STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

SERGIO ALVAREZ,)
)
Petitioner,)
)
vs.) SBA No. 2018-0342
) DCA Case No. 5D-19-2679
STATE BOARD OF ADMINISTRATION,)
)
Respondent.)
)

AMENDED FINAL ORDER ON REMAND

Petitioner, Sergio Alvarez, was already enrolled in, and a member of, the Florida Retirement System ("FRS") Investment Plan when he was hired by the University of Central Florida ("UCF") in a position that entitled him to participate in the State University System Optional Retirement Plan ("SUSORP) if he chose. When Petitioner attempted to join SUSORP, he was informed by the Division of Retirement ("DOR") of the Department of Management Services ("DMS") that he would first have to transfer to the FRS Pension Plan before he could become a member of SUSORP, as there is no statutory authority that would allow a direct transfer from the FRS Investment Plan to SUSORP. Since Petitioner would not be vested in his FRS Pension Plan account, he would effectively "forfeit" his Pension Plan account balance (about $41,000) as he would not accrue additional service credits for the Pension Plan once he became a member of SUSORP.

In response to DOR's determination, Petitioner filed a Petition for Hearing with the State Board of Administration ("SBA"), Plan Sponsor of the FRS Investment Plan,

requesting to participate in SUSORP, retroactive to his August 8, 2018 employment date with UCF and without being required to first transfer to the FRS Pension Plan and to pay any associated buy in amounts.

An informal hearing was held on December 18, 2018. On May 17, 2019, the Presiding Officer issued a Recommended Order (Exhibit 1), finding that pursuant to Section 121.35(3)(c)(2), Florida Statutes, Petitioner's position with UCF is subject to compulsory SUSORP participation. The Presiding Officer noted that if Petitioner did transfer first to the FRS Pension Plan, he would not be vested in his account assets and, as noted previously, would lose or "forfeit" all transferred funds. The Presiding Officer concluded that there is nothing, as a matter of law, that would prevent Petitioner from participating in SUSORP, with his SUSORP account having a zero balance as of his date of hire, while maintaining his FRS Investment Plan account with no further employer and employee contributions. The Presiding Officer further noted that Florida law does not contain any provisions that would allow for forfeiture of Petitioner's FRS Investment Plan account funds.

The SBA issued a Final Order reversing the Presiding Officer's Recommended Order and finding that there is no statutory authority that would allow a member of the FRS Investment Plan to transfer directly into SUSORP. Further, the Final Order noted that Section 121.35(3)(h), Florida Statutes, specifically provides that a participant in SUSORP "...may not participate in more than one state-administered retirement system, plan, or class simultaneously" [emphasis added]. Instead, such member would have to transfer first to the FRS Pension Plan and pay any associated buy-in costs. Then, as a

member of the FRS Pension Plan, the individual would be able to become a member of SUSORP pursuant to the specific provisions of Section 121.35, Florida Statutes.

The Petitioner appealed the Final Order, and the Fifth District Court of Appeal issued an Opinion on August 6, 2021 (Exhibit 2), reversing the Final Order and finding that Petitioner is entitled to be a participant in SUSORP retroactive to his date of employment with UCF. The Court noted Mr. Alvarez was compelled by law to participate in SUSORP unless he opted out and chose to remain in the FRS. Mr. Alvarez did not opt out of SUSORP. According to the plain meaning of the applicable statute, the Court found that Mr. Alvarez is a compulsory member of SUSORP, and that there is nothing in the statute that first requires him to convert his FRS Investment Plan account into an FRS Pension Plan account before becoming a member of SUSORP. With respect to the funds Mr. Alvarez has in his FRS Investment Plan account, the Court agrees that there is nothing in Section 121.35, Florida Statutes, that would allow him to transfer those plan assets into his SUSORP account. The Court noted that Mr. Alvarez is willing to have "passive ownership" of his FRS Investment Plan account, such that the account would receive no further employer and employee contributions, and Mr. Alvarez would not take any further action with respect to such account until he retires. Mr. Alvarez had questioned during the appellate proceedings whether he would be able to utilize a trustee-to-trustee rollover of his FRS Investment Plan account funds into SUSORP. The Court did not address that issue both because Mr. Alvarez was willing to accept the remedy of "passive ownership" of his FRS Investment Plan account and because the matter has been remanded to the SBA for further proceedings consistent with the opinion. The Mandate associated with the aforementioned opinion was issued on August 31, 2021.

ORDERED

In accordance with the Fifth District Court of Appeals' Mandate, Mr. Alvarez is deemed eligible to be a member of SUSORP, as of August 8, 2018, his date of hire with UCF. The SBA will allow him to retain his FRS Investment Plan account, but no further contributions, whether employer or employee, may be directed to such account as long as Mr. Alvarez remains in SUSORP. The funds in his FRS Investment Plan account must remain there as long as he is actively employed with an FRS-participating employer. The Division will enroll Mr. Alvarez in SUSORP as of his date of hire with UCF, in compliance with the SUSORP requirements.

Mr. Alvarez had inquired whether he could utilize the rollover provisions of the Internal Revenue Code to transfer his FRS Investment Plan account funds directly into his SUSORP account. Treasury Regulation Section 1.402(c)-2 notes that any amount distributable to an employee from a qualified retirement plan is an eligible rollover distribution. But, in order for there to be a distribution from a qualified retirement plan such as the FRS Investment Plan, there must be a distributable event. Section 121.591, Florida Statutes, notes that no distributions may be made from the FRS Investment Plan "…unless the member has terminated employment as provided in s. 121.021(39)(a)…". Section 121.021(39)(a), Florida Statutes, states that termination of employment occurs when a plan member ceases all employment relationships with FRS-participating employers. Page 41 of the current FRS Investment Plan Summary Plan Description (July 2021) states that an FRS Investment Plan member:

> …will not be permitted to make withdrawals from the Plan while …still employed in any capacity by an FRS-participating employer… FRS employment encompasses providing **any** service **to any FRS-participating employer** through any arrangement (paid or unpaid),

including, but not limited to, a regularly established position, OPS, adjunct, election poll work, temporary employment, or working through a third-party that provides service to an FRS-participating employer.

In this case, Mr. Alvarez has not separated from service from all FRS-participating employers, as his current employer, UCF, is an FRS-participating employer. As such, Mr. Alvarez is not eligible to take a distribution from his FRS Investment Plan account. Further, the FRS Investment Plan is not being terminated. As such, since Mr. Alvarez has not experienced a distributable event, he is not eligible to take advantage of a rollover of his FRS Investment Plan account balance.

DONE AND ORDERED this 14 day of September, 2021, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

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

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

Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Sergio Alvarez, pro se, both by email transmission at sergio.alvarez@ucf.edu and by U.P.S. to 518 E. Amelia Street, Orlando, Florida 32803; and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) and Ruth Vafek (rvafek@ausley.com) and jmcvaney@ausley.com, Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 14 day of September, 2021.

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

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

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

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.

EXHIBIT !

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., <u>and has an account established, in the Investment Plan as a result of current or **previous** employment with an FRS-covered employer</u>***" [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
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 sergio.alvarez@ucf.edu and by U.P.S. to 518 E. Amelia Street, Orlando, Florida 32803; 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
518 E. Amelia Street
Orlando, FL 32803

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

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 $35,000) was transferred to his SUSORP account as an opening balance, or to leave his current balance (some $40,000) 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 $40,826 (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 $40,000 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 $40,000 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 $41,316 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 $41,316. 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.

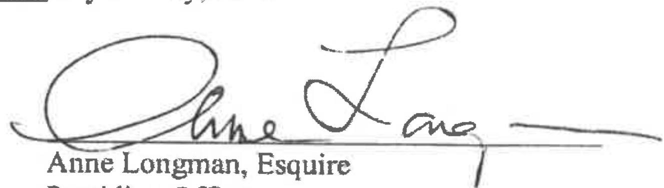
13. I cannot conclude that, as a matter of law, Petitioner is not permitted to either transfer the value of his Investment Plan account as his opening SUSORP balance, or to simply maintain his current Investment Plan account with no additional contributions, and commence participation in the SUSORP with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

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

SERGIO ALVAREZ,

Appellant,

v. Case No. 5D19-2679

STATE BOARD OF ADMINISTRATION,

Appellee.

________________________________/

Opinion filed August 6, 2021

Administrative Appeal from the
State Board of Administration.

Sergio Alvarez, Orlando, pro se.

Ruth E. Vafek and Deborah S. Minnis,
of Ausley McMullen, Tallahassee, for
Appellee.

EDWARDS, J.

Pro se Appellant Sergio Alvarez ("Alvarez"), appeals from a final order of the State Board of Administration ("SBA"), denying his request to transfer his fully vested retirement assets from his current Florida Retirement System

EXHIBIT 2

("FRS") Investment Plan into the State University System Optional Retirement Program ("SUSORP"). Alvarez argues that SBA misinterpreted the plain meaning of the provisions of chapter 121, Florida Statutes, pertaining to his participation in the SUSORP and regarding what will become of his already vested FRS Investment Plan assets. We agree and reverse SBA's final order. We hold that Alvarez is entitled to enroll in the SUSORP, retroactive to his first date of current employment with the University of Central Florida ("UCF"), without any requirement to convert his Investment Plan account to a Pension Plan account nor any requirement that he forfeit his Investment Plan retirement assets. We remand this matter to SBA and the Department of Management Services ("DMS") for further proceedings consistent with this opinion.

Background on Florida's Retirement Plans and Programs

Prior to 2000, FRS offered only a Pension Plan, or "defined benefit," option to eligible employees. The Pension Plan is established under Part I of chapter 121, Florida Statutes, and is administered by DMS pursuant to section 121.025, Florida Statutes (2018). In 2000, the legislature created the FRS Investment Plan or "defined contribution" option, established under Part II of chapter 121, *see* ch. 2000-169, § 3, Laws of Fla., and authorized

SBA[1] to administer it. § 121.4501, Fla. Stat. (2018). Nowadays, FRS contains two general plans—the Pension Plan and the Investment Plan. § 121.021(3), Fla. Stat. (2018); § 121.70(1), Fla. Stat. (2018) ("The Legislature recognizes and declares that the Florida Retirement System is a single retirement system, consisting of two retirement plans and other nonintegrated programs."). These two plans are administered by different entities, as DMS administers the Pension Plan and SBA administers the Investment Plan.

The Florida Legislature also created certain optional retirement programs offered in lieu of participation in FRS. *See, e.g.*, § 121.35, Fla. Stat. (2018) (specifically stating that the SUSORP is an Internal Revenue Code Section 403(b) plan that is offered "in lieu of participation in the Florida Retirement System"). The optional retirement program applicable to this proceeding is the SUSORP, which was created in 1984 and is only available to certain classes of state university employees. § 121.35(2)(a)(1)–(3), Fla. Stat. (delineating the classes of eligible employees). DMS is also the administrator of SUSORP. § 121.35(6), Fla. Stat. SUSORP is a desirable plan because the employer contributes more to an eligible employee's

[1] SBA is an entity created by the Florida Constitution. *See* Art. IV, § 4(e), Fla. Const. ("The governor as chair, the chief financial officer, and the attorney general shall constitute the state board of administration . . . .").

SUSORP account than the State contributes to an employee's FRS Investment Plan.[2]

Alvarez's History of State Employment

Alvarez commenced his employment as a Chief Economist with the Florida Department of Agriculture and Consumer Services on June 3, 2013, an FRS-participating employer. He had until November 27, 2013, to make an initial election between the FRS defined contribution Investment Plan and the FRS defined benefit Pension Plan. He made a timely election to enroll in the Investment Plan pursuant to section 121.4501(4)(a), Florida Statutes. This election became final and irrevocable on September 30, 2013. *See* Fla. Admin. Code R. 19-11.006(3) (2013). Alvarez was employed with the Department of Agriculture and Consumer Services from June 3, 2013, through August 3, 2018. Alvarez is fully vested in his current FRS Investment

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[2] *Compare* § 121.35(4)(a)(4), Fla. Stat. (2018) ("Effective July 1, 2012, each member of the optional retirement program shall contribute an amount equal to the employee contribution required in s. 121.71(3). The employer shall contribute on behalf of each such member an amount equal to the difference between 8.15 percent of the employee's gross monthly compensation and the amount equal to the employee's required contribution based on the employee's gross monthly compensation."), *with* § 121.571, Fla. Stat. (2018). *See also* Welcome to the Florida Retirement System For State University System SUSORP-Eligible Employees, available at https://www.myfrs.com/pdf/forms/SUSORP-Newsltr%206-22FP.pdf (last visited July 2, 2021).

Plan account (including employer contributions made thereto). *See* § 121.4501(6)(a)–(b), Fla. Stat.

On August 8, 2018, Appellant became employed with UCF as a research and instructional faculty, a SUSORP eligible position. He completed and submitted the paperwork necessary to enroll in SUSORP.

Denial of Enrollment in SUSORP Absent $41,000 Forfeiture

When Alvarez attempted to enroll in SUSORP, the Division of Retirement ("the Division") within DMS determined that he could not do so, because he was already a participant in the FRS Investment Plan. The Division stated that there was no statutory provision allowing a direct transfer of funds from the FRS Investment Plan to SUSORP; only FRS Pension Plan members could transfer the current value of their pension account directly into the SUSORP. The Division advised that if Alvarez wished to join the SUSORP, he must first exercise his second election under section 121.4501(4)(f) to transfer from the FRS Investment Plan to the Pension Plan, at an estimated cost to him of approximately $41,000. Upon transfer into the SUSORP, he would effectively forfeit the $41,000 because he did not meet the vesting requirements of the Pension Plan, and because he would be a SUSORP participant, he would not accumulate any additional vesting credits for the Pension Plan.

Not surprisingly, Alvarez did not accept the Division's interpretation and pointed out that in his new position at UCF he was eligible for and had made a written demand, that was sent to DMS, requesting to be enrolled in SUSORP. DMS consulted with SBA, and SBA advised Alvarez that the decision was final: either stay in the Investment Plan or convert his Investment Plan account into a Pension Plan account with a forfeiture of $41,000 as a means to access SUSORP. DMS by its action or inaction adopted SBA's position on that.

Alvarez timely exercised his right to an informal administrative hearing in order to formally contest DMS's and SBA's refusal to allow him to directly enroll in and transfer his vested assets to SUSORP. He made it clear that he wished to participate in that program and suggested two options. First, he offered to buy into the Pension Plan if his remaining balance would then be transferred to his SUSORP account. Alternatively, he offered to leave the current balance in his Investment Plan account untouched until retirement and begin a new account in SUSORP with a zero starting balance. He saw no justification for having to forfeit over $41,000 when there was no obvious statutory requirement for the Division's position. Nor did he see any justification requiring him to forgo the estimated additional $250,000 he projects that he will receive as a participant in SUSORP compared to the

FRS Investment Plan if he stays in his current position until normal retirement age.

Hearing and Recommended Order

An informal hearing was held in December 2018. SBA confirmed that Alvarez was eligible to participate in SUSORP but stated there were two questions to be answered by the hearing officer. First, whether Alvarez could directly transfer the assets from his Investment Plan to SUSORP or must he do something else, such as first exercise his option to transfer into the Pension Plan? Second, if he had to buy into the Pension Plan, what would become of Alvarez's $41,000 estimated payment if he bought into the Pension Plan? SBA maintained the position held by it, the Division, and DMS: that if he wanted to join SUSORP, the governing law would require Alvarez to first transfer into the Pension Plan by paying $41,000, and that transfer payment would not be added as a starting balance to his SUSORP account.

The hearing officer stated that she was "as baffled as Mr. Alvarez" that he would have to forfeit his vested Investment Plan benefit in order to partake in SUSORP "where the statute says you're just in the program automatically." Ultimately, the hearing officer issued a recommended order that SBA should issue its final order granting the relief requested by Alvarez. The hearing

officer could not conclude that as a matter of law Alvarez was not permitted to either transfer the value of his Investment Plan as his opening SUSORP account balance or to simply maintain his current Investment Plan account with no further contributions and commence participation in SUSORP with a zero balance beginning the date his employment began at UCF. Neither party filed exceptions to the recommended order.

SBA then issued its final order, adopting all of the hearing officer's findings of fact, but rejecting all but one of the conclusions of law set forth in the recommended order. In its final order, SBA engaged in a convoluted analysis of the governing statute. It concluded that because section 121.35(3)(h) provides that a participant in SUSORP cannot participate in more than one state-administered plan, Alvarez could not simply keep his Investment Plan with no further additions while joining SUSORP. SBA noted that a participant in the Pension Plan was authorized to directly transfer into SUSORP, meaning that if Alvarez wished to join SUSORP, it would cost him $41,000, which SBA acknowledged, in a gross understatement, could be deemed an "unfair result." Alvarez timely appealed.

Analysis

Exhaustion of Administrative Remedies

At the outset, we reject SBA's argument that Alvarez failed to exhaust his administrative remedies through the Division and DMS. Alvarez first corresponded with DMS which in turn was advised by SBA on how to respond. Indeed, it was SBA, apparently acting on behalf of the Division and DMS, that rendered the state's official position outlined above, described the decision as final, and notified Alvarez that he had a right to a hearing. By its action or inaction, DMS adopted the position of SBA. Alvarez thus had what SBA, the Division, and DMS declared to be a final decision, which Alvarez then contested in a hearing in which SBA participated. Given that SBA undertook to advise the Division and DMS informally, corresponded directly with Alvarez conveying the final decision, and then undertook the formal litigation of the issue with the apparent consent of DMS, SBA's position is entirely disingenuous.[3]

<u>Standard of Review and Agency Deference</u>

[3] Furthermore, the Board has a reported history of addressing similar cases on the merits. *See, e.g.*, *Byron v. State Bd. of Admin.,* SBA Case No. 2019-0019 (Fla. State Bd. of Admin. Sept. 17, 2019); *Ross v. State Bd. of Admin.,* SBA Case No. 2017-0211 (Fla. State Bd. of Admin. Jan. 17, 2018); *Jackson v. State Bd. of Admin.*, SBA Case No. 2014-2998 (Fla. State Bd. of Admin. Oct. 13, 2014); *Herman v. State Bd. of Admin.*, SBA Case No. 2010-1951 (Fla. State Bd. of Admin. Aug. 17, 2011), *available at* https://www.myfrs.com/RSIntervention.htm (last visited July 2, 2021).

The standard of review is de novo as this matter involves the interpretation of a statute. *See* Art. V, § 21, Fla. Const. This Court is free to disagree with an agency on a point of law. § 120.68(7)(d), Fla. Stat. (2020). Section 120.68(7)(d) provides that a district court "shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that . . . [t]he agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action." § 120.68(7)(d), Fla. Stat.; *see also Metro. Dade Cnty. v. Dep't of Env't Prot.,* 714 So. 2d 512, 516 (Fla. 3d DCA 1998); *Schrimsher v. Sch. Bd. of Palm Beach Cnty.*, 694 So. 2d 856, 861 (Fla. 4th DCA 1997). With the passage of Article V, section 21 of the Florida Constitution effective November 6, 2018, the previously afforded deference to agency interpretation of statutes or rules has been abolished. *See La Galere Markets, Inc. v. Dep't of Bus. & Prof'l Regul.*, 289 So. 3d 553, 556 (Fla. 1st DCA 2020) ("Before the passage of Article V, section 21 of the Florida Constitution, reviewing courts had to defer to 'an agency's interpretation of statutes it implemented unless such interpretation was clearly erroneous.' After the amendment passed, judicial deference to an agency's interpretation was no longer required. Instead, the de novo standard applies. Though the order appealed here was rendered before the

effective date of the amendment, we need not decide whether the amendment applies. When the agency's view conflicts with the plain meaning of the statute, judicial deference is not required. Our review is de novo." (quoting *S. Baptist Hosp. of Fla. v. Ag. for Health Care Admin.*, 270 So. 3d 488, 502 (Fla. 1st DCA 2019))).

<u>Statutory Language is Unambiguous</u>

This case presents two questions. First, is there any basis to claim that Alvarez was not eligible to become a participant in SUSORP on the date he commenced employment with UCF? Second, if he is allowed to participate in SUSORP, what becomes of the assets in his Investment Plan account? Both sides argue, and we agree, that these questions are answered by reference to the controlling statutory provisions.

"When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984) (quoting *A.R. Douglass, Inc. v. McRainey,* 137 So. 157, 159 (Fla. 1931)). Courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative

power." *Id.* (emphasis omitted) (quoting *Am. Bankers Life Assurance Co. of Fla. v. Williams,* 212 So. 2d 777, 778 (Fla. 1st DCA 1968)).

"[W]e begin our analysis . . . as we do in any case of statutory interpretation, with the actual language used by the Legislature." *Quarantello v. Leroy*, 977 So. 2d 648, 651 (Fla. 5th DCA 2008) (internal marks and citations omitted).

<u>Alvarez's Eligibility to Participate in SUSORP</u>

Section 121.35(3)(c) provides in pertinent part:

> **(3) Election of optional program.—**
>
> (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.
>
> 1. Any employee whose optional retirement program eligibility results from initial employment shall be enrolled in the program at the commencement of employment. If, within 90 days after commencement of employment, the employee elects membership in the Florida Retirement System, such membership shall be effective retroactive to the date of commencement of employment.
>
> 2. 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 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.

The parties agree that Alvarez became "eligible" upon commencing employment in his new position with UCF. According to the just-quoted statutory provisions, Alvarez was compelled to participate in the optional program, SUSORP, *unless* he made a written election within ninety days to instead participate in FRS. Using a belt and suspenders approach, that section goes on to say that in the absence of making such an "opt out" election, the employee "shall be deemed to have elected to participate in the optional retirement program." § 121.35(3)(c), Fla. Stat.

Here, Alvarez made no such election to opt out of SUSORP. As far as the default compulsory nature of SUSORP participation, the statute does not differentiate between whether the eligible employee is or was a participant in any FRS retirement plan. Section 121.35(3)(c)(2) deals precisely with Alvarez's circumstances where his eligibility for the optional retirement program (SUSORP) resulted from a change in status via appointment or transfer, and again, the default—absent affirmative employee election to opt

out of SUSORP—is for the now-eligible employee to become a participant in the optional retirement program, i.e., SUSORP.

Thus, according to the plain and repetitious language of the statute, Alvarez is a compulsory participant in SUSORP with commencement of his participation being retroactive to the date he became employed by UCF. There is nothing in the statute that requires him to convert his Investment Plan account into a Pension Plan account and thereby forfeit $41,000 in order to participate in SUSORP. *See State v. Geiss*, 70 So. 3d 642, 647–48 (Fla. 5th DCA 2011) ("[B]ecause the statute has no such language, it is not our place to read into the statute a concept or words that the legislature itself did not include." (citation omitted)). To answer the first question, we find there is absolutely no basis to claim that Alvarez was not eligible to become a participant in SUSORP on the date he commenced employment with UCF.

<u>What Happens to Alvarez's Assets in His FRS Retirement Fund?</u>

The second question posed above, what happens to Alvarez's Investment Plan account once he became a participant in SUSORP, is also answered by section 121.35. Subsection (3)(g) of that statute provides in pertinent part that:

> (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.

Thus, the statute contains no forfeiture provision of previously earned, vested retirement benefits.

Section 121.35(3)(h) provides that "[a] participant in the optional retirement program [like SUSORP] may not participate in more than one state-administered retirement system, plan or class simultaneously." Thus, Alvarez is not entitled to have the state make contributions to both his Investment Plan account and his SUSORP account; however, he has never requested any such thing. He has always been agreeable, as one alternative, to passive ownership of his Investment Plan account, meaning that all employee and employer contributions to his Investment Plan cease as of his date of employment with UCF and he will leave that account alone until he retires. Thus, he proposes that he will be an active participant in only one state-administered retirement program, SUSORP.

SBA's position, that Alvarez had to convert his Investment Plan account into a Pension Plan account, is apparently based on various provisions within section 121.35 which discuss the right of a participant in the Pension Plan to directly transfer his/her account credits directly into an

optional program, such as SUSORP.[4] The statute repeatedly refers to what somebody in the "pension plan" can do and what happens with his/her account and retirement credits upon electing to transfer that pension plan account to an optional program; however, it does not specifically mention an "investment plan" although it repeatedly refers to the "Florida Retirement System" which by definition, includes both.[5] Given the statutory language, we agree with SBA and DMS that Alvarez cannot directly transfer the assets from his FRS Investment Plan account into SUSORP. Thus, his SUSORP account balance as of his first day of employment at UCF would be zero.

Alvarez questions why he should not be permitted to participate in a trustee-to-trustee rollover of his Investment Account funds directly over to his

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[4] It is unclear to this Court whether the failure to provide for direct transfer of FRS Investment Plan account assets in that statute was intentional or an oversight that may deserve future consideration by the legislature.

[5] As explicitly defined by the Legislature, the "'Florida Retirement System' or 'system' means the general retirement system established by this chapter, including, but not limited to, the defined benefit program administered under this part, referred to as the 'Florida Retirement System Pension Plan' or 'pension plan,' and the defined contribution program administered under part II of this chapter, referred to as the 'Florida Retirement System Investment Plan' or 'investment plan.'" § 121.021(3), Fla. Stat. The title of Part II of chapter 121 is the "Florida Retirement System Investment Plan," meaning that the FRS includes the Investment Plan. The reference to "service credit," contrary to the final order's reasoning, is not limited to the Pension Plan. *See, e.g.*, § 121.591, Fla. Stat. (2018).

SUSORP account, much as an employee in the private sector can rollover the employee's vested 401(k) plan assets into an IRA. In support of that position, Alvarez notes that there is nothing in the controlling statute that would prohibit it, while also admitting there is nothing in the statute specifically permitting it either. Because Alvarez is willing to accept the alternative remedy mentioned earlier and because we are remanding this matter to SBA and DMS for further proceedings, we need not answer this now.[6]

Conclusion

We reverse SBA's final order and remand for further proceedings consistent with this opinion which will confirm Alvarez to be a participant in SUSORP retroactive to his date of employment with UCF without having to convert his Investment Plan into a Pension Plan and which will not result in a loss of benefits under SUSORP to Alvarez as a result of SBA's initial denial of such participation.[7]

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[6] We note that section 121.35(4)(c) created an Optional Retirement Program Trust Fund that is authorized under section (4)(f) and in accordance with the Internal Revenue Code to accept rollovers or direct trustee-to-trustee transfers for deposit into participants' accounts or contracts.

[7] Because the Division and DMS elected to have SBA resolve this matter on their behalf, they are required to promptly take any such action necessary to effectuate compliance with this opinion.

REVERSED and REMANDED, with instructions.

LAMBERT, C.J., concurs
SASSO, J., dissents, with opinion.

SASSO, J., dissenting.

Alvarez appeals a final order entered by the State Board of Administration ("SBA") after he filed a Petition for Hearing on the issue of whether he should be permitted to enroll in the State University System Optional Retirement Plan ("SUSORP"). Alvarez argued he should be permitted to enroll, either by transferring directly from the Florida Retirement System Investment Plan or by maintaining passive ownership in his current investment plan and enrolling in the SUSORP with a zero balance. The SBA concluded that it lacked authority to grant the relief Alvarez requested. Nonetheless, it went on to provide its opinion that Alvarez's requested relief was also precluded by statute.

In this appeal, to which only Alvarez and the SBA are a party, Alvarez challenges the SBA's final order. I agree with the SBA on this issue of its jurisdiction and would therefore affirm the order on review.

The SBA has only the powers, duties, and functions as prescribed by law. *See* § 20.28, Fla. Stat. (2019). As a result, it has no power to act in a manner that enlarges, modifies, or contravenes the authority that the legislature has prescribed to it. *See State, Dep't of Bus. Regul. v. Salvation Ltd.*, 452 So. 2d 65, 66 (Fla. 1st DCA 1984). Moreover, the limits of the SBA's

authority cannot be altered by agreement or consent of the parties; nor can it be based upon waiver or estoppel. *Accord Procacci v. State, Dep't of HRS*, 603 So. 2d 1299, 1300–01 (Fla. 1st DCA 1992).

Relevant to the dispute here, section 121.35, Florida Statutes, explains that the Department of Management Services ("DMS"), rather than the SBA, is charged with administering the SUSORP. *See* § 121.35(1), (6)(a), Fla. Stat. (2012) (providing DMS "shall" establish and administer the SUSORP). Consistent with that charge, DMS is responsible for adopting all required rules, including those related to program enrollment. *See* § 121.35(6)(a), Fla. Stat.; Fla. Admin. Code R. 60U-1.012 (2016).

By contrast, section 121.35 references the SBA, but only to authorize the SBA to "review and make recommendations to [DMS] on the acceptability of all investment products" subject to DMS's final determination as to whether the investment product will be approved for the program. *See* § 121.35(6)(c), Fla. Stat. No other powers are granted to the SBA under section 121.35 with respect to SUSORP, not even the power to require DMS to offer certain investment products under SUSORP.

Thus, while section 121.35 does vest 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.

As the SBA correctly determined, the relief Alvarez requests—chiefly, the ability to enroll in the SUSORP—is simply not within the SBA's power or authority to determine. Regardless of whether the SBA's decision was "disingenuous" or inconsistent, its prior action is of no legal consequence in the context of this proceeding. *See Swebilius v. Fla. Constr. Indus. Lic. Bd.*, 365 So. 2d 1069, 1070 (Fla. 1st DCA 1979).

Finally, it bears emphasis that DMS and the SBA are separate entities. SBA, not DMS, is a party to this appeal. Just as the SBA lacked authority to compel DMS to grant Alvarez's requested relief, so does this Court. *See Alger v. Peters*, 88 So. 2d 903, 906 (Fla. 1956) ("It is so fundamental to our concept of justice that a citation of supporting authorities is unnecessary to hold that the rights of an individual cannot be adjudicated in a judicial proceeding to which he has not been made a party and from which he has literally been excluded by the failure of the moving party to bring him properly into court."). I therefore respectfully dissent.