STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

STACY MCLEAN, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent. and ORANGE COUNTY, Intervenor.	)	DOAH Case No. 16-5327 SBA Case No. 2016-3724

FINAL ORDER

On December 21, 2016, Administrative Law Judge D.R. Alexander (hereafter "ALJ") submitted his Recommended Order to the State Board of Administration (hereafter "SBA") in this proceeding. A copy of the Recommended Order indicates that copies were served upon counsel for the Petitioner, upon counsel for the Respondent, and upon counsel for the Intervenor. Both Petitioner and Respondent timely filed Proposed Recommended Orders. Petitioner timely filed exceptions on January 5, 2017. Counsel for Intervenor timely filed a Response in Opposition to Petitioner's Exceptions to the Recommended Order on January 17, 2017. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs.

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 as if fully set forth herein.

PRELIMINARY STATEMENT

The State Board of Administration adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order as if fully set forth herein.

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact of an Administrative Law Judge ("ALJ") 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 an ALJ'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 administrative law judges as the triers of the facts. *Belleau v.*

Dept of Environmental Protection, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Maynard v. Unemployment Appeals Comm.*, 609 So.2d 143, 145 (Fla. 4th DCA 1993). Thus, if the record discloses any competent substantial evidence supporting finding of fact in the ALJ's Recommended Order, the Final Order will be bound by such factual finding.

Pursuant to Section 120.57(1)(l), Florida Statutes, however, a reviewing agency has the general authority to "reject or modify [an administrative law judge's] conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." Florida courts have consistently applied the "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the ALJ's application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the ALJ'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 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).

With respect to exceptions, 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."

RULINGS ON PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER AND ON INTERVENOR'S RESPONSE THERETO

Petitioner's Exception 1: Petitioner Did Not Take an Invalid Distribution

In the first part of Petitioner's Exception 1, Petitioner merely states that he takes exception with the conclusion of the Recommended Order that Petitioner took an invalid distribution from his Investment Plan account. This statement is merely a synopsis of Petitioner's argument during the proceeding. Petitioner does not offer any legal support for his statement that the Recommended Order reaches the "legally unsupported conclusion" that the settlement agreement entered into between Petitioner and his employer retroactively rendered a valid distribution invalid. Since the first part of Petitioner's Exception 1 does not clearly identify the disputed portion of the recommended order by page number or paragraph, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record, the first part of Petitioner's Exception 1 may be rejected *in toto*.

In the second portion of Petitioner's Exception 1, Petitioner makes the claim that it is "improper" for the ALJ to cite the *Colford v. Department of Transportation* case[1] in the Recommended Order. Again, Petitioner fails to cite any legal authority for his claim. Further, Petitioner's counsel, while objecting to introduction of *Colford* during the actual hearing, specifically stated during the hearing that it was appropriate for the SBA or Intervenor to argue that *Colford* was "authority" or "persuasive authority" in their proposed recommended orders and further stated that the time to properly present *Colford* to the ALJ was at the time of presentation of the proposed recommended orders. [Hearing Transcript, page 7, lines 9-16]. Thus, Petitioner was well aware that the SBA and Intervenor intended to ask the ALJ to recognize the case, and the Petitioner had ample opportunity to present his views on the *Colford* case. Petitioner stated on the record that he was agreeable to having *Colford* set forth as authority. Official recognition may be taken by a tribunal on its own, or a tribunal may excuse the failure of a party requesting official recognition of a matter to timely give written notice that recognition is to be sought, provided the adverse party does have notice and an opportunity to be heard concerning any objections it may have to recognition. *See, The Scripps Research Institute, Inc. v. The Scripps Research Institute*, 916 So.2d 988, 990 (Florida 4th DCA 2005). Thus, this portion of the Petitioner's Exception 1 that objects to the citing of the *Colford* case in the ALJ's Recommended Order hereby is rejected.

Petitioner then argues in Exception 1 that *Colford* is distinguishable from his case. Petitioner notes that in *Colford*, the employee was terminated but later won her job back as a result of an internal grievance process. In contrast, Petitioner was not reinstated via an

[1] Pub. Emp. Rel. Comm., Case No. CS-2011-0278 (Recommended Order April 21, 2011, Final Order May 9, 2011)

internal process but rather had to actually file a lawsuit to obtain his position back. Additionally, the Petitioner argues that in *Colford*, the employee returned to work before the requisite six (6) month time frame had elapsed after being retired, so it was necessary for her employer to terminate her in order to be in compliance with the six (6) month requirement. Petitioner argued that he returned to work well after the expiration of six months after his termination date. Petitioner made the same arguments in his Proposed Recommended Order, but the ALJ was not persuaded by these arguments. The ALJ noted that the settlement agreement Petitioner entered into with his employer by its very terms had the effect of a rescission of the termination. That is, the settlement agreement had the effect of undoing the termination and restoring the former status of the parties thereto. Similarly, in *Colford*, the terminated employee was reinstated with back pay, as if the termination never had occurred. As the ALJ found in the Recommended Order for this case, *Colford* and the instant case are "strikingly similar" and require a "similar result." Thus, the portion of the Petitioner's Exception 1 that states that *Colford* is distinguishable from Petitioner's case hereby is rejected.

Intervenor's Response in Opposition to Petitioner's Exception 1

Intervenor argues that it objects to the portion of Petitioner's Exception 1 that appears to state that the *Colford* case cannot be used as authority by the ALJ in making his determination. Intervenor points out that Petitioner's legal counsel actually stated that the *Colford* case could be cited in the Proposed Recommend Orders presented to the ALJ. As was discussed above, it was appropriate for the *Colford* to be cited. Thus, this portion of Intervenor's Response is accepted.

Intervenor further states that the issue in this case is whether or not the distributions taken were later rendered invalid when the Petitioner's termination date was revoked. Intervenor states that the same issue was present in the *Colford* case. As discussed above, the issues in *Colford* and the instant case are virtually identical. Thus, this portion of Intervenor's Response is accepted.

Petitioner's Exception 2: Petitioner States that the SBA Lacks the Authority to Direct Petitioner's Employer to Terminate Petitioner

Petitioner's Exception 2 does not clearly identify the disputed portion of the recommended order by page number or paragraph, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record." On that basis alone, Petitioner's Exception 2 may be rejected *in toto.*

Petitioner fails to recognize that certain authority does exist in the SBA to take actions to ensure the continuation of the tax qualified status of the Investment Plan. In order for a retirement plan such as the Investment Plan to remain a qualified retirement plan so that certain Federal income tax benefits can be received, the plan must be administered in a manner that meets the criteria set forth under Section 401(a) of the Internal Revenue Code. Section 1.401-1(a)(2) of the Federal Income Tax Regulations provides that a qualified plan is a definite written program and arrangement that is communicated to employees and that is established and maintained by an employer to provide for the livelihood of the employees or their beneficiaries after the retirement of such employees through the payment of benefits [emphasis added]. The official justification for the requirement that benefits be paid after retirement is that the government wants to make certain that a retirement plan participant's retirement savings are actually saved until retirement and not squandered away before retirement eligibility. Under Section 1.401-1(b)(1)(i), a qualified

plan must be established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits for employees over a period of years, usually for life, after retirement. As such, distributions from a qualified defined contribution plan such as the Florida Retirement System ("FRS") Investment Plan generally cannot be made until one of the following occurs:

(a) The employee terminates and reaches retirement age as defined under the plan;

(b) The employee dies, at which time the employee's beneficiary is eligible for distributions;

(c) The employee separates from service; or.

(d) The plan is terminated and is not replaced by another defined contribution plan.

Section 121.4501(13)(a), Florida Statutes, specifically states that the Investment Plan is to be administered in a manner that complies with the applicable Internal Revenue Code provisions. This requirement is essential so that the tax qualified status of the plan is not jeopardized, which would have an adverse impact on all members of the Investment Plan as well as the State of Florida. In keeping with the Federal law requirements for distributions from qualified retirement plans, Section 121.591, Florida Statutes, provides as follows:

> Payment of benefits.—Benefits may not be paid under the Florida Retirement System Investment Plan unless the member has terminated employment as provided in s. 121.021(39)(a) or is deceased and a proper application has been filed as prescribed by the state board or the department.
> ***
> (1) NORMAL BENEFITS.—Under the investment plan:
>
> (a) Benefits in the form of vested accumulations as described in s. 121.4501(6) are payable under this subsection in accordance with the following terms and conditions:
>
> 1. Benefits are payable only to a member, an alternate payee of a qualified domestic relations order, or a beneficiary.

2. Benefits shall be paid by the third-party administrator or designated approved providers in accordance with the law, the contracts, and any applicable board rule or policy.

3. The member must be terminated from all employment with all Florida Retirement System employers, as provided in s. 121.021(39).

4. Benefit payments may not be made until the member has been terminated for 3 calendar months, except that the state board may authorize by rule for the distribution of up to 10 percent of the member's account after being terminated for 1 calendar month if the member has reached the normal retirement date as defined in s. 121.021.

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5. If a member or former member of the Florida Retirement System receives an invalid distribution, such person must either repay the full amount within 90 days after receipt of final notification by the state board or the third-party administrator that the distribution was invalid, or, in lieu of repayment, the member must terminate employment from all participating employers. If such person fails to repay the full invalid distribution within 90 days after receipt of final notification, the person may be deemed retired from the investment plan by the state board and is subject to s. 121.122 [renewed membership in the Florida Retirement System]. If such person is deemed retired, any joint and several liability set out in s. 121.091(9)(d)2. is void, and the state board, the department, or the employing agency is not liable for gains on payroll contributions that have not been deposited to the person's account in the investment plan, pending resolution of the invalid distribution. The member or former member who has been deemed retired or who has been determined by the state board to have taken an invalid distribution may appeal the agency decision through the complaint process as provided under s. 121.4501(9)(g)3. As used in this subparagraph, the term "invalid distribution" means any distribution from an account in the investment plan which is taken in violation of this section, s. 121.091(9), or s. 121.4501. [emphasis added].

The applicable statutory provisions make it clear that benefits may be paid to an Investment Plan member only if that member terminates employment. If an employee receives a distribution that is not in compliance with applicable law, the SBA, in order to preserve the tax qualified status of the Investment Plan for the benefit of all plan members,

is given the authority by law to deem such an employee as "retired." Pursuant to Section 121.4501(2)(k), Florida Statutes, this means that the employee is both terminated from employment and has received a distribution. The authority vested in the SBA prevents situations in which employees try to circumvent the retirement plan qualification requirements of Federal law by continuing to work after taking distributions of all or part of their retirement benefits. When termination of employment occurs, a member cannot again participate in the FRS. Section 121.122(2), Florida Statutes, specifically provides that:

> (2) A retiree of a state-administered retirement system who is initially reemployed in a regularly established position on or after July 1, 2010, may not be enrolled as a renewed member. [emphasis added]

In Petitioner's situation, Petitioner withdrew almost $[redacted] from his Investment Plan account after he had been terminated from his employment. [Hearing Exhibits 3 and 4]. In order to obtain the distributions, Petitioner had to verify that he was not "pending reemployment." Petitioner made such verification even though, at the time of the distribution, Petitioner had a lawsuit pending against his employer seeking reinstatement. [Hearing Exhibit 7, page 8, lines 20-25; page 9, lines 1-25; page 10, lines 1-25]. Petitioner and his employer settled the lawsuit. The purpose of the settlement agreement was to effectuate the equivalent of a rescission of the termination. That is, the agreement was designed to return Petitioner to his former position in a manner that would give Petitioner the exact same benefits as if the termination never had occurred. Under the settlement terms, the Petitioner retained his seniority, pay and benefits and would continue to remain a member of the FRS. [Hearing Transcript, p. 83, lines 17-20; page 84, lines 15-18; Hearing Exhibit 5]. While Petitioner was offered the opportunity to modify his settlement agreement with his employer so that he would be in compliance with applicable law, he refused to do

so. Petitioner still wants to participate in the FRS while keeping all of the retirement benefits (amounting to approximately [redacted] that had been distributed to him. Thus, he wants to be "retired" for the purposes of keeping all of the funds that were distributed to him, while at the same time being "not retired" for purpose of accruing further retirement benefits. Such a course of action clearly is in violation of applicable law. As such, the SBA is obligated by law to ensure that the distributed funds are repaid if Petitioner refuses to pay the total distributions made to him or to voluntarily terminate. The mechanism the SBA utilizes is to invoice the employer for the improper distributions made when the employee refuses to terminate employment or to repay the invalid distributions. To avoid this liability, the employer can choose to terminate the employee. Without a mechanism in place for the SBA to remedy an improper distribution, the entire Investment Plan would become disqualified under the Internal Revenue Code, and all plan members, as well as the State of Florida, would lose all Federal tax savings. If termination of Petitioner's employment occurs and Petitioner later is entitled to return to work after a minimum period of six (6) months, Petitioner will be unable to accrue further FRS benefits. Accordingly, Petitioner's Exception 2 hereby is rejected.

Intervenor's Response in Opposition to Petitioner's Exception 2

Intervenor notes that statutory and case law provide the SBA with the requisite authority to ensure the improperly distributed funds are repaid or that termination of employment occurs. The statutory authority cited by Intervenor is discussed above in the Response to Petitioner's Exception 2. Intervenor further cites the *Colford* case, *supra*, to bolster its argument that Petitioner must be terminated. *Colford* is discussed above in the Response to Petitioner's Exception 1. To the extent that Intervenor's arguments support the

statutory authority of the SBA to utilize a procedure to correct an in-service distribution whenever an employee who has received an invalid in-service distribution from his Investment Plan account and refuses either to repay that invalid distribution or to terminate employment for six (6) calendar months, Intervenor's arguments are accepted.

FINDINGS OF FACT

The State Board of Administration adopts and incorporates in this Final Order the Findings of Fact set forth in the Recommended Order as if fully set forth herein.

CONCLUSIONS OF LAW

The State Board of Administration adopts and incorporates in this Final Order the Conclusions of Law set forth in the Recommended Order as if fully set forth herein.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. Unless the total amount of the distributions received by Petitioner are repaid within ninety (90) days from the date of this Final Order, Petitioner will be declared a "retiree" and, as such, will be ineligible for future participation in the FRS. Any retirement contributions received from Petitioner and the County after his first distribution of September 4, 2015 must be returned. Additionally, any service credit awarded for the period from March 2014 through June 2016 must be vacated. Finally, it will be necessary for Petitioner's employment to be terminated for a period of six (6) months. Petitioner's request for a hearing hereby is dismissed.

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 13th day of March, 2017, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Joan B Haseman

Joan B. Haseman
Chief of Defined Contribution Programs
State Board of Administration
1801 Hermitage Boulevard, Suite 100
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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

Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by electronic mail to phyllis@thegirleylawfirm.com and by UPS to Jerry Girley, Esq., Counsel for Petitioner, The Girley Law Firm, P.A., 125 East Marks Street, Orlando, Florida 32803; by electronic mail to sarah.reiner@gray-robinson.com and by UPS to Sarah P. Reiner, Esq., Counsel for Intervenor, Gray Robinson, P.A, 301 East Pine Street, Suite 1400, Orlando, Florida 32801; 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 13th day of March, 2017.

Ruth A. Smith

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STACY MCLEAN,

Petitioner,

vs. Case No. 16-5327

STATE BOARD OF ADMINISTRATION,

Respondent,

and

ORANGE COUNTY,

Intervenor.
_____/

RECOMMENDED ORDER

D. R. Alexander, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted a hearing in this case in Tallahassee, Florida, on November 14, 2016.

APPEARANCES

For Petitioner: Jerry Girley, Esquire
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EXHIBIT A

STATEMENT OF THE ISSUE

The issue is whether Petitioner took an in-service distribution from his Investment Plan retirement account, and if so, must either repay the distribution in full or terminate employment with all FRS-participating employers, including his current employer, Orange County (County), for six calendar months.

PRELIMINARY STATEMENT

On August 1, 2016, the State Board of Administration (SBA) informed Petitioner by letter that a routine audit revealed he had received an "in-service" distribution from his FRS Investment Plan account while still employed by the County. The letter stated that such a distribution is prohibited by section 121.591, Florida Statutes, and Internal Revenue Service regulations, and unless Petitioner or the County repaid $[redacted] to Petitioner's Investment Account by September 30, 2016, he must terminate employment with the County for at least six months. Petitioner timely requested a hearing, and the matter was referred by the SBA to DOAH to be set for hearing. The County was later authorized to intervene in this proceeding. By agreement of the parties, this case was heard on a consolidated record with Case No. 16-5326, which involved a similar case with another County employee. However, separate recommended orders are being entered.

At the final hearing, Petitioner testified on his own behalf. The SBA presented the testimony of one witness. The County presented the testimony of one witness. Joint Exhibits 1-10 were accepted in evidence. The undersigned also granted the SBA's request to take official recognition of the case of Colford v. Department of Transportation, Pub. Emp. Rel. Comm., Case No. CS-2011-0278 (Recommended Order April 21, 2011, Final Order May 9, 2011).

A one-volume Transcript of the hearing was prepared. The parties timely filed proposed recommended orders (PROs), which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The FRS is comprised of the Pension Plan, which is a defined benefit plan, and the Investment Plan, which is a defined contribution plan. The Division of Retirement administers the Pension Plan, while the SBA administers the Investment Plan. Section 121.4501(13) charges the SBA with administering the Investment Plan in compliance with the Internal Revenue Code in order to retain its qualified status.

2. Until March 4, 2014, Petitioner was a member of the FRS Pension Plan by virtue of his employment as a Lieutenant with the Orange County Fire Rescue Department. The County participates in the FRS.

3. Effective March 1, 2014, Petitioner used his one-time Second Election to switch from the FRS Pension Plan to the FRS Investment Plan. He switched plans in order to have ready access to his FRS retirement funds should he be terminated from employment by the County.

4. On March 4, 2014, Petitioner was terminated from his employment for allegedly violating County rules and regulations.

5. On March 10, 2014, Petitioner filed a formal grievance seeking reinstatement and all benefits. The decision to terminate his employment was later upheld.

6. After the grievance was denied, but before he took a distribution, Petitioner obtained legal representation and initiated a lawsuit against the County on the basis that he was terminated because of his race and gender.

7. On June 19 and July 1, 2014, Petitioner withdrew distributions totaling $[redacted] from his Investment Plan account.

8. Before taking an Investment Plan distribution, a member is required to answer several questions, either on-line or by telephone, to verify that he is eligible to take a distribution. Petitioner requested his distributions by telephone. One question asks if the member is "pending reemployment," a term that means, among other things, the member is seeking reinstatement through a pending action against his employer at

the time of the distribution. If a member answers yes, he is ineligible to take a distribution. Even though he had a pending discrimination lawsuit against his employer, which could lead to reinstatement if he prevailed, Petitioner answered no. Had he answered the question correctly, Petitioner would not have been allowed to take a distribution.

9. The SBA does not check in real time the veracity of a member's answers to the questions asked during the distribution request process. Petitioner was advised by written information, however, that the SBA might undertake a later review of his distribution and seek repayment if it was determined to be invalid.

10. During the distribution process, if a member has a question regarding the distribution or other financial topics, they are provided access to Ernst & Young planners on the MyFRS Financial Guidance Line. Although offered that educational resource, Petitioner stated he had no questions.

11. On May 24, 2016, Petitioner and his former employer entered into a Settlement Agreement and Mutual General Release (Settlement Agreement) to resolve the discrimination lawsuit. Without admitting liability, the County agreed, among other things, for Petitioner to be reinstated to his former position with all seniority, benefits, and accrued back pay effective June 6, 2016. He also had service credit restored for the

period March 2014 through June 2016. The Settlement Agreement further provided that a letter of reprimand would replace the termination notice. Petitioner was represented by an attorney during the settlement negotiations. The SBA was not a party to the agreement.

12. Following the execution of the Settlement Agreement, but before payment of the settlement funds, the County was advised by the SBA that because Mr. McLean was being reinstated and the termination set aside, an in-service distribution had occurred in September 2015, and Mr. McLean would be required to either pay back the distribution in full or terminate employment with the County for at least six months. The County was also advised that a change to the language in the Settlement Agreement confirming that Mr. McLean had in fact been separated from employment with the County for a period of six months would resolve the in-service distribution issue and make it unnecessary to repay the distribution or be separated from employment with the County. This information was orally conveyed by the County to Petitioner's counsel.

13. Despite this warning, Petitioner declined to modify the Settlement Agreement. The County reconfirmed this information in a letter dated June 14, 2016, to Petitioner's attorney. It read in pertinent part as follows:

> [T]his will confirm that you advised you met with Mr. McLean and counseled him on the potential implications of his acceptance of the enclosed payments under the Agreement (a copy of which was previously provided for your records), including the requirement that he repay to the Florida Retirement System (FRS) all sums that he previously received as disbursements from the FRS, and his responsibility for all penalties and tax consequences, if any, related to the Agreement payments and FRS disbursements. This will also confirm that although Orange County offered to enter into an alternate agreement form with Mr. McLean (for the same consideration) that would be acceptable to FRS and not require repayment of FRS disbursements, Mr. McLean elected to remain bound by the terms of the current Agreement and you advised Mr. McLean will make any FRS-related payments necessary.
>
> As we previously discussed, in the event Mr. McLean does not repay sums due and owing the FRS, Orange County will not repay such sums on his behalf. Further, in the event of Mr. McLean's non-repayment of funds to the FRS, we understand from Orange County that it may be compelled by FRS to separate Mr. McLean from his employment pursuant to applicable statutory laws, rules and regulations. In light of the serious consequences to Mr. McLean of non-repayment of the FRS funds, in an abundance of caution, Orange County once again advises that if an alternate form of settlement agreement that does not require repayment to FRS is preferred by Mr. McLean, Orange County stands ready to execute such an agreement in the form previously provided for your consideration.

Jt. Ex. 8, pp. 0001-0002. This was fair warning to Petitioner that there were serious consequences if he chose to ignore the SBA's concerns.

14. On June 15, 2016, Petitioner's counsel replied by letter that the settlement checks which accompanied the County's June 14 letter were cashed, Mr. McLean would not repay funds to the FRS, and Mr. McLean intended to return to work with the County. Id. at pp. 0003-0004. As of the date of the hearing, Petitioner had not repaid the distribution, and pending the outcome of this hearing, he has continued to work as a County employee pursuant to the Settlement Agreement.

15. Based upon an audit by the Division of Retirement after Petitioner was reinstated, which showed that Petitioner had received a distribution, he was currently receiving FRS contributions from his employer, and he had no County termination date, the SBA determined the distribution was invalid.

16. On August 1, 2016, Petitioner was notified by the SBA that his September 2015 distributions were considered "in-service" distributions based on reinstatement to his FRS-covered position and service credit given for the period from March 2014 through June 2016. He was offered the option of returning the distributions to his account by September 30, 2016, or being terminated by his employer, with leave to be reemployed by an FRS-participating employer after six months. A copy of the letter was also sent to the County. Petitioner declined this option and filed an appeal.

CONCLUSIONS OF LAW

17. Petitioner has the burden of proving by a preponderance of the evidence that he is entitled to the relief requested in his Petition. See, e.g., Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

18. The Investment Plan must be administered so as to comply with the Internal Revenue Code. See § 121.4501(13)(a), Fla. Stat. Benefit payments from the FRS that are not valid jeopardize the qualified status of the plan.

19. Section 121.591(1)(a)3. and 4. governs when payments of benefits under the Investment Plan may be made. It reads as follows:

> 3. The member must be terminated from all employment with all [FRS] employers, as provided in s. 121.021(39).
>
> 4. Benefit payments may not be made until the member has been terminated for 3 calendar months.

See also Blaesseer v. State Bd. of Admin., 134 So. 3d 1013, 1014 (Fla. 1st DCA 2012)("an employee must terminate all FRS-covered employment in order to receive a benefit" under the Investment Plan).

20. If an Investment Plan member takes a distribution in contravention of section 121.591(1)(a)3. and 4., the member has taken an "invalid distribution" and must either return the distribution or terminate employment for at least six months.

Florida Administrative Code Rule 19-11.003(9) implements the statute and requires that the member or former member "repay the entire invalid distribution within 90 days of the member's receipt of a final notification from the SBA, or in lieu of repayment, the member must terminate employment from all participating employers." Otherwise, the qualified status of the Investment Plan would be in jeopardy.

21. In sum, section 121.591(1)(a)5. makes clear that under the facts of this case Petitioner must: (1) repay or terminate employment; and (2) if he fails to repay, he is subject to section 121.122, which prohibits him from further participation in the FRS. In this case, the SBA is doing precisely what the law requires. The County agrees with this analysis.

22. Although Petitioner argues otherwise, the Colford case, officially recognized, is strikingly similar to the circumstances here and supports the position of the SBA. On January 7, 2010, Colford, a DOT employee, was terminated from employment for allegedly violating DOT rules and regulations. Colford elected to grieve her dismissal pursuant to her union contract. While the grievance was pending, due to financial difficulties, Colford elected to withdraw all of her funds from the Investment Plan. Like Mr. McLean, she neglected to advise FRS about the pending grievance. On May 3, 2010, the distribution was taken. A week later, her Step 3 grievance was

sustained, and DOT was ordered to reinstate her with back pay. She was reinstated effective July 6, 2010. After a routine audit, the SBA determined that the distribution was invalid and offered her the option of repaying the distribution and becoming "unretired," or terminating employment with DOT for at least six months. Because she declined to repay the distribution, the SBA (and DOT) concluded termination of her employment was required by chapter 121. This determination was affirmed in both the recommended and final orders. A similar result is required here.

23. The SBA contends that under section 121.091(9)(d)2., if Petitioner fails to repay the distribution and the County does not terminate his employment, the County is jointly and severally liable for repayment of the distribution. That section provides that if an FRS retiree is employed within six calendar months of his termination date, the employee and employer are "jointly and severally liable for reimbursement of any benefits paid to the retirement trust fund from which the benefits were paid." The County asserts the statute does not apply under the circumstances presented here. A resolution of that issue is unnecessary, as the County represents in its PRO that if Petitioner fails to repay the distribution, it will seek to avoid liability by "any lawful means," including terminating Mr. McLean's employment.

24. Finally, in reaching the above conclusions, the undersigned has considered the arguments raised by Petitioner. In the Pre-Hearing Stipulation, he contends the Settlement Agreement is "ambiguous" because it does not explicitly state that he would be treated as never having been terminated. By operation of the terms of the agreement, however, the termination notice was specifically replaced by a letter of reprimand. This meant he no longer had a termination date, and therefore he was not eligible for a distribution. Petitioner also contends he was not an employee when he received the distributions in September 2015. Again, by virtue of the terms of the agreement, he became "unretired" and subject to the Investment Plan distribution rules. In his PRO, Mr. McLean further argues that the Settlement Agreement does not address in detail the ramifications of taking an in-service distribution of his retirement funds. While this may be true, before the settlement checks were cashed, these details were explicitly outlined in the County's letter dated June 14, 2016.

RECOMMENDATION

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

RECOMMENDED that the State Board of Administration enter a final order dismissing the Petition for Hearing and determining that unless Petitioner repays the distribution to FRS within

30 days from the date of the final order, he must be declared a retiree and ineligible for future participation in the FRS; any retirement contributions received from Petitioner or the County after his first distribution on September 4, 2015, must be returned; service credit awarded for the period from March 2014 through June 2016 must be vacated; and Petitioner must be immediately terminated from employment for at least six calendar months.

DONE AND ENTERED this 21st day of December, 2016, in Tallahassee, Leon County, Florida.

D. R. Alexander

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STACY MCLEAN
Petitioner,

vs. **CASE NO. 16-5327**

STATE BOARD OF ADMINISTRATION,
Respondent,

and

ORANGE COUNTY,
Intervenor.
_____/

PETITIONER'S EXCEPTIONS TO THE DIVISION'S RECOMMENDED ORDER

COMES NOW, the Petitioner, Stacy McLean, in and through the undersigned counsel to state his exceptions to the Division of Administrative Hearings Recommended Order.

Factual Background

A hearing was held on November 14, 2016, pursuant to the Petitioner's request that he not be required to pay back the monies that he withdrew from his retirement account during the period of time that he was terminated from his job as a Lieutenant for Orange County Fire and Rescue. There is no dispute between the parties regarding whether the Petitioner was terminated for a period of over two years. The controversy arose as a result of the language used in the settlement agreement between the Intervenor and the Petitioner which resulted in him being reinstated. The Respondent took the position that since the language of the agreement removed the termination and replaced it with a letter of reprimand, the agreement retroactively rendered the distribution, that was valid at the time, invalid. There is substantial agreement between the parties regarding what the law requires if an invalid distribution occurs. All parties agree that an employee must either pay the invalid Distribution back or terminate his employment. Again, it is

the Petitioner's position that he did not receive an invalid Distribution, therefore, the provision of Chapter 121 of the Florida statutes are inapplicable to what occurred in the instant case.

That said, there is disagreement among the parties regarding what the law requires if a person who is deemed to have received an invalid distribution decides not to pay the money back or to resign. More specifically, the Petitioner contends that the law does not provide authority to a FRS Agency to terminate a person if he decides not to pay the distribution back or to terminate his employment. Rather, the law simply states that such a person will be deemed to have retired by the State Board of Administration. The Division has recommended that the Petitioner be required to pay the distribution back or to terminate his employment. The Division has further recommended that the Respondent issue an order requiring the Intervenor to terminate the Petitioner if he does neither.

Exception #1 The Petitioner Did Not Take an Invalid Distribution

The Respondent takes exception with the Division's conclusory statement that the Petitioner took an invalid Distribution while he was employed with the Intervenor. Neither the Intervenor or the Respondent disputes the fact that the Petitioner was terminated from all employment at the time that he received the Distribution. Further, there is no disagreement regarding the fact that after he received the Distribution he remained terminated for a period in excess of six months. Withstanding this, the Division decided to essentially adopt the legally unsupported conclusion of the Respondent that the settlement agreement, entered for the narrow purpose of resolving the employment discrimination lawsuit between the Petitioner and the Intervenor, has the legal effect of retroactively rendering a valid Distribution invalid.

During the course of the hearing on this matter the Respondent attempted to introduce into evidence the case of *Colford v. Department of Transportation*, Pub. Emp. Rel.

Comm. Case No. CS-2011-0078 (May 9, 2011). The parties were required to submit their witness list and exhibit list so many day prior to the hearing. Both parties did in fact do this. However, when the Respondent submitted its exhibit list the *Colford* case was not listed. Accordingly, when the Respondent attempted to introduce it as an exhibit in the hearing the Petitioner objected on the basis that the exhibit was untimely and it was not relevant. (Hrg. Trans. P. 6 L. 19-25; P. 7 L. 1-25; P. 1-12). After hearing argument from the Respondent and the Intervenor, the Honorable Judge stated that he agreed with the undersigned and denied the Respondent's motion for official recognition of the *Colford* case. Contrary to what the Honorable Judge stated in his recommended order, at no time did he come back later, on the record, and announce that he was changing his mind and admitting the case into evidence. It is therefore, improper for the Honorable Judge to cite to this case as legal authority for his recommended order.

Moreover, the case cited by the Honorable Judge is distinguishable from the instant matter on the facts. In *Colford* the Petitioner was terminated, but later reinstated after she won her job back as a result of the internal grievance process. Here, the Petitioner was not reinstated as a result of an internal grievance. Rather, he had to file a lawsuit after he filed an EEOC charge. Also, the narrow issue in the *Colford* case was that she returned to work before the requisite six-month time frame had elapsed after being retired. In this case the Petitioner returned to work more than six months after he received a distribution. Again, it for this reason the Petitioner asserts, and the facts clearly demonstrate, he did not receive an invalid Distribution.

Exception# 2 The State Board Lacks Authority to Issue an Order Directing Orange County, Florida, the Intervenor, to Terminate the Petitioner

The Petitioner takes exception with the Division's recommendation that the State Board direct Orange County, Florida to terminate the Petitioner if he does not pay back the distribution or voluntarily terminate his employment. Such a recommendation is completely without lawful authority. The State Board has not presented legal authority that stands for the proposition it has the authority to order a FRS agency to terminate an employee, nor has the Intervenor. Assuming for argument purposes only, (The Petitioner does not concede this point), that an invalid disbursement did occur, Section 19-11.003(9) of the Florida Administrative Code addresses the issue directly. It states the following:

(a) If a member or a former member of the FRS Investment Plan receives an invalid distribution, the member or former member is required to repay the entire invalid distribution within 90 days of the member's receipt of a final notification from the SBA, or in lieu of repayment, the member must terminate employment from all participating employers. If the member fails to repay the invalid distribution, or terminate employment, the employer is liable for the repayment of the invalid distribution even if the member signed a statement at the time the member was hired that no benefit had been received from the Plan.

During the hearing the Department's witness, Minnie Watson, was specifically, asked whether the statutes provided the Department the authority to direct that an employee be terminated, the questions and answers were as follows:

Q- But am I correct in saying there's nothing in this paragraph that says that the agency or anyone else can force Mr. James to quit?

A.- It just says he must repay or terminate.

Q.- Are you familiar with any part of any statute anywhere that says that if he doesn't repay or he doesn't voluntarily terminate his employment, that he can be terminated by the agency?

A.- We just —separation——required the termination or separation.

Q.- But when you testified earlier, what you said was that if the money isn't repaid, you go back to the agency; is that correct?

A.-Correct.

Q.-And then, if they don't fire him, then they would have to pay it back, correct?

A.-That is correct.

Q.-So I'm trying to get to that point about firing him. What is that based on?

A.- I misspoke. We just require termination. We don't get involved with the agencies, how they terminate, how the member separates, how the member resigns. We just require repayment or separation.

From Watson's answers and the plain language of 19-11.003(9), we clearly see that neither the plain language of the statutes, nor the state agency charged with implementing the statute, asserts that the State Board has the authority to direct a FRS agency to terminate an employee. Relatedly, the Intervenor's witness, John Petrelli, Risk Manager for Orange County, Florida, was asked whether the county inquired regarding whether the Petitioner was retired, prior to reinstating him, he replied that he did not know. Next, he was asked whether he was aware that it was a requirement of the law for a FRS agency to ensure that a former employee has been retired. Again, he replied that he was not aware of such a requirement (Hrg. Trans. P. 7 L. 8-25). Petrelli's testimony is a clear indicator that the Intervenor did not comply with the requirements of Chapter 121, relative to verifying the Petitioner's retirement status. Again, the Intervenor did not comply because it was not aware of such a requirement.

Conclusions

For all the above stated reason the Honorable State Board is without authority to compel the Petitioner to resign or to direct Orange County to terminate him if he does not pay the money

back that was previously withdrawn from his retirement fund. At best the Board has the authority to pursue Orange County, Florida, if it chooses to do so. But the Board cannot and must not do that which it has testified during the hearing it has no authority to do. Withstanding what the Honorable Judge has recommended, the Board must do what it clearly understands to be lawful. Further, the Board should determine that the Petitioner did not receive an invalid disbursement and relatedly, the provisions of the Chapter 121 of the Florida Statutes, that address what should occur when such a thing occurs, is inapplicable.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been sent to the following attorneys via electronic mail on this 5th day of January 2017:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STACY MCLEAN,

Petitioner, **Case No.: 16-5327**

v.

STATE BOARD OF ADMINISTRATION,

Respondent,

and

ORANGE COUNTY FLORIDA,

Intervenor.
_____/

INTERVENOR'S RESPONSE IN OPPOSITION TO PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

Intervenor, Orange County Florida ("Orange County"), by and through the undersigned counsel and pursuant to Uniform Rule of Procedure 28-106.217, submits its Response in Opposition to Petitioner's, Stacy McLean, Exceptions to the Recommended Order and states:

OPPOSITION TO PETITIONER'S EXCEPTION 1

1. Dispute Regarding Legal Authority.

Petitioner, Mr. McLean, takes exception with the Division's determination that the Petitioner took an invalid distribution. Orange County opposes Mr. McLean's exception and in particular his argument that the Division's denial of a pre-hearing Motion for Official Recognition of the case of *Colford v. Department of Transportation*, constitutes a rejection of that case as "evidence" and bars the Division from considering it as authority for the ruling in this case. In fact, both Petitioner's legal counsel (Attorney Girley) and the Division specifically stated that the case could be submitted as authority in conjunction with the parties' arguments at

the time of their submission of proposed recommended orders. The hearing testimony on this issue is as follows:

> **Petitioner's Counsel (Girley):** [*Colford*] is not relevant to anything here...Now, what – in reading that final order in that case, what I think is appropriate is for the state board or Orange County to argue that as authority or as persuasive authority in their proposed recommended order that – that Your Honor is going to allow us to submit proposed written recommended orders. That's the time to present that authority before this body, so I would object on that basis. (HT, p. 7, l. 1-16).
>
> ***
>
> **The Court:** Okay. Well, I tend to agree with counsel Mr. Girley. If you want to cite it in your order, proposed order, that's great, do it that way, and it sounds like he'll have something in response to that. So I'll go ahead and deny the motion for official recognition, but counsel can cite that along with any other cases that you want. (HT, p. 8, l. 6-12).

Based on the foregoing record, it is clear that the Division (as stipulated to by Petitioner on the record) was and is authorized to consider Colford and any other legal authority applicable to these proceedings in rendering its Recommended Order.

2. Petitioner's Distributions and *Colford*

Orange County agrees that the distribution taken by Mr. McLean was not an invalid distribution at the time it was taken based on his earlier termination from employment as a result of violations of Orange County policies and procedures. However, the issue in this case is whether or not the distribution was later rendered invalid based upon Mr. McLean seeking, and obtaining, reinstatement of employment with Orange County pursuant to the parties' Settlement Agreement entered into to resolve the Lawsuit between Orange County and Mr. McLean.

It is undisputed that prior to the distribution, at the time Mr. McLean took the distribution, and continuing thereafter during the course of his litigation against Orange County, Mr. McLean sought, among other things, reinstatement of employment with Orange County. (HT, p. 64 l. 8-25 and p. 83 l. 1 – 20). It is Mr. McLean's return to employment, and his

insistence that he be returned "as if the termination had never happened" with seniority and payment of back wages, compensatory damages and his attorneys' fees as reflected in the Settlement Agreement, that the SBA maintains, and the Division agreed in its Recommended Order, rendered the once valid distributions subsequently invalid. (HT, p. 84 l. 15-19).

In the case of *Colford*, as in this case, an employee was terminated from employment for violating the employer's (in that case, the DOT) policies and procedures. As in this case, the employee disputed her termination and sought and obtained a reinstatement with back pay that effectively eliminated her prior termination from employment. The fact that Colford's reinstatement occurred as a result of an internal grievance, rather than the settlement of litigation as in this case, is of no significance. Nor is the fact that Colford was not actually terminated for six months, while Mr. McLean was. Rather, in both *Colford* and in this case, the key issue is that because the termination date was revoked, any distributions previously received by the employees became invalid distributions.

OPPOSITION TO PETITIONER'S EXCEPTION 2

1. SBA's Authority to Require Termination

Petitioner, Mr. McLean, takes exception to the Division's determination that Petitioner must repay the invalid distribution and the language of the Recommended Order that directs that Orange County, which is an FRS employer, terminate Petitioner's employment for at least six months in the event Petitioner fails to repay the distribution. However, Mr. McLean's argument in this regard is belied by his opening statements and stipulations as he acknowledges in his Exceptions filing:

> There is substantial agreement between the parties regarding what the law requires if an invalid distribution occurs. All parties agree that an employee must either pay the invalid Distribution back or terminate his employment.

(McLean Exceptions, p. 1).

To the extent that Petitioner nonetheless argues that the SBA does not have the authority to order repayment of the distribution or termination of employment with respect to all FRS participating employers (including Orange County), Orange County opposes Petitioner's exception as that outcome is specifically provided for under statutory and case law authority. (See Section 121.591(1)(a)5, *Florida Statutes*, and *Colford*).[1]

Petitioner's argument makes much of some limited testimony by Ms. Mini Watson, SBA representative, and John Petrelli, Orange County's representative at the hearing. However, Mr. McLean ignores the language of the statutes dealing with invalid distributions as discussed in further detail below, and further neglects to include all of the relevant testimony regarding the issues raised in support of his exceptions. Specifically, regarding Mr. Petrelli's testimony, Mr. McLean attempts to assert that Orange County did not comply with unspecified requirements related to the FRS system because Mr. Petrelli is himself unfamiliar with the intricacies of the FRS requirements; however, an examination of Mr. Petrelli's testimony actually reveals that the FRS statute at issue is simply not a statute that Mr. Petrelli regularly reviews in his position as Director of Risk Management and Professional Standards. (HT, p. 70, l. 13 – p. 72, l. 19). Likewise, with respect to Ms. Watson's testimony, Mr. McLean asserts that Ms. Watson could provide no authority in support of the position that the SBA could require termination of Mr. McLean employment with Orange County, an FRS participating employer. However, Ms. Watson also testified as follows:

---

[1] To the extent that Petitioner is alleging that Orange County does not have the authority to terminate him (and in so doing, discharge any liability it may have for repayment of any invalid distribution), Orange County opposes Mr. McLean' exception as it is premature and not ripe or appropriate for determination in these proceedings. Although Orange County's authority to separate Mr. McLean or any other employee from employment is not an issue in these proceedings, Orange County notes that to prohibit termination of employment by Orange County at its discretion and for lawful reasons would not only fly in the face of established federal and state law regarding the employee and employer relationship, but would also under the circumstances present in this case potentially result in a windfall to Mr. McLean should he retain his distribution monies.

Counsel for Intervenor (Reiner): You were asked a moment ago if you were aware of any particular language or statute that required termination by an employer with respect to an employee who does not repay their in-service distribution. Are you aware of any statute or requirement that prohibits the employer from terminating the employee in lieu of payment of the in-service distribution?

Watson: I am not aware of one.

Reiner: Okay. And has it – based on your experience with the SBA, has this issue come before you before?

Watson: It has.

Reiner: Okay. And in the past, have employers been allowed to terminate in lieu of – or terminate in lieu of repayment?

Watson: Yes, they have.

(HT, p. 57, l. 4-18)

***

Counsel for Petitioner (Girley): Again, ma'am, there is no statutory language on way or the other, isn't that correct, on termination of employees who don't pay back?

Watson: Not that I am aware of under the Florida Retirement System.

(HT, p. 58, l. 3-7) Mr. McLean's arguments regarding the testimony of Ms. Watson and Mr. Petrelli are insufficient to support his position with respect to the exceptions noted, or meet his burden of proof with respect to the relief sought in his Petition.

Orange County is a separate entity from FRS, and Orange County did not authorize Mr. McLean's distributions. (HT, p. 69 l. 23 – p. 70 l. 1 and p. 86 l. 19 – p. 87 l. 1). Further, Mr. McLean was at all times during the settlement process represented by legal counsel, who was also his counsel at the DOAH hearing. (HT, p. 65 l. 6-11). It is undisputed that prior to payment of the settlement funds and his reinstatement to employment, Mr. McLean did not seek direction from his FRS resources, such as MyFRS, to determine settlement implications. (HT, p. 87 l. 2 –

7). It is also undisputed that prior to payment of the settlement funds Mr. McLean was advised that there was an issue with respect to FRS, and more specifically, that because he was being reinstated to his employment as a Lieutenant and the termination set aside, an in-service distribution had occurred and he would be required to either pay back the distribution he received in full, or terminate employment with all FRS participating employers, including Orange County. (HT, p. 67, l. 24 – p. 68 l. 10 and p. 87 l. 23 – p. 88 l. 3; Exh. 8, p. 0001-0002 and Exh. 10, p. 0001-0002). It is also undisputed that Orange County offered to amend/change the language of the Settlement Agreement to reflect that despite the reinstatement, Mr. McLean had in fact been separated from employment with Orange County for a period of six months, and that the SBA agreed this would resolve the in-service distribution issue for Mr. McLean and make it unnecessary for him to either repay the distribution or be separated from employment with Orange County. (HT, p. 66 l. 4-p. 67 l. 4). Nonetheless, Mr. McLean rejected Orange County's offer to modify the language of the Settlement Agreement (HT, p. 67 l. 3-10 and p. 68, l. 24-p. 69 l. 6), and Mr. McLean was returned to his employment with Orange County in June, 2016. (HT, p. 76 l. 7-9).

Mr. McLean cannot at this point complain that what he was warned would happen (SBA's requirement that he terminate employment with FRS participating employers), may now actually happen. Further, any argument that he should be given special treatment, and not be required to repay his distribution or terminate employment is equally without merit based on the facts in this case. Moreover, F.A.C. Section 19-11.003(9), cited by Petitioner, is not the controlling statutory authority, and does not address an FRS participating employer's ability to terminate an employee's employment or the discharge of any joint and several liability. On this point,

applicable law is clear that Orange County may terminate Petitioner's employment, as Section 121.591 (1)(a)5, *Florida Statutes* states, in pertinent part:

> 5. If a member or former member of the Florida Retirement System receives an invalid distribution, such person must either repay the full amount within 90 days after receipt of final notification by the state board or the third-party administrator that the distribution was invalid, or, in lieu of repayment, the member must terminate employment from all participating employers. If such person fails to repay the full invalid distribution within 90 days after receipt of final notification, the person may be deemed retired from the investment plan by the state board and is subject to s. 121. 122. If such person is deemed retired, any joint and several liability set out in s. 121.091(9)(d) 2. is void, and the state board, the department, or the employing agency is not liable for gains on payroll contributions that have not been deposited to the person's account in the investment plan, pending resolution of the invalid distribution. The member or former member who has been deemed retired or who has been determined by the state board to have taken an invalid distribution may appeal the agency decision through the complaint process as provided under s. 121.4501(9)(g) 3. As used in this subparagraph, the term "invalid distribution" means any distribution from an account in the investment plan which is taken in violation of this section, s. 121.091(9), or s. 121.4501.

(emphasis added.)

Section 121.011(3) (g), Florida Statutes, provides for reinstatement and rejoining FRS, but is applicable only where an employee is not "retired." In order for an employee to be deemed retired, or a "retiree," the employee must be terminated from employment and take a distribution. (See Sections 121.021(60) and 121.4501(2)(k), *Florida Statutes*). Under the FRS, an investment plan member is retired when he is separated from employment and takes a distribution. Under the current facts, Mr. McLean has taken a distribution, but based on his reinstatement and the replacement of his termination with a warning, his prior termination was revoked. Thus, to be deemed retired, Mr. McLean's employment with participating employers, including Orange County, must be terminated. Here, as in *Colford*, should Mr. McLean decline to repay his distributions, SBA may require that he be terminated from employment with Orange County as a

participating FRS employer.[2] Further, the termination of Mr. McLean's employment for at least a six month period would confirm his status as a retiree and resolve the invalid distribution.

Finally, to the extent that Orange County and Mr. McLean are, pursuant to statute, jointly and severally liable for reimbursement of any benefits (here, the invalid distribution) paid to the retirement trust fund from which the benefits were paid, Orange County may avoid liability for repayment by the same means available to Mr. McLean – termination of Mr. McLean's employment.

CONCLUSION

For all the foregoing reasons, the Recommended Order should be accepted and entered as a Final Order without modification.

RESPECTFULLY submitted this 17th day of January, 2017.

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[2] It should also be noted that in the parties' Prehearing Stipulation, SBA stipulated that Orange County may terminate Mr. McLean's employment and in so doing discharge any liability Orange County has for repayment of any alleged invalid distribution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail this 17th day of January, 2017 to the following:

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