STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

JOHN D. JACKSON, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	SBA Case No. 2014-2998

FINAL ORDER

On July 14, 2014, the presiding officer 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, John D. Jackson and upon counsel for the Respondent. Both Petitioner and Respondent filed Proposed Recommended Orders. Through counsel retained after the hearing, Petitioner timely filed exceptions on July 29, 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 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

EXCEPTIONS

The findings of fact in a recommended order 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."

Pursuant to Section 120.57(1)(l), Florida Statutes, however, a reviewing agency has the general authority to "reject or modify conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." Florida courts have consistently applied this section's "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the administrative law judge's application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the administrative law judge's interpretation of a statute or rule over which the Legislature has provided the agency administrative authority. *See, Deep Lagoon Boat Club, Ltd. V.*

Sheridan, 784 So.2d 1140, 1141-42 (Fla. 2nd DCA 2001); *Barfield v. Dept. of Health*, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001).

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 certain language set forth in Section 121.35, Florida Statutes forms the basis for all of Petitioner's exceptions, an overview of the section is useful. It must be remembered at the outset that a cardinal rule of statutory construction is that the entire statute being analyzed must be considered in determining the legislative intent of that statute. *State v. Gale Distributors*, 349 So.2d 150 (Fla. 1977). Statutory phrases under consideration cannot be read in isolation but rather must be read in the context of the entire section. *Jones v. ETS of New Orleans*, 793 So.2d 912 (Fla. 2001). In deciphering statutory language, it is necessary to harmonize the various subsections of a statute, such that a term used in one subsection has the same meaning as the same term used in another subsection. *Anderson Columbia v. Brewer*, 994 So.2d 419 (Fla. 1st DCA 2008).

Section 121.35 was enacted in 1984. Section 121.35(1) provided the Department of Management Services with the authority to establish SUSORP. Section 121.35(1) provides as follows:

> (1) OPTIONAL RETIREMENT PROGRAM ESTABLISHED.—The Department of Management Services shall establish an optional

retirement program under which contracts providing retirement and death benefits may be purchased for eligible members of the State University System who elect to participate in the program.

The criteria for participation in SUSORP are set forth in Section 121.35(2), which provides, in pertinent part as follows:

(2) ELIGIBILITY FOR PARTICIPATION IN OPTIONAL PROGRAM.—

(a) Participation in the optional retirement program provided by this section shall be limited to persons who are otherwise eligible for membership or renewed membership in the Florida Retirement System and who are employed in one of the following State University System positions:

1. Positions classified as instructional and research faculty which are exempt from the career service under the provisions of s. 110.205(2)(d).

2. Positions classified as administrative and professional which are exempt from the career service under the provisions of s. 110.205(2)(d).

3. The Chancellor and the university presidents. [Emphasis added]

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

121.051(1)(a)2, who are not entitled to participate in any manner (via election or otherwise) in the Florida Retirement System,[1] the Category 1 and Category 2 employees are not forced to participate in SUSORP. Section 121.35(3)(c) provides in pertinent part as follows:

> (c) Any employee who becomes eligible to participate in the optional retirement program on or after January 1, 1993, shall be a compulsory participant of the program unless such employee elects membership in the Florida Retirement System. Such election shall be made in writing and filed with the personnel officer of the employer. Any eligible employee who fails to make such election within the prescribed time period shall be deemed to have elected to participate in the optional retirement program.
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> 1. Any employee whose optional retirement program eligibility results from initial employment shall be enrolled in the program at the commencement of employment. If, within 90 days after commencement of employment, the employee elects membership in the Florida Retirement System, such membership shall be effective retroactive to the date of commencement of employment.
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> 2. Any employee whose optional retirement program eligibility results from a change in status due to the subsequent designation of the employee's position as one of those specified in paragraph (2)(a) or due to the employee's appointment, promotion, transfer, or reclassification to a position specified in paragraph (2)(a) shall be enrolled in the optional retirement program upon such change in status and shall be notified by the employer of such action. If, within 90 days after the date of such notification, the employee **elects to retain membership** in the Florida Retirement System, such continuation of membership shall be retroactive to the date of the change in status.
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> 3. Notwithstanding the provisions of this paragraph, effective July 1, 1997, any employee who is eligible to participate in the Optional Retirement Program and who fails to execute a contract with one of the approved companies and to notify the department in writing as provided in subsection (4) within 90 days after the date of eligibility shall be deemed to have elected membership in the Florida Retirement System, except as provided in s. 121.051(1)(a). This provision shall also apply to any employee who terminates employment in an eligible position before executing the required annuity contract and notifying the department. Such membership shall be retroactive to the date of eligibility, and all appropriate contributions shall be transferred to the Florida Retirement

[1] These employees consist of individuals who are appointed to a faculty position at certain medical colleges having a faculty practice plan.

System Trust Fund and the Health Insurance Subsidy Trust Fund. [Emphasis added]

Subsection (3)(c)3. notes that if an eligible employee who elects to participate in SUSORP fails to execute a contract with an approved SUSORP provider company, then that employee shall be deemed to be a member of the "Florida Retirement System," and the employer contributions for such member will be directed to the "Florida Retirement System Trust Fund" and the Health Insurance Subsidy Trust Fund.

Section 121.35(3)(g) discusses the rights and benefits of the Category 2 Employee, discussed in Section 121.35(3)(c)2., who is a member of the "Florida Retirement System" for purposes of Section 121.35, at the time the employee is entitled to make an election to participate in SUSORP. The language states that:

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

Section 121.35(3)(h) prohibits a SUSORP participant from participating in more than one state administered retirement plan class simultaneously.

Various provisions in Section 121.35 make reference to the "Florida Retirement System." At the time this statutory provision was enacted in 1984, only the FRS Pension Plan was available to FRS eligible employees. As noted in Paragraph 5 of the Recommended Order, the FRS Investment Plan did not become an option to FRS covered employees until 2002. The issue becomes whether the words "Florida Retirement System" in Section 121.35 now have been extended to include the FRS Investment Plan.

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

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

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

Further, Section 121.35(3)(g), that applies to employees who are members of the "Florida Retirement System" at the time of their SUSORP election, indicates that such

employees shall retain all "retirement service credit" earned at the rate earned. Further, such employees are entitled to transfer to the employees' SUSORP accounts the present value of the employees' "accumulated benefit obligation" for accrued service credit earned between particular points in time. "Service credit" and "accumulated benefit obligation" are terms that are applicable only to the FRS Pension Plan. *See*, Sections 121.021(17); 121.091; and 121.4501(2), (3), Florida Statutes. This is because the amount of the benefit received by FRS Pension Plan members is based on a formula that takes into account the member's age, membership class, years of service credit and average of 5 highest years of salary. On the other hand, an FRS Investment Plan member's benefit is comprised of employer and member contributions plus investment earnings less any expenses and fees.

Whenever Section 121.35 refers to "Florida Retirement System" it connects those references to a concept that relates to only the FRS Pension Plan. The doctrine of "*noscitur a sociis*," means that a word in the statute is "known by the company it keeps." *Stratton v. Sarasota County*, 983 So.2d 51 (Fla. 2d DCA 2008). Thus, it is necessary to look at other words used within a string of concepts to determine overall intent. General and specific words capable of analogous meaning when associated together take color from each other so that general words are restricted to a sense analogous to the specific words. *Quarantello v. Leroy*, 977 So.2d 648, 654 (Fla. 5th DCA 2008). In this instance, it is clear that references to "Florida Retirement System" mean the FRS Pension Plan and do not extend to the FRS Investment Plan.

As indicated previously, Section 121.35 was enacted well before the FRS Investment Plan. The legislature is presumed to pass subsequent enactments with full awareness of all prior enactments and to have an intent that the prior enactments remain in force. *Cannella*

v. Auto-Owners Ins. Co., 801 So.2d 94 (Fla. 2001). Certain provisions related to the FRS Investment Plan were later set forth in Section 121.35, such as the provision in Section 121.35(3)(g) that indicates that the accumulated benefit obligation of an employee who is a member of the Florida Retirement System at the time the employee elects SUSORP will be calculated as described in Section 121.4501(3), a provision that pertains to the FRS Investment Plan. However, no references to the FRS Investment Plan were made in Section 121.35(3)(c), giving a right to employees in the FRS Investment Plan to elect participation in SUSORP. 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). As noted above, the only categories of employees permitted under Section 121.35 to elect SUSORP are new hires and those employees that already are members of the FRS Pension Plan. Section 121.35 does not provide an opportunity for FRS Investment Plan members to directly elect SUSORP, nor does any provision in Section 121.4501 pertaining to the FRS Investment Plan. Section 121.4501(4) provides that an FRS Investment Plan election is irrevocable, except for the one-time "second election" opportunity to transfer from the FRS Investment Plan to the FRS Pension Plan. No other transfers are authorized. As such, members of the FRS Investment Plan who become eligible to participate in SUSORP must first switch to the FRS Pension Plan, if eligible, and once they are FRS Pension Plan members, then they can elect to participate in SUSORP.

Petitioner's Exception 1: Exception to Conclusion of Law Number 12:

Petitioner argues that the instant case is distinguishable from the case *Benjamin Herman v. State Board of Administration,* Case Number 2012-1951. Petitioner argues that

Petitioner is compelled by the provisions of Section 121.35(3)(c)2., Florida Statutes to participate in SUSORP, and that such statutory provision was not even relevant or addressed in the *Herman* case. Petitioner argues that *Herman* states that while Section 121.35(3)(g) allows employees that are members of the FRS Pension Plan to transfer to SUSORP if they become eligible, there is no statutory authority for an FRS participant to switch directly from the Investment Plan to SUSORP. Section 121.35(3)(g) provides as follows:

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

Petitioner argues that his particular situation does not involve any transfer of assets. Instead, Petitioner states that he is retaining all funds in his FRS account and is becoming a brand new participant in the future in SUSORP solely due to a change in his job status. Petitioner is arguing that Section 121.35(3)(c)2., on its plain meaning, specifically permits Petitioner to do this. However, it must be remembered that in construing statutes, the legislature is presumed to know the meaning of the words used in the statutory provision and to convey the statute's intent by the use of specific terms. *Snow v. Ruden, McClosky, Smith, Schuster & Russell, PA*, 896 So.2d 787 (Fla. 2d DCA 2005). Thus, the words in a

statute generally cannot simply be ignored or deleted absent a finding that the words at issue are so meaningless or clearly inconsistent with the legislative intent that they should be ignored as mere surplusage. *P.D. v. Department of Children & Families*, 866 So.2d 100 (Fla. 1st DCA 2004); *Greenberg v. Cardiology Surgical Ass'n*, 855 So.2d 234 (Fla. 1st DCA 2003). Petitioner appears to be ignoring a few key words in Section 121.35(3)(c)2., in order to reach his interpretation. Section 121.35(3)(c)2 provides:

> (c) Any employee who becomes eligible to participate in the optional retirement program on or after January 1, 1993, shall be a compulsory participant of the program unless such employee elects membership in the Florida Retirement System. Such election shall be made in writing and filed with the personnel officer of the employer. Any eligible employee who fails to make such election within the prescribed time period shall be deemed to have elected to participate in the optional retirement program.
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> 2. Any employee whose optional retirement program eligibility results from a change in status due to the subsequent designation of the employee's position as one of those specified in paragraph (2)(a) or due to the employee's appointment, promotion, transfer, or reclassification to a position specified in paragraph (2)(a) shall be enrolled in the optional retirement program upon such change in status and shall be notified by the employer of such action. If, within 90 days after the date of such notification, the employee elects to **retain** membership in the Florida Retirement System, such **continuation** of membership shall be retroactive to the date of the change in status. [Emphasis added]

A careful reading of Section 121.35(3)(c)2., including the highlighted words, shows that the statutory provision actually addresses the situation in which an employee is already a member of the "Florida Retirement System" which means, as discussed above, the FRS Pension Plan and becomes eligible to participate in SUSORP through a job status change. The provision states that if an employee who becomes eligible to participate in SUSROP due to a job status change elects to "retain" membership in the FRS Pension Plan, then the employee can "continue" such membership. When the legislature has not defined the

words used in a statute, the language under consideration should be given its plain and ordinary meaning. *Greenfield v. Daniels*, 51 So.3d 421 (Fla. 2010). It is appropriate to refer to dictionary definitions in order to ascertain the plain and ordinary meaning of the statutory words. *Sanders v. State*, 35 So.3d 864 (Fla. 2010). The plain meaning of the word "retain" is "to continue to have (something)" or "to keep possession of." [Oxford Dictionary]. The plain meaning of "continuation" is "the state of remaining in a particular position or condition" or "the action of carrying something on over time or the state of being carried on." [Oxford Dictionary]. By its plain meaning, Section 121.35(3)(c)2. contemplates that an employee already is a member of the FRS Pension Plan at the time the employee is transferred to a job that would allow the employee to be eligible for participation in SUSORP. In *Herman*, an employee was a member of the FRS Investment Plan when he terminated employment. He did not become a "retiree," as defined in Section 121.4501(2)(k) by taking any distributions from the Investment Plan so he was a member of the Investment Plan at the time he was hired by another employer into a SUSORP-eligible position. This situation is virtually identical to Petitioner's position where Petitioner is a member of the FRS Investment Plan when he received a promotion to a new, SUSORP-eligible position. Like the employee in *Herman*, Petitioner is arguing that he, as a member of the FRS Investment Plan should be entitled to elect to participate in SUSORP without having first to elect to participate in the FRS Pension Plan. The situations in the two cases are virtually identical. As such, Exception 1 hereby is rejected.

Petitioner's Exception 2: Exception to Conclusion of Law 13

Petitioner is arguing that Petitioner is required by law to participate in SUSORP from a plain reading of the Section 121.35(3)(c)2. That is, Petitioner is saying that Section

121.35(3)(c)2. states that Petitioner "shall" elect SUSORP due to his job status change. Petitioner cites case law for the proposition that "shall" always means a mandatory obligation. However, if reading the term "shall" as mandatory rather than permissive leads to an unreasonable result or one contrary to legislative intent, courts may look to the context in which "shall" is used, and the legislature's intent to determine whether "shall" should be read as a permissive term. *See, Allied Fidelity Ins. Co. v. State*, 415 So.2d 109, 110–11 (Fla. 3d DCA 1982) (rejecting the appellant's argument that "shall" always means "shall").As noted in the discussions above, Section 121.35(3)(c)2. pertains to employees who are members of the Florida Retirement System Pension Plan and who later become eligible to participate in SUSORP due to a change in, or reclassification of, their position. The legislature was aware of the existence of Section 121.35 at the time the FRS Investment Plan was enacted, and the restrictions Section 121.35 placed on SUSORP membership, but it elected not to amend Section 121.35(3)(c)2 to cover elections into SUSORP by employees who are members of the FRS Investment Plan at the time of election, rather than members of the FRS Pension Plan. Since there is no provision in Section 121.35 that specifically allows a member of the FRS Investment Plan to elect to participate in SUSORP when the member is hired or promoted to a SUSORP-eligible position, it would be contrary to legislative intent to accept Petitioner's position that he is required to elect to participate in SUSORP even though he is a member of the FRS Investment Plan. As such, Petitioner's Exception 2 hereby is rejected.

Petitioner's Exception 3: Exception to Conclusion of Law 20

Petitioner argues that deference should not be given to the SBA's interpretation of the law it is charged with administering; namely, Section 121.35(3)(c)2., Florida Statutes.

Petitioner argues that the meaning of Section 121.35(3)(c)2., Florida Statutes is plain and unambiguous. As such, there is no need to resort to the rules of statutory construction and no deference is due to the agency's interpretation which is contrary to the plain meaning of the statute.

Obviously, Petitioner and the SBA have a vastly different view as to what the "plain meaning" of Section 121.35 actually is. Further, the plain meaning attached to the statute by the SBA is identical to that of the Division of Retirement ("DOR") of the Department of Management Services, the entity charged by statute with implementing and administering SUSORP. *See,* Section 121.35(1), (6), Florida Statutes; Respondent's Exhibit 1. An agency's interpretation of the statute that it is charged with enforcing is entitled to great deference. *See Level 3 Communications LLC v. C.V. Jacobs*, 841 So.2d 447, 450 (Fla. 2002); *BellSouth Telecommunications, Inc. v. Johnson*, 708 So.2d 594, 596 (Fla.1998). This Court will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless the construction is "clearly unauthorized or erroneous." *See Level 3 Communications, supra; P.W. Ventures, Inc. v. Nichols*, 533 So.2d 281, 283 (Fla.1988). The record does not establish that the statutory interpretation of Section 121.35 by the SBA and the DOR, while contrary to that proffered by Petitioner, is clearly unauthorized or erroneous.

Petitioner further argues that a prior final order, such as the order rendered in *Herman, supra*, is not binding precedent and is not required to be followed. As noted in the response to Exception 1 above, the facts of *Herman* case and Petitioner's situation are virtually identical. The courts have made it clear that past administrative precedent must guide an agency's decision in a matter. *See Pagan v. Sarasota Cnty. Pub. Hosp. Bd.*, 884

So. 2d 257, 266 (Fla. 2d DCA 2004)(Canady, J., concurring specially)("Denying precedential effect to the decision of this case in future cases presenting similar facts and issues would, however, be inconsistent with the fundamental principle that like cases should be treated alike."); *Gessler v. Dep't of Bus. & Prof'l Reg.*, 627 So. 2d 501, 504 (Fla. 4th DCA 1993)("The concept of stare decisis, by treating like cases alike and following decisions rendered previously involving similar circumstances, is a core principle of our system of justice. . . . While it is apparent that agencies, with their significant policy-making roles, may not be bound to follow prior decisions to the extent that the courts are bound by precedent, it is nevertheless apparent the legislature intends there be a principle of administrative stare decisis in Florida."); *Martin Mem'l Hosp. Ass'n v. Dep't of HRS*, 584 So. 2d 39, 40 (Fla. 4th DCA 1991)("[A]gency action which yields inconsistent results based upon similar facts, without reasonable explanation, is improper."). Thus, reliance by the SBA on the *Herman* decision, which involves a situation virtually identical to that of the Petitioner, is proper.

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

MATERIAL UNDISPUTED FACTS

The Material Undisputed Facts set forth in paragraphs 1 through 3 of the presiding officer's Recommended Order hereby are adopted and are specifically incorporated by reference as if fully set forth herein.

The Material Undisputed Facts in paragraph 4 the Recommended Order hereby are modified slightly to read as follows:

4. After being hired by the University of Florida, Petitioner attempted to enroll in the SUSORP. He submitted an enrollment form to the Division of Retirement ("DOR") of the Department of Management Services on February 27, 2014. By letter dated March 3, 2014, the DOR advised Petitioner of the cost to transfer to the FRS Pension Plan and emphasized that Petitioner was required to be a member of the FRS Pension Plan before he could elect participation in SUSORP. [Respondent's Exhibit 1]. That same day, Petitioner filed a Request for Intervention with Respondent, requesting to be allowed to participate in SUSORP. [Respondent's Exhibit 2]. By letter dated March 4, 2014, the SBA explained that Petitioner's previous election of the FRS Investment Plan was irrevocable, and like the letter from DOR, indicated that Petitioner would first have to use his one-time second election to switch to the FRS Pension Plan and at that point he would be able to transfer to SUSORP. This would require buying into the Pension Plan. Petitioner then filed a Petition for Hearing contesting this decision and this administrative proceeding followed.

CONCLUSIONS OF LAW

The Conclusions of Law set forth in paragraphs 5 through 11 of the Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

Paragraph 14 of the Conclusions of Law hereby is rejected. This Final Order substitutes and adopts the following Conclusions of Law in Paragraph 14:

14. Petitioner has ably found other parts of Chapter 121 that show situations where state-sponsored retirement participants transfer from one program to another, or maintain separate benefits from discontinuous periods of employment, highlighting that what he requests is doable, and is in fact done in other situations. However, Section 121.35 has very

specific criteria for participation in SUSORP and these other situations cited by Petitioner are not relevant to Petitioner's request.

The Conclusions of Law set forth in paragraphs 15 through 17 of the Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

Paragraph 18 of the Conclusions of Law hereby is rejected. This Final Order substitutes and adopts the following Conclusions of Law in Paragraph 18:

18. Respondent correctly points out that when the SUSORP was created in 1984, the FRS Investment Plan did not exist, which creates an inference that, in the event of a conflict between the two laws, the later adopted, i.e., Investment Plan, was created recognizing the previous law, i.e., the SUSORP, and the later provision controls. *State v. City of Boca Raton*, 172 So.2d 230 (Fla. 1965).

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

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

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

In deciphering statutory language, it is necessary to harmonize the various subsections of a statute, such that a term used in one subsection has the same meaning as the same term used in another subsection. *Anderson Columbia v. Brewer*, 994 So.2d 419 (Fla. 1st DCA 2008). Whenever Section 121.35 refers to "Florida Retirement System" it connects those references to a concept that relates to only the FRS Pension Plan.

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

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

> the pension plan during this period is nullified for purposes of entitlement to a future benefit under the pension plan. [Emphasis added]

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

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

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

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

Plan in trust for the exclusive benefits of the FRS Investment Plan members and their beneficiaries.

The doctrine of "*noscitur a sociis*,"means that a word in the statute is "known by the company it keeps." *Stratton v. Sarasota County*, 983 So.2d 51 (Fla. 2d DCA 2008). Thus, it is necessary to look at other words used within a string of concepts to determine overall intent. General and specific words capable of analogous meaning when associated together take color from each other so that general words are restricted to a sense analogous to the specific words. *Quarantello v. Leroy*, 977 So.2d 648, 654 (Fla. 5th DCA 2008). In this instance, it is clear that references to "Florida Retirement System" in Section 121.35 mean the FRS Pension Plan and not the FRS Investment Plan, since all words associated in Section 121.35 with "Florida Retirement System" are words that are relevant only to the FRS Pension Plan and not the FRS Investment Plan.

Section 121.35 was enacted well before the FRS Investment Plan. The legislature is presumed to pass subsequent enactments with full awareness of all prior enactments and to have an intent that the prior enactments remain in force. *Cannella v. Auto-Owners Ins. Co.*, 801 So.2d 94 (Fla. 2001). Certain provisions related to the FRS Investment Plan were later set forth in Section 121.35, such as the provision in Section 121.35(3)(g) that indicates that the accumulated benefit obligation of an employee who is a member of the Florida Retirement System at the time the employee elects SUSORP will be calculated as described in s. 121.4501(3), a provision that pertains to the FRS Investment Plan. However, no references to the FRS Investment Plan were made in Section 121.35(3)(c). The legislature is presumed not to have intended to write a statute that renders void in its application another statute that has not been amended or repealed. *Saridakis v. State*, 936 So.2d 33 (Fla.

4th DCA 2006). By express statutory terms, the only categories of employees permitted under Section 121.35 to elect SUSORP are new hires and those employees that already are members of the FRS Pension Plan. Section 121.35 does not provide an opportunity for FRS Investment Plan members to directly elect SUSORP, nor does any provision in Section 121.4501 pertaining to the FRS Investment Plan. Instead, such members must first switch to the FRS Pension Plan, and once they are FRS Pension Plan members, then they can elect to participate in SUSORP.

The Conclusions of Law set forth in paragraphs 19 and 20 of the Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

ORDERED

The Recommended Order (Exhibit A) as modified herein is hereby adopted in its entirety. The Petitioner's request that he be permitted to enroll in the State University System Optional Retirement Program ("SUSORP") despite the fact he is a member of the FRS Investment Plan 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 13th day of October, 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
(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

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 Jon C. Moyle, Jr., Esq. (jmoyle@moylelaw.com) and Karen A. Putnal, Esq. (kputnal@moylelaw.com), Counsel for Petitioner, Moyle Law Firm, P.A., 118 North Gadsden Street, Tallahassee, Florida 32301 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 13th day of October, 2014.

Ruth A. Smith

Ruth A. Smith
Assistant General Counsel
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Tallahassee, FL 32308
Ruth.smith@sbafla.com

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

JOHN D. JACKSON,

Petitioner,

vs. Case No.: 2014-2998

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on April 29, 2014, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: John D. Jackson, Pro Se
[redacted]

For Respondent: Brian A. Newman, Esquire
Pennington, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue is whether Petitioner should be allowed to participate in the State University System Optional Retirement Plan (SUSORP), after being hired into a position eligible for that

EXHIBIT A

plan, despite having previously enrolled in the Florida Retirement System (FRS) Investment Plan.

PRELIMINARY STATEMENT

Petitioner attended the hearing in person and represented himself. Respondent presented the testimony of Petitioner and Daniel Beard, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-6 were admitted at the hearing without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties, who were invited to submit proposed recommended orders within 30 days. Both Respondent and Petitioner filed a proposed recommended order.

MATERIAL UNDISPUTED FACTS

1. Petitioner worked for the University of Central Florida, an FRS-covered employer, beginning September 9, 2005, in a position that was not classified as eligible for the SUSORP. On January 3, 2006, Petitioner used his initial election to enroll in the Investment Plan, and became a participant in that plan.

2. Petitioner accepted a new position with the University of Florida as Director of Utilities and Energy Services in January, 2014. This position is a SUSORP-eligible position. Generally, faculty, professional, and administrative positions at a university are SUSORP-eligible positions.

3. Petitioner does not occupy a position that mandates SUSORP participation. Generally, those positions are occupied by physicians or other highly compensated health care professionals employed by medical schools.

4. After being hired by the University of Florida, Petitioner attempted to enroll in the SUSORP. That request was denied. By letter of March 4, 2014, the SBA explained that Petitioner's previous election of the FRS Investment Plan was irrevocable, and that in order to participate in the SUSORP, he would first have to use his one-time second election to switch to the Pension Plan, and then could transfer to the SUSORP. This would require buying into the Pension Plan. Petitioner then filed a Petition for Hearing contesting this decision, and this administrative proceeding followed.

CONCLUSIONS OF LAW

5. The FRS Investment Plan began in 2002:

> (1) The Trustees of the State Board of Administration shall establish a defined contribution program called the "Florida Retirement System Investment Plan" or "investment plan" for members of the Florida Retirement System under which retirement benefits will be provided for eligible employees who elect to participate in the program.

Section 121.4501(1) Fla. Stat. (2013).

6. Section 121.4501(4)(a)2.a., Florida Statutes governs initial elections into the FRS Investment Plan, for employees such as Petitioner:

> (2) With respect to employees who become eligible to participate in the investment plan by reason of employment in a regularly established position with a state employer commencing after April 1, 2002:
>
> a. Any such employee shall, by default, be enrolled in the pension plan at the commencement of employment, and may, by the last business day of the 5th month following the employee's month of hire, elect to participate in the investment plan. The employee's election must be made in writing or by electronic means and must be filed with the third-party administrator. The election to participate in the investment plan is irrevocable, except as provided in paragraph (g).

7. Section 121.4501(4)(g), commonly referred to as the second election, states, in pertinent part:

> (g) 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.

8. The SUSORP was established in 1984, in section 121.35, Florida Statutes:

> (1) OPTIONAL RETIREMENT PROGRAM ESTABLISHED. The Department of Management Services shall establish an optional retirement program under which contracts providing retirement and death benefits may be purchased for eligible members of the State University System who elect to participate in the program.
>
> * * *
>
> (2) ELIGIBILITY FOR PARTICIPATION IN OPTIONAL PROGRAM.
>
> (a) Participation in the optional retirement program provided by this section is limited to persons who are otherwise eligible for membership with the Florida Retirement System and who are employed in one of the following State University System positions: . . .

9. The SUSORP is the mandatory initial choice for those hired into eligible positions, pursuant to section 121.35(3):

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

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

10. An explicit proscription in the SUSORP states, at section 121.35(1)(h):

> A participant in the optional retirement program may not participate in more than one state-administered retirement system, plan, or class simultaneously.

11. While it is clear that a state university system employee in Petitioner's position may not accrue credit simultaneously in more than one state-sponsored retirement plan, there is no express prohibition on maintaining two separate accounts – one in the Investment Plan and one created by the execution of a contract under the SUSORP.

12. The question presented here was addressed in Benjamin Herman v. State Board of Administration, Case No. 2012-1951 (Recommended Order June 17, 2011; Final Order August 17, 2011). In that case Petitioner, an Investment Plan member, was not allowed to participate in the SUSORP when he was later hired into a SUSORP-eligible position.

13. Petitioner attempts to distinguish Herman by pointing out that individuals who are *required* to participate in the SUSORP are allowed to maintain their Investment Plan assets and participate in the SUSORP. The provision that requires this result is found in section 121.051(1)(a)2, Florida Statutes and provides in pertinent part:

> 2. Any person appointed on or after July 1, 1989, to a faculty position in a college at the J. Hillis Miller Health Center at the University of Florida or the Medical Center at the University of South Florida which has a faculty practice plan adopted by rule by

> the Board of Regents[1] may not participate in the Florida Retirement System. Effective July 1, 2008, any person appointed to a faculty position, including clinical faculty, in a college at a state university that has a faculty practice plan authorized by the Board of Governors may not participate in the Florida Retirement System. A faculty member so appointed shall participate in the optional retirement program for the State University System notwithstanding s. 121.35(2)(a).

§ 121.051(1)(a)2, Fla. Stat. (emphasis added.) Petitioner is not, however, required by law to participate in the SUSORP, and section 121.051(1)(a)2 therefore is not applicable in this proceeding.

14. Petitioner has very ably found other parts of Chapter 121 that show situations where state-sponsored retirement participants transfer from one program to another, or maintain separate benefits from discontinuous periods of employment, highlighting that what he requests is doable, and in fact done, in comparable situations. There does not seem to be any compelling practical barrier to his retaining an accrued Investment Plan benefit and beginning to build a new additional benefit from this current phase of his career by executing a contract under the SUSORP.

15. The legal standard applicable in this proceeding requires Respondent to exercise its authority only as provided by the legislature. It is not authorized to depart from the requirements of Chapter 121 when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla. Div. Admin. Hrgs.). More importantly, Respondent's construction and application of Chapter 121 are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. See Level 3 Communications v. C.V. Jacobs, 841 So.2d 447, 450 (Fla. 2002); Okeechobee Health Care v. Collins, 726 So.2d 775 (Fla. 1st DCA 1998).

16. Respondent bases its denial of Petitioner's request on the absence of any statutes authorizing transfer from the Investment Plan to the SUSORP or authorizing dual membership in those two plans. But my understanding of Petitioner's position is that he does not ask for a transfer of his retirement assets or to be actively participating in two plans at once, so the absence of such statutes is irrelevant.

17. The question here is whether there is a conflict between section 121.4501(4)(a)2.a., which makes election of the Investment Plan irrevocable except for a one-time second election to the Pension Plan, and sections 121.35(3)(c) and 121.35(3)(c)2., which mandate, by their terms (shall be a compulsory participant, and shall be enrolled in the optional retirement program,) that a newly SUSORP-eligible employee be enrolled in the SUSORP plan, unless he elects within 90 days to retain FRS membership.

18. Respondent correctly points out that when the SUSORP was created in 1984, the FRS Investment Plan did not exist, which creates the inference that, in the event of a conflict between the two laws, the later adopted, i.e. the Investment Plan, was created recognizing the previous law, i.e. the SUSORP, and the later provision controls. State v. City of Boca Raton, 172 So.2d 230 (Fla. 1965.)

I do not conclude, however, that there is any necessary conflict between the two provisions. Section 121.35(3)(c)(2) expressly includes situations where an employee, already a member of FRS, is promoted into a position which is SUSORP eligible – exactly Petitioner's case - and that statute says exactly what is to happen: he must be enrolled in SUSORP and may elect to retain membership in the FRS if he does so within 90 days. By definition, the FRS includes the Pension Plan and the Investment Plan, pursuant to section 121.021(3):

> "Florida Retirement System" or "system" means the general retirement system established by this chapter, including, but not

> limited to, the defined benefit program administered under this part, referred to as the "Florida Retirement System Pension Plan" or "pension plan," and the defined contribution program administered under part II of this chapter, referred to as the "Florida Retirement System Investment Plan" or "investment plan."

So the plain meaning of section 121.35(3)(c)(2) is that an employee who is in the FRS, as either a Pension Plan or Investment Plan member, and then is hired, reclassified, or promoted into a SUSORP-eligible position, must be enrolled in the SUSORP and then has 90 days to elect to instead remain in the FRS, in whichever plan he previously chose. There is no obvious reason that this provision is not self-executing as stated, so long as the employee is not simultaneously participating in both the SUSORP and the FRS. Where possible, the construction of a statute should harmonize and reconcile it with other provisions of the same act, if there is any reasonable basis for consistency, Knowles v. Beverly Enterprises – Florida, Inc. 898 So.2d 1, rehearing denied (Fla. 2004); State v. Putnam Co. Dev. Auth., 249 So.2d 6 (Fla. 1971), and must give full effect to all statutory provisions. Bennett v. St. Vincent's Medical Center, 71 So.3d 828, rehearing denied (Fla. 2011).

19. In keeping with the result in the Herman case, Respondent views as dispositive the statement in section 121.4501(4)(a)2.a. making election of the Investment Plan irrevocable except by use of the second election. Petitioner rightly points out that this election provision speaks only to the Pension Plan and the Investment Plan; there is no mention of the SUSORP, and he asserts that, therefore, the stated irrevocability is only as to those two plans, not as to a plan for which the employee was not yet eligible at the time he made his election.

20. Although it is a very close question, my recommendation here must still be based on Herman as precedent and on the controlling principle that the agency's construction of the laws it is charged to administer is to be accorded deference. Petitioner has presented his case in

a way that permits a fuller examination of the questions at issue and has demonstrated that his may be the more logical interpretation of the applicable statutes. He has not been able to establish however, that Respondent's contrary interpretation is clearly erroneous or outside the range of interpretation permitted to it; and it may ultimately be necessary for an appellate court to determine whether, as a matter of law, the choice apparently created in section 121.35(3)(c)2. for Petitioner to participate in the SUSORP, must be provided under the instant circumstances.

PROPOSED RECOMMENDATION

Having considered the law and the undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order denying the relief requested.

RESPECTFULLY SUBMITTED this 14th day of July, 2014.

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

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

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

Filed via electronic delivery with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
Tina.joanos@sbafla.com
Daniel.Beard@sbafla.com
(850) 488-4406

This 14th day of July, 2014.

Copies furnished to:

Via Regular Mail

[redacted]

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Attorneys for Respondent

Attorney

STATE OF FLORIDA
STATE BOARD OF ADMINISTARTION

JOHN D. JACKSON,

Petitioner, CASE NO. 2014-2998

vs.

STATE BOARD OF ADMINISTARTION, FILED: JULY 29, 2014

Respondent.
_____/

PETITIONER'S WRITTEN ARGUMENT AND EXCEPTIONS TO RECOMMENDED ORDER

Petitioner, JOHN D. JACKSON ("Jackson" or "Petitioner"), pursuant to section 120.57(1)(k), Florida Statutes, and Rule 28-106.217, Florida Administrative Code, hereby submits to the STATE BOARD OF ADMINISTATION ("SBA") its written argument and exceptions to the Recommended Order entered by Hearing Officer Anne Longman in this matter on July 14, 2014. As detailed below, the SBA should give the statutes at issue their plain meaning and find that Petitioner shall be placed into the State University System Optional Retirement Plan ("SUSORP"), and overturn the Hearing Officer's recommendation.

Background, Preliminary Statement and Summary

The Petitioner, Mr. Jackson, was employed at the University of Central Florida ("UCF") beginning September 9, 2005. With respect to Mr. Jackson's UCF position, he was not eligible for SUSORP benefits while in this positon. Instead, he was eligible for the Florida Retirement System ("FRS") and elected to enroll in the Investment Plan/Defined Contribution Plan as a participant. In January of 2014, Mr. Jackson was hired by the University of Florida ("UF") into a position which provides SUSORP

benefits. Mr. Jackson's effort to obtain SUSORP benefits was denied by the SBA[1]. Mr. Jackson challenged the SBA's decision, and an informal administrative hearing was held on April 29, 2014 in Tallahassee, Florida.

Mr. Jackson has been denied the ability to participate in the SUSORP Retirement Plan based on an erroneous application of section 121.35(3)(c)2 F.S. and section 121. 121.4501(4)(a)2.a. F.S. As detailed below, s. 121.35(3)(c)2 F.S. provides that SUSORP eligible employees such as Mr. Jackson "shall" be placed into SUSORP. After being notified of placement into SUSORP, affected employees like Mr. Jackson have the ability to opt out of SUSORP and return to the FRS, if they so choose. In denying Mr. Jackson entry into the SUSORP plan, the SBA disregards the affirmative language and statutory directive of s. 121.35(3)(c)2 F.S.

Instead, the SBA takes the position that when Mr. Jackson was originally employed at UCF, he was presented with an "irrevocable election" between the FRS defined benefit/pension plan or the FRS defined contribution/investment plan. (See s. 121.4501(4)(a)2.a. F.S.) Even though the SUSORP was not a choice when Mr. Jackson was employed at UCF, the SBA treats the "irrevocable election" as preventing Mr. Jackson from receiving the SUSORP benefits linked to his new position at UF. The "irrevocable election" was between two options; it should not apply to permanently foreclose other future options, like SUSORP, that were not on the table when the "irrevocable election" was made and hamstring the ability of employees like Mr. Jackson to receive benefits, like the SUSORP, that would be available to candidates for qualifying

[1] To be clear, Mr. Jackson is not asking to transfer his existing retirement benefits contained with the FRS Investment Plan/Defined Contribution Plan or to actively participate in two plans at once. As clearly permitted, he wants to participate in SUSORP.

positions that did not previously hold state jobs. This approach disadvantages state employees and thwarts the express and plain legislative language of s. 121.35(3(c)2 F.S. that employees, such as Mr. Jackson, shall be SUSORP participants. Compounding its error, the SBA makes no effort to explicate its policy or to harmonize the two statutory provisions, as it should do, if it takes the position that the two statutes conflict, which is not the case. The SBA, should it fail to overturn the Hearing Officer's conclusion, will be abusing its discretion and acting in clear error when applying s. 121.35(3)(c)2 F.S., s. 121.4501(4)(a)2.a. F.S. and related statutes. The SBA should find the *Herman* order not binding, apply the plain meaning of s.121.35(3)(c)2, F.S. and allow Mr. Jackson to participate in the SUSORP.

Written Argument and Exceptions to Findings of Fact and Conclusions of Law

Exception No. 1: The question presented here is not the same question as presented and addressed in Benjamin Herman v. State Board of Administration, Case No. 2112-1951, as wrongly stated in Conclusion of Law paragraph 12. Section 121.35(3)(c)2. F.S., the statute which compels Mr. Jackson to participate in SUSORP, was not even at issue or addressed in the *Herman* Final Order. A careful reading of the SBA's *Herman* decision supports Petitioner's argument that statutory authority exists to place him squarely in the SUSORP plan and the SBA's reliance on *Herman* is misplaced.

In the *Herman* case, the State Board of Administration (SBA) denied Mr. Herman's request to receive SUSORP benefits "on the ground that there is no statutory authority for an FRS participant to switch directly from the Investment Plan to the SUSORP...." See Appendix A, *Herman* Final Order, Finding of Fact No. 5. Indeed, the *Herman* Final Order further states:

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

See Appendix A, *Herman* Final Order Conclusion of Law No. 8[2]. For ease of reference, the statutory provision at issue in *Herman* s. 121.35(3)(g), F.S., is set forth below:

(g) An eligible employee who is a member of the Florida Retirement System at the time of election to participate in the optional retirement program shall retain all retirement service credit earned under the Florida Retirement System, at the rate earned. No additional service credit in the Florida Retirement System shall be earned while the employee participates in the optional program, nor shall the employee be eligible for disability retirement under the Florida Retirement System. An eligible employee may transfer from the Florida Retirement System to his or her accounts under the State University System Optional Retirement Program a sum representing the present value of the employee's accumulated benefit obligation under the defined benefit program of the Florida Retirement System for any service credit accrued from the employee's first eligible transfer date to the optional retirement program through the actual date of such transfer, if such service credit was earned in the period from July 1, 1984, through December 31, 1992. The present value of the employee's accumulated benefit obligation shall be calculated as described in s. 121.4501(3)(c) 2. Upon such transfer, all such service credit previously earned under the defined benefit program of the Florida

[2] The SBA rejected Conclusions of Law 8, 9 and 10 of the Recommended Order and adopted its own Conclusions of Law.

Retirement System during this period shall be nullified for purposes of entitlement to a future benefit under the defined benefit program of the Florida Retirement System. (emphasis added).

See, Florida Statute 121.35(3)(g) (2010).

Importantly, the SBA, in the *Herman* Final Order, found that a transfer to the SUSORP would be permissible if Mr. Herman were in the FRS defined benefit/pension plan. However, because Mr. Herman was not in the pension plan, but in the investment plan, the SBA concluded no statutory language contemplated the transfer from the investment plan to the SUSORP, and ruled against Mr. Herman. The SBA's strong reliance on the plain words of the statute addressing pension plan transfers in this case, or lack of such plain words addressing the investment plan transfers, should not be overlooked.

In contrast to the *Herman* facts, in this case, which does not involve a transfer of assets (or otherwise) to SUSORP, express statutory authority permits Mr. Jackson to participate in the SUSORP retirement program. Section 121.35(3)(c)(2), F.S., plainly states:

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

date of such notification, the employee elects to retain membership in the Florida Retirement System, such continuation of membership shall be retroactive to the date of the change in status. (emphasis added).

Unlike *Herman* and its absence of affirmative statute to authorize transfer participation in SUSORP, the language of s. 121.35(3)(c)2 F.S. provides affirmative statute language authorizing the Petitioner to participate in the SUSORP. Notably, when commenting on s. 121.35(3)(c)(2) F.S., the operative statute in this case, Hearing Officer Longman made this telling observation:

"So the plain meaning of section 121.35(3)(c)(2)is that an employee who is in the FRS, as either a Pension Plan or Investment Plan member, and then is hired, reclassified, or promoted into a SUSORP-eligible position, must be enrolled in the SUSORP and then has 90 days to elect to instead remain in the FRS, in whichever plan he previously chose. There is no obvious reason why that this provision is not self-executing as stated, so long as the employee is not simultaneously participating in both the SUSORP and the FRS.".

In sum, the SBA said in *Herman* that affirmative statutory language in s. 121.35(3)(g) stating that someone who was in the FRS defined benefit plan/pension plan could participate in the SUSORP would have allowed Mr. Herman to participate by transfer in the SUSORP, but ruled against Mr. Herman because he was not in the FRS Defined Benefit Plan/Pension Plan, but in the FRS Defined Contribution/Investment Plan. (No similar statutory language existed in s. 121.35(3)(g) for one to participate in the SUSORP plan who was previously in the FRS investment plan.). Here, as a plain

reading of the statute at issue indicates, and as recognized by Hearing Officer Longman, express legislative authority exists for Mr. Jackson to enroll and benefit from the SUSORP plan. Thus, the SBA's Final Order in *Herman* actually supports Petitioner's position. (The *Herman* Final Order never even mentions the "self-executing" statute central to Mr. Jackson's case, s. 121.35(3)(c)2. F.S.). The SBA should recognize this material difference in the two cases, follow the plain legislative language of 121.35(3)(c)2 and permit Mr. Jackson to participate in the SUSORP plan.[3]

Exception No. 2: The Petitoner is required to participate in the SUSORP. The Hearing Officer stated in error in Conclusion of Law Paragraph 13 that the "Petitioner is not, however, required by law to participate in the SUSORP...."

Section 121.35(3)(c)2, Florida Statutes, is controlling on this point and requires participation in SUSORP. The statute (set forth above in Exception No. 1) states an affected employee "shall be enrolled in the optional retirement program [SUSORP] upon such change in status and shall be notified by the employer of such action." The use of

[3] The SBA takes the position that when Mr. Jackson was originally employed at UCF, he was presented with an "irrevocable election" between the FRS defined benefit/pension plan or the FRS defined contribution/investment plan. (See s. 121.4501(4)(a)2.a. F.S.) Even though the SUSORP was not a choice for Mr. Jackson due to his initial position's classification at UCF, the SBA treats the "irrevocable election" to prevent Mr. Jackson, whose career has progressed to an eligible position from now receiving the SUSORP benefits linked to his new position at UF. The "irrevocable election" was only between two options; it should not apply to all future options, like SUSORP, that were not on the table when the "irrevocable election" was made and limit the benefits, like the SUSORP, that would be available to candidates for qualifying positions that did not previously hold state jobs. The clear language of chapter 121, Florida Statutes, renders the SBA's assertion that "irrevocability" is applicable to all possible outcomes of an employee's retirement an abuse of discretion and a clear error. This approach disadvantages employees and thwarts the express and plain legislative language of s. 121.35(3(c)2 F.S. that employees, such as Mr. Jackson, shall be SUSORP participants. The SBA makes no effort to harmonize the two statutory provisions, as it should do. The SBA's reliance on s. 121.4501(4)(a)2.a. F.S. is misplaced and clearly erroneous.

the word "shall" is mandatory and obligatory, not permissive. *See,* Steinbrecher v. Better Construction Co., 587 So.2d 492 (Fla. 1st DCA 1991) (where language of a statute is clear and unambiguous statute must be given its plain and ordinary meaning; use of term "shall" has a mandatory connotation.).

The Legislature has given an affected employee the right to exercise subsequently an option to opt out of participating in the SUSORP after the employee has been notified that he/she is in the SUSORP program. Specifically, the statute provides that, within 90 days of being notified that the employee is in the SUSORP program, the employee may opt out of the SUSORP program and return to the FRS program. In other words, the Petitioner is compelled to participate in the SUSORP, but is subsequently vested with an option, which must be exercised in writing, to opt out of the SUSORP program. This point is also made clear by the plain language in s. 121.35(3)(c), F.S., which states in pertinent part that, "Any employee who becomes eligible to participate in the optional retirement program on or after January 1, 1993, shall be a compulsory participant in the program unless such employee elects membership in the Florida Retirement System." (emphasis added). Mr. Jackson became eligible to participate in the SUSORP and is a compulsory participant as he did not choose to opt out of the SUSORP plan.

Tellingly, the SBA has allowed employees who previously made an "irrevocable election" under s.121.4501(4)(a)2.a. F.S. between the FRS defined benefit/pension plan and the defined contribution/investment plan to participate in the SUSORP program if the employee was required to participate in the SUSORP program pursuant to s. 121.051(1)(a)2 F.S. This statutory provision is set forth below:

> Any person appointed on or after July 1, 1989, to a faculty position in a college at the J. Hillis Miller Health Center at the University of Florida or the Medical Center at the University of South Florida which has a faculty practice plan adopted by rule by the [1]Board of Regents may not participate in the Florida Retirement System. Effective July 1, 2008, any person appointed to a faculty position, including clinical faculty, in a college at a state university that has a faculty practice plan authorized by the Board of Governors may not participate in the Florida Retirement System. A faculty member so appointed shall participate in the optional retirement program for the State University System notwithstanding s. 121.35(2)(a).

Thus, the statutory language of s. 121.35(3)(c)2 F.S. ("Any employee whose optional retirement program eligibility results from a change in status due to the ...employee's appointment, promotion, transfer, or reclassification to a position specified in paragraph (2)(a) shall be enrolled in the optional retirement program upon such change in status and shall be notified by the employer of such action." and s. 121.051(1)(a)2 ("A faculty member so appointed shall participate in the optional retirement program for the State University System....") are both mandatory.

However, the SBA apparently has allowed FRS employees within the scope of s.121.051(1)(a)2 F.S. to participate in the SUSORP, presumably because such employees do not have an opt out provision to return to the FRS. The SBA should apply the law as plainly written. If the mandatory nature of participation in SUSORP is to be given effect, it should be effect under both statutory provisions, and not distinguished on whether or not a condition subsequent, an opt out provision, is offered. Stated differently, if the

SBA takes the position that a decision made under s. 121.4501(4)(a)2 F.S. is "irrevocable" unless participation in another program is required, it should treat participation required by s. 121.051(1)(a)2 F.S. the same as required participation by s. 121.051(3)(c)2 F.S. Ignoring the compulsory language found in both statutes, and instead reaching different results based on whether an opt out provision exists is arbitrary, an abuse of discretion, clearly in error, and should be avoided.

The mandatory words of both statutes should be given effect. The SBA should follow the statutory directives in both s. 121.051(1(a)2 F.S. and s. 121.051(3)(c)(2) F.S. and place employees in SUSORP, regardless of the ability of the ability to opt out or not.

Exception No. 3: The Petitioner takes exception to Conclusion of Law Paragraph 20 which defers to the SBA's interpretation of the law it is charged with administering, s. 121.35(3)(c)2., relies on the precedential effect of the *Herman* decision, and denies Mr. Jackson the relief he seeks.

Mr. Jackson has already pointed out in Exception Number 1 that the *Herman* decision actually supports his position because the SBA recognized that, if express statutory authority exists to authorize participation in the SUSORP retirement plan, one will be allowed to participate. Section 121.35(3)(c)2. F.S. provides express authority to participate in SUSORP, indeed requires that Mr. Jackson be in SUSORP. Furthermore, a prior final order is not binding precedent and is not required to be followed. The reliance on *Herman* for precedential weight to support the SBA's decision to deny Mr. Jackson the ability to participate in SUSORP is misplaced.

Deference should not be given to the SBA in this case because the statute in question, s. 121.35(3)(c)2, F.S., is clear and unambiguous, and the SBA's application is

contrary to the plain words of the statute. As pointed out by Hearing Officer Longman (Conclusion of Law Paragraph 19), this statute unambiguously directs that Mr. Jackson shall participate in the SUSORP and, at a later point in time, provides him with an option to opt out of such participation after Mr. Jackson is notified that he is in the SUSORP plan. The Florida Supreme Court has clearly explained that when the language of a statute is unambiguous and conveys a clear and ordinary meaning, there is no need to resort to other rules of statutory construction; the plain language of the statute must be given effect. *Starr Tyme, Inc. v. Cohen*, 659 So.2d 1064 (Fla.1995); *see Verizon Fla., Inc. v. Jacobs*, 810 So.2d 906, 908 (Fla.2002). A court owes no deference to an agency interpretation which is contrary to the terms of the applicable statute. *Fla. Hosp. v. Agency for Health Care Admin.*, 823 So.2d 844, 848 (Fla. 1st DCA 2002). This case, and the plain language of s. 121.35(3)(c)2. is surely within the scope of these authorities and no deference should be afforded to the SBA.

WHEREFORE, for the reasons stated above, the SBA Board[4] should fully consider the Recommended Order and grant Mr. Jackson the relief requested: to participate in the SUSORP plan as mandated by s. 121.35(3)(c)2., Florida Statutes.

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[4] The ultimate decision regarding the application of s. 121.35(3)(c)2. F.S. should be made by the Governor, the Chief Financial Officer and the Attorney General as the agency head of the SBA. See Article IV, Section 4(e) of the Florida Constitution. While the Legislature has delegated rulemaking (s. 121.031 F.S.) and administrative (s. 121.025) authority to the Department of Management Services, no statutory delegation could be located which would permit this policy decision to be made by another. Thus, it appears that this important policy decision, which not only affects Mr. Jackson, but will affect others in the future, is not subject to delegation. Further, as a matter of public policy, it should not be delegated to others, but decided by the SBA proper.

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Dated and filed this 29th day of July 2014.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this Petitioner's Written Argument and Exceptions to the Recommended Order entered by Hearing Officer Anne Longman in this matter on July 14, 2014 was filed with the Agency Clerk, electronically, this 29th day of July, 2014, and a true and correct copy was served on Brian A. Newman, Esq., Pennington, P.A., P.O. Box 10095, Tallahassee, Florida, (brian@penningtonlaw.com), attorney for Respondent, and to Tina Joanos and Daniel Beard, Agency Clerk, Florida State Board of Administration, 1801 Hermitage Blvd., Suite 100, Tallahassee, Florida, 32308 (Tina.joanos@sbafla.com) (Daniel.beard@sbafla.com) via email transmission this 29th day of July 2014.

Jon C. Moyle