject into Mr. Williams if the opportunity presented itself. [R-11, page 13, lines 1-8]. Petitioner responded that "we should send a message." [R-11, page 13, lines 11-14]. Newcomb mentions he has three masks if they are able to capture Williams, take him to the river, and shoot him up with insulin. [R-11, page 14, lines 14-23]. The purpose of the masks was to protect the co-conspirators from the transmission of any blood borne disease(s) because Petitioner noted Williams was "...hepatitis and aids and HIV." [R-11, page 14, lines 24-25]. Petitioner mentions if they want to do a "complete disposal," it will be necessary to "chop up the body." [R-11, page 15, lines 13-15].

Thus, there is substantial competent evidence to show that the drive was to provide the opportunity to the co-conspirators, including Petitioner, to kill Mr. Williams if they could do so without being observed. They took along a means by which to kill Mr. Williams (i.e., insulin) and they brought along a means to protect themselves from any communicable diseases that Mr. Williams had. The co-conspirators simply were not going on a ride for solely observation purposes.

There is competent, substantial evidence to support the findings of fact in paragraph 19. Accordingly, Petitioner's Exception 7 hereby is rejected.

Petitioner's Exception 8: Finding of Fact 19-

Petitioner claims Petitioner did not know who Mr. Williams was or that he had a contagious disease.

Petitioner objects to the finding that Petitioner knew Mr. Williams had a contagious infection or disease, because Petitioner states that based on the testimony of a federal agent, Petitioner did not know who Mr. Williams was. However, as stated on the response to Petitioner's Exceptions 1 and 2, there is substantial competent evidence in the record to show that Petitioner did know who Mr. Williams was. Paragraph 17 of Petitioner's own Proposed Recommended Order states that: "Moran found out about an assault on Driver by an inmate [Warren Williams] either by Driver telling Moran or by just hearing about it as everyone at the Facility probably heard about it." Further, during the DOAH hearing, Petitioner agreed, under oath, that the transcript from his conspiracy trial sets forth the fact that Petitioner responded in the affirmative when asked if he knew about the fight Mr. Driver had with Mr. Williams. [DOAH Hearing Transcript, p. 55, lines 18-25; p. 56, lines 1-21; R-6, page 1003, lines 1-25, p. 1004, lines 1-3; page 1036, lines 20-24] At no point either during the conspiracy trial or the DOAH hearing did Petitioner state that while he knew about the altercation, he had no idea as to the identity of the inmate involved in the altercation with Mr. Driver. In fact, Petitioner testified that, during the January 30, 2015 car ride, either Mr. Moore or Mr. Newcomb brought up the name of Warren Williams when they were in the truck and on their way to look for Warren Williams and to perhaps kill him. [DOAH Hearing Transcript, page 46, lines 24-25; page 47, lines 1-2; see also, Petitioner's Proposed Recommended Order, paragraph 37]. The best evidence as to what Petitioner

knew or did not know would come from Petitioner himself, not what someone else, such as Federal Agent Vaughn, thought Petitioner knew or did not know.

Further, the SBA cannot reweigh evidence since this evidentiary matter is within the purview of the ALJ. *See, 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 1993).

In addition, there is record evidence showing that Petitioner and his purported co-conspirators did believe Mr. Williams had a contagious medical condition. Mr. Driver referred to Mr. Williams as being "dirty" and stated that Mr. Williams tried to pass on that condition to him. [R-13, page 2, lines 13-24]. Petitioner stated during a conversation on January 30, 2015 with Mr. Moore and Mr. Newcomb that Mr. Williams was "Hepatitis and aids and HIV." [R-11, page 14, lines 24-25].

There is competent, substantial evidence in the record to support this Finding of Fact. Accordingly, Petitioner's Exception 8 hereby is rejected.

Petitioner's Exception 9: Finding of Fact 22-

Petitioner objects to the finding that Petitioner agreed to pull Mr. William's photo from the prison database.

After it was clear that the co-conspirators were not going to see Mr. Williams during the January 30, 2015 car ride, Mr. Newcomb indicated that he wanted to get a picture of Mr. Williams and asked Petitioner to "...go to work and pull up his recent picture when he got out of the pen." [R-12, page 10, lines 15-18]. While Petitioner may not have actually pulled up Mr. Williams' picture at work, he acknowledged he would be willing to do so if needed.

The finding that Petitioner agreed to pull up Mr. Williams' photograph from Petitioner's place of work data base is supported by competent, substantial evidence. Accordingly, Petitioner's Exception 9 hereby is rejected.

Petitioner's Exception 10: Finding of Fact 30-

Petitioner argues the findings that Petitioner offered to bring along a gun on the January 30, 2015 ride, offered advice on how to set up an attack on Mr. Williams and to dispose of Mr. Williams' body are distortions of the transcript.

When Petitioner met with Moore and Driver right before the car ride, he asked if he needed anything. Moore responded, "[t]hat's up to you, entirely up to you. Um He's got some things and we got something put together so--." Petitioner pulled out a nine-millimeter gun that had been borrowed by a co-worker, and inquired whether such an item would be needed. Petitioner had the weapon and would bring it along if requested. Thus, Petitioner did offer to bring along the gun. [R-11, pages10, lines 5-21]. When the car ride was going on, Newcomb told the group that they could grab Williams, give him some shots of insulin (that had been placed in a cooler so it would not spoil), place Williams by a river and set up a fishing pole. Petitioner asked if Williams does go fishing and indicated that whether Williams actually did fish "matters" because the placement of Williams would look suspicious otherwise. [R-11, page 15, lines 1-15]. Petitioner then noted if the group had wanted to do a "complete disposal" of Mr. Williams' body, they would have to "chop up the body." [R-11, lines 13-15].

There is substantial competent evidence to support the findings in paragraph 30, when the record evidence is viewed as a whole, rather than picking out certain words and

phrases of testimony. *See, McDonald v. Dep't of Banking & Finance*, 346 So.2d 569, 578-579 (Fla. 1st DCA 1977). Accordingly, this exception hereby is rejected.

Petitioner's Exception 11: Finding of Ultimate Fact 37-

Petitioner argues that he did not realize a profit, gain or advantage from his conduct

Petitioner claims there is nothing in the record to reflect that the Petitioner knew "informant Moore" was going to kill Mr. Williams or that he wanted camaraderie from Mr. Driver.

However, testimony of Mr. Moore during the conspiracy trial indicated as early as December 6, 2014, Petitioner and co-conspirator Newcomb had approached Mr. Moore and has told him they wanted Williams "six feet under." [R-6, pages 415-422; page 456]. The transcript of the conversations among Petitioner, Mr. Moore and Mr. Newcomb during the January 30, 2015 car ride shows that Petitioner was a willing participant in the discussions with Mr. Newcomb and Mr. Moore as to the available methods for killing Mr. Williams, such as overdosing him with insulin and laying him face down in the river, chopping up Mr. Williams' body, and removing Mr. Williams' "thinking cap." [R-11, page 14, lines 1-21; page 18, lines 1-3]. Further, Petitioner told his alleged co-conspirators that the murder should "send a message." [R-11, page 13, lines 11-14]. On February 16, 2015, Driver told Moore he wanted to "stomp [Mr. Williams'] larynx closed" because Mr. Williams had bitten him and he therefore had to endure nine months of blood work because Mr. Williams was "dirty." [R-13, page 2, lines 14-25; page 3, lines 1-22]. Because of what Williams had done to Driver, and how Driver felt about what had happened to him, Petitioner was willing to engage in the murder or attempted murder of Mr. Williams. [R-11; R-12; R-14]. To protect Driver from suspicion, Petitioner and his alleged other co-conspirators ensured that

they knew Driver's work schedule so that Mr. Driver would have an alibi if they were able to effectuate the murder of Williams. [R-11, page 19, lines 1-4]. Petitioner's conduct in trying to effectuate the murder of Mr. Williams and in trying to ensure Driver would not be suspected would cause Petitioner to violate the oath he took as a sworn law enforcement officer. [DOAH Hearing Transcript, page 59, 22-25; page 60, lines 1-11].

On March 19, 2015, when Moore showed Petitioner a staged photograph that made it appear as if Mr. Williams had been murdered, Petitioner expressed gratification from the crime. Petitioner indicated he was happy with the murder and how it played out. He also verified that the murder was a group effort. Petitioner stated that: "[t]his was me, you [Moore] and Brother Thomas [Driver] and I guess Charles [Newcomb]. [R-17, pages 2-3].

Thus, there is substantial competent evidence from the record that Petitioner wanted Mr. Moore to be involved with the murder of Mr. Williams because of what Mr. Williams had done to his acquaintance, Driver, and that Petitioner wanted the murder to "send a message" presumably to other inmates that if they took similar action against a corrections officer, they might end up harmed or dead.

Accordingly, Petitioner's Exception 11 hereby is rejected.

Petitioner's Exception 12: Finding of Ultimate Fact 38:

Petitioner objects to the statement that he used the rights, powers, privilege and knowledge to facilitate the crime for which he was convicted.

Petitioner knew Driver and Newcomb from work. They all were correctional officers that either were working, or had worked, at the same prison at the time of the alleged conspiracy. As noted above in response to Petitioner's Exception 11, Driver told Moore he wanted to "stomp [Mr. Williams'] larynx closed" because Mr. Williams had

bitten him when Mr. Williams was incarcerated and, therefore, Driver had to endure nine months of blood work because Mr. Williams was "dirty." [R-13, page 2, lines 14-25; page 3, lines 1-22]. Because of what Williams had done to Driver, and how Driver felt about what had happened to him, Petitioner was willing to engage in the murder or attempted murder of Mr. Williams with his alleged co-conspirators. [R-11; R-12; R-14]. To protect Driver from suspicion, Petitioner and his alleged other co-conspirators ensured that they knew Driver's work schedule so that Mr. Driver would have an alibi if they were able to effectuate the murder of Williams. [R-11, page 19, lines 1-4].

Mr. Newcomb had asked Petitioner to obtain a recent picture of inmate Williams so they could be sure they were attempting to kill the correct individual. Newcomb told Petitioner to go to work and "...pull up his recent picture when he got out of the pen." [R-12, page 10, lines 15-18]. While Petitioner may not have actually pulled up Mr. Williams' picture at work, he acknowledged he would be willing and able to do so if needed.

Petitioner and his co-conspirators knew personal medical information about Mr. Williams from the fact of their employment. This knowledge facilitated their commission of the crime since they knew to take precautions so that they would not be infected if they succeeded and the killing was bloody. This confidential medical information is not something to which the general public, including members of the KKK, would have access. When Petitioner went on the January 30, 2015 ride with Moore and Newcomb, Mr. Newcomb stated he had three masks if they could "grab" Williams. Petitioner stated in response: "[b]ecause you know he's – he's Hepatitis and aids and HIV." [R-11, page 14, lines 4-25]. Later, Petitioner mentioned that when he had told Newcomb the other day about removing Williams' "thinking cap" he was concerned as there would be a lot of blood and

Williams was "hepatitis C." [R-11, page 18, lines 1-3]. Petitioner had testified during the DOAH Hearing that, as a correctional officer, he had been physically attacked, spit upon and bitten, and that such types of attacks were "... an every day occurrence." [DOAH Hearing Transcript, page 44, lines 2-13]. Petitioner testified that he had been exposed to tuberculosis and had to "... take the cocktail. [R-6, page 1002, lines 14-16]. Petitioner noted that whenever a corrections officer is attacked, the officer may have a physical or be transported to the hospital." [R-6, page 1002, lines 20-24]. Thus, it would seem that their employer would have an obligation to let them know of any contagious medical conditions that inmates have and that could be passed on to the corrections officers so that they could take appropriate precautions and get timely, effective treatments. In fact, Driver did undergo treatment for hepatitis after having been bitten by Williams. The hospital told Driver and the other corrections officers that Williams was "dirty." [R-13, page 2, lines 12-24].

Accordingly, there is substantial competent record evidence that Petitioner used rights, powers, privilege and knowledge to facilitate the crime for which he was convicted. As such, Petitioner's Exception 12 hereby is denied.

Petitioner's Exception 13: Finding of Ultimate Fact 33-

Petitioner objects to the finding of a nexus between his public employment and the crime for which he was convicted.

Petitioner emphasizes the testimony of two federal FBI agents in response to a question as to whether the crime of conspiracy to commit murder had "anything to do with" Petitioner's and Mr. Driver's employment. [See, Petitioner's Exhibit 6, page 81, lines 13-22]. That question could mean anything- that is, it could mean whether the specific duties

of their DOC employment involved activities that could ultimately lead to conspiracy to commit murder. The testimony was not unequivocal. When asked if the co-conspirators utilized their employment to assist the criminal activity, Agent Campbell replied: "Not specifically." [P-6, page 81, lines 13-16]. When asked if the conspiracy was related to KKK activities, the response was: "I **guess** you could say that." [P-6, page 81, lines 17-22]. The agents never were asked to respond to the question as to whether a criterion of the Florida forfeiture statute was met by Petitioner's actions; namely, whether Petitioner's alleged crime was committed "through the use or attempted use of the power, rights, privileges, duties, or position of his … public office or employment position." *See*, Section 112.3173(2)(e)6., Florida Statutes.

Petitioner never qualified either federal agent as an expert on Florida law, and especially on the forfeiture statute, Section 112.3173, Florida Statutes. The affidavit of Agent Campbell stated that he engages in the "prevention, detection, investigation or prosecutions of Federal criminal law" and further for "enforcing Federal Criminal Statutes under the jurisdiction of the FBI." [R-1, page 1, emphasis added].

Petitioner argues that the transcript of the January 30, 2015 car ride simply showed some "tough talk" among a "bunch of guys" and that there was no real plan to kill Williams [DOAH Hearing Transcript, page 53, 13-25; page 54, lines 1-4; page 62, lines 6-25]. However, Petitioner admitted that he knew that particular car ride was connected to something that his co-conspirators wanted to do to Warren Williams. [DOAH Hearing Transcript, page 46, lines 24-25; page 47, lines1]. During that car ride, Petitioner and Mr. Newcomb specifically discussed how the murder of Mr. Williams could be effectuated, such as by overdosing him with insulin, placing him face down in the river and staging the scene

to make it appear as if Mr. Williams had a medical event while fishing; or by removing Mr. Williams' "thinking cap;" or by "chopping up" Mr. Williams' body. [R-11, pages 14-15; page 18, lines 1-3]. A cooler containing insulin and some needles was brought along to use in the murder if the opportunity presented itself, as well as a fishing pole to aid in staging the murder. [R-11, page 5, lines 15-25; page 7, lines 8-25; page 8, lines 1-4]. In addition, because Mr. Williams may have had one or more blood-borne diseases, a fact that Petitioner and his co-conspirators only knew because of Mr. Williams' incarceration, the co-conspirators took the precaution of bringing along masks to protect them from disease if the killing was bloody. [R-11, page 14, lines 22-25].

The reason expressed by Petitioner during the car ride for the attempt to kill Mr. Williams was to "send a message" since Williams, while incarcerated, attacked and attempted to transmit a disease to Mr. Driver. [R-11, page 13, lines 11-14]. Petitioner knew Driver because of his employment as a corrections officer at the same facility at which Petitioner worked. [DOAH Hearing Transcript, pages 54 and 56].

Petitioner argues that Mr. Williams was not incarcerated at the time the alleged conspiracy to commit murder took place. However, at a minimum, it would violate the oath that Petitioner and his co-conspirators took as corrections officers to murder a prison inmate and to conceal the murder in the prison facility. Also, due to the presence of other corrections officers in the same facility, all of whom took an oath under the DOC Code of Conduct, it is likely at least some of the other corrections officers would have tried to stop the murder of Mr. Williams by Petitioner and his co-conspirators and would be obligated to report an attempted murder at the facility. [Recommended Order, Endnote 2, DOC Code of Conduct]. It should be noted, though, that while Mr. Williams was not an inmate at the time

the co-conspirators plotted his murder, he was under DOC supervised release. [R-1, paragraph 8].

While Petitioner again argues that the attempted killing was a private matter by a member of the KKK, the ALJ found in Endnote #4 of her Recommended Order that whether Petitioner was a member of the KKK or a racist, and whether the KKK is a white supremacy group, "... has no bearing on whether he violated section 112.3173(2)(e)." Petitioner specifically had testified that he was not a racist and that the KKK chapter to which he belonged is not a racist organization. [DOAH Hearing Transcript, page 64, lines 3-20].

The SBA cannot reweigh evidence since this evidentiary matter is within the purview of the ALJ. *See, 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 1993). The ALJ had the testimony of the two federal agents available when she formulated her Recommended Order as well as all other documents produced during the hearing and the testimony of Petitioner. There is substantial competent evidence to support the findings in paragraph 33. According, this exception hereby is rejected.

Petitioner's Exception 14:

Petitioner objects to Findings of Fact 8, 14, 16, 17, 19, 20, 22, 23, 24, 27, 28, 29 and 30 to the extent such findings set forth any knowledge the Petitioner had concerning Mr. Williams.

Petitioner makes the statement there is no evidence to support any findings that imply Petitioner knew Williams, what he knew about Mr. Williams and when he knew it. However, as discussed previously, in the response to Petitioner's Exceptions 1, 2 and 8, there is substantial competent evidence in the record, using Petitioner's own testimony, to

show Petitioner did know who Mr. Williams is, that Mr. Williams was an inmate at the correctional facility at which Petitioner and his fellow co-conspirators were employed and that Mr. Williams was involved in an altercation with Mr. Newcomb, one of Petitioner's co-conspirators.

Accordingly, Petitioner's Exception 14 hereby is denied.

Argument

The statements contained in the first two paragraphs of Petitioner's "Argument" have been addressed in the various responses to Petitioner's fourteen enumerated exceptions and will not be re-addressed here.

Petitioner then states that his case is "analogous" to the case *Rivera v. Board of Trustees of the City of Tampa's General Employment Retirement Fund*, 189 So.3d 207 (Fla. 2d DCA 2016). Presumably, this legal argument is intended to apply to the fourteen enumerated exceptions. Petitioner states that, as in *Rivera*, the record evidence in his case "... is replete with misstatements of the record, speculation and impermissible stacking of inferences regarding what Petitioner knew or didn't know, when he did or did not know it, about whom and what information, if any, he obtained from his employment at DOC."

However, such reliance on *Rivera* is misplaced as the facts and circumstances involved in *Rivera* are vastly different from those involved in the instant matter.

Rivera involved a public employee of a city's Wastewater Department who pled guilty to unlawful sexual contact with minors. The conduct allegedly occurred on city-owned property. There was no evidence that any of the minors allegedly abused by Mr. Rivera were children of his co-workers. Further, there is no evidence that any of the duties and responsibilities of Mr. Rivera's public position involved the care and custody of minors.

The case held that Mr. Rivera did not commit the offense(s) through the use or attempted use of his powers, rights, duties or position—that is, there was no "nexus" between the offense(s) and Mr. Rivera's public position. *Id.* at 211.

An employee of a city wastewater department does not have access to minors by virtue of his public position. No duties and responsibilities of such a position entail interacting with, protecting or supervising minors. Such an individual's employer does not entrust minors to his oversight and care. Minors are not ordinarily present at city wastewater treatment facilities. Contrast that situation to that of the instant situation in which Petitioner was a guard at a prison in which Mr. Williams had been physically present as an inmate and at which Petitioner's acquaintance, and alleged co-conspirator, was attacked. Petitioner testified that his job duties at the correctional facility were the "[c]are, custody and control of inmates." [DOAH Transcript, page 43, lines 18-20].

The court in *Rivera* noted that there was no non-hearsay evidence proffered that would prove Mr. Rivera's crimes occurred on city property. As noted previously, such proof as to where the crimes occurred was critical to finding that forfeiture would be appropriate, as it was the only link between the alleged crimes and Mr. Rivera's public employment.

In the instant situation, there was testimony produced as well as recordings of conversations between Petitioner and his co-conspirators, that showed the interactions these individuals had concerning an orchestrated retaliation against an inmate, Mr. Williams, who had been in the exact same corrections facility where the co-conspirators worked or had worked. One of the co-conspirators had been attacked in that facility by Mr. Williams and perhaps was infected with a communicable disease carried by Mr. Williams. While

Petitioner argues that no action to harm Mr. Williams was attempted while Mr. Williams was an actual inmate, Mr. Williams was on supervised release when the plotting of the murder by Petitioner and his co-conspirators occurred. [R-1, paragraph 8].

It might have been difficult for Petitioner and his co-conspirators to carry out a murder or attempted murder of an inmate at the correctional facility at which they worked or had worked. However, just because the conspiracy to commit murder occurred off the employer's premises, does not mean that forfeiture would not be appropriate. There have been numerous cases that have found a sufficient nexus between the crime and public employment to require forfeiture where the specified offense did not occur at the public employee's actual place of employment. For example, *Michael Lander v. State Board of Administration*, Case No. 2013-2912, Final Order issued January 5, 2015; *per curiam affirmed*, Case No. 1D15-468, 175 So.2d 289 (Table), (Fla. 1st DCA 2015), involved a situation in which a public school teacher, Mr. Lander, convinced the mother of one of his fifth grade students that the student needed significant tutoring and that it would be better if the child lived with him and his wife at their home during the tutoring sessions. Once the child moved into his home, Mr. Lander resigned his public position and began sexually abusing the child. The Final Order found that because Mr. Lander used his public employment to gain access to the student and to aide in the commission of the charged felonies of Sexual Activity while in Custodial Authority, there was sufficient nexus between the public employment and the crime committed.

Charles Bullock v. State Board of Administration, DOAH Case No. 14-2616, SBA Final Order issued, December 10, 2014; *per curiam affirmed*, Case No. 1D14-5806, 177 So.3d 352 (Table), (Fla. 1st DCA 2015) involved a situation in which a deputy sheriff with

the Sheriff's Civil Process Unit routinely met other deputies in a shopping mall for the convenience of the unit to discuss business. The deputies received full compensation for these meetings. The meetings were located near a food court bathroom that Mr. Bullock frequented and utilized to engage in the sexual abuse of a minor who spent time in the mall after school while waiting for his mother to end her workday. Because Mr. Bullock received full compensation and benefits and was able to use the regularly-scheduled business meetings required of someone in his position as an opportunity to go to the shopping mall in his patrol car to have access to a minor who was also at the mall at or about the same time as the meetings were occurring, Mr. Bullock was found to have used the power, rights and privileges of his particular positon with the Sheriff's office to realize the personal gain, benefit or advantage of sexual gratification. Thus, a sufficient nexus was found to have existed between Mr. Bullock's public employment and the offense committed.

Maradey v. State Board of Administration, DOAH Case No. 13-4172, 2014 WL 212169 (Recommended Order, Fla. Div. Admin. Hrgs. January 16, 2014), adopted by the SBA Final Order issued April 4, 2014, 2014 WL 1391038, involved the situation in which a bus driver of Miami-Dade Transit ("MDT") solicited her fellow bus drivers to engage in insurance fraud by having treatments at a clinic located near their place of employment and by receiving kickbacks from, and referring others to, that clinic for money. While the actual crime of insurance fraud occurred away from Maradey's place of employment, the Administrative Law Judge found that "but for" Maradey's public employment, she "...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 relationships with, the other

MDT employees whom she recruited as part of her engagement in the criminal activity" (i.e., insurance fraud and patient brokering).

In this matter, Petitioner conspired to commit murder to retaliate against an inmate for an altercation that occurred at the correctional facility at which Petitioner worked. Petitioner wanted the inmate killed to "send a message." [R-11, page 13, lines 11-14].

Based on record evidence, the ALJ specifically stated that "[w]hether Petitioner was racist or a member of the KKK, or whether the KKK is a white supremacy group is irrelevant and has no bearing on whether he violated section 112.3173(2)(e)." [Recommended Order, page 23, Endnote #4].

There is competent substantial evidence is sufficient to establish a nexus between the offense(s) to which Petitioner pled and Petitioner's public employment. As such, the requirements of Section 112.3173(2)(e)6., Florida Statutes, are satisfied, and Petitioner's rights and benefits under the FRS Investment Plan must be forfeited.

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 Conclusions of Law set forth in paragraphs 39 through 51 of the Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

The Conclusions of Law set forth in paragraph 52 of the Recommended Order hereby are modified to correct some typographical errors, to read as follows:

52. In Zeh,, Petitioner committed his crime for passion, not money; he believed his conduct would stop the affair between his wife and the victim of his crime, and save his marriage. Such personal benefits obtained while employed as a law enforcement officer "are the types of profits and intended benefits chapter 112 was enacted to prohibit." *Id.* citing *Bollone*, *supra*, 100 So.3d at 1282. [The Recommended order in *Bollone* noted that: "[n]umerous hearings under this forfeiture statute and similar statutes have consistently concluded that sexual gratification constitutes personal gain." *Bollone v. Dept. of Mgmt. Servs.*, DOAH Case No. 11-3274, Recommended Order, October 19, 2011, page 20, paragraph 78, citations omitted; Final Order DMS-11-0124, December 22, 2011, 2011 WL 6917641]. Here, based on his reaction to the photograph of Mr. Williams' body, it is reasonable to infer that Petitioner received gratification; and that he also may have benefitted in his relationships with Mr. Driver and Mr. Newcomb.

The State Board of Administration adopts and incorporates in this Final Order the Conclusions of Law set forth in paragraph 53 of the Recommended Order as if fully set forth herein.

54. The case name "Maryland v. Dep't of Mgmt. Servs., Div. of Ret." set forth in Conclusion of Law 54 hereby is corrected to read: "Marsland v. Dep't of Mgmt. Servs., Div. of Ret." The remainder of Conclusion of Law set forth in paragraph 54 remains unchanged.

The Conclusions of Law set forth in paragraphs 55 through 59 of the Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety, except as modified above. Petitioner was a public employee convicted of a "specified offense" prior to his retirement and that, therefore, Petitioner has forfeited all the rights and benefits he possessed by virtue of his Florida Retirement System Investment Plan account, except for the amount of his accumulated employee contributions as of the date of his termination of employment.

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 3rd day of July, 2018, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Daniel Beard

Daniel Beard
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 by electronic mail to robert@robertarushpa.com and by UPS to Robert A. Rush, Esq., Counsel for Petitioner, Robert A. Rush, P.A., 11 SE Second Avenue, Gainesville, Florida 32601; and by email transmission to Brian Newman, Esq. (brian@penningtonlaw.com) and Brandice Dickson, Esq., (brandi@penningtonlaw.com) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 3rd day of July, 2018.

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

DAVID MORAN,

Petitioner,

vs. Case No. 17-5785

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

Hetal Desai, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH), held a final hearing on February 20, 2018, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Robert Anthony Rush, Esquire
Robert A. Rush, P.A.
11 Southeast Second Avenue
Gainesville, Florida 32601

For Respondent: Brian A. Newman, Esquire
Pennington, P.A.
215 South Monroe Street, Suite 200
Post Office Box 10095
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue is whether, pursuant to section 112.3173, Florida Statutes (2017),[1/] Petitioner forfeited his Florida Retirement System Investment Plan account after he was found guilty by a jury of conspiracy to commit first degree murder.

EXHIBIT A

PRELIMINARY STATEMENT

On August 11, 2017, Petitioner, David Moran, was found guilty by a jury of a first degree felony, "Conspiracy to Commit Murder," in violation of sections 777.04(3), (4)(a) and (4)(b), and 782.01(1)(a), Florida Statutes (conspiracy). The crime involved Petitioner--a former Florida Department of Corrections (DOC) employee--and other former and current DOC employees plotting to kill a former inmate.

On October 10, 2017, Respondent, the State Board of Administration (SBA), notified Petitioner that his rights and benefits under the Florida Retirement System Investment Plan had been forfeited based on the conviction of conspiracy. On October 13, 2017, Petitioner filed a timely Petition for Hearing in response to the SBA's letter and asserted the SBA's determination should be reversed. Petitioner requested a formal administrative hearing and asserted the crime for which he was convicted did not fall within the scope of section 112.3173(2)(e); and the conspiracy was not related to or associated with his employment at DOC, but rather related to his activity in the Traditional American Knights of the Ku Klux Klan (KKK) and, therefore, did not amount to a violation of the public trust.

On October 18, 2017, the SBA referred the matter to DOAH. The matter was assigned to an Administrative Law Judge and

noticed for a final hearing. After being continued once, a final hearing was noticed for February 20, 2018.

The parties filed a Joint Pre-hearing Stipulation and agreed to 11 facts, all of which have been incorporated into this Recommended Order.

A pre-hearing conference was held on February 13, 2018. The parties discussed, among other things, the joint pre-hearing stipulation and Petitioner's objections to SBA's exhibits. Specifically, the parties discussed the use of Petitioner's criminal trial transcript as evidence at the final hearing. Ultimately, the parties came to a resolution and agreed to allow the criminal trial transcript to be admitted, with the caveat that only the testimony portion of the transcripts cited to by the parties would be considered for the purposes of proposed recommended orders (PROs) and the recommended order. As a result, the undersigned has reviewed the criminal trial transcript, but has not considered the pretrial criminal documentation such as the arrest warrant, amended information, or Uniform commitment; or portions of the trial transcript reflecting voir dire, opening or closing arguments by counsel, or any sidebar discussions unless related to evidentiary rulings.

Petitioner was the only witness at the final hearing. Petitioner's Exhibits P1 through P16 were offered and accepted into evidence without objection; Respondent's Exhibits R1

through R5 and R7 through R18 were also offered and accepted, without objection. As mentioned above, Petitioner reserved his right to object to portions of the criminal trial transcript, Exhibit R6, but did not object to it in the entirety. As such, Exhibit R6 was also admitted into evidence.

The Transcript of the final hearing was filed on March 20, 2018. Petitioner requested and was granted two extensions for the parties to file their PROs. Petitioner did not timely file its PRO, but because there has been no objection to the late-filed PRO, it too has been considered. Respondent timely filed its PRO and it has been considered.

FINDINGS OF FACT

1. The Florida Retirement System (FRS) is a public retirement system as defined by Florida law. See § 121.021(3), Fla. Stat.

2. Petitioner was a state employee and a special risk class member of the FRS.

Work History

3. Petitioner was a 20-year DOC employee. Since 2004, he served as a sergeant at the Reception and Medical Center at Lake Butler, Florida (Center).

4. A sergeant is a supervisory position whose duties include the "care, custody and control of inmates."

5. Retaliating against an inmate is a violation of DOC policy and the oath administered to correction officers.[2/] Witnessing or having knowledge of a DOC officer's conspiracy to murder a former inmate, and failing to report that conspiracy would also be a violation of a DOC sergeant's duties. As explained by Petitioner, such conduct would be, "outside the guidelines. That's not the rules. That's not what [a DOC sergeant is] supposed to do."

Underlying Crime

6. On August 4, 2013, Thomas Driver, a DOC corrections officer who worked at the Center at the same time as Petitioner, was involved in an altercation with an inmate (referred to as Mr. Williams). During that altercation Mr. Williams bit Mr. Driver.

7. Charles Newcomb was a former DOC employee who knew Petitioner from the Center and also about Mr. Driver's incident with Mr. Williams. All of the DOC employees at the Center knew about the incident between Mr. Williams and Mr. Driver.

8. Based on information they gathered from working at the Center, Mr. Driver, Mr. Newcomb and Petitioner (collectively referred to as the conspirators) believed Mr. Williams had a contagious medical condition and intentionally bit Mr. Driver to infect him. After the incident Mr. Driver was subject to treatment for a possible infection.

9. Mr. Williams was African-American.

10. Although their race is not apparent from the record, in December 2014, the conspirators were members of a local chapter KKK.

11. Joe Moore, served as a Knighthawk for the KKK. A Knighthawk is the person responsible for security at KKK events and traditionally is responsible for the security and protection of the KKK Grand Dragon (the leader of the local KKK chapter).

12. Petitioner and his fellow KKK members (also referred to as "klansmen") knew that Mr. Moore was a veteran and had training as a sniper. Unbeknownst to the conspirators, however, Mr. Moore was a undercover informant for the Federal Bureau of Investigations (FBI).

13. Although Mr. Newcomb and Mr. Driver referred to each other and Mr. Moore as "Brother," they referred to and addressed Petitioner as "Sarge" based on his position as a DOC sergeant at the Center.

14. On December 6, 2014, Mr. Driver and Petitioner approached Mr. Moore at a KKK event. As they spoke, Mr. Newcomb stood nearby to ensure that the other klansmen would not interrupt or overhear the conversation. Mr. Driver and Petitioner showed Mr. Moore a picture of an African-American male. The picture was on an 8" x 10" piece of paper that looked as if it had been printed from a database. It was apparent to

Mr. Moore at the time that it was a picture of an inmate. After speaking with Petitioner and Mr. Driver, Mr. Moore believed they wanted his help to harm or kill Mr. Williams.

15. Mr. Moore immediately notified the FBI of his conversation with Petitioner and Mr. Driver. At the FBI's request, Mr. Moore began wearing a microphone and secretly, but legally, taping and transmitting his conversations with the conspirators.

16. Eventually, it was confirmed that the conspirators wanted Mr. Williams put "six-feet under." Mr. Driver explained to Mr. Moore the graphic nature of the altercation, his subsequent blood treatment as a result of Mr. Williams' attack, and the fact Mr. Williams served very little time for the attack before he was released on probation. Mr. Driver clearly wanted revenge.

> **Mr. Driver:** Yeah, it pissed me off. If I could I'd kick his fricking throat out.
>
> **Mr. Moore:** That's not necessary. . . . I'm all over it we're all over . . . how do you want [it] done?
>
> **Mr. Driver:** Well. I'm going to tell you like this: If it was me personally and I had another chance at him I'd stomp his larynx.

17. On January 30, 2015, Petitioner, Mr. Newcomb, and Mr. Moore met at a prearranged location and time to drive to the

area of Mr. Williams' home. Mr. Williams had been released and was no longer in custody at the Center.

18. Mr. Driver was intentionally absent from this drive so that he would not come under suspicion for the actions Petitioner and Mr. Newcomb were planning to take that night. In fact, based on his knowledge from working at the Center, Petitioner assured the group that Mr. Driver was working the night shift at the Center and, therefore, had an alibi.

19. Petitioner clearly knew the purpose of the drive was to attempt to kill Mr. Williams. Prior to the drive, Petitioner asked when they were going to "grab him" and discussed with the others whether he should bring his gun on the ride. He told the others that he had obtained the gun, a nine-millimeter, from "the guy that I work with." Petitioner also wanted to wear protective clothing because he knew, presumably from his work as a DOC sergeant at the Center, that Mr. Williams had a contagious infection or disease.

20. During the car ride, Petitioner discussed the best way to terminate Mr. Williams without raising suspicion. Mr. Newcomb suggested abducting Mr. Williams, injecting him with insulin, and leaving him near the water with a fishing pole. Petitioner said this would look suspicious unless Mr. Williams was known to go fishing.

21. The men also discussed how to dispose of Mr. Williams' body. Petitioner suggested a "complete disposal" by chopping up the body.

22. At some point that night Mr. Newcomb indicated a recent picture of Mr. Williams would be helpful; Petitioner agreed to "go to work and pull up [Mr. Williams'] picture."

23. When they arrived in Mr. Williams' neighborhood, Petitioner made numerous offensive and stereotypical remarks about African-Americans.

24. Neither Petitioner nor the others took any action against Mr. Williams the night of the January 30 drive; and Mr. Williams was never harmed.[3/]

25. On March 19, 2015, Mr. Moore met with Petitioner and showed him a staged picture of Mr. Williams' body lying on the ground in a pool of blood. Upon seeing the photo of what he believed was Mr. Williams' dead body, Petitioner laughed and stated, "I love it. F—king p-d on himself . . . good f-king job."

26. During that same meeting, Mr. Moore asked Petitioner if he was happy with the results. Petitioner seemed elated:

> **Mr. Moore:** And, we need to make sure that everybody was happy with it.
>
> **Petitioner:** Hell yeah . . . uh Brother I love you, man. . . . I will call [Mr. Driver] as soon as I get - dude you

> don't know how happy . . . I love you, brother. I love you, brother. I love you brother.

27. At the final hearing, Petitioner claimed he did not intend to hurt Mr. Williams, but only went along with the others because he believed it was part of the KKK initiation process; and that he was entrapped by the FBI. He also argued he did not know the victim was Mr. Williams or that he was a former inmate. Petitioner's assertions are not credible and his testimony is unbelievable for a number of reasons.

28. First, the evidence at the underlying criminal trial established the conspirators did not want KKK leaders to know about the plan to attack Mr. Williams. Petitioner admitted the KKK oath includes a promise not to commit acts of violence. These facts contradict the assertion that Petitioner was pretending to plan the death of an African-American (who coincidentally happened to be a former inmate) just to prove his loyalty to the KKK.

29. Second, although he claimed he was unaware of the purpose of the January 30 car ride or that Mr. Williams was a former inmate, the transcripts of the taped recordings clearly establish this is not true. In fact, Petitioner not only knew who the intended victim was, but knew he had attacked Mr. Driver and that he allegedly had an infectious disease.

30. Third, Petitioner's testimony that he was a passive participant induced by the FBI informant into planning the death

of Mr. Williams is also implausible. Again, Petitioner offered to bring a gun along on the ride, offered advice on how to possibly set up the attack so that it looked like an accident, and suggested how to dispose of Mr. Williams' body. Petitioner's reaction to seeing Mr. Williams' body in the photo also contradicts any contention that he did not intend harm to Mr. Williams or that he did not derive any pleasure from his death.

31. Finally, Petitioner testified he was not racist. This was clearly contradicted by the statements he made about African-Americans during the January 30 car ride. Similarly, his testimony that he was a passive KKK member who only participated in its social aspects (i.e., picnics and "fellowship") was belied by his own acknowledgment that his wife did not want him to be a member of the KKK, and that he participated in cross-burnings.[4/]

32. On August 11, 2017, a jury found Mr. Moran guilty of Conspiracy to Commit Murder in the First Degree.[5/]

Findings of Ultimate Fact

33. The evidence clearly establishes there is a nexus between Petitioner's employment as a DOC correctional sergeant at the Center and the commission of the felony of conspiracy to commit murder.

34. Petitioner's actions were intentional and he knew his participation in the conspiracy was illegal.

35. Petitioner knowingly violated his obligation as a sworn correctional officer by participating in the conspiracy and not reporting the criminal activity committed by the other conspirators.

36. Petitioner defrauded the public from receiving the faithful performance of his duties as a DOC sergeant. The public had a right to expect that one entrusted with guarding inmates would not act as a violent vigilante to exact revenge for a fellow correctional officer.

37. Petitioner realized a profit, gain, or advantage from the commission of the crime in the form of self-gratification and comradery with and respect from Mr. Driver.

38. Petitioner used his power, rights, privileges, and the knowledge accessible to him through his work as a correctional officer to facilitate his crime.

CONCLUSIONS OF LAW

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

40. The FRS is a public retirement system as defined by Florida law, and the SBA's proposed action to forfeit Petitioner's FRS rights and benefits is subject to administrative review. See § 112.3173(5)(a), Fla. Stat.

41. Article II, section 8, 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.

42. Section 112.3173 implements Article II, section 8, Florida Constitution, and 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:
>
> * * *
>
> (e) "Specified offense" means:
>
> * * *
>
> 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.

43. As the party asserting that Petitioner has forfeited his rights and benefits under the FRS pursuant to section 112.3173(3), the SBA bears the burden of proof in this proceeding. See Rivera v. Bd. of Trs. of Tampa's Gen. Emp't Ret. Fund, 189 So. 3d 207, 210 (Fla. 2d DCA 2016).

44. The statutory forfeiture provision at issue, section 112.3173(3), is not penal in nature. Therefore, the standard of proof in this proceeding is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.; Combs v. State Bd. of Admin., Case No. 15-6633, 2016 Fla. Div. Admin. Hear. LEXIS 262, at *21 (Fla. DOAH May 10, 2016; SBA July 26, 2016).

45. Where, as here, the crime committed by the public officer is not a violation of a specific statute or type (as

defined in sections 112.3173(2)(e)1. through 5. or subsection 7.), the question is whether the employee's crime falls within section 112.3173(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). To fall under this "catch-all" provision, the criminal act must be:

(a) a felony;

(b) committed by a public officer or employee;

(c) done willfully and with the intent to defraud the employee's public employer of the right to receive the faithful performance of the employee's duty;

(d) done to realize or obtain a profit, gain, or advantage for the employee or some other person; and

(e) done through the use of the power, rights, privileges, duties, or position of the employee's public employment. See Bollone, 100 So. 3d at 1280-81.

46. Ultimately, whether a particular crime falls under the "catch-all" provision "depends on the way in which the crime was committed." See Bollone, 100 So. 3d at 1280 ("this Court has held that 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.").

47. There is no dispute Petitioner was a public employee when he committed the acts described above. There is also no

dispute Petitioner was found guilty of a felony by a jury. Thus, the first two criteria for section 112.3173(2)(e)6. are satisfied.

48. On the question of whether Petitioner defrauded the public or DOC, this requirement is satisfied if there is evidence of a "nexus between the crimes charged against the public officer and his or her duties and/or position." DeSoto v. Hialeah Police Pension Fund Bd. of Trs., 870 So. 2d 844, 846 (Fla. 3d DCA 2003). The nexus is satisfied where a state employees violates his or her duties as a public officer in failing to safeguard the public's faith in that public office or position. Id.

49. In DeSoto, the petitioner was a law enforcement officer who had identified the victim through his role as an officer; used information about the victim he learned because of his role as an officer; and provided his accomplice, another officer, information about the victim's whereabouts so that the crime could be committed. Id. at 846 ("DeSoto informed his accomplices that this individual was a drug dealer, provided surveillance prior to the robbery, contacted a police officer accomplice to notify him that the victim was leaving work so that the officer could conduct a traffic stop, and provided the handcuffs used to restrain the victim."). As in DeSoto, here the facts demonstrate there was a nexus between Petitioner's role as a DOC sergeant and the conspiracy to kill a former inmate. See also Maradey v. St. Bd. of Admin., Case No. 13-4172, 2014 Fla. Div. Admin. Hear. LEXIS 21,

22 (Fla. DOAH Jan. 16, 2014; Fla. SBA Apr. 7, 2014)("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.").

50. Moreover, the public and DOC had a right to expect that Petitioner would not engage in plotting the murder of a former inmate with other past and current co-workers. As a sworn correctional officer, Petitioner had an obligation to refrain from getting revenge on former inmates. He also had an obligation to report criminal activity committed by another correctional officer. Petitioner obviously violated his oath by not reporting the illegal activity by Mr. Driver and Mr. Newcomb. That fact (in and of itself) would be sufficient to establish the nexus between Petitioner's offense and his duties as a public employee. See Zeh v. Bd. of Trs. of the City of Longwood Police Officers' and Firefighters' Pension Trust Fund, Case No. 14-0870, 2014 Fla. Div. Admin. Hear. LEXIS 355 (Fla. DOAH June 30, 2014; Bd. of Trs. Oct. 24, 2014)(evaluating the nexus between petitioner's duties as a police officer, noting employee took an oath which he violated by committing the underlying felonies).

51. As for the fourth criterion, while satisfying one's thirst for revenge is not a monetary gain, the personal gain

referenced in section 112.3173(2)(e)6. is not limited to finances. See Zeh v. Bd. of Trs., 2014 Fla. Div. Admin. Hear. LEXIS 355, at *10 (rejecting Petitioner's argument that Respondent failed to demonstrate that the offense was committed to obtain a profit by concluding that "the statute does not provide that only economic gain can be considered personal gain.")

52. In Bollone, petitioner committed his crime for passion, not money; he believed his conduct would stop an affair between his wife and the victim of his crime, and save his marriage. Such personal benefits obtained while employed as a law enforcement officer "are the types of profits and intended benefits chapter 112 was enacted to prohibit." Bollone, 100 So. 3d at 1282 (noting that "[n]umerous hearings under this forfeiture statute and similar statutes have consistently concluded that sexual gratification constitutes personal gain."). Here, based on his reaction to the photograph of Mr. Williams' body, it is reasonable to infer that Petitioner received gratification; and that he also may have benefitted in his relationships with Mr. Driver and Mr. Newcomb.

53. The fifth and final criterion for a specified offense under section 112.3173(2)(e)6. requires that the felonious conduct be done through the use or attempted use of the "powers, rights, privileges, duties, or position of the employee's environment." Bollone v. Dep't of Mgmt. Servs., 100 So. 3d at 1281.

54. As stated previously, there is no dispute Petitioner conspired with another DOC employee and a former DOC employee to plan the murder of a former inmate. There was no evidence that Petitioner would have come into contact with the victim inmate through any other means other than his role as a DOC sergeant. In other words, but for the knowledge, relationships and privileges of his position, Petitioner would not have been involved in the conspiracy to kill Mr. Williams. Under the circumstances of this case, SBA has satisfied its burden of showing the required nexus. See Maradey, 2014 Fla. Div. Admin. Hear. LEXIS at *22 (using the "but for" to establish nexus between position and disqualifying offense); see also Bollone, 2011 Fla. Div. Admin. Hear. LEXIS 259, at *22 (concluding petitioner's "gain or advantage to himself was effected through the use of the power, rights, privileges and position of his employment at [the community college]. His use of the public computer was a power, right and privilege of his position which he exercised to possess child pornography"); Holsberry v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 09-0087, 2009 Fla. Div. Admin. Hear. LEXIS 933 (Fla. DOAH July 24, 2009; Fla. DMS Oct. 22, 2009)(concluding petitioner "used or attempted to use the power, rights, privileges, duties, or position of his public office, and his contact with R.D. was made possible only as a result of his position as a teacher."); Maryland v. Dep't of Mgmt. Servs., Div. of Ret., Case No. 08-4385,

2008 Fla. Div. Admin. Hear. LEXIS 294, at *19 (DOAH Dec. 15, 2008; Fla. DMS Jan. 20, 2009)(concluding the petitioner "used or attempted to use the power, rights, privileges, duties, or position of his public office. Petitioner's actions were made possible only as a result of his position as a teacher."). Based on the facts cited above, this fifth criterion has been satisfied.

55. Petitioner argues SBA failed to prove either the nexus or the motive element of the "catch-all" provision at the hearing and cites Rivera v. Board of Treasurers of Tampa's General Employment Retirement Fund. In Rivera, the employee pled guilty to the underlying offense, and the only evidence as to why or how the crimes were committed was in the form of police reports and other documents, which were deemed inadmissible hearsay. Rivera, 189 So. 3d at 212-213. In contrast, in this case there was a full jury trial. The undersigned finds there was competent substantial evidence supporting both a finding of Petitioner's benefit from the conspiracy and the necessary nexus. This evidence was in the form of Petitioner's own testimony at the final hearing; the eye-witness testimony of the FBI informant; and the taped FBI recordings, which were admissible as a party admission pursuant to section 90.803(18)(a), Florida Statutes.

56. Petitioner also relies on the case of Paul G. Tillis v. State Bd. of Admin., S.B.A. Case No. 09-1581 (Apr. 19, 2010).[6/] The issue in Tillis, however, was whether the state employee's

benefits could be forfeited for committing a federal crime. There, the analysis involved a comparison of the elements of the underlying federal crime and the equivalent crime under Florida law. Additionally, unlike this case, in Tillis there was insufficient evidence establishing the employee's motivation or the benefit derived from the underlying crime. As such, Tillis is inapplicable and unpersuasive.

57. In sum, the evidence establishes Petitioner (1) was convicted of a felony; (2) was a public employee; (3) committed the crime willfully and with intent to defraud the public of the right to receive the faithful performance of his duty as a DOC employee; (4) realized, obtained, and attempted to realize or obtain, a profit or gain for himself; and (5) made his criminal act possible through his public employment position.

58. Accordingly, the offense to which Petitioner was found guilty qualifies for the "catch-all" provision under section 112.3173(2)(e)6., and therefore falls under the definition of "specified offenses."

59. As such, all of the requirements in section 112.3173(3) for forfeiture are met. Petitioner is deemed to have forfeited all of his rights and privileges in his FRS Investment Plan account, except for the return of his accumulated contributions as of the date of his termination.

RECOMMENDATIONS

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 a specified offense committed prior to retirement; and that pursuant to section 112.3173, he has forfeited all of his rights and benefits in his Florida Retirement System Investment Plan account, except for the return of his accumulated contributions as of the date of his termination.

DONE AND ENTERED this 15th day of May, 2018, in Tallahassee, Leon County, Florida.

HETAL DESAI
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of May, 2018.

ENDNOTES

[1/] All statutory citations will be to the 2017 version of the Florida Statutes unless indicated otherwise.

[2/] Petitioner admitted that he was required to take an oath upon becoming a DOC officer. Although not offered into evidence, official recognition can be taken of the DOC Code of Conduct, which states:

> I. I will never forget that I am a public official sworn to uphold the Constitutions of the United States and the State of Florida.
>
> II. I am a professional committed to the public safety, the support and protection of my fellow officers, and co-workers, and the supervision and care of those in my charge. I am prepared to go in harm's way in fulfillment of these missions.
>
> III. As a professional, I am skilled in the performance of my duties and governed by a code of ethics that demands integrity in word and deed, fidelity to the lawful orders of those appointed over me, and, above all, allegiance to my oath of office and the laws that govern our nation.
>
> IV. I will seek neither personal favor nor advantage in the performance of my duties. I will treat all with whom I come in contact with civility and respect. I will lead by example and conduct myself in a disciplined manner <u>at all times</u>.
>
> V. I am proud to selflessly serve my fellow citizens as a member of the Florida Department of Corrections. (emphasis added).

[3/] As a result of the FBI's knowledge of the car ride and that the men would be traveling to Mr. Williams' home to harm him, it created a diversion to prevent any action from being taken that night.

[4/] Whether Petitioner was racist or a member of the KKK, or whether the KKK is a white supremacy group is irrelevant and has no bearing on whether he violated section 112.3173(2)(e). It is mentioned here as a comment on Petitioner's credibility and because Petitioner made it the focus of his defense at the hearing. As argued by his counsel, "[t]he fact that [Mr.] Williams was an inmate at DOC a year before this happened had

nothing to do with a plan. It had to do with a black man attacking a white man who is a member of a racist organization, the KKK."

[5/] The conspirators were all charged with conspiracy. Mr. Newcomb was tried with Petitioner and found guilty; Mr. Driver pled guilty prior to trial. Mr. Moran has appealed his conviction.

[6/] Tillis was an informal unpublished administrative opinion. The undersigned has taken official notice of the recommended and final orders in Tillis which were submitted as an exhibit to the Joint Pre-trial Stipulation.

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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.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

DAVID MORAN,

Petitioner,

vs.

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

Case No.: 2015-3304

DOAH No.: 17-5785

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Petitioner, DAVID MORAN, ("Petitioner" or "Moran") submits his Exceptions to the Recommended Order issued by Administrative Law Judge, the Honorable Hetal Desai (the "ALJ") on May 15, 2018 (herein the "Order"). For the reasons set forth below, the Order should be rejected or modified to reflect that the Respondent did not meets its burden of establishing by the preponderance of competent substantial evidence two of the essential elements necessary under the "catch-all" provision of Florida Statute 112.3173(2)(e)6, that the criminal act was done a) to realize or obtain a profit, gain, or advantage for the employee or some other person and b) by the use of power, rights, privileges, duties, or a position of the employee's public employment.

SUMMARY OF THE ARGUMENT

The findings of fact in the Order contain inferences, innuendo, speculation, and misstatements of the evidence and testimony presented at the hearing held on February 20, 2018 ("Hearing") in order to reach the findings of ultimate fact used to reach the conclusion that Petitioner had violated each and every one of the six elements necessary for there to be a forfeiture

of his pension rights under Florida Statute 112.3173(2)(e)6. Furthermore, the Order completely ignores the sworn testimony of the two federal agents who conducted the in-depth investigation in the underlying criminal case, who provided sworn deposition testimony that:

1. Agent Vaughn was not aware of anything that Moran did in his Department of Corrections employment to assist (in the scheme);

2. Agent Vaughn found the scheme had nothing to do with Moran's employment;

3. Agent Vaughn did not find any indication that Moran ever knew who Mr. Williams was;

4. FBI agent, Lindsey Campbell, stated that it does not appear the criminal activity had anything to do with their jobs, rather it was total involvement with the organization they were involved in, the Klan. (see T34 and 37, and Petitioner's Exhibit 1)

No investigation was conducted during the course of this administrative proceeding. The Respondent relied upon the efforts of the government in the criminal case to support its position in this proceeding. The sworn testimony which was attached to the Petition for Hearing in this case, attached as Petitioner's Exhibits 5 and 6, and read into the record at the hearing of these two federal agents directly contradicts the findings in the Order and directly negates the conclusions found in it.

The failure of the ALJ to address this testimony is a glaring oversight and a fatal flaw in the analysis in the Order. At the very least, this testimony defeats and cast substantial doubt on the finding of a nexus between the Petitioner's employment at DOC and the alleged conspiracy.

The Respondent had the burden to prove by the preponderance of competent substantial evidence each element under statute 112.3173(2)(e)6. Respondent chose not to call any witnesses other than Petitioner. Respondent did not either take the deposition of or call as witnesses either Federal Agent Vaughn or Campbell to in any way clarify their testimony. Therefore, the testimony of the Federal Agents stands undisputed and conflicts directly with the finding that the scheme was in any way related to Petitioner's employment at DOC or the Petitioner received any gain from the scheme.

In light of this concrete testimony, the Order resorts to speculation, inference and innuendo to reach its conclusion on these two critical elements. It was the burden of the Respondent to establish these elements and it did not. Speculation, inference and innuendo are not valid basis for findings of fact. The Order is contrary to the evidence and should not be entered.

SPECIFIC EXCEPTIONS

1. **Exception 1:** Page 5, paragraph 7: *"all of the DOC employees at the Center knew about the incident between Mr. Williams and Mr. Driver."*

Objection: This is not an accurate rendition of the record evidence. Mr. Moran testified that everyone in the Center "probably" knew about the incident keeping in mind that the Center being referenced as the Reception and Medical Center run by the Department of Corrections in Lake Butler, Florida which receives and processes approximately 2,000 inmates a week from the North and Central Florida regions in Florida (T41, R- Ex 6, pp. 999-1000; 1038) Again, Federal Agent Vaughn provided sworn testimony that there was no indication Moran ever knew who Mr.

Williams was. Petitioner may have heard of an incident, but he did not know who Mr. Williams was.

2. **Exception 2:** Page 5, paragraph 8: *"based on information they gathered from working at the Center, Mr. Driver, Mr. Newcomb, and Petitioner "collectively referred to as the conspirators" believed Mr. Williams had a contagious medical condition and intentionally bit Mr. Driver to infect him."*

Objection: Again, the sworn testimony of Federal Agent Vaughn is that the Petitioner did not even know who Mr. Williams was and there is no evidence in the record of any such discussion among these three people. Again, this finding is speculation and conjecture.

3. **Exception 3:** Page 6, paragraph 10: *"although their race is not apparent from the record, in December 2014, the conspirators were members of a local KKK chapter."*

Objection: The race of Joe Moore, the government informant and confidential human source (referred to as "informant", "Moore" or "confidential human source"), Mr. Driver, and Mr. Newcomb was never established in the record. Therefore, this fact is based upon innuendo. The burden of proof in this case was on the Respondent.

4. **Exception 4**: Page 6, paragraph 14, third sentence: *"Mr. Driver and Petitioner showed Mr. Moore a picture of an African-American male. The picture was on an 8x10 piece of paper that looked as if it had been printed from a database. It is apparent to Mr. Moore that it was a picture of an inmate. After speaking with Petitioner and Mr. Driver, Mr. Moore believed they wanted him to help harm or kill Mr. Williams."*

Objection: These four sentences do not accurately reflect the testimony and, again, engaged in speculation. Joe Moore is the Government informant hired by the FBI to infiltrate a KKK meeting.

An Excerpt from the criminal trial of the testimony of Government informant Joe Moore found at R6-pages 418-421 (Note: Bold letters are emphasis added) is as follows:

Q Now you said that Mr. **Driver** pulls out a photograph.
Moore **A** *Yes.*

Q And you said it had some writing on it, or did you say that?
Moore A *Yes. Yes, it had some information on it.*

Q Do you remember what the information said on this photograph?
Moore A *It had a name and some other biographical information. I don't recall what exactly it was, but it* ***appeared*** *to refer the identification information of the person in the picture.*

Q Did it **appear** that it was connecting that person to a prison facility?
Moore A *Yes.*

Q So it was a photograph that **may** have been in a prison setting?
Moore A *I had* ***never seen a picture like that before****, so it* ***appeared*** *to be something printed out from some sort of database.*

Q Was it like on an eight by ten piece of paper?
Moore A *Yes.*

Q Now when **Mr. Driver** takes this photograph or this piece of paper with the individual's picture on it and some writing on it, he shows it to you?
Moore A *Yes.*

Q What do you see on the photograph, besides the writing? What image do you see on that?
Moore A *I see a picture of an inmate.*

Q And what race was he?
Moore A *Black.*

Q Had you ever seen that individual before?
Moore A *No.*

Q Was it anybody familiar to you?
Moore A *No.*

Q Do you remember the name that may have been or any name associated with that picture?
Moore A ***I did not read the name.***

Q Now do you ask Mr. Driver and Mr. Moran what this is all about?
Moore A *Yes, I asked them specifically what are you bringing this to me for.*

Q And how do they respond?
Moore A *They both said they wanted to do something.*

Q Well, did you make any further inquiry about what something meant?
Moore A *Yes, I asked them do you want him beat up. They looked at each other and said no.*

Q Well, why did you think that they wanted to do some harm to him if they just showed you a photograph?
Moore A *I don't know what's going on. I'm asking why they're bringing the information to me, and it just seemed like a logical question to at least eliminate that as a possibility.*

Q Did Mr. Moran or Mr. Driver tell you why they were interested in doing anything to the person whose picture – whose image was on that photograph?
Moore A ***Yes, Mr. Driver said that he had an altercation with the person in that picture.***

Q Did he give you any details as to how that transpired at that time?
Moore A *He gave me a short story. I got more details later.*

Q **Mr. Driver did?**
Moore A ***Yes.***

The above testimony establishes that Driver NOT, Petitioner shows Moore the picture. It "appeared" to be a person in a prison setting, but he had never seen a picture like that before. This is all speculation. It was not established if there was a name on the picture as Moore did not read the name. Driver told Moore he had an altercation with the person, not an inmate, in the picture. Driver provided a short story to Moore and Moore got Moore details later. There is nothing in the record to establish what was said about the altercation and what Petitioner heard of this conversation. The above testimony of the confidential informant source is questionable at best. In the January 30, 2015 transcript, David Moran asked "you know what he looks like", Confidential informant source Moore: "There's a photo." Page 13, line 9, 10. Confidential informant source is the one who produced the photo, not Petitioner.

It was incumbent on the Respondent to present testimony live or by deposition to clarify this vague and speculative testimony. It is improper for the Order to recast this testimony as established fact. However, this testimony does reinforce Petitioner's testimony and the testimony of agent Vaughn that there was no indication that Moran ever knew who Mr. Williams [the purported target] was. Informant Moore's testimony found at R Ex 6, starting at page 45. The criminal trial reflects that this initial conversation on December 6, 2013 took place at a KKK meeting. Petitioner did not in any way involve, mention, or relate it to DOC, as it did not occur during work hours or on DOC property.

5. **Exception 5:** Page 7, paragraph 17: *"On January 30, 2015, Petitioner, Mr. Newcomb and Mr. Moore met at a pre-arranged location and time to drive to the area of Mr. Williams' home."*

Objection: This is not an accurate representation from the transcript of the tape recording of the January 30, 2015 car ride. (See Transcript of January 30, 2015 recording, Respondent's Exhibits 11 and 12) The informant, Moore and Charles Newcomb talked for quite some time before Petitioner Moran arrived. (See Respondent's Ex 11, pages 1-8) A review of these two exhibits shows that Mr. Moran did not know where they were going on this ride and Mr. Williams' name if never mentioned in the transcript from this ride. On page 10 of Exhibit 11, Petitioner was not aware that Moore, Newcomb, and he were going on a ride. No one knows where Mr. Williams lived.

6. **Exception 6:** Page 8, paragraph 18: second sentence, *"In fact, based on his knowledge from working at the Center, Petitioner* ***assured*** *the group that Mr. Driver was working the night shift at the Center and therefore had an alibi."*

Objection: This finding again mischaracterizes the transcript. Petitioner did not "assure" the group that Mr. Driver was working the night shift. The transcript reads:

Newcomb: *Does Brother Thomas [Driver] work today?*

Moran [Petitioner]: *Um, I believe he – if he doesn't work here – if he does nights he works in the evening, yes. If he works I believe it's 6:00 tonight.*

This shows that Petitioner did not know when Driver was working and "if" Driver was working it would be at 6:00 at night.

The confidential human source is the person inquiring of Mr. Driver as to when Driver works, "for alibi purposes". [Page 2, lines 4-13, February 10, 2015 Transcript]

7. **Exception 7:** Page 8, paragraph 19: *"Petitioner clearly knew the purpose of the drive was to attempt to kill Mr. Williams."*

Objection: This is all contrary to the transcript of the car ride in which Charles Newcomb states, "*its daylight, we are doing surveillance right now, recon, but I mean I just got stuff if the opportunity presents itself."* Petitioner Moran states *"let me cover my jacket. I don't want a touching me."* (T21, page 17, lines 20, 21)

8. **Exception 8:** Page 8, paragraph 19: *"Petitioner also wanted to wear protective clothing because he knew presumably from his work as a DOC sergeant at the Center that Mr. Williams had a contagious infection or disease."*

Objection: This sentence is entirely speculative and is not supported by the record in this case. Again, the federal agent testified in this case that the Petitioner did not know who Mr. Williams was. There is nothing in the record to substantiate the comment that Mr. Moran *"presumably knew from his work at DOC that Mr. Williams had a contagious infection or disease."* Petitioner stated, "...let me cover my jacket. I don't want a touching me." This comment is vague at best. Again,

if Respondent wished to make this point he could have questioned Petitioner about it and failed to do so. It is improper to make a finding based on the presumption that Petitioner knew that Williams had a contagious disease. The record establishes that Petitioner did not know Williams and is absent of evidence that Petitioner knew Williams had a contagious disease.

9. **Exception 9:** Page 9, paragraph 22: *"...Petitioner agreed to "go to work and pull up (Mr. Williams') picture."*

Objection: This mischaracterizes the transcript as there is no mention of Mr. Williams' name and all Petitioner said is "yeah yeah I've got it." The confidential human source Moore said he already has the picture stating: "That was what I just pulled up". R. Ex 12, page 10, lines 18-19 There is no evidence in this record that Petitioner ever got a picture of Williams' using DOC equipment or from any other source.

10. **Exception 10:** Pages 10, 11, paragraph 30, first sentence at top of page 11: *"Again, Petitioner offered to bring a gun along on the ride, offered advice on how to possibly set up the attack so it looked like an accident, and suggested on how to dispose of Mr. Williams' body."*

Objection: This finding again distorts the transcript. What it actually states is: "[He also said *"do I need stuff like this"* (referring to a 9-Millimeter) *"I mean, how long are we going to be gone?...oh, so I don't need all this right now...so I'm good right now. I don't need nothing but my wallet"]* Petitioner did not offer to bring a gun. He merely asked if one was needed. Mr. Newcomb's testimony, as previously cited, is that they were doing "surveillance and recon." (page 7, line 12). There is no mention of Mr. Williams' name in the transcript of the January 30, 2015 car ride found at R Ex. 11 and 13.

11. **Exception 11:** Page 12, paragraph 37: "Petitioner realized a profit, gain, or advantage

from the commission of the crime in the form of self-gratification and camaraderie with and respect from Mr. Driver."

Objection: This is total speculation. There is nothing in this record to reflect that the Petitioner knew that informant Moore was going to go out and kill Mr. Williams, nor is there anything in the record that Petitioner wanted to or did gain camaraderie from Mr. Driver. Again, this is total speculation.

12. **Exception 12:** Page 12, paragraph 38: *"Petitioner used his power, rights, privileges, and the knowledge accessible to him through his work as a correctional officer to facilitate his crime."*

Objection: No competent substantial evidence was submitted to establish that Petitioner used any training, equipment, knowledge, searched any websites, databases, provided any picture of Mr. Williams, or used anything else from his employment with DOC in regard to any activities related to Mr. Williams [who he did not know]. In fact, this statement is contrary to the sworn testimony of the federal agents. Therefore, at a minimum, the Respondent has not met the burden in establishing this essential element.

13. **Exception 13:** Page 11, paragraph 33 The evidence clearly establishes there is a nexus between Petitioner's employment as a DOC correctional sergeant at the Center and the commission of the felony of conspiracy to commit murder.

Objection: The Hearing Officer erred in finding that there was any nexus between the Defendant's employment at the Department of Corrections and the alleged criminal conspiracy.

Where a particular crime falls under the "catch-all" provision "depends on the way in which the crime was committed" [paragraph 46, page 15 of the Recommended Order.] The Court goes on to quote *Bollone*, 100 So. 3d at 1280 "this court has found that the term specified offense is defined by **conduct** of the public officer, not by the elements of the crime for which the official

was convicted." Both FBI case agents testified that this alleged conspiracy had nothing to do with Petitioner's employment at DOC. The Court appears to be ignoring the facts as to Petitioner's actual conduct. The Court needs to look at what actions the Petitioner actually engage in. When that question is asked, it comes down to the January 30, 2015 drive to Palatka where Petitioner was accompanied by two non-DOC employees that being Newcomb and confidential human source Moore. Obvious from that transcript is that Petitioner, is a passive person, and a participant with no knowledge of any actual plan. This is demonstrated by his comments "do I need anything?, what do I need?, line 5, page 10; "how long are we going to be gone?" page 10, lines 16-17, after which he said "30 minutes", page 10, line 18. "I don't need nothing but my wallet" page 11, lines 3-4, the confidential human source responded "Yes", page 11, line 5. In the drive over, Mr. Moran does not even know what Wayne Williams looked like. Page 14, line 9-10, January 30 Transcript

On January 29, 2015, when Petitioner received a call from Mr. Newcomb, Petitioner was asked to ride with him. Petitioner thought they may be going fishing or picking up money. There was no mention of Wayne Williams. Page 1008, lines 2-12.

When a court looks at the actions committed and taken by Mr. Moran, the transcript shows that there was no real plan. Rather, there is a free-wheeling, non-linear discussion and no talk followed up by Petitioner of any kind.

Again, in looking at the actions of the Petitioner, Mr. Moran, there is absolutely no evidence that he a) used any DOC training or equipment to further this conspiracy; b) that he took any actions in furtherance of this conspiracy other than the ride in the car on January 30; c) that from the January 30 ride until the March 19, 2015 (showing of the photographs) the Petitioner, Mr. Moran, had no contact with his co-conspirators, he took no actions in furtherance

of this, and was not aware at all that confidential human source, Joe Moore, had already made plans to purportedly to kill Wayne Williams in his prior conversations with Mr. Driver.

The object of the conspiracy, Mr. Wayne Williams, had not been an inmate in the Department of Corrections for a full 16 months before the first mention of him related to this conspiracy. Again, during this 16 months, the Petitioner, Mr. Moran, never undertook or attempted to undertake any type of adverse actions towards Mr. Williams. In addition, there is no evidence that Petitioner attempted to take any action against Mr. Williams when Mr. Williams was actually incarcerated in DOC.

The Hearing Officer completely ignored the unrefuted statements of the two FBI agents who controlled and oversaw the entire investigation.

Q *Okay. And do you have any information that they utilized their employment at DOC in any way to assist this criminal activity?*
A *Not specifically.*

Q *I'm just trying to nail that down. Because it doesn't appear that it had anything to do with their actual jobs, that this was something that totally involved this organization that they were involved in, the Klan.*
A *I guess you could say that.*

(Petitioner's Ex 6 Depo of FBI Agent Lindsey Campbell, page 81, lines 13-22)

Q *Are you aware of anything that Mr. Moran did with his Department of Corrections employment to assist in this?*
A *Not that I know of.*

Q *That would be the same for Mr. Driver too?*
A *Yes, sir.*

(Petitioner's Ex 5 Depo of FBI Agent Richard Vaughn)

(see T34 and 37, and Petitioner's Exhibit 1)

This was a private matter and a private grievance by a member of the KKK who, after 16 months after Mr. Driver is attacked, Mr. Driver brings up this matter to confidential human source, Joe Moore, who is perceived as a dangerous person who has killed people in the past.

The January 30 transcript shows that there were no definite plan, and important information that is not known including what Mr. Williams actually looks like and where Mr. Williams actually lives. The Court would like to put the burden that Mr. Moran is suppose to report that which he viewed as only a bunch of guys tough talk rather than any real plan to take any action. Remember, the two people that Petitioner was talking with were not Department of Corrections employees. It stretches credibility to the point of speculation to conclude that the conversations that the three people had and the ride over to Palatka, that conduct and that actual conversation of Mr. Moran, somehow violated his oath as a correctional officer.

The Petitioner, Mr. Moran, never believed that he was committing a crime or engaging in a conspiracy.

The crime of conspiracy is incredibly broad such that it can ensnare persons who did nothing more than have conversations with others who discussed plans but made no plan to actually carry it out. Florida Statute 777.04 Mr. Moran testified that he did not believe he was violating his oath to uphold the Constitution of the United States or the State of Florida when he engaged in tough-talk while sitting in the back seat of a car ride over to Palatka. (page 52, lines 14-25) The Petitioner testified that he did not think he was committing the crime of conspiracy when he rode in the back seat of the car over to Palatka on January 30th (page 53, lines 3-9) The Petitioner thought he was engaged in what he thought was a private conversation, tough-talk, amongst guys. (page 53, 16-25; page 54, lines 1-4)

The allegation of a nexus between the Petitioner's work at DOC and the alleged criminal conspiracy is without merit. It ignores the clear testimony of the two FBI case agents who were involved in this case from start to finish and who both testified that this crime had nothing to do with Petitioner's employment at DOC.

14 Exception 14: References to Mr. Williams.

Objection: Mr. Williams' name is listed in Findings of Fact numbers 8, 14, 16, 17, 19, 20, 22, 23, 24, 27, 28, 29, 30, in reference to the Petitioner's knowledge regarding Mr. Williams. Petitioner takes exception to all of these references. There is absolutely no evidence to support any contention that the Plaintiff knew Mr. Williams, what he knew and when he knew it.

ARGUMENT

As shown from the Exceptions above, the Findings of Facts is fraught with speculation, inference, innuendo, and misstatements of the evidence. More importantly, the Facts totally disregard the testimony of the federal agents who conducted the investigation in the criminal case. Their sworn testimony alone contradicts the findings of ultimate Facts of whether Petitioner received any gain from the purported conspiracy and whether there was any nexus between the conspiracy and his job at DOC. Given this substantial gap in the Order, the Respondent did not meet the burden of establishing by the preponderance of competent substantial evidence, two of the six mandatory requirements in order to prevail under Florida Statute 112.3173.

There are only two recorded statements which Mr. Moran took part in and only one of them was prior to the fabricated killing of Mr. Williams. Respondent could have deposed or subpoenaed for the hearing Mr. Newcomb, Mr. Driver, or the informant, Mr. Moore, in order to clarify who

knew about what when, and what information was gathered from DOC, and by whom. Respondent chose not to do so. As previously stated, there is absolutely no evidence that Mr. Moran got a picture of Mr. Williams from a DOC database, nor is there any evidence that Mr. Moran used his training, equipment, or had any conversations or meetings regarding this alleged conspiracy on DOC property or using DOC equipment.

This case is analogous to *Rivera vs. Board of Trustees of Tampa's General Employment Retirement Fund*, 189 So.3d 207, 210 (Fla. 2d DCA 2016). *Rivera* was a 26 year employee of the City of Tampa. He pled guilty to multiple counts of unlawful sexual conduct with minors, including lewd and luscious battery of a victim age 12-15; unlawful sexual activity with certain minors age 16-17; lewd and luscious molestation of victim age 12-15. These were committed during Rivera's employment prior to his retirement and on City property. The Board failed to call any witnesses at the hearing regarding the forfeiture of his retirement benefits. The Board had to, *"...prove that Mr. Rivera had committed the offense or offenses through the use or attempted use of his power, rights, duties or position as an employee of the City."* Stated differently, the Board had to establish the existence of a nexus *"between the offense or offenses committed by Mr. Rivera's position as an employee."* The Board's case against *Rivera* consist of entirely documentary evidence which was inadmissible hearsay. Accordingly, even though *Rivera* had pled guilty to seven felonies regarding sexual misconduct with minors which were committed on City property, accessed with City keys, the First District found that the case should be remanded and Mr. Rivera's benefits under the retirement plan be restored because the Board had not provided competent substantial evidence to substantiate its claim. Similarly in this case, the record evidence is replete with misstatements of the record, speculation and impermissible stacking of inferences

regarding what the Petitioner knew or didn't know, when he did or did not know it, about whom and what information , if any, he obtained from his employment at DOC.

Reliance on *Bollone v. Department of Financial Services, Division of Retirement*, 100 So. 3d 1276 for the establishment of a nexus between the Petitioner and DOC is misplaced. In *Bollone*, a community college instructor had downloaded child pornography onto the computer which is a fine to him for his use as an employee of Tallahassee Community College ("TCC"). *Bollone* admitted that he made mistakes and misused his time and resources while at work. The Administrative Law Judge in *Bollone* submitted Recommended Order finding that *Bollone* knowingly possessed child pornography using the TCC computer that had been assigned to him. *Bollone* argued that the evidence failed to establish that he used or attempted to use the powers, rights, privileges, duties, or position of his public employment position. The First District Court of Appeal found that "but for" the power, rights, privileges, or duties of his public employment he would not have been able to use his TCC work computer to acquire, possess, or view child pornography.

In the instant case, the Petitioner did not use any of his power, rights, or privilege of his position as a DOC officer. In fact, employing the "but for" test to the instant case it would fail regarding DOC. Whether or not the Petitioner worked for DOC would not have any bearing on whether or not any alleged plot was contemplated to cause harm to anyone. Petitioner knew driver from TAK meeting, and rarely saw him at DOC, except at shift change. Mr. Newcomb was not employed at DOC at the time. The informant, Joe Moore, was not an employee of DOC. The true "but for" test is but for Newcomb, Driver, Petitioner Moran and Moore all being members of the TAK branch of the KKK, (herein "KKK") nothing would have been contemplated at all. The conversations regarding any activity were started at the KKK meeting on December 6, 2014.

Newcomb and various people had conversations regarding the purported scheme, however, the only conversation with the Petitioner occurred on January 6, 2015. The transcript of those conversations is vague and ambiguous at best regarding the Petitioner's actual knowledge and activities in any scheme. It was the Respondent's burden to provide competent, substantial evidence regarding Petitioner's actions and knowledge regarding the scheme as it related to his employment at DOC and it failed to do so.

Again, in *Zeh v. Board of Trustees of the City of Longwood Police Officers' and Firefighters' Pension Trust Fund,* which cited in the Recommended Order, the incident which was the underlying basis for recommendation for Petitioner (police officer) *Zeh* to forfeit his retirement benefits occurred when he was on duty, in uniform, and in possession of and utilizing City-issued equipment, including a fire arm. Again, applying the "but for" test to the in the *Zeh* case, but for his employment as a police officer and the discharge of his duties as a police officer when *Zeh* failed to safeguard the public's faith in his office or position as a police officer by breaking into a house where his estranged wife was living, without permission, through a sliding glass door, without a warrant, and without there being any circumstances that warranted his entry into the residence. *Zeh* pointed his service revolver at a man he believed was seeing his estranged wife and stated that if his former wife did not move back home then there would be dead bodies found at the residence. Again, this incident took place when *Zeh* was on duty, in uniform, using his police equipment and, therefore, there was a nexus between his duties as a police officer in safeguarding the public's faith in the public office or possession. None of those facts are present in this case.

Lastly, it is pure speculation that "but for" the Petitioner working at the DOC the alleged plot would not have occurred. It is, however, obvious from the evidence submitted at the hearing

that "but for" informant Moore, Drive, Newcomb, and Petitioner being members of the Judicial American Knights of the Klu Klux Klan the alleged plot would not have been undertaken. The nexus in this case is to the KKK, not DOC.

The finding that Petitioner realized a profit in the form of self-gratification and camaraderie with respect for Mr. Driver is pure speculation. Again, the Respondent could have put on Mr. Driver to testify regarding his camaraderie with the Petitioner as a result of the incident. Furthermore, there is absolutely no evidence in the record that the Petitioner was aware that informant Moore was going to go off and undertake to kill Mr. Williams. Presenting a picture of a purported murdered person would be shocking to anyone and there is no evidence that Petitioner had ever been involved in any type of murderous undertaking in the past. Since informant Moore had made it clear that he had been a former combat officer and killed people makes it just as plausible that the Petitioner's response to the pictures was out of self-concern than out of gratification. In addition, the contention that the Petitioner would be so incensed at an inmate attacking a corrections officers and possibly infecting him with a disease does not comport with Mr. Moran's testimony that he has been accosted in many ways, including having to go through treatment for Tuberculosis from assaults by prisoners being processed at the Center. Again, the Respondent failed to meet its burden of proof and the Order impermissible mistakes the facts, makes assumptions and reaches conclusions not supported by competent substantial evidence.

Activities of the KKK such as cross burnings and acts of bigotry are repulsive and should not be tolerated. Likewise, sexual activities with minors are repulsive and should not be tolerated. However, in this case, as in the Rivera case *Rivera vs. Board of Trustees of Tampa's General Employment Retirement Fund*, 189 So.3d 207, 210 (Fla. 2d DCA 2016) Simply because there were criminal convictions for sexual activities with minors did not excuse the Retirement Fund

Board from meeting its burden of proving by competent substantial evidence the nexus to the City of Tampa. Likewise, in the instant case, the Petitioner was convicted of conspiracy to commit first degree murder which is an appeal. He is serving a 12 year prison sentence for it. The record readily establishes that to the extent there was a scheme it was a KKK related activity. The government informant Moore testified in the underlying criminal case, "I (Moore) asked if the Grand Dragon knew about it... He said yes, but we want to keep him out of it." R Ex 6 p. 422 line 25 p. 423, line 2. Furthermore, during a February 16, 2015, call between Thomas Driver and Informant Moore, Moore stated, "And we told you we got approval to do the work" R Ex 13, page 1, lines 17 and 18. This approval was not from the DOC.

Just as it was the responsibility of the Tampa Retirement Board to prove at the Administrative Hearing that the nexus of Rivera's activities to his City work, here it was the responsibility of the Respondent to prove at the Hearing all 6 elements of the "catch-all" provision. In failing to do so, Petitioner's retirement rights must be restored.

What the Order does stack misstatements and speculation to build a case against the Petitioner. This is not the purpose of the Hearing Respondent had ample opportunity to present competent substantial evidence and failed to do so. The proposed Order is not based on competent substantial evidence.

CONCLUSION

Based upon the evidence submitted at the Hearing, the exceptions submitted above to the proposed Recommended Order, and the applicable case law cited, the Respondent did not meet the burden of proving by a preponderance of competent substantial evidence that the Petitioner realized a profit, gain, or advantage from the commission of the alleged conspiracy in the form of

self-gratification, camaraderie, or otherwise and failed to establish that the Petitioner used his power, rights, privileges, and knowledge accessible to him through his work at DOC in order to facilitate the alleged conspiracy. Likewise, the Recommended Order is not based on competent substantial evidence and should not be entered. Therefore, the original finding by the Department should be reversed with directions that the Department of Management Services, Division of Retirement enter a Final Order restoring Petitioner Moran his rights and benefits under the FRS and provide payment to him for any past due benefits, together with interest thereon.

Respectfully submitted,

ROBERT A. RUSH, P.A.

s/Robert A. Rush

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER has been furnished via electronic delivery: BRIAN A. NEWMAN, ESQ. at brian@penningtonlaw.com and slindsey@penningtonlaw.com, on this 30th day of May, 2018.

s/Robert A. Rush

Robert A. Rush