

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TRACY J. HOFFMAN,

Petitioner,

vs.

Case No. 17-5562CVL

DEPARTMENT OF MANAGEMENT
SERVICES, DIVISION OF STATE
PURCHASING,

Respondent.

2018 JUN 24 AM 11:22
OFFICE OF THE
CLERK OF THE
DIVISION OF ADMINISTRATIVE HEARINGS

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case before W. David Watkins, a duly designated Administrative Law Judge of the Division of Administrative Hearings, on November 8, 2017, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Tracy J. Hoffman, pro se
Inmate No. K90666
South Unit
11064 Northwest Dempsey Barron Road
Bristol, Florida 32321-0711

For Respondent: Timothy L. Newhall, Esquire
Matthew J. Knoll, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

The issues to be determined in this case are whether
Petitioner committed a public entity crime as that term is

defined in section 287.133, Florida Statutes (2017); and, if so, whether it is in the public interest to place Petitioner's name on the convicted vendor list maintained by the Department of Management Services (DMS).

PRELIMINARY STATEMENT

By letter dated September 8, 2017, DMS notified Petitioner, Tracy J. Hoffman, of its intent to place him on the convicted vendor list pursuant to section 287.133. The basis for the Department's determination, as alleged in its notification, was that Petitioner had been convicted of a public entity crime.

On October 4, 2017, Petitioner timely filed a Request for Administrative Hearing (Petition) with DMS. In his Petition, Petitioner disputed whether it is in the public interest to place him on the convicted vendor list. On October 9, 2017, the matter was referred to the Division of Administrative Hearings (DOAH), and on October 24, 2017, a Notice of Hearing scheduling the final hearing for November 8, 2017, at 10:00 a.m. in Tallahassee, was entered.

On November 7, 2017, Respondent filed Respondent's Pre-hearing Stipulation. However, there is no indication on the face of the document that Petitioner was a participant in the preparation of the stipulation. Accordingly, none of the "admitted facts requiring no proof at hearing" are binding on

Petitioner, and have not independently formed the basis of any of the Findings of Fact contained herein.

The final hearing was convened as noticed. At hearing, Petitioner testified on his own behalf (telephonically) and did not offer any exhibits into evidence. Respondent presented the testimony of Lori Van Riper, senior investigations supervisor for the Florida Department of Transportation (FDOT). DMS offered Respondent's Exhibits 1 through 5, which were received into evidence subject to written objection by Petitioner. However, Petitioner did not subsequently submit any written objections to the exhibits.

At the conclusion of the hearing, the parties agreed to file their proposed orders within 10 days of the date of filing of the official transcript at DOAH.

A one-volume Transcript of the final hearing was filed on November 28, 2017. Thereafter, DMS timely filed a Proposed Final Order (PFO), while Petitioner has not filed a PFO as of the date of this Final Order.

Unless otherwise noted, all statutory references are to the 2017 version of the Florida Statutes.

FINDINGS OF FACT

1. Petitioner is currently an inmate at Liberty Correctional Institution, in Bristol, Florida. Petitioner's

presumptive release date, including gain time, is February 12, 2020.

2. On June 7, 2016, Petitioner and James Lee were charged by a seven-count criminal information by the State Attorney for the Nineteenth Judicial Circuit in St. Lucie County, Florida. Two of the seven counts were against Petitioner and arose out of the contract between the Petitioner's company, Gator Signage and Striping LLC (Gator), and FDOT.

3. Count One of the information charged Petitioner with second degree grand theft pursuant to a scheme or course of conduct, and provided in relevant part the following:

On or Between June 12, 2012, and October 4, 2013 Tracey Joseph Hoffman did unlawfully and knowingly engage in a systematic, ongoing course of conduct to obtain or use or endeavor to obtain or to use the property of another, to-wit, the property of the Florida Department of Transportation, as owner or custodian, of the value of \$20,000 or more, but less than \$100,000, with intent to either permanently or temporarily deprive the true owner of a right to the property or benefit therefrom or to appropriate the property to use of the taker or to the use of any person not entitled thereto, in violation of Florida Statute 812.014;

4. Count One related to contract E4M30 for project number 23041085201, which consisted of roadway signing and pavement marking throughout Martin, St. Lucie, and Indian River counties, and to activities which allegedly occurred between June 12, 2012, and October 4, 2013.

5. Specifically, Petitioner's conduct cited as the offense was the submission of false invoices to FDOT, for materials that were never installed during the course of the contract in the amount of \$51,812.13, of which \$47,612.13 was paid to Petitioner.

6. Lori Van Riper, an investigations supervisor and accreditation manager for the FDOT Office of Inspector General, testified on behalf of DMS. Ms. Van Riper testified that Petitioner did not cooperate with the criminal investigation, and denied responsibility for any criminal activity.

7. On July 5, 2016, Petitioner filed a Felony Plea Form and entered a plea of no contest to second degree grand theft. Petitioner was adjudicated guilty, and sentenced to be imprisoned for a term of 48 months, followed by a period of 11 years' probation.

8. Petitioner did not deny that he was convicted of second degree grand theft, and that fact is unrebutted in this record. However, Petitioner stated that he plans to file an action against his criminal attorney for ineffective assistance of counsel.

9. It is undisputed that second degree grand theft pursuant to a scheme or course of conduct, under section 814.014, Florida Statutes, in the context of doing business with

a state agency, constitutes a "public entity crime" as defined by section 287.133(1)(g).

10. Of the \$47,612.13 fraudulently paid to Petitioner, only \$5,000 has been returned.

11. Gator is a single member LLC, with Petitioner as its sole manager. No evidence was presented that anyone else associated with Gator was involved in the offense.

12. At the time the crime was committed, Petitioner was the only person on the bank account where the deposits were made, and was listed as sole owner of Gator. No evidence was presented that anyone other than Petitioner received any proceeds from the theft.

13. On or about December 13, 2012, Petitioner submitted a \$12,000 invoice, while at the time there was no outstanding work order to be paid. According to Ms. Van Riper, this was "one of the more egregious payments that we paid for not getting the work performed."

14. The final invoice submitted by Petitioner was for \$4,200 for maintenance of traffic, even though maintenance of traffic was already included in the work orders and cannot be billed separately.

15. James Lee (Lee) was the FDOT special projects coordinator tasked with inspecting the work performed by Gator and processing the pay requests.

16. Petitioner admitted to manipulating invoices. However, Petitioner stated that Lee "does not know what (Petitioner) is doing" and that "because Lee is getting ready to retire, he does not care."

17. The original Florida Department of Law Enforcement (FDLE) investigation did not make note of any demonstration of good citizenship by Petitioner. However, at hearing Petitioner testified that:

- He has been installing traffic control signs since 2005 as a subcontractor;
- He pays taxes on the 10-acre ranch he owns;
- He volunteers at the schools his children attend and is on the PTA;
- He was Homecoming King at his high school;
- He has no prior criminal record;
- He has been a great father to his children;
- He regrets pleading no contest to the fraud charge, and maintains that he had ineffective assistance of counsel.

18. A person who is placed on the convicted vendor list is precluded from transacting business with any public entity for a period of 36 months following the date of being placed on the list. § 287.133(2)(a), Fla. Stat.

CONCLUSIONS OF LAW

19. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2017).

20. In this instance, DOAH has final order authority for placement on the convicted vendor list pursuant to section 287.133(3)(e)1.e.

21. Findings of Fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings, or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized. § 120.57(1)(j), Fla. Stat.

22. Respondent is charged by the Legislature with the duty to manage the convicted vendor list, pursuant to section 287.133.

23. Section 287.133(1) defines a public entity crime, and provides, in pertinent part, that:

(g) "Public entity crime" means a violation of any state or federal law by a person with respect to and directly related to the transaction of business with any public entity or with an agency or political subdivision of any other state or with the United States, including, but not limited to, any bid, proposal, reply, or contract for goods or services, any lease for real property, or any contract for the construction or repair of a public building or public work, involving antitrust, fraud,

theft, bribery, collusion, racketeering, conspiracy, or material misrepresentation.

24. Petitioner's conviction of second degree theft was directly related to the transaction of business between Petitioner and FDOT, and is a public entity crime.

25. Section 287.133 establishes the burden on the Department to prove that it is in the public interest to place a person on the convicted vendor list, and section 287.133(3)(e) provides, in pertinent part, that:

4. In any proceeding under this section, the department shall be required to prove that it is in the public interest for the person to whom it has given notice under this section to be placed on the convicted vendor list. Proof of a conviction of the person or that one is an affiliate of such person shall constitute a prima facie case that it is in the public interest for the person or affiliate to whom the department has given notice to be put on the convicted vendor list. Prompt payment of damages or posting of a bond, cooperation with investigation, and termination of the employment or other relationship with the employee or other natural person responsible for the public entity crime shall create a rebuttable presumption that it is not in the public interest to place a person or affiliate on the convicted vendor list. Status as an affiliate must be proven by clear and convincing evidence. If the administrative law judge determines that the person was not convicted or is not an affiliate of such person, that person or affiliate shall not be placed on the convicted vendor list.

26. The Legislature has provided further guidance to the undersigned as to whether Petitioner should be placed on the convicted vendor list:

3. In determining whether it is in the public interest to place a person or affiliate on the convicted vendor list, the administrative law judge shall consider the following factors:

a. Whether the person or affiliate committed a public entity crime.

b. The nature and details of the public entity crime.

c. The degree of culpability of the person or affiliate proposed to be placed on the convicted vendor list.

d. Prompt or voluntary payment of any damages or penalty as a result of the conviction.

e. Cooperation with state or federal investigation or prosecution of any public entity crime, provided that a good faith exercise of any constitutional, statutory, or other right during any portion of the investigation or prosecution of any public entity crime shall not be considered a lack of cooperation.

f. Disassociation from any other persons or affiliates convicted of the public entity crime.

g. Prior or future self-policing by the person or affiliate to prevent public entity crimes.

h. Reinstatement or clemency in any jurisdiction in relation to the public entity crime at issue in the proceeding.

i. Compliance by the person or affiliate with the notification provisions of paragraph (b).

j. The needs of public entities for additional competition in the procurement of goods and services in their respective markets.

k. Mitigation based upon any demonstration of good citizenship by the person or affiliate.

§ 281.133(3)(e)3., Fla. Stat.

27. The Department has presented a prima facie case that it is in the public interest to place Petitioner on the convicted vendor list since, as found above, the Department proved that Petitioner was convicted of one count of second degree grand theft, pursuant to section 812.014(2)(b)1., in the context of doing business with a state agency, and that such conviction constitutes a "public entity crime" as defined by section 287.133(1)(g).

28. Petitioner is not entitled to a rebuttable presumption that it is not in the public interest to place him on the convicted vendor list. While Petitioner has repaid \$5,000 to FDOT, that amount represents only a small portion of the funds he stole. Moreover, Petitioner did not cooperate with the FDLE investigation. Finally, Petitioner cannot "unaffiliate" himself from the person responsible for the public entity crime, since he was the perpetrator of the crime.

29. Once the Department presents a prima facie case, Petitioner is required to prove by the preponderance of the evidence that it would not be in the public interest to be placed on the convicted vendor list. Section 287.133(3)(e) provides, in pertinent part, that:

5. Any person or affiliate who has been notified by the department of its intent to place his or her name on the convicted vendor list may offer evidence on any relevant issue. An affidavit alone shall not constitute competent substantial evidence that the person has not been convicted or is not an affiliate of a person so convicted. Upon establishment of a prima facie case that it is in the public interest for the person or affiliate to whom the department has given notice to be put on the convicted vendor list, that person or affiliate may prove by a preponderance of the evidence that it would not be in the public interest to put him or her on the convicted vendor list, based upon evidence addressing the factors in subparagraph 3.

30. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000) (relying on American Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997), (quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987))).

31. Petitioner presented no evidence and offered no testimony related to any of the factors under section

287.133(4)(e)3., except for his own testimony on his demonstrated good citizenship. Although Petitioner may have paid his taxes, volunteered at his children's various schools, and been a good father, the totality of the evidence shows a public interest in placing Petitioner on the convicted vendor list.^{1/} The grand theft committed by Petitioner was directly related to his contract with FDOT, the stolen funds have not been repaid, and Petitioner continues to deny culpability for his criminal actions.

32. Petitioner failed to meet his burden of proving that it is not in the public interest to place him on the convicted vendor list.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED that Petitioner, Tracy J. Hoffman, be placed on the convicted vendor list pursuant to section 287.133, Florida Statutes.

DONE AND ORDERED this 22nd day of January, 2018, in
Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of January, 2018.

ENDNOTE

^{1/} The undersigned notes that the majority of the time that
Petitioner will be on the convicted vendor list, he will be
incarcerated, and therefore unable to contract with public
entities regardless.

COPIES FURNISHED:

Tracy J. Hoffman K90666
Liberty Correctional Institution, South Unit
11064 Northwest Dempsey Barron Road
Bristol, Florida 32321-0711

Timothy L. Newhall, Esquire
Department of Management Services
Suite 160
4050 Esplanade Way
Tallahassee, Florida 32399
(eServed)

Matthew J. Knoll, Esquire
Department of Management Services
Suite 160
4050 Esplanade Way
Tallahassee, Florida 32399
(eServed)

Roz Ingram
Director of State Purchasing and
Chief Procurement Officer
Division of State Purchasing
Department of Management Services
4050 Esplanade Way
Tallahassee, Florida 32399-0950

J. Andrew Atkinson, General Counsel
Office of the General Counsel
Department of Management Services
4050 Esplanade Way, Suite 380
Tallahassee, Florida 32399
(eServed)

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.