STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

SHARON R. HUBERTY Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	DOAH Case No. 09-0640 SBA Case No. 2008-1379

FINAL ORDER

On October 1, 2009, Administrative Law Judge Daniel M. Kilbride (hereafter "ALJ") submitted his 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. Both Petitioner and Respondent filed Proposed Recommended Orders. Both Petitioner and Respondent timely filed exceptions on October 16, 2009. Both Petitioner and Respondent filed responses to the other's exceptions. 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.

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.

PRELIMINARY STATEMENT

The State Board of Administration adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order.

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact of an Administrative Law Judge 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 a Division of Administrative Hearings ("DOAH") 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 19932). 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." Nevertheless, the "unadopted rule" provisions of section 120.57(1)(e)3., Florida Statutes, state that "the administrative law judge's determination regarding the unadopted rule shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with the essential requirements of law."

RULINGS ON PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

Petitioner's Exception 1: Exception to Finding of Fact 55

Petitioner has filed an exception to the finding in the Recommended Order that Petitioner had moved from Wisconsin to Florida in "1977." Finding of Fact 1, as well as the transcript, indicates that the correct date of the relocation was "1997." This exception is accepted and this change is incorporated into the Final Order.

Petitioner's Exception 2: Exception to Conclusion of Law 75

Petitioner contends the Recommended Order erred in concluding that the State Board of Administration did not take any "agency action" affecting Petitioner's substantial interests when it allowed the Petitioner to transfer from the Pension Plan into the Investment Plan

telephonically. Petitioner contends that "agency action" did occur because the SBA transferred Petitioner's assets from the Pension Plan into the Investment Plan, and the SBA established an unadopted and invalid rule.

The Record clearly shows Petitioner wanted to be a member of the Investment Plan. The Record indicates Petitioner took the initiative to call the MyFRS Financial Guidance line in August 27, 2002 to specifically request the transfer of assets from her Pension Plan account into the Investment Plan. Her request came after she had the opportunity to consult a competent, independent financial advisor of her own choosing, as to which available Investment Plan account funds she should select. The SBA took no action that either forced her to transfer her Pension Plan assets into the Investment Plan or prohibited her from doing so. The Record indicates that the SBA merely gave effect to what Petitioner wanted to do. The SBA did not require the Petitioner to make her election telephonically. She had two other means (paper form and the internet election) available to effectuate her election, but she herself chose that available option.

Petitioner proffers the argument that the SBA, not the Petitioner, actually physically transferred Petitioner's Pension Plan funds into the Investment Plan. Petitioner cites section 121.4501(3)(c)(4)., Florida Statues to demonstrate that the actual transfer of funds is effectuated by the SBA. However, that section states that the SBA will transfer assets "[a]s directed by the participant...." [emphasis supplied] Finding of Fact 29 clearly shows

Petitioner wanted to have the present value of her Pension Plan account, as well as all future employer contributions, transferred to her Investment Plan account. It was only after the SBA was made aware of Petitioner's desire to switch retirement plans did the SBA cause the asset transfer, in accordance with the express direction of the Petitioner. Thus, Petitioner's own actions, rather than those of the SBA, have affected Petitioner's interests.

Petitioner argues that the mere fact that the SBA had allowed Petitioner to transfer from the Pension Plan into the Investment Plan telephonically was adverse to the Petitioner's interests because such action caused Petitioner to lose substantial retirement benefits. However, as established by the Record, it is clear Petitioner's election to transfer into the Investment Plan actually benefitted her for several years, as the value of her Investment Plan account grew dramatically. Had she experienced any event that would have allowed her to take a distribution during that period of growth, she may have been in a more favorable financial position than if she had remained in the Pension Plan. The Record notes that Petitioner had been warned through the Plan Choice Kit that the value of her Investment Plan account could go down. World economic conditions recently did cause unprecedented and unforeseeable losses to investments. Those factors caused the decline to Petitioner's account balance, not any action by the SBA. There was no evidence adduced that Petitioner is planning on retiring in the immediate future. If market conditions change, Petitioner could recoup any paper losses in her Investment Plan account that she has experienced to date.

Petitioner further argues that the mere creation of the MyFRS Financial Guidance Line was agency action that adversely affected Petitioner. Petitioner did not make such a challenge in her Petition. And again, it is not the MyFRS Financial Guidance Line that caused any adverse impact on Petitioner. It is the investment environment that has produced any adverse impact on Petitioner's retirement plan assets, as it has done to investments held by all investors.

The agency action that occurred in this matter was the denial by the SBA of Petitioner's request to be transferred back into the Pension Plan without having to comply with the "buy back" provisions of Section 121.4501(4)(e)2., Florida Statues (2002). It was not the mere giving of effect to what the record demonstrated was Petitioner's clear choice to be transferred into the Investment Plan.

Petitioner's exception to Conclusion of Law 75 hereby is rejected.

Petitioner's Exception 3: Exception to the Recommendation of the ALJ that Petitioner Remains a Member of the Investment Plan

Petitioner's next exception does not refer to any specific conclusions of law in the Recommended Order but instead consists of a general argument that Petitioner's election to transfer into the Investment Plan should be invalidated and that the ALJ's recommendation that Petitioner should remain in the Investment Plan because of her actions should be denied. Petitioner argues that the ALJ made findings of fact in Paragraphs 59 and 65 that the

Petitioner's election was "legally invalid." Petitioner claims that these findings of fact cannot be disturbed and must support a finding that Petitioner effectively never transferred from the Pension Plan to the Investment Plan. Both of the Paragraphs cited by Petitioner appear in the Conclusions of Law portion of the Recommended Order and clearly are legal conclusions, not findings of fact

The ALJ's recommendation is consistent with Conclusion of Law 75, which states that the SBA gave effect to Petitioner's clear intent to join the Investment Plan, and that Petitioner did not establish any blame on the part of the SBA for Petitioner's unmistakable desire to be a member of the Investment Plan.

Petitioner cites the case, Julie Lambrou v. State Board of Administration, DOAH Case 05-4184 (DOAH 2005), for the proposition that the SBA has itself stated that if a Pension Plan participant's election to transfer into the Investment Plan is invalid, then the participant should be found to have not transferred into the Investment Plan. But this case is inapposite. Lambrou involves the issue as to whether a Pension Plan participant was actually employed in the month in which her election to transfer into the Investment Plan became effective. If she was not employed, then she would not have been eligible to make the transfer. In the instant case, Petitioner clearly was eligible to make a transfer from the Pension Plan to the Investment Plan because she was actively employed at the time of the transfer.

Accordingly, this exception is rejected.

Petitioner's Exception 4: Exception to Conclusion of Law 71

Petitioner objects to the ALJ's conclusion that Petitioner has waived her rights to complain about her enrollment into the Investment Plan. Petitioner argues she was unaware of the fact she was enrolled in the Investment Plan, and thus could not voluntarily relinquish any right to protest such enrollment.

"As a general principle of law, the doctrine of waiver encompasses not only the intentional or voluntary relinquishment of a known right, but also conduct that warrants an inference of the relinquishment of a known right." Russ v. Silbiger, 988 So.2d 80, 81 (Fla. 4th DCA 2008), citing (Singer v. Singer, 442 So.2d 1020, 1022 (Fla. 3d DCA 1983)) [emphasis supplied].

The Record shows Petitioner was aware of the fact she was enrolled in the Investment Plan. She had contacted an independent financial advisor to best determine the funds into which she should direct her Investment Plan assets. She specifically called the MyFRS Financial Guidance Line and requested to have the present value of her Pension Plan assets transferred into the Investment Plan. Petitioner received quarterly statements showing her status as an Investment Plan member and setting forth the value of her Investment Plan account. And, for over six years, while her account balance continued to grow, she did not question where her retirement funds were being directed. It was only when her account lost value, due to market conditions, did she suddenly decide to challenge what the Record

established as her clear and unmistakable election. The ALJ correctly applied the doctrine of waiver to the circumstances of this matter.

Petitioner makes the argument that the ALJ incorrectly relied on the case, Felder v. Dept. of Management Services, Division of Retirement, Case No. 03-0486 (DOAH October 6, 2003), for the proposition that the Petitioner waived her rights. Petitioner argues the Felder case was distinguishable because the situation involves a participant who did not sign an enrollment form. The Petitioner notes the ALJ in Felder stated that the applicable statute only required the enrollment form to be in writing, but not signed. However, section 121.4105(4)(a)1, Florida Statures, which is applicable to Petitioner's election, does not require a signed form either. The statute requires an election to "...be made in writing or by electronic means" and "..to be filed" (not signed) with the third- party administrator. There is a clear distinction between "filing" and "signing" Black's Law Dictionary, 6th Ed. 1990, states that something is considered to be "filed" "...when it is delivered to the proper officer and by him received to be kept on file as a mater of record and reference." "Signing" is the "...making of any mark, as upon a document, in token of knowledge, approval, acceptance or obligation. Id.

The Petitioner also argues that Felder involved a situation in which the employee waited 20 years, instead of 6 years, to challenge the election. This distinction is without merit. The ALJ in Felder stated: "Each state employee bears the burden of acting timely to protect his or her own interests with regard to retirement accounts, and Petitioner has not." Similarly, in

Petitioner's situation, Petitioner received quarterly statements for 6 years advising her she was a participant in the Investment Plan, and never sought any redress until her investment accounts declined in value. Clearly, Petitioner did not act timely to protect her own interests.

Accordingly, Petitioner's exception to Conclusion of Law 71 hereby is rejected.

Petitioner's Exception 5: Exception to Conclusion of Law 70 through 72

Petitioner objects to the ALJ's conclusion that the Petitioner was aware of the consequences of her election to transfer from the Pension Plan to the Investment Plan. Petitioner attempts to have the agency re-weigh evidence presented and ruled upon by the Administrative Law Judge. However, an agency reviewing a DOAH Recommended Order may not reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the purview of the administrative law judge as the trier of facts. Martuccio v. Dept. of Professional Regulation, 622 So.2d 607, 609 (Fla. 1st DCA 1993); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Having witnesses the demeanor of the parties, the ALJ is in the best position to make credibility determinations. Grossman v. Jewish Community Ctr. Of Greater Ft. Lauderdale, Inc., Unemployment Appeals Commission, 704 So. 2d 714, 716 (Fla. 4th DCA 1998).

Accordingly, Petitioner's exception to Conclusions of Law 70 through 72 hereby is rejected.

Petitioner's Exception 6: Argument that Petitioner' Election was Void *Ab Initito* such that Petitioner Remains in the Investment Plan

This exception does not appear to dispute portions of the Recommended Order but appear to be strictly legal argument.

Accordingly, this exception hereby is rejected. *See* Heifetz v. Dept. of Business Regulation, 475 So.2d 1277(Fla. 1st DCA 1985).

Petitioner's Exception 7: Exception to Conclusion of Law 76

Petitioner argues that the ALJ's conclusion that former rules 19-10.001, 19-10.002 and 19-10.003, F.A.C. have no application in Petitioner's case is erroneous. Petitioner argues these rules require a completed form. And, thus, since she never submitted a form, Petitioner argues she was never effectively enrolled in the Investment Plan.

A reading of these rules shows that the rules solely were applicable to asset transfers and not to the plan choice process. As such, the rules are not applicable to Petitioner's Investment Plan election. As noted previously, section 121.4105(4) (a)1, Florida Statutes governs Petitioner's election. This section requires an election to "...be made in writing or by electronic means." [emphasis supplied]. Generally, the word "or," when used in a statute, is to be construed in the disjunctive. Teleophase Society of Florida, Inc. v. State Board of Funeral Directors & Embalmers, 334 So.2d 563 (Fla. 1976). The use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately. Ellinwood v.

Board of Architecture and Interior Design, 835 So.2d 1269 (Fla. 1st DCA 2003). Thus, under section 121.4105(4) (a)1, a physical form is not statutorily required.

Accordingly, Petitioner's exception to Conclusion of Law 76 hereby is rejected.

Petitioner's Exception 8: Exception to Conclusion of Law 76

Petitioner argues that the ALJ's second conclusion in paragraph 76 that an agency can waive a rule is erroneous. As noted previously, the cited rules have no application in this particular case.

Accordingly, this exception hereby is rejected.

Petitioner's Exception 9: Exception to Conclusion of Law 72

Petitioner argues that the ALJ's conclusion that Petitioner's monitoring of her Investment Plan account funds for over six years before questioning her status as an Investment Plan member served to ratify her initial Investment Account election is erroneous. Petitioner argues that she was unaware of the consequences of her election. However, the Record clearly establishes that Petitioner was receiving quarterly statements that indicated her membership in the Investment Plan, as well as the performance of the funds she had selected upon the advice of her independent investment advisor. While Petitioner's account balance continued to climb, she did not question her status as an Investment Plan member. It was only after her account balance declined as a result of market conditions, six years after she had joined the Investment Plan, did Petitioner decide to broach the issue of her status as an Investment Plan member. The

Record also establishes Petitioner was provided with materials that cautioned her that while the value of her account could go up, it also could go down. The Record also establishes that no one affiliated with he SBA mislead Petitioner about the Investment Plan. It is the function of any Administrative Law Judge in a formal administrative proceeding "... to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence." *See, e.g.*, Goin v. Commission on Ethics, 658 So.2d 1131, 1138 (Fla. 1st DCA 1995); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). The ALJ's findings that Petitioner was fully aware of her status as an Investment Plan member and the consequences of being an Investment Plan member are "permissible inferences" drawn from the undisputed facts presented at the hearing, and support the conclusion of law, that Petitioner "ratified" her election to join the Investment Plan. As Petitioner notes, "ratification" occurs when a person has "full knowledge of all material facts and circumstances relating to the unauthorized act or transaction at the time of the ratification." *See* Deutsche Credit Corp. v. Peninger, 603 So.2d 57 (Fla 5th DCA 1992).

Accordingly, Petitioner's exception to Conclusion of Law 72 hereby is rejected.

RULINGS ON RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER

Respondent's Exception 1: Exception to Finding of Fact 10

Respondent objects to the ALJ's finding that Petitioner had not been provided with "very important information" at the time she elected to enroll into the Investment Plan. As Respondent notes, this "very important information" was information that, in fact, was present on the back of the "Your Plan Choice Form." This finding of fact clearly conflicts with Paragraph 27 of the Recommended Order which notes that Petitioner did possess a copy of the "Your Plan Choice Form" and that Petitioner either had the form in hand at the time she made her telephonic election or had reviewed such form prior to her election. Petitioner clearly carefully examined the form for purposes of deciding which fund options to choose, because during her telephone call in which she made her Investment Plan election, she identified her fund selections by the exact location (by section and order) each chosen fund was listed on the "Your Plan Choice Form." There was no evidence in the record that the copy of the "Your Plan Choice Form" that Petitioner either had or reviewed did not contain the information that the ALJ deemed as "very important information," or that Petitioner somehow was prevented from reading such information on her copy of the form.

Respondent's exception to Finding of Fact 10 hereby is accepted. Accordingly, paragraph 10 of the Recommended Order hereby is modified to delete the statement that finds Petitioner was not provided with the "very important information" at the time she used the MyFRS Financial Guidance Line to elect to enroll into the Investment Plan.

Respondent's Exception 2: Exception to Findings of Fact 41 through 45

Respondent argues that these findings should be rejected since they are not material to the outcome of this case. As noted above, an agency may reject findings of fact if they are not based on competent substantial evidence.

Respondent's exceptions to Findings of Fact 41 through 44 hereby are rejected because they are based on information contained in the Record as to what occurred during Petitioner's telephone call to the MyFRS Financial Guidance Line when Petitioner requested to transfer to the Investment Plan.

Respondent's Exception to Finding of Fact 45 is accepted in part and rejected in part. The ALJ found that the Petitioner had a copy of the form and the Plan Choice Kit. These documents contained all of the information that the ALJ stated was not provided by the representative who assisted Petitioner when she called the MyFRS Financial Guidance Line. The finding by the ALJ that Petitioner actually needed to physically complete and sign the form in order to be presented with information about the Investment Plan is not supported by competent substantial evidence. The Record shows the information was available to Petitioner. There is no evidence to support the finding that Petitioner would have received the information only if she had signed a physical form. However, it is the case that in signing a form, Petitioner would have affirmatively stated that she understood her rights as a participant in the Investment Plan.

Further, paragraph 45 also correctly states that section 121.4501 is referenced on the physical enrollment form.

Accordingly, the statement in paragraph 45 of the Recommended Order that states that Petitioner would have been presented with information about the Investment only if she had completed and signed a physical enrollment form hereby is rejected.

Respondent's Exception 3: Exception to Finding of Fact 46

Respondent asserts that the finding by the ALJ that Petitioner's telephonic election was not equivalent to her having completed and signed an election form and, therefore, such telephonic election was "voidable," is actually a conclusion of law and not a finding of fact. An agency is not bound by the labels affixed to findings of fact and conclusions of law. If a conclusion is improperly labeled as a finding of fact, such label can be disregarded. Battaglia Properties v. Florida Land and Water Adjudicatory Comm., 629 So.2d 161, 168 (Fla. 5th DCA 1993). An agency, however, cannot disregard an Administrative Law Judge's finding of fact by simply characterizing such finding as a conclusion of law. Kinney v. Department of State, 501 So.2d 129 (Fla. 5th DCA1987).

Based on his interpretation of section 121.4501, the ALJ first makes the conclusion that the telephonic election to join the Investment Plan is not the "functional equivalent" of making such an election via a completed and signed form. The ALJ thus makes the legal conclusion that section 121.4501 requires a "signed" election form. But, section 121.4105(4)(a)1.a. states ...[t]he election must be made in writing or by electronic means and must be filed with third party administrator... [emphasis supplied]. Black's Law Dictionary, 6th Ed. 1990, states that something is considered to be "filed"

"...when it is delivered to the proper officer and by him received to be kept on file as a mater of record and reference." With this definition in mind, it can be concluded that a telephone call making an election pursuant to section 121.4501 would be "filed" if it was made, as required, to the third party administrator and if it was recorded and was retrievable for later use and reference.

In the next part of paragraph 46, the ALJ concludes that the Petitioner's election was "voidable." Black's Law Dictionary, supra, states "voidable" "... imports a valid act which may be avoided rather than an invalid act which may be ratified." Therefore, the statement that Petitioner's election was "voidable" is properly characterized as a conclusion of law, rather than a finding of fact. There does not appear to be any statutory or case law that permits an Investment Plan participant to avoid a valid election to participate in the plan.

Therefore, this exception is accepted. Accordingly, paragraph 46 of the Recommended Order hereby is rejected in toto.

Respondent's Exception 4: Exception to Conclusion of Law 59

Respondent argues that the conclusion that the SBA knew or should have known that the method by which Petitioner transferred into the Investment Plan was "invalid" is erroneous. This Conclusion of Law is consistent with the ALJ's Conclusion of Law 65 which concludes that the SBA's interpretation of section 121.4501, Florida Statues conflicts with the clear provisions of the statute. The ALJ concludes that this interpretation, which allows participants to transfer from the Pension Plan to the Investment Plan via a telephonic election, "clearly erroneous," since, according to the ALJ, the statute requires the completion and signing of a physical form.

However, as noted above, under the ruling on Respondent's Exception 3, the statute does not mandate the "signing" of a form- it simply requires the "filing" of the participant's election. "Filing" is not equivalent to "signing."

Further, the statute does not require a "form" to be filed. Section 121.4501 states that the election must be made in writing or by electronic means and such election must be filed.

As noted previously, the word "or," when used in a statute, generally is to be construed in the disjunctive. Teleophase Society of Florida, Inc. v. State Board of Funeral Directors & Embalmers, 334 So.2d 563 (Fla. 1976). The use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately. Ellinwood v. Board of Architecture and Interior Design, 835 So.2d 1269 (Fla. 1st DCA 2003). Thus, it would appear that the term "electronic means" should be construed as being something other than an election made in writing.

The word "electronic means" is a type of technical word. As discussed by the court in City of Tampa v. Thatcher Glass Corporation, 445 So.2d 578, 580, n.2, (Fla. 1984):

> Technical words are those "[b]elonging or peculiar to an art or profession." Black's Law Dictionary 1312 (rev. 5th ed. 1979). The presumption favoring the "popular signification" of technical terms applies unless the profession to which the technical term belongs is the legal profession. Terms of special legal significance are presumed to have been used by the legislature according to their legal meanings. Davis v. Stroples, 39 So.2d 468 (Fla.1949). (Barnes, J., concurring in part and dissenting in part)....

The term "electronic means" does have legal significance. The Uniform Electronic Transaction Act "Act"), contained in Part II of Chapter 668, was enacted by the legislature in 2000, and specifically made applicable to any "electronic record" or "electronic signature" created on or after July 1, 2000. Section 668.50(4), Florida Statutes. The Act specifically applies to records received by state governmental entities, such as the SBA. Section 668.50(2)(i), (l), (p) and (3), Florida Statutes. This Act was in existence at the time of the 2002 "initial election" enrollment period for the Investment Plan.

The Act applies to transactions in which both parties have agreed to conduct the transaction by electronic means. See section. 668.50(5)(b), Florida Statutes. Thus, the Act does not require agencies to utilize electronic records, but allows them to do so if both parties to the transaction agree to do so. Agreement is to be determined from "...the context and surrounding circumstances, including the parties' conduct." Section 668.50(5)(b), Florida Statutes. The Act states that if parties to a transaction have agreed to conduct a transaction by electronic means and a provision of law requires a person to send or deliver information in writing to another person, then that requirement is satisfied if the information is sent in an electronic record capable of retention by the recipient at the time of receipt. . .

Section 668.50(2), provides some important definitions relevant to electronic transactions, as follows:

> ***
>
> (e) "Electronic" means relates to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities
> ***

> (g) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.
> ***
> (h) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.
> (i) "Governmental agency" means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of this state, including a county, municipality, or other political subdivision of this state and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.
> ***
> (m) "Record" means "...information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form, including public records as defined in s. 119.011

The definition of "electronic record" in the Act clearly is broad enough to encompass recorded telephone calls. As the Record shows, Petitioner's telephone call not only was recorded but was retrievable. Thus, the Act would find that there was an electronic record of Petitioner's call. And, since an "electronic signature" can encompass a "sound" associated with the electronic record, a recoding of Petitioner's voice making the election would fall within the Act's definition of an electronic signature.

Further, Section 668.50(7), Florida Statutes, sets forth the legal recognition of electronic records and signatures:

> (a) A record or signature may not be denied legal effect or enforceability solely because the record or signature is in electronic form.
> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in the formation of the contract.

> (c) If a provision of law requires a record to be in writing, an electronic record satisfies such provision.
> (d) If a provision of law requires a signature, an electronic signature satisfies such provision.

The SBA's interpretation of "electronic means" in section 121.4501, Florida Statutes, is consistent with the meaning term as contemplated by the Act.

Additionally, as a state governmental entity, the SBA also is subject to the provisions of Chapter 119, Florida Statutes (Public Records). See section 119.011(2), Florida Statutes. The Division of Library and Information Services of the Department of State has provided by rule guidance to state governmental entities concerning the managing of public records in electronic format. Rule 1B-26.003(3)(a)1., Florida Administrative Code, provides that "electronic records" include "numeric, audio, video, and textual information which is recorded or transmitted in analog or digital form." Again, this definition is broad enough to cover telephone calls that are recorded.

The SBA's construction and application of the phrase "electronic means" is entitled to great weight and should be accepted unless clearly erroneous. Level 3 Communications v. C.V. Jacobs, 841 So.2d 447, 450 (Fla. 2002); Okeechobee Health Care v. Collins, 726 So.2d 775, 778 (Fla. 1st DCA 1998). When viewed in light of the Act (which specifically is made applicable to state governmental entities), the rule promulgated by The Division of Library and Information Services of the Department of State to guide state governmental entities in managing public records, and the principles of statutory construction, the SBA's interpretation of "electronic means" cannot be said to be "erroneous" but rather is consistent with the literal meaning of such term. As such,

the telephonic election method utilized by Petitioner to transfer into the Investment Plan was not invalid.

Accordingly, Respondent's Exception 4 hereby is accepted, and paragraph 59 of the Recommended Order hereby is rejected.

Respondent's Exception 5: Exception to Conclusion of Law 65

The Respondent objects to the portion of the paragraph 65 which states that the SBA's interpretation that the phrase "by electronic means" contained in section 121.4501, Florida Statutes permits a recorded telephonic election is "clearly erroneous."

This exception is accepted for the reasons specified in the discussion under Respondent's Exception 4, above. Accordingly, paragraph 65 of the Recommended Order hereby is modified to remove the conclusion that the SBA's interpretation of the term "in writing or by electronic means is clearly erroneous."

Respondent's Exception 6: Exception to Conclusion of Law 66

Respondent makes an exception to the ALJ's conclusion that the use of the SBA's hotline to allow Investment Plan elections contravened section 121.4501, Florida Statutes. As noted above in the discussion under Respondent's Exception 4, the SBA's interpretation allowing telephonic elections is consistent with the plain meaning of the statute and is not erroneous.

Accordingly, Respondent's Exception 6 hereby is accepted and paragraph 66 of the Recommended Order hereby is rejected.

Respondent's Exception 7: Exception to Conclusion of Law 67

Respondent makes an exception to the ALJ's conclusion that the legislative intent of section 121.4501 is for a physical enrollment form for participants wishing to transfer from the Pension Plan to the Investment Plan.

As noted above under the discussion under Respondent's Exception 4, Section 121.4501 states that the election must be made in writing or by electronic means. The use of the word "or" means that the enrollment election may be made by means other than a physical form. No legislative history was introduced at the hearing that would support any other interpretation. Based on statutory interpretation and plain meaning, the conclusion in paragraph 67 is erroneous.

Thus, Respondent's Exception 7 hereby is accepted. Accordingly, paragraph 67 of the Recommended Order hereby is rejected.

Respondent's Exception 8: Exception to Conclusions of Law 68,. 69 and 73

Respondent argues that the conclusions that both the SBA's construction of section 121.4501, Florida Statutes, and the implementation of the telephonic election constitute an unadopted rule, and further that Petitioner's election by telephone contravened the statute, are erroneous.

As noted under the discussion of Respondent's Exception 4, the SBA's construction of "electronic means" is consistent with the literal meaning of such term used in section 121.4501, Florida Statutes.

In St. Francis Hospital, Inc. v. Dept. of Health, 553 So.2d 1351, 1354 (Fla. 1st DCA 1989), the court stated:

> [A]n agency interpretation of a statute which simply reiterates the legislature's mandate and does not place upon the statute an interpretation that is not readily apparent from its literal reading, nor in and of itself purport to create rights, or require compliance, or to otherwise have the direct and consistent effect of the law, is not an unpromulgated rule, and actions based upon such an interpretation are permissible without requiring the agency to go through rulemaking.

Additionally, the fact that the telephonic election method was found to be an alternative election method of electing participation in the Investment Plan, as an option does not require compliance and create certain rights while adversely affecting others, and does not have the direct and consistent effect of law. Either of these elements would be necessary in order for a statement to be considered an unpromulgated rule. See Dept. of Transportation v. Blackhawk Quarry Co., 528 So.2d 447, 449 (Fla. 5th DCA 1988), rev. den., 536 So.2d 243 (Fla. 1988).

Accordingly, these exceptions are hereby accepted. Conclusions 68, 69 and 73 which find that the telephonic election method was an unpromulgated rule hereby are rejected as being clearly erroneous.

ORDERED

The Recommended Order (Exhibit A), subject to the modifications as stated above under the Rulings on Exceptions, is adopted. The Petitioner's request to rescind her second election and be returned to the Pension Plan without having to pay the "buy back" amount 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 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 6th day of January, 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 US Mail to Daniel M. Kilbride, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, FL 32399-1550; Gavin D. Burgess, Esq., Oertel, Fernandez, Cole & Bryant, PA, P.O. Box 1110, Tallahassee, Florida 32302, and to Brian Newman and Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 6th day of January, 2010.

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

SHARON R. HUBERTY, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	Case No. 09-0640

RECOMMENDED ORDER

After due notice, this cause came on for formal hearing before Daniel M. Kilbride, duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH) in Tallahassee, Florida, on July 31, 2009.

APPEARANCES

For Petitioner: Gavin D. Burgess, Esquire
Oertel, Fernandez, Cole & Bryant, P.A.
Post Office Box 1110
Tallahassee, Florida 32302

For Respondent: Brian A. Newman, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
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Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUES

Whether Respondent, State Board of Administration (SBA or Respondent), validly enrolled Petitioner, Sharon R. Huberty (Petitioner), into the Florida Retirement System (FRS)

Exhibit A

"Investment Plan" (Investment Plan), when Petitioner used a telephonic hotline to "elect" to transfer her FRS assets without completing or signing any form.

Whether SBA should void Petitioner's initial election to join the Investment Plan made via telephone in August 2002 and allow her to transfer back into the FRS Pension Plan (Pension Plan) without any cost in excess of the current value of her Investment Plan accounts.

PRELIMINARY STATEMENT

On October 20, 2008, Petitioner, a state employee, inquired to the SBA about transferring from the Investment Plan into the Pension Plan. In a letter to Petitioner, dated November 5, 2008, the SBA stated that she had actively enrolled in the Investment Plan by making her "initial election" by telephone in August 2002. The SBA informed Petitioner that she would have to use her "second election" to return to the Pension Plan. This letter advised Petitioner that it required that Petitioner transfer from her Investment Plan account and from other money as necessary, a sum representing the present value of her Pension Plan benefit at the time of such election.

On November 22, 2008, pursuant to Chapter 120, Florida Statutes (2008), and the Uniform Rules of Procedure codified as Florida Administrative Code, Chapter 28-106, Petitioner timely filed an FRS Investment Plan Petition for Hearing with the SBA.

The petition was referred to the DOAH on February 6, 2009, and ultimately to the undersigned Administrative Law Judge for formal hearing, and discovery ensued.

The hearing was originally set for April 17, 2009. Thereafter, by unopposed motion to continue, the hearing was rescheduled for May 8, 2009. On April 27, 2009, Petitioner filed a Petition for Determination of Invalidity of Unadopted Rule, together with a Motion to Consolidate her rule challenge case with her challenge of the validity of the 2002 transfer of her FRS assets. On April 27, 2009, Petitioner also filed a motion for continuance of the hearing date. On April 29, 2009, the two cases were consolidated, and, on May 1, 2009, the hearing was rescheduled for July 31, 2009.

This cause came on for hearing as noticed on July 31, 2009. At the hearing, official recognition was taken of several rules promulgated by the SBA, including former Florida Administrative Code Rule 19-10.001 (effective May 9, 2001); former Rules 19-10.002 and 19-10.003 (effective September 19, 2001); former Rule 19-10.001 (effective August 11, 2002); and former Rules 19-10.002 and 19-10.003 (effective December 8, 2002). Petitioner testified in her own behalf, and Petitioner's Exhibits 1 through 7 were admitted into evidence. Respondent presented the testimony of Daniel Beard, the director of Policy, Risk Management and Compliance with the Office of Defined

Contribution Programs in the SBA. Respondent's Exhibits 1 through 7 were admitted into evidence.

The Transcript of the consolidated hearings was filed on August 25, 2009. Both parties timely filed their proposals. Each of the party's proposals have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner has been employed as a corrections officer with the Florida Department of Corrections since 1997 and has been assigned to the Hendry County Corrections Institute in Fort Myers, Florida. In Florida, corrections officers are classified as "special risk" for FRS purposes. Petitioner became a member of the Pension Plan in 1997 after she moved from Wisconsin to Florida to work for the Florida Department of Corrections.

2. In 2000, the Florida Legislature enacted law creating a bipartite retirement system for public employees. The new system granted existing public employees the one-time option of "electing" to transfer their FRS Defined Benefit Plan assets into a newly-created FRS Defined Contribution Plan, also known as the Investment Plan. This election was termed the "first election." Under the new optional retirement system, FRS-eligible public employees who had made a valid "first election" could, at a later date, exercise the option of making a "second election," whereby the market value of the FRS-eligible public

employee's Investment Plan assets would be returned to the Pension Plan, and any deficit between the value of the employee's Investment Plan assets and the value of the Pension Plan would be paid by the employee.

3. The Investment Plan is a defined contribution plan, and the member bears the risk of loss of the investments he or she chooses. In contrast, the Pension Plan is a defined benefit plan, wherein retirement benefits are calculated based upon a fixed formula, not the performance of the investments, which are selected by the state. Thus, the state, not the member, bears the risk of loss of the Pension Plan investments.

4. In creating the Investment Plan option, the Florida Legislature emphasized through the enabling legislation, the importance of providing information and education to potential program participants.

5. During the 2002 "initial election" enrollment period, the SBA implemented three ways for a Pension Plan member to elect to join the Investment Plan: (1) by submitting a hard copy of the MyFRS Your Plan Choice Form, (2) by logging into the MyFRS.com website and completing the MyFRS Your Plan Choice Form electronically, or (3) by calling the MyFRS Financial Guidance Line and enrolling verbally over the telephone.

6. Section 121.4501, Florida Statutes (2002),[1] describes the standards by which the SBA must administer the Public

Employee Optional Retirement Program (PEORP or Investment Plan). Subsection 121.4105(4)(a)1., Florida Statutes, provides, in part:

> (a)1. With respect to an eligible employee who is employed in a regularly established position on June 1, 2002, by a state employer:
>
> a. Any such employee may elect to participate in the Public Employee Optional Retirement Program in lieu of retaining his or her membership in the defined benefit program of the Florida Retirement System. The election must be made in writing or by electronic means and must be filed with the third-party administrator by August 31, 2002, or within 90 days after the conclusion of the leave of absence whichever is later. This election is irrevocable, except as provided in paragraph (e). . . .

7. Thus, state employees electing to transfer from the Pension Plan into the Investment Plan must do so "in writing or by electronic means." Further, the election must be "filed" with the third-party administrator.

8. Pursuant to Section 121.4501, Florida Statutes, the SBA created a form called the MyFRS Your Plan Choice Form.

9. In order to complete the MyFRS Your Plan Choice Form and elect to transfer from the Pension Plan into the Investment Plan, the SBA required that the employee sign the form. If an eligible employee submitted an otherwise complete MyFRS Your Plan Choice Form without signing it, the SBA would reject the

form as incomplete and not effectively enroll the employee into the Investment Plan.

10. For employees electing to enroll in the Investment Plan by submitting the MyFRS Your Plan Choice Form, the SBA requires that the employee sign the "Authorization" section of the form, which includes a section titled "IMPORTANT INFORMATION," which contains several affirmative statements describing the Investment Plan participant's rights and responsibilities. According to Daniel Beard, the form requires a signature "because there is some very important information that a member needs to take into consideration before making any choices." This "very important information" was not provided to Petitioner at the time she used the MyFRS Financial Guidance Line to "elect" to enroll into the Investment Plan.

11. In 2002, the SBA contracted with a third-party administrator to create and operate a telephone hotline (MyFRS Financial Guidance Line) whereby FRS-eligible public employees could elect to transfer their Pension Plan assets into the newly-created Investment Plan via telephone.

12. On August 27, 2002, Petitioner contacted the telephone hotline intending to transfer her retirement assets from the Pension Plan to the Investment Plan. Petitioner's initial election to transfer into the Investment Plan was made orally by telephone to the third-party administrator on August 27, 2002.

13. The SBA did not require Petitioner to complete or sign any form following her election to transfer into the Investment Plan by telephone. Petitioner did not sign or submit a form, and no form was "filed" with the third-party administrator.

14. At the time of her 2002 election, Petitioner understood the Investment Plan to be an alternative to the Pension Plan whereby she would have the ability to choose her own investments rather than follow the investments that the state FRS administrators picked for her. She assumed that her retirement benefits would otherwise be unchanged.

15. At the time of her 2002 election, Petitioner claims that she did not understand that she was effectively canceling her fixed-benefit pension plan and replacing it with a fixed-contribution, market-based investment plan and that she would no longer be eligible to receive pension benefits or to participate in the state's deferred compensation "DROP" program.

16. Petitioner's deadline to elect membership in the newly-created Investment Plan was August 31, 2002. Before this deadline expired, a Plan Choice Kit was mailed to members who were eligible to enroll in the Investment Plan.

17. The Plan Choice Kit included a document entitled "Your Plan Choice Form" (Plan Choice Form). The Plan Choice Form identified 39 different investment options available to members who transferred to the Investment Plan.

18. The Plan Choice Form advised plan members to review the material in the Plan Choice Kit before making a plan choice.

19. The MyFRS Choice Book (Choice Book), including the Plan Choice Kit, advised members of key differences between the Pension Plan and the Investment Plan. The Choice Book warned members that the value of an Investment Plan account is not fixed and "will vary depending on the performance of your investment. That means, the value of your account can go up, but it also can go down . . .".

20. The Choice Book also advised members that they would have an opportunity to switch back to the Pension Plan if they so desired, but they would have to "buy back" into the Pension Plan with money from their Investment Plan account. The Choice Book cautioned members, "[i]f you don't have enough money in your Investment Plan account, you can still get back in . . . but you'll have to make up the difference from other savings."

21. The Plan Choice Form advised members to review a description of their "rights and responsibilities under the FRS Pension Plan and FRS Investment Plan in the respective Summary Plan Descriptions and Florida Statutes, available through the MyFRS Financial Guidance Line at 1-866-44-MyFRS . . . or at MyFRS.com."

22. The Investment Plan Summary Plan Description informed members in 2002:

> You will have a one-time opportunity to switch to the Pension Plan at any point while working for an FRS employer. If you decide to switch, you must "buy back" into the Pension Plan with the money in your Investment Plan account. If you don't have enough money in your Investment Plan account, you can still get back in . . . but you'll have to make up the difference from your other financial resources.

23. The Plan Choice Form and Choice Book advised members that they could make an election to enroll in the Investment Plan online at MyFRS.com or by calling the MyFRS Financial Guidance Line and choosing option five to be connected directly to the FRS Plan Choice Administrator.

24. The SBA conducted numerous workshops for members to help them determine which plan to choose. Five workshops were noticed in Fort Myers, Florida, for April 8 through 12, 2002. Petitioner testified that she was not aware the workshops were offered and, therefore, did not avail herself of the information available at the workshops.

25. Petitioner did call her personal financial advisor at Raymond James, before the plan choice deadline expired, to discuss the investment options available to her if she chose to transfer to the Investment Plan. Petitioner's financial advisor recommended that she invest in the following Investment Plan funds identified on the Plan Choice Form: Franklin Small-Mid Cap Growth, Fidelity Mid Cap Stock Fund, Fidelity Growth Company Stock Fund, and the T. Rowe Price Small Cap Stock Fund.

26. On August 27, 2002, Petitioner called the MyFRS Financial Guidance Line and spoke to an FRS Plan Choice Administrator representative (Representative). She told the Representative she wanted to transfer to the Investment Plan. She also told the Representative she wanted her Investment Plan assets to be invested in the four funds recommended by her Raymond James financial advisor and identified a beneficiary for her Investment Plan account.

27. Petitioner testified at hearing that she did not have a copy of the Plan Choice Form with her when she made the call to the Representative on August 27, 2002. However, it is evident from the transcript of the recording of the August 27, 2002, call that Petitioner, in fact, either did have that form or had reviewed it prior to the call.

28. When asked by the Representative what she had decided to elect, Petitioner replied "section one, number two." "Section one, number two" of the Plan Choice Form is the option to transfer all of the member's Pension Plan assets and all future contributions to the Investment Plan.

29. The Representative confirmed Petitioner's "section one, number two" reference as follows:

> REPRESENTATIVE: Okay. You want to go into the Investment Plan?
> MS. HUBERTY: Yes ma'am.
> REPRESENTATIVE: Okay. So you're wanting to transfer your present value of your Pension

Plan and all future contributions to the Investment Plan?
MS. HUBERTY: Yes, Ma'am.

30. Similarly, when identifying the funds in which she wanted to invest, Petitioner referenced the funds in "section three," the section containing the list of fund choices in the Plan Choice Form. Petitioner identified the funds in the order they are found in "section three" of the Plan Choice Form.

31. Petitioner claims she had another form with her during the call, but failed to produce a copy of this other form in the instant proceeding. Petitioner's claim that she either did not receive or did not review the Plan Choice Kit prior to her enrollment in the Investment Plan is not credible.

32. After enrolling in the Investment Plan, Petitioner received quarterly statements indicating her membership in the Investment Plan. The quarterly statements advised Petitioner of the value of her Investment Plan account and the performance of the investment funds she selected.

33. Petitioner changed her beneficiary designation by submitting a written form on February 2, 2007. She called the MyFRS Financial Guidance line to clarify that one of the beneficiaries she designated was to be contingent. During the call, Petitioner did not complain or make any mention of the possibility that she might be in the wrong plan.

34. Petitioner's Investment Plan account value grew from an opening balance of $[redacted] on September 30, 2002, to a high of $[redacted] on September 30, 2007.

35. As of September 30, 2008, the value of Petitioner's Investment Plan account had declined to $[redacted].

36. On October 7, 2008, Petitioner contacted the MyFRS Guidance Line and spoke with an FRS representative about the circumstances under which she had made her first election into the Investment Plan. Petitioner requested that the FRS representative send her a copy of the document that she had signed electing to switch to the Investment Plan. The FRS representative responded that Petitioner would not necessarily have signed anything and that Petitioner may have enrolled verbally over the telephone or may have filled out an electronic enrollment form.

37. During the October 7, 2008, telephone call, Petitioner stated that she would never have "join[ed] something where I wouldn't be getting a pension. There's nowhere on any form or whatever supposedly that I signed or was over the telephone that nobody ever told me that I wouldn't be getting a pension if I joined this." Petitioner repeated this sentiment on several subsequent telephone calls to the MyFRS Financial Guidance Line.

38. On November 5, 2008, the SBA sent a letter to Petitioner stating that on August 27, 2002, Petitioner "actively

enrolled" in the Investment Plan by making her "initial election" through calling the MyFRS Financial Guidance Line, effective September 1, 2002.

39. The SBA letter stated as follows:

> In processing the election through the MyFRS Financial Guidance line, you agreed to the following statements listed on the Retirement Plan Enrollment Form:
>
> "I want to . . . take the FRS Investment Plan 100% Transfer Option. That means I switch to the new FRS Investment Plan and transfer the present value of my FRS Pension Plan benefit to the new FRS Investment Plan. I will also have future employer contributions sent to my new FRS Investment Plan."
>
> "I understand that I can find a description of my rights and responsibilities under the FRS Pension Plan and the FRS Investment Plan in the respective Summary Plan Descriptions, Florida Statutes, available through the MyFRS Financial Guidance Line . . . or at MyFRS.com. I understand that the value of my FRS Pension Plan benefit which will be initially transferred to my Investment Plan account will be an estimate. Then, within 60 days of that transfer, there will be a reconciliation pursuant to Florida law which will use my actual FRS membership record. The actual amount could be more or less than the estimate you received."
>
> "Your choice will be final at 4:00 p.m. (Eastern Time) on the first day of your Choice period if you file prior to the beginning of your Choice period. Otherwise it will be final on the day it is received. You must file before the applicable deadline noted on page 1. See Your Choice Book for more details on when your Choice period begins, and on the second chance opportunity

you have during your career with the FRS to change your selection."

40. The attestations and warnings listed on the SBA's November 5, 2008, letter to Petitioner were taken from the MyFRS Your Plan Choice Form, Section 4: Authorization.

41. However, the Representative who received Petitioner's August 27, 2002, telephone call had not verbally, or subsequently in writing, provided Petitioner with the information, attestations and warnings that the SBA listed on its November 5, 2008, letter to her, or those which are included in the MyFRS Your Plan Choice Form.

42. On the August 27, 2002, telephone call to the MyFRS Financial Guidance Line, Petitioner did not verbally attest that she agreed to any statements from the MyFRS Your Plan Choice Form, Section 4: Authorization.

43. The Representative who assisted Petitioner on August 27, 2002, did not advise her that she could speak with a financial services expert from Ernst & Young to discuss the distinctions between the Investment Plan and the Pension Plan.

44. The Representative who assisted Petitioner on August 27, 2002, did not:

(a) Refer Petitioner to Section 121.4501, Florida Statutes.

(b) Confirm that Petitioner understood the terms and conditions of the "second election."

(c) Confirm that Petitioner understood that there might be a cost if she decided later to transfer from the Investment Plan back into the Pension Plan.

(d) Confirm that Petitioner understood that under the terms of the Investment Plan, she would not be eligible to receive monthly pension checks during her retirement.

(e) Provide any disclosures about where Petitioner could find information concerning her rights as a participant in the Investment Plan.

(f) Confirm that Petitioner understood that under the terms of the FRS Investment Plan, she would not be eligible to participate in the state's deferred compensation "DROP" program.

(g) Confirm that Petitioner understood that she should review the fund profiles and the Investment Fund Summary before choosing investment funds.

45. Had Petitioner been required to complete and sign the MyFRS Your Plan Choice Form, she would necessarily have been presented with such information and had the opportunity to affirmatively state that she understood her rights as a participant in the Investment Plan. The form also references Section 121.4501, Florida Statutes, which is the governing statute of the Investment Plan.

46. Therefore, Petitioner's alleged "election" by telephone was not the functional equivalent of her having completed and signed the MyFRS Your Plan Choice Form, and Petitioner's alleged "election" was voidable. Petitioner did

not complete any kind of form that met the requirements of Florida Administrative Code Rule 19-10.001, 19-10.002, or 19-10.003, which were in effect at the time of her alleged election.

47. The MyFRS telephone hotline used to enroll FRS-eligible public employees into the Investment Plan at the time of Petitioner's alleged "election" did not require that employees complete a written or electronic enrollment form in order to transfer their Pension Plan assets into the Investment Plan. However, no one affiliated with the SBA provided her with any misleading information about the Investment Plan.

48. The SBA did not require that an FRS-eligible public employee sign any form in order to transfer his or her FRS assets from the Pension Plan to the Investment Plan, but did require that Investment Plan participants complete and sign a "Beneficiary Designation Form" in order to change the beneficiary designation on an Investment Plan participant's account.

49. On November 22, 2008, Petitioner filed a petition for hearing with the SBA seeking to return to the Pension Plan at no cost over the value of her Investment Plan account.

50. As of July 15, 2009, the balance of Petitioner's Investment Plan account was [redacted].

51. As of July 16, 2009, Petitioner's cost to "buy back" into the Pension Plan was [redacted] Based upon this value, Petitioner would have to contribute $[redacted] in addition to the value of her Investment Plan account if she exercised her second election to transfer back to the Pension Plan.

52. Subsection 121.4501(4)(a)1., Florida Statutes, governed Petitioner's enrollment in the Investment Plan in 2002. This provision provides in pertinent part:

> Any such employee may elect to participate in the [Investment Plan] in lieu of retaining his or her membership in the defined benefit program of the Florida Retirement System. The election must be made in writing or by electronic means and must be filed with the third-party administrator by August 31, 2002. . . .

53. The SBA construed the phrase "by electronic means" used in Subsection 121.4501(4)(a)1., Florida Statutes, to mean the election could be made by computer or by telephone. The SBA considers a telephone call to be "electronic" because the telephone calls to the Plan Choice Administrator are recorded.

54. However, Petitioner received her bachelor's degree in 1976 and completed a semester of coursework toward a Masters of Business Administration degree in 1977.

55. When Petitioner moved from Wisconsin to Florida in 1977, she "rolled-over" her Wisconsin retirement plan account into an Individual Retirement Account (IRA) with the assistance of a Raymond James financial advisor.

CONCLUSIONS OF LAW

56. DOAH has jurisdiction over the parties and subject matter of this cause, pursuant to Subsection 120.57(1), Florida Statutes (2009).

57. Petitioner, as the party seeking affirmative relief in this administrative proceeding, has the burden to demonstrate entitlement to the relief request by a preponderance of evidence. Young v. Department of Community Affairs, 625 So. 2d 837 (Fla. 1993). Florida Department of Transportation v. J.W.C., Inc., 396 So. 2d 778, 788 (Fla. DCA 1981).

58. Under the auspices of Subsection 121.4501(4)(a)1., Florida Statutes, the SBA created and administrated a telephonic hotline which allowed FRS-eligible pubic employees to enroll in the Investment Plan verbally by telephone. Petitioner was transferred from the Pension Plan and enrolled into the Investment Plan when she elected to enroll in the Investment Plan through the use of this telephonic hotline. As a result of Petitioner's enrollment into the Investment Plan, she has lost substantial pension and retirement benefits to which she would otherwise have been entitled under the Pension Plan. Further, when Petitioner petitioned the SBA to return her to the Pension Plan without penalty, the SBA responded that Petitioner had effected a valid election to switch from the Pension Plan into the Investment Plan. As such, Petitioner is substantially

affected by the SBA's decision and has standing to petition for relief.

59. Any claim by the SBA that Petitioner is estopped from bringing her petition must be rejected, as the SBA has known or should have known that the method by which Petitioner "elected" to transfer into the Investment Plan was invalid. See Schueler v. Franke, 522 So. 2d 904 (Fla. 2d DCA 1988).

60. This case is governed by Chapter 121, Florida Statutes, and in particular Section 121.4501, Florida Statutes.

61. Section 121.4501, Florida Statutes, sets forth the requirements for membership in the Investment Plan and also establishes the sole process for the transfer of membership from the Pension Plan into the Investment Plan. Section 121.4501, Florida Statutes, was designed to provide participants in the Pension Plan the opportunity to transfer into the Investment Plan. The statute provided an initial transfer period for existing employees during the calendar years 2002 and 2003, the so-called "first election period." Thereafter, in accordance with Subsection 121.4501(4)(e)2., Florida Statutes, there is provided a "second election" after the first election period has elapsed, giving FRS members a second chance to elect a transfer from one plan to the other, at their discretion, but with potential costs involved if the "second election" was returning assets from the Investment Plan into the Pension Plan, and those

Investment Plan assets were less than the equivalent value of the Pension Plan given the employee's average salary times years of service upon the date of the second election transfer.

62. Subsection 121.4501(4)(e)2., Florida Statutes, requires Petitioner to "buy back" into the Pension Plan if she chooses to switch plans. Subsection 121.4501(4)(e)2., Florida Statutes, provides:

> If the employee chooses to move to the defined benefit program, the employee must transfer his or her [Investment Plan] program account and from other employee moneys as necessary, a sum representing the present value of that employee's accumulated benefit obligation immediately following the time of such movement, determined assuming that attained service equals the sum of service in the defined benefit program and service in the [Investment Plan]. Benefit commencement occurs on the first date the employee would become eligible for unreduced benefits, using the discount rate and other relevant actuarial assumptions that were used to value the Florida Retirement System defined benefit plan liabilities in the most recent actuarial valuation. For any employee who, at the time of the second election, already maintains an accrued benefit amount in the defined benefit plan, the then-present value of such accrued benefit shall be deemed part of the required transfer amount described in this subparagraph. The division shall ensure that the transfer sum is prepared using a formula and methodology certified by an enrolled actuary.

63. Subsection 121.4501(8)(a), Florida Statutes, obligates the SBA to administer the Investment Plan. The SBA is not authorized to depart from the requirements of this statute when

exercising its jurisdiction. See Balezentis v. Department of Management Services, Division of Retirement, Case No. 04-3263 (DOAH March 2, 2005, adopted in toto Final Order April 4, 2005), 2005 WL 517476.

64. The SBA's construction and application of the provisions of Section 121.4501, Florida Statutes, are entitled to great weight and will be followed by courts, unless clearly erroneous or amounting to an abuse of discretion. See Okeechobee Health Care v. Collins, 726 So. 2d 775, 778 (Fla. 1st DCA 1998).

65. However, when the clear provisions of the statute are in conflict with the SBA's interpretation of the statute, the agency's construction and application of the statute must be rejected. Cf. Willette v. Air Products, 700 So. 2d 397, 401 (Fla. 1st DCA 1997). In this case, the SBA's interpretation of the term "in writing or by electronic means" such as to permit a telephone transfer (although recorded) from the Pension Plan to the Investment Plan without completing and signing a form is clearly erroneous.

66. The SBA's hotline contravened Section 121.4501, Florida Statutes, and the SBA rules adopted to implement Section 121.4501, Florida Statutes. For reasoning, see the companion Rule Challenge, Huberty v. State Board of Administration, Case No. 09-2268RU (DOAH October 1, 2009).

67. The legislative intent of Section 121.4501, Florida Statutes, was for a physical form providing for full disclosure of participants' rights and responsibilities under the Investment Plan.

68. The SBA's implementation of a telephonic election process is an unadopted rule and cannot be relied upon for authority.

69. As such, Petitioner's August 2002 "election" by telephone contravened the provisions of the statute and, therefore, was not valid.

70. However, Petitioner knew or should have known that at the time of her election to participate in the Investment Plan, her participation was in lieu of participation in the defined benefit program of the FRS. See § 120.4501(3), Fla. Stat. Petitioner is not entitled to sit back, watch the market, and then decide to take action to unwind her Investment Plan election when the stock market declines. Petitioner elected membership into the Investment Plan with the assistance of a private and self-selected financial advisor. Petitioner admits to receiving quarterly statements advising her of the performance of her selected investments. Petitioner did not complain about her Investment Plan membership when her account value grew from $[redacted] in 2002 to over [redacted] in 2007; rather, she waited until her investments declined significantly

to complain she was in the wrong plan. Petitioner also changed her beneficiary designation before she complained that she was in the wrong plan. Petitioner's testimony that she was not aware that she was enrolled in the Investment Plan and was no longer in the Pension Plan until she complained to the SBA about her election in 2008 is not credible.

71. Even though Petitioner's enrollment into the Investment Plan in 2002 was deficient, Petitioner waived the right to complain about it by waiting for more than six years. Felder v. Department of Management Services, Division of Retirement, Case No. 03-0486 (DOAH October 6, 2003, adopted in toto Final Order December 12, 2003), 2003 WL 22322026. In Felder, the Administrative Law Judge found the petitioner waived his right to complain that his enrollment in the State University Optional Retirement Program was invalid because he did not sign the required enrollment form. The petitioner in Felder waited 20 years to complain about the validity of his election and took action during that time that was inconsistent with a decision to terminate his optional retirement status.

72. Similarly, in this case, Petitioner selected funds based upon the recommendation of a private financial advisor and monitored her investment performance for over six years before she decided to question her status as an Investment Plan member. Accordingly, even if Petitioner's enrollment was somehow

deficient, her post-election conduct ratified her initial decision.

73. Although, the SBA's construction of the phrase "by electronic means" found in Subsection 121.4501(1)(a)1.a., Florida Statutes, is an unadopted rule, Petitioner argues that the SBA cannot rely upon this unadopted rule to deny her request to be placed back in the Pension Plan at no additional cost.

74. Petitioner's reliance on Subsection 120.57(1)(e), Florida Statutes, in this proceeding is misplaced. Subsection 120.57(1)(e), Florida Statutes, provides:

> An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule. The administrative law judge shall determine whether an agency statement constitutes an unadopted rule. This subparagraph does not preclude application of adopted rules and applicable provisions of law to the facts.

75. First, the SBA did not take agency action affecting Petitioner's substantial interests when it allowed her to make her election telephonically. On the contrary, the SBA gave effect to Petitioner's intent to join the Investment Plan, which is clearly and unmistakably articulated in the transcript of her August 27, 2002, telephone call to the MyFRS Financial Guidance Line. The fact that six years of market performance has shown Petitioner's decision to be unwise in hindsight does not change her clear instructions to the SBA in 2002. Petitioner has

failed to satisfactorily explain why the SBA is to blame for her enrollment in the Investment Plan or her decision to ignore the myriad of educational materials available to her before she made the choice. Subsection 120.57(1)(e), Florida Statutes, has no application in this proceeding.

76. Finally, Petitioner contends that allowing her to make her election telephonically violates various rules in effect in 2002. The rules cited by Petitioner govern asset transfers between the Pension Plan and the Investment Plan and have no application in the instant case. See former Fla. Admin. Code R. 19-10.001, 19-10.002, and 19-10.003. Even if these rules were intended to limit the means by which members are allowed to effectuate plan choice, they are of no assistance to Petitioner in this proceeding. An agency is empowered to waive a rule requirement when the application of a rule would lead to an unfair result or create a substantial hardship on an individual. § 120.542, Fla. Stat.

77. The fact that Petitioner's decision has proven to be imprudent with the passage of time does not abrogate the agency's authority to waive a rule requirement to give effect to her desired election at the time it was made.

RECOMMENDATION

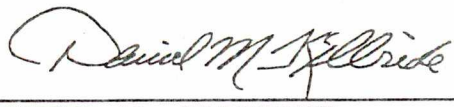
Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the State Board of Administration enter a final order, as follows:

1. Allowing Petitioner to transfer her accumulated retirement assets from the Pension Plan to the Investment Plan by telephone without completing or signing a form was improper and invalid.

2. By taking no action for six years after the SBA enrolled her in the Investment Plan, Petitioner has waived her right to transfer back into the Pension Plan without any cost in excess of the current value of her Investment Plan accounts and must comply with requirements of Subsection 121.4501(4)(e), Florida Statutes, if she desires to make a "second election."

DONE AND ENTERED this 1st day of October, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of October, 2009.

ENDNOTE

[1/] All references to Florida Statutes are to Florida Statutes (2002), unless otherwise indicated.

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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.