STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

RICHARD CONLEY, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	Case No.2016-3596

FINAL ORDER

On September 9, 2016, the Presiding Officer submitted her Recommended Order to the State Board of Administration in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Richard Conley, and upon counsel for the Respondent. This matter was decided after an informal proceeding. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. A copy of the Recommended Order is attached hereto as Exhibit A to this Final Order and incorporated to the extent described herein. Neither party filed exceptions to the Recommended Order, which would have been due on September 24, 2016. Respondent supplemented the record on September 13, 2016, by filing an Affidavit of Garry Green, Chief of Research and Education for the Florida Division of Retirement. A copy of this affidavit is attached hereto as Exhibit B. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

STATEMENT OF THE ISSUE

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

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 a presiding officer 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 presiding officer's recommended order may not reweigh evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of presiding officers as the triers of the facts.

Belleau v. Dept of Environmental Protection, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Maynard v. Unemployment Appeals Comm.*, 609 So.2d 143, 145 (Fla. 4th DCA 1993). Thus, if the record discloses any competent substantial evidence supporting finding of fact in the 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 conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." Florida courts have consistently applied the "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the presiding officer's application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the presiding officer's interpretation of a statute or rule over which the Legislature has provided the agency with administrative authority. *See Deep Lagoon Boat Club, Ltd. v. Sheridan,* 784 So.2d 1140, 1141-42 (Fla. 2d DCA 2001); *Barfield v. Dep't of Health*, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001). When rejecting or modifying any conclusion of law, the reviewing agency must state with particularity its reasons for the rejection or modification and further must make a finding that the substituted conclusion of law is as reasonable, or more reasonable, than that which was rejected or modified. Further, an agency's interpretation of the statutes and rules it administers is entitled to great weight, even if it is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. *See, State Bd. of Optometry v. Fla. Soc'y of Ophthalmology*, 538 So.2d 878, 884 (Fla. 1st DCA 1998). An agency's interpretation will be rejected only where it is proven such interpretation is clearly erroneous or amounts to

an abuse of discretion. *Level 3 Communications v. C.V. Jacobs*, 841 So.2d 447, 450 (Fla. 2002); *Okeechobee Health Care v. Collins*, 726 So.2d 775 (Fla. 1st DCA 1998).

MATERIAL UNDISPUTED FACTS

The Material Undisputed Facts in the Presiding Officer's Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

RULINGS ON CONCLUSIONS OF LAW IN THE RECOMMENDED ORDER

The Conclusions of Law in paragraphs 11. through 15. of the Presiding Officer's Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

The Conclusions of Law in paragraphs 16. through 18. of the Recommended Order are rejected and replaced with the following:

16. Petitioner is seeking a refund of his employee contributions made while he was a member of the Pension Plan. Section 121.091(5)(a), Florida Statutes creates an entitlement to a return of accumulated employee contributions to the Pension Plan under certain conditions, and provides, in pertinent part, as follows:

> (5) TERMINATION BENEFITS.—A member whose employment is terminated prior to retirement retains membership rights to previously earned member-noncontributory service credit, and to member-contributory service credit, if the member leaves the member contributions on deposit in his or her retirement account. If a terminated member receives a refund of member contributions, such member may reinstate membership rights to the previously earned service credit represented by the refund by completing 1 year of creditable service and repaying the refunded member contributions, plus interest.

(a) A member whose employment is terminated for any reason other than death or retirement before becoming vested is entitled to the return of his or her accumulated contributions as of the date of termination. Effective July 1, 2011, upon termination of employment from all participating employers for 3 calendar months as defined in s. 121.021(39)(c) for any reason other than retirement, a member may receive a refund of all contributions he or she has made to the pension plan, **subject to the restrictions otherwise provided in this chapter**. ***

[emphasis added]

Thus, it is clear from the foregoing provisions that there may be restrictions imposed on the ability of a member to receive a return of employee contributions made to the Pension Plan. When a member transfers from the Pension Plan to the Investment Plan, the amount transferred is not the sum of employer and employee contributions made while the member was participating in the Pension Plan, but rather is the present value of the employee's accumulated benefit obligation under the Pension Plan. Section 121.4501(3)(b)(1), Florida Statutes provides, in pertinent part, as follows:

(b) Notwithstanding paragraph (a), an eligible employee who elects to participate in the investment plan and establishes one or more individual member accounts may elect to transfer to the investment plan a sum representing the **present value of the employee's accumulated benefit obligation under the pension plan**. Upon transfer, all service credit earned under the pension plan is nullified for purposes of entitlement to a future benefit under the pension plan. A member may not transfer the accumulated benefit obligation balance from the pension plan after the time period for enrolling in the investment plan has expired.

1. For purposes of this subsection, **the present value of the member's accumulated benefit obligation is based upon the member's estimated creditable service and estimated average final compensation** under the pension plan, subject to recomputation under subparagraph 2. ***The actuarial present value of the employee's accumulated benefit obligation shall be based on the following:**

a. The discount rate and other relevant actuarial assumptions used to value the Florida Retirement System Trust Fund at the time the amount to

be transferred is determined, consistent with the factors provided in sub-subparagraphs b. and c.

b. A benefit commencement age, based on the member's estimated creditable service as of the estimate date.

c. Except as provided under sub-subparagraph d., for a member initially enrolled:

(I) Before July 1, 2011, the benefit commencement age is the younger of the following, but may not be younger than the member's age as of the estimate date:

(A) Age 62; or

(B) The age the member would attain if the member completed 30 years of service with an employer, assuming the member worked continuously from the estimate date, and disregarding any vesting requirement that would otherwise apply under the pension plan.

(II) On or after July 1, 2011, the benefit commencement age is the younger of the following, but may not be younger than the member's age as of the estimate date:

(A) Age 65; or

(B) The age the member would attain if the member completed 33 years of service with an employer, assuming the member worked continuously from the estimate date, and disregarding any vesting requirement that would otherwise apply under the pension plan.

* * *

e. The calculation must disregard vesting requirements and early retirement reduction factors that would otherwise apply under the pension plan.

[emphasis added]

Because the amount transferred to the member's Investment Plan account is based on the member's creditable service and estimated final compensation, the amount transferred from a member's Pension Plan account either may be less than, or more than, the sum of employer and employee contributions made, depending, in

part, on the member's length of service. [Exhibit B, Affidavit of Garry Green, paragraph 7]

17. When a member signs a second election enrollment form to switch from the Pension Plan to the Investment Plan, the member specifically acknowledges that he or she understands that he or she is transferring, not the total of employer and employee contributions made while a member of the Pension Plan but rather the "...present value, if any, of [the member's] existing FRS Pension benefit to the FRS Investment Plan." [emphasis added] [Respondent's Exhibit 3, 2nd Election Retirement Plan Enrollment Form, page 1]. As such, the member is cashing out his or her future Pension Plan benefit with the transfer of the member's accumulated benefit obligation to the member's new Investment Plan account. The amounts transferred are subject to the vesting requirements of the Pension Plan, as provided under Section 121.4501(6)(c), Florida Statutes. And, in fact, the 2nd Election Enrollment Plan Enrollment Form specifically notes that if a member has elected to switch from the Pension Plan to the Investment Plan, that member understands that "... any accrued value [the member] may have in the Pension Plan will be transferred to the Investment Plan as [the member's] opening balance and any Pension Plan accrued value transferred to [the member's] Investment Plan account will be subject to the vesting requirement of the FRS Pension Plan." [Respondent's Exhibit 3, 2nd Election Retirement Plan Enrollment Form, page 3].

18. Thus, the Petitioner's Pension Plan funds that were transferred to the Investment Plan at Petitioner's request will be segregated from other funds in Petitioner's account going forward and will be subject, in total, to the applicable six

(6) year vesting requirement. Because Petitioner now has terminated FRS-covered employment before meeting the applicable six (6) year vesting requirement, these funds will remain in a suspense account and will be forfeited if he does not return to FRS-covered employment within five (5) years of his termination date of January 20, 2016, as provided under Section 121.4501(6)(d), Florida Statutes.

The Conclusions of Law in paragraphs 19. of the Presiding Officer's Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

The Conclusions of Law in paragraph 20. hereby are revised as follows:

20. Respondent has no intent or interest in depriving any FRS member of contributions paid from their salary to the FRS. However, it is clear from applicable law and from information set forth in the second election form signed by Petitioner that any accrued value the Petitioner had in the Pension Plan was transferred to the Petitioner's Investment Plan account as his opening balance. Such Pension Plan accrued value transferred is subject to the vesting requirement of the FRS Pension Plan, and no portion thereof can be refunded to Petitioner.

ORDERED

The Recommended Order (Exhibit A), subject to the modifications as stated above hereby is adopted. Petitioner has failed to show that he is entitled to the relief requested. The Petitioner's request that he be entitled to a refund of contributions he made to the Florida Retirement System Pension Plan prior to the time he filed his second

election to join the FRS Investment Plan hereby is denied since Petitioner terminated employment before he met the applicable six (6) year vesting requirement of the Pension Plan.

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

DONE AND ORDERED this 8th day of December, 2016, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Joan Haseman

Joan Haseman, Chief of Defined Contribution Programs
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

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

Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent was sent to Richard Conley, pro se, both by email transmission, [redacted] and by UPS to [redacted] and by email transmission to Brian Newman, Esq. (brian@penningtonlaw.com) and Brandice Dickson, Esq., (brandi@penningtonlaw.com) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 8th day of December, 2016.

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

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

RICHARD CONLEY,

Petitioner,

vs. Case No.: 2016-3596

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on May 24, 2016, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Richard Conley, pro se

[redacted]

For Respondent: Brian A. Newman
Brandice D. Dickson
Pennington, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue is whether Petitioner may obtain refund of employee contributions he made to the Florida Retirement System (FRS) Pension Plan either by rescinding his second election transfer from the Pension Plan to the Investment Plan, or by any other legal means.

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on his own behalf and presented the testimony of his wife, Ruth Conley. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits 1 through 10 were admitted into evidence without objection, noting Petitioner's caveat that he was given incorrect information by his employer.

A transcript of the hearing was made, filed with the agency, and provided to the parties, who were invited to submit proposed recommended orders within thirty days after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings. On August 15, 2016 Respondent filed a supplemental brief on the issue of whether Pension Plan members who transfer to the Investment Plan and terminate prior to vesting are entitled to refund of their employee contributions made to the Pension Plan.

MATERIAL UNDISPUTED FACTS

1. Petitioner became a member of the FRS on August 15, 2010 by virtue of his employment with the Hernando County Sheriff's Office, an FRS-participating employer.

2. He had until February 28, 2011 to make an initial election between the defined benefit Pension Plan and the defined contribution Investment Plan and made an affirmative election to join the Pension Plan with an effective date of March 1, 2011.

3. On September 15, 2015, Petitioner called the MyFRS Financial Guidance Line. During this call he stated that he wanted to switch to the Investment Plan because he wanted to receive a lump-sum distribution upon retirement. He was told that he would need to attain six

years of creditable service to be fully vested. Petitioner acknowledged his understanding of this requirement, stating that he would reach six years of FRS service in August of 2016.

4. On January 13, 2016, Petitioner submitted a 2nd Election Retirement Plan Enrollment Form to the Investment Plan's Plan Choice Administrator indicating his desire to transfer from the Pension Plan to the Investment Plan. Petitioner testified that he made the decision to transfer to the Investment Plan based upon the recommendation of a human resources representative of his employer. Specifically, Petitioner contends that "[a]t the time of my change, I was misinformed by my employer that I would have full access to the money once I changed to Investment."

5. The second election form that Petitioner signed encouraged him to call the MyFRS Financial Guidance Line or to visit MyFRS.com if he had any questions about the impact of changing from one plan to another. The 2nd Election form Petitioner completed and signed also states in pertinent part:

> I am exercising my one-time 2nd Election to… change from the FRS Pension Plan to the FRS Investment Plan
>
> You understand that the one-time 2nd Election is irrevocable and that you must remain in the plan you chose in Section 1 until your FRS-covered employment ends and you retire.
>
> You understand and acknowledge the following: You have elected to switch to the Investment Plan and any accrued value you may have in the Pension Plan will be transferred to the Investment Plan as your opening balance and any Pension Plan accrued value transferred to your Investment Plan account will be subject to the vesting requirement of the FRS Pension Plan.

6. On January 15, 2016, Petitioner received a Florida Retirement System Confirmation of 2nd Election – Investment Plan, that advised him as follows:

> If you feel this retirement plan election was made in error, you may be able to cancel it. Please call the MyFRS Financial Guidance Line at 1-866-446-9377, Option 2. Failure to notify us no later than 4:00 PM EST on the last business day of the month following your election month will void your right to cancel this election.

Thus, Petitioner was advised that he had until February 29, 2016 to cancel his second election.

7. On January 19, 2016, Petitioner called the MyFRS Financial Guidance Line again and spoke to an Ernst and Young financial planner. He was told that he could not access a lump sum distribution of his Pension Plan benefit if he switched to the Investment Plan and terminated FRS-covered employment before he attained six years of creditable service. Petitioner was then transferred to the Division of Retirement so he could obtain an accurate date as to when he would reach six years of creditable FRS service.

8. Petitioner terminated FRS-covered employment on January 20, 2016 with 5.41 years of creditable service.

9. On March 1, 2016, one day after the deadline to cancel his second election expired, Petitioner attempted to rescind his second election. His request was denied as untimely.

10. Petitioner submitted a Request for Intervention on March 11, 2016 asking to transfer back to the Pension Plan in order to obtain a refund of his employee contributions. His request was denied by the SBA. Petitioner then filed a Petition for Hearing requesting the same relief and this administrative proceeding followed.

CONCLUSIONS OF LAW

11. Movement between the Pension Plan and Investment Plan is governed by Section 121.4501(4)(g), Florida Statutes, which states, in pertinent part:

> (g) After the period during which an eligible employee had the choice to elect the pension plan or the investment plan, or the month following the receipt of the eligible employee's plan election, if sooner, the employee shall have one opportunity, at the employee's discretion, to choose to move from

> the pension plan to the investment plan or from the investment plan to the pension plan. Eligible employees may elect to move between plans only if they are earning service credit in an employer-employee relationship consistent with s. 121.021(17)(b), excluding leaves of absence without pay.

§ 121.4501(4)(g), Fla. Stat. (2015) (emphasis added).

12. As provided in the above statute, members of the FRS are allowed only one opportunity to switch plans after their initial election period expires. By rule, the State Board of Administration has created a grace period which may be used by participants who believe they have mistakenly submitted a second election. The grace period provided by Rule 19-11.007, Florida Administrative Code, is as follows:

> (4) Grace Period.
>
> (a) If a member files an election with the Plan Choice Administrator and the member realizes that the election was made in error, or if the member has reconsidered his or her plan choice, the SBA will consider, on a case-by-case basis, whether the election will be reversed, subject to the following: The member must notify the SBA by a telephone call to the toll free MyFRS Financial Guidance Line at: 1(866) 446-9377, or by written correspondence directly to the SBA, to the Plan Choice Administrator, to the Financial Guidance Line, or to the Division, no later than 4:00 p.m. Eastern Time on the last business day of the election effective month.
>
> (b) If the request to reverse the election is made timely and the SBA finds the election was made in error, the member will be required to sign a release and return it to the SBA no later than 4:00 p.m., Eastern Time, on the last business day of the election effective month prior to the election's being officially reversed. Upon receipt of the release, the Division and the Plan Choice Administrator will be directed to take the necessary steps to reverse the election and to correct the member's records to reflect the election reversal.
>
> (c) A confirmation that the election was reversed will be sent to the member by the FRS Plan Choice Administrator.
>
> (d) The member retains the right to file a subsequent second election consistent with subsections (2) and (3), above.

> (e) Nothing contained in this subsection will interfere with a member's right to file a complaint, as permitted by Section 121.4501(8)(g), F.S. and discussed in Rule 19-11.005, F.A.C.

Rule 19-11.007(4), F.A.C.

13. Under the rule, Petitioner had until the time the present value of his Pension Plan benefit was transferred to his Investment Plan account (February 29, 2016) to rescind his second election. Unfortunately, Petitioner's request to rescind his second election on March 1, 2016 was just beyond this deadline.

14. Pension Plan funds that are transferred by second election to the Investment Plan, remain subject to the vesting period in force when those funds were accrued. §121.4501(6)(c)1. Fla. Stat. (2015). Petitioner states that he was misled by his employer's human resource department by being told he would be able to take a lump sum if he switched to the Investment Plan even though he was not fully vested in the Pension Plan amounts which would be transferred to the Investment Plan.

15. If Petitioner was misinformed by his employer, that misinformation was corrected by the MyFRS Guidance Line Counselor on January 19, 2016 before his deadline to cancel his second election expired. In addition, under Section 121.021(10), Florida Statutes "[e]mployers are not agents of the ... state board... and the... state board... [is] not responsible for erroneous information provided by representatives of employers." Petitioner also did not timely attempt to rescind his second election when told he could not take a lump sum distribution before meeting the six year vesting requirement during that same January 19, 2016 call.

16. Alternatively, since what Petitioner seeks is refund of his employee contributions made while he was a member of the Pension Plan, a different question is presented. Section 121.091(5)(a) Florida Statutes creates an entitlement to return of accumulated employee

contributions to the Pension Plan. Likewise Section 121.04501(6)(a) makes an Investment Plan member fully and immediately vested in all employee contributions paid to the Investment Plan, plus interest and earnings.

Respondent asserts that because an accumulated benefit obligation calculated based on creditable service and average final compensation is the amount transferred to the Investment Plan when a member switches plans, and because that amount is not divided into employer and employee contributions, no refund may be had. Respondent cites the final clause of section 121.091(5)(a) as imposing a qualification on the entitlement to refund of Pension Plan contributions:

> (5) TERMINATION BENEFITS. – A member whose employment is terminated prior to retirement retains membership rights to previously earned member-non-contributory service credit, and to member-contributory service credit, if the member leaves the member contributions on deposit in his or her retirement account. If a terminated member receives a refund of member contributions, such member may reinstate membership rights to the previously earned service credit represented by the refund by completing 1 year of creditable service and repaying the refunded member contributions, plus interest.
>
> (a) A member whose employment is terminated for any reason other than death or retirement before becoming vested is entitled to the return of his or her accumulated contributions as of the date of termination. Effective July 1, 2011, upon termination of employment from all participating employers for 3 calendar months as defined in s. 121.021(39)(c) for any reason other than retirement, a member may receive a refund of all contributions he or she has made to the pension plan, subject to the restrictions otherwise provided in this chapter.

§121.091(5)(a), Fla. Stat. (Emphasis added.)

But the only restriction Respondent cites is section 121.4501(3)(b)(1):

> (b) Notwithstanding paragraph (a), an eligible employee who elects to participate in the investment plan and establishes one or more individual member accounts may elect to transfer to the investment plan a sum representing the present value of the employee's accumulated benefit obligation under the pension plan. Upon transfer, all service credit earned under the pension plan is nullified for purposes of entitlement to a future benefit under the pension plan. A member may not transfer

> the accumulated benefit obligation balance from the pension plan after the time period for enrolling in the investment plan has expired.
>
> 1. For purposes of this subsection, the present value of the member's accumulated benefit obligation is based upon the member's estimated creditable service and estimated average final compensation under the pension plan, subject to recomputation under subparagraph 2...

§ 121.4501(3), Fla. Stat.

I can find nothing in the above that eliminates or qualifies the entitlement to refund expressed in section 121.091(5)(a).

17. Florida law expressly makes the employee contributions which were required as of 2011, when the mandatory FRS system changed from noncontributory to contributory, refundable. This is reiterated on the MyFRS website under a section comparing the two plans as to vesting. For the Pension Plan:

> Employee contributions are always 100% vested. This means that if you terminate employment prior to meeting the vesting requirements of the Pension Plan, you will be entitled to a refund of your employee contributions. However, taking such a refund may not be a sound financial decision because, if you return to FRS employment at a later date and wish to restore all service associated with the refund, you will be required to work for 1 year to become eligible to purchase back the refunded service plus interest.
> (Emphasis added.)

For the Investment Plan:

> Employee contributions are always 100% vested. This means that if you terminate employment prior to meeting the vesting requirements of the Investment Plan, you will be entitled to a distribution of your employee contributions. However, taking such a distribution may not be a sound financial decision because you will forfeit any unvested employer contributions and service credit associated with the service and be declared a retiree. As a retiree you will not be eligible for future FRS membership if you return to FRS-covered employment.
> (Emphasis added.)

The assertion that a member loses entitlement to refund of his own contributions when he switches from the Pension Plan to the Investment Plan does not comport with express provisions of the

Florida Statutes cited above. I note in addition that with regard to the funding of benefits, section 121.70(1) provides:

> **121.70 Legislative purpose and intent. –**
>
> (1) This part provides for a uniform system for funding benefits provided under the Florida Retirement System Pension Plan established under part I of this chapter (referred to in this part as the pension plan) and under the Florida Retirement System Investment Plan established under part II of this chapter (referred to in this part as the investment plan). The Legislature recognizes and declares that the Florida Retirement System is a single retirement system, consisting of two retirement plans and other nonintegrated programs.
> § 121.70(1) Fla. Stat. (Emphasis added.)

18. The Pension Plan funds that were transferred to the Investment Plan at Petitioner's request remain subject to Petitioner's Pension Plan vesting requirement. § 121.4501(6)(c)1., Fla. Stat. (2015). They are segregated from funds accrued going forward. Because Petitioner has terminated FRS-covered employment before reaching that six year point, these funds will remain in a suspense account and will be forfeited if he does not return to FRS-covered employment within five years of his termination date of January 20, 2016. § 121.4501(6)(d), Fla. Stat. (2015). To refuse him refund of his employee contribution portion of that segregated amount is not consistent with the applicable statutes or the intent expressed by the legislature that the FRS be a uniform system and that employee contributions be refundable. Mandatory employee contributions from salary payments are to be refunded when an FRS member terminates prior to vesting. It makes no sense that a transfer from the Pension Plan to the Investment Plan would nullify the express requirements of statute and expressed legislative intent, leading to the anomalous result that Pension Plan members who transfer to the Investment Plan and then terminate are the only FRS members who get nothing from their own contributions.

19. The SBA must comply with the Florida Statutes creating and governing the Florida Retirement System. Balezentis v. Department of Management Services, Division of Retirement,

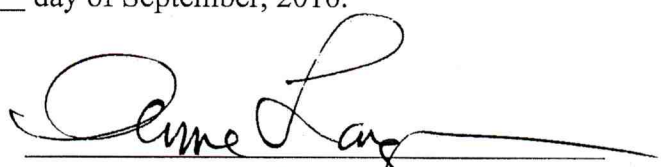
2005 WL 517476 (Fla.Div.Admin.Hrgs.). Its construction and application of Chapter 121, Florida Statutes, the statute it is charged to implement, are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. Level 3 Communications v. C.V. Jacobs, 841 So.2d 447, 450 (Fla. 2002), Okeechobee Health Care v. Collins, 726 So.2d 775 (Fla. 1st DCA 1998).

20. I am confident that Respondent has no intent to or interest in depriving Petitioner or any other FRS member of contributions from their salary paid to the FRS, and trust that the SBA is interpreting the relevant statutes so as to most effectively and efficiently administer the Investment Plan. I acknowledge also that the prior recommendation and Final Order in Tashek Hamlette v. State Board of Administration, Case No. 2014-2996, (Recommended Order August 1, 2014) are to the contrary. But on fuller examination, Respondent's construction appears to run head-on into express provisions of Florida law.

RECOMMENDATION

Having considered the law and the undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order granting the relief requested by refunding the employee contributions made to Petitioner's Pension Plan account.

RESPECTFULLY SUBMITTED this 9th day of September, 2016.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
315 South Calhoun Street, Suite 830
Tallahassee, FL 32301-1872

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

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

Filed via electronic delivery with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
Tina.joanos@sbafla.com
mini.watson@sbafla.com
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COPIES FURNISHED via mail and electronic mail to:

Richard Conley
[redacted]

Petitioner

and via electronic mail only to:

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Counsel for Respondent

AFFIDAVIT OF GARRY GREEN

STATE OF FLORIDA
COUNTY OF LEON

I, Garry Green, am over eighteen years old. The following statements are made of my own personal knowledge.

1. I am the Chief of Research and Education. I have been responsible for Research and Education for 14 years. I have worked for the Division of Retirement for 28 years. A true and accurate copy of my work history with the Division of Retirement is attached hereto.

2. My job responsibilities include having a thorough working knowledge and application of the provisions of section 121.4501(3)(b), Florida Statutes with regard to the present value of an FRS member's accumulated benefit obligation (commonly known as an "ABO") under the Pension Plan as well as the proper application of the Investment Plan's and Pension Plan's vesting requirements.

3. When a Pension Plan member elects to transfer to the Investment Plan the election provides for the transfer of the ABO of any previous Pension Plan service, and the Division of Retirement is charged with calculating the present value of the member's ABO. The ABO is the amount of money transferred from the Pension Plan to the Investment Plan when a Pension Plan member elects to transfer to the Investment Plan and has previous Pension Plan service. The ABO transferred amount becomes the opening balance of the member's Investment Plan account and the funds are invested in accordance with the member's instructions. The ABO is subject to the vesting requirements of the Pension Plan.

4. An ABO is calculated based upon the member's creditable service and average final compensation under the Pension Plan. See, § 121.4501(3)(b), Fla. Stat. ABO calculations are

EXHIBIT B

made by credentialed actuaries who are contracted to perform these calculations by the Division of Retirement.

5. The Pension Plan is funded by contributions from FRS-participating employers and, beginning in 2011, contributions from employees as well. See, § 121.71(3) and (4), Fla. Stat.

6. Pension Plan members who terminate all employment with FRS-participating employers for three calendar months may request (and receive) a refund of their employee contributions even if they have not met the vesting requirements of the Pension Plan at termination. The Division of Retirement maintains a record of employee contributions and the sum total of employee contributions is the amount paid to a member when a refund is requested and properly payable.

7. An ABO calculation is not, however, segregated into employee and employer contributions. An ABO calculation is determined based upon creditable service and average final compensation. Employer and employee contributions are not factors applied in an ABO calculation. As a result, an ABO calculation may exceed the sum of the employer and employee contributions or be less than the member's total employer and employee contributions.

8. For example, assume that a regular class Pension Plan member has 2.40 years of creditable service and has an annual salary of $40,000. Also, assume that the FRS employee contributions for the member total $2,809, i.e. 3% of her total wages since March 2012 of $80,042. The ABO calculation for this member would be approximately $1,328, which is less than her total FRS employee contributions. This example is based upon an actual second election Investment Plan transfer where an ABO was calculated and transferred to the Investment Plan.

9. As the example above illustrates, when an employee requests a second election Investment Plan transfer, she is requesting that her Pension Plan benefit be converted to an ABO

present value sum, a value that bears no relationship whatsoever to the FRS contributions (both employer and employee) that have been made on her behalf. For these reasons, the Division of Retirement does not segregate a member's ABO into employee and employer contributions when a second election transfer to the Investment Plan occurs.

10. Once the ABO funds are transferred to the Investment Plan, they are invested in accordance with the member's directions. The member bears all of the risk and reward associated with the market performance of the investments she chooses. It is quite possible that an ABO could exceed the member's Pension Plan employee contributions when the ABO funds are transferred to the Investment Plan, but then fall below the value of the Pension Plan employee contributions due to market losses.

11. Florida law authorizes the Pension Plan to refund employee contributions after the member has terminated all employment with FRS-covered employers for three calendar months. In order to receive a refund, however, a Pension Plan member must waive all creditable service represented by the refunded contributions. See, § 121.071(2)(b), Fla. Stat. Once a member has elected Investment Plan membership and transferred an ABO representing earned service credit, she cannot receive a refund of only employee contributions to waive the creditable service represented as if she were still a Pension Plan member. An ABO calculation represents the present value of the member's future Pension Plan benefit. When a member requests an ABO transfer to the Investment Plan, she is, in effect, cashing-out her future Pension Plan benefit today. The member cannot thereafter waive the creditable service because it is represented by both her employee and employer contributions that she has already used to be invested in accordance with her instructions to the Investment Plan.

12. For all of these reasons, the Division of Retirement interprets the Florida law governing second elections and ABO calculations to require that ABO funds transferred to the Investment Plan in connection with a second election remain subject to the applicable Pension Plan vesting requirements.

FURTHER AFFIANT SAYETH NAUGHT

GARRY GREEN

SWORN TO AND SUBSCRIBED before me in the State and County last aforesaid this 12 day of September, 2016 by Garry Green, who is personally known to me or has produced the following identification _____.

STEPHANIE G. FARMER
Commission # FF 220026
Expires June 19, 2019
Bonded Thru Troy Fain Insurance 800-385-7019

NOTARY PUBLIC

Printed Name: Stephanie Farmer

My Commission Expires: June 19, 2019

Commission Number: FF 220026

(SEAL)