STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

ROBERT MARINAK, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	DOAH Case No. 20-0740 SBA Case No. 2020-0009

FINAL ORDER

On July 27, 2020, Administrative Law Judge Jodi-Ann V. Livingston (hereafter "ALJ") submitted her 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 the pro se Petitioner, Robert Marinak, and upon counsel for the Respondent. Both Petitioner and Respondent filed Proposed Recommended Orders. Petitioner timely filed exceptions on August 4, 2020. 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 State Board of Administration adopts and incorporates in this Final Order the Statement of the Issue in the Recommended Order as if fully set forth herein.

PRELIMINARY STATEMENT

The State Board of Administration adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order as if fully set forth herein.

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 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

Petitioner's Exception 1: Exception to Findings of Fact in Paragraph Number 6

The Findings of Fact in Paragraph Number 6 state that the parties stipulate that Voya has records showing Petitioner elected the Hybrid Option by means of a telephone call made on November 27, 2002, but no longer has the actual recording of that call. Now Petitioner is trying to argue that the Findings of Fact in Paragraph Number 6 should be rejected since Voya did not produce such records. However, because of the stipulation between the parties, there was no need for Voya to produce the records. Section (E)4. of the Joint Prehearing Stipulation, filed by the parties on March 23, 2020, states that it is specifically admitted by the parties that Voya has records indicating that Petitioner elected the Hybrid Option on November 27, 2002 via a telephone call, but a recording of such telephone call no longer is available. As such, the parties agreed through their stipulation that no proof of such facts would be required at hearing. [Joint Prehearing Stipulation, p. 6]. Thus, the ALJ's Findings of Fact in Paragraph Number 6 were based on substantial competent evidence. Therefore, Petitioner's Exception 1 regarding the Findings of Fact in Paragraph 6 must be rejected.

Petitioner also makes a statement in Exception 1 that Voya would not speak to him regarding his matter. However, such statement does not include appropriate and specific citations to the record, and is hereby rejected.

Petitioner's Exception 2: Exception to Findings of Fact in Paragraph Number 11

The Findings of Fact in Paragraph Number 11 specifically note that Petitioner received his first documented Investment Plan statement in 2005, covering the period January 1, 2005 through March 31, 2005. Section (E)6. of the Joint Prehearing Stipulation, filed by the parties on March 23, 2020, states that it is specifically admitted by the parties that beginning in 2005, the SBA sent or otherwise made available to Petitioner his Investment Plan statements. [Respondent's Exhibit R-5; Hearing Transcript, p. 12, lines 1-4]. As such, the parties agreed through their stipulation that no proof of the fact that Petitioner had access to, or otherwise received, Investment Plan statements at least as early as 2005 would be required at hearing. [Joint Prehearing Stipulation, p. 6]. The Findings of Fact further note that Petitioner did not inquire as to why the first documented statement received in 2005 referred to the Investment Plan rather than the Pension Plan, and that Petitioner did not file a complaint with the SBA after receiving that statement. No evidence was produced to show that Petitioner either inquired as to why he had received an Investment Plan account statement or that Petitioner previously had filed a complaint regarding his enrollment into the Investment Plan. Thus, the ALJ's Findings of Fact in Paragraph Number 11 were based on substantial competent evidence. Therefore, Petitioner's Exception 2 must be rejected.

Petitioner's Exception 3: Exception to Findings of Fact in Paragraphs Number 12 and 13

The Findings of Fact in Paragraph Number 12 note that as early as 2008, Petitioner received Pension Plan- Hybrid Option statements at his correct address of record. This finding was supported by Section (E)5. of the Joint Prehearing Stipulation, filed by the parties on March 23, 2020; Respondent's Exhibit R-4; and Page 11, lines 5-25 and Page 12, lines 1-4 of the DOAH Hearing Transcript. Thus, there is substantial competent evidence to support the Findings of Fact in Paragraph 12. As such, this portion of Exception 3 must be rejected.

Petitioner's Exception 3 also takes issue with the ALJ's Finding of Fact in Paragraph 13 that Petitioner has updated his beneficiary designations for both the Pension Plan and the Investment Plan portions of his Hybrid Option. This finding was supported by Section (E)7. of the Joint Prehearing Stipulation, filed by the parties on March 23, 2020; Respondent's Exhibit R-4; and Respondent's Exhibit R-5. Thus, there is substantial competent evidence to support the Findings of Fact in Paragraph 13. As such, this portion of Exception 3 must be rejected.

Petitioner's Exception 4: Exception to Findings of Fact in Paragraph Number 15

The Findings of Fact in Paragraph Number 15 note that Petitioner was provided with an Estimate of Retirement Benefits in December 2008 that contained a Comments section noting that Petitioner had 6.00 years in the Hybrid Investment Plan and that those 6.00 years were not used in calculating his monthly retirement benefit from the Pension Plan. These findings were supported by substantial competent evidence. [Respondent's R-2, page 4]. No evidence was produced to show that Petitioner previously had filed a complaint regarding his enrollment into the Investment Plan. Thus, the ALJ's Findings of Fact in

Paragraph Number 15 were based on substantial competent evidence and, therefore, Petitioner's Exception 4 must be rejected *in toto*.

Petitioner's Exception 5: Exception to Findings of Fact in Paragraph Number 17

The Findings of Fact in Paragraph Number 17 note that Petitioner did not produce any documentary evidence or audio recordings to show that he did not elect to transfer from the Pension Plan to the Hybrid Option. As noted previously, 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).

In Conclusion of Law Paragraph 27, the ALJ does recognize that if Petitioner did not switch plans, Petitioner would be unable to produce any recordings or documentary evidence. But, in Conclusion of Law Paragraph 28, the ALJ found it persuasive that the evidence produced by the SBA demonstrated that Petitioner was put on notice that he was enrolled in the Hybrid Option and that the Hybrid Option has an Investment Plan component. Despite such notice, Petitioner failed to take any action. The ALJ also noted Petitioner had plenty of opportunities to ask about the impact of the Investment Plan component before 5 year period set forth in Section 121.4501(8)(g) elapsed.

Thus, there is substantial competent evidence to support the Findings of Fact in Paragraph 17. Therefore, Petitioner's Exception 5 hereby is rejected.

Petitioner's Exception 6: Petitioner's Arguments in Paragraphs 7-10 of Petitioner's Exceptions

In Paragraphs 7 through 10 of his Exceptions, Petitioner is making certain statements and arguments that are not connected to any particular Findings of Fact or Conclusions of Law and that do not include appropriate and specific citations to the record. Additionally, Petitioner does not provide any legal basis for any of his assertions.

For example, Petitioner makes the statement in Paragraph 8 of his Exceptions that he believes that Voya, the Third Party Administrator at the time of Petitioner's switch to the Hybrid Option may have been given an "incentive" to switch Pension Plan members into the Hybrid Option. Yet, Petitioner has given no evidence from the record to support such an assertion.

Any Exceptions that may have been set forth by Petitioner in Paragraphs 7 through 10 hereby are rejected as being bare argument, not supported by the record, and/or arguments that have been fully considered by the ALJ and rejected by her as the trier of fact.

FINDINGS OF FACT

The State Board of Administration adopts and incorporates in this Final Order the Findings of Fact set forth in the Recommended Order as if fully set forth herein.

CONCLUSIONS OF LAW

The State Board of Administration adopts and incorporates in this Final Order the Conclusions of Law set forth in the Recommended Order as if fully set forth herein.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner was properly enrolled in the Florida Retirement System Hybrid Option Plan in 2002. As such, Petitioner is not entitled to be retroactively re-enrolled into the Florida Retirement System Pension Plan without being required to pay the statutorily required buy-in amount.

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 20th day of October, 2020, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Daniel Beard

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

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

Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to the Petitioner, Robert Marinak, both by email transmission to [redacted]; and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) and Ruth Vafek (rvafek@ausley.com; jmcvaney@ausley.com. Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 20th day of October, 2020.

Ruth A. Smith
Assistant General Counsel
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT MARINAK,

Petitioner,

vs. Case No. 20-0740

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

The final hearing in this matter was conducted before Administrative Law Judge Jodi-Ann V. Livingstone of the Division of Administrative Hearings (DOAH), pursuant to sections 120.569 and 120.57(1), Florida Statutes (2019),[1] on June 10, 2020, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Robert John Marinak, pro se
[redacted]

For Respondent: Ruth E. Vafek, Esquire
Ausley McMullen
123 South Calhoun Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

The issues in this case are whether Petitioner was properly enrolled in the Florida Retirement System (FRS) Hybrid Option Plan (Hybrid Option) in 2002, and whether he should be retroactively re-enrolled in the Florida

[1] All statutory references are to the 2019 version of the Florida Statutes, except where indicated otherwise.

EXHIBIT A

Retirement System Pension Plan (Pension Plan) without having to pay a "buy-in" amount.

PRELIMINARY STATEMENT

By letter dated January 15, 2020, the State Board of Administration (Respondent or SBA) advised Petitioner, Robert Marinak (Petitioner or Mr. Marinak), that it was denying his Request for Intervention to move his retirement account from the Hybrid Option to the Pension Plan. Mr. Marinak timely filed a Florida Retirement System Investment Plan Petition for Hearing (Petition). On February 12, 2020, SBA transmitted the Petition to DOAH for the assignment of an Administrative Law Judge to conduct a chapter 120 hearing.

Prior to the hearing, the parties submitted a Joint Pre-hearing Stipulation, which has been accepted and incorporated into the Findings of Fact of this Recommended Order. The final hearing was held on June 10, 2020, with both parties present. At the final hearing, Mr. Marinak represented himself and testified on his own behalf. Respondent called Ms. Allison Olson, Director of Policy Risk Management and Compliance in the Office of Defined Contribution Programs at SBA, as its witness. Respondent's Exhibits R-1 through R-6 were admitted into evidence, without objection.

At the close of the hearing, the parties were advised of a ten-day timeframe following DOAH's receipt of the hearing transcript to file post-hearing submittals. On June 26, 2020, the court reporter filed a one-volume hearing Transcript. On June 29, 2020, Mr. Marinak filed Petitioner's Proposed Recommended Order. On July 6, 2020, Respondent filed State Board of Administration's Proposed Recommended Order. Both submissions were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Mr. Marinak began employment with the Marion County Public School System, an FRS-participating employer, in 1989. At that time, the Pension Plan was the only retirement program available for eligible employees, and, thus, Petitioner was enrolled in the Pension Plan.

2. The Pension Plan is administered by the Florida Division of Retirement (Division of Retirement), which is housed within the Department of Management Services. The Pension Plan is a defined benefit plan; the benefit is formula-based. The formula used for calculating a pension plan benefit is based on total years of service at the time of retirement, membership class, and average final compensation.

3. Mr. Marinak has been continuously employed by an FRS-participating employer from 1989 to present.

4. In 2002, the FRS Investment Plan (Investment Plan) became available to employees participating in FRS. The Investment Plan is administered by Respondent. The Investment Plan is a defined contribution plan; the benefit is based on gains and losses due to market performance.

5. Mr. Marinak was provided a choice window of September 1, 2002, through November 30, 2002, to remain in the Pension Plan or switch to the Investment Plan.

6. The parties stipulate that the Plan Choice Administrator at the time, now doing business as Voya, has records indicating Mr. Marinak elected the Hybrid Option by means of a telephone call on November 27, 2002. Voya no longer has a recording of the call. SBA does not have a recording of the telephone call either.

7. The Hybrid Option is as its name indicates—it is a hybrid of the Pension Plan and the Investment Plan. When the Investment Plan was introduced in 2002, Pension Plan participants, with at least five years of service, could elect to enroll in the Investment Plan with a zero balance. With the election of the Hybrid Option, retirement funds from all years of service

prior to the election remain in the Pension Plan; everything from the election forward is administered under the Investment Plan. Hybrid Option participants will receive the resulting defined benefit from the Pension Plan (earned prior to the election) upon retirement, plus the benefits from the investments in the Investment Plan after the election.

8. The Pension Plan portion of the Hybrid Option remains with, and continues to be administered by, the Division of Retirement. The Investment Plan portion is administered by Respondent.

9. Mr. Marinak disputes electing to enter the Hybrid Option. He credibly testified that he did not desire to transfer to the Investment Plan and has no recollection of authorizing such a transfer.

10. Beginning at least as early as 2005, Respondent sent or otherwise made available to Mr. Marinak quarterly "FRS Investment Plan" statements. Mr. Marinak testified that he received these statements, but did not know what they meant.

11. The earliest FRS Investment Plan statement documented by Respondent as having been sent to Mr. Marinak covered the period of January 1, 2005, to March 31, 2005. Mr. Marinak did not inquire about the statement or file a complaint with Respondent after receiving this statement.

12. Beginning at least as early as 2008, the Department of Management Services sent or otherwise made available to Mr. Marinak annual "FRS Pension Plan – Hybrid Option" statements. These statements were sent to Mr. Marinak's address of record at the time the statements were mailed. Mr. Marinak testified that the addresses where the statements were sent were, indeed, his addresses.

13. Since the transfer in 2002, Mr. Marinak has updated his beneficiary designations for both the Pension Plan and Investment Plan portions of his Hybrid Option.

14. In November 2008, Mr. Marinak communicated by e-mail with personnel at the Division of Retirement about the status of the Pension Plan and the years of service used to calculate his benefits.

15. In December 2008, in response to his inquiry, the Division of Retirement prepared and provided to Mr. Marinak an Estimate of Retirement Benefit. The "Comments" section of the Estimate of Retirement Benefit stated as follows:

> This estimate is based on retirement at 30 years of service. It represents your 13.40 years of service in the Florida Retirement Pension Plan (8/1989 through 11/2002). You will have to terminate all employment with FRS employer to receive this benefit. You have an additional 6.00 years in the Hybrid Investment Plan through 11/2008; the years in the Hybrid Option are not used in calculating your monthly retirement benefit from the pension plan, which is why they are not reflected in your Member Annual Statement.

16. Mr. Marinak did not inquire about the comment or file a complaint after receiving the Estimate of Retirement Benefit.[2] Mr. Marinak testified that he saw the comment, but not being an expert in retirement financing, he did not comprehend what it meant.

17. Mr. Marinak did not present documentary evidence or an audio recording demonstrating that he did not elect to transfer from the Pension Plan to the Hybrid Option.

18. In early 2019, Mr. Marinak, nearing retirement, reviewed his retirement account and recognized that he was enrolled in the Hybrid Option. He contacted the Division of Retirement for guidance on how to switch back into the Pension Plan.

19. The Division of Retirement informed Mr. Marinak that he may utilize a one-time "second election" to move back into the Pension Plan, but must

pay a sum of approximately $160,000 as a "buy-in" amount to do so. This sum is derived from an actuarial calculation conducted by the Division of Retirement.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569 and 120.57(1).

21. Mr. Marinak initiated this matter, alleging he did not consent to be enrolled in the Hybrid Option in 2002. Consequently, he believes that he should be re-enrolled in the Pension Plan without having to pay the "buy-in" amount quoted to him by the Division of Retirement.

22. The burden of proof in an administrative proceeding, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue. *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981); *see also Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 935 (Fla. 1996). The standard of proof is the preponderance of the evidence standard. § 120.57(1)(j), Fla. Stat.

23. Section 121.4501(8)(g), Florida Statutes, provides, in relevant part:

> The state board shall receive and resolve member complaints against the program, the third-party administrator, or any program vendor or provider; shall resolve any conflict between the third-party administrator and an approved provider if such conflict threatens the implementation or administration of the program or the quality of services to employees; and may resolve any other conflicts. *The third-party administrator shall retain all member records for at least 5 years for use in resolving any member conflicts. The state board, the third-party administrator, or a provider is not required to produce documentation or an audio*

[2] It is worth noting that if Mr. Marinak had filed a complaint after receiving the Estimate of Retirement Benefit, it would have been over six years after his enrollment in the Hybrid Option.

> *recording to justify action taken with regard to a member if the action occurred 5 or more years before the complaint is submitted to the state board. It is presumed that all action taken 5 or more years before the complaint is submitted was taken at the request of the member and with the member's full knowledge and consent. To overcome this presumption, the member must present documentary evidence or an audio recording demonstrating otherwise.* (emphasis added).

24. Under Florida law, SBA is not required to maintain a recording of the telephone call to justify enrolling Mr. Marinak in the Hybrid Option, as this action was taken more than five years before he made a complaint.

25. Approximately 17 years passed before Mr. Marinak complained to SBA about his enrollment in the Hybrid Option. As such, his decision is presumed to have been made with his full knowledge and consent. To overcome the presumption, Mr. Marinak had the burden to present documentary evidence or an audio recording to support his position that he did not elect to make the transfer and prove that his enrollment in the Hybrid Option was made without his full knowledge and consent.

26. Mr. Marinak did not meet that burden.

27. Understandably, if, as Mr. Marinak testified, no phone call to make the election took place, it would be impossible for him to have such a recording. Similarly, taking Mr. Marinak's position that he neither sought out nor authorized the transfer to the Hybrid Option, he likely would have no documentary evidence to demonstrate such.

28. The documents that were presented by SBA establish that Mr. Marinak received, for a period of more than ten years prior to his complaint, statements which showed that he was enrolled in the Hybrid Option. He was put on notice that he had an Investment Plan component, and had multiple opportunities to ask about it before the five-year period expired.

29. In addition to his contention that he did not elect to transfer from the Pension Plan to the Hybrid Option in 2002, Mr. Marinak took issue with Respondent's assertion that he did so over the telephone.

30. In November 2002, when SBA contends that Mr. Marinak elected to transfer to the Hybrid Option, section 121.4501(4), Florida Statutes (2002), provided, in relevant part:

> (b)1. With respect to an eligible employee who is employed in a regularly established position on September 1, 2002, by a district school board employer:
> a. Any such employee may elect to participate in the Public Employee Optional Retirement Program[3] in lieu of retaining his or her membership in the defined benefit program of the Florida Retirement System. The election must be made in writing or by electronic means and must be filed with the third-party administrator by November 30, or, in the case of an active employee who is on a leave of absence on July 1, 2002, by November 30, 2002, or within 90 days after the conclusion of the leave of absence, whichever is later.

31. In *State Board of Administration v. Huberty*, 46 So. 3d 1144 (Fla. 1st DCA 2010), the Court held that SBA's interpretation of "by electronic means," to include permitting an employee to make that election by telephone, is consistent with the plain language of the law.

32. In accordance with his contention that he did not authorize the 2002 change from the Pension Plan to the Hybrid Option, Mr. Marinak seeks to be re-enrolled in the Pension Plan. Florida law authorizes such a change, but with conditions. Section 121.4501(4)(f) provides, in relevant part:

> After the period during which an eligible employee had the choice to elect the pension plan or the investment plan, or the month following the receipt of the eligible employee's plan election, if sooner, the employee shall have one opportunity, at the

[3] The Public Employee Optional Retirement Program is the Investment Plan.

> employee's discretion, to choose to move from the pension plan to the investment plan or from the investment plan to the pension plan.

33. Section 121.4501(4)(f)2. provides, in relevant part, conditions for that second election:

> *If the employee chooses to move to the pension plan, the employee must transfer from his or her investment plan account, and from other employee moneys as necessary, a sum representing the present value of that employee's accumulated benefit obligation immediately following the time of such movement, determined assuming that attained service equals the sum of service in the pension plan and service in the investment plan.* Benefit commencement occurs on the first date the employee is eligible for unreduced benefits, using the discount rate and other relevant actuarial assumptions that were used to value the pension plan liabilities in the most recent actuarial valuation. For any employee who, at the time of the second election, already maintains an accrued benefit amount in the pension plan, the then-present value of the accrued benefit is deemed part of the required transfer amount. The division must ensure that the transfer sum is prepared using a formula and methodology certified by an enrolled actuary. A refund of any employee contributions or additional member payments made which exceed the employee contributions that would have accrued had the member remained in the pension plan and not transferred to the investment plan is not permitted. (emphasis added).

34. SBA does not have statutory authority to allow Mr. Marinak to utilize his second election without paying the sum representing the present value of that employee's accumulated benefit obligation immediately following the time of such movement—that is the "buy-in" amount. The payment of this "buy-in" amount, when an employee elects to move from the Investment Plan back to the Pension Plan, is expressly required by statute.

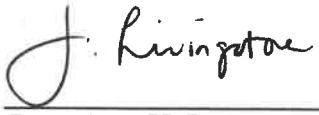
35. Florida law provides no avenue for re-enrollment into the Pension Plan, by way of Mr. Marinak's second election, without the payment of the "buy-in" amount. In discharging its responsibilities, SBA must act within the parameters established by the Legislature. SBA has only the authority conferred on it by the Legislature. *See Pesta v. Dep't of Corr.*, 63 So. 3d 788, 790 (Fla. 1st DCA 2011) (observing that administrative agencies have only such powers as statutes confer); *Schiffman v. Dep't of Prof'l Reg., Bd. of Pharm.*, 581 So. 2d 1375, 1379 (Fla. 1st DCA 1991) ("An administrative agency has only the authority that the legislature has conferred it by statute.").

36. In sum, Mr. Marinak did not rebut the presumption that the initial election to transfer from the Pension Plan to the Hybrid Option, which occurred in 2002 (that is, more than five years prior to Mr. Marinak's initial complaint in 2019), was made with his full knowledge and consent. Moreover, SBA has no authority to grant Mr. Marinak a second election to re-enroll in the Pension Plan without paying the statutorily mandated "buy-in" amount.

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 dismissing Petitioner's Florida Retirement System Investment Plan Petition for Hearing.

DONE AND ENTERED this 27th day of July, 2020, in Tallahassee, Leon County, Florida.



JODI-ANN V. LIVINGSTONE
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Filed with the Clerk of the
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this 27th day of July, 2020.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT MARINAK,

Petitioner,

vs. Case No. 20-0740

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

PETITIONER'S EXEMPTIONS TO RECOMMENDED ORDER

PETITIONER, Robert Marinak, submits the following exceptions to the Recommended Order filed on July 27, 2020:

Paragraph 6

1. The findings of fact in paragraph 6 should be rejected because Voya, the Plan Choice Administrator (*currently*), provided no records indicating Mr. Marinak elected the Hybrid Option by means of a telephone call on November 27, 2002. There was no recording of said phone call, no documentation signed by the Petitioner acknowledging the election, and no follow up documentation provided – there was only a copy of an email where a representative from Voya claimed this election took place.

2. Despite several emails and calls from Mr. Marinak, the representative from Voya refused to have any dialogue with him regarding this matter (*even though Mr. Marinak is currently using Voya for a 403b investment and is an active 'customer'*). The SBA even requested that Mr. Marinak not try to contact the representative from Voya at all.

Paragraph 11

3. The findings of fact in paragraph 11 should be rejected because Mr. Marinak had no knowledge that he had been switched into the Investment Plan and therefor would have

no reason to suspect that his statements from the FRS would reflect anything other than his Pension Plan information. He did not inquire or file a complaint at that time because he had no reason to think he was not enrolled in the Pension Plan.

Paragraph 12 & 13

4. The findings of fact in paragraph 12 and 13 should be rejected because Mr. Marinak, again, had no knowledge that he had been switched into the Investment Plan. Receiving statements and changing beneficiaries is something that any employee would do when presented with the need to change them based on life circumstances (*they were changed due to a subsequent divorce*).

Paragraph 15

5. The findings of fact in paragraph 15 should be rejected because, for the very first time, Mr. Marinak noticed there was something 'wrong' with his retirement statement. The "Comments" on the Estimate of Retirement Benefit did not reflect the total number of years he had been teaching. Even though it did include an explanation of 13.40 years in the Pension Plan and 6.00 years in the Investment Plan, Mr. Marinak was still not aware that he had been switched into that plan. Because he had no reason to suspect anything was different, he did not make an inquiry – he kept focusing on his teaching career and family.

Paragraph 17

6. The findings of fact in paragraph 17 should be rejected because Mr. Marinak would absolutely have no documentary evidence (*or audio recording*) to demonstrate he did not elect to transfer from the Pension Plan to the Hybrid Option. How would he have been able to document something that never happened (*as was his sworn testimony*)?

7. This is also directly connected to the "Conclusion of Law" in paragraph #22 where Mr. Marinak would be subjected to the 'burden of proof' issue: he had no documentary evidence of making a switch because he never made one. Even if he would have challenged the FRS in 2008, the 5-year grace period for the 3rd party administrator would have expired – a point that Mr. Marinak finds most coincidental: see Section 121.4501(8)(g).

8. Based on the foregoing arguments, the Petitioner requests a substituted conclusion of law, reflecting that the S.B.A. has not proven that Mr. Marinak made any changes to his original Pension Plan. The Petitioner believes that the "3rd party administrator" at the time (*that information was also never shared with Mr. Marinak*) may have been given some sort of incentive to 'switch' Pension Plan members in the Investment Plan (*through the Hybrid Option*). As he claimed during this hearing, there is no way that he would ever agree to switching to a plan that was predicted to be $10,000 less per year even in an opportune market. If the 3rd party administrator is at fault, then the SBA should look for rectification from the current plan administrator which is ultimately responsible for what took place.

9. For the reasons stated above, the ALJ's conclusions of law, particularly in her findings related to the factors in section 121.4501 (4) and 121.4501 (4)(f), Mr. Marinak contends that no communication was made on his part to give permission to any 3rd party administrator to change his retirement plan. Even if a 'telephone call' is considered a form of "electronic means", there was no evidence of any follow up documentation provided by the SBA during this hearing. Ironically, there was evidence presented for another totally separate phone call made by Mr. Marinak (*where it seemed that he might have been trying to get information about the Investment Plan*) roughly at the same time. Why would there

be a 'record' of this call and not the alleged call to make a change in his retirement plan? In section 121.4501 (4) (f) it states that an employee making such a switch would be given a month to retract that move. There was no such time period afforded to Mr. Marinak because he was totally unaware that any change had been made to his retirement account. Any other rule of law after that would not be enforceable because there is no evidence that a switch was actually made.

10. The Petitioner is also unsure of why the process he followed to rectify this error in his retirement plan was established based on the information provided in paragraph #34 which states that the "SBA does not have the statutory authority to allow Mr. Marinak to use his second election without paying the sum representing the present value". Mr. Marinak does not believe that he is subject to a "2nd election" requirement because he never made a 'first election' to be switched into the Investment Plan (*Hybrid Option*).

11. For the foregoing reasons, the Petitioner requests entry of a final order consistent with its exceptions, concluding that Mr. Marinak should be returned to his original Pension Plan retirement fund allowing for the transfer of his current funds in the Investment Plan to be rolled over to the pension fund but at no extra expense to him. Should the SBA need additional monies to make up any difference in the fund, they should seek renumeration from Voya, the acting plan manager since it was their responsibility.

R. J. Marinak

PETITIONER

[redacted]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the true and correct copy of the foregoing has been furnished via electronic delivery on this 4th day of August 2020, to the following:

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