STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

SCOTT STANDLEY, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	SBA Case No. 2016-3736

FINAL ORDER

On November 6, 2017, the Presiding Officer submitted her 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 the Petitioner's counsel and upon counsel for the Respondent. Petitioner and Respondent both timely filed Proposed Recommended Orders. Petitioner timely filed Exceptions to the Recommended Order on November 9, 2017. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

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

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

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

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

Pursuant to Section 120.57(1)(l), Florida Statutes, however, a reviewing agency has the general authority to "reject or modify conclusions of law over which it has

substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." Florida courts have consistently applied the "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the presiding officer's application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the presiding officer's interpretation of a statute or rule over which the Legislature has provided the agency with administrative authority. *See Deep Lagoon Boat Club, Ltd. v. Sheridan,* 784 So.2d 1140, 1141-42 (Fla. 2d DCA 2001); *Barfield v. Dep't of Health*, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001). When rejecting or modifying any conclusion of law, the reviewing agency must state with particularity its reasons for the rejection or modification and further must make a finding that the substituted conclusion of law is as or more reasonable than that which was rejected or modified. Further, an agency's interpretation of the statutes and rules it administers is entitled to great weight, even if it is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. *See, State Bd. of Optometry v. Fla. Soc'y of Ophthalmology*, 538 So.2d 878, 884 (Fla. 1st DCA 1998). An agency's interpretation will be rejected only where it is proven such interpretation is clearly erroneous or amounts to an abuse of discretion. *Level 3 Communications v. C.V. Jacobs*, 841 So.2d 447, 450 (Fla. 2002); *Okeechobee Health Care v. Collins*, 726 So.2d 775 (Fla. 1st DCA 1998).

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides that "…an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify

the legal basis for the exception, or that does not include appropriate and specific citations to the record."

RULINGS ON PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

Petitioner takes exception to Conclusions of Law 10 through 13 of the Recommended Order as being expressly contrary to the provisions of Sections 112.3173(3) and 121.091(5)(f), Florida Statutes which state that a public employee who is found guilty of a forfeitable offense shall lose entitlement to all rights and benefits under the Florida Retirement System ("FRS"), except for the amount of accumulated contributions that such individual made to the FRS as of the date of employment termination.

As Petitioner notes, Section 121.091(5)(a), Florida Statutes, does create an entitlement to a return of accumulated employee contributions to the Pension Plan under certain conditions, and provides, in pertinent part, as follows:

> (5) TERMINATION BENEFITS.—A member whose employment is terminated prior to retirement retains membership rights to previously earned member-noncontributory service credit, and to member-contributory service credit, if the member leaves the member contributions on deposit in his or her retirement account. If a terminated member receives a refund of member contributions, such member may reinstate membership rights to the previously earned service credit represented by the refund by completing 1 year of creditable service and repaying the refunded member contributions, plus interest.
>
> (a) A member whose employment is terminated for any reason other than death or retirement before becoming vested is entitled to the return of his or her accumulated contributions as of the date of termination. Effective July 1, 2011, upon termination of employment from all participating employers for 3 calendar months as defined in s. 121.021(39)(c) **for any reason other than retirement**, a member may receive a refund of all contributions he or she has made to the pension plan, **subject to the restrictions otherwise provided in this chapter**. ***
>
> [emphasis added]

Thus, it is clear from the foregoing provisions that there may be restrictions imposed on the ability of a member to receive a return of employee contributions made to the Pension Plan. When a member transfers from the Pension Plan to the Investment Plan, the amount transferred is not the sum of employer and employee contributions made while the member was participating in the Pension Plan, but rather is the present value of the employee's accumulated benefit obligation under the Pension Plan. Section 121.4501(3)(b)(1), Florida Statutes provides, in pertinent part, as follows:

> (b) Notwithstanding paragraph (a), an eligible employee who elects to participate in the investment plan and establishes one or more individual member accounts may elect to transfer to the investment plan a sum representing the **present value of the employee's accumulated benefit obligation under the pension plan.** Upon transfer, all service credit earned under the pension plan is nullified for purposes of entitlement to a future benefit under the pension plan. A member may not transfer the accumulated benefit obligation balance from the pension plan after the time period for enrolling in the investment plan has expired.
>
> 1. For purposes of this subsection, **the present value of the member's accumulated benefit obligation is based upon the member's estimated creditable service and estimated average final compensation** under the pension plan, subject to recomputation under subparagraph 2. ***__The actuarial present value of the employee's accumulated benefit obligation shall be based on the following:__**
>
> a. The discount rate and other relevant actuarial assumptions used to value the Florida Retirement System Trust Fund at the time the amount to be transferred is determined, consistent with the factors provided in sub-subparagraphs b. and c.
>
> b. A benefit commencement age, based on the member's estimated creditable service as of the estimate date.
>
> c. Except as provided under sub-subparagraph d., for a member initially enrolled:

(I) Before July 1, 2011, the benefit commencement age is the younger of the following, but may not be younger than the member's age as of the estimate date:

(A) Age 62; or

(B) The age the member would attain if the member completed 30 years of service with an employer, assuming the member worked continuously from the estimate date, and disregarding any vesting requirement that would otherwise apply under the pension plan.

(II) On or after July 1, 2011, the benefit commencement age is the younger of the following, but may not be younger than the member's age as of the estimate date:

(A) Age 65; or

(B) The age the member would attain if the member completed 33 years of service with an employer, assuming the member worked continuously from the estimate date, and disregarding any vesting requirement that would otherwise apply under the pension plan.

* * *

e. The calculation must disregard vesting requirements and early retirement reduction factors that would otherwise apply under the pension plan.

[emphasis added]

Because the amount transferred to the member's Investment Plan account is based on the member's creditable service and estimated final compensation, the amount transferred from a member's Pension Plan account either may be less than, or more than, the sum of employer and employee contributions made, depending, in part, on the member's length of service. [Respondent's Exhibit R-9, Affidavit of Garry Green, paragraph 7]

When a member of the FRS signs a second election enrollment form to switch from the Pension Plan to the Investment Plan, the member specifically

acknowledges that he or she understands that he or she is transferring, not the total of employer and employee contributions made while a member of the Pension Plan but rather the "...present value, if any, of [the member's] existing FRS Pension benefit to the FRS Investment Plan." [emphasis added] [Petitioner's Exhibit 3, Petitioner's FRS Transfer Request (2nd Election Retirement Plan Enrollment Form), page 1]. As such, the member is cashing out his or her future Pension Plan benefit with the transfer of the member's accumulated benefit obligation to the member's new Investment Plan account. And, in fact, the 2nd Election Enrollment Plan Enrollment Form specifically notes that if a member has elected to switch from the Pension Plan to the Investment Plan, that member understands that "... any accrued value [the member] may have in the Pension Plan will be transferred to the Investment Plan as [the member's] opening balance and any Pension Plan accrued value transferred to [the member's] Investment Plan account will be subject to the vesting requirement of the FRS Pension Plan." [Petitioner's Exhibit 3, Petitioner's FRS Transfer Request (2nd Election Retirement Plan Enrollment Form), page 3].

The accumulated benefit obligation that is transferred on behalf of an FRS member who is switching from the Pension Plan to the Investment Plan is not segregated between employer and employee contributions. [Respondent's Exhibit R-9, Affidavit of Garry Green, paragraph 7]. Thus, no accumulated employee contributions that were made to the FRS Pension Plan by such a member prior to the switch to the Investment Plan continue to exist.

Section 112.3173(3), Florida Statutes, provides that forfeiture does not apply to accumulated contributions of an employee who is convicted of a specified

offense. But, as noted previously, once an FRS member, such as the Petitioner, transfers from the Pension Plan to the Investment Plan, any contributions made by such member to the Pension Plan prior to the transfer no longer continue to exist. As such, all of the funds in Petitioner's FRS Investment Plan account are subject to forfeiture.

Based on the foregoing, Petitioner's exceptions hereby are rejected *in toto*.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

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

ORDERED

The Recommended Order (Exhibit A) hereby is adopted in its entirety. Petitioner's request to receive the employee contributions he made to the FRS Pension Plan starting in July 2011 and ending when he switched to the FRS Investment Plan hereby is denied. Because those contributions became part of the present value of the Petitioner's accumulated benefit obligation ("ABO") that was transferred to the FRS Investment Plan, there are no accumulated employee contributions remaining in Petitioner's FRS Pension Plan account.

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

DONE AND ORDERED this 17th day of January, 2018, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Joan B. Haseman

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

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

Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Benjamin H. Yormak, Counsel for Petitioner, both by email transmission to byormak@yormaklaw.com and by UPS to Yormak Employment & Disability Law, 9990 Coconut Road, Bonita Springs, Florida 34135-8488; 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 17th day of January, 2018.

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

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

SCOTT STANDLEY,

Petitioner,

v. CASE NO.: 2016-3736

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on August 7, 2017, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Benjamin H. Yormak, Esq.
Yormak Employment & Disability Law
1208 Orleans Drive
Mundelein, IL 60060

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

STATEMENT OF THE ISSUE

The issue is whether Petitioner's employee contributions to the Florida Retirement System (FRS) Pension Plan, made before he changed to membership in the Investment Plan, should be forfeited due to a criminal conviction.

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner was represented by counsel at the hearing and Petitioner's exhibits 1-4 were accepted without objection. Respondent offered exhibits 1-10 which were accepted without objection. Legal argument was presented by counsel for both parties but no testimony was offered.

A transcript of the hearing was made, filed with the agency, and provided to the parties. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. Respondent and Petitioner both filed proposed recommended orders.

In his proposed recommended order, Petitioner's counsel for the first time asserted that his client's second election, by which he transferred from the FRS Pension Plan to the FRS Investment Plan, was invalid because he made it when he was on administrative leave. Pursuant to my order of October 4, 2017, Respondent supplemented its proposed recommended order and filed Respondent's exhibit 11, consisting of pay stubs and details of Petitioner's work history and wage payments. Petitioner has made no further filings with regard to this additional information, which documents that Petitioner earned service credit in the month he filed his second election and therefore submitted a valid second election in accord with Cummings v. State Board of Administration, 2016 WL 5784137 (DOAH Recommended Order September 29, 2016), Case No. 16-1947.

MATERIAL UNDISPUTED FACTS

1. Petitioner was a member of the FRS defined benefit Pension Plan for approximately 16 years by virtue of his employment with the Lee County Emergency Medical Services (EMS). As a member of the FRS Pension Plan, Petitioner made $10,486.25 in employee retirement plan contributions. Petitioner's employee contributions began in July of 2011 when a

change in law required FRS members to make contributions to their FRS retirement plan accounts.

2. On July 14, 2016, Petitioner transferred to the defined benefit FRS Investment Plan via the second election process.

3. Petitioner's transfer to the Investment Plan occurred while he was under investigation for theft of medication from his employer, Lee County EMS. During a search of Petitioner's residence, medications were located that were taken from IV kits assembled specifically for Lee County EMS. Petitioner confessed that he took the medication and medical supplies from a Lee County supply depot.

4. On January 9, 2017 Petitioner pled guilty to a single count of grand theft, a third-degree felony, for theft of the medication and medical supplies from Lee County EMS.

5. As a result of his plea, Petitioner was notified by Respondent on February 7, 2017 that his FRS Investment Plan benefits had been forfeited pursuant to Article II, Section 8(d) of the Florida Constitution and Section 112.3173(2)(e), Florida Statutes.

6. Petitioner, who was initially unrepresented by counsel, disputed the forfeiture of the entire balance of his Investment Plan account, and his petition was forwarded to the Division of Administrative Hearings for formal hearing pursuant to section 120.57(1), Florida Statutes.

7. Thereafter, Petitioner retained counsel and the parties filed a Joint Motion to Relinquish Jurisdiction back to the SBA, citing no disputed issues of fact as to whether Petitioner's FRS retirement account was subject to forfeiture due to Petitioner's criminal conviction. The parties now agree that the only issue to be resolved in this case is the legal question of whether the portions of his present Investment Plan account which represent

employee contributions Petitioner made while a member of the Pension Plan (totaling $10,486.25) are subject to forfeiture.

CONCLUSIONS OF LAW

8. The Florida Constitution makes plain that "[a]ny public officer or employee who is convicted of a felony involving a breach of the public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan in such manner as may be provided by law." ART. II, § 8(d), FLA. CONST. This provision is implemented by Section 112.3173, Florida Statutes.

9. Effective July 1, 2011, all FRS-covered employees were required to contribute 3% of their gross compensation toward their retirement plan accounts, for either the Pension Plan or the Investment Plan. §§ 121.071(2)(a), 121.4501(2)(j), 121.71(3), Fla. Stat. FRS Pension Plan members, like Petitioner, who use their second election to switch into the Investment Plan are subject to the transfer of benefits requirements of section 121.4501(3), Florida Statutes. That section states:

> **(3) Retirement service credit; transfer of benefits.—**
>
> (a) An eligible employee who is employed in a regularly established position by a state employer on June 1, 2002; by a district school board employer on September 1, 2002; or by a local employer on December 1, 2002, and who is a member of the pension plan at the time of his or her election to participate in the investment plan shall retain all retirement service credit earned under the pension plan as credited under the system and is entitled to a deferred benefit upon termination. However, election to enroll in the investment plan terminates the active membership of the employee in the pension plan, and the service of a member in the investment plan is not creditable under the pension plan for purposes of benefit accrual but is creditable for purposes of vesting.
>
> (b) Notwithstanding paragraph (a), an eligible employee who elects to participate in the investment plan and establishes one or more individual member accounts may elect to transfer to the investment plan a sum representing the present value of the employee's accumulated benefit obligation under the pension plan. Upon transfer, all service credit earned under the pension plan is nullified for purposes

of entitlement to a future benefit under the pension plan. A member may not transfer the accumulated benefit obligation balance from the pension plan after the time period for enrolling in the investment plan has expired.

1. For purposes of this subsection, the present value of the member's accumulated benefit obligation is based upon the member's estimated creditable service and estimated average final compensation under the pension plan, subject to recomputation under subparagraph 2. For state employees, initial estimates shall be based upon creditable service and average final compensation as of midnight on June 30, 2002; for district school board employees, initial estimates shall be based upon creditable service and average final compensation as of midnight on September 30, 2002; and for local government employees, initial estimates shall be based upon creditable service and average final compensation as of midnight on December 31, 2002. The dates specified are the "estimate date" for these employees. The actuarial present value of the employee's accumulated benefit obligation shall be based on the following:

a. The discount rate and other relevant actuarial assumptions used to value the Florida Retirement System Trust Fund at the time the amount to be transferred is determined, consistent with the factors provided in sub-subparagraphs b. and c.

§121.4501(3)(b), Fla. Stat. (emphasis added).

10. Petitioner's "accumulated benefit obligation" or "ABO" in the Pension Plan is representative of and inclusive of the "present value" of his creditable service. "Creditable service" includes all employee contributions made while Petitioner was a member of the Pension Plan. §121.021(17), Fla. Stat. Once a present value Pension Plan benefit obligation is calculated and transferred, the funds are no longer segregated as "employer" and "employee" contributions. The present value calculation is an actuarial determination of service credit, not of employee or employer contributions. The ABO calculation may exceed the sum of the employer and employee contributions or be less than the member's total employer and employee contributions.

11. Forfeiture does not apply to accumulated employee contributions. §112.3173(3), Fla. Stat. But Respondent has determined that when a member requests an ABO transfer to the

Investment Plan (as Petitioner did here) he is, in effect, cashing-out his accumulated employer contributions at that time, and therefore there are no accumulated employee contributions that can be segregated.

12. Respondent SBA has held uniformly that a refund of employee contributions made to the Pension Plan is not possible once a transfer to the Investment Plan has occurred. See, Tashek Hamlette v. State Board of Administration, Case No.: 2014-2996, (Recommended Order August 1, 2014; Final Order August 27, 2014); Richard Conley v. State Board of Administration; Case No. 2016-3596 (Recommended Order Sept. 9, 2016; Final Order Dec. 8, 2016); Sammy Hanafi v. State Board of Administration; Case No. 2016-3543 (Recommended Order Sept. 9, 2016; Final Order Dec. 8, 2016); Fred Horn v. State Board of Administration; Case No. 2016-3601(Recommended Order Sept. 9, 2016; Final Order Dec. 8, 2016).

13. In accord with the logic in the refund cases cited above, employee contributions no longer exist once an FRS member cashes in his future Pension Plan benefits to fund an opening Investment Plan balance. This is a harsh result which may ultimately require review by an appellate court, but Respondent SBA has been consistent in developing and applying this interpretation of the statutes it is charged with implementing. There are no accumulated contributions remaining in Petitioner's Pension Plan account, and all of the funds in his Investment Plan account are now subject to forfeiture due to his criminal conviction.

RECOMMENDATION

Having considered the law and the undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order denying the relief requested.

RESPECTFULLY SUBMITTED this 6th day of November, 2017.

Anne Longman, Esquire
Anne Longman
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
315 South Calhoun Street, Suite 830
Tallahassee, FL 32301-1872

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions must be filed with the Agency Clerk of the State Board of Administration and served on opposing counsel at the addresses shown below. The SBA then will enter a Final Order which will set out the final agency decision in this case.

Filed via electronic delivery with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
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COPIES FURNISHED via mail and electronic mail to:

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Counsel for Respondent

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

SCOTT STANDLEY, Petitioner, v. **STATE BOARD OF ADMINISTRATION,** Respondent.	**Case No. 2016-3736**

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

NOW COMES the Petitioner, by and through undersigned counsel, pursuant to section 120.57(1)(k), Florida Statutes and Rule 28-106.217 of the Florida Administrative Code, files the following exceptions to the Hearing Officer's Recommended Order, filed on November 6, 2017:

EXCEPTIONS TO ¶¶10-13

The Recommended Order's conclusions of law ignores the fact that forfeiture statutes are not favored in Florida. "They are considered harsh exactions, odious, and to be avoided when possible. Statutes imposing forfeiture will be strictly construed in a manner such as to avoid the forfeiture and will be liberally construed so as to avoid and relieve from forfeiture." *Williams v. Christian*, 335 So. 2d 358, 361 (Fla. 1st DCA 1976). Forfeiture statutes "are strictly construed in favor of the party against whom the penalty is sought to be imposed." *Cabrera v. Dep't of Nat. Res.*, 478 So. 2d 454, 456 (Fla. 3d DCA 1985); *see also Mulligan v. City of Hollywood*, 871 So. 2d 249, 252-53 (Fla. 4th DCA 2003)(*citing Williams v. Christian*). Thus, "the determinative analysis of the question before us begins, proceeds and ends with the particular terms of the authorizing statute which, because the law is said to abhor forfeitures, must be strictly

construed." *Flam v. City of Miami Beach*, 449 So. 2d 367, 368 (Fla. 3d DCA 1984)(citations omitted).

Furthermore, the Respondent has the burden of proving that retirement benefits under the Plan should be forfeited. *See Espinoza v. Dep't of Bus. & Prof'l Reg.*, 739 So. 2d 1250, 1251 (Fla. 3d DCA 1999); *see also Wilson v. Dep't of Admin., Div. of Ret.*, 538 So. 2d 139 (Fla. 4th DCA 1989); *Rivera v. Bd. of Trs. of Tampa's Gen. Empl. Ret. Fund*, 189 So. 3d 207, 210 (Fla. 2d DCA 2016). However, in this case, the Recommended Order essentially sides with the Respondent because the Respondent has previously held the same, which is erroneous as a matter of law.

"The Florida Constitution and statutes provide the framework for the forfeiture of public retirement benefits." *Simcox v. City of Hollywood Police Officers' Ret. Sys.*, 988 So. 2d 731, 733 (Fla. 4th DCA 2008). The assertion that a member loses entitlement to a refund of his own contributions when he switches from the Pension Plan to the Investment plan does not comport with the express provisions of Florida law. For example, with regard to the funding of benefits Section 121.70(1) provides:

> (1) This part provides for a uniform system for funding benefits provided under the Florida Retirement System Pension Plan established under part I of this chapter (referred to in this part as the pension plan) and under the Florida Retirement System Investment Plan established under part II of this chapter (referred to in this part as the investment plan). The Legislature recognizes and declares that the Florida Retirement System is a single retirement system, consisting of two retirement plans and other nonintegrated programs.

Section 121.091(5)(a), Florida Statutes, creates an entitlement to the return of accumulated employee contributions. Likewise, Section 121.04501(6)(a) makes an Investment Plan member fully and immediately vested in all employee contributions paid to the Investment Plan, plus interest and earnings. Similarly, Section 112.3173(3) also makes crystal clear that, even when a

member is convicted of a specified offense, he forfeits the *employer* contribution, but he is still nevertheless entitled to "the return of his or her accumulated contributions as of the date of termination." Florida law makes no distinction between the Pension Plan and the Investment Plan. Florida law expressly makes the employee contributions which were required as of 2011, when the mandatory FRS system changed from noncontributory to contributory, refundable.

The Respondent asserts, and the Recommended Order finds, that because an accumulated benefit obligation calculated based on creditable service and average final compensation is the amount transferred to the Investment Plan when a member switches plans, and because that amount is not divided into employer and employee contributions, no refund may be had. But the assertion that a member loses entitlement to refund of his own contributions when he switches from the Pension Plan to the Investment Plan does not comport with the express provisions of the Florida Statutes cited above, and in fact, such a position is directly contrary to Sections 112.3173(3) and 121.091(5)(f). Nothing eliminates or disqualifies the Petitioner's entitlement to a refund.

This is reiterated on the MyFRS website section comparing the two plans as to vesting.[1] For the Pension Plan:

> Employee contributions are always 100% vested. This means that if you terminate employment prior to meeting the vesting requirements of the Pension Plan, you will be entitled to a refund of your employee contributions. However, taking such a refund may not be a sound financial decision because, if you return to FRS employment at a later date and wish to restore all service associated with the refund, you will be required to work for 1 year to become eligible to purchase back the refunded service plus interest. (Emphasis added).

For the Investment Plan:

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[1] *See* https://www.myfrs.com/FRSPro_ComparePlan_Vesting.htm.

> Employee contributions are always 100% vested. This means that if you terminate employment prior to meeting the vesting requirements of the Investment Plan, you will be entitled to a distribution of your employee contributions.

As can be seen from the above, the Respondent's position that once a 2nd Election Form is completed a member loses entitlement to a refund of their own contributions is without merit. The Respondent's website makes clear that should a member in the Investment Plan terminate their employment prior to becoming vested, they nevertheless are *still* entitled to a refund of their own contributions, which belies the Respondent's position it attempts to advance here that no refund is due upon becoming a member of the Investment Plan.

To refuse the Petitioner a refund of his own employee contributions is simply inconsistent with the applicable statutes and is contrary the intent expressed by the legislature that the FRS be a unified system and that employee contributions are refundable. It makes no sense that a transfer from the Pension Plan to the Investment Plan would nullify the express requirements of statute and expressed legislative intent, leading to the anomalous result that Pension Plan members who transfer to the Investment Plan and then terminate are the only FRS members who get nothing from their own contributions, in stark contract to the guarantees of Sections 112.3173(3) and 121.091(5)(f).

Section 121.091(5)(f) remains in effect today, and we must give effect to that statute in combination with section 112.3173. *See Fla. Dep't of State, Div. of Elections v. Martin*, 916 So. 2d 763, 768 (Fla. 2005) ("The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent.") (citation omitted).

Each section of Florida Statutes make clear that forfeiture is appropriate, *except* for the return of the member's personal contributions and those sections *must* be followed. That is to say, in

this case, the Petitioner is due the return of his own FRS contributions. This is consistent with the Fourth District Court of Appeals' decision in *Childers v. Dep't of Mgmt. Servs., Div. of Ret.*, 989 So. 2d 716 (Fla. 4th DCA 2008), where the appropriate remedy was "forfeiture of all of the employee's rights and benefits under the FRS, *excepting the return of accumulated contributions*." *Id.*, at 718 (emphasis added); *see also Bollone v. Dep't of Mgmt. Servs.*, 100 So. 3d 1276 (Fla. 1st DCA 2012); *Hames v. City of Miami Firefighters' & Police Officers' Trust*, 980 So. 2d 1112, 1114 (Fla. 3d DCA 2008)(public employee forfeits all rights to receive public retirement benefits in excess of his or her accumulated contributions if convicted of a specified offense committed prior to retirement); *Maradey v. State Board of Administration*, DOAH Case No. 13-4172 (2013)(finding forfeiture *except* for member's contributions); *Zeh v. Board of Trustees of the City of Longwood Police Officers' and Firefighters' Pension Trust Fund*, DOAH Case No. 14-0870 (2014)(same); *Combs v. State Board of Administration*, DOAH Case No. 15-6633 (2015)(same).

The Respondent must comply with the Florida Statute creating and governing the Florida Retirement System. *Balezentis v. Department of Management Services, Division of Retirement*, 2005 WL 517476 (Fla. Div. Admin. Hrgs.). For the reasons discussed *supra*, the Petitioner is entitled to a refund of his member contributions to FRS and these exceptions are due to be granted.

CONCLUSION

The Recommended Order incorrectly applies the law governing refunds to member contributions to their FRS account. The incorrect interpretations of law are due to be rejected and the Petitioner is entitled to a refund of his member contributions to FRS. For the reasons discussed herein, these exceptions are due to be granted.

Respectfully submitted,

Dated: November 9, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 9, 2017, a true and correct copy of the foregoing has been furnished by email to:

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