STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

LADDIE BUHOLZ, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	DOAH Case No. 21-0084 SBA Case No. 2020-0468

FINAL ORDER

On April 20, 2021, Administrative Law Judge Robert S. Cohen (hereafter "ALJ") submitted his Recommended Order to the State Board of Administration (hereafter "SBA") in this proceeding. A copy of the Recommended Order indicates that copies were served upon counsel for the Petitioner and upon the *pro se* Petitioner, Laddie Buholz. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions to the Recommended Order which were due May 5, 2021. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

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

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

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

An agency reviewing an ALJ's recommended order may not reweigh evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of administrative law judges as the triers of the facts. *Belleau v. Dept of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Maynard v. Unemployment Appeals Comm.*, 609 So.2d 143, 145 (Fla. 4th DCA 1993). Thus, if the record discloses any competent substantial evidence supporting finding of fact in the 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 ALJ'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 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).

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

The Conclusions of Law set forth in the ALJ's Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

ORDERED

The Recommended Order (Exhibit A) hereby is adopted in its entirety. The Petitioner's Florida Retirement System Investment Plan Petition for Hearing hereby is dismissed. The Petitioner has failed to establish that he was entitled to the relief requested.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the State Board of Administration in the Office of the General Counsel, State Board of Administration, 1801 Hermitage Boulevard, Suite 100, Tallahassee, Florida, 32308, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days from the date the Final Order is filed with the Clerk of the State Board of Administration.

DONE AND ORDERED this 17th day of June, 2021, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Daniel Beard

Daniel Beard
Chief of Defined Contribution Programs
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State Board of Administration
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FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by electronic mail to the *pro se* Petitioner, Laddie Buholz, both by email transmission to lbuholz@gmail.com and by UPS to: [redacted] and to the counsel for Respondent by email transmission to: Deborah Minnis, Esq. (dminnis@ausley.com) and Ruth Vafek (rvafek@ausley.com; jmcvaney@ausley.com, Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 17th day of June, 2021.

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

LADDIE BUHOLZ,

Petitioner,

vs. Case No. 21-0084

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, an administrative hearing was held before the Honorable Robert S. Cohen, Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), on March 11, 2021, via Zoom Conference.

APPEARANCES

For Petitioner: Laddie Buholz, pro se
[redacted]

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

STATEMENT OF THE ISSUE

The issue to be determined is whether Petitioner was correctly defaulted into the Florida Retirement System ("FRS") Investment Plan after he was hired into an FRS-eligible position on November 1, 2019.

EXHIBIT A

PRELIMINARY STATEMENT

Pursuant to a letter dated December 7, 2020, Respondent, State Board of Administration ("Respondent" or "SBA"), filed a Response to Request for Intervention received from Petitioner on November 30, 2020. Petitioner thereafter filed an FRS Investment Plan Petition for Hearing ("PFH") with SBA on December 30, 2020. That petition was referred to DOAH on January 11, 2021, and, pursuant to a Notice of Hearing by Zoom Conference dated January 25, 2021, was set for final hearing on March 11, 2021. The hearing was held as scheduled on that date.

At the March 11, 2021, hearing, Petitioner testified on his own behalf. Respondent presented the testimony of Ms. Allison Olson. In addition, Respondent's Exhibits R-1 through R-10 were admitted into evidence, in some instances over objection as to hearsay.

The one-volume Transcript of the hearing was filed with DOAH on March 26, 2021. Pursuant to stipulation, the parties agreed to file any proposed recommended orders on April 15, 2021, 20 days from the filing of the Transcript. Respondent filed its Proposed Recommended Order on April 15, 2021. Petitioner did not file a post-hearing submittal. Based upon the evidence and testimony presented at hearing, as well as the Proposed Recommended Order submitted by SBA, the following Findings of Fact and Conclusions of Law are made:

FINDINGS OF FACT

1. Petitioner was employed in FRS-eligible positions, with the Florida Department of Corrections and other participating employers, at various times from 1985 through 1998. At all of those times, the Pension Plan was the only retirement program available for eligible employees.

2. In 2002, the Investment Plan became available for employees participating in FRS. Petitioner was not employed in an FRS-eligible position at that time.

3. Petitioner began employment with the Florida Department of Children and Families ("DCF"), an FRS-participating employer, on or about November 1, 2019.

4. Following his return to FRS-eligible employment, Petitioner was provided an initial choice period with a deadline of July 31, 2020, by 4:00 p.m., Eastern Time, to elect the Pension Plan or the Investment Plan.

5. DCF had initially provided an incorrect Social Security number for Petitioner to the Florida Department of Management Services, Division of Retirement, which administers the FRS Pension Plan and also is responsible for review and correction of any Social Security number discrepancies.

6. Upon correction of Petitioner's Social Security number, Petitioner's deadline for his initial choice period was extended to October 30, 2020, and emails and other communications were sent to him reflecting the new deadline.

7. At some point prior to Petitioner's receipt of the first email informing him of the new, later deadline, Petitioner believed he had "logged on to the MyFRS.com website and made the election to remain in the Pension fund."

8. At the time Petitioner thought he had logged onto the MyFRS.com website from his office computer, Petitioner was in the process of transferring from the DCF office in Bartow to the DCF office in Orlando, where he had accepted a new legal position.

9. Petitioner testified that he "would have made a screen capture of the confirmation [he] would receive after submitting [his Pension Plan election]" but that, "because [he] was using the computer from Bartow, the screen capture ... would have been on that particular computer. It didn't transfer when [he] got [his] new computer in Orlando."

10. Petitioner also testified that, after he had transferred to Orlando, he never inquired as to whether he or anyone else could access the computer in Bartow and get a copy of the confirmation screenshot he thought he would have captured.

11. Ms. Olson, the Director of Policy, Risk Management, and Compliance in the SBA Office of Defined Contribution Programs, testified that if the Plan Choice Administrator had received an election form from Petitioner, then, in the ordinary course of business, it would have caused a statement to be sent to him confirming that the election was received.

12. On or about August 5, 2020, a "Confirmation of Plan Choice Default – Investment Plan" notice was sent to Petitioner, informing him that he had been defaulted into the FRS Investment Plan.

13. On or about August 10, 2020, a "Confirmation of Plan Choice Election Reversal" notice was sent to Petitioner, confirming reversal of the Investment Plan default election due to the mix-up over Petitioner's Social Security number.

14. Petitioner was unable to provide any evidence of having logged into MyFRS.com to make the election to the Pension Plan option, either through a screenshot showing he had made the election, a notice or email received from the website of his having made the election, or any communication from the Division of Retirement or SBA stating the election had been made.

15. Moreover, Respondent has no record of Petitioner utilizing an election during his initial choice period, whether ending on the original July 31, 2020, date or the extended date of October 30, 2020.

16. Having no record of Petitioner's election to participate in the Pension Plan to act otherwise, Petitioner was, therefore, enrolled in the Investment Plan.

17. There is no support or evidence in the record for a finding that Respondent or its agents missed or otherwise failed to properly record an affirmative election of the Pension Plan option by Petitioner.

18. On or about November 30, 2020, Petitioner submitted a Request for Intervention ("RFI"), asserting that he had elected the Pension Plan and requesting that his retirement account be "returned" to the Pension Plan. Petitioner's RFI was denied.

19. On December 30, 2020, Petitioner filed a PFH, again asserting that he had made an election to participate in the Pension Plan "prior to July 31, 2020." This proceeding followed.

20. There is credible evidence that Respondent sent numerous reminders to Petitioner during his "choice period" in 2019 and 2020, both via mail and email, that he needed to make an election between the Investment Plan and the Pension Plan before the original, then the extended election deadline.

21. Petitioner, an articulate and thoughtful individual, was unable to provide any competent proof that he affirmatively elected to remain in the Pension Plan. Therefore, Respondent had no choice but to enroll him in the Investment Plan.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2020).

23. In this case, Petitioner argues that he believes he did, in fact, click through one of the reminder emails to complete an election form for the FRS Pension Plan. However, there is no credible evidence to support a finding that Respondent or the Plan Choice Administrator, Alight Solutions, ever received an affirmative election from Petitioner to remain in the Pension Plan.

24. When Petitioner was initially employed in FRS-eligible positions, from 1985 through 1998, the Pension Plan was the only retirement program available. In 2002, the Investment Plan became available for employees participating in FRS. Ch. 2000-169, Laws of Fla. Pursuant to the statutes creating the new Investment Plan option, eligible employees were granted an

initial "election window" to make a choice whether to remain in the Pension Plan or move to the Investment Plan. Petitioner was not employed in an FRS-eligible position at that time.

25. For the majority of the 17 years between the initiation of the Investment Plan and the beginning of Petitioner's employment with DCF, the Legislature provided that FRS members who did not make an affirmative election during their initial choice window would default into the Pension Plan. Ch. 2000-169, Laws of Fla. In 2017, the Legislature changed the governing statute so that employees initially enrolled in FRS on or after January 1, 2018, or former participants who did not complete an election window prior to January 1, 2018 (such as Petitioner), would default into the Investment Plan. Ch. 2017-88, Laws of Fla.

26. This provision appears in section 121.4501(4)(b), Florida Statutes (2019), which provides, in pertinent part, as follows:

> With respect to employees who become eligible to participate in the investment plan by reason of employment in a regularly established position commencing on or after January 1, 2018, or who did not complete an election window before January 1, 2018, any such employee shall be enrolled in the pension plan at the commencement of employment and may, by the last business day of the eighth month following the employee's month of hire, elect to participate in the pension plan or the investment plan.

That portion of the statute sets up the choice period, not the mandatory default. It also provides for applicability to both new hires and returning members who had not, for instance, been employed in an FRS-eligible position when the Investment Plan became an option in 2002. Section 121.4501(4)(b)2. then requires that "[t]he employee's election must be made in writing or by electronic means and must be filed with the third-party administrator." The 2019 version of subsection (4)(b)3.a., meanwhile, provides, in pertinent part:

> Except as provided in subparagraph 4. [applying to Special Risk class employees], *if the employee fails to make an election to either the pension plan or the investment plan during the 8-month period following the month of hire, the employee is deemed to have elected the investment plan and shall default into the investment plan retroactively to the employee's date of employment.* The employee's option to participate in the pension plan is forfeited, except as provided in paragraph (f) [pertaining to the "second election" option].

(Emphasis added).

27. The quoted statutory provisions are unambiguous and mandate that Petitioner must have made an affirmative election in order to remain in the Pension Plan after his return to FRS-eligible employment in 2019.

28. Pursuant to the express terms of the governing statute, Petitioner's Pension Plan election must have been received by the Plan Choice Administrator on or before the October 30, 2020, end of his initial election period.

29. There is no credible evidence of record to support Petitioner's contention that he made the Pension Plan election and that it had been received as required by section 121.4501(4)(f). Therefore, he did not make an effective election.

30. Florida Administrative Code Rule 19-11.006(2)(f) further provides, in pertinent part:

> The enrollment by form or electronic means shall be complete and the election shall be final if all the required information is clearly indicated and if the enrollment is received by the Plan Choice Administrator by 4:00 p.m. (Eastern Time) on the last business day of the 8th month following the date of hire. The form shall be transmitted via mail, courier, online or by fax, as provided on the form. It is the responsibility of the member to ensure that the enrollment form is received by the Plan Choice Administrator no later than 4:00 p.m.

> (Eastern Time) on the last business day that the member is earning salary and service credit, or the last business day of the 8th month following the date of hire, whichever first occurs.

Subsection (2)(g) of the same rule requires as follows:

> Upon receipt of the completed enrollment form by the Plan Choice Administrator, the Plan Choice Administrator shall enroll the employee in the indicated FRS retirement plan. Upon completion of the enrollment, but no later than two working days after enrollment, the Plan Choice Administrator shall send confirmation of the effective enrollment to the employee at the employee's address of record or electronically if the member has consented to electronic delivery of documents through the MyFRS.com website ... .

31. Clearly, the test here is whether the election is received and processed by the Plan Choice Administrator during the permitted time frame; since no election for Petitioner was ever received or processed, Respondent is not authorized to revoke his default into the Investment Plan.

32. A recent similar case to the present one, *Wagner v. State Board of Administration*, Case No. 19-4954 (Fla. DOAH Jan. 8, 2020; Fla. State Bd. of Admin. Apr. 6, 2020), addressed a strikingly similar issue, with regard to whether an attempted election is effective if not received by the Plan Choice Administrator. The Petitioner in *Wagner* had attempted to make an election through the FRS website, MyFRS.com, from her home computer. Ms. Wagner believed she had clicked all the required buttons to properly execute her election. The Recommended Order contained a finding that:

> The preponderance of the evidence establishes that Ms. Wagner intended to make her second election on March 4, 2019, and to move her retirement account from the Pension Plan to the Investment Plan. The preponderance of the evidence also establishes that Ms. Wagner failed to complete her second election and that Alight Solutions, the Plan

> Choice Administrator for the Investment Plan did not receive her election.

R.O., p. 14, ¶¶ 44 and 45.

The Recommended Order proceeded to conclude:

> The [Florida Administrative Code] reiterates the statute's admonition that the second election must be received by the Plan Choice Administrator to be effective. It also places a duty on the employee to assure that the Plan Choice Administrator has received the ... election. ... Even if the server malfunctioned, Ms. Wagner still had a responsibility to follow up once she failed to receive a confirmation statement from the Plan Choice Administrator.

R.O., p. 17, ¶ 52.

33. As in *Wagner*, although the evidence shows that Petitioner in this matter believed he had submitted an election form, he did not ensure receipt of that election; could provide no concrete proof at hearing of having made the election; and the law makes no provision for allowing a "redo" under these facts.

34. Florida law is clear that Respondent may not undo the Investment Plan default and retroactively enroll Petitioner in the Pension Plan. He does have the option, pursuant to section 121.4501(4)(f), to switch to the Pension Plan while still in an FRS-eligible position, although there may be a "buy-in" requirement as determined by actuarial calculations provided by the Department of Management Services.

35. Respondent does not have the authority to waive the legislative requirement that employees rehired after January 1, 2018, who did not participate in the original choice window beginning in 2002, shall default into the Investment Plan absent receipt by the Plan Choice Administrator of an affirmative election.

36. Petitioner carries the burden to demonstrate compliance with all applicable statutory requirements before being granted the relief requested. *Young v. Dep't of Cmty. Aff.*, 625 So. 2d 831 (Fla. 1993); *Dep't of Transp. v. J.W.C.*, 396 So. 2d 778 (Fla. 1st DCA 1981).

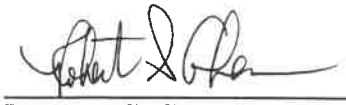
37. Respondent, as an administrative entity of the State of Florida, has only those powers conferred upon it by the Legislature. *See, e.g., Pesta v. Dep't of Corr.*, 63 So. 3d 788 (Fla. 1st DCA 2011). The Florida Administrative Procedure Act expressly provides that statutory language describing the powers and functions of such an entity are to be construed to extend "no further than ... the specific powers and duties conferred by the enabling statute." §§ 120.52(8) and 120.536(1), Fla. Stat. Here, Respondent has exercised only those powers conferred upon it by the Florida Legislature. While the result is unfortunate for Petitioner, who testified in good faith that he believed he had properly logged into the MyFRS.com website and made an affirmative election to continue to participate in the Pension Plan, he was unable to meet his burden of proving, through competent evidence, that such action had actually occurred. Therefore, his claim for relief from the automatic default enrollment into the Investment Plan must be dismissed.

38. Accordingly, based upon the foregoing Findings of Fact and Conclusions of Law, there is no statutory or rule basis for Respondent to rescind Petitioner's default enrollment in the Investment Plan and re-enroll him in the Pension Plan retroactive to November of 2019.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the State Board of Administration denying Petitioner's request for relief.

DONE AND ENTERED this 20th day of April, 2021, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of April, 2021.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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