STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

KIMBERLY A. CAMPBELL, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	DOAH Case No. 14-2803 SBA Case No. 2013-2901

FINAL ORDER

On September 18, 2014, the Administrative Law Judge, D.R. Alexander (hereafter "ALJ") submitted his Recommended Order to the State Board of Administration (hereafter "SBA") in this proceeding. A copy of the Recommended Order indicates that copies were served upon counsel for the Petitioner and upon counsel for the Respondent. Petitioner and Respondent had agreed that a hearing was unnecessary, and they filed a pre-hearing stipulation, a stipulated record, and proposed recommended orders. Petitioner timely filed exceptions on October 3, 2014. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Senior Defined Contribution Programs Officer for final agency action.

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

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

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact of an Administrative Law Judge 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 Division of Administrative Hearings ("DOAH") recommended order may not reweigh evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of administrative law judges 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 a finding of fact in the ALJ's 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 [an administrative law judge's] conclusions of law

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

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides that "...an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

RULINGS ON PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

Since the placement of various sections in Chapter 121, Florida Statutes, forms the basis for many of Petitioner's exceptions and argument, a brief overview of Chapter 121 is useful. Chapter 121, Florida Statues, known as the "Florida Retirement System Act," [Section 121.011, Florida Statutes] is comprised of three parts. Part I, that contains Section 121.011 through and including Section 121.40, Florida Statutes, governs all Florida Retirement System ("FRS") members and specifically FRS Pension Plan members. Part II, that contains Section 121.4501 through and including Section 121.5911, Florida Statutes, governs all Investment Plan members. Part III, comprised of Sections 121.70 through and including Section 121.78, Florida Statutes, governs the contribution rates for both plans[1]. Part I also contains overarching provisions that create(d), merge(d), and govern various retirement plans throughout the State. Sections 121.021(60), 121.012, 121.051, 121.052, 121.053, and 121.122, Florida Statutes at issue in this action all are found in Part I. Section 121.4501(2)(k) is found in Part II. *See*, Chapter 121, Florida Statues.

[1] Part III also contains the following declaration viz. purpose and intent, "The Legislature recognizes and declares that the Florida Retirement System is a single retirement system, consisting of two retirement plans and other nonintegrated programs." § 121.70(1), Florida Statutes.

The stipulated facts clearly state that Petitioner was a member of the FRS Investment Plan, and not the FRS Pension Plan, when she terminated FRS-covered employment on September 30, 2003. A major difference between the FRS Investment Plan and the FRS Pension Plan is the manner in which benefit payments are paid. In the case of the FRS Investment Plan, a member has flexible benefit payment options. A member can, as Petitioner did, take a lump sum payment upon meeting the distribution requirements of the applicable plan. A member also can purchase a guaranteed monthly annuity for life using all or part of the member's balance. In the case of the FRS Pension Plan, the member does not have flexible benefit payment options. A member of the FRS Pension Plan will receive monthly guaranteed payments for life- there is no lump sum option. *See,* Sections 121.091 and 121.591, Florida Statutes. Because of the significant difference in the manner that benefit payments may be made by the two plans when members retire, there has to be a different definition of "retiree" for each of the plans. The definition of "retiree" for FRS Investment Plan members, such as Petitioner, is set forth in Section 121.4501(2)(k), Florida Statutes, which is contained in Part II of Chapter 121, Florida Statutes.

Section 121.122(2), Florida Statutes, which is contained in Part I of Chapter 121, Florida Statutes, states that "[a] retiree of a state-administered retirement system who is initially reemployed on or after July 1, 2010, is not eligible for renewed membership." Both the plain meaning of the statutory provision and logic compel the application of the statutory definition of "retiree" that specifically is applicable to the state-administered retirement plan of which a retiree is a member.

Section 121.053, Florida Statutes, that pertains to the Elected Officers' Class is contained in Part I of Chapter 121. Section 121.053(3)(a), Florida Statutes, states that:

(3) On or after July 1, 2010:

(a) A retiree of a state-administered retirement system who is elected or appointed for the first time to an elective office in a regularly established position with a covered employer may not reenroll in the Florida Retirement System.

A state administered retirement "system" is defined by Section 121.021(3), Florida Statutes, [which is contained in Part I] as "...including...the defined benefit retirement program administered under this part [Part I], referred to as the "Florida Retirement System Pension Plan" ... and the defined contribution retirement program administered under the provisions of part II of this chapter, referred to as the "Florida Retirement System Investment Plan"....

Petitioner's Exception 1: Exception to Finding of Fact 4

Petitioner takes exception to the second sentence of paragraph 4 which states that the relevant definition of "retiree" for members of the FRS Investment Plan is set forth in Section 121.4501(2)(k), Florida Statutes, rather than one of the other definitions contained in Section 121.122, Florida Statutes. Petitioner argues this sentence is a Conclusion of Law and should be stricken. Petitioner does not give any legal basis for her assertion that it is appropriate to strike this language. The statement appears to be a factual synopsis of what the Conclusions of Law state. Interestingly, Petitioner does not take exception to the ALJ's Conclusions of Law in paragraphs 19 and 20 that specifically find that the definition of "retiree" set forth in Section 121.4501(2)(k) is applicable to the Petitioner.

Because Petitioner has not provided a legal basis for her exception, Petitioner's Exception 1 hereby is denied.

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

Petitioner contends that the reference to Section 121.122(2), Florida Statutes, the section that provides that a "retiree" of the FRS who is initially re-employed on or after July 1, 2010, is not eligible for renewed membership, is inappropriate to Petitioner's situation since Petitioner is a compulsory member of the Elected Officer Class of the FRS. Petitioner contends that therefore her situation instead is governed by the provisions of Sections 121.052 and 121.053, Florida Statues. Petitioner's exception is merely a conclusion that is devoid of any legal argument, and therefore is not required to be addressed. Additionally, it should be noted that the ALJ is not making any statement in Paragraph 5 itself that the cited section is applicable to Petitioner. The ALJ is describing the year when Section 121.122(2) was first enacted and is giving a synopsis as to what the section provides.

Accordingly, Petitioner's Exception 2 hereby is rejected.

Petitioner's Exception 3: Exception to Finding of Fact 6

In this exception, Petitioner contends that Section 121.053 is contained in Part I of Chapter 121 and is separate and apart from Section 121.122(2) which "is found" in Part II of Chapter 121. Petitioner then sets forth the provisions of Section 121.012 that state that certain provisions of Part I of Chapter 121 are also applicable to Parts II and III of Chapter 121 (to the extent such provisions are not inconsistent with, or duplicative of provisions in parts II and III). Petitioner states that Section 121.012 is not intended to make provisions of Part II and Part III applicable to Part I of Chapter 121. Petitioner argues it would be a misinterpretation of the legislative intent of Section 121.012 if the provisions of Section 12.122(2), "found" in Part II were to be applied to Section 121.053, which "stands on its own terms in Part I of the Chapter 121, F.S."

Section 121.122(2), Florida Statutes, is not found in Part II of Chapter 121. Instead, such statutory section, like Section 121.053, also is found in Part I. Part II begins with Section 121.4501. *See,* Chapter 121, Florida Statutes. In fact, in Paragraph 24 Petitioner's Proposed Recommended Order dated August 29, 2014, Petitioner specifically states that "Sections 121.053 and 121.122 are contained within part I of Chapter 121." Thus, the statements in this exception are in direct conflict with those contained in Petitioner's Recommended Order.

Further, Petitioner does not address in the exception what Petitioner deems the "clear" legislative intent of Section 121.053, Florida Statutes to be. Section 121.053 addresses participation in the Elected Officers' Class by retired members. In construing a statute, significance and effect must be given to every word, phrase, sentence and part, and words in a statute should not be construed as mere surplusage. *See, e.g., Mendenhall v. State*, 48 So.3d 740 (Fla. 2010). Subsection (3)(a) is part of Section 121.053, and provides as follows:

> (3) On or after July 1, 2010:
>
> (a) A retiree of a state-administered retirement system who is elected or appointed for the first time to an elective office in a regularly established position with a covered employer may not reenroll in the Florida Retirement System.

A state administered retirement "system" is defined by Section 121.021(3) [which is contained in Part I] as "...including...the defined benefit retirement program administered under this part [Part I], referred to as the "Florida Retirement System Pension Plan" ... and the defined contribution retirement program administered under the provisions of part II of this chapter, referred to as the "Florida Retirement System Investment Plan"....

Petitioner never addresses Section 121.053(3)(a) in the exception or what Petitioner believes about its "clear intent" that does not create a prohibition on renewed FRS membership of FRS retirees akin to the prohibition set forth in Section 121.122(32), Florida Statues.

Based on the foregoing, Petitioner's Exception 3 hereby is denied.

Petitioner's Exception 4: Exception to Finding of Fact 7

Petitioner contends that the ALJ's taking official recognition of a 2012 Staff Analysis of an amendment to Section 121.122(2) was inappropriate since such analysis was not included by the parties in the stipulated record and there was no opportunity for either party to address such evidence before the Recommended Order was issued. However, Petitioner has not provided any statutory authority, case law or rule(s) to support this bare argument or that would serve to modify or restrict the provision contained in Section 120.569(2)(g), Florida Statutes, that states in pertinent part that:

> (g) Irrelevant, immaterial or unduly repetitive evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida....

Additionally, Petitioner is reiterating in this exception her previous factual argument that she is not "re-employed" since she is a compulsory member of the Elected Officers Class by virtue of being elected, re-elected or appointed, as provided in Section 121.052, Florida Statutes. As such, Petitioner again asserts that the prohibition on FRS members who are reemployed on or after July 1, 2010 from being re-enrolled as a renewed member of the

FRS do not apply to her. Again, the exception does not state a legal argument, but rather reiterates Petitioner's previous factual arguments.

Therefore, based on the foregoing, Petitioner's Exception 4 hereby is denied.

Petitioner's Exception 5: Exception to Conclusion of Law 16

Petitioner again erroneously states that Section 121.122(3) is contained in Part II of Chapter 121, and further that the conclusion that Section 121.122(3) "applies equally" to elected officials such as Petitioner "improperly applies part II of the statute to part I." As noted previously in the response to Petitioner's Exception 3 above,, Section 122.122(3) is contained in Part I of Chapter 121.

Accordingly, based on the foregoing, Petitioner's Exception 5 hereby is rejected.

Petitioner's Exception 6: Exception to Conclusion of Law 20

In this Exception, it appears that Petitioner is arguing that there is no conflict between Sections 121.4501(2)(k) that defines "retiree" for purposes of members of the FRS Investment Plan as one who has terminated employment and taken a distribution, [and that would thereby make her ineligible to re-enroll in the FRS] and Section 121.052(3) that provides that participation in the Elected Officers' Class is mandatory for all elected officers such as Petitioner. Petitioner argues that any "conflict" that the ALJ "assumed" the Legislature recognized when enacting the prohibition on renewed FRS membership of FRS retirees is the result of the SBA and ALJ failing to recognize that the Elected Officers' Class has its own separate statutory scheme unrelated to either the FRS Investment Plan or the FRS Pension Plan, and further in erroneously trying to apply provisions of Part II of Chapter 121 to Part I of that chapter.

However, Paragraph 33 of Petitioner's Proposed Recommended Order dated August 29, 2014, states as follows:

> Therefore, while the application of the definition of "retiree" in Section 121.4501(2)(k) seemingly conflicts with the general elected officer compulsory participation provisions of Section 121.051 ...it undeniably conflicts with the compulsory participation provisions of Section 121.052 and the 121.012(60) definition of "retiree" which specifically are applicable to elected officials. [emphasis added]

Thus, it appears the ALJ's conclusion in paragraph 20 to the effect that Petitioner is making the argument in documents submitted by the Petitioner to the ALJ that there is a conflict between Section 121.4501(2)(k) and Section 121.052 is a correct statement. The ALJ goes on to state in paragraph 20 that any purported "conflicts" such as that broached by Petitioner, were presumably recognized by the Legislature. The ALJ put the term "conflicts" in quotes in paragraph 20, thereby indicating that the ALJ might not agree any conflicts actually exist.

Further, the "assumption" that the ALJ is making as to the Legislature's recognition of "conflicts" when it enacted the prohibition on renewed FRS membership of FRS retirees is simply a recognized principal of statutory construction which is there exists a presumption that contradictory statutes are not intended by the Legislature. That is, there is a presumption that the Legislature passes statutes with the knowledge of prior existing statutes. *See, e.g., Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So.2d 1 (Fla. 2004). Further, there is a presumption that the Legislature does not intend to retain contradictory enactments or to repeal a law without expressing an intention to do so. *Id.* As such, 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).

Finally, as explained previously above, the ALJ and the SBA have not applied the provisions that Petitioner has claimed are contained Part II of Chapter 121 to the provisions that Petitioner has claimed reside in Part I of the chapter in violation of any expressed intent of the Legislature.

Based on the foregoing, Petitioner's Exception 6 hereby is denied.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that she be permitted to enroll in the Elected Officers' Class of the FRS as a first-time elected official who previously had retired from the FRS Investment Plan by terminating employment, taking a full distribution, and returning to FRS-covered employment after July 1, 2010, 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 17th day of December, 2014, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Joan B. Haseman

Joan B. Haseman
Senior Defined Contribution Programs Officer
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
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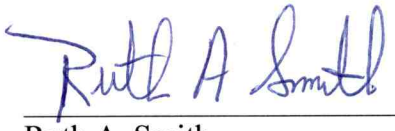
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Tina Joanos

Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by email transmission and U.S. mail to Thomas H. Bateman III, Esq.. (tbateman@lawfla.com) and Mark Herron, Esq. (mherron@lawfla.com), Counsel for Petitioner, at Messer Caparello, P.A., 2618 Centennial Place, Tallahassee, Florida 32308 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 17th day of December, 2014.



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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KIMBERLY A. CAMPBELL,

Petitioner,

vs. Case No. 14-2803

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

This matter came before D.R. Alexander, an administrative law judge of the Division of Administrative Hearings (DOAH), on a stipulated record and written argument submitted by counsel.

APPEARANCES

For Petitioner: Thomas H. Bateman, III, Esquire
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For Respondent: Brian A. Newman, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioner, an elected circuit court judge, is entitled to renewed membership or is otherwise entitled to participate in the Florida Retirement System (FRS).

PRELIMINARY STATEMENT

The procedural history of this case is somewhat disjointed. On November 14, 2013, the State Board of Administration (SBA) advised Petitioner by letter that her request to enroll in the FRS had been denied. Petitioner timely requested a hearing, and her Petition for Hearing (Petition) was transmitted to DOAH and assigned Case No. 13-4781. Later, she filed a Corrected First Amended Petition for a Formal Administrative Hearing (Amended Petition). On May 30, 2014, the parties requested that jurisdiction in the case be returned to the agency "to facilitate settlement discussions." An Order closing the file was issued on June 2, 2014.

Without referring to the first case, on June 17, 2014, the original Petition was again transmitted by SBA to DOAH and was assigned Case No. 14-2803. The disposition of the first case is not known.

After a final hearing was scheduled, the parties agreed a hearing was unnecessary, and they would file a pre-hearing stipulation, a stipulated record, and proposed recommended orders.

The parties submitted Joint Exhibits 1-6 which are accepted in evidence. Exhibits 1 and 2 are the depositions of Petitioner and Daniel Beard, SBA Director of Policy, Risk Management, and Compliance, respectively. Exhibit 3 is a copy of the Amended

Petition filed in Case No. 13-4781, which according to the parties' Joint Pre-hearing Stipulation, they now rely upon, rather than the original Petition referred to DOAH.

The parties filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. The FRS Plan

1. There are two classes of members in the FRS: all officers or employees, except elected officers; and elected officers, including circuit judges. See §§ 121.051(1)(a) and 121.052, Fla. Stat. (2014). The second class is identified as the Elected Officers' Class (EOC). See § 121.052(1), Fla. Stat.

2. Members of the FRS may elect to participate in either the Defined Benefit Retirement Program (Pension Plan) or the Public Employee Optional Retirement Program (Investment Plan). The Investment Plan has a one-year vesting requirement, thus enabling a vested participant to receive a distribution of his or her account at any time after leaving FRS-covered employment.

3. Upon retirement, a vested Pension Plan member receives a monthly benefit for his or her lifetime whereas a vested Investment Plan member receives a lump-sum distribution of accumulated benefits from his or her account. Under both plans, a member must terminate all FRS-covered employment in order to receive a benefit.

4. "Retiree" is defined at least three times in chapter 121, none the same. See §§ 121.021(60), 121.35(5)(h), and 121.4501(2)(k), Fla. Stat. However, as explained in the Conclusions of Law, all Investment Plan retirees are covered by section 121.4501(2)(k), which defines a "retiree" as "a former member of the investment plan who has terminated employment and taken a distribution of vested employee or employer contributions as provided in s. 121.591."

5. In 2009, the Legislature created section 121.122(2), which provides that a "retiree of a state-administered retirement system who is initially reemployed on or after July 1, 2010, is not eligible for renewed membership." See Ch. 2009-209, § 12, Laws of Fla. By virtue of this amendment, FRS retirees who did not become reemployed with a covered employer by July 1, 2010, were ineligible for renewed membership in the FRS.

6. The same bill amended section 121.053 by adding a new subsection (3)(a), which provided that on or after July 1, 2010, a "retiree of a state-administered retirement system who is elected or appointed for the first time to an elective office in a regularly established position with a covered employer may not reenroll in the Florida Retirement System." Id. at § 5. This amendment makes clear that the prohibition in section 121.122(2) applies equally to elected officials.

7. In 2012, the Legislature amended section 121.122(2) to provide that "[a] retiree of a state-administered retirement system who is initially reemployed in a regularly established position on or after July 1, 2010, may not be enrolled as a renewed member." See Ch. 2012-222, § 7, Laws of Fla. The sole purpose of the amendment was to "make it clear that a retiree of the investment plan . . . who is reemployed on or after July 1, 2010, is prohibited from being reenrolled as a renewed member of a state-administered retirement system." Fla. Govt. Oper. Comm., CS/HB 7079 (2012) Staff Analysis, p. 5 (final May 11, 2012)(available at http//www.myfloridahouse.gov).[1]

B. Petitioner's Employment History and Retirement Option

8. Petitioner was a member of the FRS while employed as an Assistant State Attorney from January 2, 2001, through September 30, 2003. When first employed, Petitioner was a member of the Pension Plan. Shortly thereafter, the Legislature created the Investment Plan option, and Petitioner was given a deadline of August 31, 2002, to make an election between the two plans. On August 31, 2002, she switched to the Investment Plan.

9. On or about September 30, 2003, Petitioner left the Office of State Attorney for private law practice. In January 2006, she took a complete distribution from her FRS Investment Plan in the amount of [redacted] By taking a lump-sum distribution, she became a "retiree." See § 121.4501(2)(k),

Fla. Stat. ("Retiree" means a former member of the investment plan who has terminated employment and taken a distribution of vested employee . . . contributions."). She was not employed in an FRS-eligible position between September 30, 2003, and January 8, 2013.

10. On August 14, 2012, Petitioner was elected to the position of Circuit Judge in the Sixth Judicial Circuit of Florida.

11. On January 8, 2013, Petitioner was commissioned as a Circuit Judge for the Sixth Judicial Circuit of Florida.

C. The Proposed Agency Action

12. In response to her request to enroll in the FRS, by letter dated November 14, 2013, Daniel Beard, who is Director of Policy, Risk Management, and Compliance for the State Board of Administration, advised Petitioner in pertinent part as follows:

> You retired from the FRS on January 23, 2006 when you requested a distribution of your FRS Investment Plan account. Section 121.4501(2)(k), Florida Statutes, defines a "retiree" as a member of the FRS Investment Plan who has terminated employment and has taken a distribution as provided in Section 121.591. There are no statutory provisions that would allow you to cancel or void your retirement, and there are no statutory provisions that would allow you to repay the distribution in order to be "unretired."
>
> Section 121.122, Florida Statutes, states that a retiree of a state-administered retirement system who is initially reemployed in a regularly established

> position on or after July 1, 2010 is not eligible to enroll in renewed membership and receive additional retirement benefits. This change in law pertained to any retiree of a state-administered retirement system who had not returned to FRS employment prior to July 1, 2010. You were hired by the Office of State Courts on January 8, 2013.

13. Petitioner timely challenged the proposed agency action asserting that she is entitled to participate in the FRS as a compulsory member of the EOC pursuant to part I, chapter 121.

CONCLUSIONS OF LAW

14. Petitioner has the burden of proving that she is eligible to participate in the FRS. See, e.g., Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

15. As previously found, the stipulated facts show that Petitioner retired from the FRS Investment Plan in 2006 by withdrawing all funds from her Investment Plan account and that she failed to return to FRS-eligible employment before July 1, 2010. Given this set of facts, her request to reenter the FRS in 2013 should be denied for the following reasons.

16. Pursuant to section 121.122(2), FRS retirees must return to FRS-eligible employment on or before July 1, 2010. See Ch. 2009-209, § 12, Laws of Fla. Retirees returning on or after this date are ineligible to reenroll in the FRS. This

prohibition applies equally to elected officials, including judges, regardless of whether they are a retiree under part I or part II of chapter 121. See § 121.053(3)(a), Fla. Stat. ("A retiree of a state-administered retirement system who is elected or appointed for the first time to an elective office in a regularly established position with a covered employer may not reenroll in the [FRS]."). Given this clear legislative directive, Petitioner is precluded from reenrolling in the FRS. The SBA is obliged to follow these statutory requirements and cannot deviate from them. See, e.g., Balezentis v. Dep't of Mgmt. Servs., Case No. 04-3263, 2005 Fla. Div. Adm. Hear. LEXIS 851 at *8 (Fla. DOAH Feb. 22, 2005), adopted, (Fla. DMS Apr. 4, 2005)("The [SBA] is not authorized to depart from the requirements of its organic statute when it exercises its jurisdiction."); Smith v. Dep't of Mgmt. Servs., Case No. 10-9449, 2011 Fla. Div. Adm. Hear. LEXIS 10 at *7 (Fla. DOAH Feb. 23, 2011), adopted, (Fla. DMS June 14, 2011)(section 121.122(2) "is a legislative limitation giving no discretion to the [SBA]").

17. Petitioner contends, however, that she is a retiree under section 121.021(60), and the prohibition in section 121.053(3)(a) does not apply because she is not currently receiving monthly "benefit payments," as contemplated by the law. Subsection (60) defines a "retiree" as a former member who

"is receiving benefit payments from the system." The case of Blaesser v. State Board of Administration, 134 So. 3d 1013 (Fla. 1st DCA 2012), review denied, 110 So. 3d 440 (Fla. 2013), is instructive on this issue and supports SBA's decision. In that case, the employee was first hired by the Seminole County School Board in September 2005 and enrolled in the Investment Plan. After working for a little more than a year, he terminated employment and in March 2007 took a total distribution of his Investment Plan account. In April 2011, he began work as an attorney with a state agency and was advised by the SBA that he could not participate in the FRS because he was a retiree who came back to FRS-covered employment after July 1, 2010. On appeal, the court affirmed SBA's decision and held that because Blaesser had taken a lump-sum distribution of benefits in 2007, he was ineligible for renewed membership in the FRS by virtue of the prohibition in section 121.122(2). It rejected Blaesser's argument that because he received a prior nonrecurring, lump-sum distribution, he was not a retiree under section 121.021(60) who "is receiving benefit payments." Id. at 1015. The court addressed the argument in the following way:

> [T]he statutory prohibition applies to "[a] retiree of a state-administered retirement system" and that "[s]ystem" is defined by section 121.021(3) as "including . . . the defined benefit retirement program administered under the provisions of part I of this chapter and the defined contribution

> retirement program known as the Public Employees Optional Retirement Program and administered under the provisions of part II of this chapter." Moreover, section 121.4501(2)(k), which falls under part II of Chapter 121, defines "[r]etiree" as "a former participant of the optional retirement program who has terminated employment and has taken a distribution as provided in s. 121.591, except for a mandatory distribution of a de minimis account authorized by the state board." Reading all of these related provisions together, the SBA asserts the prohibition of section 121.122(2) applies to appellant because he retired by taking a total distribution from his Investment Plan account and did not return to FRS-covered employment until after July 1, 2010. This court will defer to an agency's interpretation of a statute that it is charged with administering unless that interpretation is contrary to the plain meaning of the statute or is clearly erroneous. [citation omitted]. We defer to the SBA's interpretation of section 122.122(2), which we conclude is not contrary to the plain meaning of the statute and is not clearly erroneous.

Blaesser at 1015.

18. Even so, Petitioner contends that Blaesser does not apply here because that case involved a regular employee of FRS, and not an elected official. However, this is not a material distinction as the Legislature made it clear that the prohibition on renewed FRS membership applies equally to elected officials. See § 121.053(3)(a), Fla. Stat.

19. Petitioner also contends that she is a retiree under part I of chapter 121; section 121.4501(2)(k) applies only to

retirees under part II; and SBA's reliance on section 121.4501(2)(k) is misplaced. As noted in Blaesser, however, all of these related provisions must be read together and harmonized. When doing so, SBA's application of section 121.4501(2)(k) to an FRS retiree who is elected for the first time to an elective office is not contrary to the plain meaning of the statute or clearly erroneous. Moreover, to construe the statute otherwise would be at odds with the clear language in section 121.053(3)(a).

20. Finally, Petitioner contends that the application of the definition of "retiree" in section 121.4501(2)(k) prevents her from reenrolling in the FRS, and this conflicts with the requirement in section 121.052(3) that "participation in the [EOS] shall be compulsory for elected officers." The undersigned assumes, however, that the Legislature recognized any purported "conflicts" when it enacted the reenrollment prohibition in 2009. Moreover, when reading all of these provisions together, the SBA's interpretation of the statutory framework is not contrary to the plain meaning of the law and is not clearly erroneous. Blaesser at 1015.

21. In summary, as stated in SBA's letter of November 14, 2013, "[a] change in Florida law would be required to grant [Petitioner's] request." While this may be a harsh result,

under the existing statutory scheme, Petitioner is ineligible to reenroll in the FRS.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the State Board of Administration enter a final order denying Petitioner's request to reenroll in the FRS.

DONE AND ENTERED this 18th day of September, 2014, in Tallahassee, Leon County, Florida.

D. R. Alexander

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of September, 2014.

ENDNOTE

[1/] The undersigned has taken official recognition of the Legislative staff analysis of chapter 2012-222, § 7, Laws of Florida.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

KIMBERLY A. CAMPBELL,
Petitioner,

vs. Case No. 14-2803

STATE BOARD OF ADMINISTRATION AND THE FLORIDA DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT,
Respondents.

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Petitioner, Kimberly A. Campbell ("Campbell"), in accordance with Section 120.57, Florida Statutes, and Rule 28-106.217, Florida Administrative Code, submits the following exceptions to the Recommended Order rendered September 18, 2014 by D. R. Alexander, Administrative Law Judge ("ALJ") designated by the Division of Administrative Hearings ("DOAH") to hear this matter.

Standard of Review

Section 120.57(1)(l), Florida Statutes, sets forth the standards which the State Board of Administration ("SBA") must follow in its consideration of the Recommended Order:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Agency review of a recommended order is analogous to an appellate proceeding. It is neither the time nor the place to retry the case; nor is appropriate to ask the agency head to reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses. Rather, the issues before the agency are whether the findings of fact are supported by competent substantial evidence and the correctness of the legal conclusions over which the agency has substantive jurisdiction. Florida Department of Transportation v. J.W.C. Company, 396 So.2d 778 (Fla. 1st DCA 1981)("(1) The agency may adopt the recommended order as the agency's final order; or, (2) the agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the order, but

may not reject or modify the findings of fact unless it determines from the record, and states with particularity in the order, that (a) the findings of fact were not based on competent substantial evidence, or (b) that the proceedings on which the findings were based did not comply with essential requirements of law.")

This proceeding involves review of the denial of Petitioner's request to enroll in the Elected Officer Class (EOC) of the Florida State Retirement System (FRS) upon her election to the constitutional office of Circuit Judge pursuant to the provisions of Chapter 121, Florida Statutes. It is within this context and the standard for review that the agency, the SBA, must consider and act on the DOAH Recommended Order and the exceptions filed by the parties.

Exception 1

Petitioner takes exception to the second sentence in Finding of Fact paragraph number 4 of the Recommended Order. The sentence is not related to a finding of fact as the ALJ recognizes – it is a conclusion of law and should be stricken.

Exception 2

Petitioner takes exception to Finding of Fact paragraph number 5 of the Recommended Order. The discussion and statutory reference and citation to §121.122(2), F.S. does not apply to Petitioner, a compulsory member of the Elected

Officer Class of the FRS who is covered by the specific provisions in §§ 121.052 and 121.053, F.S., respectively.

Exception 3

Petitioner takes exception to Finding of Fact paragraph number 6 of the Recommended Order. The ALJ's statement, "This amendment makes clear that the prohibition in section 121.122(2) applies equally to elected officials," when referring to §121.053 is not supported by competent evidence nor is it a correct statement of the law. Section 121.053, by its clear legislative enactment and intent, stands on its own terms in Part I of the Chapter 121, F.S., separate and apart from Part II of the chapter where §121.122(2) is found.

Moreover, application and affirmance of the ALJ's finding will result in the SBA's joining the ALJ in the misinterpretation of the legislative intent of §121.012, F.S.; that is, the application of the provisions of Part I of Chapter 121 to Parts II and III. That section provides as follows:

> 121.012 Inclusive provisions.—The provisions of part I of this chapter shall be applicable to parts II and III to the extent such provisions are not inconsistent with, or duplicative of, the provisions of parts II and III.

Importantly, and contrary to the ALJ's finding, the Legislature did not say that the provisions of Parts II or III of the chapter apply to Part I. Affirming the ALJ's finding that "section 121.122(2) applies equally to elected officials" would serve to

rewrite not only the Legislature's specific treatment of the Elected Office Class in Part I of Chapter 121 but would write into law something the Legislature did not say and did not intend.

Exception 4

Petitioner takes exception to Finding of Fact paragraph number 7 of the Recommended Order. First, counsel for both Petitioner and Respondent stipulated to the record on which to submit the matter to DOAH. The various relevant Staff Analyses that were prepared during the 2009 and 2012 legislative sessions are well-known to the parties. A reasoned decision was made to not include them in the DOAH record.

Second, the ALJ taking official recognition of the 2012 Staff Analysis without giving the Petitioner and Respondent an opportunity to address it results in a "proceeding … on which the finding is based did not comply with the essential requirements of the law," to wit: a failure of due process and an opportunity to be heard.

Finally, notwithstanding the foregoing and so as to not waive the exception or argument, the Petitioner asserts that from the very terms of the 2012 Staff Analysis (as well as the 2009 Staff Analysis) and a plain reading of it demonstrates that the application of the statutory amendments do not apply to the Elected Officer Class. Indeed, the Analysis, in the "Effect of Proposed Changes" section states:

"The bill makes it clear that a retiree of the investment plan, SMSOAP, SUSORP, or SCCSORP who is reemployed on or after July 1, 2010, is prohibited from being reenrolled as a renewed member of a state-administered retirement system." Elected Officer's Class members are not "reemployed;" they are compulsory members of the EOC by virtue of "election, reelection, or appointment." § 121.052, F.S. ("The following holders of elective office, hereinafter referred to as 'elected officers,' whether assuming elective office by election, reelection, or appointment, are members of the Elected Officers' Class."). An elected, reelected or appointed circuit judge, as is Petitioner, is a compulsory member of the EOC. §121.052(2)(a), F.S.

Exception 5

Petitioner takes exception to Conclusion of Law paragraph number 16 of the Recommended Order. The legal conclusion that the § 121.122(3) "prohibition applies equally to elected officials, including judges, ..." by virtue of the language found in § 121.053(3)(a) is a misapplication of the plain reading of the inclusive provisions and intent of § 121.012 providing that part I of the chapter shall be applicable to parts II and III. The ALJ, by concluding that the § 121.122(3) "prohibition" found in part II of the statute "applies equally" to "elected officials, including judges," improperly applies part II of the statute to part I, ignores and

then rewrites the very precise legislative application of § 121.012, rendering the statute and legislative intent meaningless.

Exception 6

Petitioner takes exception to Conclusion of Law paragraph number 20 of the Recommended Order. The ALJ "assumes" the Legislature recognized any purported conflict between §§ 121.4501(2)(k) and 121.052(3) when it enacted § 121.122(2). Petitioner asserts that the "assumption" is based on a misinterpretation and misapplication of the law as it is written.

In fact, there is no actual conflict between or among the statutes that are being referenced. Petitioner has attempted to demonstrate in this proceeding that the error in the SBA's decision to deny her membership in the FRS is due to the agency's and the ALJ's creation of a "conflict" by their failure to recognize that the Legislature has promulgated a separate statutory retirement scheme for the EOC and by their insistence in interpreting and rewriting the statutes to apply the provisions of part II to part I of the statute as they relate to members of the EOC in violation of the express intent of the Legislature.

Conclusion

Based on the foregoing, the SBA should modify the Findings of Fact and Conclusions of Law in the Recommended Order and issue a Final Order concluding the Petitioner is a retiree who is entitled to enroll in the Elected

Officer's Class of the Florida Retirement System pursuant to the express terms and legislative intent of part I of Chapter 121, Florida Statutes as they relate specifically to elected officers, including elected circuit judges.

Respectfully submitted this 3rd day of October 2014.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by electronic mail this 3rd day of October 2014, to:

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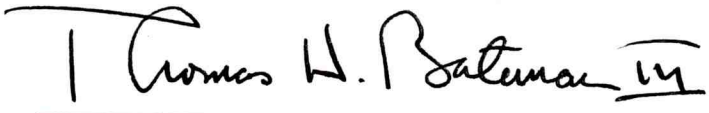

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