

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

LEE HAYES BYRON,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2019-0019
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On July 24, 2019, 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, Lee Hayes Byron, and upon counsel for the Respondent. Both parties timely filed a Proposed Recommended Order. Neither party filed exceptions, which were due on August 8, 2019. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

STATEMENT OF THE ISSUE

The Statement of the Issue as set forth in the presiding officer's Recommended Order hereby is adopted in its entirety.

PRELIMINARY STATEMENT

The Preliminary Statement as set forth in the presiding officer's Recommended Order hereby is adopted in its entirety.

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.

UNDISPUTED MATERIAL FACTS

The Material Undisputed Facts set forth in paragraphs 1 and 2 of the presiding officer’s Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

The Material Undisputed Facts set forth in paragraph 3 are modified slightly, based on record evidence, as follows:

3. On April 20, 2018, Petitioner began employment with the University of Florida, and became eligible to participate in SUSORP. Section 121.35(1), Florida Statutes specifically states that SUSORP is an Internal Revenue Code Section 403(b) plan that is offered in lieu of participation in the Florida Retirement System. Under SUSORP, participants contract directly with approved provider companies offering group annuity or similar products. SUSORP is a defined contribution plan that has slightly higher

contribution rates than the Investment Plan. Petitioner was provided with a “Welcome to the Florida Retirement System for State University System SUSORP-Eligible Employees” informational flyer (hereafter “Flyer”). The Flyer advised Petitioner that if she was in the Investment Plan, she would have to buy back into the Pension Plan in order to enroll in SUSORP. The Flyer also advised Petitioner that she was not permitted to make a direct transfer from the Investment Plan to SUSORP. The flyer cautioned that after 90 days from the date of hire, an eligible employee no longer would be able to elect SUSORP. In addition, page 6 of the Flyer specifically states the following as one of the disadvantages of the SUSORP Plan:

Any prior non-vested FRS Pension Plan service will not be vested until you return to FRS-covered employment and complete the vesting requirements.

The Material Undisputed Facts set forth in paragraphs 4 and 5 of the presiding officer’s Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

The Material Undisputed Facts set forth in paragraph 6 are revised and supplemented, based on record evidence, as follows:

6. Petitioner made her first telephone call to the MyFRS Financial Guidance Line on May 29, 2018, or about five (5) weeks after she commenced employment. Petitioner spoke with Mike with Ernst & Young. Petitioner indicated she had changed jobs and now was eligible for SUSORP. She further indicated that she had been advised that if she wanted to move from the FRS Investment Plan into SUSORP, she would have to first “pay a fee to get into the pension plan and then move to SUSORP...”. She further stated she was calling to find out what the “fee” to transfer to the FRS Pension Plan might be.

[Respondent's Exhibit R-4, p. 40, lines 2-13]. Petitioner indicated she did not want to switch to SUSORP if the cost to do so was too high. [Respondent's Exhibit R-4, p. 46, lines 12-14]. Petitioner and Mike had an extensive conversation about the procedural steps necessary to accomplish Pension Plan enrollment and the required buy in amount. Mike emphasized that Petitioner had only a 90-day window from the Petitioner's date of hire to become enrolled in SUSORP. He suggested that Petitioner go ahead and file her second election form to transfer to the Pension Plan rather than waiting to receive an estimate of the required buy-in amount. Mike indicated the estimate might take four to six weeks and waiting that long to file paperwork could foreclose her ability to meet the 90-day deadline. Mike further indicated if she filed her second election but did not want to transfer after finding out the required buy-in, she was not forced to leave the Investment Plan. [Respondent's Exhibit R-4, p. 40, lines 16-25; p. 41, lines 1-25; p. 42, lines 1-18]. Mike further stated that he wanted Petitioner to talk to SUSORP administration, and he offered to switch Petitioner to the SUSORP administrator, but Petitioner declined. [Respondent's Exhibit 4, p. 12, lines 13-18, lines 22-25; p. 13, lines 1-2; p. 15, lines 4-6]. Mike and Petitioner further discussed the Health Insurance Subsidy and the fact it would not be available to Petitioner if she elected to participate in SUSORP. [Respondent's Exhibit R-4, pp. 51-53]. Nowhere in the lengthy call between Mike and Petitioner was any reference made as to whether the money that would transfer from the Petitioner's Investment Plan account, plus any additional cash Petitioner would have to contribute to buy into the Pension Plan, would remain in the Pension Plan or be transferred to SUSORP as an opening balance. The issue was not discussed and Petitioner did not make any inquiry as to this issue.

The Material Undisputed Facts set forth in paragraphs 7 through 14 of the presiding officer's Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

CONCLUSIONS OF LAW

The Conclusions of Law set forth in Paragraphs number 15 through 22 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 set forth in Paragraphs 23 through 27 of the presiding officer's Recommended Order hereby are rejected in whole or in part. This Final Order substitutes and adopts the following Conclusions of Law for those five paragraphs as follows, and adds one new paragraph, finding that, based on record evidence and applicable law, these substituted and added conclusions of law comport with applicable law and are at least as reasonable as, or are more reasonable than, those five conclusions of law that are hereby rejected:

23. There does not appear to be any material dispute of fact as to what occurred in this case. Through numerous communications, made by email and telephone calls, with various individuals, such as a university financial advisor, personnel with the Division of Retirement and Respondent SBA, as well as with third party counsellors on the MyFRS Financial Guidance Line, Petitioner attempted to follow a complex process to become a member of SUSORP. The individuals with whom Petitioner communicated attempted to assist her. During the first telephone call Petitioner made, on May 29, 2018, to the MyFRS Financial Guidance Line, Petitioner indicated to Mike that she had been

advised that if she wanted to transfer to SUSORP, she first would have to transfer to the Pension Plan, and there might be a cost to do so. Petitioner stated she was told to call the MyFRS Financial Guidance Line to find out what that buy in cost would be before she decided if transferring to SUSORP was in her best interest. [Respondent's Exhibit R-4, pp. 4-10]. Petitioner noted that she was not sure she wanted to go into SUSORP and that she didn't "...want to pay much into [the Pension Plan]..." in order to effectuate the ultimate switch to SUSORP. [Respondent's Exhibit R-4, p. 10, lines 1-14]. Mike did everything possible to ensure Petitioner could timely make her second election into the Pension Plan if she chose to do so by encouraging Petitioner to file the second election form rather than waiting for the estimate of the buy in cost from the Division of Retirement. Mike noted the window for making the ultimate election into SUSORP was "kind of tight." [Respondent's Exhibit R-4, pp. 5-11; p. 14, lines 24-25]. Mike offered to transfer Petitioner to the Division of Retirement to obtain further information about SUSORP, but Petitioner declined. [Respondent's Exhibit R-4, p. 12, lines 20-25; p. 13, lines 1-2]. Petitioner did not ask Mike whether, if she decided to switch to the Pension Plan and then ultimately to SUSORP, the funds in the Pension Plan account would transfer to the SUSORP account.

Petitioner made a couple of other calls to the MyFRS Financial Guidance Line to ensure her second election form had been received. [Respondent's Exhibit R-4, pp. 63-82]. Petitioner did not make any inquiries as to whether the amounts that would be placed into her Pension Plan account would transfer over to a SUSORP account. Petitioner apparently made an assumption that the funds would transfer and she failed to verify her assumption even though she had ample opportunity to do so.

24. The plan comparison sheets given to Petitioner show highly detailed comparisons of SUSORP, the Investment Plan and the Pension Plan. Page 6 of the Flyer specifically states the following as one of the disadvantages of the SUSORP Plan:

Any prior non-vested FRS Pension Plan service will not be vested **until you return to FRS-covered employment** and complete the vesting requirements. [emphasis added]

The foregoing language indicates that the funds in the FRS Pension Plan do not transfer over to the SUSORP account, but rather remain in the FRS Pension Plan account and will be subject to any applicable Pension Plan vesting requirements. If such amounts were transferred to SUSORP, there would be no need to return to FRS covered employment in order to complete the vesting requirements. The amounts simply would be transferred to SUSORP subject to the vesting requirements of the Pension Plan. That is, the transferred amounts would become vested once the employee attained 8 years of service (or fewer depending on when the employee initially enrolled in the FRS). This is unlike the situation in which a member of the Pension Plan decides to switch to the Investment Plan. The plan comparison sheets specifically note that the money transferred to the Investment Plan from the Pension Plan will not vest until, for members initially enrolled on or after July 1, 2011, the member has eight (8) years of FRS service credit.

25. Pursuant to Section 121.450(1), Florida Statutes, Respondent is charged with implementing Chapter 121, Florida Statutes, concerning the implementation of the FRS Investment Plan. It is not authorized to depart from the requirements of the applicable statutes when exercising its jurisdiction. *See also, Balezentis v. Dep't of Mgmt. Servs., Div. of Retirement*, Case No. 04-3263, 2005 WL 517476 (Fla. Div. Admin. Hrgs. March 2, 2005)(noting that an agency "is not authorized to depart from the requirements of its

organic statute when it exercises its jurisdiction”). The statutory language describing the powers and functions of such an entity is to be construed to extend “no further than ... the specific powers and duties conferred by the enabling statute.” Sections 120.52(8) and 120.536(1), Florida Statutes.

26. Respondent rightfully asserts that that there is no statutory authority that would allow Petitioner to have a third election so that she could transfer back to the Investment Plan to remedy her situation. Petitioner had failed to rescind her second election within the allowed grace period. The applicable statute only provides for a one-time second election. Respondent and its agents and representatives ensured that Petitioner had full and complete information as to the process for effectuating a second election from the Investment Plan to the Pension Plan. Any deficiencies in educational materials and advice provided to Petitioner regarding SUSORP are not due to any actions or omissions of the SBA. The SBA has no responsibility for providing educational materials concerning SUSORP. Section 121.35(1), Florida Statutes specifically states that SUSORP is an Internal Revenue Code Section 403(b) plan that is offered in lieu of participation in the Florida Retirement System. Under SUSORP, participants contract directly with approved provider companies offering group annuity or similar products. The provider companies supply to SUSORP participants, on an annual basis, a written program description discussing the soundness of the SUSORP plan and available benefits thereunder. Unlike the situation involving the Pension and Investment Plans, neither the Department of Management Services (“DMS”) nor the SBA is required by law to provide detailed educational plan information about SUSORP. *See*, Section 121.35(6)(d), Florida

Statutes. Thus, there are no available equitable remedies that would provide relief to Petitioner from the Respondent.

27. As to Petitioner's second request to be able to roll over the former balance of her Investment Plan account into her SUSORP account, only DMS has the authority to provide such relief. Pursuant to Section 121.35(1), DMS has the sole authority to establish and administer SUSORP. Under Section 121.35, Florida Statutes, Respondent is charged only with reviewing and making recommendations to DMS as to the acceptability of proposed investment products to be offered under SUSORP and the acceptability of the mix of investment products to be offered. No other powers are granted to the SBA under Section 121.35, Florida Statutes with respect to SUSORP, not even the power to **require** DMS to offer certain investment products under SUSORP. Thus, because the only duties granted to the SBA under Section 121.35, Florida Statutes, are advisory, it is clear that the legislature did not intend for the SBA to have powers or control over DMS concerning the administration of SUSORP. As such, Respondent lacks jurisdiction even to consider Petitioner's request to fund her SUSORP account with the former balance of her Investment Plan account.

28. It should be noted that even if no relief is granted to Petitioner, Petitioner will not lose her Pension Plan benefit. It will be available to her at normal retirement age. In addition, she will have whatever amounts have accrued in her SUSORP account.

ORDERED

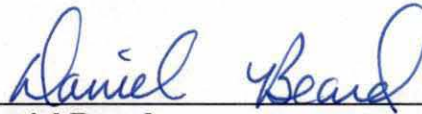
Petitioner's request that she be permitted to rescind her second election into the Pension Plan, made on May 31, 2019, hereby is denied. As to Petitioner's request to fund her SUSORP account with her former Investment Plan account, Petitioner's Petition for

Hearing will be transferred to the Department of Management Services' Division of Retirement for further proceedings.

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.

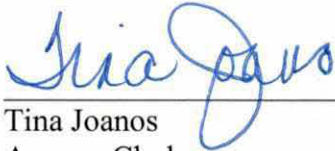
DONE AND ORDERED this 17 day of September, 2019, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Daniel Beard
Chief of Defined Contribution Programs
State Board of Administration
1801 Hermitage Boulevard, Suite 100
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(850) 488-4406

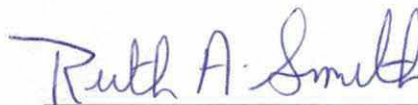
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Lee Hayes Byron, pro se, both by email transmission at [REDACTED] and by U.P.S. to [REDACTED] and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) and Ruth Vafek (rvafek@ausley.com), Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 17th day of September, 2019.



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

LEE HAYES BYRON,

Petitioner,

vs.

CASE NO. 2019-0019

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 21, 2019, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Lee Hayes Byron, pro se

[REDACTED]

For Respondent: Deborah S. Minnis
Ausley McMullen, P.A.
123 South Calhoun Street
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The primary issue in this case is whether Petitioner may rescind her second election transferring from the Florida Retirement System (FRS) Investment Plan to the FRS Pension Plan, an election she was required to make before she could enroll into the State University System Optional Retirement Program (SUSORP). Secondly, if Petitioner must remain in SUSORP, is she entitled to transfer the lump sum value of her Pension Plan service credit into her SUSORP account or must that value remain in the Pension Plan and her SUSORP account begin at zero?

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on her own behalf, and presented no other witnesses. Respondent presented the testimony of Allison Olson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-4 were admitted into evidence without objection. Petitioner subsequently requested to file a SUSORP Newsletter and two transcribed phone calls to supplement the record following the hearing, which was done without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. Both parties made timely post-hearing submissions.

UNDISPUTED MATERIAL FACTS

1. Petitioner began employment with the Sarasota County Board of County Commissioners, an FRS-participating employer, on July 11, 2005.

2. Petitioner had until December 30, 2005 to make an initial election between the defined benefit Pension Plan and the defined contribution Investment Plan. Petitioner made an initial election online to participate in the Investment Plan on December 28, 2005, with an effective date of January 1, 2006.

3. On April 20, 2018, Petitioner began employment with the University of Florida, and became eligible to participate in SUSORP, a defined contribution plan which has slightly higher contribution rates than the Investment Plan. Petitioner was provided a "Welcome to Florida Retirement System Florida State SUSORP" eligible employee flyer. The flyer advised Petitioner that if she was in the Investment Plan, she would have to buy back into the Pension

Plan to enroll in SUSORP. The flyer also advised Petitioner that she was not permitted to make a direct transfer from the Investment Plan to SUSORP.

4. Petitioner made a series of phone calls to the MyFRS Financial Guidance Line and the Department of Management Services' Division of Retirement (DOR) in May, June, July, and August of 2018 about the SUSORP enrollment process.

5. In an April 24, 2018 email, Petitioner had been welcomed to her new position at the University of Florida by Patrick Ashe, who described himself as a partner with the university and with AXA Advisors, a retirement planning resource. On May 4, 2018, he sent Petitioner a copy of an FRS plan comparison sheet comparing the SUSORP, the Investment Plan, and the Pension Plan. He and Petitioner spoke that day, and later he provided various FRS phone numbers to her by email.

6. On May 29, 2018, Petitioner spoke with Mike with Ernst & Young, on the MyFRS Financial Guidance Line. They discussed her new SUSORP option, and Ms. Byron expressed her interest in being in SUSORP, but only if she didn't have to pay in too much to do so. Petitioner knew at this point that to be in SUSORP, she had to move to the Pension Plan, which could require paying additional money to transfer in, and that she could then move to SUSORP. She needed to know what her cost to get into the Pension Plan would be. She and Mike had an extensive conversation about the procedural steps necessary to accomplish Pension Plan enrollment and the required pay-in, and the timing of these processes, and the Guidance Line counsellor reinforced that the only way to go into SUSORP was to first be a Pension Plan member. Nowhere in this lengthy call is there any reference to whether the money that would transfer from the Investment Plan plus whatever cash she would have to contribute to buy into the

Pension Plan would remain in the Pension Plan or be transferred to SUSORP as an opening balance. The issue simply is not discussed.

7. On May 31, 2018, Petitioner called the Financial Guidance Line and spoke with Gladys. Petitioner had just submitted her second election to move from the Investment Plan to the Pension Plan and wanted to be sure it had been received. Gladys transferred her to Misty at the Investment Plan. Petitioner told Misty that she was switching from the Investment Plan to the Pension Plan “with the intention of eventually switching to SUSORP.” Misty states that she does not know what that is, and wants to refer her to a Pension Plan representative. Misty is unable to confirm receipt of Petitioner’s second election because not enough time has elapsed, and tells Petitioner that both the Investment Plan and Pension Plan representative would be involved in the transfer process.

8. On June 18, 2018, Petitioner called the FRS Financial Guidance Line and spoke with Rick. She had received confirmation of her second election, but had not been told what her buy-in amount would be. Rick transferred her from the Investment Plan side to the Pension Plan side for this information. She then spoke with Leah at DOR about her need to timely receive the letter which would tell her if she would have to contribute additional money to complete her transfer to the Pension Plan, and if so, how much. Petitioner was concerned because she had a deadline to enter the SUSORP, and while she had received a confirmation that she had made her second election into the Pension Plan, she knew that she might still have to pay money and had not been told how much. On each of her recent calls she had to be transferred to two or three different sections for an answer to her questions. Petitioner knew that her SUSORP enrollment could not be finalized until her payment was received.

9. On June 29, 2018, the grace period within which Petitioner could have rescinded her second election into the Pension Plan expired.

10. On July 3, 2018, Petitioner called the Department of Management Services Division of Retirement to ask about the status of her switch to the Pension Plan and subsequent enrollment in SUSORP. She had apparently learned by now that she would have to pay additional funds to effectuate her Pension Plan transfer and is trying to assure the actual transfer of her Investment Plan money and additional funds needed.

11. On August 3, 2018, Petitioner called DOR and spoke to Leah, who confirmed that a "rollover check" for \$32,378.63 and an IRA rollover check of \$3,793.00 had both been received and processed. She learns that she now has 13 years of Pension Plan service and should be receiving a confirmation of receipt of her money shortly. She reiterates that she did not want to end up in the Pension Plan, and wanted to be in the SUSORP. She is transferred to another section to address this concern, where Phyllis confirms that she doesn't know much about the process, and will need to transfer her to another section. Leah then transfers her to Jim, who assures her that everything is fine. After Petitioner hangs up, Jim explains to Leah that Petitioner has just spent a whole lot of money to purchase 13 years of Pension Plan service, and that money will now remain there. Jim again reiterates that the substantial sum that Petitioner has spent has now gone out of her control, although it has purchased her 13 years of Pension Plan, with her SUSORP account starting at zero. He explains that the value of being in the SUSORP as opposed to remaining in the Investment Plan is being able to shelter additional money in that kind of account. He states: "So she gets to retirement age and her SUSORP account has grown and grown and grown, that's the plan anyway, and she's got pension."

12. On November 4, 2018, Petitioner emailed Patrick Ashe with AXA Advisors to ask him to check on her transfer from the Investment Plan to the Pension Plan to the SUSORP, because a statement she has received showed only a few hundred dollars in her SUSORP account.

13. On December 2, 2018, Petitioner contacted the Division of Retirement Optional Retirement Program by e-mail requesting that the Division transfer the value of her Investment Plan account funds used to buy into the Pension Plan to her SUSORP account as an opening account balance. She further requested that if this could not be done, she wished to return to the Investment Plan. Because Petitioner's request was to return to the Investment Plan, the Division of Retirement Optional Retirement Program forwarded this matter to Respondent. Respondent ultimately denied Petitioner's request.

14. On February 18, 2019, Petitioner filed a Petition for Hearing requesting that Respondent rescind her second election and place her back in the Investment Plan *or* transfer the lump sum value of her Pension Plan service credit into her SUSORP account. This administrative proceeding followed.

CONCLUSIONS OF LAW

15. The State Board of Administration is the agency designated to establish the Florida Retirement System Investment Plan. See § 121.4501(1), Fla. Stat. ("The Trustees of the State Board of Administration shall establish a defined contribution program called the "Florida Retirement System Investment Plan" or "investment plan" for members of the Florida Retirement System under which retirement benefits will be provided for eligible employees who elect to participate in the program.")

16. The Department of Management Services is the agency designated to establish SUSORP. See § 121.35(1), Fla. Stat. ("The Department of Management Services shall establish

an optional retirement program under which contracts providing retirement and death benefits may be purchased for eligible members of the State University System who elect to participate in the program.”)

17. Pursuant to Section 121.021(3), Florida Statutes, FRS is Florida’s general retirement system, and includes but is not limited to the Pension Plan and the Investment Plan.

18. Movement between the FRS Investment Plan and the FRS Pension Plan is governed by Section 121.4501(4)(f), Florida Statutes, which is a statute Respondent SBA administers.

19. That section states, in pertinent part:

(f) 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. Effective July 1, 2005, such elections are effective on the first day of the month following the receipt of the election by the third-party administrator and are not subject to the requirements regarding an employer-employee relationship or receipt of contributions for the eligible employee in the effective month, except when the election is received by the third-party administrator. This paragraph is contingent upon approval by the Internal Revenue Service.

§ 121.4501(4)(f), Fla. Stat. (emphasis added).

20. Members of the FRS have one opportunity to switch plans after their initial election period expires. Petitioner used her one-time second election in May 2018.

21. Respondent has adopted a rule which allows rescission of a second election under some circumstances. The grace period provided under this 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. (emphasis added).

22. Under the above rule, Petitioner had until 4:00 p.m. Eastern Time on the last business day of June 2018 to rescind her second election to move from the Investment Plan to the Pension Plan and did not rescind her second election within this grace period.

23. There does not appear to be any material dispute of fact as to what occurred in this case. Through numerous communications, by email and telephone calls with a university financial advisor, personnel with the Division of Retirement and Respondent SBA, as well as third party counsellors on the MyFRS Guidance Line, Petitioner attempted to follow a complex process, and numerous advisors attempted to assist her. But although Petitioner stated clearly and from the outset that her wish and intention was to be in the SUSORP, she was never expressly told that the interim step required to achieve her goal would result in her paying her current Investment Plan assets, plus more, into a Pension Plan account, which would then have to remain there while her SUSORP account began at zero.

24. The comparison sheets given to Petitioner show extensive highly detailed comparisons of the SUSORP, the Investment Plan and the Pension Plan, and a footnote states:

If you are enrolled in the Investment Plan and move to a SUSORP-eligible position, you must use your 2nd Election (if available) to buy back into the Pension Plan in order to enroll in the SUSORP. You are not permitted to make a direct transfer from the Investment Plan to the SUSORP (unless in a mandatory SUSORP position).

But this does not address Petitioner's fundamental concern as to what becomes of value transferred to the Pension Plan when a member wishes only to be in the SUSORP. It was incumbent on the integrated FRS structure to create a clear path for Petitioner to make a fully informed decision, and it did not do this.

25. Respondent is charged with implementing Chapter 121, Florida Statutes, and it is not authorized to depart from the requirements of these statutes when exercising its jurisdiction.

Balezentis v. Dep't of Mgmt. Servs., Div. of Retirement, Case No. 04-3263, 2005 WL 517476

(Fla. Div. Admin. Hrgs. March 2, 2005) (noting that agency “is not authorized to depart from the requirements of its organic statute when it exercises its jurisdiction”).

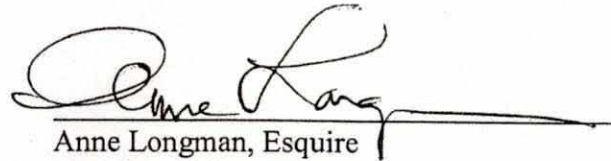
26. Respondent asserts that it cannot offer Petitioner a third election and that it has no jurisdiction to remedy the problem Petitioner complains of. But my review of the record indicates that, had Petitioner been adequately informed about the process she had embarked upon, she would have had enough time to rescind her election prior to June 29, 2018, the expiration of the grace period under Rule 19-11.007(4), and would not have allowed her accumulated Investment Plan account to be frozen in the Pension Plan. Pension statutes are to be liberally construed in favor of the intended recipients. Scott v. Williams, 107 So.3d 379 (Fla.2013), citing Board of Trustees of Town of Lake Park Firefighters’; Pension Plan v. Town of Lake Park, 966 So.2d 448, 451 (Fla. 4th DCA 2007) and Green v. Gray, 87 So. 2d 504 (Fla. 1956).

27. As to Petitioner’s alternate request, to roll over the former balance of her Investment Plan account into her SUSORP account, I acknowledge Respondent’s assertion that its jurisdiction does not include administering the Optional Retirement Program. I do not reach Petitioner’s alternate request, as I recommend that Respondent SBA recognize that under the very narrow circumstances in this case, Petitioner should be allowed to rescind her second election and return to the Investment Plan, as she was not adequately or timely informed as to the ultimate result of transferring a substantial retirement fund to a plan she did not wish to be in.

RECOMMENDATION

Having considered the law and the undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order allowing Petitioner to rescind her second election to the Pension Plan made May 31, 2018.

RESPECTFULLY SUBMITTED this 24th day of July, 2019.



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
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Tallahassee, FL 32308
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Petitioner

and via electronic mail only to:

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