STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

CAROL LAGASSE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No.2020-0149
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

On August 26, 2020, the Presiding Officer submitted her Recommended Order to the State Board of Administration in this proceeding. A copy of the Recommended Order indicates that copies were served upon the *pro se* Petitioner, Carol Lagasse, and upon counsel for the Respondent. This matter was decided after an informal proceeding. A copy of the Recommended Order is attached hereto as Exhibit A to this Final Order and incorporated to the extent described herein. Neither party filed exceptions to the Recommended Order, which would have been due on September 10, 2020. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

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

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact of a presiding officer cannot be rejected or modified by a reviewing agency in its final order "...unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings were not based upon competent substantial evidence...." *See* Section 120.57(1)(l), Florida Statutes. *Accord, Dunham v. Highlands Cty. School Brd*, 652 So.2d 894 (Fla 2nd DCA 1995); *Dietz v. Florida Unemployment Appeals Comm*, 634 So.2d 272 (Fla. 4th DCA 1994); *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122 (Fla. 1st DCA 1987). A seminal case defining the "competent substantial evidence" standard is *De Groot v. Sheffield,* 95 So.2d 912, 916 (Fla. 1957), in which the Florida Supreme Court defined it as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred" or such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached."

An agency reviewing a presiding officer's recommended order may not reweigh evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of presiding officers as the triers of the facts. *Belleau v. Dept of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Maynard v. Unemployment Appeals Comm.*, 609 So.2d 143, 145 (Fla. 4th DCA 1993). Thus, if the record discloses any competent substantial evidence supporting finding of fact in the Recommended Order, the Final Order will be bound by such factual finding.

Pursuant to Section 120.57(1)(l), Florida Statutes, however, a reviewing agency has the general authority to "reject or modify conclusions of law over which it has

substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction."

UNDISPUTED FACTS

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

RULINGS ON CONCLUSIONS OF LAW IN THE RECOMMENDED ORDER

The Conclusions of Law in paragraphs 12. through 15. of the Presiding Officer's Recommended Order, that discuss the rescission of a second election, are adopted and are specifically incorporated by reference as if fully set forth herein.

The SBA rejects the Conclusions of Law set forth in paragraphs 16. through 27. of the Recommended Order and replaces them with the following Conclusions of Law set forth in paragraphs 16. through 22. below, finding that the substituted Conclusions of Law are as reasonable, or are more reasonable, than those rejected Conclusions of Law:

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

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

year of creditable service and repaying the refunded member contributions, plus interest.

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

[emphasis added]

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

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

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

a. The discount rate and other relevant actuarial assumptions used to value the Florida Retirement System Trust Fund at the time the amount to be transferred is determined, consistent with the factors provided in sub-subparagraphs b. and c.

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

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

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

(A) Age 62; or

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

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

(A) Age 65; or

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

* * *

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

[emphasis added]

18. When a Pension Plan member decides to switch to the Investment Plan, Section 121.4501(3)(b), Florida Statutes, makes it clear that the dollar amount that is transferred to the Investment Plan is the member's accumulated benefit obligation,

or "ABO." The ABO calculation is based only on the member's estimated creditable service and the member's estimated average final compensation under the Pension Plan. In other words, the ABO is the present value of a member's future Pension Plan benefit. Employer and employee contributions do not figure at all into the calculation of the member's ABO. Such contributions effectively cease to exist and no longer are relevant once the ABO is calculated.

19. When a member signs a second election enrollment form to switch from the Pension Plan to the Investment Plan, the member specifically acknowledges that he or she understands that he or she is transferring, not the total of employer and employee contributions made while a member of the Pension Plan but rather the "…present value, if any, of [the member's] existing FRS Pension benefit to the FRS Investment Plan." [emphasis added] [Respondent's Exhibit R-1, 2nd Election Retirement Plan Enrollment Form, pages 4 and 5]. As such, the member is cashing out his or her future Pension Plan benefit with the transfer of the member's accumulated benefit obligation to the member's new Investment Plan account. The amounts transferred are subject to the vesting requirements of the Pension Plan, as provided under Section 121.4501(6)(c), Florida Statutes. And, in fact, the 2nd Election Enrollment Plan Enrollment Form specifically notes that if a member has elected to switch from the Pension Plan to the Investment Plan, that member understands that "… any accrued value [the member] may have in the Pension Plan will be transferred to the Investment Plan as [the member's] opening balance and any Pension Plan accrued value transferred to [the member's] Investment Plan account will be subject to the vesting requirement of the FRS Pension Plan."

[Respondent's Exhibit R-1, 2nd Election Retirement Plan Enrollment Form, pages 4 and 5].

20. Thus, the Petitioner's Pension Plan funds that were transferred to the Investment Plan at Petitioner's request will be segregated from other funds in Petitioner's account going forward and will be subject, in total, to the applicable eight (8) year vesting requirement. Because Petitioner now has terminated FRS-covered employment before meeting the applicable eight (8) year vesting requirement, these funds will remain in a suspense account and will be forfeited if she does not return to FRS-covered employment within five (5) years of her January 2020 termination date, as provided under Section 121.4501(6)(d), Florida Statutes. Of course, if Petitioner does return to FRS employment, she will be entitled to all forfeited funds as soon as she satisfies the eight year vesting requirement.

21. The SBA must comply with the Florida Statutes creating and governing the Florida Retirement System. *Balezentis v. Dept. of Management Services, Division of* Retirement 2005 WL 517476 (Fla.Div.Admin.Hrgs.) The SBA has developed and consistently applied the policy that there will be no refund of Pension Plan employee contributions when a member switches from the Pension Plan to the Investment Plan and terminates employment prior to the time the ABO funds satisfy the Pension Plan vesting requirement.

22. Respondent has no intent or interest in depriving any FRS member of contributions paid from their salary to the FRS. However, it is clear from applicable law and from information set forth in the second election form signed by Petitioner that any

accrued value the Petitioner had in the Pension Plan was transferred to the Petitioner's Investment Plan account as his opening balance. Such Pension Plan accrued value transferred is subject to the vesting requirement of the FRS Pension Plan, and no portion thereof can be refunded to Petitioner.

ORDERED

The Recommended Order (Exhibit A), subject to the modifications as stated above hereby is adopted. Petitioner has failed to show that she is entitled to the relief requested. Petitioner is not entitled under applicable law to rescind her second election. The Petitioner's request that she be entitled to a refund of contributions that she made to the Florida Retirement System Pension Plan prior to the time she filed her second election to join the FRS Investment Plan hereby is denied since Petitioner terminated employment before she met the applicable eight (8) year vesting requirement of the Pension Plan.

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

DONE AND ORDERED this 20th day of November, 2020, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

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

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

Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent was sent to Carol Lagasse, *pro se*, both by email transmission to [redacted] and by UPS to [redacted] and by email transmission to and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) and Ruth Vafek (rvafek@ausley.com) and jmcvaney@ausley.com, Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 20th day of November, 2020.

Ruth A. Smith

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

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

CAROL LAGASSE,

Petitioner,

vs. CASE NO. 2020-0149

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, on July 8, 2020, with all parties appearing telephonically before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA). The appearances were as follows:

APPEARANCES

For Petitioner: Carol Lagasse, *pro se*
[redacted]

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

STATEMENT OF THE ISSUE

The issue is whether Petitioner may rescind her second election to the Florida Retirement System (FRS) Investment Plan and return to the FRS Pension Plan, and if not, whether she is entitled to return of employee contributions she made to the Pension Plan prior to her transfer to the Investment Plan.

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner testified on her own behalf and presented the testimony of Kim Falter, Benefits Coordinator for the Pasco County Board of County Commissioners. Respondent 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 July 17, 2020. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. The following recommendation is based on my consideration of the complete record in this case and all materials submitted by the parties.

UNDISPUTED FACTS

1. The Petitioner enrolled in the Florida Retirement System when employed by the Pasco County Board of County Commissioners beginning March 20, 2017.

2. On August 16, 2017, Petitioner made an initial election and enrolled in the FRS defined benefit Pension Plan effective September 1, 2017.

3. Very soon after her initial election, on August 24, 2017, Petitioner contacted the MyFRS Guidance Line to ask about the effect on her Pension Plan benefits if she did not work eight years. She was told that if she stayed in the Pension Plan she would get a refund of some contributions. About two years later, on May 30, 2019, October 7, 2019, and October 10, 2019, Petitioner again called the MyFRS Guidance Line. During these conversations, Petitioner spoke with various counselors about her plan to take early retirement, the vesting requirements under the Pension Plan, and the consequences of leaving employment before fully vesting.

4. On December 3, 2019, Petitioner contacted the MyFRS Guidance Line and spoke with an EY Financial Planner about retiring early and switching from the Pension Plan to the

Investment Plan. The Financial Planner advised Petitioner that if she switched to the Investment Plan, the benefit transferred from the Pension Plan to the Investment Plan would become an opening account balance and still would be subject to her eight-year vesting requirement. Petitioner also was advised that any employee contributions paid while in the Pension Plan would be "tied up into the balance." The Financial Planner specifically advised Petitioner that if she transferred to the Investment Plan and left employment in January 2020, she could lose the opening account balance transferred to the Investment Plan because employee contributions to the Pension Plan are bound to the service credits used to determine an opening account balance for the Investment Plan, and at that time, Petitioner would have been employed for approximately two years and ten months, far short of the eight year vesting period.

5. Despite these conversations, Petitioner accepted and acted on contrary advice she received from her employer's human resources department and submitted a second election request to transfer to the defined contribution Investment Plan.

6. On December 17, 2019, the SBA Plan Administrator received Petitioner's second election form, which established a January 1, 2020 Investment Plan effective date. The form includes many warnings and advises participants to be sure they understand the impact of the change they are making. It also includes a second page that sets out what to do if an election has been made in error, that a second election is irrevocable, and if, as Petitioner did, Option 2 is selected, how a transfer to the Investment Plan would work:

> • **If You Elected Option 2**—You understand, acknowledge, and authorize that any accrued value you may have in the Pension Plan will be transferred to your Investment Plan account as your opening balance and is subject to the vesting requirements of the Pension Plan. The present value of your Pension Plan benefit is not segregated as employee and employer contributions, but rather is an actuarial determination of your accrued Pension Plan benefit. The initial transfer amount is an estimate and your account will be reconciled within 60 days of the transfer using your actual FRS membership record pursuant to

Florida law. You direct that all future employer and employee contributions be deposited in your Investment Plan account.

7. More warnings were included in the Confirmation of 2nd Election – Investment Plan mailed to Petitioner on December 19, 2019:

> You have elected to change to the FRS Investment Plan and transfer the Present Value of your FRS Pension Plan benefit. The effective date of this election will be January 1, 2020. Future employee and employer contributions will be directed to your new FRS Investment Plan account. As a member who is using your 2nd election to transfer to the FRS Investment Plan, you will have the Present Value of your FRS Pension Plan benefit calculated and transferred to the FRS Investment Plan as your opening account balance. The Present Value calculation is an actuarial determination of your service credit; it is not the total of any employee or employer contributions paid into the Pension Plan.
>
> If you terminate prior to vesting in your transferred FRS Pension Plan benefit (with less than 6 or 8 years of total FRS service, depending on your date of hire) you will only be entitled to receive a distribution of:
>
> — If less than 1 year of total service, your employee contributions, plus earnings, paid into the Investment Plan since the effective date of your transfer to the Investment Plan.
> — If more than 1 year but less than 6 or 8 years of total FRS service, your employee and employer contributions plus earnings paid into the Investment Plan since the transfer.
>
> This is your final Plan Choice Election under the Florida Retirement System. You must remain in the FRS Investment Plan until your retirement from FRS-covered employment.
>
> If you feel this retirement plan election was made in error, you may be able to cancel it. Please call the MyFRS Financial Guidance Line at 1-866-446-9377, Option 2. Failure to notify us no later than 4:00 PM EST on the last business day of the month following your election month will void your right to cancel this election.

8. Petitioner did not cancel her second election, and on January 31, 2020, an opening account balance based on her Pension Plan benefit was transferred to her Investment Plan account.

9. Petitioner terminated employment with the Pasco County School Board in January 2020 prior to meeting her eight year Pension Plan vesting requirement.

10. On or about April 9, 2020, Petitioner submitted a Request for Intervention stating the Pasco County Benefits Coordinator and its Assistant Human Resources Director advised her to use her second election to switch to the Investment Plan, that she later learned that this would cause her to lose $2212 in employee contributions she made while in the Pension Plan, and that Pasco County acknowledged having given her erroneous advice.

11. Plaintiff's request was denied and on May 7, 2020, she filed a Petition for Hearing requesting the same relief. This administrative proceeding followed.

CONCLUSIONS OF LAW

Rescission of Second Election

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

> (f) After the period during which an eligible employee had the choice to elect the pension plan or the investment plan, or the month following the receipt of the eligible employee's plan election, if sooner, the employee shall have one opportunity, at the employee's discretion, to choose to move from the pension plan to the investment plan or from the investment plan to the pension plan. Eligible employees may elect to move between plans only if they are earning service credit in an employer-employee relationship consistent with s. 121.021(17)(b), excluding leaves of absence without pay.

§ 121.4501(4)(f), Fla. Stat. (2019) (emphasis added).

13. As provided in the above statute, members of the FRS are allowed only one opportunity to switch plans after their initial election period expires. By rule, the State Board of Administration has created a grace period which may be used by participants who believe they

have mistakenly submitted a second election. The grace period provided by Rule 19-11.007, Florida Administrative Code, is as follows:

> (4) Grace Period.
>
> (a) If a member files an election with the Plan Choice Administrator and the member realizes that the election was made in error, or if the member has reconsidered his or her plan choice, the SBA will consider, on a case-by-case basis, whether the election will be reversed, subject to the following: The member must notify the SBA by a telephone call to the toll free MyFRS Financial Guidance Line at: 1(866) 446-9377, or by written correspondence directly to the SBA, to the Plan Choice Administrator, to the Financial Guidance Line, or to the Division, no later than 4:00 p.m. Eastern Time on the last business day of the election effective month.
>
> (b) If the request to reverse the election is made timely and the SBA finds the election was made in error, the member will be required to sign a release and return it to the SBA no later than 4:00 p.m., Eastern Time, on the last business day of the election effective month prior to the election's being officially reversed. Upon receipt of the release, the Division and the Plan Choice Administrator will be directed to take the necessary steps to reverse the election and to correct the member's records to reflect the election reversal.
>
> (c) A confirmation that the election was reversed will be sent to the member by the FRS Plan Choice Administrator.
>
> (d) The member retains the right to file a subsequent second election consistent with subsections (2) and (3), above.
>
> (e) Nothing contained in this subsection will interfere with a member's right to file a complaint, as permitted by Section 121.4501(8)(g), F.S. and discussed in Rule 19-11.005, F.A.C.

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

14. Under the rule, Petitioner had until the time the present value of her Pension Plan benefit was transferred to her Investment Plan account to rescind her second election. Petitioner did not timely request to rescind her second election, and the grace period remedy is not available to her now.

15. Although erroneous information was given to Petitioner by her employer, that misinformation was corrected repeatedly by the MyFRS Guidance Line counselors. In addition, under Section 121.021(10), Florida Statutes "[e]mployers are not agents of the ... state board... and the... state board... [is] not responsible for erroneous information provided by representatives of employers." There is no statutory authority that would allow Petitioner to now rescind her irrevocable second election, and she was a member of the Investment Plan when she terminated her employment with Pasco County.

Return of Employee Pension Plan Contributions

16. Petitioner also seeks refund of her employee contributions made while she was a member of the Pension Plan. Section 121.091(5)(a) provides:

> (5) TERMINATION BENEFITS. – A member whose employment is terminated prior to retirement retains membership rights to previously earned member-non-contributory service credit, and to member-contributory service credit, if the member leaves the member contributions on deposit in his or her retirement account. If a terminated member receives a refund of member contributions, such member may reinstate membership rights to the previously earned service credit represented by the refund by completing 1 year of creditable service and repaying the refunded member contributions, plus interest.
>
> (a) A member whose employment is terminated for any reason other than death or retirement before becoming vested is entitled to the return of his or her accumulated contributions as of the date of termination. Effective July 1, 2011, upon termination of employment from all participating employers for 3 calendar months as defined in s. 121.021(39)(c) for any reason other than retirement, a member may receive a refund of all contributions he or she has made to the pension plan, subject to the restrictions otherwise provided in this chapter. The refund may be received as a lump-sum payment, a rollover to a qualified plan, or a combination of these methods. Partial refunds are not permitted. The refund may not include any interest earnings on the contributions for a member of the pension plan. (Emphasis added.)

§121.091(5)(a), Fla. Stat.

The above-highlighted language appears clear: members are entitled to return of all contributions they have made, unless there are other statutory provisions that restrict this.

17. Employer contributed Pension Plan funds that are transferred by second election to the Investment Plan remain subject to the vesting period in force when those funds were accrued.

> (c)1. With respect to amounts contributed by an employer and transferred from the pension plan to the investment plan, plus interest and earnings, and less investment fees and administrative charges, a member shall be vested in the amount transferred upon meeting the vesting requirements for the member's membership class as set forth in s. 121.021(45).

§121.4501(6)(c)1. Fla. Stat. (2019).

But I can find no comparable express provision as to employee contributions.

18. Respondent asserts that because an accumulated benefit obligation calculated based on creditable service and average final compensation is the amount transferred to the Investment Plan when a member switches plans, and because that amount is not divided into employer and employee contributions, no refund may be had. Respondent cites section 121.091(5)(a) as imposing a qualification on the entitlement to refund of Pension Plan contributions. But the only statutory restriction Respondent cites is section 121.4501(3)(b):

> (b) Notwithstanding paragraph (a), an eligible employee who elects to participate in, or who defaults into, the investment plan and establishes one or more individual member accounts may elect to transfer to the investment plan a sum representing the present value of the employee's accumulated benefit obligation under the pension plan, except as provided in paragraph (4)(b). Upon transfer, all service credit earned under the pension plan is nullified for purposes of entitlement to a future benefit under the pension plan. A member may not transfer the accumulated benefit obligation balance from the pension plan after the time period for enrolling in the investment plan has expired.
>
> 1. For purposes of this subsection, the present value of the member's accumulated benefit obligation is based upon the member's estimated creditable service and estimated average final compensation under the pension plan, subject to recomputation under subparagraph 2...

§ 121.4501(3)(b), Fla. Stat.

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

19. In addition, Section 121.4501(6)(a) makes an Investment Plan member fully and immediately vested in all employee contributions paid to the Investment Plan:

> (6) VESTING REQUIREMENTS
> (a) A member is fully and immediately vested in all employee contributions paid to the investment plan as provided in s. 121.71, plus interest and earnings thereon and less investment fees and administrative charges.

20. Chapter 121, Florida Statutes, makes the employee contributions which were required as of 2011, when the mandatory FRS system changed from noncontributory to contributory, refundable. This is reiterated on the MyFRS website under a section comparing the two plans as to vesting:

For the Pension Plan:

> 8 years of service.
> Once you complete 8 years of service, you qualify for a benefit which is payable when you reach retirement age as defined by the plan. If you leave FRS employment sooner, you own your employee contributions.
> (Emphasis added.)

For the Investment Plan:

> 1 year of service.
> Once you complete 1 year of service, you own all contributions and earnings in your account. If you leave FRS employment sooner, you own your employee contributions and any earnings on your contributions.
> (Emphasis added.)

21. The assertion that a member loses entitlement to refund of her own contributions when she switches from the Pension Plan to the Investment Plan does not comport with the totality of the express provisions of the Florida Statutes cited above. I note in addition that with regard to the funding of benefits, section 121.70(1) provides:

121.70 Legislative purpose and intent. –

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

§ 121.70(1) Fla. Stat. (Emphasis added.)

22. The employer contributed Pension Plan funds that were transferred to the Investment Plan at Petitioner's request remain subject to Petitioner's Pension Plan vesting requirement. § 121.4501(6)(c)1., Fla. Stat. (2019). They are segregated from funds accrued going forward. Because Petitioner has terminated FRS-covered employment before reaching the eight year point, these funds will remain in a suspense account and will be forfeited if she does not return to FRS-covered employment within five years of her termination date. § 121.4501(6)(d), Fla. Stat. (2019). To refuse her refund of her employee contribution portion of that segregated amount is not consistent with the applicable statutes or the intent expressed by the legislature that the FRS be a uniform system and that employee contributions be refundable. Mandatory employee contributions from salary payments are to be refunded when an FRS member terminates prior to vesting. It makes no sense that a transfer from the Pension Plan to the Investment Plan would nullify the express requirements of statute and legislative intent, leading to the anomalous result that Pension Plan members who transfer to the Investment Plan and then terminate are the only FRS members who get nothing from their own contributions.

23. The SBA must comply with the Florida Statutes creating and governing the Florida Retirement System. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). It is clear that Respondent SBA has

developed and consistently applied the no-refund policy in this and other cases and has warned of that policy in its rules and educational materials, but that does not mean that its policy necessarily comports with all statutory requirements.

24. I am confident that Respondent has no interest in depriving Petitioner or any other FRS member of legislatively-mandated contributions from their salary paid to the FRS, and trust that the SBA is interpreting the relevant statutes so as to carry out its view of the most effective and efficient way administer the Investment Plan. I acknowledge also that the prior Final Orders in Tashek Hamlette v. State Board of Administration, Case No. 2014-2996, (Recommended Order August 1, 2014; Final Order August 27, 2014); Richard Conley v. State Board of Administration, Case No.: 2016-3596 (Recommended Order Sept. 9, 2016; Final Order Dec. 8, 2016); Sammy Hanafi v. State Board of Administration, Case No. 2016-3543 (Recommended Order Sept. 9, 2016; Final Order Dec. 8, 2016); Fred Horn v. State Board of Administration, Case No. 2016-3601 (Recommended Order Sept. 9, 2016; Final Order Dec. 8, 2016) are to the contrary.

25. But all of the Final Orders cited above were entered before the enactment of the revision to Article V, section 21 of the Florida Constitution, effective January 8, 2019, which reads:

> In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.

Fla. Const. art. V, § 21.

26. Plaintiff's initial Request for Intervention makes clear that she was given conflicting advice regarding her best course of action as she approached retirement. The MyFRS Guidance Line counsellors clearly informed her of Respondent's policy on no refund of

employee contributions after transfer to the Investment Plan. Her employer's human relations personnel, ironically, were sure that employee contributions are always refundable. Under Respondent's policy, if Petitioner had remained in the Pension Plan and then terminated her FRS employment, she would have received a refund of her $2200 of employee contributions. By transferring to the Investment Plan prior to terminating employment, she receives nothing.

27. There is no statutory authority for Petitioner to rescind her second election to the Investment Plan, but I conclude that a more reasonable de novo interpretation of the applicable statutes requires refund of all her employee contributions to the Florida Retirement System, particularly in light of long-standing precedent that pension laws are to be "liberally construed" in favor of the intended recipient. See Greene v. Gray, 87 So. 2d 504, 507 (Fla. 1956); Adams v. Dickinson, 264 So. 2d 17, 21 (Fla. 1st DCA 1972); Scott v. Williams, 107 So. 3d 379, 384-85 (Fla. 2013).

RECOMMENDATION

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

DATED this 26th day of August 2020.

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
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Florida State Board of Administration
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