STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

MICHELLE VAUGHAN, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	Case No. 2022-0268

FINAL ORDER

On April 5, 2023, 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 counsel for the Petitioner and upon counsel for the Respondent. Both parties timely filed a Proposed Recommended Order. Petitioner timely filed exceptions, which were due on April 20, 2023. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

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

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

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

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

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

substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." Florida courts have consistently applied the "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the presiding officer's application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the presiding officer's interpretation of a statute or rule over which the Legislature has provided the agency with administrative authority. *See Deep Lagoon Boat Club, Ltd. v. Sheridan,* 784 So.2d 1140, 1141-42 (Fla. 2d DCA 2001); *Barfield v. Dep't of Health*, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001). When rejecting or modifying any conclusion of law, the reviewing agency must state with particularity its reasons for the rejection or modification and further must make a finding that the substituted conclusion of law is as reasonable, or more reasonable, than that which was rejected or modified.

With respect to exceptions, "[t]he final order shall include an explicit ruling on each exception, but 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." Section 120.57(1)(k), Florida Statutes.

RULINGS ON PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

Petitioner's Exception 1: Exception to Finding of Fact 3

Petitioner argues that Finding of Fact 3 that indicates that Petitioner's husband called the MyFRS.com Financial Guidance Line is not undisputed since Petitioner

testified that she did not give her former husband authority to act on her behalf. Petitioner is trying to use her exceptions to address two different issues. The first issue is whether or not the record discloses any competent substantial evidence supporting finding of fact in the Recommended Order. If it does, then the Final Order will be bound by such factual finding.

The presiding officer was provided with the transcript of a call that was initiated by the Petitioner's husband on December 10, 2007 [Exhibit R-6]. In the transcript, someone indicating that she was Mrs. Vaughan gave permission for Mr. Vaughan (Petitioner's former husband) to speak to a CitiStreet Representative (the prior plan administrator) about her Florida Retirement System Plan. That person, who represented herself as Mrs. Vaughan provided her address and date of birth. [Exhibit R-6, page 8, lines 15-25; page 9, lines 1-11]. Petitioner, who bears the burden of proof in this case, has not claimed any of the information provided was erroneous. Petitioner has only asserted in the hearing that the person claiming to be her was not actually her, without giving any explanation or evidence as to who that other person could have been in order to support her bare assertion. Petitioner added that she could not have possibly been present on the call since she was at work at the original time provided by Respondent for the call. Her only support for this assertion was an unsubstantiated school calendar for her employer for the 2007-2008 school year with the heading, "Draft Proposal." No one from Petitioner's employer testified that attendance records verified that Petitioner was at work on December 10, 2007, and that Petitioner was prohibited from taking any breaks during her workday.

Documentary evidence was produced by the Respondent prior to the hearing to show the actual initiation time for the transcribed call originally provided for such call was in error. *See,* Respondent's Exhibit R-4. The presiding officer noted in her Recommended Order that the end time for the call remained consistent even though the initiation times changed. If the original initiation time for the call were used, that would mean that the call would have lasted several hours. But as the transcript of the call demonstrates, the call lasted far less than one hour. [*See*, Respondent's Exhibit R-6].

Petitioner has not produced any documentary evidence that the information set forth in Respondent's Exhibit R-4 was not authentic or was nefariously created. Petitioner alleged that the change in call times shown by Respondent's Exhibit R-4 made her feel "...something unethical was going on." [Hearing Transcript, page 16, lines 9-22]. However, she has not produced any documentary evidence that Respondent and/or its representatives and agents were somehow colluding with Petitioner's former husband to change her retirement plan or that any of them would derive a benefit from the change.

Thus, a review of the entire record demonstrates that this finding of fact was based on competent substantial evidence. The transcript of the call does not, by itself, serve to raise any concerns that the parties whose words were transcribed were other than who they were identified in the call transcript as being. Petitioner did not produce any evidence other than her own testimony that the person identified by the transcript as Mrs. Vaughan was not her.

Petitioner also is claiming in the exception that the specified finding of fact was a "disputed issue of material fact" in order to try to have the matter transferred to the

Division of Administrative Hearings (DOAH). Petitioner was provided with the Respondent's exhibits, such as the transcript of the call set forth in Exhibit R-6, well in advance of the informal hearing. Petitioner had ample opportunity to allege a disputed issue of material fact and ask for the case to be transferred to DOAH at the very beginning of the informal proceeding. However, she chose not to do so. As will be discussed in more detail at the end of this Final Order, case law is clear that a party to an informal proceeding must bring that matter to the attention of the presiding officer at the earliest opportunity or will lose the right to request a formal hearing. *See, e.g., Stueber v. Gallagher*, 812 So.2d 454, 457 (Fla. 5th DCA 2002) ("[W]hen a party at an informal hearing does not request that the informal hearing be terminated in lieu of a formal hearing, the party waives the right to receive a formal hearing). Here the Petitioner waited until after the Recommended Order was issued to try to have her case transferred to DOAH. The provisions in Section 120.569(1) requiring the transfer of a case to DOAH where a disputed issue of material fact arises during an informal proceeding, were not designed to provide parties with the opportunity to switch from one forum to another if the case is not turning out the way the parties had hoped. *See*, The Florida Bar, *Florida Administrative Practice,* Section 5.4.B.

Further, Petitioner has not shown that this fact, or any other fact for which she has filed an exception, is a "material fact." A "material fact" is defined as "[a] fact that is significant or essential to the issue or matter at hand." *Black's Law Dictionary*, 7th Edition. In this situation, the second election was effectuated through an online election made on the MyFRS.com website. [Hearing Transcript, page 22, lines 16-25; page 23, lines 1-25; Respondent's Exhibit R-1, pages 5-6]. The second election was not made

during any phone call described during the hearing. In order for the second election to be made online, the person making the second election would have needed certain personal identifying information of the Petitioner. [Hearing Transcript, page 24, lines 11-21]. Petitioner has not alleged her online account was hacked. It appears that she is claiming her former spouse filed the second election without her knowledge. To void her second election in this matter, Petitioner would need to show that her former husband conspired with the Respondent and/or its agents and representatives to effectuate, online, the second election. Petitioner has not shown that Florida law would allow the Respondent to void the second election when such request was made over fifteen years after the second election was made, unless there is some other legal theory, such as equitable estoppel, that could be used against Respondent. So, in order to prevail in this case, the Petitioner would need to show that the Respondent SBA and/or its agents, using the Petitioner's login credentials for the MyFRS.com website, filed, either directly or in conjunction with Petitioner's former spouse, a second election, on December 10, 2007, whereby Petitioner's FRS plan election was changed from the Pension Plan to the Investment Plan. None of the facts Petitioner has identified in any of Petitioner's exceptions appears to be a **material** fact that would support what Petitioner would need to show by a preponderance of the evidence.

Based on the foregoing, Petitioner's Exception 1 hereby is denied.

Petitioner's Exception 2: Exception to Finding of Fact 5

Petitioner objects to the finding of fact stating that Petitioner got on the call transcribed in Respondent's Exhibit R-6 because she was working at the time the call occurred. However, as noted above, the initiation time for the call originally provided was in error based on

documentary evidence produced by the Respondent. Petitioner, who bears the burden of proof in this matter, did not produce any evidence to show that the corrected initiation time for the call was inaccurate. As noted above, the corrected initiation time in more in line with the end time for the call which did not change. A review of the entire record shows that there is substantial competent evidence to support this finding of fact.

Further, if Petitioner is trying to state that this fact is a disputed material fact, Petitioner has not demonstrated the materiality of this particular fact, pursuant to the requirements discussed under the Ruling on Petitioner's Exception 1, as set forth above.

Accordingly, Petitioner's Exception 2 hereby is rejected.

Petitioner's Exception 3: Exception to Finding of Fact 7

Petitioner is asserting, without any argument, that this finding does not have any basis in evidence. However, a review of the entire record shows that there is substantial competent evidence to support such a finding, from the exhibits produced by both Petitioner and Respondent. Additionally, the "case close" time notation did not change in any of Petitioner's or Respondent's exhibits covering the for the referenced call, as discussed previously.

Further, if Petitioner is trying to state that this fact is a disputed material fact, Petitioner has not demonstrated the materiality of this particular fact, pursuant to the requirements discussed under the Ruling on Petitioner's Exception 1, set forth above.

Accordingly, this exception hereby is rejected.

Petitioner's Exception 4: Exception to Finding of Fact 8

This exception states that Petitioner's "entire argument" is based on disputing the times when certain calls were made. However, it must be remembered that the second

election under review in this matter was not made during either of the referenced calls. It was made online via the MyFRS.com website. [Hearing Transcript, page 22, lines 16-22; page 23, lines 1-25]. Thus, any issues with Petitioner's second election would derive from a login to the MyFRS.com website, not with any phone call since no phone call effectuated the second election.

Petitioner in this exception is merely trying to make an argument to allow the transfer of her case to DOAH. But as mentioned previously, the ability to have the case transferred has been foreclosed because of Petitioner's failure to timely try to assert that this matter is one that Section 120.591, Florida Statutes, was meant to address.

Further, if Petitioner is trying to state that this fact is a disputed material fact, Petitioner has not demonstrated the materiality of this particular fact, pursuant to the requirements discussed under the Ruling on Petitioner's Exception 1, set forth above.

Based on the foregoing, this exception hereby is denied.

Petitioner's Exception 5: Exception to Finding of Fact 9

Petitioner objects to the finding that Petitioner and her husband made the second election online. There is record evidence that Petitioner's login credentials were utilized to make the second election. Those credentials were originally given to Petitioner as a member of the FRS. *Felder v. Dept. of Management Services, Division of Retirement,* DOAH Case Number 03-0486 (December 6, 2003) states that "each state employee bears the burden of acting timely to protect his or her own interests with regard to retirement accounts…". In this situation, Petitioner apparently allowed her former husband to effectuate the second election on her behalf. He would not have obtained his wife's login credentials unless she provided them to

him. Based on a review of the entire record, there is substantial competent evidence to support this finding of fact.

Further, if Petitioner is trying to state that this fact is a disputed material fact, Petitioner has not demonstrated the materiality of this particular fact, as discussed under the Ruling on Petitioner's Exception 1, set forth above.

Accordingly, this exception hereby is rejected.

Petitioner's Exception 6: Exception to Finding of Fact 10

Since Petitioner has elected not to set out her arguments, but rather to make reference to the arguments in Petitioner's Exception 3, then Petitioner's Exception 6 is hereby rejected for the same reasons set forth in the response to Petitioner's Exception 3 above.

Petitioner's Exception 7: Exception to Finding of Fact 13

Petitioner states that she "disputes" that she received an Investment Plan Second Choice Confirmation Statement, which was sent to her at her address of record. Exceptions are not the proper venue for adding testimony. Petitioner did not discuss at the hearing the Investment Plan Second Choice Confirmation Statement and the Hearing Transcript is devoid of any reference to it. However, Respondent's Exhibit R-1, pages 5-6, does indeed show an Investment Plan Second Choice Confirmation Statement, with the date of December 7, 2008, was sent to Petitioner at the 9861 Lago Drive, Boynton Beach address. That address was identified by Petitioner as having been her address at the time her second election was made. [Hearing Transcript, page 25, lines 3-16] There is competent substantial evidence to support this finding of fact. The finding of fact does not state that Petitioner received this statement- only that it was sent.

Further, if Petitioner is trying to state that this fact is a disputed material fact, Petitioner has not demonstrated the materiality of this particular fact, pursuant to the requirements discussed under the Ruling on Petitioner's Exception 1, set forth above.

Additionally. if Petitioner is trying to create a disputed issue of material fact at this point in order to try to have the case re-litigated at DOAH is too late. As cited previously, as well as below, *Stueber v. Gallagher*, 812 So.2d 454, 457 (Fla. 5th DCA 2002) specifically stated that "[W]hen a party at an informal hearing does not request that the informal hearing be terminated in lieu of a formal hearing, the party waives the right to receive a formal hearing.

Based on the foregoing, this Exception hereby is denied.

Petitioner's Exception Number 8- Exceptions to Conclusions of Law 23, 27 and 29

Petitioner makes a claim, without any analysis or supporting authority, that Conclusions of Law 23, 27 and 29 are "based on weighing evidence and deciding facts in dispute." Since this exception is devoid of any legal authority, it does not have to be addressed.

Accordingly, Exception 8 hereby is denied.

UNDISPUTED MATERIAL FACTS

The Material Undisputed Material Facts set forth in paragraphs 1 through 10 of the presiding officer's Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

The Material Undisputed Facts set forth in paragraph 11 are modified slightly, based on record evidence, by adding some additional information as follows:

11. The Plan Choice Administrator received and processed a completed second election for Petitioner's account to transfer from the FRS Pension Plan to the FRS Investment Plan on December 11, 2007. This second election request was made using the MyFRS.com website. Petitioner did not dispute that a second election was made. In fact, she specifically stated that: "[s]omebody that was ineligible obviously made this [second] election without my knowledge." [Hearing Transcript, page 21, lines 23-25]. This purported "ineligible" person who completed the online election was previously identified by Petitioner as her former spouse. [Hearing Transcript, page 20, lines 9-10]. Her former spouse needed to use Petitioner's personal account information to access the MyFRS.com website. [Hearing Transcript, page 24, lines 18-21].

The Material Undisputed Facts set forth in paragraphs 12 through 15 of the presiding officer's Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

CONCLUSIONS OF LAW

The Conclusions of Law set forth in Paragraphs number 16 through 28 of the presiding officer's Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

The Conclusions of Law set forth in Paragraph 29 of the presiding officer's Recommended Order hereby are rejected. This Final Order substitutes and adopts the following Conclusions of Law for that paragraph as follows, and adds four new paragraphs, finding that, based on record evidence and applicable law, these substituted and added conclusions of law comport with applicable law and are at least as reasonable as, or are more reasonable than, the conclusion of law that is hereby rejected:

29. Petitioner has argued that the reason her former spouse made the second election was to "... get ahold of the money." [Hearing Transcript, page 18, line 18]. However, by law, neither Petitioner nor Petitioner's spouse could obtain the retirement funds while Petitioner still was working, even if Petitioner experienced a hardship or other emergency. Section 121.591, Florida Statutes, specifically provides as follows:

> 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. Benefits, including employee contributions, are not payable under the investment plan for employee hardships, unforeseeable emergencies, loans, medical expenses, educational expenses, purchase of a principal residence, payments necessary to prevent eviction or foreclosure on an employee's principal residence, or any other reason except a requested distribution for retirement, a mandatory de minimis distribution authorized by the administrator, or a required minimum distribution provided pursuant to the Internal Revenue Code.

It is the case that Petitioner's husband, since he had access to her account, could select the type of investment funds into which her account benefits were directed. However, since Petitioner's husband purportedly is a "market maker" in the financial services industry, it is not inconceivable that Petitioner may have wanted him to select investments on her behalf. [Hearing Transcript, page 10, lines 19-25; page 11, lines 1-11]. Petitioner has not asserted that she has the type of expertise her former husband possessed.

30. There is nothing in applicable law, and Petitioner has cited none, that gives the Respondent SBA the authority to void the second election here, even if it was made without the express consent of the Petitioner. The case, Sherry *Ann Jaramillo v. SBA*, Recommended Order issued January 22, 2009, Final Order issued February 16, 2009,

involved a situation in which a financial planner, specifically Primerica, advised the Petitioner to use her second election to transfer from the Pension Plan to the Investment Plan. Apparently, her account lost value and she asked to rescind her second election a few years later. The case held that Petitioner did not timely rescind her second election, and noted in the Recommendation section, on page 5 of the Recommended Order that:

> It appears that Petitioner may have been victimized by an unscrupulous financial planner and given bad advice regarding the best choices for her retirement assets. But the SBA has no jurisdiction over Primerica or any other entity not within its statutory authority, and any remedies against those entities would lie elsewhere. I note that Petitioner still has her retirement assets, albeit not in the type of account she might want.

Similarly, in this situation, the SBA has no jurisdiction over the Petitioner's ex-spouse. Petitioner has cited no law that would give the SBA jurisdiction over the Petitioner's spouse and allow and/or require the SBA to void Petitioner's second election based on actions taken by Petitioner's spouse. As is the *Jamarillo* case, Petitioner still has her "retirement assets."

31. The real question in this matter is whether or not the second election was made following the security protocols and safeguards of the MyFRS.com website, including the providing of personal identifying information of the Petitioner. Here, there has been no allegation by Petitioner that a "hacker" got access to her account, or that the Respondent and/or its representatives and agents gave her former spouse any personal identifying information of the Petitioner. Petitioner admitted that her former husband used her personal identifying information, information that she had an obligation to protect, to gain access to her online account. [Hearing Transcript, page 24, lines 11-21]. Thus, her second election must stand. Any recourse Petitioner has for any alleged

wrongful filing of her second election is against her former husband, not against the Respondent and/or its agents and representatives.

32. The Recommendation section on page 9 of the Recommended Order states that the Respondent SBA should give Petitioner "...the opportunity to choose to present her argument to the Division of Administrative Hearings in a full evidentiary hearing...".

At no point during the hearing or in the body of the recommended order did either the presiding officer or the Petitioner raise the issue that a disputed material fact or facts was/were present. Similarly, the existence of disputed issues of material fact(s) was (were) not raised at all in Petitioner's Proposed Recommended Order. It was only after the presiding officer mentioned the arguable possibility of such facts in her Recommendation section of the Recommended Order did Petitioner's counsel suddenly decide to make some "exceptions" based on the existence of disputed facts and further make a request for a formal administrative hearing.

Section 120.569(1), Florida Statutes, specifically provides in pertinent part that:

> If a disputed issue of material fact arises during a proceeding under s. 120.57(2), then, unless waived by all parties, the proceeding under s. 120.57(2) shall be terminated and a proceeding under s. 120.57(1) shall be conducted ***. [emphasis added]

In this situation, the facts Petitioner now is trying to assert are material disputed facts were known well in advance of the hearing. But there was absolutely no discussion of even the possibility of the existence of any disputed issue of material fact during the proceeding that would require the transfer of the case to DOAH. To allow the transfer of the case to DOAH in this situation, after a Recommended Order has been issued by the presiding officer, would essentially allow the Petitioner to completely proceed through

the Section 120.57(2) hearing, find out how she fared, and then, if she is unhappy with the result, (which, in this case, she likely is since the Recommended Order found against her) argue that she instead should be entitled to a Section 120.57(1) hearing; proceed with such hearing curing any deficiencies in evidence or argument that may have been present in the Section 120.57(2) hearing; and perhaps offer a much better presented/prepared case with more complete evidence to DOAH. Or, in other words, that would allow Petitioner to essentially use the 120.57(2) hearing to serve as a "dress rehearsal" for the Section 120.57(1) hearing and make the outcome of her case perhaps much more favorable to her.

The case, *Goodson v. Florida Dept. of Business & Professional Regulation, Division of Real Estate,* 978 So.2d 195 (Fla. 1st DCA 2008), involved a situation in which the Petitioner, during the course of a Section 120.57(2) hearing, raised some statements that potentially could amount to disputed issues of material fact. He did not either object to the continuation of the hearing or request that the case be terminated and transferred for a formal hearing. The court stated that the failure to affirmatively request a formal hearing during the proceeding amounted to the failure to preserve the issue for review. *See also, Garrison v. Dept. of Health, Board of Nursing,*220 So.3d 1278, 1279 (Fla. 5th DCA 2017) (licensee did not request a formal hearing, either initially or when a disputed issue of material fact arose at the informal hearing, so the issue was not preserved for appeal); *Stueber v. Gallagher*, 812 So.2d 454, 457 (Fla. 5th DCA 2002) ("[W]hen a party at an informal hearing does not request that the informal hearing be terminated in lieu of a formal hearing, the party waives the right to receive a formal hearing)]; *Gonzlez v. Dept. of Health*, 120 So.3d 234, 237 (Fla. 1st DCA 2013) (Appellant's failure to request a

formal hearing once it became apparent that disputed issues of material fact existed precluded appellate argument that the board was required to terminate and reconvene for such hearing.

33. The time when Petitioner's second election was made (i.e., December 2007), did not turn out to be favorable for her Investment Plan account balance. Not too long after her second election was made, world economic conditions caused unprecedented and unforeseeable losses to investments. In fact, on Sept. 29, 2008, the stock market crashed. The Dow Jones Industrial Average fell 777.68 points in intra-day trading. Until 2018, it was the largest point drop in history. *See,* Kimberly Amadeo, *The Great Recession of 2008: A Timeline and Its Effects*, updated on April 24, 2022. Thus, Petitioner's account balance probably declined fairly rapidly after she transferred to the FRS Investment Plan and still may not have fully recovered to date.

Additionally, Petitioner has not asserted she has the financial expertise of her ex-spouse. Thus, she may not want to be in the FRS Investment Plan where she bears full responsibility for its performance and is required to assume a far more active role in the management of her account than if she were a member of the Pension Plan. But she has not tried to void her second election for over 15 years. While unfortunate for Petitioner that she would much rather be in the Pension Plan, those facts do not allow Petitioner to fail, as she has here, to prove entitlement to the relief she has requested.

ORDERED

Petitioner's request that she be permitted to rescind her second election into the Investment Plan, made using the MyFRS.com website on December 11, 2007, hereby is denied. The presiding officer's recommendation to have the case transferred to the

Division of Administrative Hearings (DOAH) hereby is rejected, for the reasons stated above. The Recommended Order, as modified above and with the removal of the Recommendation section is hereby adopted.

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 15th day of May 2023, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Daniel Beard

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

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

Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Paul A. Daragjiati, Esq., Paul Daragjati, PLC, both by email transmission at paul@daragjatilaw.com and by U.P.S. to 4745 Sutton Park Ct., Suite 503, Jacksonville, FL 32224; and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) , Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 15th day of May, 2023.

Ruth A. Smith
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STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

MICHELLE VAUGHAN,

Petitioner,

vs.

CASE NO. 2022-0268

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, on January 31, 2023, after Petitioner requested delay of a previously scheduled hearing in order to obtain legal representation. All parties appeared telephonically before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA). The appearances were as follows:

APPEARANCES

For Petitioner: Paul A. Daragjati, Esq.
4745 Sutton Park Ct., Suite 503
Jacksonville, FL 32224

For Respondent: Deborah Minnis
Ausley McMullen, P.A.
123 South Calhoun Street (32301)
PO Box 391
Tallahassee, FL 32302

STATEMENT OF THE ISSUE

The issue is whether Petitioner may transfer from the Florida Retirement System (FRS) Investment Plan back to the FRS Pension Plan despite a one-time second election made

Exhibit A

approximately 15 years ago, which she asserts was made without her full knowledge and consent.

PRELIMINARY STATEMENT

Both parties and their attorneys attended the hearing by telephone. Petitioner testified on her own behalf and presented no other witnesses. Respondent representative Allison Olson, SBA Director of Policy, Risk Management, and Compliance testified for the SBA. Respondent's Exhibits R-1 through R-7 and Petitioner's Exhibits P-1 through P-3 were admitted into evidence.

A transcript of the hearing was made, filed with the agency, and provided to the parties on February 8, 2023. Both parties submitted proposed recommended orders within thirty days after the transcript was filed. The following recommendation is based upon the undersigned's consideration of the complete record in this case, all materials submitted by the parties, and the transcript of the hearing.

UNDISPUTED MATERIAL FACTS

1. Petitioner began employment with the Palm Beach County School Board, an FRS participating employer, on August 4, 2004.

2. She had until February 28, 2005 to elect to remain in the defined benefit Pension Plan or enroll in the defined contribution Investment Plan. The Plan Choice Administrator did not receive an election from Petitioner by this date, and so she was defaulted into the Pension Plan.

3. On December 10, 2007, Petitioner's then-spouse called the MyFRS Financial Guidance Line on her behalf and spoke with a representative from Ernst and Young (EY) (Call number 1138632). The EY representative provided her spouse with general information about

FRS vesting requirements. As the questions became more specific, the EY representative brought a representative from CitiStreet, the Investment Plan Administrator, into the call.

4. During the conversation with CitiStreet, because her spouse asked questions that would require the representative to access Petitioner's account, the Petitioner was required to authorize the representative to disclose the information.

5. The representative asked to speak directly to Petitioner. The call transcript indicates Petitioner got on the call, confirmed her address and date of birth for the representative, and authorized the representative to provide information to her spouse.

6. Petitioner's spouse asked questions specifically relating to whether Petitioner received documentation that provided information relating to the initial election and the vesting requirements if she switched plans. Petitioner's spouse was advised that the matter would have to be researched and that it would take three-five business days.

7. For this call, Petitioner's Exhibit 2 shows a time under the "created on" column of 11:06. This time notation was made in error, and a corrected summary was submitted to Respondent on August 9, 2022, by Pamela Sheehan, Senior Associate for EY Personal Finance. The assertion that this notation was an error is supported by further review of Respondent's Exhibit 5 and Petitioner's Exhibit 2. Both these documents contain a "case close" time within the "resolution" column in addition to the time notation within the "created on" column. The "case close" time notation did not change and is the same on both documents.

8. A review of the time notation in the "resolution" column of both Respondent's Exhibit 5 and Petitioner's Exhibit 2 shows that this call was made at 4:14:56 p.m.

9. A second call (Call number 1138792) was made to the MyFRS Financial Guidance Line on December 10, 2007. During this call, Petitioner's spouse stated that they had

made a switch from the Pension Plan to the Investment Plan through the MyFRS.com website. Petitioner's spouse was provided general information about vesting requirements for the Investment Plan and the Pension Plan. The time of this call was 6:53 p.m.

10. As with the earlier call on this date, Petitioner's Exhibit 2 shows a different time for this call. In Petitioner's Exhibit 2, the time shown under the "created on" column is 1:46. This time notation was made in error and a corrected summary was submitted to Respondent on August 9, 2022, by Pamela Sheehan, Senior Associate for EY Personal Finance. The assertion that this notation was an error is supported by further review of Respondent's Exhibit 5 and Petitioner's Exhibit 2. Both these documents contain a "case close" time within the "resolution" column in addition to the time notation within the "created on" column. The "case close" time notation did not change and is the same on both documents.

11. The Plan Choice Administrator received and processed a completed second election for Petitioner's account to transfer from the FRS Pension Plan to the FRS Investment Plan on December 11, 2007. This second election request was made using the MyFRS.com website.

12. In completing a second election on the MyFRS.com website, a participant is advised of the resources available to assist in making an informed choice, and explicitly advised that the election is a one time second election.

13. An Investment Plan Second Election Choice Confirmation Statement was sent to Petitioner at her address of record on December 11, 2007. The effective date of this election was January 1, 2008. This statement again advised that this was her final election, and that she must remain in the Investment Plan until her retirement from FRS-covered employment.

14. Petitioner's spouse made a call to the MyFRS Financial Guidance Line on February 13, 2008 and was given general vesting information relating to the Opening Account Balance in Petitioner's Investment Plan account. On April 21, 2010, per Respondent's call log, Petitioner provided authorization for her spouse to have full access to her account.

15. Other than a brief call on July 26, 2011 to request duplicate statements for Petitioner's trades, no further calls were made to the MyFRS Financial Guidance Line until June 14, 2022. During this call Petitioner inquired about a second election and was advised that none was available.

CONCLUSIONS OF LAW

16. Movement between the two FRS plans is governed by Section 121.4501(4)(f), Florida Statutes. This section states, in pertinent part:

> (f) After the period during which an eligible employee had the choice to elect the pension plan or the investment plan, or the month following the receipt of the eligible employee's plan election, if sooner, the employee shall have one opportunity, at the employee's discretion, to choose to move from the pension plan to the investment plan or from the investment plan to the pension plan. Eligible employees may elect to move between plans only if they are earning service credit in an employer-employee relationship consistent with s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections are effective on the first day of the month following the receipt of the election by the third-party administrator and are not subject to the requirements regarding an employer-employee relationship or receipt of contributions for the eligible employee in the effective month, except when the election is received by the third-party administrator.

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

17. As provided in the above statute, members of the FRS have one opportunity to switch plans after their initial election. Because Petitioner used her one-time second election in December of 2007, she has exhausted her only opportunity to move between plans.

18. Pursuant to Section 121.4501(8)(g), Florida Statutes, the Respondent's action in enrolling Petitioner in the Investment Plan pursuant to her second election is presumed to have been taken at Petitioner's request and with her full knowledge and consent. This section states:

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

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

19. Here, the Plan Choice Administrator sent notice to Petitioner that she had utilized her second election on December 11, 2007. The notice was mailed to the address of record and is presumed to have been received. *Brake v. State of Florida,* 473 So.2d 774 (Fla. 3rd DCA 1985).

20. Petitioner did not call to inquire about the election until June 14, 2022, more than 15 years after the election was made.

21. Petitioner seeks to overcome this presumption by arguing that her then-spouse submitted the second election form without her knowledge and consent. To support her argument she attempts to show that she was not present during the telephone calls to the MyFRS Financial Guidance Line on December 10, 2007 when the issue was discussed by her spouse.

22. She claims that she could not have been present to authorize the calls, because based on the uncorrected time notations on the call summaries, she was at work when the calls were made.

23. The documents show, however, that the time notifications Petitioner is relying on were made in error. Based on the actual time of the calls, which is consistent on both the initial and corrected call summaries, Petitioner could have been present during those calls. In fact, during the first call on December 10, 2007, Petitioner participated in the telephone call and provided authorization for her spouse to get information about her account.

24. In addition, the second election request was not made during those telephone calls, but through the MyFRS.com website. To access Petitioner's account and initiate a second election request via the MyFRS.com website, the individual would have had to have had Petitioner's personal account information.

25. Respondent, as an administrative entity of the State of Florida, has only those powers conferred upon it by the legislature. See, e.g., *Pesta v. Dep't of Corrections*, 63 So.3d 788 (Fla. 1st DCA 2011). The Florida Administrative Procedure Act expressly provides that statutory language describing the powers and functions of such an entity are to be construed to extend "no further than ... the specific powers and duties conferred by the enabling statute." §§ 120.52(8) and 120.536(1), Fla. Stat.

26. Respondent is not authorized to depart from the requirements of these statutes when exercising its jurisdiction and has no power to enlarge, modify, or contravene the authority granted to it by the legislature. State, *Dept. of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco v. Salvation Ltd., Inc.*, 452 So. 2d 65, 66 (Fla. 1st DCA 1984); *Balezentis v. Dep't of Mgmt. Servs., Div. of Retirement*, Case No. 04-3263, 2005 WL 517476 (Fla. Div. Admin. Hrgs. March 2, 2005) (noting that agency "is not authorized to depart from the requirements of its organic statute when it exercises its jurisdiction").

27. Although not required to do so, Respondent has produced documentation from well over five years ago, in fact from over 15 years ago, which details how Petitioner's second election was made. Petitioner has presented assertions of lack of knowledge and consent and her own testimony regarding same, along with a proposed inference from SBA produced documents which is tenuous, and which also requires a weighing of evidence to counter those documents.

28. It is not the province of a presiding officer for the State Board of Administration conducting a proceeding under 120.57(2) to determine the admissibility of evidence or its weight, or to resolve disputes of fact. This would require that all parties waive their right to a 120.57(1) evidentiary hearing. Counsel for Petitioner asserts that the evidence submitted in this proceeding, consisting of Respondent's records and Petitioner's testimony, is sufficient to both overcome the strictures imposed by section 121.4501(8)(g) and to compel a second election made in 2007 to be voided.

29. The plain meaning terms of 120.4501(8)(g) specify how the presumption set out therein is to work. It may be overcome by specific kinds of evidence presented by Petitioner. In this case Petitioner has presented only the documents filed by the Respondent and alleges that they show that the second election was taken without her full knowledge or consent. I see no reasonable reading of the record that supports this allegation, but this is a conclusion dependent on my scrutiny and weighing of the evidence, and therefor is arguably in the realm of disputed facts, and outside the province of section 120.57(2), Florida Statutes. I make no finding regarding the credibility of Petitioner's testimony, as this also would be a matter beyond the proper scope of this proceeding.

RECOMMENDATION

I recommend that Petitioner be given the opportunity to choose to present her arguments to the Division of Administrative Hearings in a full evidentiary hearing, and that if she chooses not to do this, that Respondent SBA issue a final order denying the relief requested.

DATED this 5th day of April 2023.

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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STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION
Case No. 2022-0268

MICHELLE VAUGHAN,

Petitioner,

v.

STATE BOARD OF ADMINISTRATION,

Respondent.

_____/

PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER AND REQUEST FOR DOAH HEARING

Petitioner, Michelle Vaughan, submits these exceptions to the Hearing Officer's Recommended Order in the above-styled action. Pursuant to these exceptions, the Petitioner respectfully requests that this matter be forwarded to the Division of Administrative Hearings for a full evidentiary hearing on this matter.

Exception No. 1. Petitioner excepts to Finding of Fact No. 3 as "undisputed." The finding states, "On December 10, 2007, Petitioner's then-spouse called the MyFRS Financial Guidance Line on her behalf..." Petitioner testified that she did not provide her ex-husband authority to act on her behalf. See transcript of proceedings, p.19, l.4.

Exception No. 2. Petitioner excepts to Finding of Fact No. 5 as "undisputed." The finding states, "The representative asked to speak directly to Petitioner. The call transcript indicates Petitioner got on the call, confirmed her address and date of birth for the representative, and authorized the representative to provide information to her spouse." Petitioner testified that she was working at the time of the calls, as they were originally time-stamped, and could not have called or been the person on the call. Transcript, p.14, l.14 – p.16, l.5.

Exception No. 3. Petitioner excepts to Finding of Fact No. 7 as "undisputed." The finding states:

> For this call, Petitioner's Exhibit For this call, Petitioner's Exhibit 2 shows a time under the "created on" column of 11:06. This time notation was made in error, and a corrected summary was submitted to Respondent on August 9, 2022, by Pamela Sheehan, Senior Associate for EY Personal Finance. The assertion that this notation was an error is supported by further review of Respondent's Exhibit 5 and Petitioner's Exhibit 2. Both these documents contain a "case close" time within the "resolution" column in addition to the time notation within the "created on" column. The "case close" time notation did not change and is the same on both documents.

Petitioner excepts to this fact as not having any basis in evidence. No representative of the Plan Administrator testified to how the time stamp for the "case closed" time works, and this was nothing more than argument made by the SBA in their proposed order.

Exception No. 4. Petitioner excepts to Finding of Fact No. 8 as "undisputed." The finding states: "A review of the time notation in the "resolution" column of both Respondent's Exhibit 5 and Petitioner's Exhibit 2 shows that this call was made at 4:14:56 p.m." The Petitioner's entire argument is based on disputing these entries, and the fact is in dispute.

Exception No. 5. Petitioner disputes Finding of Fact No. 9 as "undisputed." The finding states: "Petitioner's spouse stated that they had made a switch from the Pension Plan to the Investment Plan through the MyFRS.com website." The transcript of the call shows the ex-husband stating he made the switch, not "they" or the Petitioner. See Respondent's exhibit 7, p.44, lines 18-23 – ex-husband stating, "I just did it right now." Petitioner's argument refers to this statement by the ex-husband as making the switch without Petitioner's authority.

Exception No. 6. Petitioner disputes Finding of Fact No. 10 as "undisputed." The argument is the same as that argued above in Exception No. 3, above.

Exception No. 7. Petitioner disputes Finding of Fact No. 13 as "undisputed." Petitioner disputes that she received this document.

Exception No. 8. Petitioner excepts to Conclusions of Law 23, 27 and 29 as they are based on weighing evidence and deciding facts in dispute.

CONCLUSION

The Petitioner requests that the State Board of Administration forward this matter to the Division of Administrative Hearings for a full evidentiary hearing.

Respectfully Submitted this 20th day of April 2023.

PAUL DARAGJATI PLC

/s/ Paul Daragjati

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 20, 2023, I electronically filed the foregoing with:

Agency Clerk
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and served via electronic mail on the same date to:

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