

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

CAROL WARTENBERG,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2015-3522
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
)	
)	
)	

FINAL ORDER OF DISMISSAL WITH PREJUDICE

On August 11, 2016, an administrative law judge (“ALJ”) from the Division of Administrative Hearings (“DOAH”) submitted his Order Determining that Relief Requested by Petitioner is Unavailable in an Administrative Proceeding and Closing File (hereafter “Order”) to the Respondent, State Board of Administration (“SBA”), a copy of which is attached as Exhibit A. Subsequent to the Order, Respondent filed a Motion for a Final Order of Dismissal (Exhibit B). Petitioner then filed an Opposition to Respondent’s Motion for Final Order of Dismissal with Prejudice (Exhibit C). Respondent then filed a Reply to Petitioner’s Opposition to Respondent’s Motion for Final Order of Dismissal with Prejudice (Exhibit D). The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

BACKGROUND

On December 7, 2015, the Petitioner, a member of the Florida Retirement System (“FRS”) Investment Plan, had submitted a request for intervention with the SBA asking

that she be allowed to return to the FRS Pension Plan despite the fact she had already used her allowed second election as provided under Section 121.4501(4)(g), Florida Statutes to join the Investment Plan in 2008. She also requested that her second election be treated as if it had never occurred, such that any required buy in amount would be waived. Petitioner stated that the only reason she switched to the Investment Plan in 2008 was to protect her spouse since same sex marriages in Florida were not recognized at the time and under the Pension Plan she would not be able to designate her same sex spouse as a beneficiary of her Pension Plan benefit if she were to die. She would, however, be entitled to name anyone as a beneficiary under the Investment Plan. In 2011, Petitioner and her domestic partner were legally married in Iowa and in 2015, Florida recognized the marriage.

The SBA denied her request, and Petitioner filed a request for an informal administrative hearing. At that informal hearing, Petitioner raised certain issues that were determined to be disputed issues of material fact. She also raised the issue as to whether or not the denial of her request by the SBA to return to the Pension Plan violated her constitutional rights. Since there were disputed material facts and since it appeared the Petitioner was raising an “as applied” constitutional challenge, the Petitioner’s case was transferred to DOAH to proceed with her Administrative challenge while preserving her constitutional challenge for a district court of appeal once a Final Order was issued.

The day before the scheduled hearing, Petitioner’s counsel filed a motion (Exhibit E) requesting that an order be issued determining that DOAH lacked the authority both to decide the constitutional issues raised by Petitioner, and to require the SBA to pay the required buy in amount.

The SBA is requesting that Petitioner's case be dismissed with prejudice. Petitioner is arguing the case should be dismissed without prejudice. Petitioner offers no legal authority for Petitioner's position. Petitioner merely states that it is "trite law" that an order of dismissal for lack of jurisdiction can never be entered with prejudice since such an order does not constitute a ruling on the merits. *See*, Exhibit C, paragraph 4.

DISCUSSION

When Petitioner had requested DOAH to issue the Order, Petitioner noted that the Order would allow Petitioner to exhaust her administrative remedies and bring an appropriate action in state or federal court pursuant to 42 USC §1983 (the federal law, popularly known as "Section 1983," that allows lawsuits for violations of constitutional rights) and related federal statutes. *See*, Exhibit E, page 4.

Generally, when choosing between circuit court and administrative forums, there is a duty to first exhaust administrative remedies before turning to a court of general jurisdiction. *Department of General Services v. Willis*, 344 So.2d 580 (Fla. 1st DCA 1977). The rationale for this requirement is that there is an "impressive arsenal" of administrative remedies that may prevent a court action. *Id.* at 590. However, the exhaustion principle has certain exceptions, one of which occurs when a claim challenges the facial constitutionality of a statute. Originally recognized in *Willis*, this exception later was refined. In *Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So.2d 153 (Fla. 1982), it was held that a challenge to a statute's constitutionality could be brought either in an administrative forum or in circuit court. While only a judicial court could actually rule on a statute's constitutionality, the *Key Haven* court noted that a litigant could administratively

adjudicate all other facets of his or her argument and later raise the statute's constitutionality on appeal. However, the court noted that once a single forum was chosen, the other forum was foreclosed. *Id.* at 157.

Further, Petitioner has asserted from the time of filing her petition that there were certain other grounds besides constitutional violations that could allow her to return to the Pension Plan. Such other grounds, such as a misapplication of a particular statute or rule, could have been litigated in an administrative proceeding. However, Petitioner chose not to do so. As such, Petitioner should be foreclosed from raising in the future any claim that currently is ripe and with the SBA's power to determine. *See, Florida Department of Transportation v. Juliano*, 801 So.2d 101, 105 (Fla. 2001) in which the court held that the doctrine of res judicata bars not only issues that were actually raised, but also those that could have been raised but that were not raised in the first case; and *Alderwoods Group, Inc. v. Garcia*, 119 So.3d 497 (Fla. 3d DCA 2013), in which the court recognized that the doctrine of res judicata is applicable to prior administrative proceedings.

Although a dismissal of a complaint for lack of jurisdiction does not operate as an adjudication on the merits, "... it is proper to designate such a dismissal as being 'with prejudice' in order to preclude it from being refiled in that court where there is a lack of jurisdiction." However, such dismissal does not operate to bar the filing of a suit thereon in a separate cause in a court having jurisdiction. *Miami Super Cold Co. v. Giffin Industries, Inc.*, 178 So.2d 604, 605 (Fla. 3d DCA 1965).

As such, indicating the dismissal is with prejudice will not prevent Petitioner from bringing a claim in another forum that the SBA lacked jurisdiction to resolve. *See, Felder*

v. State, Dept. of Management Services, Div. of Retirement, 993 So.2d 1031 (Fla. 1st DCA 2008).

ORDERED

The Order Determining that Relief Requested by Petitioner is Unavailable in an Administrative Proceeding and Closing File is adopted in its entirety and is incorporated herein by reference. Petitioner's matter hereby is dismissed with prejudice.

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.

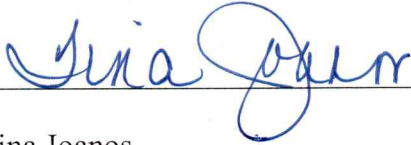
DONE AND ORDERED this 7th day of December 2016, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Joan B. Haseman
Chief of Defined Contribution Programs
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

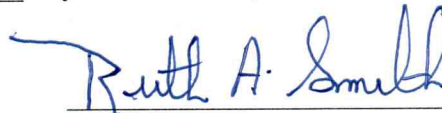
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent via electronic mail to Anthony V. Falzon, LL.M (Cantab.), Esq., Counsel fro Petitioner, afalzon@miami-law.net and by UPS to Simon, Schindler & Sandberg, LLC, 2650 Biscayne Boulevard, Miami, Florida 33137, and by electronic mail to Brian Newman and Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, brian@pennington.com and brandi@pennington.com, this 7th day of December, 2016.



Ruth A. Smith
Assistant General Counsel
State Board of Administration of Florida
1801 Hermitage Boulevard
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EXHIBIT A

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CAROL WARTENBERG,
Petitioner,

vs.

Case No. 16-3123

STATE BOARD OF ADMINISTRATION,

Respondent.

ORDER DETERMINING THAT RELIEF REQUESTED BY PETITIONER IS
UNAVAILABLE IN AN ADMINISTRATIVE PROCEEDING AND CLOSING FILE

By request filed on August 11, 2016, Petitioner requested an order stating that the relief that she is seeking in this administrative proceeding is unavailable. The final hearing in the case is set for tomorrow. The Administrative Law Judge's administrative assistant called counsel for Respondent to learn if he opposed the request. Unfortunately, due to the manner of service, Respondent's counsel was unaware of the request. The parties thus asked for a 30-day continuance, so Respondent could respond to the request. However, Respondent opposes the relief sought in its Pre-hearing Statement filed on August 5, 2016, and there is no need to subject the parties to additional time or expense at the administrative level where no effective relief is available.

For the purpose of this order, the facts set forth in Petitioner's Pre-hearing Statement filed on August 8, 2016, are deemed correct, as is the law set forth in Respondent's Pre-hearing Statement. Essentially, Petitioner elected to participate in the FRS defined benefit plan, which is known as the FRS Pension Plan, when she commenced FRS-covered employment in 2003. At the time, since 1999, Petitioner and a same-sex partner were registered domestic partners under a Broward County ordinance that provided that domestic partners of Broward County employees were entitled to all employment benefits that were extended to spouses and dependents. However, Petitioner was an employee of the Broward County School Board, not Broward County, so the ordinance was not applicable. Petitioner learned in 2007 that her domestic partner would not qualify as a joint annuitant

under the FRS Pension Plan, so, in 2008, Petitioner made her second election, as provided by Florida statutes, to change from the FRS Pension Plan to the FRS Investment Plan, which is a defined contribution plan that allowed her to name her domestic partner as a beneficiary. Respondent processed the second election, and the grace period within which Petitioner could revoke her second election has long since expired. Neither Florida statutes nor Respondent's rules permit a third election.

In 2011, Petitioner and her domestic partner were legally married in Iowa, and, in 2015, Florida recognized this marriage. Following Florida's recognition of her same-sex marriage, Petitioner requested Respondent for the relief set forth in the following paragraph.

In her Pre-hearing Statement, Petitioner sets out the relief that she seeks in this case: 1) "annulling" or rescinding her 2008 second election; 2) restoring her to the FRS Pension Plan as though the 2008 second election had never taken place; and 3) relieving Petitioner of any liability for the pay-back amount of about \$30,000 representing the amount by which the value of her FRS Investment Plan is exceeded by the amount of her FRS Pension Plan, if her second election were annulled or rescinded. In her Pre-hearing Statement and request filed today, Petitioner asks for a retroactive application of two recent federal decisions, including one addressing Florida law, requiring the recognition of same-sex marriages and a declaration that her 2011 marriage relates back to 1999 when the parties registered under the Broward County ordinance.

The Pre-hearing Statement describes Petitioner's case as an as-applied challenge to the constitutionality of, it appears, Florida statutes and Respondent's rules limiting FRS plan participants to two elections and statutes and rules that presently, or at one time, limited the class of persons who could be named as joint annuitants under the FRS Pension Plan to spouses (any other eligible persons being irrelevant to this case).

The presence of constitutional claims in administrative proceedings is addressed in Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So. 153 (Fla. 1982). In general, this case states that, as a matter of "judicial policy," state courts, which have the sole power to consider constitutional issues, should exercise restraint in intervening in pending administrative proceedings to support the integrity of the administrative

process and allow the executive branch to carry out its constitutional duties. Id. at 156-57. The court considered three scenarios: a facial challenge to a statute; a facial challenge to a rule implementing a constitutional statute; and an as-applied challenge to an agency's implementation of a constitutional statute or rule. Id. at 157. The court noted that no judicial restraint need be shown in the case of a facial challenge to a statute due to the waste of resources in administrative litigation that can have no bearing on the ultimate judicial determination. Id. The court noted that courts should allow a facial challenge to a rule to conclude administratively because the administrative process, once exhausted, may dispense with the necessity of the constitutional challenge. Id. at 157-58.

The court noted that courts should allow an as-applied challenge to a rule to conclude administratively to give the agency a chance to reach a measured determination based on a full evidentiary record. Id. at 158.

However, Key Haven is distinguishable. The agency in Key Haven was presented with a routine request for a dredge-and-fill permit, which it had denied preliminarily, applying various statutes and rules detailing the procedure for processing permit applications and the substantive law to be applied in doing so. The developer was not asking the agency to set aside or rewrite these statutes and rules, but instead wanted an expeditious judicial declaration that the denial of the permit constituted inverse condemnation, so, immediately after the DOAH recommended order was issued, the developer sought judicial relief.

By contrast, in the present case, Petitioner asks Respondent to set aside and rewrite clear statutes and rules that prohibit third elections and, at least historically, limited the class of persons who could be named as joint annuitants for an FRS Pension Plan--all in reliance on recent court decisions. (Under the circumstances, it is unnecessary to consider the extent to which, on these facts, the sought-after relief of annulment, rescission, and damages are available administratively or only judicially.) Nothing in Key Haven suggests that an agency or Administrative Law Judge has such power.

Based on the foregoing, it is

ORDERED that the request of Petitioner is granted, the hearing set for tomorrow is cancelled, and the DOAH file is

closed. Late in the morning of August 11, 2016, the administrative assistant called both attorneys and advised them of this ruling.

DONE AND ORDERED this 11th day of August, 2016, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of August, 2016.

COPIES FURNISHED:

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EXHIBIT B

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

CAROL WARTENBERG,

Petitioner,

vs.

CASE NO. 2015-3522

STATE BOARD OF ADMINISTRATION,

Respondent.

RESPONDENT'S MOTION FOR FINAL ORDER OF DISMISSAL

Respondent, State Board of Administration ("SBA"), files this Motion for Final Order of Dismissal, and says:

1. On December 7, 2015, the Petitioner submitted a request for intervention with the SBA asking that she be allowed to return to the Pension Plan even though she used her second election to join the Investment Plan in 2003. Petitioner alleged that she moved to the Pension Plan in 2003 because Florida law did not recognize the legitimacy of a same sex marriage at that time and that she moved to the Investment Plan because the Pension Plan would not allow her to name her same sex spouse as a beneficiary.

2. Petitioner's request was denied by the SBA on December 11, 2015 because there is no third election under Florida law. Petitioner timely filed a request for hearing under Chapter 120 and a hearing involving no disputed issues of material fact was scheduled pursuant to section 120.57(2), Florida Statutes (commonly referred to as an "informal hearing").

3. At Petitioner's informal hearing, Petitioner raised what the hearing officer considered to be disputed issues of fact. These disputed issues of fact (including whether the Petitioner should be deemed married to a same sex spouse before she transferred to the Investment Plan in 2003) could not be resolved in an informal hearing. Petitioner also argued that the SBA's

denial of her request to return to the Pension Plan violated her constitutional rights, thus implicating the decision of Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So. 2d 153 (Fla. 1982). Under Key Haven, Petitioner could proceed with her administrative challenge and raise her “as-applied” constitutional challenge before the District Court of Appeal after a final order was issued. Id. at 158. Thus, because this case involved disputed issues of fact and because Petitioner expressed the desire to ultimately raise an “as-applied” constitutional challenge to the SBA’s decision on appeal, the case was transferred to the Division of Administrative Hearings (“DOAH”) for the assignment of an Administrative Law Judge (“ALJ”) to conduct a hearing involving disputed issues of material fact pursuant to section 120.57(1), Florida Statutes.

4. On August 8, 2016, the day before Petitioner’s DOAH hearing was to be held, Petitioner filed a motion asking the ALJ to enter an order declaring that it lacked the jurisdiction to decide the constitutional issues Petitioner raised as well as the authority to require the SBA to pay the difference between the value of Petitioner’s Investment Plan account and the Pension Plan buy-back that had been calculated. (See, Petitioner Carol Wartenberg’s Request for the Court to Determine Whether it has the Jurisdiction to Grant the Relief Being Requested by the Petitioner, attached hereto as Exhibit A). The Administrative Law Judge promptly granted Petitioner’s motion. (See, Order Determining that Relief Requested by Petitioner is Unavailable in an Administrative Proceeding and Closing File, attached hereto as Exhibit B.)

5. Respondent finds the DOAH order granting Petitioner’s motion to be well-founded and that it should be adopted by a Final Order that dismisses Petitioner’s case with prejudice.

WHEREFORE, Respondent, State Board of Administration, respectfully requests that the Order Determining that Relief Requested by Petitioner is Unavailable in an Administrative

Proceeding and Closing File should be adopted by a Final Order of Dismissal.

Respectfully submitted,

Brian A. Newman

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been filed via ELECTRONIC MAIL this 12th day of
August, 2016 on:

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Brian A. Newman

Attorney

EXHIBIT C

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

CAROL WARTENBERG,

Petitioner,

vs.

Case No. 2016-3123

STATE BOARD OF ADMINISTRATION,

Respondent.

**PETITIONER CAROL WARTENBERG'S OPPOSITION TO RESPONDENT'S
MOTION FOR FINAL ORDER OF DISMISSAL *WITH PREJUDICE***

Petitioner, Carol Wartenberg ("Wartenberg") by and through undersigned counsel, hereby files this opposition to Respondent State Board of Administration's Motion for entry of a final order of dismissal *with prejudice* served August 12, 2016 and in support thereof states as follows:

1. On August 11, 2016 the administrative tribunal entered an order determining that the relief requested by Petitioner is unavailable in an administrative proceeding and closing file. *See Exhibit B to Respondent's Motion.*

2. The order also provided for the cancellation of the hearing scheduled for August 12, 2016.

3. The administrative tribunal's order did not rule on the merits of Petitioner's claims but simply determined that the administrative tribunal did not have the jurisdiction to grant the relief being requested.

4. It is trite law that an order of dismissal for lack of jurisdiction, or for improper venue

or even for lack of an indispensable party can never be entered with prejudice because the orders in question do not constitute a ruling on the merits of a parties claims but simply constitute a determination that a court is without jurisdiction to adjudicate the claims.

WHEREFORE, Petitioner Wartenberg requests that the court enter an order denying the relief being sought by the Respondent and allow the order entered on August 11, 2016 to stand unamended or for such other and further relief as this administrative tribunal deems necessary and appropriate.

Respectfully Submitted this 15th day of August, 2016.

Anthony V. Falzon
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via FedEx on this 15th day of August, 2016 to:

The Honorable Robert E. Meale Administrative Law Judge Division of Administrative Hearings The DeSoto Building 1230 Apalachee Parkway Tallahassee, FL 32399-3060	850-488-9675
Pam Bondi Office of the Attorney General State of Florida The Capitol PL-01 Tallahassee, FL 32399-1050	866-966-7226 pam.bondi@myfloridalegal.com
Agency Clerk Office of the General Counsel	850-413-9917 Tima.joanos@sbafla.com

Florida State Board of Administration 1801 Hermitage Blvd., Suite 100 Tallahassee, Florida 32308	<u>mimi.watson@sbafla.com</u>
Brandice D. Dickson 215 S. Monroe Street, Suite 200 Tallahassee, FL 32301 P.O. Box 10095 (32302-2095) Tallahassee, FL 32301	Office 850-222-3533 Fax 850-222-2126 <u>brandi@penningtonlaw.com</u> <u>slindsey@penningtonlaw.com</u>

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EXHIBIT D

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

CAROL WARTENBERG,

Petitioner,

vs.

CASE NO. 2015-3522

STATE BOARD OF ADMINISTRATION,

Respondent.

**RESPONDENT'S REPLY TO PETITIONER'S OPPOSITION TO
RESPONDENT'S MOTION FOR FINAL ORDER OF DISMISSAL**

Respondent, State Board of Administration ("SBA"), files this Reply to Petitioner's Opposition to Respondent's Motion for Final Order of Dismissal, and says:

1. Petitioner opposes Respondent's Motion for Final Order of Dismissal to the extent it asks for entry of a final order of dismissal *with prejudice*.

2. The Order Determining that Relief Requested by Petitioner is Unavailable in an Administrative Proceeding and Closing File recommends dismissal of the case in response to Petitioner's clarification of the remedy being sought (which was filed the day before the final hearing). The ALJ properly noted that the Petitioner's clarified request for relief required the SBA "to rewrite clear statutes and rules that prohibit third elections and, at least historically, limited the class of persons who could be named as joint annuitants for an FRS Plan – all in reliance on recent court decisions." The ALJ cancelled the final hearing recognizing that neither the SBA nor an ALJ have the power to rewrite the law to give Petitioner that which she now seeks in this administrative proceeding. The ALJ is correct and his recommendation to dismiss the case should be adopted in toto¹.

¹ Petitioner has not raised any objection to the adoption of the Order Determining that Relief Requested by Petitioner is Unavailable in an Administrative Proceeding and Closing File.

3. Heretofore, however, the Petitioner suggested that she may have other grounds to justify her return to the Pension Plan. The SBA has the authority to determine any claim that Petitioner could bring that is founded upon the SBA's alleged misapplication of a Florida statute or rule. The SBA can also determine by final order whether its action should be overturned based upon the application of an unadopted rule and, as of July 1, 2016, can set aside agency action taken pursuant to an invalid rule.² Although it now appears that the Petitioner has abandoned any such claim, she should nevertheless be foreclosed from hereafter raising any claim that is ripe now and within the SBA's power to determine. See, Florida Dep't of Transp. v. Juliano, 801 So. 2d 101, 105 (Fla. 2001)(holding that the doctrine of res judicata not only bars issues that were raised, but it also precludes consideration of issues that *could have been raised* but were not raised in the first case); See also, Alderwoods Group, Inc. v. Garcia, 119 So. 3d 497 (Fla. 3d DCA 2013)(recognizing that the doctrine of res judicata extends to prior administrative proceedings). And to that extent, the Final Order of Dismissal that is entered should be *with prejudice*.

4. In general terms, a dismissal with prejudice connotes a dismissal on the merits, not a dismissal based upon lack of jurisdiction. See, Schindler v. Bank of New York Mellon Trust Co., 190 So. 3d 102 (Fla. 4th DCA 2015). Moreover, res judicata generally will not apply to bar claims the administrative agency lacked the jurisdiction to resolve. Felder v. State, Dept. of Management Services, Division of Retirement, 993 So. 2d 1031 (Fla. 1st DCA 2008). As such, including the statement that the case is dismissed, with prejudice, in the Final Order will not bar the Petitioner from bringing a claim in another forum that the SBA lacked the jurisdiction to resolve.³

² Chapter 2016-116, § 4, Laws of Florida

³ Respondent does not concede that Petitioner has a colorable claim that she can bring in another forum on any ground, including the claim she labels an "as applied" constitutional challenge.

WHEREFORE, Respondent, State Board of Administration, respectfully requests that the Order Determining that Relief Requested by Petitioner is Unavailable in an Administrative Proceeding and Closing File should be adopted by a Final Order of Dismissal and that the Final Order state that the dismissal be with prejudice.

Respectfully submitted,

Brian A. Newman

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been filed via ELECTRONIC MAIL this 7th day of September, 2016 on:

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EXHIBIT E

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

CAROL WARTENBERG,

Petitioner,

vs.

Case No. 2016-3123

STATE BOARD OF ADMINISTRATION,

Respondent.

**PETITIONER CAROL WARTENBERG'S REQUEST FOR THE COURT TO
DETERMINE WHETHER IT HAS THE JURISDICTION TO GRANT THE RELIEF
BEING REQUESTED BY THE PETITIONER**

Petitioner, Carol Wartenberg, requests the court to make a preliminary determination as to whether the court has the jurisdiction to grant the relief being requested by the Petitioner. This request is being made in order to conserve the judicial resources that would be expended in an all day hearing currently scheduled for August 12, 2016. In support thereof Wartenberg states as follows:

1. Wartenberg's case is set out in detail in the Petitioner's Pre-Hearing Statement submitted to the court on August 8, 2016. Essentially Wartenberg is asking for the decisions in *Obergefell v. Hodges* 135 S.Ct. 2584 (2015) (holding that it is a fundamental right protected by the XIV Amendment to the U.S. Constitution for couples of the same sex to be married and for those same sex marriages to be given full faith and credit) and *Brenner v. Scott*, 2015 WL 44260 (N.D. Fla. 2016)(striking down Fla. Stat. 741.212 as unconstitutional) to be applied retroactively.

2. Wartenberg requests the court to declare that her 2011 marriage to Hohnecker be backdated to February 18, 1999 - the date that Wartenberg and Hohnecker registered their domestic partnership under Broward County's Domestic Partnership Ordinance - on the grounds that the declaration of domestic partnership filed under the Ordinance in the presence of a notary public constituted a marriage in all but name under Florida law. This declaration is being sought solely for the purposes of having Hohnecker declared by the court to have been Wartenberg's spouse under Fla. Stat. 121.021(28) and therefore a qualified joint annuitant under the Florida Retirement System Pension Plan under Fla. Stat. 121.091 at the date that Wartenberg exercised her first election in 2003.

3. Wartenberg also requests the court to either nullify her second election made in 2008 or grant her a third election to opt back into the pension plan as make whole relief for the injury she suffered when she was unconstitutionally prevented from marrying Hohnecker in 1999 and then unconstitutionally prevented from having Hohnecker recognized as her spouse and joint annuitant under Fla. Stat. 121.021(28) and Fla. Stat. 121.091 when she originally enrolled in the plan in 2003.

4. Wartenberg further requests the court to order the Florida Retirement System to pay the difference between the buy in amount for her to return to the pension plan and the value of her Investment Plan.

5. An Informal hearing was held before Presiding Officer Longman on February 11, 2016 (Petitioner's Exhibit 25) in which the Presiding Officer made the following observations:

"Generally speaking, when you make a claim under the constitution, and what you're saying is there is a provision of state law that is not constitutional and something different should be done, that is a claim that really cannot be decided in an administrative law forum, which is where you are right now in terms of procedure."
Exh 25 pg 19 lines 2-8.

"Obviously in an administrative proceeding, I am not going to be ruling on

constitutional issues except that I believe there is a line of cases about when constitutional issues are raised in the context of an administrative proceeding and it is an as-applied challenge as opposed to a facial challenge, which this is not, that the Petitioner's required to exhaust their administrative remedies. And that means have a hearing on this thing. So, we are having a hearing, but I don't know that we're really getting at any of the issues that are going to be important to deciding this, nor do I know whether we should frankly. And I don't think anybody's really had a chance to look at that the way it maybe has to be looked at." Exh 25. 26:16 - 27:5.

"Well, I understand what you're saying. And again, let me say what my concern is. And I understand what you're saying about looking behind the paper record. But, if there are a bunch of fact issues that are going to ultimately determine whether she has any prospect for relief, I'm not sure whether somebody's supposed to be looking at those fact issues in an administrative proceeding – now, it's not going to be me unless everybody agrees to it, because that's going to be at DOAH. But, you know, instead of saying, looking at her intent, I would say that there's a complex of fact issues that would surround any court making a determination. In other words, were you married when you made this second election? Can you present evidence of your situation at that time? Do you have evidence of this being why you did this? I'm not in any position to say that that would change, you know, or determine the outcome, but it's pretty clearly a fact determination to me.

So, I don't want to prejudice Dr. Wartenberg's ability in some other forum to make her factual case that she may be entitled to some sort of retroactive relief. And there's a lot of, you know, quasi legal terms here. We've got retroactive. I'd be concerned about whether it's speculative, which I think is part of what you are getting to. There would be a lot to prove, I think, under circumstances like this. And I have not looked at what all the law says. And there is law rapidly being developed in other jurisdictions I know that. **But my overall concern here is that we not prejudice Dr. Wartenberg's ability to find her way to venue that does have the jurisdiction to answer the questions that she wants answered. I don't think this is it. But I am still troubled by whether the way you get to that venue is for your administrative proceeding to determine facts or to just say, we have our statutes, our statutes don't provide for this, so you have to go somewhere else.**" Exh25. 28:17-30:7.

"This venue, this tribunal, this hearing, cannot give you the relief that you have asked for. Because we don't have the jurisdiction to do that. I don't have the jurisdiction to decide constitutional issues." Exh 25. 32:9-12; 14-15.

6. Petitioner would request the court to enter an order determining that it does not

have the jurisdiction to decide the constitutional issues raised by the Petitioner or the jurisdiction to

grant the relief requested. In doing this the court will be allowing the Petitioner to exhaust her administrative remedies and bring an action in state or federal court pursuant to 42 U.S.C. § 1983 and other related federal statutes.

WHEREFORE, Petitioner, Carol Wartenberg, moves this Honorable Court to enter an order granting the relief requested or for such other and further relief as this court deems necessary and appropriate.

Respectfully Submitted this 8th day of August, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via FedEx on this 11th day of August, 2016 to:

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 ANTHONY V. FALZON
 Florida Bar No.: 69167

Exhibit 25

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

CAROL WARTENBERG,

Petitioner,

vs.

CASE NO.: 2015-3522

STATE BOARD OF ADMINISTRATION,

Respondent.

COPY

PROCEEDINGS:

Informal Hearing

BEFORE:

ANNE LONGMAN, HEARING OFFICER

DATE:

Thursday, February 11, 2016

TIME:

Commenced at 1:00 p.m.
Concluded at 1:45 p.m.

LOCATION:

1801 Hermitage Blvd.
Tallahassee, FL

REPORTED BY:

Tracy L. Brown
Certified Registered Reporter
tbrown567@comcast.net

ACCURATE STENOGRAPHY REPORTERS, INC.
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APPEARANCES:

REPRESENTING THE RESPONDENT:

BRANDICE DICKSON, ESQUIRE
PENNINGTON PA
215 S. Monroe Street, Suite 200
Tallahassee, FL 32301

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PROCEEDINGS

1
2 **MS. DICKSON:** This is Brandi Dickson with the
3 Pennington Law Firm. I'm calling for your hearing
4 before the State Board of Administration.

5 Can you hear me?

6 **DR. WARTENBERG:** Yes, I can.

7 **MS. DICKSON:** Okay. We are on speakerphone
8 and we have a court reporter here along with the
9 hearing officer and Mini Watson, who will be the
10 State Board's witness. So with that, if you will
11 just speak more slowly and more clearly than you
12 normally would so the court reporter can get
13 everything down, we are ready to begin your
14 hearing. Okay?

15 **DR. WARTENBERG:** I appreciate that because I
16 do wear hearing aids. So loudly and clearly is
17 probably good.

18 **MS. DICKSON:** Okay. Thank you.

19 **HEARING OFFICER:** Okay. Good. Well,
20 Ms. Wartenberg, my name is Anne Longman, I am
21 presiding officer here today. I need to confirm
22 that you are the Carol Wartenberg who is the
23 Petitioner in case number 2015-3522 before the
24 State of Florida State Board of Administration; is
25 that correct?

1 DR. WARTENBERG: Yes. Yes, it is.

2 HEARING OFFICER: Okay. And I would like to
3 swear in you and Ms. Watson as witnesses here
4 today. So after I say the oath, you will have to
5 answer audibly.

6 Do you swear or affirm that the testimony you
7 will give today is the truth, the whole truth, and
8 nothing but the truth?

9 DR. WARTENBERG: Yes.

10 MS. WATSON: Yes, I do.

11 HEARING OFFICER: Okay. Thank you.

12 Ms. Wartenberg, this is what is known as an
13 informal proceeding. We try to make a complete
14 record so that the decision that is ultimately made
15 will be correct. We try to do this in a way that
16 makes sense and that everybody can follow what's
17 going on. Generally speaking, the person who's the
18 Petitioner, which is you, goes first because you
19 have the burden of showing that you're entitled to
20 the relief that you have requested. But if you
21 would prefer to hear the State Board of
22 Administration's case first, I will ask them to do
23 that.

24 So which is your preference?

25 DR. WARTENBERG: I can go ahead and go first.

1 That's fine.

2 HEARING OFFICER: Okay. Please just do.

3 DR. WARTENBERG: I'm sorry?

4 HEARING OFFICER: Please go ahead then.

5 DR. WARTENBERG: Okay. I'm a little nervous
6 to say the least. But -- and I tried to in my --
7 you know, what I want to bring up now be as clear
8 as possible. Because as I kind of gone through
9 this process, it's become more clear in my head, so
10 I think I'm even able to speak to it even better
11 than when I was originally writing some things out.
12 And I realize that this is all based on my making a
13 second election, but I feel that having to make
14 that second election was based on, you know,
15 discriminatory practices at the time. You know,
16 and it's because of the loss of retirement income
17 over time because I wasn't able to be on the
18 pension plan. And most importantly recently, it's
19 cost me a loss of income because since I'm in the
20 investment plan, I can't participate in the DROP
21 program, which is just furthering my sense of
22 feeling discriminated against.

23 You know, at the time that I made the first
24 election of the pension, you know, I -- you know,
25 living in Broward County, we had the domestic

1 partnership, you know, enactment that was there.
2 So the whole time that I was employed by the
3 Broward School Board, my wife and I have been
4 covered under the Broward domestic partner. We've
5 been together for 30 years. And as soon as you
6 could marry, we went out of state and married. So,
7 for all intents and purposes, even if we looked at
8 common law, you know, we have been wife and wife,
9 partners, for a good long period of time. And we
10 feel -- I feel that I'm being discriminated against
11 because I've had a commitment to this person who,
12 of course, nobody wanted to recognize.

13 Now, in Broward County, we're recognized, so I
14 think I just assumed that she was covered under the
15 pension plan until I was discussing it with
16 somebody and they said, well, of course she's not
17 because the Florida Retirement System doesn't
18 follow Broward County law, they follow Florida law.
19 And that's when I figured out that I -- you know,
20 if something were to happen to me, that she would
21 have, you know, no benefits. She would have
22 nothing from the money that I had put into the plan
23 up until that point.

24 I guess the only thing that I could say is
25 that I really feel that this decision should be

1 made retroactively. There is a lot of movement in
2 this country right now to restore benefits
3 retroactively to people who have lost benefits due
4 to their sexual preference or due to marriage and
5 equality. And I just reviewed some of the things
6 that I found in our gay local news, so I don't have
7 documents or anything to support it, but for
8 example, I know that many veterans are now getting
9 their benefits restored based on having been
10 discharged during don't ask, don't tell. And one
11 individual as long as 50 years ago was thrown out
12 of the army because of his sexual preference and
13 they are currently restoring his benefits et cetera
14 and reinstated him as a veteran.

15 Social security is also now allowing some
16 same-sex partners to retroactively file social
17 security claims based on their spouse's benefits.
18 The Department of Justice on January 29th
19 determined that their employees that had been
20 discriminated against should be -- and the quote
21 was "be made whole" and receive benefits
22 retroactively.

23 There's been also retroactive decision to
24 allow a same-sex spouse to receive survivor annuity
25 benefits from the Department of Veteran Affairs.

1 The Arista Retirement plans have indicated that
2 employers may be retroactively liable for denying
3 spousal benefits before the marriage equality
4 decision was made. And there's been all sorts of
5 reversals on denied tuition and immigration
6 status -- well, not all sorts, I don't know how
7 many. I don't want to be inaccurate there. But
8 there have been decisions based on, you know,
9 tuition and immigration status having been denied
10 to same-sex partners. And currently Walmart and
11 several private companies are being sued for
12 retroactive benefits. And many employers are now
13 considering what they're calling equalization
14 benefits to compensate their employees for benefits
15 that could not claim for their same-sex spouses
16 while the more restrictive laws were in place.

17 You know, even right now, there's retroactive
18 changes being applied to individuals who were
19 incarcerated for drug violations. So there is some
20 precedent for reinstating benefits retroactively,
21 based on, you know, past discriminatory practices.

22 And in all -- I'd at least be able -- like to
23 be able to go on trial because right now, that's a
24 problem for me. And, you know, I've always been
25 concerned, upset that my retirement income has had

1 to be based on vagaries of the market because I had
2 to go to the -- help me out here.

3 **HEARING OFFICER:** The investment plan, yeah.

4 **DR. WARTENBERG:** Yeah, the investment plan.

5 And even with expert advice that I've sought out,
6 you know, it's been up and down and, you know, as I
7 get closer and closer to my retirement age, you
8 know, that's a concern. And it just -- I just feel
9 like, you know, to some degree, you know, we've
10 been punished for our commitment to each other and
11 not getting these benefits like our, you know,
12 heterosexual counterparts have always been able to
13 get without question, you know, without even having
14 to show any sort of documentation or proof.

15 So I guess that's why I decided to continue on
16 at this point. And I probably don't have a
17 snowball's chance in hell, but I thought I'd
18 present my case and see what might happen, so --

19 **HEARING OFFICER:** Okay. Well, let me --

20 **DR. WARTENBERG:** I'm done. Thank you.

21 **HEARING OFFICER:** Yes. And if I could clarify
22 some things, I will then turn it over to
23 Ms. Dickson. And we will come back to you, so
24 don't worry that --

25 **DR. WARTENBERG:** Yeah, no problem.

1 HEARING OFFICER: -- if there are other things
2 you want to say.

3 DR. WARTENBERG: Yeah, I've been in IEP
4 meetings and things like that.

5 HEARING OFFICER: Yeah. Okay. So you say
6 that you have approximately 30 years in FRS?

7 DR. WARTENBERG: I'm sorry, say again.

8 HEARING OFFICER: Do you have 30 years in FRS?

9 DR. WARTENBERG: Oh, no, no, no. Not at all.

10 HEARING OFFICER: Oh, you've been married for
11 30 years. I'm sorry. I'm sorry.

12 DR. WARTENBERG: I've been married for 30
13 years, yes.

14 HEARING OFFICER: So let me -- I just wanted
15 to get some dates down here.

16 DR. WARTENBERG: Okay.

17 HEARING OFFICER: You said that -- oh, you had
18 a domestic partnership under Broward County
19 ordinances. When was that? When did that begin.

20 DR. WARTENBERG: Oh, heavens. That was
21 passed -- I don't know the exact year, I'm really
22 sorry, but it was past prior to my becoming a
23 Broward County School system employee. I'd have
24 to, you know, go back and figure out the exact date
25 of that.

1 **HEARING OFFICER:** But were you required to do
2 anything, like register to take advantage of that?

3 **DR. WARTENBERG:** Yes.

4 **HEARING OFFICER:** So do you know when that
5 occurred?

6 **DR. WARTENBERG:** Oh, heavens, let me -- I
7 didn't realize I needed --

8 **HEARING OFFICER:** Well, I don't need an exact
9 date, I'm just trying to get a flow here. So even
10 if --

11 **DR. WARTENBERG:** Yes, exactly. We were
12 registered. It is on county law. I even have a --
13 you know where I might have it is in my wallet
14 because I still carry that because they give you a
15 little -- they gave you a card at the time so it's
16 like if you were in the hospital or anything like
17 that --

18 **HEARING OFFICER:** Right.

19 **DR. WARTENBERG:** -- we were able to
20 demonstrate at the hospital that, you know, you did
21 have those benefits. And I think I might be able
22 to find that. Man, where did I put that? I still
23 used to carry it because I never knew if possible
24 even -- here it is. Good. It was the 13th day
25 of August, 1999.

1 HEARING OFFICER: Okay.

2 DR. WARTENBERG: And the file number -- I'm
3 sorry, do you want the file number?

4 HEARING OFFICER: No, that's not necessary.

5 DR. WARTENBERG: Okay.

6 HEARING OFFICER: And let me ask you this
7 then, and again, approximate is all right, what was
8 the date that you went out of state and married and
9 where?

10 DR. WARTENBERG: Oh, I know that for sure.
11 That was July 15th, 2015. 11

12 HEARING OFFICER: Okay. And where was that?

13 DR. WARTENBERG: Iowa.

14 HEARING OFFICER: In Iowa, okay.

15 DR. WARTENBERG: Hard to believe, huh.

16 HEARING OFFICER: Yes. I think that's all I
17 have for now.

18 Ms. Dickson, if you would go ahead.

19 MS. DICKSON: Thank you.

20 Ms. Wartenberg, I want to confirm --

21 DR. WARTENBERG: It's Dr. Wartenberg actually.

22 MS. DICKSON: I'm sorry. Dr. Wartenberg.

23 DR. WARTENBERG: That's all right. We want to
24 be correct.

25 MS. DICKSON: All right. Dr. Wartenberg, I

1 want to make sure that you received a copy in
2 advance of the hearing of the Respondent's
3 prehearing statement as well as our notice of
4 filing exhibits and witness list.

5 Did you receive those two items?

6 **DR. WARTENBERG:** Yes, I did.

7 **MS. DICKSON:** Okay. And I will be looking at
8 the Respondent's prehearing statement. So if you
9 would like to follow along with me, we can
10 literally be on the same page, okay?

11 **DR. WARTENBERG:** Actually I have the device
12 that has that information up to my ear right now,
13 so I won't be able to follow along, but I'll be
14 comfortable with you going ahead and going over it.
15 Because I'd read it through pretty carefully.

16 **MS. DICKSON:** All right.

17 **DR. WARTENBERG:** Is that okay?

18 **MS. DICKSON:** That's fine. That's fine.

19 The issue to be resolved today is whether
20 Dr. Wartenberg's request to switch from the FRS
21 investment plan to the pension plan, despite having
22 no elections remaining, should be granted.

23 DIRECT EXAMINATION

24 **BY MS. DICKSON:**

25 **Q** Dr. Wartenberg, do you agree that you were

1 employed by the Broward County School Board and given a
2 deadline of December 29, 2003 to elect between the pension
3 plan and the investment plan?

4 **A** Yes. I can't -- to be honest with you, can't
5 clearly remember how that all went about, but, you know, if
6 that's the way it typically happens, then I'm sure that's
7 what happened.

8 **Q** Okay. And if you --

9 **A** I don't remember.

10 **Q** And you elected to join the pension plan on
11 December 22nd, 2003, correct?

12 **A** Right.

13 **Q** And then on May 7th, 2008, you filed a second
14 election form to switch from the pension plan to the
15 investment plan, correct?

16 **A** Yes.

17 **Q** And you understood at that time, that by filing
18 that second election, you had to stay in the investment
19 plan until your retirement, correct?

20 **A** Right.

21 **Q** In other words, you understood that that decision
22 was irrevocable, correct?

23 **A** Yes.

24 **Q** And now you --

25 **A** Because other people have thought that decisions

1 were -- you're going to come back to me, I'm sorry.

2 Q That's okay.

3 A I'm just saying, you know, that decision was made
4 on, you know, trying to protect my wife at the time and
5 would not -- I would not have switched if I were able, like
6 every heterosexual couple, to have made her my beneficiary
7 but I couldn't do that, so I had to protect her. So I feel
8 that I made the second election due to discrimination at
9 the time. And would never have changed by first election
10 if I didn't have to.

11 Q I understand.

12 And --

13 A Like the military has thrown people out and now
14 they're saying, yeah, that probably shouldn't have
15 happened.

16 Q I understand.

17 Have you read the statutory provision that is
18 found at Section 121.4501(4) (g) Florida Statutes that
19 was included in the Respondent's prehearing statement?

20 A Would you remind me what that said again?

21 Q Sure. It's in our prehearing statement on the
22 third page, and it's Section 121.4501(4) (g). And it states
23 that after you make your initial election, you have
24 remaining to you a single election to switch between plans,
25 and there are no exceptions to that.

1 Do you recall reading that statute?

2 A Yes.

3 Q Okay. And there is a grace period afforded if
4 you believe that you have made that decision incorrectly,
5 but you have to notify the SBA within about a 30-day
6 period. And you agree with me that that did not happen in
7 this case, correct?

8 A Right. Because I at that time thought I had no
9 other option than to choose the investment plan.

10 Q So do you understand that there's no statutory
11 provision for the State Board of Administration to grant
12 you the relief that you are requesting today?

13 A Yes, I understand that.

14 Q And do you understand that the State Board of
15 Administration has no authority to deviate from that
16 statute and grant you the relief that you request today?

17 A So even though it was based on discriminatory
18 practices, that, what, that can only be changed if, you
19 know, the State of Florida change its statutory -- is
20 that --

21 Q Well, the State Board of Administration is an
22 agency of the State and can only do those things which are
23 authorized by statute. And there is no authority in the
24 statute that allows the SBA to do what you are asking it to
25 do.

1 **A** So, Florida Statute cannot be changed
2 retroactively based on, you know, it's now currently
3 recognizing that same-sex couples should have the right to
4 be married?

5 **Q** I can't speak for what the legislature could do
6 in the future. But as we sit here today, there is no
7 authority that the SBA has to grant you the relief that you
8 have requested.

9 **A** So it would have to be through statutory change?

10 **HEARING OFFICER:** Well, let me -- this is Anne
11 Longman again, Dr. Wartenberg.

12 **DR. WARTENBERG:** Sure. I'm just trying to
13 understand.

14 **HEARING OFFICER:** Yes. And I want you to
15 understand. And I frankly am trying to understand
16 because this is not an issue that I have followed
17 with regard to the application of these new court
18 cases on State of Florida retirement benefits. So,
19 I think that what we have here today is that your
20 claim, your assertion under your petition is based
21 on a constitutional right. It's a right that has
22 been determined by the United States Supreme Court.
23 It was --

24 **DR. WARTENBERG:** Right.

25 **HEARING OFFICER:** It was first determined by a

1 local district court, federal district court here.
2 So, generally speaking, when you make a claim under
3 the constitution, and what you're saying is there
4 is a provision of state law that is not
5 constitutional and something different should be
6 done, that is a claim that really cannot be decided
7 in an administrative law forum, which is where you
8 are right now in terms of procedure.

9 So, if you would bear with me for a minute, I
10 need to get just a little bit better understanding
11 of the facts here before --

12 DR. WARTENBERG: Sure.

13 HEARING OFFICER: -- I'm going to be
14 comfortable.

15 And, Ms. Dickson, would you be all right with
16 me questioning Ms. Watson or would you rather I
17 direct the questions to you?

18 DR. WARTENBERG: I'm sorry, could you repeat
19 that?

20 HEARING OFFICER: I'm --

21 DR. WARTENBERG: I lost --

22 HEARING OFFICER: Yeah, I'm going to ask, as
23 the presiding officer, I would like to ask
24 Ms. Watson, who is the representative for the State
25 Board of Administration a few questions.

1 DR. WARTENBERG: Okay.

2 HEARING OFFICER: Okay.

3 MS. DICKSON: And that's fine. Just from a
4 housekeeping perspective, can we get the exhibits
5 in before I turn over?

6 HEARING OFFICER: Sure.

7 MS. DICKSON: Dr. Wartenberg, I also want to
8 confirm that you received a copy of the exhibits
9 that we sent prior to the hearing? And those were
10 premarked as Respondent's Exhibits R-1 through R-5.

11 DR. WARTENBERG: Yes, I did.

12 MS. DICKSON: Okay. At this time, I would
13 like to admit those into evidence.

14 HEARING OFFICER: Okay. Dr. Wartenberg, this
15 is just to put those documents into the record. Do
16 you have any objection to that?

17 DR. WARTENBERG: No, not at all.

18 HEARING OFFICER: Okay. Without objection,
19 they're admitted.

20 (Respondent's Exhibit Nos. R-1 through R-5
21 admitted into the record.)

22 MS. DICKSON: And that might assist you in
23 getting some of these facts down, particularly
24 Dr. Wartenberg's assertion that she did not use her
25 initial election. Exhibit R-2 demonstrates that

1 she did affirmatively use her initial election to
2 go into the pension plan. She did not default, she
3 affirmatively chose --

4 **DR. WARTENBERG:** I was confused about that
5 because I couldn't remember exactly how that
6 occurred -- as you indicated, you know, that was
7 the procedure that -- so that's what I'm saying,
8 that must have happened, even though I couldn't
9 recollect it exactly. I thought I was just put
10 into the pension plan, but I couldn't remember
11 having elected that, but obviously I did.

12 **HEARING OFFICER:** Okay. All right.

13 Ms. Watson, forgive me if this seems a little
14 far afield, and I know that this is not necessarily
15 something you prepared for today.

16 **DR. WARTENBERG:** Just a second, let me close
17 the door.

18 Go ahead.

19 **HEARING OFFICER:** Okay. If Dr. Wartenberg had
20 been legally married within the eyes of the law
21 when she made her initial election in 2003, what
22 effect would that have had with regard to the
23 rights that she now seeks? In other words, a
24 beneficiary, a right to leave your retirement
25 assets to your spouse?

1 DR. WARTENBERG: And be able to ^{have} leave the DROP
2 program --

3 HEARING OFFICER: Okay. We'll get to that.
4 One thing at time.

5 DR. WARTENBERG: I'm sorry. Forgive me.

6 MS. WATSON: Under the pension plan, a joint
7 annuitant is defined as a spouse or a child 25
8 years or under. So, if something were to happen to
9 someone in the pension plan, the benefits would go
10 first to their spouse. So, if she was in the
11 pension plan and the law recognized her as being
12 married, and having a spouse, then they would
13 receive the same benefit as any other spouse would
14 receive.

15 HEARING OFFICER: Okay. Is that automatic or
16 do you have to say, if I die, give this money to my
17 spouse and my children?

18 MS. WATSON: It depends on what benefit you're
19 seeking. So if something were to happen before the
20 pension plan member receives -- is retirement
21 eligible, then it automatically defaults to Florida
22 law to --

23 HEARING OFFICER: Spouse.

24 MS. WATSON: Spouse.

25 HEARING OFFICER: Okay.

1 **MS. WATSON:** If the member goes to retire,
2 they can -- there are certain options. They can
3 designate someone else to receive that benefit.
4 However, option -- different options require them
5 to have a spouse in order to receive a benefit. So
6 if they didn't have a spouse and they wanted option
7 three, then if there was not a joint annuitant,
8 then there would be no one to give it to.

9 **HEARING OFFICER:** Okay.

10 **MS. WATSON:** Does that make sense?

11 **HEARING OFFICER:** It does. Although I will
12 tell you I've done a little bit of poking around on
13 this trying to get a framework for thinking about
14 it and it's fairly dense. If I have this right,
15 there are certain or there were certain benefits
16 that would flow automatically to a spouse without
17 their having to be further action on the part of
18 the participant.

19 **MS. WATSON:** Correct. Well, it depends if
20 they're going to action the retirement or if there
21 is a death. At that point, of course, the spouse
22 would say, I'm the spouse, I receive benefits. So,
23 it just depends on the situation.

24 Now, as far as --

25 **DR. WARTENBERG:** Could I just -- could I ask

1 something?

2 **HEARING OFFICER:** No.

3 **DR. WARTENBERG:** If I came in as a
4 heterosexual person and opted for the pension plan,
5 I would not have had to let you know at that moment
6 in time who my husband was or that I had a husband,
7 but just that I was electing the pension plan and
8 at some point in time if I should die or whatever,
9 the pension plan would have automatically gone to
10 my husband?

11 **MS. WATSON:** It would have, but your husband
12 or your spouse would have had to provide
13 documentation that they were your spouse. The same
14 thing --

15 **DR. WARTENBERG:** Right, but at the time that I
16 died.

17 **MS. WATSON:** That is correct. The same thing
18 is when you go to retire, you have to provide
19 documentation that that -- when that person
20 receives your benefit and you were to pass away,
21 they would have to provide documentation that they
22 were your spouse regardless --

23 **DR. WARTENBERG:** Not on the front end, on the
24 back end?

25 **HEARING OFFICER:** Right. Okay,

1 Dr. Wartenberg, we've got to do this one at a time.
2 So let me ask these questions now.

3 **DR. WARTENBERG:** I'm sorry.

4 **HEARING OFFICER:** I think I do understand
5 that. And frankly, I don't know that I need to
6 understand it in all details. I don't think
7 there's much question, but what -- the situation
8 now is different.

9 Can you explain to me what the situation is
10 now?

11 **MS. WATSON:** Sure. So they process
12 retirements. The retirement process is exactly the
13 same as it was before, however, you show
14 documentation that someone is your spouse,
15 whether -- which would be a marriage license. And
16 so where before, the State or the -- did not
17 recognize same-sex marriage, well, now the state
18 recognizes same-sex marriage, therefore the
19 participants receive a marriage license. So the
20 participants would just submit a marriage license
21 regardless of where they received it at. They have
22 a marriage license, then they would receive
23 benefits based on the marriage license.

24 **HEARING OFFICER:** Right. And the way that I
25 say that would be now there's more than one kind of

1 spouse. But the way that all of this happens has
2 not really changed, what has changed is who is the
3 spouse.

4 MS. WATSON: Correct.

5 HEARING OFFICER: Is that accurate?

6 MS. WATSON: Correct.

7 HEARING OFFICER: Okay. All right. Well, I
8 do understand that.

9 Ms. Dickson, the thing that's giving me a
10 problem here is that I do know that this is really
11 exactly the same kind of fact pattern that has come
12 up in a number of cases with regard to how this
13 newly recognized right is going to affect people's
14 retirement benefits, all kinds of government
15 benefits.

16 Obviously in an administrative proceeding, I
17 am not going to be ruling on constitutional issues
18 except that I believe there is a line of cases
19 about when constitutional issues are raised in the
20 context of an administrative proceeding and it is
21 an as-applied challenge as opposed to a facial
22 challenge, which this is not, that the Petitioner's
23 required to exhaust their administrative remedies.
24 And that means have a hearing on this thing. So,
25 we are having a hearing, but I don't know that

1 we're really getting at any of the issues that are
2 going to be important to deciding this, nor do I
3 know whether we should frankly. And I don't think
4 anybody's really had a chance to look at that the
5 way it maybe has to be looked at.

6 Do you have any response to that?

7 **DR. WARTENBERG:** -- I don't think I'll be the
8 first person to bring this up.

9 **HEARING OFFICER:** No, you are not the first
10 person. And I'm aware of at least that much. But
11 we have to do this, you know, within the bounds of
12 the laws and the procedural rules that we're
13 supposed to follow.

14 **DR. WARTENBERG:** Sure.

15 **MS. DICKSON:** It's the SBA's position that
16 they're not going to look behind the intent of a
17 member for selecting one plan over the other. By
18 way of example, people try to time the market. And
19 they may have joined the investment plan thinking
20 they were going to enter the market when it was
21 low, ride it until it's high. They misunderstood
22 what the market was going to do, they wanted to
23 change their minds and go back to the pension plan,
24 but they're out of elections. So the SBA cannot
25 and will not look to the intent of members'

1 decisions to switch plans. And that's why the
2 statute has to be clear. You have one time.

3 **HEARING OFFICER:** Right.

4 **MS. DICKSON:** One opportunity. And if you
5 think you did it errantly, before we move money,
6 tell us and we can change it back. But the SBA
7 cannot be put into a position to divine intent.
8 And at this point, that's what Dr. Wartenberg is
9 asking the SBA to do is to divine her intent based
10 open the two paper elections that she filed.

11 **HEARING OFFICER:** Right.

12 **MS. DICKSON:** And that's why the SBA is
13 constrained to deny the relief that she is
14 requesting. And it might be that she has a
15 different forum to bring these issues, but in this
16 particular forum, the relief cannot be granted.

17 **HEARING OFFICER:** Well, I understand what
18 you're saying. And again, let me say what my
19 concern is. And I understand what you're saying
20 about looking behind the paper record. But, if
21 there are a bunch of fact issues that are going to
22 ultimately determine whether she has any prospect
23 for relief, I'm not sure whether somebody's
24 supposed to be looking at those fact issues in an
25 administrative proceeding -- now, it's not going to

1 be me unless everybody agrees to it, because that's
2 going to be at DOAH. But, you know, instead of
3 saying, looking at her intent, I would say that
4 there's a complex of fact issues that would
5 surround any court making a determination. In
6 other words, were you married when you made this
7 second election? Can you present evidence of your
8 situation at that time? Do you have evidence of
9 this being why you did this? I'm not in any
10 position to say that that would change, you know,
11 or determine the outcome, but it's pretty clearly a
12 fact determination to me.

13 So, I don't want to prejudice Dr. Wartenberg's
14 ability in some other forum to make her factual
15 case that she may be entitled to some sort of
16 retroactive relief. And there's a lot of, you
17 know, quasi legal terms here. We've got
18 retroactive. I'd be concerned about whether it's
19 speculative, which I think is part of what you are
20 getting to. There would be a lot to prove, I
21 think, under a circumstance like this. And I have
22 not looked at what all the law says. And there is
23 law rapidly being developed in other jurisdictions,
24 I know that. But my overall concern here is that
25 we not prejudice Dr. Wartenberg's ability to find

1 her way to a venue that does have the jurisdiction
2 to answer the questions that she wants answered. I
3 don't think this is it. But I am still troubled by
4 whether the way you get to that venue is for your
5 administrative proceeding to determine facts or to
6 just say, we have our statutes, our statutes don't
7 provide for this, so you have to go somewhere else.

8 DR. WARTENBERG: Because then it --

9 HEARING OFFICER: Go ahead. Go ahead, please.

10 DR. WARTENBERG: Because then at that point,
11 if I have to -- and I don't know what the next
12 thing would be, but I have limited income, so to be
13 able to pursue this, would become costly to me and
14 I don't know how to do that or that -- you know
15 what I mean?

16 HEARING OFFICER: Yes, I do.

17 DR. WARTENBERG: I guess I'm just saying to
18 y'all, you know, it just doesn't seem fair to me.
19 And, you know, it certainly wasn't because I
20 preferred the investment plan. In fact, I really
21 hated the idea of having to come off the pension
22 plan. And you know, I've suffered over it ever
23 since. And when finally the State of Florida
24 recognized my marriage and then the United States
25 of America recognized my marriage, I just feel that

1 I have this right, of course, to present this
2 petition on my part. Yeah.

3 **HEARING OFFICER:** Okay. Well, I absolutely
4 understand what you're saying, and I know that the
5 idea of a legal action, you know, where you really
6 do need an attorney to represent you is pretty
7 daunting.

8 I think we have the record insofar as we were
9 prepared to make a record today.

10 Ms. Dickson, do you have any further thoughts?

11 **MS. DICKSON:** Nope. No thoughts.

12 **HEARING OFFICER:** Okay. Okay. Well, here's
13 what I'm going to do, and this is a little bit
14 unusual. I think we don't have much in the record
15 here today other than the pretty clearly undisputed
16 facts that are reflected on the pieces of paper
17 which nobody disputes. So, that's -- in some
18 sense, that's good. There's no dispute about that.

19 Dr. Wartenberg, what we generally do is we get
20 a transcript of the proceeding. The transcript's
21 provided both to you and to the SBA. And then you
22 have 30 days from the receipt of the transcript to
23 file anything else that you want to file by way of
24 argument saying this is why I think I should
25 prevail. You don't have to file anything else.

1 There's no obligation to do that.

2 DR. WARTENBERG: Well, if I were to do that,
3 would I need like the like legal precedent
4 documents, et cetera that demonstrate that
5 retroactive benefits are being at this time looked
6 at and reconsidered and changed in other localities
7 and venues?

8 HEARING OFFICER: I can't tell you that that's
9 what you would have to do. Because this venue,
10 this tribunal, this hearing, cannot give you the
11 relief that you have asked for. Because we don't
12 have the jurisdiction to do that.

13 DR. WARTENBERG: Right.

14 HEARING OFFICER: I don't have the
15 jurisdiction to decide constitutional issues. But
16 what I'm struggling with here is, Ms. Dickson,
17 lawyer to lawyer, I would appreciate some
18 assistance perhaps before a proposed recommended
19 order is filed, on the question of what is the
20 proper thing to do with a constitutional issue that
21 is raised in an informal hearing. Meaning, there
22 is no dispute of fact as to what actually occurred,
23 but there may be fact disputes as to whether the
24 constitutional prohibition gets her the relief that
25 she has asked for. I hope that makes sense.

1 MS. DICKSON: It does.

2 HEARING OFFICER: I know that there is a line
3 of cases about what you do with constitutional
4 issues that are embedded in administrative
5 proceedings. And I think the law, frankly, has
6 been a little bit all over the place, which is why
7 I don't feel comfortable just sailing into this
8 without having the chance to really flesh out the
9 issue.

10 So, do you think you could get that within two
11 weeks?

12 MS. DICKSON: Sure.

13 HEARING OFFICER: I don't think there's
14 anything about the transcript that is going to help
15 us in that regard.

16 MS. DICKSON: I agree.

17 HEARING OFFICER: And I also think it's
18 important to do this because I do suspect that
19 there are going to be more of these cases. It's a
20 good thing to know going forward.

21 So, Dr. Wartenberg, what's going to happen
22 here is that Ms. Dickson, as the attorney for the
23 State Board of Administration, is going to brief --
24 meaning create a legal document that contains the
25 law, the state of the present law with regard to

1 how claims like yours should be addressed in these
2 kinds of administrative hearings. So you'll get a
3 copy of that within approximately two weeks. And
4 what I am going to do then is take a look at that.
5 You can certainly respond to that document if you
6 want to, but that would be more of a legal
7 argument. But I'm going to take a look at that
8 document and then I am going to issue an order
9 setting the procedure for going forward from that
10 point.

11 **DR. WARTENBERG:** Okay.

12 **HEARING OFFICER:** I hope that makes sense to
13 you.

14 **DR. WARTENBERG:** Yes, it does.

15 **HEARING OFFICER:** Okay.

16 **DR. WARTENBERG:** And if I have questions about
17 that, I can call and ask them and that kind of
18 thing?

19 **HEARING OFFICER:** Yes, yes.

20 **DR. WARTENBERG:** Can that also be sent to me
21 on paper as well as by email? Because I guess, you
22 know, I'm 63, I'm a short-timer now before
23 retirement, that's why this to some degree is of
24 some, you know, timeliness to me.

25 **HEARING OFFICER:** Yes.

1 **DR. WARTENBERG:** So I still like paper copies.
2 If that could possibly be sent to me via the mail
3 as well as email, I appreciate that. And I still
4 continue to have questions about the DROP program,
5 you know, because that's also been, you know -- you
6 know what I mean, the people that are able to make
7 these huge amounts of extra money for their
8 retirement based on them being heterosexual versus
9 being, you know, homosexual and not being able to
10 be in the retirement plan.

11 **HEARING OFFICER:** Well, I understand that
12 that's embedded in your petition, so I think you've
13 adequately raised that and as far as I can tell,
14 that would be determined by the same set of
15 questions that we're trying to get to here.

16 **DR. WARTENBERG:** Okay.

17 **HEARING OFFICER:** So I think you're good on
18 that.

19 **DR. WARTENBERG:** Great. Thank you.

20 **HEARING OFFICER:** So you don't have any
21 trouble with providing paper copies?

22 **MS. DICKSON:** That's fine.

23 **DR. WARTENBERG:** Thank you.

24 **HEARING OFFICER:** I think we do want to go
25 ahead and get the transcript out, just go ahead and

1 send it to everybody. But instead of having a
2 30-day time period to submit a PRO, we're going to
3 wait until we all look at this legal argument. I'm
4 going to make another order then saying what
5 happens from there. Okay.

6 MS. DICKSON: Okay.

7 DR. WARTENBERG: Thank you very much.

8 HEARING OFFICER: Yes. Anything further?

9 MS. DICKSON: Not from the SBA.

10 DR. WARTENBERG: Are you asking me?

11 HEARING OFFICER: Yes, I am asking you also.

12 DR. WARTENBERG: Okay. No, I appreciate y'all
13 hearing me out. And I pretty much figured that
14 kind of the situation will come about. But I do
15 truly appreciate the addition that you're talking
16 about, so thank you.

17 HEARING OFFICER: Thank you all and we will be
18 adjourned.

19 (Hearing adjourned at 1:45 p.m.)

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CERTIFICATE OF REPORTER

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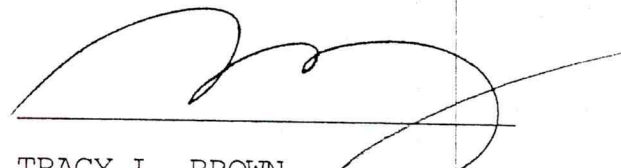
STATE OF FLORIDA:

COUNTY OF LEON:

I, TRACY L. BROWN, court reporter and Notary Public do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated, and that the foregoing pages numbered 1 through are a true and correct record of the aforesaid proceedings.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the foregoing action.

DATED THIS 27th day of February, 2016.



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August 3, 2016

By FedEx to:

The Honorable Robert E. Meale
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

**Re: Wartenberg, Carol v State Board of Administration
Case No.:16-3123**

Dear Judge Meale:

Enclosed please find a binder with a copy of Petitioner Carol Wartenberg's proposed exhibits as well as a courtesy copy of Petitioner's Pre-Hearing Statement and Notice of Filing Exhibits.

Very truly yours,


ANTHONY V. FALZON.

AVF:va
Encls.