STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

RICHARD NALBANDIAN, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	Case No.2020-0213

FINAL ORDER

On October 28, 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, Richard Nalbandian, 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 November 12, 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 15. through 18. 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 19. through 30. of the Recommended Order and replaces them with the following Conclusions of Law set forth in paragraphs 19. through 24. below, finding that the substituted Conclusions of Law are as reasonable, or are more reasonable, than those rejected Conclusions of Law:

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

> (5) TERMINATION BENEFITS.—A member whose employment is terminated prior to retirement retains membership rights to previously earned member-noncontributory service credit, and to member-contributory

service credit, if the member leaves the member contributions on deposit in his or her retirement account. If a terminated member receives a refund of member contributions, such member may reinstate membership rights to the previously earned service credit represented by the refund by completing 1 year of creditable service and repaying the refunded member contributions, plus interest.

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

[emphasis added]

20. 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]

21. 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.

22. 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 of [the member's] Pension Plan (if any)… to the Investment Plan." [emphasis added] [Respondent's Exhibit R-2, 2nd Election EZ Retirement Plan Enrollment Form, page 1]. As such, the member is cashing out his or her future Pension Plan benefit with the transfer of the member's accumulated benefit obligation to the member's new Investment Plan account. The amounts transferred are subject to the vesting requirements of the Pension Plan, as provided under Section 121.4501(6)(c), Florida Statutes. And, in fact, the 2nd Election Enrollment Plan Enrollment Form specifically notes that if a member has elected to switch from the Pension Plan to the Investment Plan, that member understands that "… any accrued value [the member] may have in the Pension Plan will be transferred to [the

member's] Investment Plan account as [the member's] opening balance and is subject to the vesting requirement of the Pension Plan. The present value of [the member's] Pension Plan benefit is not segregated as employee and employer contributions, but rather is an actuarial determination of [the member's] accrued Pension Plan benefit." [Respondent's Exhibit R-2, 2nd Election Retirement Plan Enrollment Form, page 2].

22. 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 he does not return to FRS-covered employment within five (5) years of his May 2020 termination date, as provided under Section 121.4501(6)(d), Florida Statutes. Of course, if Petitioner does return to FRS employment within five years, the funds in suspense will be placed back into the member's Investment Plan account and he will be entitled to all funds as soon as he satisfies the eight year vesting requirement.

23. 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.

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

ORDERED

The Recommended Order (Exhibit A), subject to the modifications as stated above hereby is adopted. Petitioner has failed to show that he is entitled to the relief requested. Petitioner is not entitled under applicable law to rescind his second election. The Petitioner's request that he be entitled to a refund of contributions that he made to the Florida Retirement System Pension Plan prior to the time he filed his second election to join the FRS Investment Plan hereby is denied since Petitioner terminated employment before he met the applicable 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 22nd day of January, 2021, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Daniel Beard

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

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

Tina Joanos

Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent was sent to Richard Nalbandian, *pro se*, both by email transmission to [redacted] 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 22nd day of January, 2021.

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

RICHARD NALBANDIAN,

Petitioner,

vs. CASE NO. 2020-0213

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, on September 2, 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: Richard Nalbandian, *pro se*

For Respondent: Ruth Vafek
Ausley McMullen, P.A.
123 South Calhoun Street
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue is whether Petitioner may obtain return of employee contributions he made to the Florida Retirement System (FRS) Pension Plan prior to his transfer to the Investment Plan.

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner testified on his own behalf at hearing, and Respondent presented the testimony of Allison Olson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-6 were admitted into evidence without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties on September 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 was enrolled in the Florida Retirement System (FRS) when employed by the Indian River County Board of County Commissioners beginning in May of 2016.

2. Petitioner utilized his initial election to enroll in the Pension Plan on the final day of his initial choice period, November 30, 2016.

3. Petitioner contacted the MyFRS Guidance Line on September 17, 2019 and discussed the Investment Plan option in the context of his then-current retirement plans. On December 5, 2019, Petitioner again called the MyFRS Guidance Line. During that latter conversation, Petitioner spoke with an EY Financial Planner and again had discussions about the vesting requirements under the Pension Plan and the consequences of leaving employment before fully vesting. He stated that he was "not going to do five more years in general," and that he was "probably going to do three more, four more years."

4. During the referenced phone conversations, the EY Financial Planners advised Petitioner that the Pension Plan benefit used to create the opening balance in the Investment Plan "holds on" to the Pension Plan vesting requirement, which in Petitioner's case is eight years, and

that if he were to transfer and then promptly terminate employment in an FRS-eligible position, he would not have access to those funds. The first Planner also informed Petitioner that if he were to "leave prior to completing eight years, you don't actually own that yet, so it goes into...an expense account.... If you don't come back within five years, then you forfeit it back to the State." The EY Planners also informed Petitioner multiple times that if Petitioner were to remain in the Pension Plan rather than transferring to the Investment Plan, he would be eligible for a refund of his three percent employee contributions following termination of his employment, even if he did not complete eight years of service.

5. Despite these conversations, on December 16, 2019, the Plan Choice Administrator received Petitioner's 2nd Election EZ Retirement Plan Enrollment Form by which he requested a transfer to the Investment Plan, which established a January 1, 2020 effective date for his Investment Plan membership.

6. In the 2nd Election EZ Retirement Plan Enrollment Form, under the bullet titled "If You Elected Option 2," Petitioner was advised that the amount transferred to the Investment Account as his opening balance would be an actuarial determination and not segregated into employee/employer contributions made up to that point. He was also advised that the opening balance would be subject to the Pension Plan vesting requirements.

7. A notice confirming Petitioner's Investment Plan election dated December 17, 2019, was sent to the Petitioner at his address of record. That notice confirmed that he had utilized his one-time second election and had to remain in the FRS Investment Plan until his retirement from FRS–covered employment.

8. Petitioner was also advised that if he terminated employment prior to vesting in the transferred Pension Plan benefits, he would be entitled to a distribution of only the employee and employer contributions paid into the Investment Plan since the transfer.

9. Finally, Petitioner was advised in the confirmation notice that he could cancel his election and of the expiration date for exercising this option.

10. Pursuant to Rule 19-11.007, Florida Administrative Code, there is a grace period of no later than 4:00 p.m. Eastern Time on the last business day of the month following the election month to rescind a second election. Petitioner did not submit such a request, and once the grace period expired, his election became irrevocable.

11. On January 31, 2020, an opening account balance based on Petitioner's Pension Plan benefit was transferred to his Investment Plan account.

12. Petitioner terminated his employment with the Indian River Board of County Commissioners in May of 2020, prior to meeting his eight year Pension Plan vesting requirement.

13. On or about May 20, 2020, Petitioner submitted a Request for Intervention asserting that he "was not explained the Pension Plan options in detail" and requesting that he receive his "employee contributions of 3% from (June 2016-May 2020)." Petitioner's request was denied.

14. On or about June 29, 2020, Petitioner filed a Petition for Hearing requesting the same relief. This administrative proceeding followed.

CONCLUSIONS OF LAW

Rescission of Second Election

15. If Petitioner could rescind his second election and return to the Pension Plan, he would be entitled to refund of his employee contributions. 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).

16. 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.

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

18. Petitioner was fully advised about the consequences of moving to the Investment Plan and made aware of his option to rescind his election within the prescribed time. There is no statutory authority that would allow Petitioner to now rescind his irrevocable second election, and he was a member of the Investment Plan when he terminated his employment with Indian River County Board of County Commissioners.

Return of Employee Pension Plan Contributions

19. Petitioner also seeks refund of his employee contributions made while he 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.

20. 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.

21. 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).

22. 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.

23. 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.)

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

25. 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 he does not return to FRS-covered employment within five years of his termination date. § 121.4501(6)(d), Fla. Stat. (2019). To refuse him refund of his employee contribution portion of that segregated amount is not consistent with the applicable statutes or the intent expressed by the legislature that the FRS be a uniform system and that employee contributions be refundable. Mandatory employee contributions from salary payments are to be refunded when an FRS member terminates prior to vesting. It makes no sense that a transfer from the Pension Plan to the Investment Plan would nullify the express requirements of statute and 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.

26. 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.

27. 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.

28. 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.

29. The MyFRS Guidance Line counsellors clearly informed Petitioner of Respondent's policy on no refund of Pension Plan employee contributions after transfer to the Investment Plan. Under Respondent's policy, if Petitioner had remained in the Pension Plan and then terminated his FRS employment, he would have received a refund of his employee contributions made while in the Pension Plan. By transferring to the Investment Plan prior to terminating employment, he receives nothing.

30. There is no statutory authority for Petitioner to rescind his second election to the Investment Plan, but I conclude that a more reasonable de novo interpretation of the applicable statutes requires refund of all his 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 28th day of October, 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
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
Tina.joanos@sbafla.com
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COPIES FURNISHED via mail and electronic mail to:

Richard Nalbandian
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Petitioner

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