STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

MARWAN SIMAAN, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	Case No.2016-3639

FINAL ORDER

On August 30, 2016, the Presiding Officer submitted her Recommended Order to the State Board of Administration in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Marwan Simaan, and upon counsel for the Respondent. This matter was decided after an informal proceeding. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. A copy of the Recommended Order is attached hereto as Exhibit A to this Final Order and incorporated to the extent described herein. The Respondent timely filed exceptions to the Recommended Order ("Exceptions"), copies of which are also attached to this Final Order. The Petitioner did not file Exceptions to the Recommended Order itself, but rather filed a Response to the Respondent's Written Exceptions to the Recommended Order (hereafter "Response"). Rulings on the Respondent's Exceptions and Petitioner's Response are set forth below. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

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

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact of a presiding officer cannot be rejected or modified by a reviewing agency in its final order "...unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings were not based upon competent substantial evidence...." *See* Section 120.57(1)(l), Florida Statutes. *Accord, Dunham v. Highlands Cty. School Brd*, 652 So.2d 894 (Fla 2nd DCA 1995); *Dietz v. Florida Unemployment Appeals Comm*, 634 So.2d 272 (Fla. 4th DCA 1994); *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122 (Fla. 1st DCA 1987). A seminal case defining the "competent substantial evidence" standard is *De Groot v. Sheffield,* 95 So.2d 912, 916 (Fla. 1957), in which the Florida Supreme Court defined it as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred" or such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached."

An agency reviewing a presiding officer's recommended order may not reweigh evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are

evidentiary matters within the province of presiding officers as the triers of the facts. *Belleau v. Dept of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Maynard v. Unemployment Appeals Comm.*, 609 So.2d 143, 145 (Fla. 4th DCA 1993). Thus, if the record discloses any competent substantial evidence supporting finding of fact in the Recommended Order, the Final Order will be bound by such factual finding.

Pursuant to Section 120.57(1)(l), Florida Statutes, however, a reviewing agency has the general authority to "reject or modify conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." Florida courts have consistently applied the "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the presiding officer's application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the presiding officer's interpretation of a statute or rule over which the Legislature has provided the agency with administrative authority. *See Deep Lagoon Boat Club, Ltd. v. Sheridan,* 784 So.2d 1140, 1141-42 (Fla. 2d DCA 2001); *Barfield v. Dep't of Health*, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001). When rejecting or modifying any conclusion of law, the reviewing agency must state with particularity its reasons for the rejection or modification and further must make a finding that the substituted conclusion of law is as reasonable, or more reasonable, than that which was rejected or modified. Further, an agency's interpretation of the statutes and rules it administers is entitled to great weight, even if it is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. *See, State Bd. of Optometry v. Fla. Soc'y of Ophthalmology*, 538 So.2d 878, 884 (Fla. 1st DCA 1998). An agency's interpretation will

be rejected only where it is proven such interpretation is clearly erroneous or amounts to an abuse of discretion. *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).

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

FINDINGS OF FACT

The Findings of Fact in paragraph 1 of the presiding officer's Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

The Findings of Fact in paragraph 2 of the Recommended Order hereby are modified to set forth additional relevant information contained in the record and to now read as follows:

2. On April 7, 2008, before his initial plan election deadline, Petitioner called the MyFRS Financial Guidance Line. During this call, Petitioner and the MyFRS Financial Guidance Line representative had an extensive discussion regarding the differences between the defined benefit Pension Plan and the defined contribution Investment Plan. Petitioner recognized the difference in the applicable vesting schedules between the two plans. He recognized he would be vested in the Pension Plan only after six (6) years of employment, while he would be vested in the Investment Plan after only one (1) year of employment. [Respondent's Exhibit 9, page 8, lines 1-25, page 9, lines 1-

23; page 15, line 25, page 16, lines 1-4]. Petitioner also discussed the fact with the representative that with the Pension Plan, the risk of loss is on the state and the fact that Petitioner would not be required to make any investment decisions. [Respondent's Exhibit 9, Page 11, lines 1-7; page 16, lines 1-25; page 17, lines 1-25; page 19, lines 11-25; page 20, lines 1-6] At the time of this call, Petitioner noted he was age 61, and believed he had 10 (ten) more years of work. [Respondent's Exhibit 9, page 25, lines 5-12]. Petitioner stated several times that he was inclined to select the Pension Plan. The Guidance Line representative offered to run a comparison of the two plans, but Petitioner declined this offer and stated he would run his own projections using the comparison tool available on MyFRS.com. Petitioner testified during the hearing that, even though he received a Benefit Comparison Statement from Respondent in January 2008 that set forth information as to how he could receive free assistance in making his retirement plan choice, he did not take any available steps to receive that free personalized help which would take into account how salary growth, length of service, investment risk and inflation could make it clearer which plan would provide him with the best benefits under his unique facts and circumstances. [Hearing Transcript, page 21, lines 4-25; page 22, lines 19- 25; page 23, lines 1-25; page 26, lines1-5; Petitioner's Exhibit 1, pages 2 and 4]

The Findings of Fact set forth in paragraphs 3 of the Recommended Order hereby are adopted in their entirety.

The Findings of Fact set forth in paragraph 4 of the Recommended Order hereby are revised to set forth additional relevant information contained in the record and to now read as follows:

4. The MyFRS Financial Guidance Line representative also stated twice during this call that the employer's obligation under the Investment Plan is to make a monthly contribution of 9% of a member's monthly pay into the member's Investment Plan account. The MyFRS Financial Guidance Line representative noted that with the Investment Plan, the account balance is impacted by the rise or fall in the value of the investments chosen. [Respondent's Exhibit 9, page 17, lines 18-25; page 18, line 1].

The Findings of Fact set forth in paragraphs 5, 6 and 7 of the Recommended Order hereby are adopted in their entirety.

The Findings of Fact set forth in paragraph 8 of the Recommended Order hereby are revised as follows to set forth additional relevant information contained in the record and to now read as follows:

:8. During an audit of Petitioner's Investment Plan account conducted by the Division of Retirement, it was discovered that contributions were made to the Petitioner's Investment Plan account for fiscal years 2008/2009 through 2015/2016 on salaries that exceeded the limitations imposed pursuant to Internal Revenue Code Section 401(a)(17) [as adjusted for inflation pursuant to Section 415(d) of the Internal Revenue Code]. The source of these excess contributions was neither the Petitioner nor the Petitioner's employer. The contributions received both from Petitioner and his employer during the period involved were correct and based on salary that was properly within the limits imposed under Internal Revenue Code Section 401(a)(17). That is, the employer, and for periods beginning in 2011, the Petitioner, stopped making contributions on the amount of salary that was in excess of the Internal Revenue Code limits. However, an error in computer programming mistakenly caused excess funds to be taken from the Florida

Retirement System Trust Fund (and not from Petitioner and Petitioner's employer) and credited to Petitioner's Investment Plan account. Thus, Petitioner's account received a "windfall" for the eight year period. Unfortunately, no one became aware of the computer issue until shortly before Petitioner was notified his account had to be reduced. This may be due to the fact that only a very small number (estimated at less than 25) of participants out of the many thousands of total participants were impacted by the computer issue. [Hearing Transcript, page 31, line 25; page 32, lines 1-21; page 34, lines 9-25; page 35, lines 20-25; page 37, lines 24-24; page 38, lines 1-12; Respondent's Exhibit 10, Affidavit of Daniel Beard, paragraphs 3-4; Respondent's Exhibit 5]. Pursuant to Internal Revenue Service Guidelines, the excess funds, and any earnings on such excess funds, are required to be retrieved from any plan member that received them. [Respondent's Exhibit 10, Affidavit of Daniel Beard, paragraph 5-6].

The Findings of Fact set forth in paragraphs 9 and 10 of the Recommended Order hereby are adopted in their entirety.

The Findings of Fact set forth in paragraph 11 of the Recommended Order hereby are revised to set forth additional relevant information contained in the record and to now read as follows:

11. After receiving this notice, Petitioner filed a Request for Intervention asking that he be enrolled in the Pension Plan as his initial election and, therefore without having to pay the Pension Plan buy-in required by law. The amount of the buy-in was not established by Petitioner. During the hearing, Petitioner noted that he did not ask the Division of Retirement to provide him with a calculation of the dollar amount he would need to pay from personal funds in addition to the balance in his Investment Plan account

in order to buy into the Pension Plan. However, Petitioner noted that his Human Resource Office advised him that additional amount would be around $50,000. [Hearing Transcript, page 28, lines 3-17]. Petitioner claimed he would not have initially elected to join the Investment Plan had he known (a) about the Section 401(a)(17) Internal Revenue Code limitation on the maximum amount of salary that can be used in determining qualified retirement plan member contributions and benefits; and (b) that the employer contributions made to the FRS could be reduced by the Florida Legislature. Respondent denied Petitioner's request and Petitioner then requested a hearing to contest this decision. This administrative proceeding followed.

RULINGS ON RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER AND ON PETITIONER'S RESPONSE THERETO

Respondent's Exception 1: Exception to Conclusion of Law 17

Respondent has filed an exception to the findings in Paragraph 17 of the Recommended Order stating that the material undisputed "facts" show that Respondent and its third party provider failed to inform Petitioner of the Internal Revenue Service salary cap and this salary cap was a "fact" critical to Petitioner's making an informed choice as to whether or not membership in the Investment Plan was a better retirement plan choice. An agency is not bound by the labels affixed to findings of fact and conclusions of law. If a conclusion is improperly labeled as a finding of fact, such label can be disregarded. *Battaglia Properties v. Florida Land and Water Adjudicatory Comm.*, 629 So.2d 161, 168 (Fla. 5th DCA 1993). An agency, however, cannot disregard

a presiding officer's finding of fact by simply characterizing such finding as a conclusion of law. *Kinney v. Department of State,* 501 So.2d 129 (Fla. 5th DCA1987).

Respondent notes that whether or not the salary cap was a "fact" or a law is critical to a determination as to whether equitable estoppel, which is the apparent basis upon which the presiding officer based her recommendation, is an appropriate remedy in this case. Equitable estoppel is based on principles of fair play and essential justice and comes into being when one party lulls another into a disadvantageous legal position. *Major League Baseball v. Morsani*, 790 So.2d 1071, 1076 (Fla.2001). The effect of equitable estoppel is to prevent a party from profiting from his or her wrongdoing.

Generally, estoppel effectively can be applied "...in all cases where one, by word, act or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induces him to act on this belief injuriously to himself, or to alter his own previous condition to his injury." *Major League Baseball, supra.* [emphasis supplied]. However, under some circumstances, negligence may be enough to support a claim of estoppel. *See*, *Steen v. Scott*, 198 So. 489 (Fla.1940). That means that estoppel can arise if one party by words, acts or conduct negligently causes the other party to believe in the existence of a certain state of things whereby the other party is induced to change his or her previous position to his or her detriment. If two innocent parties are injured by the negligence or fraud of a third party, the party who made the loss possible must bear legal responsibility. *Florida Auto Finance Corp. v. Reyes*, 710 So.2d 216 (Fla. 3d DCA 1998); *In re Int'l Forum of Florida Health Benefit Trust v. South Broward Hosp. Dist.*, 607 So.2d 432 (Fla. 1st DCA 1992), *rev. den.*, 618 So.2d 210 (Fla. 1993). That is, in instances in which one of two innocent parties must endure the wrongdoing, act or

negligence of a third party, the party who by conduct created the circumstance that allowed the third party to perpetrate the wrong or cause the loss is the party who must bear the loss. *See, Joel Strickland Enterprises, Inc. v. Atlantic Discount Co.*, 137 So.2d 627 (Fla. 1st DCA 1962); *Niccolls v. Jennings*, 92 So.2d 829 (Fla. 1957). This is known as the "two innocent persons principle."

Estoppel depends on the facts and circumstances of each case. Estoppel is demonstrated by the following elements: "1) a representation as to a material fact that is contrary to a later-asserted position; 2) reliance on that representation; and 3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." *State v. Harris,* 881 So.2d 1079 (Fla. 2004)*; Salz v. Department of Administration, Division of Retirement*, 432 So.2d 1376, 1378 (Fla. 3d DCA 1983). Estoppel can effectively be applied against the State only in rare and exceptional circumstances. *See, North Am. Co. v. Green*, 120 So.2d 603, 610 (Fla.1959) ("The instances are rare indeed when the doctrine of equitable estoppel can effectively be applied against state action."); *see also State Dep't of Revenue v. Anderson*, 403 So.2d 397, 400 (Fla.1981). Estoppel cannot be applied against the state for conduct resulting from a mistake of law. *Salz, supra.*

It is the case that the salary cap is imposed by Federal law. Specifically, the salary limitations are set forth under Section 401(a)(17) of the Internal Revenue Code , and these limitations are adjusted for inflation pursuant to Section 415(d) of the Internal Revenue Code . Further, Respondent, in his Response notes that "...there is no dispute that the IRS salary cap is law." [Petitioner's Response to Exception Number 1, page 1]

Therefore, the Respondent's Exception Number 1 that states that the IRS salary

cap is "law" and not "fact" hereby is accepted. Conclusion of Law number 17 will be modified as set forth later below.

It should be noted that Respondent further argues that the issue as to whether the Internal Revenue Code salary cap is a disputed issue of fact needs to be addressed by the Division of Administrative Hearings. However, based on the record for this case, there is no need to refer the matter for additional proceedings. There is ample evidence in the record that is not disputed that will allow a decision to be made without further offers of proof in a formal proceeding.

Petitioner's Response to Exception 1 further gives a synopsis of his arguments. However, the record clearly sets forth Petitioner's position and this Response simply is unnecessary and redundant.

Respondent's Exception 2: Exception to Conclusion of Law 18

Respondent argues that it is the IRS limitation on the maximum amount of salary that can be used in determining the amount of a qualified retirement plan member's contributions and benefits that is at issue and not the employer contribution cap. This is correct and Petitioner has recognized this fact as he stated numerous times that the "contributions" that the employer made to his account were based upon 9% of his salary. [See Hearing Transcript, page 11, lines 17-25, page 12, lines 1-14; page 14, lines 11-12; page 53, lines 10-11' lines 21-24]

The exception also notes that there is no evidence supporting a finding that Petitioner's buy in to the Pension Plan would have been a more financially feasible alternative at some point before eight (8) years had elapsed between his Petitioner's initial election and Petitioner's receipt of notification that his Investment Plan account needed to be reduced because of the excess contributions that had been erroneously sent to his account. It should be noted that

Finding of Fact 11 has been herein modified to indicate that the amount Petitioner would need to pay in addition to the value of his Investment Plan account was estimated at about $50,000 not $270,000, based on conversations Petitioner had with his Human Resources Department [Hearing Transcript, page 28, lines 3-17]. Section 121.4501(4)(g)3., Florida Statutes requires FRS Investment Plan participants to buy into the Pension Plan if they wish to switch to that defined benefit plan. Section 121.4501(4)(g)3. provides in pertinent part as follows:

> 3. *** [A]n who chooses to move to the pension plan and who became eligible to participate in the investment plan by reason of employment in a regularly established position with a state employer after June 1, 2002 *** must transfer from his or her investment plan account, and transfer from other employee monies as necessary, a sum representing the employee's actuarial accrued liability. ***

Petitioner first enrolled in the FRS in 2008. At this time, world economic conditions had caused unprecedented and unforeseeable losses to investments. In fact, many economists have considered the global financial crisis of 2007-2008 to be the "worst financial crisis since the Great Depression of the 1930s". *See, 2008 Financial Crisis: Could It Happen Again,* Kevin McCoy, USA Today, September 9, 2013. Investment Plan members are subject to risk of loss on their investments and the losses can be substantial over a short period of time. For example, the case *Joseph Burns v. State Board of Administration*, SBA Case Number 2009-1432, Final Order issued September 11, 2009, *per curiam aff'd*, Florida 1st DCA, Case No. 1D09-4899 (Opinion Filed March 17, 2010), involved a situation in which a school teacher with over 34 years of service decided to switch from the Pension Plan to the Investment Plan shortly before he terminated employment on July 1, 2008. His account balance was about $571, 000. By law, he was required to wait three full calendar months after his termination before he could take a total distribution of his account. During the period between July 1, 2008 when he

terminated employment and November 25, 2008 when he took his account distribution, his account lost over $100,000 in value. Therefore, it is certainly possible that the buy in amount for Petitioner actually could have been greater several years ago. The buy in amount a member must pay out of pocket is connected to the value of the member's investments in the member's Investment Plan account at the time of the plan switch. Thus, as the Exception notes, there is no substantial competent evidence to support a conclusion that the Petitioner's buy in amount "would have been a more financially feasible alternative" if Petitioner had been notified earlier of the erroneous excess contributions.

It also should be noted that there was no evidence that Respondent or any other party was negligent in discovering the erroneous contributions. As far as anyone knew, both Petitioner's employer and employee contributions were based on a salary amount that was within the limits of Internal Revenue Code Section 401(a)(17). Due to the fact that so few participants (estimated at less than 25 out of many thousands of total participants) were impacted by the computer error discussed in Finding of Fact 8 as modified herein above, such an error would likely only be detectable after an audit. Once the issue was discovered, steps were immediately taken to notify affected participants. [Hearing Transcript, page 35, lines 20-25; Respondent's Exhibit 10, Affidavit of Daniel Beard, paragraph 6].

Petitioner's Response merely reiterates his position and states that he is not asking for a waiver of the buy in statute. He just wishes to be placed in the Pension Plan as his initial election, even though his initial election actually occurred eight years ago. However, Petitioner has cited no statutory authority that would allow a rescission of an initial election. There is a statutory provision that does allow an Investment Plan member who made an initial election to join the Investment Plan to make a one-time second election to join the Pension Plan. *See*,

121.4501(4)(g), Florida Statutes. However, that option requires the payment of the buy-in amount. And, that avenue still is available to Petitioner.

Based on the above discussion, Respondent's Exception 2 hereby is accepted, and the Conclusions of Law will be modified below. It should be noted that again Respondent further argues that there may be some disputed issues of material fact that may need to be addressed by the Division of Administrative Hearings. However, based on the record for this case, there is no need to refer the matter for additional proceedings. There is ample evidence in the record that does not consist of disputed material facts that will allow a decision to be made without further offers of proof in a formal proceeding.

Respondent's Exception 3: Exception to the Presiding Officer's Recommendation

Respondent objects to the Presiding Officer's Recommendation that Petitioner's initial election into the Investment Plan be deemed null and void since Petitioner did not have information that would have caused him to make a more appropriate plan choice.

It is speculative at least to find that if Petitioner had more detailed information about the Internal Revenue Code salary cap, he would have made a different plan choice. Petitioner had claimed during his hearing testimony that the election of the Investment Plan was a "no brainer" since he apparently believed that his employer would contribute 9% of his salary to his Investment Plan account and that amount somehow would remain in his account until he decided to retire. [Hearing Transcript, page 11, lines 17-25, page 12, lines 1-2, page 17, lines 12-22]. However, during his telephone call with the MyFRS Financial Guidance Line representative, it was clear Petitioner recognized that with the Investment Plan, loses can result. See, Respondent's Exhibit 9, page 10, lines 10-24; page 25, lines 10-25]. In fact, the EZ Retirement Plan Enrollment Form that Petitioner signed on May 9, 2008, when he made his

retirement plan election specifically states that the amount of benefit is based on contributions and their growth over time. Growth can be negative. [Respondent's Exhibit 1]

Further, both Petitioner and the Presiding Officer seem to ignore the fact that the salary cap applies to all retirement plans qualified under Internal Revenue Code Section 401, and those plan include both the Investment Plan and the Pension Plan.

Petitioner's Response again states that it is a "no brainer" that without the information on the salary cap, the Investment Plan is "far superior" to the Pension Plan. However, Petitioner admitted he had never asked calculations to be run to compare the two plans. Those calculations would have taken into account the salary cap. [Respondent's Exhibit 10, Affidavit of Daniel Beard, paragraph 8]. Therefore, there is no substantial competent evidence to support Petitioner's Response to Exception 3.

Accordingly, Respondent's Exception 3 hereby is accepted.

RULINGS ON CONCLUSIONS OF LAW IN THE RECOMMENDED ORDER

The Conclusions of Law in paragraphs 12 through 15 of the Presiding Officer's Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

The Conclusions of Law in paragraphs 16 through 18 of the Recommended Order hereby are revised as follows:

16. It is clear there was no intent by Respondent or its third party provider staffing the MyFRS Financial Guidance Line to mislead or misinform Petitioner with regard to his critical initial election of retirement plans. In fact, Petitioner was given several opportunities to receive additional information to help make that initial choice, both during his telephone call with the MyFRS Financial Guidance Line Representative

on April 7, 2008 and in materials sent to Petitioner well in advance of the deadline - May 30, 2008- he was required to make his initial plan election. [Petitioner's Exhibit 1, New Employee FRS Benefit Comparison Statement dated January 16, 2008; Respondent's Exhibit 9, page 5, lines 16-23]. It is also clear that no one could have known that the Legislature would change the FRS from a non-contributory plan to a contributory plan, and reduce the 9% contribution rate previously paid by employers on the appropriate salary of Investment Plan members. For the vast majority of FRS members, whether they are in the Pension Plan or the Investment Plan, the ceiling on the amount of salary earned by a retirement plan member that can be used in determining member contributions provided pursuant to Internal Revenue Code Section 401(a)(17) would never have any applicability. And that may be the reason why the computer glitch that caused Petitioner's Investment Plan account to be artificially inflated would not be noticeable for such a long period of time. Again, it must be remembered that the contributions received both from Petitioner and his employer during the period involved in this matter were correct and based on salary that was properly within the limits imposed under Internal Revenue Code Section 401(a)(17). It was solely an error in computer programming that mistakenly caused excess funds to be taken from the Florida Retirement System Trust Fund (and not from Petitioner and Petitioner's employer) and credited to Petitioner's retirement plan account so that Petitioner's account balance was artificially inflated. In addition, the actions of the 2012 Legislature did significantly reduce the Investment Plan contribution rate from 9% of salary to 6.3%. The Respondent has no responsibility for setting the contribution rate established under Section 121.72, Florida Statutes, and

cannot waive it. So, it is understandable that Petitioner may not feel that his Investment Plan choice was a wise one.

17. However, by law, qualified retirement plan members cannot receive contributions to their retirement plan accounts based on salaries in excess of specified limits. *See*, Internal Revenue Code Section 401(a)(17). To allow Petitioner to keep any funds that arose due to the computer error that took such excess funds out of the Florida Retirement System Trust Fund (and not from either Petitioner or his employer) and placed them in his Investment Plan could jeopardize the tax qualified status of the Investment Plan itself. [Hearing Transcript, page 40, lines 2-7]. As such, those excess contributions, which were strictly a "windfall" to Petitioner, had to be returned to the Florida Retirement System Trust Fund as set forth in Respondent's Exhibit 5.

18. Petitioner has failed to produce substantial competent evidence that the salary cap by itself was the reason that his retirement plan choice may not have been as favorable as the alternative. There are many factors that may serve to make one plan choice preferable to another. These include salary growth, length of service, investment risk, inflation and world economic conditions in general. But calculations have to be run to estimate the impact of all these various factors.

New Conclusion of Law 19 is added to the Recommended Order, to read as follows:

19. It is unfortunate that because of a computer error, contributions on salary in excess of the Federal limitation of Internal Revenue Code Section 401 were sent, not from Petitioner and Petitioner's employer, but rather from the FRS Trust Fund to

Petitioner's Investment Plan account. Petitioner, for numerous years, was led to believe that the value of his Investment Plan account was greater than it really was because of this "windfall." As the Presiding Officer noted during the hearing, for any system as large as the Florida Retirement System "...that has as many people participating in it ... there's going to be glitches." [Hearing Transcript, page 59, lines 9-12]. But, it is clear from the evidence proffered that Petitioner was not entitled to the "windfall" amount. And, this "windfall" occurred after Petitioner made his retirement plan election. While Petitioner argues that he would not have chosen the Investment Plan if he clearly had been made aware of the Internal Revenue Code cap on salary, the salary cap applies to all qualified retirement plans under Section 401(a), and therefore applies to both the Investment Plan and the Pension Plan. The impact of the cap on the benefits available under each plan can only be estimated by making certain calculations. Petitioner had been offered the opportunity to have the calculations run on his behalf totally without charge for the purpose of helping him to make an appropriate plan election based on his own unique facts and circumstances. However, despite his assertion that choice between retirement plan was such an important decision to him, Petitioner elected not to take advantage of the knowledge that the calculations, which would have taken into account the Internal Revenue Code salary cap into consideration for both plans, may have provided. The "New Employee FRS Benefit Comparison Statement" ("Benefit Comparison Statement") provided to Petitioner on January 16, 2008, before he made his plan choice, shows that if Petitioner had remained employed for 3 years (until he was age 65), he would have no benefits if he had selected the Pension Plan (because of its 6 year vesting requirement) whereas it was projected he would have an annual benefit of $4,220 even if the market

performed poorly. [Petitioner's Exhibit 1, page 4]. The calculation set forth in the Benefit Comparison Statement took into account the salary cap amount. [Respondent's Exhibit 9, pages 27-29; and Respondent's Exhibit 10, Affidavit of Daniel Beard, paragraph 8]. Given the fact that Petitioner was about age 62 at the time he received this comparison, the Investment Plan may have indeed looked like a far better choice to him. The Benefit Comparison Statement notes that the estimate is only a "start" and that he could obtain free help to determine how "length of service, salary growth, investment risk, and inflation" might impact his potential benefits under both plans so he could make a better choice. Petitioner testified he did not take advantage of this free assistance even though he asserted that his retirement plan choice was so important to him.

Petitioner still has an opportunity to join the Pension Plan if he believes it will provide him with a better benefit. However, Petitioner will be responsible for paying the buy in amount as required by Florida law. Petitioner has shown no law or exceptional circumstances that would allow for a waiver of the buy-in amount in his situation.

ORDERED

The Recommended Order (Exhibit A), subject to the modifications as stated above hereby is adopted. Petitioner has failed to show that he is entitled to the relief requested. The Petitioner's request that membership in the Florida Retirement System ("FRS") Pension Plan be deemed to be his initial plan choice even though Petitioner has been a member of the Investment Plan since 2008 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 29th day of November, 2016, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Joan Haseman

Joan Haseman, 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

Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent was sent to Marwan Simaan, pro se, both by email transmission, [redacted], and by UPS to [redacted] 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 29th day of November, 2016.

Ruth A. Smith

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

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

MARWAN SIMAAN

Petitioner,

vs. CASE NO. 2016-3639

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 June 15, 2016, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Marwan Simaan, pro se
[redacted]

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

STATEMENT OF THE ISSUE

The issue is whether Petitioner may retroactively change his initial election and join the Florida Retirement System (FRS) Pension Plan without paying the estimated buy-in because he was not informed of the Internal Revenue Service's (IRS) annual salary limitation on retirement

EXHIBIT A

plan contributions until eight years after his initial election, and was not told that the Employer's Contribution Rate could change from the 9% it was when he enrolled.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented the testimony of Daniel Beard, SBA Director of Administration for the Office of Defined Contribution Programs. Respondent's Exhibits 1 through 8 and Petitioner's Exhibits 1 and 2 were admitted into evidence without objection.

After the hearing, supplemental exhibits including a transcript of Petitioner's call to the MyFRS Financial Guidance Line on April 7, 2008, and the Affidavit of Daniel Beard were admitted. Petitioner submitted supplemental exhibit P-3, his employment agreement with the University of Central Florida showing his salary as of the date he was first employed. Petitioner also filed a response to the Affidavit of Daniel Beard.

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 thirty days after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings.

MATERIAL UNDISPUTED FACTS

1. Petitioner became eligible for FRS membership by virtue of his employment with the University of Central Florida, an FRS-participating employer, in December of 2007. On May 9, 2008 Petitioner submitted an initial election of the FRS Investment Plan. Petitioner is a highly compensated employee of an academic institution.

2. On April 7, 2008, before his initial plan election deadline, Petitioner called the MyFRS Financial Guidance Line. During this call, he and the MyFRS Financial Guidance Line

representative had an extensive discussion regarding the differences between the defined benefit Pension Plan and the defined contribution Investment Plan. Petitioner stated several times that he was inclined to select the Pension Plan. The Guidance Line counselor offered to run a comparison of the two plans, but Petitioner declined this offer and stated that he would run his own projections using the comparison tool available on MyFRS.com.

3. While discussing how to create various comparison scenarios on the MyFRS website, the counselor stated that his screen showed Mr. Simaan's salary as $225,000 and asked if this was correct. Petitioner replied that it was not, that his salary was actually $252,000, to which the counselor replied: "Okay. It sounds like there were some numbers transposed." After discussion of his correct hire date, Petitioner states:

> I'd appreciate it then if you can look into this discrepancy in the salary and I'll try to log under my . . .

The counselor replies:

> [W]e don't have the means to research that here, but what I will do is initiate an inquiry for FRS to research it.

Mr. Simaan:

> Okay. Because they probably - - because on the form that I got where they already have some estimates, maybe those were based on the wrong numbers, right?

Counselor: It's entirely possible.

4. The FRS counselor also stated twice during this call that the employer obligation under the Investment Plan is to make a monthly contribution of 9% of the member's monthly pay to his Investment Plan account.

5. Respondent states that if Petitioner had utilized the plan comparison tool available online, it would have calculated Petitioner's plan comparison projections based on the maximum

salary allowed by the IRS at that time, $225,000, which corresponds to the figure the counselor was looking at on his screen when he spoke with Petitioner, and which the counselor assumed was an error in entering Petitioner's salary caused by transposing numbers.

6. The FRS Investment Plan Summary Plan Description contains a sentence stating that the Internal Revenue Service applies both contribution and salary limits on the amount of contributions that may be made to the plan. It does not set out the current salary limit, which at that time was $225,000, but states that because the limits are high, very few members will be affected, and that, "[y]our employer will be notified if you approach these limits".

7. The Division of Retirement notifies FRS-participating employers of the IRS salary limits, which are inflation adjusted in accordance with section 415(d) of the Internal Revenue Code.

8. During an audit of Petitioner's Investment Plan account, it was determined that the contributions paid on behalf of Petitioner for fiscal years 2008/09 through 2015/16 exceeded the salary limitations imposed by section 401(a)(17) of the Internal Revenue Code.

9. On the advice of tax counsel, Respondent determined that the excess funds contributed to Petitioner's account had to be returned.

10. On March 25, 2016, the Respondent notified Petitioner that it would remove the excess contributions made to his account; and on April 1, 2016, $101,739.74 was deducted, over a third of his total account.

11. After receiving this notice, Petitioner filed a Request for Intervention asking that he be enrolled in the Pension Plan, without having to pay the Pension Plan buy-in estimated at over $270,000, because he would not have initially elected to join the Investment Plan had he

known about the salary limitation imposed by section 401(a)(17) of the Internal Revenue Code and was not aware that the employer contribution could be reduced. This request was denied by Respondent, and Petitioner then requested a hearing to contest this decision. This administrative proceeding followed.

CONCLUSIONS OF LAW

12. The FRS Investment Plan must meet certain standards in order to receive favorable tax treatment as a qualified retirement plan. Section 401(a)(17) of the Internal Revenue Code limits the amount of annual salary that may be applied towards retirement under a qualified retirement plan. For members who joined the FRS after July 1, 1996 (like Petitioner) the salary limits (adjusted in accordance with section 415(d)) are as follows:

-2007/08 = $225,000
-2008/09 = $230,000
-2009/10 = $245,000
-2010/11 = $245,000
-2011/12 = $245,000
-2012/13 = $250,000
-2013/14 = $255,000
-2014/15 = $260,000
-2015/16 = $265,000

The SBA cannot waive or ignore the salary limits imposed by federal law without jeopardizing the Investment Plan, and Pension Plan buy-in is mandated by statute when an FRS member moves from the Investment Plan to the Pension Plan. § 121.4501(4)(g)2, Fla. Stat. (2015).

13. In 2011 the percentage payable to FRS accounts by employers was reduced, and FRS employees were required to contribute from their salaries. This change was made by the Florida Legislature in Chapter 2011-68, Laws of Florida, effective July 1, 2011, and converted

the FRS from a noncontributory to a contributory system with a contribution rate by Petitioner's employer of 3.3%. This change could not have been predicted by Respondent SBA or anyone.

14. Petitioner is not disputing the relevance of any of the applicable Florida Statutes, nor is he disputing that Section 401(a)(17) of the Internal Revenue Code limits the amount of annual salary that may be applied towards his retirement. Petitioner is disputing Respondent's assertion that he was provided with all pertinent information when he made his initial plan choice. He maintains that this selection was his single most important decision related to his retirement and that he did not have accurate and complete crucial information to help him make the correct selection for him. Petitioner further maintains that Respondent or some of its employees or agents was unaware of Section 401(a)(17) of the Internal Revenue Code limiting the amount of annual salary that could be applied toward his retirement when it asked the Petitioner to make his selection in 2008.

15. Petitioner is not asking to buy into the Pension Plan, which he could do using his one-time second election, but rather to be allowed to change his initial choice retroactive to May 9, 2008 from the Investment Plan to the Pension Plan, on the basis that Respondent failed to provide the necessary information for him to make an informed initial choice and that if he had been provided with the correct and complete necessary information at the time when he was asked to choose, he would have chosen the Pension Plan instead of the Investment Plan.

16. It is clear that there was no intent by Respondent or its third party provider staffing the MyFRS Guidance Line to mislead or misinform Petitioner with regard to his critical initial election of retirement plans. It is also clear that no one could have known that the Legislature would change the FRS from a non-contributory to a contributory plan, and reduce the

9% contribution paid previously to Investment Plan members. For the vast majority of FRS members, the IRS contribution limits will never have any applicability, and for them, the Summary Plan Description general warning that there are such caps, without setting them out, is sufficient. But for Mr. Simaan, the confluence of two factors over which he had no control – the IRS contribution limits and the actions of the 2011 legislature, which changed the employer contribution from 9 to 3.3 percent – worked together to transform what was a well-considered decision to enroll in the Investment Plan, into a poor choice. Respondent SBA has no responsibility for setting the contribution rate.

17. But the material undisputed facts show that Respondent and its third party provider did not inform Petitioner of a fact critical to his decision – the IRS contribution cap – despite several instances where it could and should have done so. Petitioner's salary was over the cap from the moment when he enrolled. He told the Guidance Line counselor this, and was told that the FRS would be notified that the screen the counselor was looking at showed a figure that was not Petitioner's salary. I see no indication that this was done. It is also clear that the MyFRS counselor was not aware of the cap.

18. FRS employers apparently are charged with notifying an employee if his salary moves over the contribution cap, that also did not happen here, but that omission by the employer does not remove Respondent's responsibility. This employee was over the cap from his initial enrollment in the FRS, and there is no indication that he was ever informed, by anyone, that he was over the cap when he enrolled and for the entire time period from 2008 to 2016. If Petitioner had been informed of the cap before eight years had elapsed, buying into the Pension Plan would have been a more financially feasible alternative, rather than requiring a payment of over $270,000.00.

RECOMMENDATION

Under these very limited circumstances, where it is shown that the member was not given the critical information that his salary already exceeded the IRS contribution cap, both when he enrolled and during the eight years that followed, where there is evidence that he was initially inclined to enroll in the Pension Plan, and where using his second election to buy into the Pension Plan now would be very onerous, I recommend that his initial election of the Investment Plan be deemed null and void as having been made in the absence of information which would have caused him to instead choose the Pension Plan, and that initial election be deemed his choice of the Pension Plan on May 8, 2008.

RESPECTFULLY SUBMITTED this 30th day of August, 2016.

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
mini.watson@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Marwan Simaan
[redacted]

Petitioner

and via electronic mail only to:

Brian A. Newman, Esquire
Brandice D. Dickson, Esquire
Pennington, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301
slindsey@penningtonlaw.com

Counsel for Respondent

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

MARWAN SIMAAN,

Petitioner,

vs. Case No.: 2016-3639

STATE BOARD OF ADMINISTRATION,

Respondent.

RESPONDENT'S WRITTEN EXCEPTIONS TO RECOMMENDED ORDER

Respondent, State Board of Administration ("SBA") submits the following as its written exceptions to the Recommended Order, and says:

INTRODUCTION

The result recommended here is that Petitioner be allowed to rescind his initial election to join the Investment Plan and that he be transferred to the Pension Plan without paying the buy-in required by section 121.4501(4)(g)2, Florida Statutes. Although the Recommended Order does not specify the legal grounds that justify the recommended relief, it is presented that it is based upon the application of the equitable doctrine of estoppel. The Recommended Order misstates that Petitioner was not informed of a "fact" critical to his decision, to wit: the imposition of the IRS salary cap imposed by federal law. The salary cap is not a "fact," it is the law. See § 401(a)(17) of the Internal Revenue Code. The distinction between a "fact" and a "law" is material here because it is well settled that estoppel will not be applied against a state agency (like the SBA) due to a mistake of law. Salz v. Department of Administration, Division of Retirement, 432 So. 2d 1376, 1378 (Fla. 3rd DCA 1983) citing North American Co. v. Green, 120 So. 2d 603 (Fla 1959). Thus, even if Petitioner was not informed (or was even misinformed) about the application

of federal law to his retirement benefits, estoppel does not apply to allow him to move back to the Pension Plan without payment of the statutorily-mandated buy-in.

Assuming, *arguendo*, that if the application of the IRS salary limit to Petitioner is a "fact" and not a law, the recommendation that the doctrine of estoppel should apply here is premature because Petitioner must also establish that: 1) he was misled, and 2) that he relied upon the misstatement. Salz, 432 So. 2d at 1378. A factual finding that these two elements have been satisfied would require the hearing officer to resolve disputed issues of fact, authority she does not have in a proceeding involving no disputed issues of material fact under section 120.57(2), Florida Statutes. Accordingly, in order to determine whether estoppel should be applied to grant Petitioner the relief he seeks, this case must be transferred to the Division of Administrative Hearings for a hearing involving disputed issues of material fact under section 120.57(1), Florida Statutes. See § 120.569(1), Fla. Stat. ("If a disputed issue of material fact arises during a proceeding under s. 120.57(2), then, unless waived by the parties, the proceeding under s. 120.57(2) shall be terminated and a proceeding under s. 120.57(1) shall be conducted.")

WRITTEN EXCEPTIONS TO SPECIFIC PORTIONS OF THE RECOMMENDED ORDER

- **Exception Number 1.**

Paragraph 17 of the Recommended Order provides in pertinent part that:

> But the material undisputed facts show that Respondent and its third party provider did not inform Petitioner of a fact critical to its decision – the IRS contribution cap – despite several instances where it could and should have done so.

This recommended conclusion of law should be rejected because the IRS cap on salary contribution is not a "fact," it is a law. As stated above, estoppel will not be applied against a state agency for a mistake of law. Salz, 432 So. 2d at 1378. Second, the IRS contribution cap is not

applicable here, at issue is the IRS salary cap found in section 401(a)(17) of the Internal Revenue Code.

In addition, whether the Petitioner was informed of the IRS salary cap is a disputed issue of fact that must be resolved in a section 120.57(1) hearing involving disputed issues of fact. The FRS summary plan description – made available to FRS members – clearly advises FRS members of the existence of the IRS salary cap. Moreover, when Petitioner called the MyFRS Financial Guidance Line, he was encouraged to utilize the plan comparison tool available online that would have produced retirement plan projection estimates for him that applied the IRS salary cap. (R-9, pp. 27-29; and R-10, Affidavit of Daniel Beard, paragraph 8). Petitioner stated that he would go online and use the plan comparison tool, but never did. (R-9, pp. 27-29). Had he done so, he would have received future benefit projections that applied the IRS salary cap. (R-10, Affidavit of Daniel Beard, paragraph 8). The doctrine of estoppel will not apply if the party seeking estoppel has equal knowledge of, or the same means of ascertaining, the information at issue. Lennar Home, Inc. v. Gabb Construction Services, Inc. 654 So. 2d 649 (Fla. 3rd DCA 1995); and Overstreet v. Bishop, 343 So. 2d 958 (Fla. 1st DCA 1977). "A person has no right to shut his eyes or ears to avoid information, and then say that he has no notice." Citizens Property Ins. Corp. v. European Woodcraft & Mica Design, Inc., 49 So. 3d 774, 777 (Fla. 4th DCA 2010) citing Sapp v. Warner, 141 So. 124, 127 (Fla. 1932).

Accordingly, although identified as a conclusion of law, this paragraph contains a finding of fact that is in dispute that must be resolved in a hearing involving disputed issues of material fact under section 120.57(1), Florida Statutes.

WHEREFORE, Respondent, SBA respectfully requests that this conclusion of law/finding of fact be rejected outright, or alternatively, that the case be referred to the Division of

Administrative Hearings so the factual dispute as to whether Petitioner was informed about the IRS salary cap can be determined.

- **Exception Number 2.**

Paragraph 18 of the Recommended Order provides that:

> FRS employers apparently are charged with notifying an employee if his salary moves over the contribution cap, that also did not happen here, but that omission of the employer does not remove Respondent's responsibility. This employee was over the cap from his initial enrollment in the FRS, and there is no indication that he was ever informed, by anyone, that he was over the cap when he enrolled and for the entire time period from 2008 to 2016. If Petitioner had been informed of the cap before eight years had elapsed, buying into the Pension Plan would have been a more financially feasible alternative, rather than requiring a payment of over $270,000.00.

As stated above, at issue here is the IRS salary cap, not the employer contribution cap. Also, there is no law that expressly charges the SBA with the responsibility to inform Petitioner about the application of the IRS salary cap (and none was cited in the Recommended Order). As such, the alleged failure to advise Petitioner of the IRS salary cap cannot justify a waiver of the buy-in statute.

Even if it did, the FRS met that obligation by notifying Petitioner of the existence of the IRS salary cap (which changes annually) in the FRS Investment Plan Summary Plan Description. Moreover, had Petitioner utilized the plan comparison tool available online – as he said he would – he would have received retirement plan projections that applied the IRS salary cap. (R-9, pp. 27-29; and R-10, Affidavit of Daniel Beard, paragraph 8). Thus, even if the SBA was required to inform Petitioner of the existence of the IRS salary cap, whether it did so is at the very least a disputed issue of fact that must be resolved by an Administrative Law Judge in a section 120.57(1) hearing.

Finally, there is no record evidence supporting the finding/conclusion that Petitioner's buy-in to the Pension Plan "would have been a more financially feasible alternative" eight years ago. This conclusion/finding must be rejected as not based upon competent substantial evidence.

WHEREFORE, Respondent, SBA respectfully requests that this conclusion of law/finding of fact be rejected outright, or, alternatively that the case be referred to the Division of Administrative Hearings so the factual dispute as to whether Petitioner was informed about the IRS salary cap can be determined.

- **Exception Number 3.**

The recommendation of the Recommended Order contains the following finding of fact:

> ... I recommend that his initial election of the Investment Plan be deemed null and void as having been made in the absence of information which would have caused him to instead choose the Pension Plan...

This finding of fact is not contained in the Material Undisputed Facts section of the Recommended Order. This fact is in dispute. Petitioner's assertion that he would have chosen the Pension Plan instead of the Investment had he known about the salary cap is not credible because the IRS salary cap applies to both the Pension Plan and the Investment Plan. As such, the application of a restriction that applies equally to both plans cannot be accepted as a rationale for why Petitioner would have chosen a different plan. In terms of whether estoppel should be applied here, whether Petitioner actually relied on any misinformation (or lack of information) is a disputed issue of fact that must be resolved by an Administrative Law Judge in a section 120.57(1) hearing involving disputed issues of material fact.

WHEREFORE, Respondent, SBA respectfully requests that this finding of fact be rejected outright, or alternatively, that the case be referred to the Division of Administrative Hearings so

the factual dispute as to whether Petitioner would have selected the Pension Plan if he had known about the IRS salary cap can be determined.

Respectfully submitted,

Brian A. Newman

Brian A. Newman (FBN 0004758)
brian@penningtonlaw.com
Brandice D. Dickson (FBN 300100)
brandi@penningtonlaw.com
PENNINGTON, P.A.
215 S. Monroe Street, Suite 200
Post Office Box 10095
Tallahassee, FL 32302-2095
Telephone: (850) 222-3533
Facsimile: (850) 222-2126
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been filed via ELECTRONIC MAIL this 14th day of September, 2016 on:

Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
tina.joanos@sbafla.com
mini.watson@sbafla.com

Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
315 S. Calhoun Street, Ste. 830
Tallahassee, Florida 32301
alongman@llw-law.com
lschneider@llw-law.com

Marwan Simaan
[redacted]

Brian A. Newman
Attorney

MARWAN SIMAAN

Petitioner

Vs. Case No: 2016-3639

STATE BOARD ADMINISTRATION

Respondent

PETITIONER RESPONSE TO "RESPONDENT'S WRITTEN EXCEPTIONS TO RECOMMENDED ORDER"

Petitioner would like to enter for the record the following response to the Petitioner Response to "Respondent's Written Exceptions to Recommended Order" filed by Respondent on September 14, 2016

Response to Exception Number 1.

Respondent is attempting to muddy the waters by re-arguing undisputed facts that have been stated numerous times in past arguments and responded to by Petitioner ad nauseam. First, there is no dispute that the IRS cap on salary is law. No one is arguing this point. Second, Petitioner has stated numerous times in the arguments that Respondent has failed to provide the Petitioner with clear and concrete information about the salary cap that the Petitioner needed to make an informed decision about choosing between the Pension and Investment plans. Respondent has never been able to provide clear and concrete proof that it has provided this information. Here is a summary again:

1) The Respondent has failed to mention the cap in the informational materials that was mailed to the petitioner in 2008 (Exhibit P-1)

2) The Respondent has failed to mention the cap in the telephone conversation that the petitioner had with the FRS Financial Agent in 2008 (according to the transcript provided by the respondent Exhibit R-9). It was very clear from the transcript that the Agent was confused about the exact salary of the Petitioner due to the transposition of two digits in the salary system. The Agent never mentioned the existence of a salary cap in the conversation.

3) The Respondent has failed to mention the salary cap in all of its correspondence with the Petitioner over a period of 8 years (2008 to 2016) including all 32 quarterly statements that he received from the FRS about the balances in his investment plan account during the mentioned period. The claimed incorrect account balances that were provided by the Respondent to the Petitioner over a period of 8 years constitute what would be classified as mismanagement of the Petitioner's investment account.

4) The Respondent attempted to use a scape goat about his lack of knowledge of the salary cap over a period of 8 years by blaming it on a computer glitch, which was easily disputed as computer glitches are normally detected quickly (within minutes or days) but not after 8 years.

5) As a point of fact, and a further proof that the FRS did not provide information about the salary cap in their informational materials, the FRS has now corrected the informational materials concerning the retirement plans to now include a clear and concrete statement

mentioning clearly the existence of a Federal Salary Cap on salary (see page 21 of the FRS Investment Plan Summary dated July 1, 2016 -Attached as Exhibit P-4). This statement did not exist in any of the FRS Investment Plan Summary materials published prior to July 1, 2016 (for comparison purposes the same paragraph is shown on page 2 of exhibit R-9 and the statement that was added in the 2016 version is very clear). This is a **clear admission** on the part of FRS of that it has a responsibility to inform potential employees of these limits in a clear and concrete statement and that it has failed to do so in all years prior to 2016.

Response to Exception Number 2.

1) Respondent mentions on line 4 of Exception Number 2 (page 4) that the "alleged failure to advise Petitioner of the IRS salary cap cannot justify a waiver of the buy-in-statute". Neither the Petitioner nor the Recommended Order suggested that a waiver of the buy-in-statute be granted. Instead the Recommended Order asked that "the Petitioner's initial selection of the Investment Plan be deemed null and void and replaced with the Pension Plan".

2) Respondent mentions at the beginning of next paragraph that "Even if it did, the FRS met its obligation by notifying petitioner of the existence of the limit in the FRS Summary Plan..." Again, this claim is False. The FRS never did so as already stated ad nauseam. (see again response to Exception Number 1 above). The Respondent has never provided any clear and undisputed proof that the summary plan provided to the Petitioner contained a clear statement of the salary cap as the one in the 2016 version (as shown in Exhibit P-4).

Response to Exception Number 3.

1) Respondent seems to assume that he has a God Given Super Ability and Power to be able to read the Petitioner's mind as to what process the Petitioner has used to arrive at the decision to choose the investment plan and to assume that just because the two plans have the same cap that the choice of the investment plan was the correct one made by the Petitioner. This is mind boggling and defies any logic. It is in fact a no brainer and it does not require rocket science to figure out that without the information on the salary cap, the Investment Plan is far superior to the Pension Plan for those whose salaries exceed the cap even when the cap applies to both plans. It is no surprise that the Petitioner's Investment Plan has generated $101,739.74 in additional revenue to his Investment plan that the FRS has found so conveniently easy to claim back as belonging to it on March 25, 2016. The assertion made by the Respondent in this exception that the information about the salary cap is not relevant in deciding which plan to choose is ludicrous does not make any sense. In fact, it is the most important piece of information that is needed to make an informed and intelligent decision, and the FRS was so negligent and irresponsible in not providing it in the most transparent and clear way to the Petitioner.

RECOMMENDATION:

The three exceptions to the recommended order provided by the Respondent should be rejected outright as they have all been responded to on numerous times in past proceedings of this hearing.

ADDITIONAL COMMENTS AND CONCLUSIONS:

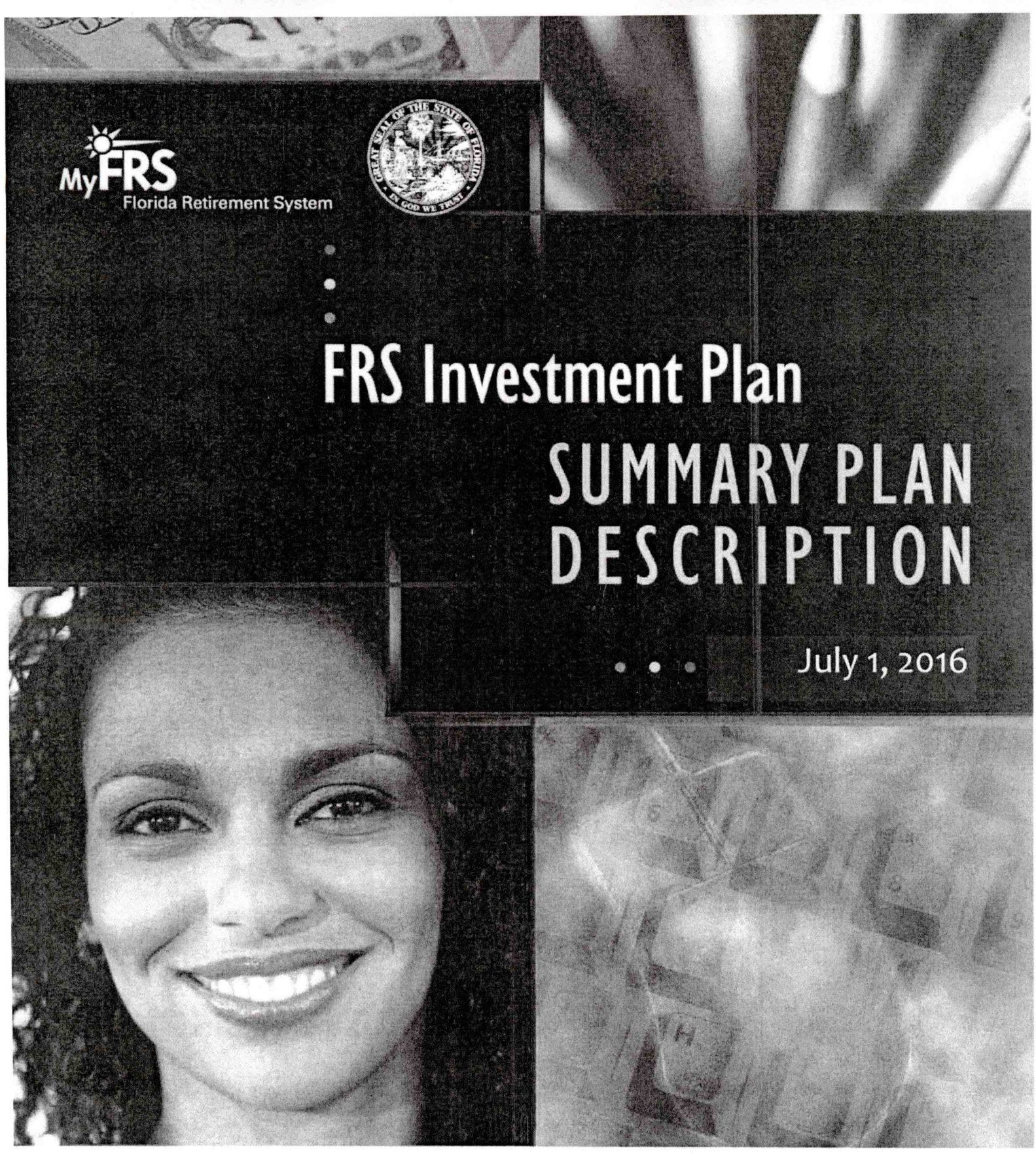
1) At a minimum, Petitioner expected and should have received an apology from the FRS a) for its negligence in not providing the necessary information that should have helped him to make an informed choice in 2008 and 2) for its mismanagement of his Investment plan over a period of 8 years by providing the Petitioner with incorrect quarterly statements about the balance in his Investment Plan; a balance that he was watching carefully over the span of 8 years to plan the time when he would initiate retirement.
2) Normal professional courtesy should have followed the FRS decision to reduce the Petitioner's Investment plan by 30% on March 25 of this year due to no fault of his own by offering the Petitioner an option to revert to the Pension Plan. This should have been done as a courtesy on the part of FRS due to its negligence and mismanagement and not as a result of a Recommended Order of this long and unnecessary hearing that has lasted more than 6 months.
3) The Respondent should consider itself fortunate that the Recommended Order included only a recommendation to revert the Petitioner to the Pension Plan. This type of negligence and mismanagement would not have been tolerated if it happened in the private sector by a private investment company and would have resulted in more serious actions than just the simple and obvious recommendation arrived at in the Recommended Order.

Respectfully Submitted

Marwan Simaan,

September 15, 2016

P4



FRS Investment Plan

SUMMARY PLAN DESCRIPTION

July 1, 2016

Membership Class	Paid by You	Paid by Your Employer	and Your Employer
Regular Class	3%	3.30%	6.30%
Special Risk Class	3%	11.00%	14.00%
Special Risk Administrative Support Class	3%	4.95%	7.95%
Elected Officers' Class - (Judges)	3%	10.23%	13.23%
Elected Officers' Class - (Legislature/Cabinet/Public Defender/State Attorney)	3%	6.38%	9.38%
Elected Officers' Class - (County and Local)	3%	8.34%	11.34%
Senior Management Service Class	3%	4.67%	7.67%

Upon receipt of the blended contributions, the Division balances the payroll and transfers the data and the Investment Plan contributions to the Investment Plan Administrator for Investment Plan members. Payroll information is electronically transmitted to the Investment Plan Administrator daily. The Investment Plan Administrator posts contributions to members' accounts within two business days of receipt of the data and contributions. If the contributions are delayed from posting due to acts of God beyond the reasonable control of the Division, SBA, or the Investment Plan Administrator, market losses will not be payable as a result of the delay.

The Internal Revenue Service imposes limits on the amount of your salary that may be used for contribution purposes, and the amount of contributions that may be made on your behalf. For the calendar year 2016, the contribution limit is the lesser of $53,000 or 100% of the salary actually paid to you. This limit includes employer contributions, employee salary reductions, and employee contributions, in aggregate, to 401(a) retirement plans, as well as to other plans such as a 401(k), 403(a), 403(b), and 408(k). Because these limits are high, very few members will be affected. The federal salary limit for contribution purposes for fiscal year 2016-17 is $394,300 if you were initially enrolled before July 1, 1996, or $265,000 if you were initially enrolled on or after July 1, 1996. Your employer will be notified if you approach these limits.

* Compare with Equivalent paragraph in 2005 plan next 2 pages

In addition to those contributions paid by your employer to fund your retirement benefit, your employer contributes additional amounts to fund your Health Insurance Subsidy benefit (1.66%), disability benefits (will vary depending on employment class), in line of duty death benefits for Special Risk Class members, and Investment Plan administration costs and educational program costs for all FRS members (.06%).

Reference: Sections 121.052(7), 121.055(3), 121.4501(1), (5) and (13), 121.71, 121.72, 121.73, 121.74, and 121.76, F.S.
Sections 19-11.001, 11.011, and 13.003, F.A.C.

FRS Investment Plan

SUMMARY PLAN DESCRIPTION

March 1, 2008

compensation claims, capital collateral regional counsels and assistant capital collateral regional counsels, and selected managerial staff with the Judicial Branch, as well as elected officials who chose to join the SMSC in lieu of the EOC. Local government agencies may designate additional non-elective managerial positions for SMSC membership.

Reference: Section 121.021(12), F.S.
Section 19-11.006(4), F.A.C.

How are contributions made to my account in the FRS Investment Plan?

Employers are required to submit retirement contributions no later than the fifth business day of each month following the month wages are earned. Note that Florida law neither requires nor permits you to make contributions to your FRS Investment Plan account from your own funds. The amount contributed by your employer on your behalf is equal to a percentage of your gross monthly salary, based on your employment class.

Employment Class	Rate
Regular	9.00%
Special Risk	20.00%
Special Risk Administrative Support	11.35%
Elected Officers	
Legislators	13.40%
Governor, Lt. Governor, Cabinet Officers	13.40%
State Attorney, Public Defenders	13.40%
Justices, Judges	18.90%
County Elected Officers	16.20%
Senior Management Service	10.95%

The Internal Revenue Service imposes limits on the amount of your salary that may be considered for contribution purposes, and the amount of contributions that may be made on your behalf. For the calendar year 2008, the contribution limit is the lesser of $46,000 or 100% of the salary actually paid to you. This limit includes employer contributions, employee salary reductions, and employee contributions, in aggregate, to 401(a) retirement plans. Because these limits are high, very few members will be affected. Your employer will be notified if you approach these limits.

* Compare with 2016 Version on page Pg-2

In addition to those contributions paid by your employer to fund your retirement benefit, your employer contributes additional amounts to fund your Health Insurance Subsidy benefit (1.11%), disability benefits (will vary depending on employment class) and FRS Investment Plan administration costs (.05%).

Reference: Sections 121.052(7)(c), 121.055(3)(c), 121.4501(1) and (13), 121.72, 121.73, 121.74, and 121.76, F.S.
Sections 19-12.001, 12.003, and 13.003, F.A.C.