STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

KELLY A. CUMMINGS, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	DOAH Case No. 16-1947 SBA Case No. 2016-3567

FINAL ORDER

On September 29, 2016, Administrative Law Judge Robert E. Meale (hereafter "ALJ") submitted his Recommended Order to the State Board of Administration (hereafter "SBA") in this proceeding. A copy of the Recommended Order indicates that copies were served upon counsel for the Petitioner and upon counsel for the Respondent. Both Petitioner and Respondent timely filed Proposed Recommended Orders. Neither party filed exceptions to the Recommended Order which were due October 14, 2016. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Senior Defined Contribution Programs Officer for final agency action.

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

The SBA adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order as if fully set forth herein.

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact of an Administrative Law Judge 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 Division of Administrative Hearings ("DOAH") recommended order may not reweigh evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of administrative law judges as the triers of the facts. *Belleau v. Dept of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Maynard v. Unemployment Appeals Comm.*, 609 So.2d 143, 145 (Fla. 4th DCA 19932). Thus, if the record discloses any competent substantial evidence supporting finding of fact in the ALJ's 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 [an administrative law judge's] conclusions of law

over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction."

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

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

ORDERED

The Recommended Order (Exhibit A) hereby is adopted in its entirety. Petitioner has failed to show that she is entitled to the relief requested. The Petitioner's request that she be entitled to rescind her second election whereby she transferred from the Florida Retirement System ("FRS") Pension Plan to the FRS Investment Plan hereby is denied. Petitioner's request for a hearing hereby is dismissed.

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

DONE AND ORDERED this 13th day of December, 2016, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Joan Haseman

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

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

Tina Joanos

Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent was sent to T.A. Delegal, III, Esq., Counsel for Petitioner, both by email transmission to tad@delegal.net and by UPS to Delegal Law Offices, P.A., 424 East Monroe Street, Jacksonville, Florida 32202; by US Mail to Robert E. Meale, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by email transmission to Brian Newman, Esq. (brian@penningtonlaw.com) and Brandice Dickson, Esq., (brandi@penningtonlaw.com) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095; , this 13th day of December, 2016.

Ruth A. Smith

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

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KELLY A. CUMMINGS,

Petitioner,

vs. Case No. 16-1947

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

On July 19, 2016, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Jacksonville and Tallahassee, Florida.

APPEARANCES

For Petitioner: T. A. Delegal, III, Esquire
James C. Poindexter, Esquire
Delegal Law Offices, P.A.
424 East Monroe Street
Jacksonville, Florida 32202

For Respondent: Brian A. Newman, Esquire
Pennington, P.A.
215 South Monroe Street, Second Floor
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to rescind a "second election" to invest in the Florida Retirement System (FRS) Investment Plan on the ground that, when filed, the second

election failed to comply with the requirements of sections 121.4501(4)(g) and 121.021(17)(b), Florida Statutes (2012).

PRELIMINARY STATEMENT

By letter dated March 4, 2016, Respondent denied Petitioner's request to transfer to the FRS Pension Plan. The letter states that Petitioner effectively elected to participate in the FRS Pension Plan when first eligible, on March 1, 2005; was allowed only one subsequent election; and made her second election to transfer to the FRS Investment Plan on November 29, 2012.

By petition served on March 30, 2016, Petitioner requested a hearing. Respondent initially treated the request as a demand for an informal hearing, but, by Order Transferring Case entered on April 8, 2016, transmitted the case to DOAH for a formal hearing.

At the hearing, each party called one witness. Petitioner offered into evidence four exhibits: Petitioner Exhibits 1 through 4. Respondent offered into evidence 26 exhibits: Respondent Exhibits 1 through 26. All exhibits were admitted.

The court reporter filed the transcript on August 5, 2016, and each party filed a proposed recommended order on August 26, 2016.

FINDINGS OF FACT

1. On August 9, 2004, Petitioner first became eligible to participate in the FRS. At the time, she was employed by Monroe County in its building department. On February 21, 2005, Petitioner timely elected to participate in the FRS Pension Plan, which is a defined benefit plan, rather than the FRS Investment Plan, which is a defined contribution plan.

2. Petitioner participated in the FRS Pension Plan until the events described in this paragraph. Her last day of work was in June 2012, although she did not formally terminate her employment until December 6, 2012. At the time, Petitioner was experiencing health problems that Petitioner worried would prevent her from continuing to perform the duties of her job with Monroe County. In July 2012, Petitioner called the FRS financial guidance line and discussed transferring to the FRS Investment Plan, so she could withdraw funds to live on during a period of extended unemployment for health reasons.

3. Even though Petitioner did not work after June, from November 1 through 6, she received pay for 13.25 hours of unused sick leave and 5 hours of unused annual leave. For the remainder of the month, Petitioner was on leave without pay.

4. On November 29, Petitioner called the FRS financial guidance line to discuss again transferring to the FRS Investment Plan. An FRS representative warned her that, to make

an election, she would have to be "employed with the FRS service credit" to make a second election.

5. On the same day, Petitioner filed a second election with Respondent to transfer from the FRS Pension Plan to the FRS Investment Plan. In a form mailed on December 3, 2012, Respondent acknowledged receipt of Petitioner's second election, effective December 1, 2012. There is some dispute as to whether Respondent adequately advised Petitioner of any grace period to rescind her second election, but she did not attempt to do so until over three years had elapsed, as noted below.

6. On April 5, 2013, Petitioner called the FRS financial guidance line and asked about withdrawing some of the funds in her FRS Investment Plan. She was informed that, if she did so, she could not defer compensation to this account on regaining FRS-covered employment.

7. In September or October 2015, Petitioner obtained FRS-covered employment at the library of the City of Islamorada. On November 1, 2015, Petitioner called the FRS financial guidance line and asked about rescinding her second election. An FRS representative told her that she would have to submit a request for "intervention." On February 10, 2016, Petitioner filed a request for intervention, stating that no one had warned her that, if she withdrew any funds from the defined contribution account, she could not again defer compensation to

this account. By letter dated March 4, 2016, Respondent denied the request solely on the ground that Petitioner had earned service credit for the month of November 2012 when she filed her second election, so, since she had not yet terminated employment, her second election was lawful.

CONCLUSIONS OF LAW

8. DOAH has jurisdiction of the subject matter. §§ 120.569 and 120.57(1), Fla. Stat. (2012).

9. Petitioner bears the burden of proving the material allegations by a preponderance of the evidence. § 120.57(1)(j); Dep't of Transp. v. J.W.C., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

10. Pension statutes must be liberally construed in favor of the "intended recipients." Scott v. Williams, 107 So. 3d 379, 384-85 (Fla. 2013). As Respondent notes in its proposed recommended order, this case presents an interesting wrinkle because Petitioner contends that Respondent improperly allowed her to make her second election--meaning that, if she prevails, Petitioner would force a change in Respondent's administration of FRS second elections so as to restrict the freedom of choice that participants presently enjoy. Fortunately, this case does not present so close a question of law that this rule of statutory construction is dispositive.

11. Section 121.4501(4)(g) provides:

> The employee shall have one opportunity . . . 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.

12. Section 121.021(17)(b)4. provides that monthly service credit is awarded "for each month salary is paid for service performed." By this provision, the legislature chose as the unit of measurement for the determination of whether an employee is earning a service credit a month. The legislature was free to choose any unit of measurement--although the shorter the unit, the greater the administrative burden. The point is that the month is the unit of measurement for service credits, so an employee's right to make a second election is dependent on her earning service credit during the month in which the election is filed.

13. An employee performs service when her only activity during a month is taking sick or annual leave. This relationship was arguably clearer when a monthly service credit was linked to the payment of a minimum compensation amount, section 121.021(17)(b)2. and 3., but if "service performed" were to exclude all forms of compensated leave, an employee taking

paid leave of more than one month's duration would suffer a break in service.

14. As Respondent states in its proposed recommended order, an employee may make a second election only while she is an active participant in the FRS, so the election must be filed prior to the date of formal termination of employment. In the present case, Petitioner's formal date of termination was in December, so the date of termination is irrelevant.

15. Petitioner relies on Florida Administrative Code Rule 19-11.007, which provides:

> A member may make a valid 2nd election only if the 2nd election is made and processed by the Plan Choice Administrator while the member is actively employed and earning salary and service credit in an employer-employee relationship consistent with the requirements of Section 121.021(17)(b), F.S. Members on an unpaid leave of absence, terminated members, or employees of an educational institution on summer break cannot use their 2nd election until they return to covered FRS employment. In general terms, this means that the 2nd election must be made and processed while the member is actively working and being paid for that work. It is the responsibility of the member to assure that the 2nd election is received by the Plan Choice Administrator no later than 4:00 p.m. (Eastern Time) on the last business day the member is earning salary and service credit. (emphasis supplied).

16. This rule misses several opportunities to restate that the FRS unit of measurement for service credits is the month,

not the day. "While" in the first and third sentences of the rule means "during the month that." The second sentence would be clearer if "during entire months of" replaced "on" immediately before "summer break." And "of the month" should follow "day" in the fourth sentence. Further confusing matters, the reference to "actively working," rather than "actively employed," in the highlighted sentence may suggest that an employee may not earn credit by the use of paid leave, although the following sentence properly rephrases this requirement as "earning salary." This rule must be interpreted in light of the clear statutory provisions discussed above. Any interpretation of such language is going to be strained, but Respondent's interpretation is preferable to Petitioner's--without regard to the principle requiring deference, during judicial review, of an agency's interpretation of its rules. If ever they did, casually drafted rules no longer stand in the way of the efficient administrative adjudication of disputes based on the clear language of governing statutes. § 120.57(1)(e)1.

17. Based on the foregoing, it is unnecessary to address Respondent's alternative claims of waiver and a failure to satisfy the prerequisites for rescission.

RECOMMENDATION

It is

RECOMMENDED that Respondent enter a final order dismissing Petitioner's request for hearing on Respondent's denial of her request for intervention to allow her to transfer from the FRS Investment Plan to the FRS Pension Plan.

DONE AND ENTERED this 29th day of September, 2016, in Tallahassee, Leon County, Florida.

Robert E. Meale
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of September, 2016.

COPIES FURNISHED:

T. A. Delegal, III, Esquire
James C. Poindexter, Esquire
Delegal Law Offices, P.A.
424 East Monroe Street
Jacksonville, Florida 32202
(eServed)

Brian A. Newman, Esquire
Pennington, P.A.
215 South Monroe Street, Second Floor
Tallahassee, Florida 32302
(eServed)

Ash Williams, Executive Director
and Chief Investment Officer
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Post Office Box 13300
Tallahassee, Florida 32317-3300

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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