

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

KENNETH ALAIMO,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2009-1642
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
_____)	

FINAL ORDER

On April 5, 2010, the Presiding Officer submitted her Recommended Order to the State Board of Administration in this proceeding. A copy of the Recommended Order indicates that copies were served upon counsel for the Petitioner and, and upon counsel for the Respondent. Both Petitioner and Respondent filed a Proposed Recommended Order. The matter is now pending before the Senior Defined Contribution Programs Officer for final agency action.

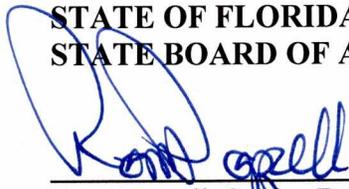
ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner has forfeited his right to a retirement benefit under the Florida Retirement System (FRS) pursuant to Section 112.3173, Florida Statutes, and he must repay the distribution he already has taken.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal

pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the State Board of Administration in the Office of the General Counsel, State Board of Administration, 1801 Hermitage Boulevard, Suite 200, Tallahassee, Florida, 32308, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days from the date the Final Order is filed with the Clerk of the State Board of Administration.

DONE AND ORDERED this 3rd day of May, 2010, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**


Ron Poppell, Senior Defined Contribution Programs Officer
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

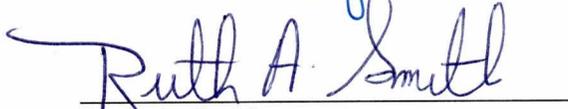
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Clerk
TINA JOANOS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to John Kearns, Hertz and Kearns, 618 Northeast First Street, Gainesville, Florida 32601, and by U.S. mail to Brian Newman and Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 3rd day of May, 2010.



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

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

KENNETH ALAIMO,

Petitioner,

v.

Case No.: 2009-1642

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

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

APPEARANCES

For Petitioner: John Kearns, Esq.
Hertz & Kearns
618 Northeast First Street
Gainesville, Florida 32601

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

RECEIVED
STATE BOARD OF ADMIN
10 APR - 6 AM 9:40
GENERAL COUNSEL'S OFFICE

STATEMENT OF THE ISSUE

The issues are whether the Petitioner forfeited his right to a retirement benefit under the Investment Plan of the Florida Retirement System (FRS) and whether he must repay the distribution he has already taken.

PRELIMINARY STATEMENT

Pursuant to section 120.57(2), Florida Statutes, the parties agreed to informal proceedings in this matter and agreed further to have the case decided on written submissions after the filing of a Joint Stipulation identifying the material facts and exhibits to be considered. Stipulated joint exhibits designated J1-5 were filed, as well as a set of stipulated facts. Respondent's Motion for Extension of Time to File its Proposed Recommended Order is granted and said pleading is accepted as timely filed.

UNDISPUTED MATERIAL FACTS

The Stipulated Facts filed by the parties are as follows:

1. Kenneth Alaimo was an instructor at Gainesville High School and employed as such during the time the charged incidents occurred.
2. At the time of the charged incidents, HK [victim] was a student at Gainesville High School.
3. All of the sexual encounters between Kenneth Alaimo and HK occurred when Kenneth Alaimo was twenty-five (25) years of age and HK was seventeen (17) years of age.
4. All sexual encounters between Kenneth Alaimo and HK occurred at Kenneth Alaimo's residence in Gainesville, Florida. No sexual encounters between the two occurred on school grounds.

5. All sexual encounters between the two occurred after school hours or on non-school days.
6. Though Kenneth Alaimo taught at Gainesville High School and HK was a student at Gainesville High School, HK was never a student in any class taught by Kenneth Alaimo. However, Kenneth Alaimo met HK through his employment at the school.
7. All sexual activity between Petitioner and HK occurred prior to October 1, 2008.
8. Kenneth Alaimo was arrested for these incidents on October 1, 2008.
9. Kenneth Alaimo entered a nolo contendere plea on June 11, 2009, to two counts of having unlawful sexual contact with a minor in violation of Florida Statute 794.05.
10. Kenneth Alaimo was adjudicated on both counts and sentenced to two years of community control followed by ten (10) years of probation.
11. In pronouncing sentence, Circuit Court Judge Martha Ann Lott deviated downward from the recommended Sentencing Guidelines Sentence based on Florida Statute 921.006(2)(f) finding that HK was a willing participant. Judge Lott's Order was submitted as an exhibit by Petitioner.
12. HK appeared at Kenneth Alaimo's sentencing hearing and submitted a statement indicating the sexual conduct was voluntary and not coerced. HK was eighteen (18) years of age at the time of sentencing. HK's letter was submitted as an exhibit by Petitioner.
13. At all times material, Gainesville High School was a Florida Retirement Plan-covered agency and the Petitioner was a member of the FRS Investment Plan.
14. On March 13, 2009, the Petitioner took a total distribution of his FRS Investment

Plan account in the amount of [REDACTED].

15. The Petitioner's subsequent plea of nolo contendere on June 11, 2009 caused the Respondent to notify the Petitioner on October 28, 2009 that his FRS benefit had been forfeited and that the Petitioner had to return the distribution by December 31, 2009.

16. The Petitioner filed his Petition for Hearing on November 16, 2009 requesting the SBA "pardon [him] of this obligation on the grounds that the dates of [his] felony & the date listed in the statute requiring [him] to forfeit [his] retirement funds do no correlate, as well as on the basis of severe financial hardship."

17. The distribution amount remains unpaid pending the outcome of this case.

CONCLUSIONS OF LAW

18. Respondent State Board of Administration is directed to administer the Public Employee Optional Retirement Program (commonly known as the Investment Plan) for FRS members. Respondent's proposed action to forfeit Petitioner's FRS rights and benefits in his Investment Plan account is subject to administrative review. See § 112.3173(5)(a), Fla. Stat. (2008).

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

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

SECTION 8. Ethics in government.—A public office is a public trust. The people shall

have the right to secure and sustain that trust against abuse. To assure this right:

* * *

(d) Any public officer or employee who is convicted of a felony involving a breach of public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan in such manner as may be provided by law.

21. Chapter 112, Part III, of the Florida Statutes, implements this part of the Florida

Constitution in Section 112.3173, which provides in relevant part:

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

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

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

* * *

(e) “Specified offense means:

1. The committing, aiding, or abetting of an embezzlement of public funds;
2. The committing, aiding, or abetting of any theft by a public officer or employee from his or her employer;
3. Bribery in connection with the employment of a public officer or employee;
4. Any felony specified in chapter 838, except ss. 838.15 and 838.16;
5. The committing of an impeachable offense;
6. The committing of any felony by a public officer or employee who, willfully and with intent to defraud the public or the public agency for which the public officer or employee acts or in which he or she is employed of the right to receive the faithful performance of his or her duty as a public officer or employee, realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or herself or for some other person through the use or attempted use of the power, rights, privileges, duties, or position of his or her public office or employed position. (Emphasis added.)
7. The committing on or after October 1, 2008, of any felony defined in §800.04 against a victim younger than 16 years of age, or any felony defined in chapter 794 against a victim younger than 18 years of age, by a public officer or employee through the use or attempted use of power, rights, privileges, duties, or position of his or her public office or employment position.

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

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

22. The legislature has made clear that an employee who is convicted of a specified offense committed prior to retirement from the FRS shall forfeit all rights and benefits, Childers v. Dept. of Mgmt. Services, 989 So.2d 716, 718 (Fla. 4th DCA 2008), and if this standard is met, Respondent has no discretion as to whether to proceed with forfeiture of a participant's Investment Plan account.

23. Respondent asserts that forfeiture is required in this case under the Florida Constitution and Section 112.3173 (2)(e)6, Florida Statutes, cited and underlined above, which is informally known as the "catch all" provision, and brings within the definition of specified offense: 1. any felony; 2. committed by a public employee; 3. willfully and with intent to defraud the public or the public's employer of the right to receive the faithful performance of the employee's duty; 4. to obtain a profit, gain or advantage for the employee or some other person; and 5. by use of the power, rights, privileges, duties, or position of the employment position. These five elements are set out in the statute and reiterated in reported decisions of formal hearings in the Division of Administrative Hearings. Holsberry at *5; Marsland v. Department of Management Services, 2008 WL 5451423 at *7 (Fla. Div.Admin.Hrgs. December 15, 2008).

24. It is clear that the offense committed by Petitioner is a Florida felony, that Petitioner was a public employee at the time he committed the offense at issue, that his actions were a willful misuse of the power he was given as a school board employee and deprived the public of the right to receive the faithful performance of his duties, and that he came into contact with his victim through

his employment position, even though the victim was never in any of his classes. It is less clear that the acts he committed were done to obtain a profit, gain or advantage for himself or another person, within the meaning of the statute. Petitioner asserts that the element of “profit, gain or advantage” is missing in his case because he was not in a position to coerce or have authoritative influence over the victim.

25. Respondent points out that some acts which might not at first appraisal seem to result in gain to a participant facing forfeiture have been found to do so. Personal gain is not necessarily limited to economic benefit. See, Marsland (personal sexual gratification); Holsberry (inappropriate contact with student, child abuse). Both the Marsland and Holsberry cases suggest that the type of sexual misconduct at issue here may be regarded as meeting the fourth required element of the “catch all” provision, because gratification of sexual urges results in gain, profit or advantage to the perpetrator. Although this interpretation of the statute is logical, it has yet to be either ratified or disapproved by an appellate court, and rests instead on the decisions of the Department of Management Services, Division of Retirement, made through the formal hearing process under Chapter 120, Florida Statutes. In the absence of authority to the contrary, I find Marsland and Holsberry to be persuasive here.

26. Petitioner asserts that the enumerated offense for which he received notification of forfeiture – unlawful sexual activity with certain minors – has now been expressly addressed in Chapter 2008-108, Laws of Florida, which took effect July 1, 2008 and created Section 112.3173(2)(e)7, adding a new section to the definition of “specified offense,” covering certain felonies defined in Section 800.04 or Chapter 794:

7. The committing on or after October 1, 2008, of any felony defined in §800.04 against a

victim younger than 16 years of age, or any felony defined in chapter 794 against a victim younger than 18 years of age, by a public officer or employee through the use or attempted use of power, rights, privileges, duties, or position of his or her public office or employment position. (Emphasis added.)

There is no assertion by any party that the above section applies directly to Petitioner; his offense was committed prior to October 1, 2008. But Petitioner does assert that enactment of the above new, specific section on sexual offenses, indicates that such offenses were not previously covered by the catch all provision.

27. Respondent points out that in Marsland, the Administrative Law Judge determined that the catch-all provision provided ample authority for forfeiture of the teacher's benefits because he had breached the public's trust by using his position as a teacher in committing the sex act with the child. 2008 WL 5451423 *7. I see no indication, however, that the argument made by this Petitioner was presented in Marsland: that the enactment of Subsection 7 as a part of Chapter 2008-108, Laws of Florida, is the best indication that what is now covered in that section was not previously covered by other parts of 112.3173(2)(e), including Subsection 6. Respondent's assertion that Article II Section 8(d) of the Florida Constitution requires forfeiture for any public officer "convicted of a felony involving a breach of public trust," likewise does not necessarily answer the relevant question, as this part of the Constitution also requires that it be carried out "in such manner as may be provided by law." See, Jacobo v. Board of Trustees of the Miami Police, etc. 788 So. 2d 362 (Fla. 3d DCA 2001).

28. Petitioner asserts:

[B]y adding subsection (7) into the statute, the State Legislature felt that the language used in subsection (6) was not broad enough to encompass felonies found in Florida Statute 800.04 and 794, else why amend the statute to specifically include Florida Statute 800.04 and 794. If this is true, then subsection (6) of the statute did not apply to Petitioner at the time the acts

were committed and subsection (7) was not in effect at the time of the commission of the acts by Petitioner.

In adding Subsection 7 in 2008, was the legislature making clear that such conduct had always been covered, but giving an alternate way of describing it, by reference to certain statutory offenses, or conversely, was it recognizing that there was a gap in the statute that needed to be filled? The title of Chapter 2008-108 describes the amendment to 112.3173 as “specifying certain felony offenses against a minor as additional offenses that constitute a breach of the public trust; requiring a person committing such an offense to forfeit benefits” (emphasis added). While the title of an enactment is not part of the statute, the bill title may be useful in determining legislative intent. Kasischke v. State, 991 So2d 803, (Fla. 2008), and due weight must be given to it as constituting a direct statement by the legislature. Certain Lands v. City of Alachua, 518 So2d 386 (Fla. 1st DCA 1987). I have reviewed the legislative history of the Chapter 2008-108, Laws of Florida, and find no mention of the idea that the enactment is meant to cement existing law or practice, rather, all discussions of this section are conditional – i.e., if the law is enacted, then the newly enumerated offenses will require forfeiture. In addition, section 7 contains a start date: it is applicable only to offenses after October 1, 2008. If it were meant to ratify past practice, it would not be operative only going forward.

29. I note also that the short title of Chapter 2008-108, Laws of Florida, is the “Ethics in Education Act,” and the substance of the 32 page act deals with many different aspects of ethics in the education setting. I see no indication that the legislature was considering what acts were or were not already a basis for forfeiture when Chapter 2008-108 was enacted, although the staff reports discuss the new section as if it creates a change in existing law. See, House of Representatives Staff

Analysis CS/CS/CS/SB1712, 4/18/2008.

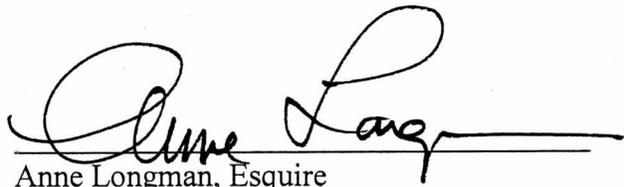
30. The structure and interaction of the applicable sections of Part III of Chapter 112, Code of Ethics for Public Officers and Employees and of Chapter 121, governing the Florida Retirement System, suggest that forfeiture of participants' retirement benefits has been focused primarily on assuring that "public office not be used for private gain other than the remuneration provided by law," and avoiding conflicts of interest based on financial interests. §112.311(1) Florida Statutes. But at this point, two reported cases from the Division of Administrative Hearings find forfeiture for sexual misconduct committed prior to the effective date of Section 112.3173(2)(e)7. Petitioner points out that his case differs from Marsland in particular, in that no sexual activity occurred on school grounds, the victim was a willing participant and has been supportive of Petitioner in proceedings to date, and that the victim was never actually Petitioner's pupil. Respondent counters that but for Petitioner having been a teacher, he would never have come into contact with the victim, and her willingly participating in the offense for which he was adjudicated guilty is completely irrelevant.

31. Respondent is required to seek forfeiture if it appears that an offense is covered by the applicable statute, and the SBA would have been remiss not to do so in this case, given Petitioner's actions and the Marsland and Holsberry precedents.

RECOMMENDATION

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

RESPECTFULLY SUBMITTED this 5th day of April, 2010.



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

NOTICE: THIS IS NOT A FINAL ORDER

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

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

This 5th day of April, 2010.

Copies furnished to:

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