STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

MARGARET AIKHIONBARE, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	SBA Case No. 2019-0117

FINAL ORDER

On June 28, 2019, the Presiding Officer submitted her Recommended Order to the State Board of Administration ("SBA" or "Respondent") in this proceeding. The Recommended Order indicates that copies were served upon the pro se Petitioner, Margaret Aikhionbare, and upon counsel for the Respondent. Respondent timely filed a Proposed Recommended Order. Petitioner filed what she deemed to be a response to the hearing, setting forth two additional arguments. Petitioner timely filed exceptions to the Recommended Order dated July 5, 2019, and received by Respondent on July 9, 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.

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact set forth in a Recommended Order 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."

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 this section's "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 administrative authority. *See, Deep Lagoon Boat Club, Ltd. V. Sheridan,* 784 So.2d 1140, 1141-42 (Fla. 2nd DCA 2001); *Barfield v. Dept. of Health*, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001).

Section 120.57(1)(k), Florida Statutes, provides that "...an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

RULING ON PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

None of Petitioner's three enumerated exceptions clearly identifies the disputed portions of the Recommended Order by page number or paragraph; and none of three enumerated exceptions includes appropriate and specific citations to the record. As such, the SBA is not required, on that basis alone, to rule on any of Petitioner's three exceptions.

Petitioner, as the party seeking affirmative relief, has the burden of demonstrating that she is entitled to the relief requested. *See, Young v. Department of Community Affairs*, 625 So.2d 837 (Fla. 1993); *Florida Department of Transportation v. J.W.C.*, 396 So.2d 778, 788 (Fla. 1st DCA 1981).

Petitioner's Exception 1: The first part of Petitioner's exception seems to consist of an argument that because there is no record that Petitioner received a confirmation of her initial election sixteen (16) years ago, and because Respondent is required by law to provide such a confirmation, then Petitioner should prevail. Petitioner argues that such a confirmation would have allowed her to correct the "obvious error" that she specifically requested to be placed in the Investment Plan. This is the exact same argument that Petitioner had broached during the hearing and that was rejected by the Presiding Officer. Additionally, Petitioner completely ignores the provisions of Section 121.4501(8)(g), Florida Statutes, that provide that if the records of the Respondent demonstrate that the action about which the Petitioner is complaining occurred more than five (5) prior to the filing of Petitioner's complaint, then a presumption arises that such action occurred with the Petitioner's full knowledge and consent. A petitioner only can rebut such presumption by supplying some documentary evidence or an audio recording otherwise. Petitioner has not produced any such evidence, but instead simply

states that the Respondent, contrary to applicable law, should be required to produce a copy of her now sixteen-year-old confirmation statement in order to prevail. Petitioner is asking that all available documentary evidence, such as almost fifteen years' worth of her quarterly account statements, each of which is clearly marked "Florida Retirement System Investment Plan", and each of which clearly sets forth the gains/losses Petitioner experienced in each of the five categories of investments she selected, simply be ignored. Petitioner has not provided any legal authority to establish that Section 121.4501(8)(g), Florida Statutes is not relevant to her matter.

The second part of Petitioner's Exception 1 consists of an argument that even if her initial election simply was by default, then she should be a Pension Plan member. However, no argument was made during the proceeding that Petitioner's election was a default election. Rather, the evidence establishes that Petitioner affirmatively elected the Investment Plan, knew or should have known she was in the Investment Plan, and failed to take any action over a period of sixteen years to switch or undo her election.

Accordingly, Petitioner's Exception 1 hereby is rejected *in toto*.

Petitioner's Exception 2: Petitioner is arguing that the provision of quarterly statements to her cannot be considered as proof that she made the election into the Investment Plan. However, the almost fifteen years' worth of quarterly statements, that Petitioner admitted under oath that she received, clearly are marked "Florida Retirement System Investment Plan" and clearly set forth the various investment funds that Petitioner had selected. Petitioner testified that her husband was a member of the Pension Plan and he was receiving account statements. [Hearing Transcript, p. 23, lines 10-25; p. 24, lines 1-25; p. 25, lines 1-25; p. 26, lines 1-22]. The statements that Petitioner was receiving would be different from those her husband was receiving. Petitioner's husband's account statements would not be labeled as "Florida

Retirement System Investment Plan." Additionally, his statements would not set forth various investments. [Respondent's Exhibits R-1 and R-2]. Thus, Petitioner knew or reasonably should have known from her quarterly statements that she was in the Investment Plan. She failed to take timely action to switch or undo the election.

Petitioner further argues that the provisions of Section 121.4501(8)(g), Florida Statutes, is "unethical" and "unrealistic." However, Petitioner's characterization of the statutory provisions simply is her unsupported opinion. She has not cited any case law finding that the provisions of Section 121.4501(8)(g), Florida Statutes, or those of any similar laws, either are unethical or unrealistic.

Finally, Petitioner argues that the burden of proof should "rest with the SBA" and not with Petitioner. Again, this statement simply represents Petitioner's opinion. Applicable case law establishes that Petitioner, not the Respondent, has the burden of establishing that she is entitled to the relief requested. *See, Young v. Department of Community Affairs*, 625 So.2d 837 (Fla. 1993); *Florida Department of Transportation v. J.W.C.*, 396 So.2d 778, 788 (Fla. 1st DCA 1981).

Accordingly, Petitioner's Exception 2 hereby is rejected *in toto*.

Petitioner's Exception 3: Petitioner is merely arguing, without any legal basis, that the Recommended Order simply is selectively citing some statutory provisions while ignoring "key elements" of other statutory provisions. Petitioner has failed to provide a legal basis for her exception, and has not provided appropriate and specific citations to the record.

Accordingly, Petitioner's Exception 3 to the Recommended Order hereby is rejected.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that she be allowed to use her second election to transfer from the FRS Investment Plan to the FRS Pension Plan without having to pay the statutorily-required "buy-in" amount, hereby is denied. Petitioner had claimed that she was placed in the Investment Plan in 2003 without her knowledge and consent. Yet, Petitioner was unable to produce any evidence to support her assertion.

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 22 day of August, 2019, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Daniel Beard

Daniel Beard
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 to Margaret Aikhionbare, pro se, both by email transmission at [redacted] and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) and Ruth Vafek, Esq. (rvafek@ausley.com), Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 22 day of August, 2019.

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

Margaret Aikhionbare

[redacted]

[redacted]

July 5, 2019.

Agency Clerk

Office of the General Counsel

Florida State Board of Administration

1801 Hermitage Blvd., Suite 100

Tallahassee, FL 32308

MY EXCEPTIONS TO THE RECOMMENDED ORDER

I have been notified of the recommended order by Anne Longman, Esquire who is representing the State Board of Administration that a final order denying my relief be issued. What a travesty of Justice this will be!!! It is my contention that the presiding officer has nebulously interpreted Florida Statutes to recommend denying my relief.

I submit my exceptions below:

1. As correctly stated in your notice, there is simply no record of confirmation sent to me regarding my alleged initial election. Florida Statutes require the FRS to send me a confirmation notice of the alleged initial election for record purposes and to provide me with the opportunity to request for such election to be rescinded within the grace period allowed by statutes under Rule 19-11.007, Florida Administrative Code. Section 4 of this rule would have provided me with a grace period to correct this obvious error.
   Even if the alleged initial option was by default, as an FRS-covered employee hired prior to January 1, 2018, the default option for me would have been the Pension Plan rather than the Investment Plan since I did not fall under any other membership class where the default option would have been the Investment Plan.

2. The provision of quarterly statements to me cannot be substituted for the confirmation notice as required by Florida Administrative Code and a proof that I personally made the alleged initial election. The presumption that the alleged initial election was at my request and with my full knowledge and consent is erroneous at best. There is no doubt that placing this burden on me to produce any documentary evidence or audio recording that will demonstrate that the alleged initial election was done without my knowledge and consent is purely unethical and unrealistic. The burden of proof should rest with the SBA and not with me. Nothing in the Florida Administrative Code requires me or anyone else to keep such documentary evidence or audio recording. Since I never requested to be changed from pension to investment, what documentation are you asking me to provide? The only documentary evidence that would have been in my possession would be a confirmation of the alleged initial election if the FRS had followed the Statutes as required.

3. It is seriously unfortunate that such selective incorporation of Florida Statutes, while ignoring key elements of it, will deny me a right to choose the retirement plan that I truly would like to elect.

RESPECTFULLY SUBMITTED this 7th day of July, 2019.

Margaret Aikhionbare (Petitioner).

COPY FURNISHED via mail and electronic mail to:

Deborah Minnis, Esquire

Ruth Vafek, Esquire

125 South Calhoun Street

P.O. Box 391

Tallahassee, Florida 32301

(Counsel for Respondent)

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

MARGARET AIKHIONBARE,

Petitioner,

vs. CASE NO. 2019-

0117 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 April 23, 2019, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Margaret Aikhionbare, pro se
[redacted]

For Respondent: Sarah Logan Beasley
Ausley McMullen, P.A.
123 S. Calhoun Street
Tallahassee, FL 32302

STATEMENT OF THE ISSUE

The issue is whether Petitioner is properly in the Florida Retirement System (FRS) Investment Plan, and if so, whether Respondent should grant her request to make a second election to transfer to the FRS Pension Plan without having to pay the "buy-in" amount as required by statute.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on her own behalf, and presented no other witnesses. Respondent attended the hearing in person and presented the testimony of Allison Olson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-5 were admitted into evidence without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties on May 7, 2019. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. Respondent filed a Proposed Recommended Order and Petitioner filed a response to the hearing.

UNDISPUTED MATERIAL FACTS

1. Petitioner began employment with the Palm Beach County Board of County Commissioners, an FRS-participating employer, on November 18, 2002.

2. Petitioner had until May 31, 2003 to make an initial election between the defined benefit Pension Plan and the defined contribution Investment Plan.

3. Respondent SBA's former third-party administrator determined that an online election to participate in the Investment Plan was made on May 28, 2003, with an effective date of June 1, 2003.

4. Neither Respondent, nor its former third-party administrator, could locate a record of confirmation being sent to Petitioner regarding her initial election.

5. Respondent did produce records of Petitioner's quarterly statements that date from 2004 to the present. Petitioner admitted she received these quarterly statements in the mail.

6. The top of each quarterly statement is titled "Florida Retirement System Investment Plan."

7. These same quarterly statements show that Petitioner's investment account was allocated among five different asset classes including retirement date funds, money market, bonds, U.S. stocks, and foreign/global stocks.

8. Petitioner's quarterly statements also indicate that she designated a primary beneficiary and three secondary/contingent beneficiaries.

9. In November 2018, Petitioner asked her employer's retirement coordinator for enrollment information for the Deferred Retirement Option Program (DROP) program. Petitioner was advised that she was not qualified to enroll into DROP because she was not enrolled in the FRS Pension Plan but was instead a member of the FRS Investment Plan.

10. In January 2019, Petitioner utilized her second election to transfer from the Investment Plan to the Pension Plan. Petitioner's second election was received and processed on January 7, 2019, with an effective date of February 1, 2019.

11. After learning that she would have to pay additional funds to buy into the Pension Plan, Petitioner filed a Request for Intervention on March 4, 2019, requesting that she be "reinstated" in the Pension Plan without having to pay the buy-in amount. Petitioner stated that she had "always known and believed that [she] was on the Pension Plan rather than the Investment Plan," and that she "has never elected to sign up for the Investment Plan since the beginning of [her] employment with her employer." Her request was denied.

12. Petitioner filed a Petition for Hearing dated March 28, 2019, again requesting that she be "reinstated" in the Pension Plan without having to pay the buy-in. This administrative proceeding followed.

CONCLUSIONS OF LAW

13. Respondent's records demonstrate that the action complained of, Petitioner being placed in the Investment Plan, occurred more than five years prior to when Petitioner's complaint was submitted. Pursuant to Section 121.4501(8)(g), Florida Statutes, the Respondent's action is presumed to have been taken at Petitioner's request and with her full knowledge and consent. This section states:

> (g) The state board shall receive and resolve member complaints against the program, the third-party administrator, or any program vendor or provider; shall resolve any conflict between the third-party administrator and an approved provider if such conflict threatens the implementation or administration of the program or the quality of services to employees; and may resolve any other conflicts. The third-party administrator shall retain all member records for at least 5 years for use in resolving any member conflicts. **The state board, the third-party administrator, or a provider is not required to produce documentation or an audio recording to justify action taken with regard to a member if the action occurred 5 or more years before the complaint is submitted to the state board. It is presumed that all action taken 5 or more years before the complaint is submitted was taken at the request of the member with the member's full knowledge and consent. To overcome this presumption, the member must present documentary evidence or an audio recording demonstrating otherwise.**

§ 121.4501(8)(g), Fla. Stat. (emphasis added).

14. Ms. Olson confirmed on the record at the hearing that record retention beyond this five-year requirement is up to the discretion of Respondent's third-party administrator, and that Respondent does not direct anyone to destroy records that are older than five years.

15. Petitioner has not produced any documentary evidence or audio recording demonstrating that the action taken by Respondent in 2003 was done without her knowledge and consent. Rather, all of the documentary evidence, including fourteen years' worth of quarterly statements demonstrates that Petitioner initially elected the Investment Plan, knew she was in the Investment Plan, and never took timely action to switch or undo her initial election.

16. At the time of Petitioner's initial election in 2003, members could choose from more than three dozen fund options to customize their investment portfolios. In the event a member did not choose to allocate her investments, the member defaulted to investing entirely (100%) in the FRS Select Moderate Balanced Fund. But here, Petitioner's quarterly statements show that her investments were allocated roughly equally between five different asset classes, indicating that she or someone she authorized affirmatively chose from dozens of investment options to curate her investment portfolio.

17. Petitioner's quarterly statements also show that she or someone she authorized designated primary and secondary/contingent beneficiaries.

18. In light of the former third-party administrator's verification of initial election, the information contained in the fourteen years' worth of quarterly statements, and the absence of any documentation or audio recording demonstrating otherwise, Petitioner cannot overcome the statutory presumption that her initial election to enroll in the Investment Plan was done at her request and with her full knowledge and consent. Accordingly, Petitioner was and still is correctly placed in the Investment Plan.

19. Movement from the FRS Investment Plan to the Pension Plan is governed by 121.4501(4)(f)3., Florida Statutes. This section states, in pertinent part:

> Notwithstanding subparagraph 2., an employee who chooses to move to the pension plan and who became eligible to participate in the investment plan by reason of employment in a regularly established position with a state employer after June 1, 2002; a district school board employer after September 1, 2002; or a local employer after December 1, 2002, must transfer from his or her investment plan account, and from other employee moneys as necessary, a sum representing the employee's actuarial accrued liability. A refund of any employee contributions or additional member payments made which exceed the employee contributions that would have accrued had the member remained in the pension plan and not transferred to the investment plan is not permitted.

§ 121.4501(4)(f)3., Fla. Stat. (emphasis added).

20. There is no statutory provision authorizing a switch from the Investment Plan to the Pension Plan without using a second election and paying the "buy-in" amount. If Petitioner chooses to utilize her second election to switch to the FRS Pension Plan, she must do so in accordance with the statutory requirement that she pay the buy-in amount associated with that switch, as it is Petitioner who carries the burden to demonstrate compliance with all applicable statutory requirements before being granted the relief requested. Young v. Dep't of Community Affairs, 625 So. 2d 831 (Fla. 1993); Dep't of Transp. v. J.W.C., 396 So. 2d 778 (Fla. 1st DCA 1981).

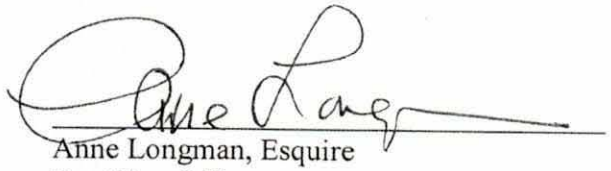
21. Respondent is charged with implementing Chapter 121, Florida Statutes, and not authorized to depart from the requirements of these statutes when exercising its jurisdiction. Balezentis v. Dep't of Mgmt. Servs., Div. of Retirement, Case No. 04-3263, 2005 WL 517476 (Fla. Div. Admin. Hrgs. March 2, 2005) (noting that agency "is not authorized to depart from the requirements of its organic statute when it exercises its jurisdiction").

22. It is unfortunate that Petitioner is not in the retirement plan that she would now prefer, but Respondent does not have the authority to waive the statutorily mandated Pension Plan buy-in amount, and therefore cannot grant the relief requested in the Petition for Hearing.

RECOMMENDATION

Having considered the law and the undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order denying the relief requested.

RESPECTFULLY SUBMITTED this 28th day of June, 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
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
Tina.joanos@sbafla.com
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COPIES FURNISHED via mail and electronic mail to:

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Petitioner

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