

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

MICHAEL J. BAXTER,)	
)	
Petitioner,)	
)	
vs.)	DOAH Case No. 20-2155
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On May 30, 2023, Administrative Law Judge Lisa Shearer Nelson (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 the counsel for the Petitioner and upon counsel for the Respondent. Petitioner and Respondent both timely filed a Proposed Recommended Order. No exceptions were filed by either party. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief, Defined Contribution Programs for final agency action.

STATEMENT OF THE ISSUE

The State Board of Administration adopts and incorporates in this Final Order the Statement of the Issue in the Recommended Order as if fully set forth herein.

PRELIMINARY STATEMENT

The State Board of Administration adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order as if fully set forth herein.

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact of an Administrative Law Judge (“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.

Pursuant to Section 120.57(1)(l), Florida Statutes, however, a reviewing agency has the general authority to “reject or modify [an administrative law judge’s] conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction.” Florida courts have consistently applied 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.

FINDINGS OF FACT

The State Board of Administration adopts and incorporates in this Final Order the Findings of Fact set forth in the Recommended Order as if fully set forth herein.

CONCLUSIONS OF LAW

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

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner has forfeited his Florida Retirement System Investment Plan account benefit under Section 112.3173, Florida Statutes, except for the return of any accumulated employee contributions, by having been convicted of a felony that meets the criteria of a “specified offense” under Section 112.3173(2)(e)(4). and Section 112.3173(2)(e)6., Florida Statutes.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the State Board of Administration in the Office of the General Counsel, State Board of Administration, 1801 Hermitage Boulevard, Suite 100, Tallahassee, Florida, 32308, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days from the date The Final Order is filed with the Clerk of the State Board of Administration.

DONE AND ORDERED this 29th day of August 2023, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

Walter Kelleher

for **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 email transmission to Ryan J. Andrews at ryan@andrewslaw.com and by U. S. mail to the Andrews Law Firm, 822 North Monroe Street, Tallahassee, Florida 32303; and by email transmission to Rex Ware (RexWare@FloridaSalesTax.com), Moffa, Sutton & Donnini, P.A., Suite 330, 3500 Financial Plaza, Tallahassee, Florida 32312 and Jonathan Taylor (JonathanTaylor@FloridaSalesTax.com), Moffa, Sutton, & Donnini, P.A., 100 West Cypress Creek Road, Suite 930, Fort Lauderdale, FL 33309, this 29th day of August 2023.



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**

MICHAEL J. BAXTER,

Petitioner,

vs.

Case No. 20-2155

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

On February 28, 2023, Administrative Law Judge Lisa Shearer Nelson of the Florida Division of Administrative Hearings (DOAH) conducted a hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes (2022).

APPEARANCES

For Petitioner: Ryan Joshua Andrews, Esquire
Andrews Law Firm
822 North Monroe Street
Tallahassee, Florida 32303

For Respondent: Rex D. Ware, Esquire
Moffa, Sutton & Donnini, P.A.
3500 Financial Plaza, Suite 330
Tallahassee, Florida 32312

STATEMENT OF THE ISSUE

Whether Petitioner's retirement benefits must be forfeited pursuant to section 112.3173, Florida Statutes.

EXHIBIT A

PRELIMINARY STATEMENT

On April 22, 2020, Daniel Beard, as Chief of Defined Contribution Programs with the State Board of Administration (Petitioner or SBA), notified Petitioner, Michael Baxter (Petitioner or Mr. Baxter), that his rights and benefits under the Florida Retirement System (FRS) had been forfeited as a result of his conviction under federal law for falsification of Document/ Obstruction of Justice, pursuant to Article II, section 8(d) of the Florida Constitution, and section 112.3173(2)(e). On May 7, 2020, Petitioner disputed the allegations in the April 22, 2020, letter and requested a section 120.57(1) hearing. On May 11, 2020, SBA forwarded the case to DOAH for the assignment of an administrative law judge.

The hearing was initially scheduled for July 13, 2020. However, Petitioner's incarceration, the restrictions related to COVID-19, and the illness of both counsels resulted in multiple continuances. Ultimately, the case was scheduled for February 28, 2023, after Petitioner was released from confinement and could participate in the proceedings.

At hearing, Michael Baxter, Melinda Baxter, and William Mitchell testified for Petitioner, and Petitioner's Exhibits 1, 2, 18, and 19 were accepted into evidence. Petitioner's Exhibits 20 through 30 were rejected but proffered, so while they were not considered in preparation of this Recommended Order, they travel with this record. Mini Watson testified on behalf of the SBA and Respondent's Exhibits 1 through 8 were admitted into evidence. The parties filed a Joint Prehearing Stipulation; however, there were no identified facts on which the parties agreed that there would be no evidence required at hearing.

All statutory references are to the 2015 codification of the Florida Statutes unless otherwise indicated.

The Transcript of the hearing was filed with DOAH on April 3, 2023. By agreement of the parties, the parties' proposed recommended orders were to be filed 30 days after the transcript was filed. Accordingly, a Scheduling Order was issued on April 3, 2023, after the filing of the transcript, specifying that the proposed recommended orders were to be filed no later than May 3, 2023, and the Recommended Order would be rendered no later than June 2, 2023. On April 28, 2023, Petitioner filed an unopposed request for another week to file the proposed recommended orders, which was granted. Both parties timely submitted Proposed Recommended Orders that were carefully considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Michael Baxter is a former employee of the Florida Department of Corrections (Department or DOC). He began employment with the Department in about 1988, starting as a corrections officer and rising to the rank of major. Mr. Baxter was also employed by entities other than the state of Florida, but was employed by DOC as of July 13, 2015.
2. As a result of Mr. Baxter's employment with DOC, he was eligible to participate in FRS and received benefits under the FRS. Mr. Baxter was a member of the FRS Investment Plan, which the SBA administers.
3. On September 12, 2017, Mr. Baxter was charged by a two-count indictment related to an incident that occurred during Mr. Baxter's employment at the Apalachee Correctional Institution on July 13, 2015. The indictment in *United States v. Michael J. Baxter*, Case No. 5:17cr26/RH, Northern District of Florida, Panama City Division, charged Mr. Baxter with a violation of 18 U.S.C. section 242 (Count 1), and a violation of 18 U.S.C. section 1519 (Count 2).
4. The charged violation of 18 U.S.C., section 242, in Count 1, dealt with the alleged unlawful use of force and depriving an inmate of his right to be

free of cruel and unusual punishment. Title 18 U.S.C., section 1519, the basis for Count 2, provides:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

5. A violation of 18 U.S.C. section 1519 is a felony.

6. The indictment alleges that Mr. Baxter “did knowingly cover up, falsify, and make a false entry in a record and document with the intent to impede, obstruct, and influence the investigation and proper administration of a matter within the jurisdiction of the Federal Bureau of Investigation.” The indictment identified eight statements in a Report of Force Used and an Incident Report related to the July 13, 2015, incident that it alleges Baxter wrote, “knowing it to be false”:

- (1) D.G. “advanced towards” BAXTER;
- (2) D.G. acted “forcefully and intentionally striking his head against” BAXTER’s forehead;
- (3) D.G. “aggressively charged” Baxter “in an attempt to again batter” BAXTER;
- (4) BAXTER had to punch D.G. “in an attempt to compel him to cease his forward advance towards” BAXTER;
- (5) D.G. was “attempting to strike us with closed fists, and was violently kicking his legs in the direction of us all”;

(6) BAXTER “struck the desk in the Major’s office as well as the table that was in the corner prior to forcefully falling to the floor”;

(7) D.G. “grabbed” BAXTER “by the left leg and began repeatedly pulling it”; and

(8) BAXTER was in “imminent danger” from D.G.’s “violent attempts to harm us.”

7. The reports referenced in the indictment were reports prepared by Mr. Baxter during his employment with the Department of Corrections, and were prepared through the course and scope of his employment.

8. The criminal proceeding against Mr. Baxter proceeded to a jury trial. On January 25, 2018, the jury acquitted him with respect to Count 1, but found him guilty as to Count 2.

9. Based on the jury’s verdict, on April 12, 2018, the court adjudicated Mr. Baxter guilty of violating section 1519, and sentenced him to 60 months in prison, followed by one year of supervised release. The felony conviction was affirmed by the Eleventh Circuit, and all appellate rights have been exhausted.

10. Mr. Baxter challenged the conviction, in part, based on what may be seen as inconsistent verdicts. The Eleventh Circuit rejected this argument, stating in part:

A jury’s verdicts are insulated from review on the ground that they are inconsistent as long as there was sufficient evidence of guilt. The jury is free to choose among reasonable constructions of the evidence in reaching its guilty verdict. If the defendant testified at trial, the jury is free to disbelieve his statements and consider them as substantive evidence of his guilt.

To prove a violation of 18 U.S.C. § 242, the government must present evidence that establishes beyond a reasonable doubt that the defendant acted

(1) willfully and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States. To prove that a defendant falsified records in violation of 18 U.S.C. § 1519, the government must show that the defendant (1) knowingly (2) altered, destroyed, mutilated, concealed, covered up, falsified, or a made a false entry in a record or document (3) with the intent to impede, obstruct, or influence an investigation.

Here, the district court did not abuse its discretion in denying Baxter's motion for new trial. Notably, deprivation of a constitutional right under color of law and falsification of records are distinct crimes with no overlapping elements, so an acquittal on the first and a guilty verdict on the second are not inherently inconsistent. Even if the jury acquitted Baxter on Count One because it believed his version of the events, it could still find that he had knowingly fabricated some portion of his report to influence the use-of-force investigation. It is equally possible that the jury did not believe Baxter's version of the events but found that the government had not proven one or more elements of the excessive force claim beyond a reasonable doubt. Nonetheless, even if the jury's verdicts were inconsistent, they were insulated from review because the guilty verdict on Count Two was supported by sufficient evidence. ... [T]he jury was free to choose among reasonable constructions of the evidence in reaching its conclusion that at least some of the statements in the report were false. In particular, the jury was free to disbelieve Baxter's trial testimony and consider it as substantive evidence that he had falsified records.

United States v. Baxter, 778 Fed. Appx. 617, 621 (11th Cir. 2019)(citations omitted).

11. As a DOC employee, Mr. Baxter was subject to the rules of the Department found at Florida Administrative Code Rules 33-208.001 (Personnel – General); 33-208.002 (Rules of Conduct); and

33-208.002 (Range of Disciplinary Actions), as well as the Department's Code of Conduct. The Rules of Conduct specifically require employees to truthfully answer questions specifically related to the performance of his (or her) official duties, and prohibit the falsification of reports or records. Fla. Admin. Code R. 33-208.002(6) and (12). The rule also requires that when force becomes necessary, a detailed written report must be made by the employee to the warden, and that "[n]o employee shall knowingly submit inaccurate or untruthful information for or on any Department of Corrections record, report or document." Fla. Admin. Code R. 33-208.002(14), (19). Similarly, the Code of Conduct states:

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.

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 at all times.

12. Officers who falsify reports or records are subject to discipline, up to dismissal.

13. Mr. Baxter strenuously denies falsifying any statement in either the incident report or the use of force report related to the incident giving rise to the criminal prosecution and conviction. That said, this proceeding is not an avenue through which he can challenge the factual basis for the conviction. Counsel questioned SBA's representative, Mimi Watson, extensively, asking her repeatedly to identify which statement in the incident report or use of force report was falsified. Ms. Watson admitted that she did not know (and

could not know) what statement was falsified, because she was not part of the jury deliberations and did not know the basis for its decision.

14. Ms. Watson testified that because of the jury verdict, the Department was deprived of Mr. Baxter's faithful performance of his duty as a public employee. Ms. Watson could not identify specifically what "benefit" Mr. Baxter sought to gain through the falsification of records, either for himself or for anyone else, in part because she could not know what evidence persuaded the jury to convict him. She believed that the logical benefit would be the preservation of his position with the Department.

15. Ms. Watson testified that Florida's statutory equivalent for 18 U.S.C. section 1519 is section 838.022, Florida Statutes.

CONCLUSIONS OF LAW

16. DOAH has jurisdiction over the parties to and the subject matter of these proceedings pursuant to sections 120.569 and 120.57(1).

17. As the party seeking forfeiture of Petitioner's retirement benefits, Respondent bears the burden of proof by a preponderance of the evidence. *Fla. Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat.

18. Article II, section 8 of the Florida Constitution provides:

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 a manner as may be provided by law.

19. Section 112.3173 implements this constitutional provision, and subsection (3) provides:

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 the termination.

20. SBA notified Petitioner that his benefits under the FRS were subject to forfeiture based on his federal conviction for falsification of documents/obstruction of justice during a federal investigation, which had been affirmed on appeal. The notification letter referenced section 112.3173(2)(e)1.-7., which provides:

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

* * *

(e) "Specific offense" means:

1. The committing, aiding, or abetting of an embezzlement of public funds;
2. The committing, aiding, or abetting of any theft by a public officer or employee from his or her employer;
3. Bribery in connection with the employment of a public officer or employee;
4. Any felony specified in chapter 838, except ss. 835.15 and 838.16;
5. The committing of an impeachable offense;
6. The committing of any felony by a public officer or employee who, willfully and with intent to defraud the public or the public agency for which the public officer or employee acts or in which he or she is employed of the right to receive the faithful

performance of his or duty as a public officer or employee, realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or herself or for some other person through the use or attempted use of the power, rights, privileges, duties, or position of his or her public office or employment position; or

7. The committing on or after October 1, 2008, of any felony defined in s. 800.04 against a victim younger than 16 years of age, or any felony defined in chapter 794 against a victim younger than 18 years of age, by a public officer or employee through the use or attempted use of power, rights, privileges, duties, or position of his or her public office or employment position.

21. There is no dispute that the specific offenses described in paragraphs one through three, five, and seven do not apply here. SBA is proceeding under paragraphs four and six.

22. Section 112.3173(2)(a) provides that “conviction” and “convicted” mean an adjudication of guilt by a court of competent jurisdiction; a plea of guilty or of nolo contendere; a jury verdict of guilty when adjudication is withheld and the accused is placed on probation; or a conviction by the Senate of an impeachable offense.

23. The jury found Mr. Baxter guilty of Count 2 of the indictment and the trial judge adjudicated him guilty. Mr. Baxter was convicted for purposes of section 112.3173(2)(a).

24. “[T]he legislature did not create a framework under which any crime or misconduct by a public employee results in a forfeiture of retirement benefits. Rather, the legislature limited the definition of a ‘specified offense’ ... to a narrow set of seven categories.” *Houston v. City of Tampa Firefighters and Police Officers’ Pension Fund Bd. of Tr.*, 303 So. 3d 233, 236 (Fla. 2d DCA 2020).

Section 112.3173(2)(e)4.

25. For Mr. Baxter's conviction to justify forfeiture under section 112.3173(2)(e)4., the conviction must be "any felony specified in chapter 838, except ss. 838.15 and 838.16."

26. Mr. Baxter's conviction is a conviction of a federal crime rather than a state crime. At the same time, section 775.08(1), Florida Statutes, provides that when used in the laws of this state, the term "felony" means "any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by death or imprisonment in a state penitentiary." A person is imprisoned in the state penitentiary for any sentence that exceeds one year. *See also Hames v. City of Miami Firefighters' and Police Officers' Tr.*, 980 So. 2d 1112, 1116 (Fla. 3d DCA 2008).

27. The federal offense for which Mr. Baxter was convicted, 18. U.S.C. section 1519, provides as follows:

Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.--Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object *with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or into relation to or contemplation of any such matter or case*, shall be fined under this title, imprisoned not more than 20 years, or both.

28. SBA asserts that this charge is like section 838.022, which provides:

838.022 Official misconduct.—

(1) It is unlawful for a public servant or public contractor, to knowingly and intentionally obtain a benefit for any person or to cause unlawful harm to another, by:

- (a) Falsifying, or causing another person to falsify, any official record or official document;
- (b) Concealing, covering up, destroying, mutilating, or altering any official record or official document, except as authorized by law or contract, or causing another person to perform such act; or
- (c) Obstructing, delaying, or preventing the communication of information relating to the commission of a felony that directly involves or effects the government entity served by the public servant or public contractor.

29. Typically, a “specified offense” is determined by the conduct of the public officer and not by the elements of the crime committed. *Jenne v. Dep’t of Mgmt. Servs.*, 36 So. 3d 738, 742 (Fla. 1st DCA 2020); *Simcox v. City of Hollywood Police Officers’ Ret. Sys.*, 988 So. 2d 731 (Fla. 4th DCA 2008); *Newmans v. Div. of Ret.*, 701 So. 2d 573 (Fla. 1st DCA 1997). But as the court explained in *Jenne*, when a person is convicted by a jury, the inquiry is necessarily limited to the elements of the crime, because the court could not know which facts the jury accepted and which ones the jury rejected. “All the court could know for certain was that the defendant committed a crime that required proof of certain elements.” 36 So. 3d at 743.

30. Here, a comparison of 18 U.S.C. section 1519 and section 838.022 shows that both provisions proscribe the same type of conduct. SBA has therefore demonstrated a basis for forfeiture of benefits based on section 112.3173(2)(e)4.

Section 112.3173(2)(e)6.

31. SBA also relies on what is often called the “catch-all” provision in section 112.3173(2)(e)6. As stated by the court in *Bollone v. Department of Management Services*, 100 So. 3d 1276, 1280-81 (Fla. 1st DCA 2012),

In order to constitute a “specified offense” under section 112.3173(2)6., the criminal acts must be: (a) a felony; (b) committed by a public employee; (c) done willfully and with intent to defraud the public

or the employee's public employer of the right to receive the faithful performance of the employee's duty; (d) done to obtain a profit, gain or advantage for the employee or some other person; and (e) done through the use or attempted use of the power, rights, privileges, duties, or position of Appellant's employment.

32. There is no dispute that the crime for which Mr. Baxter was convicted is a felony, and that Mr. Baxter was a public employee at the time the incident giving rise to the conviction occurred. The crime for which he was convicted, falsification of records, is a disciplinable offense pursuant to the DOC Rules of Conduct in rule 33-208.002(6) and (12), and is punishable up to dismissal from his position. Violating this Rule of Conduct as evidenced by the conviction defrauds the public and the Department of the faithful performance of his duty. There is also no dispute that the falsification of records was accomplished with the use of Mr. Baxter's position as a major with the Department.

33. Petitioner contends that the conviction does not meet the definition of the catch-all provision because he claims that the SBA did not demonstrate that he received a benefit or advantage. Ms. Watson freely admitted that she did not know what Mr. Baxter thought, and that she could not know what evidence was relied upon by the jury, but that she believed the motivation for falsification of records would be to avoid discipline had he written what actually happened.

34. Avoidance of punishment is a benefit for purposes of official misconduct. *Bauer v. State*, 609 So. 2d 608, 611 (Fla. 4th DCA 1992). In *Jacobo v. Board of Trustees of the Miami Police*, 788 So. 2d 362 (Fla. 3d DCA 2001), a former Miami police officer was convicted for falsely reporting on an arrest affidavit that a suspect who was shot by another officer was carrying a gun when he was not. Forfeiture proceedings were started pursuant to

section 112.3173(2)(e)6. The Third District rejected *Jacobo's* challenge, stating that

[I]t is a breach of the public trust to violate any standard of ethical conduct in Chapter 112, including section 112.3173(2)(e)6, which proscribes the commission of a felony with intent to defraud the public to gain an advantage for himself or someone else through the use of his office. Official misconduct is clearly a breach of the public trust, and the pension board's conclusion that it is so is affirmed.

35. Finally, the Third District recently considered the "benefit" element of section 838.022, in *Melendez v. State*, ___ So. 3d ___, 2023 WL 2993873 (Fla. 3d DCA Apr. 19, 2023)(motion for rehearing pending). The opinion states, in its entirety,

This court has not evaluated the "benefit" element in the current version of section 838.022, Florida Statutes, though we have previously upheld convictions under section 839.25, Florida Statutes, the predecessor statute to section 838.022, where the offending officer falsified official reports to avoid punishment for failure to follow office procedures. *See Barr v. State*, 507 So. 2d 175, 177 (Fla. 3d DCA 1987) ("Officers Barr and McQueen recanted the false information contained in their reports only after suspecting that they might be found out. Allowing them to assert the defense of recantation does not remove the impression that they used their positions to avoid the consequences of their mistake and thereby benefit."); *Bauer v. State*, 609 So. 2d 608, 611 (Fla. 4th DCA 1992) (citing *Barr* for the proposition that the State can prove the officer's intent to benefit by direct or circumstantial evidence that the falsification of documents "was intended to avoid punishment, whether it be in the form of a reprimand, lawsuit, criminal charges, termination or the like," and

finding that circumstantial evidence that officers actions were deliberate and “inconsistent with simply an honest mistake” satisfied this element); *Hames v. City of Miami Firefighters’ and Police Officers’ Tr.*, 980 So. 2d 1112, 1117 (Fla. 3d DCA 2008) (noting, as basis for predicate offense, that officer violated section 839.25, Florida Statutes, by giving “a false, sworn statement to investigators to hide the actions of his fellow officers from the eyes of the law”). Based on the facts before us, the result would be the same under either version of the statute.

36. In this case, the evidence as a whole supports the inference that Mr. Baxter falsified the incident report or use of force report to protect his own job as well as the jobs of the other officers involved in the altercation with the prisoner. Moreover, the notion of a benefit is imbedded in the criminal provision itself. Similar to section 838.022, which specifically references a benefit, 18 U.S.C. section 1519 includes a motive in the crime itself: to “impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.” The only plausible purposes for impeding, obstructing, or influencing an investigation or proper administration of any matter is to obtain an advantage or avoid prosecution – both of which would constitute a benefit under section 112.3173(2)(e)6. Respondent has demonstrated a basis under this catch-all provision.

37. One other issue bears discussion. Petitioner challenged whether he had to forfeit all of his pension benefits, or merely that portion related to his employment with DOC when he became re-employed with the Department after employment elsewhere. However, section 112.3173(3) specifies that any public officer or employee whose rights are forfeited “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 at the date of termination.” Based on the express language of the statute, all

pension benefits attributable to FRS based on state employment must be forfeited.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the State Board of Administration enter a final order determining that Mr. Baxter forfeited all of his rights and benefits under the Florida Retirement System, except for the return of any accumulated contributions, when he was convicted of specified offenses as defined in section 112.3173(2)(e)4. and 6., committed during his employment with the Department of Corrections.

DONE AND ENTERED this 30th day of May, 2023, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of May, 2023.

COPIES FURNISHED:

Rex D. Ware, Esquire
(eServed)

John M. Vernaglia, Esquire
(eServed)

Ryan Joshua Andrews, Esquire
(eServed)

Jonathan W. Taylor, Esquire
(eServed)

E. Lamar Taylor
Interim Executive Director
and Chief Investment Officer
(eServed)

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.