

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

GEORGE BEHAR)	
)	
Petitioner,)	
)	
vs.)	Case No. 2008-1265
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On March 5, 2009, 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 the pro se Petitioner, George Behar, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on March 20, 2009. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Senior Defined Contribution Programs Officer for final agency action.

ORDERED

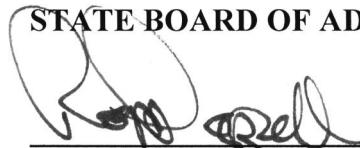
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's assertion that the hold placed on his FRS Investment Plan account was not authorized absent a conviction on the criminal charges leveled against him is denied.

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.

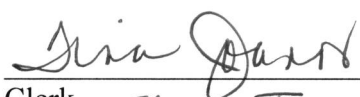
DONE AND ORDERED this 31st day of March, 2009, in Tallahassee, Florida.

**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 U.S. Mail, return receipt requested, to George Behar, pro se, [REDACTED], 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 23rd day of March, 2009.

Ruth L. Gokel

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

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

GEORGE BEHAR,

Petitioner,

v.

CASE NO.: 2008-1265


STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer on December 12, 2008, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner:	George Behar, pro se  Petitioner
For Respondent:	Brandice D. Dickson, Esquire Pennington, Moore, Wilkinson, Bell & Dunbar, P.A. Post Office Box 10095 Tallahassee, Florida 32302-2095

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GENERAL COUNSEL'S OFFICE

STATEMENT OF THE ISSUE

The issue is whether Respondent State Board of Administration (SBA) properly placed a hold on Petitioner's Florida Retirement System (FRS) account in light of the criminal charges

Exhibit A

pending against Petitioner.

PRELIMINARY STATEMENT

On May 29, 2008, Respondent notified Petitioner by letter that a hold had been placed on his FRS Investment Plan account as a result of criminal charges having been brought against him. On October 22, 2008, Petitioner filed a Petition for Hearing asserting that this action by Respondent was not authorized absent a conviction on those criminal charges.

Petitioner attended the informal hearing by telephone and testified on his own behalf. Respondent presented the testimony of Dan Beard, Director of Policy, Risk Management and Compliance, and offered Respondent's Exhibits R-1 through R-5. R-1 and R-3, 4 and 5 were admitted without objection. Petitioner objected to Exhibit R-2 as hearsay, which objection was overruled, given the informal nature of the proceeding and that the newspaper article designated as R-2 was not offered to prove the truth of the matter asserted.

A transcript of the informal hearing was filed with the agency on January 26, 2008 and made available to the parties, who were invited to submit proposed recommended orders. Respondent submitted a proposed recommended order; Petitioner made no further filings.

MATERIAL UNDISPUTED FACTS

1. Petitioner was a deputy with the Palm Beach County Sheriff's Office.
2. On May 28, 2008, Petitioner was arrested for allegedly taking part in an overtime scheme that defrauded taxpayers out of approximately \$350,000.00.
3. As a result of his arrest, Petitioner was charged with violation of Sections 777.04(3), 817.034(4)(a)3, and 838.022, Florida Statutes.

4. Because of these criminal charges, the SBA placed a hold on Petitioner's FRS account, which prevents any distributions until final disposition of charges.

5. The referenced charges have not been disposed and remain pending.

6. Petitioner acknowledges that the funds in his FRS Investment Plan account were solely employer-contributed funds and that he contributed none of his own money to that account.

CONCLUSIONS OF LAW

7. Petitioner may ultimately have to forfeit his FRS benefit. See §§ 112.3173 and 121.091(5), Fla.Stat. If forfeiture is determined, Petitioner has the right to a Chapter 120 hearing and a right of appeal to the district court of appeal, as set out below.

8. Section 112.3173, Florida Statutes, states, in pertinent part:

112.3173. Felonies involving breach of public trust and other specified offenses by public officers and employees; forfeiture of retirement benefits

...

(e) "Specified offense" means:

...

4. Any felony specified in chapter 838, except ss. 838.15 and 838.16;

5. The committing of an impeachable offense; or

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.

...

(5) Forfeiture determination.--

(a) Whenever the official or board responsible for paying benefits under a public retirement system receives notice pursuant to subsection (4), or otherwise has reason to believe that the rights and privileges of any person under such system are required to be forfeited under this section, such official or board shall give notice and hold a hearing in accordance with chapter 120 for the purpose of determining whether such rights and privileges are required to be forfeited. If the official or board determines that such rights and privileges are required to be forfeited, the official or board shall order such rights and privileges forfeited.

(b) Any order of forfeiture of retirement system rights and privileges is appealable to the district court of appeal.

...

§ 112.3173, Fla.Stat.

9. Sections 121.091(5)(f) and (j), Florida Statutes state:

(5) Termination benefits.—

...

(f) Any member who has been found guilty by a verdict of a jury, or by the court trying the case without a jury, of committing, aiding, or abetting any embezzlement or theft from his or her employer, bribery in connection with the employment, **or other felony specified in chapter 838, except ss. 838.15 and 838.16**, committed prior to retirement, or who has entered a plea of guilty or of nolo contendere to such crime, or any member whose employment is terminated by

reason of the member's admitted commitment, aiding, or abetting of an embezzlement or theft from his or her employer, bribery, or other felony specified in chapter 838, except ss. 838.15 and 838.16, shall forfeit all rights and benefits under this chapter, except the return of his or her accumulated contributions as of the date of termination.

...

(k) **Benefits shall not be paid by the division pending final resolution of such charges** against a member or beneficiary if the resolution of such charges could require the forfeiture of benefits as provided in paragraph (f), paragraph (g), paragraph (h), paragraph (i) or paragraph (j).

§§ 121.091(5)(f) and (k), Fla.Stat. (2008)(emphasis added).

10. Petitioner has been charged with, among other things, a felony violation of Section 838.022, Florida Statutes. That section states:

838.022 Official misconduct

(1) It is unlawful for a public servant, with corrupt intent to obtain a benefit for any person or to cause harm to another, to:

(a) Falsify, or cause another person to falsify, any official record or official document;

(b) Conceal, cover up, destroy, mutilate, or alter any official record or official document or cause another person to perform such an act; or

(c) Obstruct, delay, or prevent the communication of information relating to the commission of a felony that directly involves or affects the public agency or public entity served by the public servant.

(2) For the purposes of this section:

(a) The term "public servant" does not include a candidate who does not otherwise qualify as a public servant.

(b) An official record or official document includes only public records.

(3) Any person who violates this section commits a felony of the third degree,

punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 838.022, Fla.Stat. (2008).

11. Because Petitioner has been charged with a violation of Section 838.022 (a felony), he may have to forfeit his FRS benefits, and no benefits can be paid to him from his FRS account until final resolution of the relevant charges against him. See § 121.091(5), Fla.Stat.

12. Respondent correctly notified Petitioner that no distribution (benefit) could be paid to him during the time the relevant charges were pending. The practical result of the application of the pertinent statutes is that Petitioner's FRS Investment Plan account is frozen pending disposition of the charges.

13. Section 121.4501(8)(a), Florida Statutes obligates Respondent SBA to administer the Investment Plan without departing from the requirements of this statute when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). Respondent's construction and application of Chapter 121, Florida Statutes, the statute it is charged to implement, are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting 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).

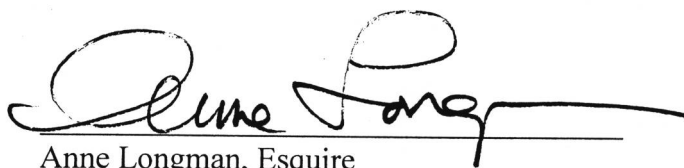
14. Respondent has correctly applied the applicable statutes in this matter and correctly notified Petitioner of what may happen to his FRS account, depending on the outcome of the criminal case against him. Benefits may not be paid to Petitioner in the interim, and while this may work a hardship on Petitioner and seem inequitable if he is ultimately found not guilty of the relevant

charges, it is required by law. I note as well, as set out above, that Petitioner will have remedies available to contest an action for forfeiture of his FRS benefits, should such an action be brought against him.

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 March, 2009.



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

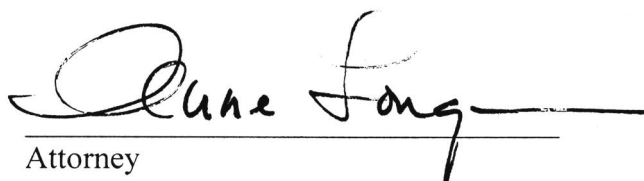
This 5th day of March, 2009.

Copies furnished to:

George Behar



Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson Bell & Dunbar
Post Office Box 10095
Tallahassee, FL 32302-2095
Attorneys for Respondent


Attorney