STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

MANUEL J. MARI, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	DOAH Case No. 21-1541

FINAL ORDER

On March 15, 2022, Administrative Law Judge Robert S. Cohen (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 the Petitioner, Manuel Mari, a Florida licensed attorney, and upon counsel for the Respondent. Petitioner and Respondent both timely filed a Proposed Recommended Order. No exceptions were filed by either party. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief, 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 ("ALJ") 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 an ALJ'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 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." Florida courts have consistently applied the "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the ALJ's application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the ALJ'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 or more reasonable than that which was rejected or modified.

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's Petition for Hearing hereby is dismissed, as Petitioner presented no competent substantial evidence to show that Maria Mari had filed a valid Florida Retirement System second election form prior to her date of death while she still was actively employed and earning service credit.

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 June, 2022, 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 by email transmission to Manuel J. Mari at manuel@manueljmaripa.com and Ada G. Llerena.at ada@manueljmaripa.com; by UPS to Manuel J. Mari, P.A., [redacted]; and by email transmission to Rex Ware (RexWare@FloridaSalesTax.com), Moffa, Sutton & Donnini, P.A., Suite 330, 3500 Financial Plaza, Tallahassee, Florida 32312 and Jonathan Taylor (JonathanTaylor@FloridaSalesTax.com), Moffa, Sutton, & Donnini, P.A.,100 West Cypress Creek Road, Suite 930, Fort Lauderdale, FL 33309, this 14th day of June, 2022.

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

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANUEL J. MARI,

Petitioner,

vs. Case No. 21-1541

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 14, 2022, via Zoom video conference, before the Honorable Robert S. Cohen, a duly designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Ada G. Llerena, Esquire
Manuel J. Mari, Esquire, P.A.
[redacted]

For Respondent: Rex D. Ware, Esquire
Moffa, Sutton & Donnini, P.A.
3500 Financial Plaza, Suite 330
Tallahassee, Florida 32312

Jonathan W. Taylor, Esquire
Moffa, Sutton & Donnini, P.A.
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100 West Cypress Creek Road
Fort Lauderdale, Florida 33309

STATEMENT OF THE ISSUE

Whether the State Board of Administration ("SBA") properly reversed its previous decision and, therefore, properly denied the 2nd Election Retirement Plan Enrollment Form ("Enrollment Form") submitted for Maria C. Mari for the purpose of changing her Florida Retirement System ("FRS") election from the FRS Pension Plan to the FRS Investment Plan.

PRELIMINARY STATEMENT

Pursuant to section 121.4501(4)(f), Florida Statutes, eligible employees have a one-time option to change elections between the FRS Pension Plan and the FRS Investment Plan. The right to change elections is expressly limited to eligible employees, meaning FRS-covered employees; and the second election must be received and processed by the Plan Choice Administrator while the eligible employee is actively employed and earning service credit. The election of a different plan will be hereafter referred to as the "Second Election."

Maria C. Mari, who was a tenured professor of Accounting Economics at Miami-Dade College, and a member of the FRS Pension Plan, allegedly made her Second Election to the FRS Investment Plan and, completed and submitted her Enrollment Form. On March 27, 2019, Ms. Mari died unexpectedly. On March 27, 2019, Petitioner, Manuel J. Mari, Ms. Mari's surviving brother and sole heir, faxed and mailed Ms. Mari's Enrollment Form, dated March 23, 2019, to the Plan Choice Administrator. Subsequently, Petitioner received the Florida Retirement System's 2nd Election Status Notice, dated April 1, 2019, stating that the Enrollment Form's Page 2 contained investment choices that did not equal 100 percent. After subsequent contact by Petitioner with the Plan Choice Administrator, an investment plan account was opened, and Ms. Mari's assets were transferred to the account on July 1, 2019. On July 5, 2019, the 2nd Election

was reversed, and the assets were removed from the investment plan account by the Plan Choice Administrator.

On April 21, 2021, Petitioner submitted a Request for Intervention, seeking a review of the reversal decision concerning Ms. Mari's Second Election. On April 23, 2021, Respondent responded to Petitioner, defending its decision to reverse Ms. Mari's Second Election to the Investment Plan. On May 7, 2021, Petitioner timely submitted his Petition for Hearing involving disputed issues of material fact.

The SBA referred that petition to DOAH and the matter was assigned to ALJ Robert S. Cohen. The final hearing was held on January 14, 2022. The SBA and Mr. Mari were present and represented by counsel.

At the hearing, the SBA called Allison Olson, the Director of Policy, Risk Management, and Compliance in the SBA Office of Defined Contribution Programs, to testify and offered Exhibits 1 through 14 and 17, all of which were admitted into evidence. Petitioner presented his case through his own testimony, the testimony of Frederick Jordan, and the testimony of Allison Olson, and offered Exhibits 1 through 24, all of which were admitted into evidence.

The one-volume final hearing Transcript was filed on February 8, 2022. Each party timely filed proposed recommended orders, which were considered in the preparation of this Recommended Order. All references to the Florida Statutes are to the 2021 codification.

FINDINGS OF FACT

1. Petitioner is the brother of Ms. Mari and the personal representative of her estate. Petitioner is an attorney, licensed to practice in Florida.

2. The SBA, an agency of the State of Florida, is authorized to administer the FRS and oversees the FRS Investment Plan pursuant to section 121.4501.

3. Ms. Mari was a tenured professor of Accounting and Economics and a former employee of Miami-Dade College in Miami, Florida. Her employment with Miami-Dade College began in approximately 1989. As such, she was a member of the FRS Pension Plan.

4. Petitioner testified that on March 23, 2019, prior to her death, Ms. Mari made her Second Election to the FRS Investment Plan, and completed and submitted her Enrollment Form. Petitioner testified that he learned of Ms. Mari's submission of her Enrollment Form from Ms. Mari herself on March 23, 2019, when they met for dinner.

5. On March 27, 2019, Ms. Mari unexpectedly passed away.

6. Petitioner testified that Ms. Mari submitted the Enrollment Form prior to her death on March 27, 2019.

7. On March 28, 2019, the day after Ms. Mari's death, Petitioner faxed the Enrollment Form to the SBA's third-party Plan Choice Administrator, Alight Solutions.

8. The Second Election was denied because the investment elections did not equal 100 percent; at that time, the Plan Choice Administrator was not aware of Ms. Mari's passing.

9. Petitioner did not contact anyone to discuss why the Second Election was denied. Instead, on April 1, 2019, Petitioner faxed the exact same Enrollment Form to the Plan Choice Administrator.

10. The Second Election was again denied because the investment elections did not equal 100 percent, according to the SBA.

11. On April 9, 2019, Petitioner faxed a revised Enrollment Form to the Plan Choice Administrator. Petitioner revised the form by removing the 100 percent election.

12. The revised Second Election faxed on April 9, 2019, was initially accepted. After the SBA became aware that Ms. Mari had passed away, however, on March 27, 2019, the SBA directed that the Second Election be reversed.

13. The election was reversed, according to the SBA, because Ms. Mari was not eligible to make a Second Election due to her passing, and because the second election was not received and processed until after her death.

14. On April 21, 2021, Petitioner filed a Request for Intervention disputing the reversal. The SBA thereafter issued a Response to the Request for Intervention, upholding the reversal. Following that decision, Petitioner timely filed an FRS Investment Plan Petition for Hearing with DOAH.

Petitioner presented no competent substantial evidence that Ms. Mari timely submitted an Enrollment Form.

15. Petitioner has consistently contended, and testified as such at hearing, that Ms. Mari submitted an Enrollment Form electing to transfer from the FRS Pension Plan to the Investment Plan, prior to her death on March 27, 2019.

16. Despite his contention and despite his earnest testimony that he is confident in the fact that the Enrollment Form was signed, notarized, and filed prior to Ms. Mari's date of death, Petitioner was unable to document this in any credible way other than through his testimony. In his deposition taken by counsel for the SBA in this matter, Petitioner was clear on two points: a) he talked at length with his sister during the month of December 2018 about the need for her to make the Second Election, and he was still having this conversation with her mere days before her passing; and b) he had no documentation in his possession that would effectively prove Ms. Mari submitted this documentation "to someone, to some agency."

17. When reminded by SBA counsel at the deposition of a conversation Petitioner had with Ms. Olson, he agreed that, except for the signed Second

Election document he entered into evidence at hearing, he had no written evidence that his sister submitted that signed document to either Alright Solutions (the Plan Choice Administrator) or to the SBA prior to her death.

18. Consistent with his testimony at deposition, Petitioner submitted no documentation or competent substantial evidence at hearing to support Ms. Mari's having submitted a Second Election to the Plan Choice Administrator or to the SBA. Further, Petitioner submitted no evidence in the form of a power of attorney or any other legally binding document that would have authorized Petitioner to submit a Second Election on her behalf.

19. The SBA's records and testimony likewise reflect that neither the SBA nor the Plan Choice Administrator received a Second Election from, or on behalf of, Ms. Mari prior to her death.

20. Petitioner's statement, even under oath, that Ms. Mari told him she had "chosen" a Second Election does not prove that she *submitted* a Second Election; does not prove that she authorized Mr. Mari to submit a Second Election on her behalf; and cannot be used to support a finding because the statement is hearsay, unsupported by any other competent substantial evidence.

21. The evidence instead supports that Petitioner faxed the Enrollment Form on March 28, 2019, to the Plan Choice Administrator; and this faxed document from Petitioner was the first notice received indicating Ms. Mari's alleged intent to make a Second Election.

22. Ultimately, the evidence shows that Ms. Mari passed away on March 27, 2019. At the time of her passing, Ms. Mari's employment relationship with Miami-Dade College ended, and, as of that date, Ms. Mari had not submitted a Second Election.

23. The Second Election, first submitted as the Enrollment Form on March 28, 2019, was, therefore, not submitted by an "eligible employee." Nor was the Second Election received and processed by the Plan Choice Administrator while Ms. Mari was actively employed in an eligible position.

Whether the Second Election Enrollment Form was properly completed by Petitioner is irrelevant to Ms. Mari's posthumous attempt at making the second election.

24. Much was made by Petitioner about Ms. Olson's testimony at hearing that the Enrollment Form was improperly completed, leading it to be rejected on more than one occasion until Petitioner completed it in the manner Ms. Olson believed to be correct.

25. Ms. Olson testified that, because Ms. Mari had selected Option 3 entitled "Choose A Retirement Date Fund for Me" on Page 1 of the Enrollment Form, it would be unnecessary to complete Page 2 of the form, giving this as the reason for the rejection of the submission the Plan Choice Administrator received on March 28, 2019. Under cross-examination, Ms. Olson admitted that there are no instructions on Page 1 indicating that if Option 3 is selected, Page 2 would not need to be completed. It should be noted that Page 2 of the Enrollment Form contains language at the top of that page instructing the Plan Member to complete Page 2.

26. Under cross-examination, Ms. Olson testified that she reached the conclusion that Ms. Mari's Second Election needed to be reversed after it had been accepted and processed by the Plan Choice Administrator because she believed that Ms. Mari's death was tantamount to termination of Ms. Mari's employment and, therefore, rendered her ineligible for the Second Election. Ms. Olson could not reference any specific rule or statute which supported her conclusion. Based upon the findings above that Ms. Mari's death terminated her employment and ceased her ability to make a Second Election by submitting the Enrollment Form, none of this discussion about whether the Enrollment Form was correctly completed is relevant to the ultimate determination in this proceeding.

CONCLUSIONS OF LAW

27. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

28. Petitioner argues that the "key month" for determining whether Ms. Mari could make a Second Election is March 2019. To support this contention, he relies upon section 121.4501(4)(f), which states, in pertinent 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 employee's discretion, to choose to move from the pension plan to the investment plan or from the investment plan to the pension plan. Eligible employees may elect to move between plans only if they are earning service credit in an employer-employee relationship consistent with s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections are effective on the first day of the month following the receipt of the election by the third-party administrator and are not subject to the requirements regarding an employer-employee relationship or receipt of contributions for the eligible employee in the effective month, except when the election is received by the third-party administrator.

29. To support its position that Ms. Mari should be deemed to have continued to work and earn a salary and benefits through the month of March 2019, thereby entitling her to the Second Election as of March 28, 2019, Petitioner asserts that it was clear from the testimony presented at the final hearing that: a) Ms. Mari earned a salary and service credit for the month of March 2019; and b) that even accepting the Respondent's assertion

that the Enrollment Form was first received on March 28, 2019, Ms. Mari was entitled to make her Second Election to the FRS Investment Plan.

30. The undersigned agrees that the statute cited above dictates that the Second Election must be made by an "eligible employee," which means an employee who is an FRS member. § 121.4501(2)(e), Fla. Stat.

31. The plain language of section 121.4501(4)(f) above states that the employee must ensure the Second Election is *received* by the third-party administrator while the employee is "earning service credit in an employer-employee relationship consistent with s. 121.021(17)(b), excluding leaves of absence without pay." The statutory language makes clear that the employee must be both in an employer-employee relationship and earning service credit when the Second Election is *received* by the third-party administrator. *See also Wagner v. State Bd. of Admin.*, Case No. 19-4954 (Fla. DOAH Jan. 8, 2020; Fla. State Bd. of Admin. Apr. 6, 2020)("*Wagner*")(concluding that the Second Election under section 121.4501(4)(f) must be received by the third-party administrator while the employee is employed by an FRS-participating employer).

32. Florida Administrative Code Rule 19-11.007 implements section 121.4501(4)(f) and reiterates that only an eligible employee can make a Second Election; and that the Second Election must be received and processed by the Plan Choice Administrator while the member is actively employed and earning service credit. Fla. Admin. Code R. 19-11.007(2); *see also Wagner* (concluding that the rule "places a duty on the employee to assure that the Plan Choice Administrator has received the Second Election before the employee leaves active employment.").

33. The Enrollment Form, which is incorporated by reference in rule 19-11.007(3)(a), likewise confirms that the employee must be both actively employed and earning service credit when the form is received by the Plan Choice Administrator. Because the form must be received and processed

during the employee's active employment, an employee's right to make a Second Election ends when his or her FRS employment is terminated. § 121.4501(4)(f), Fla. Stat.; Fla. Admin. Code R. 19-11.007(2) ("[T]erminated members cannot use their 2nd election until they return to FRS-covered employment."); [(directing the member that the Second Election must be received by the Plan Choice Administrator "prior to your date of termination.").]

34. An employee's employment is terminated "when a member ceases all employment relationships with participating employers." § 121.021(39)(a), Fla. Stat. Death is encompassed within the meaning of "termination." § 121.091(7), Fla. Stat. ("If the employment of a member is terminated by reason of his or her death ... "); *see also* § 121.012, Fla. Stat. (explaining that the provisions of part I of chapter 121 are applicable to parts II and III).

35. Moreover, an employee cannot change elections after death because, upon an employee's death, the benefits are automatically payable to the employee's designated beneficiary. §§ 121.091(7) and 121.591(3), Fla. Stat.

36. The statutes and rules thus establish that: a) only an eligible employee can make a Second Election; and b) the Second Election must be received and processed by the Plan Choice Administrator while the employee is actively employed and earning service credits; and c) death terminates active employment. Here, the SBA properly denied the Second Election submitted by Petitioner because: a) the Second Election was not made by an eligible employee; and b) the Second Election was not received and processed by the Plan Choice Administrator while Ms. Mari was actively employed and earning service credit—Ms. Mari was deceased when the Second Election was first received.

The SBA properly denied the Enrollment Form submitted by Petitioner because the Second Election was not made by an eligible employee.

37. As a threshold matter, only an eligible employee can switch elections. § 121.4501(4)(f), Fla. Stat. To be eligible, the employee must be an active FRS member. § 121.4501(2)(e), Fla. Stat. Based on the evidence in this case, an eligible employee never made a Second Election. No evidence was presented proving that Ms. Mari submitted a Second Election. Nor was any evidence produced showing that, prior to her passing, Ms. Mari authorized Petitioner to submit a Second Election on her behalf.

38. Instead, the evidence shows that Petitioner, as the personal representative of Ms. Mari's estate, submitted a Second Election for Ms. Mari the day after she passed away. Nothing in chapter 121, section 121.4501(4)(f), or rule 19-11.007, authorizes a personal representative to change elections for a deceased former employee. Rather, upon an employee's death, the benefits go to the employee's designated beneficiary. §§ 121.091(7) and 121.591(3), Fla. Stat. As Ms. Mari was a member of the FRS Pension Plan at the time of her death, her benefits are payable as authorized under section 121.091(7).

39. Because Ms. Mari never submitted a Second Election, and Petitioner lacked authority to change Ms. Mari's election after her death, the SBA correctly reversed the election.

40. Petitioner argues that Ms. Mari did change elections because her signing the form indicates an intent to change plans. Intent to make a Second Election, however, does not equate to making a Second Election. Clearly, the test here is whether the election is received and processed by the Plan Choice Administrator during the permitted time frame. Petitioner was unable to prove, through computer records, fax transmission records, discovery, public records requests to the SBA, or by any other means, that Ms. Mari submitted the executed Second Election prior to her death. Petitioner believes the Second Election was submitted by Ms. Mari because, as he testified, at dinner the Saturday night before she died "she mentioned that she was

electing to move to the investment program ... she wanted to get her money." This unsubstantiated hearsay cannot serve as the basis for the undersigned to determine that the Second Election was actually submitted to or received by the SBA prior to March 27, 2019. *See Wagner*; *see also, Buholz v. State Bd. of Admin. Case*, No. 21-0084, RO at 7-8 (Fla. DOAH Apr. 20, 2021; Fla. State Bd. of Admin. June 17, 2021).

41. Although Ms. Mari may have intended to make a Second Election, the competent substantial evidence does not support that she acted upon that intent by submitting a Second Election or by authorizing Petitioner to submit a Second Election on her behalf.

42. Even if evidence had been produced showing that Ms. Mari submitted a Second Election prior to her death, the only form ultimately processed by the Plan Choice Administrator was the revised form received from Petitioner on April 9, 2019, after Ms. Mari's death. *See* Fla. Admin. Code R. 19-11.007(3)(h) (explaining that resubmitted forms are considered new forms). The only Second Election received and processed was thus indisputably sent by Petitioner, who was not eligible to make a Second Election on Ms. Mari's behalf.

A Second Election cannot be deemed "timely" if received after the employee's date of death.

43. The law is clear that an employee must be both actively employed and earning service credit when the Second Election is received by the Plan Choice Administrator. Yet, Petitioner contends that the Second Election by Ms. Mari was timely because death does not end the employment relationship. Petitioner's argument is rejected primarily because death is encompassed within the meaning of "termination"; and, upon an employee's death, the benefits go to the employee's designated beneficiary. §§ 121.091(7) and 121.591(3), Fla. Stat.; *see also Twin Oaks Villas, Ltd. v. Joel D. Smith, LLC*, 79 So. 3d 67, 70 (Fla. 1st DCA 2011) (quoting *Palm Bch. Cnty.*

Canvassing Bd. v. Harris, 772 So. 2d 1273, 1287 (Fla. 2000): "[R]elated statutory provisions must be read as a cohesive whole, and a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision.").

44. Although active employment ends upon death, Petitioner still argues: a) employment does not end upon death because the definition of "termination" under section 121.021(39)(a) does not specifically identify the word "death"; and b) alternatively, that only an employee can terminate the employment relationship. Petitioner's arguments on this point are rejected as the first argument would render section 121.021(39)(a) meaningless; and the alternative argument conflicts with the plain language of the statute and chapter 121.

45. An interpretation that renders a statute meaningless should be rejected. *Forsythe v. Longboat Key Bch. Erosion Control Dist.*, 604 So. 2d 452, 454-56 (Fla. 1992). Petitioner, therefore, appears to argue that only acts specifically listed in the definition of "termination" can end an employment relationship. But section 121.021(39)(a) does not identify any specific act. Rather, under the statute's plain language, an employee is terminated when the employment relationship has ceased.

46. Although the terms "ceased" and "employment relationship" are undefined, the lack of definitions do not make the terms ambiguous; the ordinary meanings of the terms apply. *Univ. of Fla. Bd. of Trustees v. Andrew*, 961 So. 2d 375, 376 (Fla. 1st DCA 2007) ("Although the key terms...are not defined, the words have common and ordinary meanings that lead to clear and unambiguous results.")

47. The term "cease" means: "1. To stop, forfeit, suspend, or bring to an end. 2. To become extinct; to pass away." Cease, Black's Law Dictionary (11th ed. 2019); *see also* "cease", Merriam-Webster Online Dictionary, www.merriam-webster.com/dictionary/cease (last visited March 9, 2022)(noting that die, end, quit, and terminate are synonyms of "cease.").

48. The term "employment relationship" derives from common law and, at common law, control establishes an employment relationship. *Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1182-83 (Fla. 2020)(explaining that when a statute uses a common-law term without defining it, the common-law meaning must be used); *Saudi Arabian Airlines, Corp. v. Dunn*, 438 So. 2d 116, 120-21 (Fla. 1st DCA 1983)(holding that, at common law, "the essential element [for an employment relationship] being the right of control and the right to direct the manner in which the work shall be done.").

49. When applying the common meanings of "ceased" and "employment relationship," an employee is therefore terminated when the employee is no longer controlled by the FRS-participating employer. Any act that ceases, or ends, the employment relationship must qualify as "termination." *Raymond James Fin. Servs, Inc. v. Phillips*, 126 So. 3d 186, 190-91 (Fla. 2013)(explaining that a statutory term encompasses all acts falling within the plain meaning of that term).

50. The provisions in chapter 121 support that any act ending the employment relationship qualifies as "termination." § 121.011(3)(g), Fla. Stat. ("[A]ny member of an existing system under this chapter who is not retired and who is, has been, or shall be dismissed from employment shall be considered terminated from active membership in such system."); § 121.091(7), Fla. Stat. (equating death with termination); *Wagner*, Case No. 19-4954, at RO 10, 17 (explaining that petitioner's FRS-qualifying employment terminated the day she retired).

51. Petitioner's interpretation—only acts listed in the definition qualify as termination—would render section 121.021(39)(a) meaningless. If Petitioner's interpretation was applied, an employee would never be considered terminated simply because section 121.021(39)(a) does not identify any specific act. An employee could thus get fired, quit, retire, or die, and still be considered actively employed because those acts are not identified in the definition of "termination." Section 121.021(39)(a), by including the word

"ceased," was not intended to be so restricted. The references in chapter 121 to death, dismissal, and retirement, further show that "termination" occurs when employment ends. Because "termination" encompasses all acts that end an employment relationship, including death, and because Respondent's interpretation would render section 121.021(39)(a) meaningless, Respondent's interpretation is rejected.

52. Petitioner also appears to argue that Ms. Mari was still employed after her death because she was issued a paycheck after her date of death and allegedly awarded service credit with that paycheck. This argument is rejected as well because, regardless of payment, a person cannot be actively employed after death—the essential element of control for an employment relationship ends once a person is deceased. *See Hoar Const. v. Varney*, 586 So. 2d 463, 464 (Fla. 1st DCA 1991)(holding that the administrative task of payment does not prove employment when control is lacking); *Saudi Arabian Airlines*, 438 So. 2d at 120-21 ("[T]he payment of wages being the least important factor."); *see also* § 121.091(7), Fla. Stat. (mandating that an employee's benefits go to the beneficiary upon the employee's death).

53. Section 121.4501(4)(f) requires that the employee be both actively employed and earning service credit at the time the second election is received by the Plan Choice Administrator. Even if Ms. Mari received a paycheck after her death, her second election was still correctly reversed because she was not actively employed and earning service credit when the election was received from Respondent.

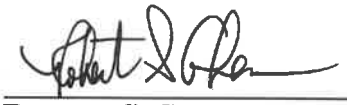
54. Petitioner's alternative argument conflicts with the plain language of section 121.021(39)(a) and chapter 121. An interpretation that conflicts with a statute's plain language should likewise be rejected. *Forsythe*, 604 So. 2d at 454-56. Despite the unequivocal language in section 121.021(39)(a), Petitioner argues that an employee can only be "terminated" when the employee affirmatively ends the employment relationship, not when the employer ends the relationship. Under this somewhat absurd reasoning,

employees would be treated differently based on how their employment ends: the acts of quitting or retiring would qualify as termination but the acts of getting fired or dying would not qualify. Section 121.021(39)(a) does not distinguish between whether the employee ends the relationship or the employer ends the relationship. Further, no language in section 121.4501 or chapter 121 states that employees who quit are considered terminated but employees who are fired or die are still considered actively employed. The statutes instead equate each of those acts that end employment with "termination." §§ 121.011(2)(g) and 121.091(7), Fla. Stat. Petitioner's attempt to create a distinction not apparent from the plain statutory language is rejected.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the SBA enter a final order dismissing Petitioner's Florida Retirement System Plan Petition for hearing.

DONE AND ENTERED this 15th day of March, 2022, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of March, 2022.

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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.