STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

KARI CHIN, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	SBA Case No. 2016-3788

FINAL ORDER

On September 6, 2017, the Presiding Officer submitted her Recommended Order to the State Board of Administration ("SBA") in this proceeding. A copy of the Recommended Order indicates that copies were served upon counsel for the Petitioner and upon counsel for the Respondent. Counsel for Petitioner had filed a Notice of Appearance after the informal hearing was held but before the Recommended Order was issued. This matter was decided after an informal proceeding. Respondent and Petitioner timely filed Proposed Recommended Orders. Neither party filed exceptions to the Recommended Order which were due on September 21, 2017. 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.

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).

MATERIAL UNDISPUTED FACTS

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

CONCLUSIONS OF LAW

The Conclusions of Law set forth in paragraphs 10 through 22 of the Recommended Order are hereby rejected. This Final Order substitutes and adopts the following Conclusions of Law:

10. In order for an employee who is a member of the Investment Plan to transfer to the Pension Plan, certain requirements must be satisfied. These requirements, which include the amount of money that a member must transfer to the Pension Plan, are set forth in Section 121.4501(4)(f), Florida Statutes (2017), which provide, in pertinent part, as follows:

> (f) After the period during which an eligible employee had the choice to elect the pension plan or the investment plan, or the month following the receipt of the eligible employee's plan election, if sooner, the employee shall have one opportunity, at the employee's discretion, to choose to move from the pension plan to the investment plan or from the investment plan to the pension plan. Eligible employees may elect to move between plans only if they are earning service credit in an employer-employee relationship consistent with s. 121.021(17)(b), excluding leaves of absence without pay. * * *
>
> 1. If the employee chooses to move to the investment plan, the provisions of subsection (3) govern the transfer.
>
> 2. **If the employee chooses to move to the pension plan, the employee must transfer from his or her investment plan account, and from other employee moneys as necessary, a sum representing the present value of that employee's accumulated benefit obligation immediately following the time of such movement, determined assuming that attained service equals the sum of service in the pension plan and service in the investment plan.** Benefit

commencement occurs on the first date the employee is eligible for unreduced benefits, using the discount rate and other relevant actuarial assumptions that were used to value the pension plan liabilities in the most recent actuarial valuation. For any employee who, at the time of the second election, already maintains an accrued benefit amount in the pension plan, the then-present value of the accrued benefit is deemed part of the required transfer amount. **The division must ensure that the transfer sum is prepared using a formula and methodology certified by an enrolled actuary.** A refund of any employee contributions or additional member payments made which exceed the employee contributions that would have accrued had the member remained in the pension plan and not transferred to the investment plan is not permitted.

3. Notwithstanding subparagraph 2., an employee 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; a district school board employer after September 1, 2002; or a local employer after December 1, 2002, must transfer from his or her investment plan account, **and from other employee moneys as necessary, a sum representing the employee's actuarial accrued liability**. A refund of any employee contributions or additional member payments made which exceed the employee contributions that would have accrued had the member remained in the pension plan and not transferred to the investment plan is not permitted.

* * *

[emphasis added]

11. It is clear that the Division of Retirement is charged by Section 121.4501(4)(f), Florida Statutes, with the responsibility of ensuring that the proper amount of funds are transferred by a member switching from the Investment Plan to the Pension Plan. Further, Rules 19-11.007(3)(e) and 19-13.002, Florida Administrative Code, emphasize that the "present value of the employee's accumulated benefit obligation" that must be transferred by a member of the Investment Plan who elects to transfer to the pension plan is determined by, and must be remitted to, the Division of Retirement. If the employee fails to timely remit and

required personal payments to the Division of Retirement, the Division of Retirement may void the employee's election.

12. The SBA, as an administrative entity of the State of Florida, has only has those powers that are conferred upon it by the Legislature. *See, e.g., Pesta v. Department of Corrections*, 63 So.3d 788 (Fla. 1st DCA 2011); *Department of Revenue ex rel. Smith v. Selles*, 47 So.3d 916 (Fla. 1st DCA 2010); *Florida Elections Commission v. Davis*, 44 So.3d 1211 (Fla. 1st DCA 2010). In this connection, the Florida Administrative Procedure Act expressly states that statutory language describing the powers and functions of such an entity is to be construed to extend "no further than … the specific powers and duties conferred by the enabling statute." Sections 120.52(8) and 120.536(1), Florida Statutes. Thus, an administrative entity has no power to act in a manner that enlarges, modifies, or contravenes the authority that the legislature has granted to it. *State, Dept. of Business Regulation, Div. of Alcoholic beverages and Tobacco v. Salvation Ltd.*, Inc., 452 So.2d 65 (Fla. 1st DCA 1984). As such, the SBA has no authority to calculate the accumulated benefit obligation or to waive its payment. Rule 19-11.007(3)(e) states:

> (e) For members transferring to the Pension Plan, if the member's Investment Plan account balance was less than the calculated amount required to buy back into the Pension Plan, the election will require a personal payment. **The member will receive notification and proper instructions from the Division of Retirement (Division) detailing where and in what form to send any personal payments. Such payment, if necessary, must be received by the date determined by the Division. If the required amount is not received by the Division by the date due, the election will be voided.** [emphasis added]

Rule 19-13.002 provides, in pertinent part:

(1) The Division of Retirement (Division) within the Department of Management Services provides the following administrative services, in accordance with Section 121.4501(8)(a)1., F.S.:

* * *

(d) Calculate members' Pension Plan benefit, calculate the accumulated benefit obligation and calculate any buy-back amount for those members who elected the Investment Plan but subsequently elect to return to the Pension Plan;

[emphasis added]

13. On June 26, 2013, the U.S. Supreme Court ruled that Section 3 of the so-called "Defense of Marriage Act" (DOMA), (which had defined "marriage," for all purposes under Federal law, to mean only a legal union between one man and one women and that had stated that the term "spouse" can only refer to a person of the opposite sex who is a husband or a wife) is unconstitutional. The case further held that the federal government cannot discriminate against married lesbian and gay couples for the purposes of determining federal benefits and protections. *United States v. Windsor*, 570 U.S. _____, 133 S. Ct. 2675 (2013). Windsor involved a same-sex couple who were married in a lawful ceremony then "continued to reside" in a state that "deems their …marriage to be a valid one." *Windsor*, 133 S.Ct. at 2682-83. Windsor did not disturb Section 2 of DOMA, that was not challenged in the case and that allows states to refuse to recognize the validity of same-sex marriages that were legally performed in other states.

14. In response to *Windsor*, the Internal Revenue Service ("IRS") issued Revenue Ruling 2013-17, 2013-38 I.R.B. 201 (September 16, 2013), which states that for purposes of Federal tax law, "spouse," "marriage," "husband," and "wife" will include spouses of the same sex, if the couple is legally married under either state or federal law. Revenue

Ruling 2013-17 also states that the "place of celebration" and not the law of the place of residence controls the definition of spouse. And finally, Revenue Ruling 2013-17 specifically states that "marriage" does not include domestic partnerships or civil unions under state law.

15. In 2014, the IRS issued Notice 2014-19 (hereafter "Notice"), that states that it is designed to provide guidance on the application of the decision in *United States v. Windsor*, *supra*, and the holdings of Revenue Ruling 2013-17 with respect to "qualified retirement plans." The Investment Plan and the Pension Plan are qualified retirement plans under Internal Revenue Code Section 401(a). *See*, Sections 121.30, 121.4501(1) and 121.4501(13)(a), Florida Statutes; *Willie James v. State Board of Administration*, 2016 WL 7428106 (Fla.Div.Admin.Hrgs.) (Recommended Order December 21, 2016; Final Order March 13, 2017). The Notice states that the holdings of Revenue Ruling 2013-17 "...will be applied **prospectively as of September 16, 2013.** Further, the Notice indicates that qualified retirement plans must be operated in a manner that reflects the outcome of *Windsor* **as of June 26, 2013.** *See*, Notice, page 3; Questions and Answers, number 2 [emphasis added].

16. Question and Answer number 6 of the Notice states that if a qualified retirement plan's terms are not inconsistent with the outcome of *Windsor*, the guidance set forth in Rev. Rul. 2013-17 and the Notice, **then no amendment of the plan is required.** In the case of the Investment Plan, no amendment of the Investment Plan's terms are required because the terms of the Investment Plan do not prevent a same-sex spouse from receiving the same benefits as an opposite-sex spouse. And, in fact, when Petitioner

joined the Investment Plan in 2011, she did name her same-sex partner as the beneficiary of her Investment Plan account and such designation was honored.

17. According to Petitioner, she chose the Investment Plan in 2011 because "...several payment options of the pension plan would not recognize [her] wife." Hearing Transcript, page 14, lines 18-19. The Pension Plan is administered by the Division of Retirement of the Department of Management Services, which has been given the authority by statute for administering the Pension Plan and adopting rules for its administration. *See,* Sections 121.015, 121.031, Florida Statutes. The SBA has no statutory authority to take any action with respect to the Pension Plan, to administer any of its benefits, or to require the Division of Retirement to amend the plan document for the Pension Plan. As noted previously above, the SBA cannot act in a manner that enlarges, modifies, or contravenes the authority that the legislature has granted to it. Petitioner was adversely impacted by the manner in which the Pension Plan was administered by the Division of Retirement of the Department of Management Services in accordance with the statutory provisions applicable to it, and not the manner in which the SBA administered its statutory obligations related to the administration of the Investment Plan.

18. On September 27, 2013, about two months after the decision of *Windsor* was published, Petitioner was legally married in Massachusetts. So it appears Petitioner was aware of the benefits that *Windsor* could provide. However, the date of her marriage was about two and one-half years *after* she selected the Investment Plan. Petitioner did not seek to be allowed to transfer to the Pension Plan without being required to remit the buy-in amount until three years *after* she was legally married. Neither *Windsor* nor any of the

guidance issued by the IRS concerning *Windsor* provides a retroactive remedy that would allow Petitioner to rescind her election of the Investment Plan and/or to seek waiver of the statutorily-required buy-in amount that she would need to remit upon switching to the Pension Plan.

19. The SBA is not authorized to depart from the requirements of Chapter 121, Florida Statutes, the statutes that it must implement when exercising its jurisdiction. *Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.).* Additionally, the SBA's construction and application of the statutes it is charged with implementing are entitled to great weight and must be followed unless proven to be clearly erroneous or amounting 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). Further, the SBA has no authority to consider constitutional issues. *See, Dept. of Business Regulation, Division of Alcoholic Beverages & Tobacco v. Ruff*, 592 So.2d 668 (Fla. 1992).

20. Petitioner has the burden of proving by a preponderance of evidence that she is entitled to the relief requested in her petition. *See, e.g., Fla. Dep't of Transportation v. J.W.C. Co., Inc.*, 396 So.2d 778, 788 (Fla. 1st DCA 1981). Petitioner has failed to establish she is entitled to rescind her election into the Investment Plan and to transfer to the Pension Plan without paying the by-in amount through a retroactive application of case law and IRS guidance because she was not legally married at the time she made her Investment Plan election and that election occurred over two years prior to the *Windsor* decision.

ORDERED

The Recommended Order (Exhibit A), subject to the modifications set forth above under the Conclusions of Law, is hereby adopted. The Petitioner's request to be allowed to transfer from the Florida Retirement System (FRS) Investment Plan to the FRS Pension Plan without being required to pay the statutorily-required buy-in amount through retroactive recognition of her same-sex marriage 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 5th day of December, 2017, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Joan B. Haseman

Joan B. 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
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Melissa A. Giasi, Esq., Counsel for Petitioner, both by email transmission to: mgiasi@kasslaw.com and by U.P.S. to Kass Shuler, P.A., 1505 North Florida Avenue, Tampa, Florida 33601; 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 5th day of December, 2017.

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

KARI CHIN,

Petitioner,

vs. Case No.: 2016-3788

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 March 30, 2017, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Kari Chin, pro se
[redacted]

On May 22, 2017, Melissa A. Giasi, Esquire, filed a Notice of Appearance on behalf of Petitioner.

For Respondent: Brandice Dickson, Esq.
Pennington, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue is whether Petitioner may use her second election to switch from the Florida Retirement System (FRS) Investment Plan to the FRS Pension Plan without having to pay the required "buy-in" amount. Petitioner asserts that retroactive recognition of her same-sex marriage

EXHIBIT A

is required under recent federal court decisions, and that Respondent should therefore remedy a prior deprivation of her constitutional rights by regarding her initial election as having been to the Pension Plan and waiving any buy-in requirement.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on her own behalf, and presented no other witnesses. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits 1 through 4 were admitted into evidence without objection. Petitioner's Composite Exhibit 1 was admitted by agreement of the parties after the hearing.

A transcript of the hearing was made, filed with the agency, and provided to the parties. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. Respondent filed a proposed recommended order on May 17, 2017. Petitioner's attorney appeared after hearing in this case had been held, and accordingly has been granted several extensions of time to file a Proposed Recommended Order.

Petitioner's Motion to Convert to Formal Proceeding was denied by Order of July 6, 2017. That order rejected the assertion that there is a material dispute of fact as to the date of Petitioner's marriage, because the record shows clearly that the date of Petitioner's marriage is known, and is September 7, 2013, by virtue of a valid Massachusetts license.

Petitioner's Proposed Recommended Order was filed on August 14, 2017.

MATERIAL UNDISPUTED FACTS

1. Petitioner has testified, without contradiction, that she and her spouse were married in a ritual ceremony on August 3, 2001.

2. Petitioner was enrolled in the FRS in August 30, 2010 and had until February 28, 2011 to elect between the FRS Pension Plan and the FRS Investment Plan. The traditional defined benefit Pension Plan does not permit designation of a beneficiary who is not a spouse; the defined contribution Investment Plan does.

3. Petitioner made an initial plan election on February 25, 2011, when she executed an EZ Retirement Plan Enrollment Form selecting the Investment Plan.

4. On September 27, 2013, Petitioner was married in Massachusetts and obtained a valid marriage license from that state.

5. Petitioner still has a one-time second election available to her, which can be used to transfer to the Investment Plan, but as reflected on the initial election form she filed, there is a cost associated with that switch:

> I understand that I may have a one-time future opportunity to switch to the FRS Pension Plan at any time during my FRS career, and that there will be a cost for doing so.
>
> ***
>
> **3. Your Election will become final at 4:00 p.m. (Eastern time) on the day it is received.**

(emphasis in original.)

6. On September 28, 2016, Petitioner executed a Request for Intervention asking that Respondent allow her to use her second election to join the Pension Plan without paying the Pension Plan buy-in amount. Petitioner asserts that the only reason she elected the Investment Plan was that during the initial enrollment period, same-sex marriage was not recognized by Florida law, and the Investment Plan was the only plan as between the two FRS plans that provided a benefit to her same-sex spouse.

7. When an FRS participant moves from the Investment Plan to the Pension Plan, she must pay the present value of her actuarially determined accumulated benefit obligation, by using

the funds in her Investment Plan account plus whatever additional amount is required. This amount, especially in the case of a participant who has been in the FRS system for a number of years, may substantially exceed the balance in her Investment Plan account, and therefore demand considerable out-of-pocket expense. Respondent informed Petitioner that it had no statutory authority to waive the buy-in provision and therefore could not grant her request.

8. Petitioner filed a Petition for Hearing reiterating her previous request for relief, and this proceeding ensued.

9. At hearing, Petitioner asserted that the requested administrative remedy could be granted in light of the holdings in United States v. Windsor, ___ U.S. ___, 133 S.Ct. 2675 (2013), Obergefell v. Hodges, ___ U.S. ___, 135 S.Ct. 2584 (2015), and/or Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (Sept. 16, 2013). Specifically, Petitioner asserted that these authorities apply retroactively so as to both permit and require the relief requested.

CONCLUSIONS OF LAW

10. Movement between the two FRS plans is governed by Section 121.4501(4)(g), Florida Statutes. That section states, in pertinent part:

> (g) After the period during which an eligible employee had the choice to elect the pension plan or the investment plan, or the month following the receipt of the eligible employee's plan election, if sooner, the employee shall have one opportunity, at the employee's discretion, to choose to move from the pension plan to the investment plan or from the investment plan to the pension plan. Eligible employees may elect to move between plans only if they are earning service credit in an employer-employee relationship consistent with s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections are effective on the first day of the month following the receipt of the election by the third-party administrator and are not subject to the requirements regarding an employer-employee relationship or receipt of contributions for the eligible employee in the effective month, except when the election is received by the third-party administrator. This paragraph is contingent upon approval by the Internal Revenue Service.

1. If the employee chooses to move to the investment plan, the provisions of subsection (3) govern the transfer.

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

...

§121.4501(4)(g), Fla.Stat.

11. In United States v. Windsor, ____ U.S. ___ (2013), the United States Supreme Court found a provision in the Defense of Marriage Act ("DOMA") unconstitutional as it had the effect of denying recognition of same-sex spouses for purposes of federal tax law. DOMA had defined "marriage" to mean only a legal union between one man and one woman and the term "spouse" to mean only a person of the opposite sex who is a husband or a wife. Id. Windsor, therefore, broadened the definition of "spouse" to include same-sex individuals who were a husband or a wife.

12. Obergefell v. Hodges, ___ U.S. ___ (2015) announced that the right to marry is a fundamental right and that states must recognize same-sex marriages lawfully performed in other states.

13. The Florida Retirement System, which includes both the Pension Plan and the Investment Plan, is a retirement plan qualified under section 401(a) of the Internal Revenue Service. §§121.30, 121.4501(1) and 121.4501(13)(a), Fla.Stat.; James v. State Board of Administration, 2016 WL 7428106 (Fla.Div.Admin.Hrgs.)(Recommended Order Dec. 21, 2016).

14. IRS Notice 2014-19 indicates that Windsor, Obergefell, and Internal Revenue Rulings 2013-17, 2013-38 I.R.B. 201 apply to qualified retirement plans, like the FRS, in addition to having federal tax filing effects.

15. Respondent has conceded that the cited authorities intended to and do in fact have some retroactive effect. Internal Revenue Notice 2014-19, in response to question 1, states at A-1, "...any retirement plan qualification rule that applies because a participant is married must be applied with respect to a participant who is married to an individual of the same sex," but that same notice also states that amendments to retirement plans for periods prior to June 26, 2013, the date of the Windsor decision, are optional.

16. Respondent SBA must maintain its qualified status as a retirement plan under Internal Revenue Service regulations, but this is not necessarily the extent of its obligations under what is now settled law. Although I reach no conclusion of law with regard to the fine points of the Internal Revenue Service regulations, my brief review of same indicates that there is no barrier to Respondent SBA amending its plan to provide new rights to participants with same-sex spouses – including amendments that provide a new opportunity to elect benefits not previously available. See FAQ-4, Application of the Windsor Decision and Post-Windsor Published Guidance to Qualified Retirement Plans FAQs, https://irs.gov/retirement-plans. On the other hand, Respondent has no authority or expertise whatsoever to make decisions regarding the validity of ritual marriages under Florida statutory or common law. Respondent has not adopted any rules

addressing the issue in this matter, which therefore must be determined on a case-by-case basis.

17. Respondent asserts that because Petitioner was legally married on September 27, 2013, well after she selected the Investment Plan option on February 25, 2011, she is entitled to no relief here. But it is clear that when she made her plan selection, she did so subject to a plan provision which created consequences for her only because her spouse was the same sex: i.e. she had to be married in accord with a state law definition of that term now known to be unconstitutional. The negative financial consequences to Petitioner and her wife occurred even though the applicable regulations refer neutrally to the term "spouse." "As a matter of federal constitutional law, a state cannot properly refuse to correct a federal constitutional violation going forward, even if the violation arose before the dispute over the constitutional issue was settled." See, e.g., Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993); see also Glazner v. Glazner, 347 F.3d 1212, 1218 (11th Cir. 2003) (*en banc*); cited in Birchfield v. Armstrong, Order Granting Summary Judgment, Case No. 4:15-cv-00615, U.S. Dist. Ct. N.D. Fl. Mar. 23, 2017.

18. Petitioner entered into a marriage legally cognizable in Florida on September 27, 2013. When this occurred, the traditional definition of spouse which had previously made the Pension Plan a disadvantageous choice for her, changed, and expanded to provide an option and a benefit which had not previously been available to her.

19. That benefit and the potentially substantial monetary advantage it carries for her family has now been offered to her, but at a price which still penalizes her marriage status, even after the date of its legal inception.

20. The SBA has every right to require appropriate documentation of a marriage recognizable under Florida law (including marriages lawfully entered into in other jurisdictions, as required by the U.S. Constitution) before determining who is a spouse under regulations neutral

on their face.

21. The SBA is not authorized to depart from the requirements of Chapter 121, Florida Statutes, the statutes it is charged to implement, when exercising its jurisdiction. Balezentis v. Dep't of Mgmt. Services, Div. of Ret., 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and its construction and application of those statutes are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting 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 DCA1998). Respondent has no expertise in or jurisdiction over matters of statutory or common law outside the reach of the statutes it administers, but it must implement the Investment Plan in accordance with all applicable law.

22. Petitioner has the burden of proving by a preponderance of the evidence that she is entitled to the relief requested in her Petition. See, e.g., Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So.2d 778, 788 (Fla. 1st DCA 1981). There is no dispute here as to the date of Petitioner's marriage, and federal law now requires that retirement benefits be provided even-handedly to same-sex spouses. I therefore conclude that Petitioner is entitled to relief as a matter of law, and recommend that Respondent SBA craft a remedy to make Petitioner whole as of the date of her legal marriage. It appears that the best way to accomplish this would be to allow her to make a second election dated to the day of her legal marriage, and to calculate the buy-in payment required as if she had switched to the Pension Plan on that date in 2013, but I defer to Respondent's expertise to craft an appropriate and effective remedy.

PROPOSED RECOMMENDATION

Having considered the law and the undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order granting in part the relief requested, as outlined above.

RESPECTFULLY SUBMITTED this 6th day of September, 2017.

Anne Longman, Esquire
Anne Longman
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
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