STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

SERGIO ALVAREZ, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	Case No. 2018-0342

FINAL ORDER

On May 17, 2019, 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, Sergio Alvarez, and upon counsel for the Respondent. Both parties timely filed a Proposed Recommended Order. Neither party filed exceptions, which were due on June 1, 2019. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

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.

FINDINGS OF FACT

The Findings of Fact set forth in the presiding officer's Recommended Order hereby are adopted in their 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.

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.

MATERIAL UNDISPUTED FACTS

The Material Undisputed Facts set forth in 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 paragraph 7 specifically are incorporated by reference as if fully set forth herein.

The Conclusions of Law set forth in Paragraphs number 8 through 14 hereby are rejected *in toto*. This Final Order substitutes and adopts the following Conclusions of Law for those seven paragraphs as follows and adds three additional 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, those seven conclusions of law that are hereby rejected:

8. The SBA, as an administrative entity of the State of Florida, has only has those powers that are conferred upon it by the Legislature. *See, e.g., Pesta v. Department of Corrections*, 63 So.3d 788 (Fla. 1st DCA 2011); *Department of Revenue ex rel. Smith v. Selles*, 47 So.3d 916 (Fla. 1st DCA 2010); *Florida Elections Commission v. Davis*, 44 So.3d 1211 (Fla. 1st DCA 2010). In this connection, the Florida Administrative Procedure Act expressly states that statutory language describing the powers and functions of such an entity is to be construed to extend "no further than ... the specific powers and duties conferred by the enabling statute." Sections 120.52(8) and 120.536(1), Florida Statutes. Thus, an administrative entity has no power to act in a manner that enlarges, modifies, or contravenes the authority that the legislature has granted to it. *State, Dept. of Business Regulation, Div. of Alcoholic Beverages and Tobacco v. Salvation Ltd., Inc.*, 452 So.2d 65 (Fla. 1st DCA 1984).

However, whenever a statute does impose a duty on an administrative entity, such statute confers by implication, the power and reasonable means necessary for the performance of that duty. A power to act will be implied whenever the terms of a statute are such that it may be reasonably assumed that the power or powers to be implied was/were in the legislative mind and such implied power(s) is (are) essential to effectuate the powers that are expressly granted. *In re Warner's Estate*, 160 Fla. 460, 35 So.2d 296 (1948).

Section 121.35, Florida Statutes established the State University System Optional Retirement Program (SUSORP). This section states, in pertinent part, that:

> (1)[t]he **Department of Management Services** shall establish an optional retirement program under which contracts providing retirement and death benefits may be purchased for eligible members of the State University System who elect to participate in the program. The benefits to be provided for or on behalf of the participants in such optional retirement program shall be provided through individual contracts or individual certificates issued for group annuity or other contracts. ***
>
> (6)(a) The optional retirement program authorized by this section **shall be administered by the department** [of management services]. The **department** shall adopt rules establishing the responsibilities of the institutions in the State University System in administering the optional retirement program. ***
>
> (c) Effective July 1, 1997, the State Board of Administration shall review and make recommendations to the department on the acceptability of all investment products proposed by provider companies of the optional retirement program before they are offered through annuity contracts to the participants and may advise the department of any changes necessary to ensure that the optional retirement program offers an acceptable mix of investment products. **The department shall make the final determination** as to whether an investment product will be approved for the program. *** [emphasis added]

Pursuant to Section 121.35, Florida Statutes, the Department of Management Services ("DMS") clearly is charged by with administering the SUSORP, including promulgating all required rules. The State Board of Administration is charged only with reviewing and making recommendations to DMS as to the acceptability of proposed investment products to be offered under SUSORP and the acceptability of the mix of investment products to be offered. No other powers are granted to the SBA under Section 121.35, Florida Statutes with respect to SUSORP, not even the power to **require** DMS to offer certain investment products under SUSORP. Thus, while Section 121.35 does charge the SBA with certain advisory duties regarding the types of products to be offered in SUSORP, those powers cannot be extended to cover the administration of SUSORP,

which the statute specifically places within the sole purview of DMS. When the legislature includes particular language in one section of the statute but not in another of the same statute, the omitted language is presumed to have been excluded intentionally. *See, e.g., Board of Trustees of Florida State University v.* Esposito, 991 So.2d 924 (Fla. 1st DCA 2008); L.*K. v. Department of Juvenile Justice*, 917 So.2d 919 (Fla. 1st DCA 2005). Thus, because the only duties granted to the SBA under Section 121.35, Florida Statutes, are advisory, it is clear that the legislature did not intend for the SBA to have powers or control over DMS concerning the administration of SUSORP.

In addition, while the SBA is charged under Section 121.4501(1), Florida Statutes, with the duty of establishing a defined contribution plan, meeting the requirements of Internal Revenue Code Section 401(a), for members of the Florida Retirement System, it cannot be concluded that it would be essential for the SBA to have certain implied powers over the administration of SUSORP in order to fulfill its statutory obligations with respect to the creation and administration of that defined contribution plan. Section 121.35(1), Florida Statutes specifically states that SUSORP is an Internal Revenue Code Section 403(b) plan that is offered in lieu of participation in the Florida Retirement System. Under SUSORP, participants contract directly with approved provider companies offering group annuity or similar products. The provider companies supply to SUSORP participants, on an annual basis, a written program description discussing the soundness of the SUSORP plan and available benefits thereunder. Unlike the situation involving the Pension and Investment Plans, neither DMS nor the SBA is required to provide detailed educational plan information about SUSORP. *See,* Section

121.35(6)(d), Florida Statutes. Thus, SUSORP clearly is a separate and distinct plan from the Investment Plan and is not part of the FRS.

. 9. Section 121.35(3), Florida Statutes, sets forth the manner in which an eligible employee may make an election into SUSORP. Section 121.35(3)(c), Florida Statutes, pertains to employees who became eligible to participate in SUSORP after January 1, 1993, and applies to two categories of employees. The first category, set forth in Section 121.35(3)(c)1., Florida Statutes, consists of employees who become eligible for SUSORP as a result of their initial employment. The second category, set forth in Section 121.35(3)(c)2.,Florida Statutes, consists of employees who are members of the "Florida Retirement System" as that term is contemplated by Section 121.35, Florida Statutes, and who later become eligible to participate in SUSORP due to a change in, or reclassification of, their position.

Section 121.35(3)(c) 2., Florida Statutes, by its plain meaning shows that if an eligible employee who was a member of the Florida Retirement System, as that term is contemplated by Section 121.35, becomes eligible to participate in SUSORP then that individual will cease participation in the FRS unless that individual otherwise elects to retain membership in the FRS.

It is important to consider what is meant by the term "Florida Retirement System" in Section 121.35, Florida Statutes. The issue is whether such term applies to both the Pension Plan and the Investment Plan.

10. In deciphering statutory language, it is necessary to harmonize the various subsections of a statute, such that a term used in one subsection has the same meaning as the same term used in another subsection. *Anderson Columbia v. Brewer*, 994 So.2d 419

(Fla. 1st DCA 2008). Whenever Section 121.35, Florida Statutes, refers to "Florida Retirement System" it connects those references to a concept that relates to only the Pension Plan.

For example, Section 121.35(3)(g), Florida Statutes, provides as follows:

> (g) An eligible employee who is a member of the Florida Retirement System at the time of election to participate in the optional retirement program shall retain **all retirement service credit** earned under the Florida Retirement System at the rate earned. Additional service credit in the Florida Retirement System may not be earned while the employee participates in the optional program, and the employee is not eligible for disability retirement under the Florida Retirement System. An eligible employee may transfer from the Florida Retirement System to his or her accounts under the State University System Optional Retirement Program a sum representing the present value of the employee's **accumulated benefit obligation** under the pension plan for any **service credit** accrued from the employee's first eligible transfer date to the optional retirement program through the actual date of such transfer, if such service credit was earned from July 1, 1984, through December 31, 1992. The present value of the employee's **accumulated benefit obligation** shall be calculated as described in s. 121.4501(3). Upon transfer, all service credit earned under the pension plan during this period is nullified for purposes of entitlement to a future benefit under the pension plan. [Emphasis added]

"Service credit" and "accumulated benefit obligation" are terms that are applicable only to the Pension Plan. *See*, Sections 121.021(17), 121.091, and 121.4501(2), (3), Florida Statutes. This is because the amount of the benefits received by Pension Plan members is based on a formula that takes into account the member's age, membership class, years of service credit and, depending upon when the member commenced employment, average of the 5 (five) or 8 (eight) highest years of salary. On the other hand, an Investment Plan member's benefit is comprised of employer and member contributions plus investment earnings, less any expenses and fees.

Further, Section 121.35(3)(c)3., Florida Statutes, specifically states that if a SUSORP eligible employee fails to execute a contract with an approved SUSORP provider company after making the SUSORP election, then that employee shall be deemed to be a member of the "Florida Retirement System," rather than a member of SUSORP, and the employer contributions for such member will be directed to the "Florida Retirement System Trust Fund." The "System Trust Fund" is defined in Section 121.021, Florida Statues, which provides definitions related to the Pension Plan. Section 121.021(36), Florida Statutes, defines this particular "trust fund" as:

> ...the trust fund established in the State Treasury by this Chapter for the purpose of holding and investing the contributions paid by members and employers and paying the benefits to which members or their beneficiaries may become entitled.***

Section 121.35(3)(c)3., Florida Statutes, does not make any reference to the separate and distinct "Florida Retirement System Investment Plan Trust Fund" that is established in Section 121.4502, Florida Statutes, and that was created for the purpose of holding the assets of the Investment Plan in trust for the exclusive benefits of the Investment Plan members and their beneficiaries.

The doctrine of "*noscitur a sociis*,"means that a word in the statute is "known by the company it keeps." *Stratton v. Sarasota County*, 983 So.2d 51 (Fla. 2d DCA 2008). Thus, it is necessary to look at other words used within a string of concepts to determine overall intent. General and specific words capable of analogous meaning when associated together take color from each other so that general words are restricted to a sense analogous to the specific words. *Quarantello v. Leroy*, 977 So.2d 648, 654 (Fla. 5th DCA 2008). In this instance, it is clear that references to "Florida Retirement System" in

Section 121.35, Florida Statutes, **mean the Pension Plan and not the Investment Plan**, since all words associated in Section 121.35, Florida Statutes, with "Florida Retirement System" are words that are relevant only to the Pension Plan and not to the Investment Plan.

11. Section 121.35, Florida Statutes, was enacted well before the provisions in Section 121.4501, *et. seq.,* that created the Investment Plan. The legislature is presumed to pass subsequent enactments with full awareness of all prior enactments and to have an intent that the prior enactments **remain in force**. *Cannella v. Auto-Owners Ins. Co.*, 801 So.2d 94 (Fla. 2001). Certain provisions related to the Investment Plan were later set forth in Section 121.35, such as the provision in Section 121.35(3)(g) that indicates that the accumulated benefit obligation of an employee who is a member of the Florida Retirement System at the time the employee elects SUSORP will be calculated as described in s. 121.4501(3), a provision that pertains to the Investment Plan. However, no references to the Investment Plan were made in Section 121.35(3)(c), Florida Statutes. The legislature is presumed not to have intended to write a statute that renders void in its application another statute that has not been amended or repealed. *Saridakis v. State*, 936 So.2d 33 (Fla. 4th DCA 2006). By express statutory terms, the only categories of employees permitted under Section 121.35, Florida Statutes, to elect SUSORP are new hires and those employees that already are members of the **Pension Plan**. Section 121.35, Florida Statutes, does not provide an opportunity for Investment Plan members to directly elect SUSORP, nor does any provision in Section 121.4501, Florida Statutes, pertaining to the Investment Plan. Instead, Investment Plan members must first switch to

the Pension Plan, and once they are Pension Plan members, then they can elect to participate in SUSORP.

12. Section 121.35(3)(g), Florida Statutes, allows an employee who becomes eligible to elect to participate in SUSORP and who already is a member of the **Pension Plan** to transfer to SUSORP. However, there is no comparable statutory authority that allows such an individual who is a member of the Investment Plan to transfer directly from the Investment Plan to SUSORP.

13. Section 121.4501(4)(a)1.a., Florida Statutes applies to employees such as Petitioner, who was initially employed in a regularly established position prior to January 1, 2018 and chose to participate in the Investment Plan. The section states that the decision to participate in the Investment Plan generally is irrevocable (except for a one-time second election to transfer to the Pension Plan). This statutory section provides:

> ... such employee shall, by default, be enrolled in the pension plan at the commencement of employment, and may, by the last business day of the 5th month following the employee's month of hire, elect to participate in the investment plan. The employee's election must be made in writing or by electronic means and must be filed with the third-party administrator. **The election to participate in the investment plan is irrevocable, except as provided in paragraph (f).** [emphasis added]

14. In view of the fact that, pursuant to Section 121.4501(4)(a)1.a., Florida Statutes, an Investment Plan election generally is irrevocable, and there is no statutory authority that allows an Investment Plan member to transfer directly into SUSORP, Respondent, SBA, concludes that if an employee, such as the Petitioner, who is participating in the Investment Plan, changes employers so that the employee becomes eligible for SUSORP, then such employee must first use his or her second election to

transfer to the Pension Plan. Once the employee is a member of the Pension Plan, then the employee may elect to participate in SUSORP.

15. Petitioner argues that he should be able to open a SUSORP account with a zero initial balance, while retaining his Investment Plan account with its existing balance. However, Section 121.35(3)(h), Florida Statutes, specifically states that a participant in SUSORP "...cannot participate in more than one state-administered retirement system, plan or class simultaneously." Under Section 121.021(16), Florida Statutes, a person's "participation" in a retirement plan occurs when that individual "...becomes a member." For Investment Plan purposes, a member is defined under Rule 19-11.001(38), Florida Administrative Code as including "...an employee who elected to participate, defaulted, or is considered a renewed member pursuant to section 121.122, F.S., and has an account established, in the Investment Plan as a result of current or **previous** employment with an FRS-covered employer***" [emphasis added]. An individual who has an account established may make changes to the allocations of his or her account funds among the various available investment options in accordance with Section 121.4501(15), Florida Statutes. This exercise of control over account assets continues as long as funds still remain in the member's account, even if additional funds are not being contributed to such account. Thus, Petitioner's proposed "solution" to his issue would be in direct conflict with Section 121.35(3)(h), Florida Statutes, and, therefore, would not be permissible under Florida law.

16. The Respondent is charged with implementing Chapter 121, Florida Statutes. It is not authorized to depart from the requirements of these statutes when exercising its jurisdiction. *Balezentis v. Department of Management Services, Division of Retirement,*

2005 WL 517476 (Fla. Div. Admin. Hrgs.). There is no statutory provision that expressly authorizes a direct transfer from the Investment Plan into SUSORP. Moreover, Section 121.4501, Florida Statutes expressly provides that an election to participate in the Investment Plan is irrevocable. Further, it is clear under Section 121.35(3)(h), Florida Statutes, that Petitioner cannot simply cease participation in his Investment Plan account in order to elect SUSORP.

Florida law does not require members of the Investment Plan to have the exact same type of options that are available to members of the Pension Plan. For example, members of the Pension Plan meeting certain eligibility criteria may elect to "freeze" their current Pension Plan benefit and direct all future retirement plan contributions to the Investment Plan. Section 121.4501(3)(a); Rules 19-11.001, 19-11.006, and 19-11.007, Florida Administrative Code. However, there are no provisions under Florida law that would permit an Investment Plan member to "freeze" his or her Investment Plan account in order to participate in the Pension Plan.

As such, in order for Petitioner to enroll in SUSORP upon his employment with UCF, he would be required to use his second election to buy into the Pension Plan, and then he would be able to, pursuant to the provisions of Section 121.35(3)(g), Florida Statutes, to transfer to SUSORP.

17. While the current statutory scheme may produce what could be deemed as an "unfair" result for members of the Investment Plan that later become eligible to participate in SUSORP and, in order to participate, must first switch to the Pension Plan, the ability to resolve any such unfairness lies with the Legislature and not with the SBA. Any action attempted by the SBA to remedy such unfairness would be ultra vires.

ORDERED

Petitioner's request that he be permitted to enroll in the State University Optional Retirement System ("SUSORP"), retroactive to his first day of employment with the University of Central Florida, without being required first to transfer from the Florida Retirement System ("FRS") Investment Plan to the Pension Plan and to pay any costs associated with the switch, hereby is denied.

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 14th day of August, 2019, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Daniel Beard

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

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

Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Sergio Alvarez, pro se, both by email transmission at [redacted] and by U.P.S. to [redacted]; and by email transmission to Brian Newman, Esq. (brian@penningtonlaw.com) and Brandice Dickson, Esq., (brandi@penningtonlaw.com) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 14th day of August, 2019.

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

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

SERGIO ALVAREZ,

Petitioner,

vs. Case No.: 2018-0342

STATE BOARD OF ADMINISTRATION,

Respondent.

_____/

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on December 10, 2018, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Sergio Alvarez, pro se
[redacted]

For Respondent: Brandice D. Dickson, Esquire
Pennington, P.A.
215 South Monroe Street, Second
Floor Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

The issue raised by Petitioner is whether he should be enrolled in the State University System Optional Retirement Plan (SUSORP), without paying to first transfer from the Florida

EXHIBIT A

Retirement System (FRS) Investment Plan to the FRS Pension Plan, retroactive to the first day of his employment with the University of Central Florida (UCF).

PRELIMINARY STATEMENT

Petitioner attended the hearing in person and testified on his own behalf. Respondent presented the testimony of Allison Olson, Director of Policy, Risk Management and Compliance, Office of Defined Contribution Programs. Petitioner's Composite Exhibit 1 and Respondent's Exhibits 1 through 3 were admitted into evidence without objection.

I entered an Order of Abatement on the day after the hearing to allow Respondent to communicate with the Florida Department of Management Services, Division of Retirement (DOR) regarding Petitioner's status, so that the factual details of this case could be clarified. Respondent filed a Status Report and Request for Dismissal on January 10, 2019, to which Petitioner filed a response. By my Order of January 17, 2019 I requested final clarification of a fact question not answered in the Status Report. This clarification was made on or about March 25, 2019. In accordance with my Order of March 29, 2019, the parties filed Proposed Recommended Orders by April 26, 2019.

MATERIAL UNDISPUTED FACTS

1. Petitioner was employed by the Florida Department of Agriculture and Consumer Affairs on June 3, 2013 and had until November 27, 2013 to make an initial election between the FRS defined contribution Investment Plan and the FRS defined benefit Pension Plan.

2. On August 12, 2013, Petitioner used his initial election to enroll in the Investment Plan.

3. Petitioner became employed with the University of Central Florida on August 8, 2018 in a position eligible for the State University System Optional Retirement Plan.

4. On August 21, 2018, Petitioner completed the paperwork necessary to enroll in the SUSORP. By letter of August 16, 2018, UCF was notified by the Division of Retirement that because Petitioner was a member of the FRS Investment Plan, he should not be in the SUSORP. Petitioner later was told by DOR personnel that there was no statutory provision allowing a direct transfer from the FRS Investment Plan to the SUSORP, and that to join the SUSORP, he had to first use his second election to transfer to the Pension Plan and then elect to participate in the SUSORP.

5. Petitioner filed a Request for Intervention asking to be allowed to participate in the SUSORP. He also stated his willingness to either buy into the Pension Plan if the money required to do that (some [redacted] was transferred to his SUSORP account as an opening balance, or to leave his current balance (some $[redacted]) in the Investment Plan until retirement and begin a new SUSORP account with a zero balance. That request was denied. Petitioner then filed a Petition for Hearing requesting the same relief, and this administrative proceeding followed.

6. During the requested hearing on December 10, 2018, the parties agreed that Petitioner was eligible to join the SUSORP, and that the remaining issues - as to how Petitioner could enroll in the SUSORP and the effect of that enrollment in the SUSORP – fell under the purview of statutes administered by DOR, and that this case should be in abeyance pending consultation with the Division of Retirement. Petitioner and DOR personnel consulted directly with each other on March 25, 2019, and Petitioner filed a report of same as follows:

I spoke with Joyce Morgan (Bureau Chief, copied in this email) and Ladasiah Ford (Attorney) from the Division of Retirement, earlier today. Here is a summary of their position regarding my case.

- I can buy into the pension plan with a one-time contribution that has previously been estimated at $[redacted] (as of November 2018). If my investment plan balance is not sufficient to cover this contribution, I will have to pay out of pocket. I will not be allowed to pay the balance as a tax deductible contribution from future paychecks.
- Once I am a member of the pension plan, I can rapidly transfer to SUSORP, where my initial account balance will be zero.
- Since I will make this 'second choice' before the FRS Pension vesting period, I will lose the existing pension benefits I just payed more than $[redacted] for.

In summary, transferring to the SUSORP will cost me all my hard earned retirement savings, and it is unlikely that I would ever recover them.

In my opinion, my case constitutes a clear violation of Florida Statutes 121.35 (3)(c)2.

There is a solution that solves this violation of Florida law: the Division of Retirement allows me to open a SUSORP account with an initial balance of zero (for future contributions), and the SBA allows my investment plan to keep its existing balance (I would pay any required maintenance fees for all funds). This would not constitute a violation of F.S. 121.021, which makes no mention of the optional retirement plan, or F.S. 121.45, where there is no reference to transfers from or to SUSORP.

(Emphasis added.)

CONCLUSIONS OF LAW

7. Petitioner asserts that the law requires that he be given a reasonable pathway to SUSORP participation, and that asking him to incur a non-refundable cost of approximately $[redacted] from his retirement assets is not reasonable or legal. In his Proposed Recommended Order, he refers as follows to the applicable statutes:

Eligibility for participation in the SUSORP is governed by Section 121.35 (2), Florida Statutes. That section states, in pertinent part:

(2) ELIGIBILITY FOR PARTICIPATION IN OPTIONAL PROGRAM.—

> **(a) Participation in the optional retirement program provided by this section shall be limited to persons who are otherwise eligible for membership or renewed membership in the Florida Retirement System and who are employed in one of the following State University System positions:**
>
> **1. Positions classified as instructional and research faculty which are exempt from the career service under the provisions of s. 110.205(2)(d).**

§ 121.35 (2), Fla. Stat. Subsection (2)(a) by its plain meaning affirms Petitioner's eligibility to participate in SUSORP.

Election of the SUSORP is governed by Section 121.35 (3), Florida Statutes. That section states, in pertinent part:

> **(c) Any employee who becomes eligible to participate in the optional retirement program on or after January 1, 1993, shall be a compulsory participant of the program unless such employee elects membership in the Florida Retirement System. Such election shall be made in writing and filed with the personnel officer of the employer. Any eligible employee who fails to make such election within the prescribed time period shall be deemed to have elected to participate in the optional retirement program.**

§ 121.35 (3)(c), Fla. Stat. (emphasis added). Subsection (c) is clear that any employee that becomes eligible to participate in the SUSORP "shall be a compulsory participant" of the SUSORP.

Situations where eligibility for the SUSORP results after a change in status due to appointment, promotion, transfer, or reclassification are governed by Section 121.35 (3)(c), Florida Statutes. That section states, in pertinent part:

> **(2) <u>Any employee whose optional retirement program eligibility results from a change in status due to the subsequent designation of the employee's position as one of those specified in paragraph (2)(a) or due to the employee's appointment, promotion, transfer, or reclassification to a position specified in paragraph (2)(a) shall be enrolled in the optional retirement program upon such change in status</u> and shall be notified by the employer of such action. If, within 90 days after the date of such notification, the employee elects to retain membership in the**

> **Florida Retirement System, such continuation of membership shall be retroactive to the date of the change in status.**

§ 121.35 (3)(c)(2), Fla. Stat. (emphasis added). Subsection (3)(c)(2) affirms legislative intent of compulsory participation in the SUSORP by "any employee" whose eligibility results from a change in status.

The Florida Retirement System as a whole is bound to the Internal Revenue Code of the United States, as governed in Section 121.30, Florida Statutes. This section states, in pertinent part:

> **(7) Any provision of this chapter relating to an optional annuity or retirement program must be construed and administered in such manner that such program will qualify as a qualified pension plan under applicable provisions of the Internal Revenue Code of the United States.**

§ 121.30 (7), Fla. Stat. On the issue of rollover distributions, the Internal Revenue Code of the United States, 26 U.S. Code § 401 states, in pertinent part:

> **(31) Direct transfer of eligible rollover distributions.—**
>
> **(A) In general.—A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that if the distributee of any eligible rollover distribution—**
>
> **(i) elects to have such distribution paid directly to an eligible retirement plan, and**
>
> **(ii) specifies the eligible retirement plan to which such distribution is to be paid (in such form and at such time as the plan administrator may prescribe), such distribution shall be made in the form of a direct trustee-to-trustee transfer to the eligible retirement plan so specified.**

26 U.S. Code § 401(31)(A). (emphasis added). The Internal Revenue Code of the U.S., in conjunction with Subsection 121.30 (7), require the FRS administrator to allow a rollover transfer of Petitioner's existing retirement benefits from the FRS Investment Plan to the SUSORP, as both are eligible plans under the FRS umbrella.

As provided by the above referenced statutes, any person who is appointed as a faculty member in the State University System, is an eligible participant in the SUSORP. Because Petitioner became employed in a SUSORP eligible position, he must be given at least a reasonable election pathway to participate in the SUSORP.

The "election" that the Division of Retirement is presenting Petitioner is not a reasonable election pathway. In the letter to Petitioner, the Division of Retirement states that Petitioner must first transfer to the FRS Pension Plan before becoming eligible for transfer to the SUSORP. To transfer to the FRS Pension Plan, Petitioner must incur a non-refundable cost estimated to be $[redacted] at the time of making an election to participate in the Pension Plan. In the letter, the Division of Retirement states "any personal resources paid will not transfer to the SUSORP".

Since Petitioner was initially employed with the Florida Department of Agriculture and Consumer Services in 2013, he has not met the vesting requirements of the FRS Pension Plan. In this case, the letter states that after transfer to SUSORP:

"If you terminate employment or die before you meet the vesting requirements of the Pension Plan:

- **you nor your beneficiary, in the event of your death, would not be entitled to receive any personal out-of-pocket resources paid to complete the transfer.**

- **you or your beneficiary, in the event of your death, will only be entitled to receive a refund of your mandatory employee contributions (without interest) paid into the Pension Plan after the date of the transfer.**

- **if you do not participate in the Pension Plan after your SUSORP participation, you will not have any mandatory employee contributions eligible for a refund."**

[Ex. R-1] (emphasis in original). Because Petitioner has not met the vesting requirements of the FRS Pension Plan, this "election" to enroll in SUSORP requires a non-refundable expense of $[redacted] In the event of death or terminating employment with UCF, Petitioner will not receive any pension benefits in exchange of this non-refundable expense.

Petitioner Proposed Recommended Order at paragraphs 7-12.

8. Respondent asserts that Petitioner cannot be a member of more than one state administered retirement system, plan, or class simultaneously, citing section 121.35(3)(h), Florida Statutes, which provides in pertinent part:

> A participant in the optional retirement program may not participate in more than one state-administered retirement system, plan, or class simultaneously. Except as provided in s. 121.052(6)(d), a participant who is or becomes dually employed in two or more positions covered by the Florida Retirement System, one of which is eligible for the optional program and one of which is not, may remain a member of the optional program and contributions shall be paid as required only on the salary earned in the position eligible for the optional program during the period of dual employment; or, within 90 days after becoming dually employed, he or she may elect membership in the Regular Class of the Florida Retirement System in lieu of the optional program and contributions shall be paid as required on the total salary received for all employment.

(emphasis added.) § 121.35(3)(h) Fla. Stat. The term "participate" is not defined, but is generally used to denote an employee who is both eligible for and making required contributions to a retirement system or plan. The SUSORP and the Investment Plan are both state administered retirement plans, but it is not in any way clear that what Petitioner proposes would cause him to be simultaneously a contributing member of more than one plan, especially since what follows in this section concerns dual employment, which is not pertinent to this matter involving successive employment.

9. The SUSORP is administered by the Department of Management Services, not the State Board of Administration. *See* §§ 121.35(2)(c) and (6)(a), Fla.Stat. (2018). In correspondence of October 5, 2018 to SBA personnel, regarding Petitioner, a Department of Management Services analyst states:

> This member has been informed by Jim on a number of occasions that he is not eligible for SUSORP due to the fact that he is enrolled in the Investment plan. I would love to respond to his request, however, the only supporting evidence that I have to back Jim's advice to the member is the fact that no provision exists in

> statute that allows for this. I do not think that my response would be satisfactory to this member. Therefore, I must leave his case in your custody. Please let me know if you would like to discuss.

No statute, rule, or case law has been cited to me which expressly addresses the situation presented by this case, and the above referral of Petitioner to the "custody" of Respondent SBA has not provided a meaningful answer to his question or adequately rebutted his assertions.

10. The enactment effective January 1, 2019 of Article V, Section 21 of the Florida Constitution, which states:

> Judicial interpretation of statutes and rules.---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.

has altered the balance in cases such as this where interpretation of statutes or rules is required. While Petitioner must still bear the burden of proof, an agency's interpretation of its statutes is no longer entitled to a presumption of correctness.

11. Here Petitioner is vested in his current FRS Investment Plan account. There is no basis for forfeiture of that account under Section 112.3173, Florida Statutes. He has proposed a resolution of the current impasse which comports with applicable law and does not require forfeiture of his account.

12. Section 121.35(3)(c)(2) makes participation in the SUSORP mandatory for any employee whose eligibility results from a change in status to a State University System position as specified in Section 121.35(2)(a). It is undisputed that Petitioner's position with UCF is subject to compulsory SUSORP participation, by operation of statute, and an agency may not interpret the statutes to provide otherwise.

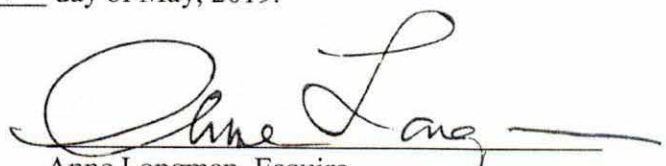
13. I cannot conclude that, as a matter of law, Petitioner is not permitted to either transfer the value of his Investment Plan account as his opening SUSORP balance, or to simply maintain his current Investment Plan account with no additional contributions, and commence participation in the SUSORP with a zero balance beginning the date of his hire.

14. Respondent's assertion that it has no authority to administer the SUSORP may be accurate, but this case has been referred to it by DOR, and as part of the integrated FRS under Section 121.021(3), Florida Statutes, it must assist in coordinating SUSORP administration. I note also that Respondent's letter of October 8, 2018 is couched in terms of proposed final agency action, and this administrative remedy offered.

RECOMMENDATION

Having considered the law and the undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order granting, to the extent of its jurisdiction, the relief requested by Petitioner.

RESPECTFULLY SUBMITTED this 17th day of May, 2019.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
315 South Calhoun Street, Suite 830
Tallahassee, FL 32301-1872

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions must be filed with the Agency Clerk of the State Board of Administration and served on opposing counsel at the addresses shown below. The SBA then will enter a Final Order which will set out the final agency decision in this case.

Filed via electronic delivery with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
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Petitioner

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