STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

ANGELIA SHERIDAN,
Petitioner,
vs.
STATE BOARD OF ADMINISTRATION,
Respondent.

Case No. 2011-2100

FINAL ORDER

On December 5, 2011, the presiding officer submitted her Recommended Order to the State Board of Administration in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Angelia Sheridan, and upon counsel for the Respondent. Both Petitioner and Respondent filed a Proposed Recommended Order. Petitioner timely filed exceptions on December 19, 2011. 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.

PRELIMINARY STATEMENT

The State Board of Administration adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order.

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."

The findings of fact in a recommended order 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.

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."

RULINGS ON PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

Petitioner's Exception 1: Exception to Conclusions of Law 5-7

Petitioner objects to the Conclusions of Law 5 through 7 to the extent that they state that an FRS employee must be "actively employed" with an FRS-participating employer at the time a second election to enroll in the FRS Investment Plan is submitted. Petitioner states

that the removal of certain language from the 2009 version of current Section 121.4501(4)(g), Florida Statutes (formerly, Section 121.4501(4)(e), Florida Statutes) proves that the "actively employed" requirement has been eliminated.

A review of the two versions demonstrates Petitioner's position is without merit. In 2009, Section 121.4501(4)(e), Florida Statutes (hereafter referred to as "2009 Version"), stated in pertinent part as follows:

> ....Eligible employees may elect to move between Florida Retirement System programs **only if they are earning service credit in an employer-employee relationship** consistent with the requirement under s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections shall be effective on the first day of the month following the receipt of the election by the third party administrator and are not subject to the requirements regarding an employer-employee relationship or receipt of contributions for the eligible employee **in the effective month**, except that the employee must meet the conditions of the previous sentence when the election is received by the third party administrator.... [emphasis added]

.

In 2011, subsection (e) of Section 121.4501(4) was renumbered to subsection (g), and now provides, pertinent part, as follows (hereafter referred to as "2011 Version"):

> ....Eligible employees may elect to move between plans **only if they are earning service credit in an employer-employee relationship** consistent with s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections shall be effective on the first day of the month following the receipt of the election by the third party administrator and are not subject to the requirements regarding an employer-employee relationship or receipt of contributions for the eligible employee **in the effective month**, except when the election is received by the third party administrator.... [emphasis added]

.

In both the 2009 Version and the 2011 Version, it is clear that in order to make a valid second election to move from the FRS Pension Plan to the FRS Investment Plan, the member

must be "earning service credit in an employer-employee relationship." In both the 2009 Version and the 2011 Version, it is also clear that while an employee must be earning service credit when the second election form is received, such an employee does not need to be earning service credit on the "effective date" of that second election (the "effective date" is the first day of the month following the receipt of the employee's second election). The removal of the words "that the employee must meet the conditions of the previous sentence" in the 2011 Version does not reflect any change in meaning between the 2009 Version and the 2011 Version, but rather simply serves to eliminate some unnecessary language that existed in the 2009 Version.

Further, as the Recommended Order notes in Conclusion of Law 13, the Respondent's application and construction of Chapter 121, Florida Statutes are entitled to great weight and are to be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. *See, 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). Petitioner has failed to prove that Respondent's construction and application of Section 121.4501(4), Florida Statutes is clearly erroneous or an abuse of discretion.

Accordingly, Petitioner's Exception 1 hereby is rejected.

Petitioner's Exception 2: Exception to Conclusions of Law 8-11

Petitioner objects to the presiding officer's conclusions that whether the Respondent sought Internal Revenue Service ("IRS") approval in the form of a private letter ruling as to whether any of the extensive 2011 amendments made to the statutes governing the FRS would cause the FRS to be disqualified for tax purposes is irrelevant to the Petitioner's situation. Petitioner cites no legal basis for her exception. Further, a review of the statutory

provisions pertaining to the FRS Investment Plan demonstrates that the presiding officer's conclusions are correct.

The FRS Investment Plan, formerly known as the Public Employee Optional Retirement Program, was originally effective on July 1, 2002. When the law requiring the establishment of the FRS Investment Plan was enacted, Section 121.4501(4)(e), Florida Statutes (2001) provided as follows:

> After the period during which <u>an eligible employee</u> had the choice to elect the defined benefit plan [i.e., the FRS Pension Plan] or the Public Employee Optional Retirement Program [the FRS Investment Plan], the employee shall have one opportunity, at the employee's discretion, to choose to move from the defined benefit program to the Public Employee Optional Retirement Program, or from the Public Employee Optional Retirement Program to the defined benefit program. <u>This paragraph shall be contingent upon approval from the Internal Revenue Service for including the choice described herein within the programs offered by the Florida Retirement System</u>. [emphasis added]

The purpose of Section 121.4501(4)(e) requiring the approval from the IRS was to ensure that neither the election to participate in either the FRS Pension Plan or the FRS Investment Plan (hereafter "Plans"), nor the limited ability of participants in one such plan to elect to move from one plan to the other and the transfer of assets in connection with such election, would result in currently taxable income to the participant under Code section 72 or Code section 402, or result in imposition of the early distribution tax under Code section 72(t). The FRS Investment Plan received an initial determination letter from the Service on its qualified status on January 22, 2002. Thus, IRS approval was properly obtained in full compliance with the statutory requirement.

At the time of this initial determination letter, Section 121.4501(4)(e), Florida Statutes (2001), likewise required an FRS employer to be "actively employed" by an

FRS-participating employer since it permitted second elections only by "eligible employees." Under Section 121.4501(2)(d), Florida Statutes (2001), an "eligible employee" was:

> ...an officer or employee, as defined in s. 121.021(11), who:
>
> 1. Is a member of, or is eligible for membership in, the Florida Retirement System;
>
> 2. Participates in, or is eligible to participate in, the Senior Management Service Optional Annuity Program as established under s. 121.055(6); or
>
> 3. .Is eligible to participate in, but does not participate in, the State University System Optional Retirement Program established under s. 121.35 or the State Community College System Optional Retirement Program established under s. 121.051(2)(c).

The definition of "officer" or "employee" set forth under Section 121.021(11), Florida Statutes was as follows"

> "...any person receiving salary payments for work performed in a regularly established position and, if employed by a city or special district, employed in a covered group. [emphasis added]

Since at the time the initial determination letter was obtained, Section 121.4501, Florida Statutes required an employee to be actively employed in order to submit a second election, and that particular requirement has not changed up to and including the current version of that statutory provision, the Respondent is not required to show that the 2011 version of the statute has obtained additional IRS approval in order for such provision to be operative. Further, the substantive terms of the FRS Investment Plan have

not changed until the 2011 amendments, so there was no need to secure a new determination letter in the interim.[1]

. In her exception, Petitioner cites only section (1) of the Amendment Note (hereafter "Note") set forth by Section 41, chapter 2011-68, Laws of Florida, which imposes a requirement that a determination letter and a private letter ruling be obtained from the IRS. She does not set forth section (2) of the Note which provides in pertinent part:

> (2) If the board [SBA] or the department {Department of Management Services] receives notification from the United States Internal Revenue Service that this act or any portion of this act will cause the Florida Retirement System or a portion thereof to be disqualified for tax purposes under the Internal Revenue Code, then the portion that will cause disqualification does not apply... [emphasis added]

"This act" refers to SB 2100 as enacted by the Florida legislature, codified as Chapter 2011-28, Laws of Florida (2011) which amended the Florida Statutes relating to the Plans to provide for mandatory employee contributions to the Plans which will be picked up by participating employers and treated as employer contributions. *See* Section 121.0171(2)(a), Florida Statutes, as amended (requiring employee contributions to the FRS Pension Plan) and section 121.571(1), Florida Statutes, as amended (requiring employee contributions to the FRS Investment Plan). SB 2100 did not make any amendments to the requirements that an employee be actively employed in order to submit a second election.

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[1] In the abundance of caution, and in case of changes in Federal law or interpretations thereof, the Respondent did submit a request for a determination letter to the IRS in September 2008, to ensure that the FRS Investment Plan still met the requirements for qualification under Section 401(a) of the Internal Revenue Code. That request is still pending with the IRS. *See*, Transcript, pg. 30.

At the time of the 2001 IRS revenue ruling request, there were no employee contributions, picked up or otherwise, that were being paid into the FRS Pension Plan and the FRS Investment Plan, other than employee contributions to purchase past service under the FRS Pension Plan or to make up any additional payment when an election to transfer from the FRS Investment Plan to the FRS Pension Plan required a payment in excess of the amount available to be transferred from the FRS Investment Plan. As such, a new revenue ruling referred to in the Note would need to address only these new mandatory employee contributions into the FRS pursuant which each participating employer "picks up." This new ruling, which was requested in October 2011, sought a determination that these mandatory employee contributions: (1) will be considered employer contributions within the meaning of Internal Revenue Code (the "Code") section 414(h)(2) with corresponding federal income tax treatment, and (2) will not adversely affect the ability of the State to rely on the 2001 private letter ruling issued by the IRS to the effect that neither the election to participate in either the FRS Pension Plan or he FRS Investment Plan, nor the limited ability of participants in one such plan to elect to move from one plan to the other and the transfer of assets in connection with such election, will result in currently taxable income to the participant under Code section 72 or Code section 402, or result in imposition of the early distribution tax under Code section 72(t).

Regardless of the outcome of this new ruling, it will have no impact on the Petitioner's situation, since Petitioner's situation does not involve mandatory employee contributions.

Accordingly, Petitioner's Exception 2 hereby is rejected.

Petitioner's Exception 3: Exception to Conclusion of Law 12 and 13:

The Petitioner states, without any legal analysis and without any discussion, that she disputes any implications in Conclusions of Law 11 and 12 that the Respondent has implemented Chapter 121, Florida Statutes in accordance with the requirements set forth therein.

As Petitioner has failed to identify the legal basis for the exception, Petitioner's Exception 3 hereby is rejected.

Petitioner's Exception 4: Exception to Conclusion of Law 13

The Petitioner disputes the presiding officer's conclusion that the laws pertaining to the FRS must be "consistently applied" by the SBA to all participants. Petitioner makes the assertion, without any explanation or citations, that Federal law requires Respondent to make "reasonable accommodations" for her disability with respect to her FRS election, and that she was afforded no such accommodation since she was not permitted to make a second election after she was terminated. She asserts the denial of her second election was a "penalty" for being disabled. Petitioner seems to be asserting that the reasonable accommodations provisions set forth under Federal law would allow her to have certain privileges that other members of the FRS who are not disabled specifically are denied from having by statute, and that the Respondent thereby is required to ignore state law in her specific situation. Petitioner does not provide any statutory or case law to support her assertion. Petitioner's assertion appears to be at odds with Federal law. For example, the Americans with Disabilities Act requires employers to provide "...reasonable accommodations so that employees with disabilities can enjoy the 'benefits and privileges

of employment' equal to those enjoyed by similarly-situated employees without disabilities." *See, The U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (October 2002), p. 11 [emphasis added].* Petitioner has not alleged how her disability prevented her from being able to switch to the FRS Investment Plan. In fact, as the presiding officer notes in Conclusion of Law 5, the Petitioner in 2006 did seek assistance from the MYFRS Guidance Line with comparing the FRS Pension Plan and the FRS Investment Plan, and in 2010 she did ask for help logging into the MyFRS.com website, where she would be able to compare the two Plans, and to elect to move to the Investment Plan if she so chose. Petitioner has not alleged that she was not provided with appropriate assistance. Petitioner could have made the election to switch at either of these times, or any time subsequent up to the day of her termination. Petitioner had the same opportunity, as any other eligible employee, to make her second election up to the time of termination of employment. It was not Petitioner's disability that prevented her ability to switch plans but rather her alleged unexpected termination that caused the inability to switch. The Respondent had no control over Petitioner's termination- the termination was solely within the purview of her employer. Any dispute regarding Petitioner's alleged unexpected termination needs to be addressed in another tribunal.

The Respondent SBA has issued numerous Final Orders which specifically found that, pursuant to Section 121.4501(4), Florida Statutes, a second election is valid only when the employee is actively employed when the second election is submitted. *See, e.g., Lesley Dumas* v. *State Board of Administration*, SBA Case 2010-1960 (Final Order issued April 25, 2011); *Juan M. Cordova v. State Board of Administration,* SBA Case 2010-

1687 (Final Order issued July 9, 2010); *Amanda Ferreira v. State Board of Administration*, SBA Case 2008-1401 (Final Order issued August 5, 2009); *Daniel Alonso* v. *State Board of Administration*, SBA Case 2007-982 (Final Order issued June 25, 2008); *Nichole Bailey* v. *State Board of Administration*, SBA Case 2006-702 (Final Order issued February 20, 2008). By state law, the Respondent is required to be consistent in its application of the applicable statutory provisions. *See, Amos v. Department of Health and Rehabilitative Services*, 444 So.2d 43, 45 (Fla. 1st DCA 1983), which held that inconsistent results in similar cases, without justification could violate Chapter 120, Florida Statutes (the Administrative Procedures Act) and the equal protection clauses of both the Florida and United States Constitutions. The court noted that persons affected by agency action have "right to locate precedent and have it apply." *Id.*

Petitioner has not provided any legal argument to show that there is any Federal law that would require or that would permit the Respondent to ignore state law in this case.

Accordingly, Petitioner's Exception 4 hereby is rejected.

Petitioner's Exception 5: Exception to Conclusion of Law 6

Petitioner objects to the presiding officer's conclusion that Section 120.542, Florida Statutes which permits variances and waivers is not applicable in this case. Section 120.52(21), Florida Statutes defines "variance" for the purposes of Chapter 120, Florida Statutes (the Administrative Procedure Act) as "... a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule...." [emphasis added]. Section 120.52(22), Florida Statutes

defines waiver as "...a decision by an agency not to apply all or part of a rule to a person who is subject to the rule. It is clear that Section 120.542, Florida Statutes only applies when a rule is involved. Petitioner has not alleged any rule was at issue in the instant matter. There are no provisions in Section 120.542, Florida Statutes that would allow the Respondent to modify or to not apply any statutory provisions. The accepted rule in Florida is that administrative agencies may only employ powers which are expressly authorized by statute or necessarily implied from such express powers. *State v. Atlantic Coast Line R. Co.*, 47 So. 969 (Fla.1908). *See also*, *East Central Regional Wastewater Facilities Operations Bd. v. City of West Palm Beach*, 659 So.2d 402 (Fla. 4th DCA 1995); *State Dept. of Environmental Regulation v. Puckett Oil Co.*, 577 So.2d 988 (Fla. 1st DCA 1991); *State ex rel. Greenberg v. Florida State Board of Dentistry*, 297 So.2d 628 (Fla. 1st DCA 1974), *cert. dismissed*, 300 So.2d 900 (Fla.1974). Administrative agencies are also constrained not to expand their authority beyond that provided in the statutory grant, nor to amend such provisions. *State, Department of Environmental Regulation v. Falls Chase Special Taxing District*, 424 So.2d 787 (Fla. 1st DCA 1982), *pet. for rev. den.*, 436 So.2d 98 (Fla.1983). *See also, Rinella v. Abifaraj*, 908 So.2d 1126 (Fla. 1st DCA 2005); *Department of Transportation v. James*, 403 So.2d 1066 (Fla. 4th DCA 1981). If any doubt exists as to whether a particular power has been statutorily granted, such doubt must be resolved against the employment of that power. *State v. Atlantic Coast Line R. Co. supra*; *State ex rel. Greenberg v. Florida State Board of Dentistry, supra.* Thus, the powers of administrative agencies must affirmatively appear from the enactment under which they claim to act. There is no power granted to

Respondent in Section 120.542, Florida Statutes that would allow the Respondent to modify or to not apply any statutory provisions

Additionally, a general and well-recognized rule of statutory construction is that the mention of one thing in a statute implies the exclusion of another--*expressio unius est exclusio alterius*. *See*, *Thayer v. State*, 335 So.2d 815, 817 (Fla. 1976); *Dobbs v. Sea Isle Hotel,* 56 So.2d 341 (Fla. 1952); and *Ideal Farms Drainage District v. Certain Lands*, 19 So.2d 234 (Fla. 1944). Because Section 120.542, Florida Statutes only mentions "rule" in its provisions, it can be concluded that the Legislature did not intend for an administrative agency to have the power to grant variances and waivers from statutory provisions.

Accordingly, Petitioner's Exception 5 hereby is rejected.

ORDERED

The Recommended Order (Exhibit A) hereby is adopted in its entirety. The Petitioner's request that she be entitled to utilize her second election to transfer from the FRS Pension Plan to the FRS Investment Plan even though she is not presently employed by an FRS-participating agency in a regularly established position is hereby denied.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the State Board of Administration in the Office of the General Counsel, State Board of Administration, 1801 Hermitage Boulevard, Suite 100, Tallahassee, Florida, 32308, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District

Court of Appeal. The Notice of Appeal must be filed within thirty (30) days from the date the Final Order is filed with the Clerk of the State Board of Administration.

DONE AND ORDERED this 6th day of January, 2012, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Ron Poppell, Senior Defined Contribution
Programs Officer
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 by U.S. mail to Angelia Sheridan, pro se, [redacted], and by U.S. mail to Brian Newman and Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 6th day of January, 2012.

Ruth A. Smith

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

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ANGELIA SHERIDAN,

Petitioner,

vs. CASE NO. 2011-2100

STATE BOARD OF ADMINISTRATION,

Respondent.

______________________________________/

RECOMMENDED ORDER

This case came before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on August 17, 2011, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Angelia Sheridan,

For Respondent: Brian A. Newman, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue is whether Petitioner may utilize her second election to transfer from the Florida Retirement System (FRS) Pension Plan to the FRS Investment Plan while not employed by an FRS-covered agency.

PRELIMINARY STATEMENT

Petitioner filed a request for intervention with the SBA on or after May 5, 2011 asking that she be allowed to make a second election to join the Investment Plan even though she did not submit a second election form before terminating FRS-covered employment. That request was denied by letter from Daniel Beard, SBA Director of Policy, Risk Management, & Compliance, citing applicable statutes. Petitioner then filed a Petition for Hearing requesting the same relief, and this hearing followed.

Petitioner, who is an attorney, attended the hearing via telephone, testified on her own behalf, and represented herself in this proceeding. Respondent presented the testimony of Petitioner and of Mr. Beard. Respondent's Exhibits R-1 through R-4 were admitted without objection at hearing, and Respondent's supplemental Exhibits R-5 and R-6 were submitted after hearing and admitted without objection.

A transcript of the hearing was filed with the agency and provided to the parties, who were invited to submit proposed recommended orders. Both Petitioner and Respondent submitted proposed recommended orders.

MATERIAL UNDISPUTED FACTS

1. Petitioner was employed by the [redacted] in 1996 and 1997

and began FRS-covered employment with the [redacted] in 2001.

2. When the FRS Investment Plan began, Petitioner was given an opportunity in 2002 to make an initial election to join that plan or remain in the FRS Pension Plan. After speaking with a counselor on the MyFRS Financial Guidance Line on August 13, 2002, Petitioner made an affirmative election to remain in the Pension Plan.

3. In February 2011, Petitioner was placed on medical leave. Petitioner's FRS-covered employment was terminated on March 24, 2011, while she was on medical leave.

4. Petitioner called the MyFRS Financial Guidance line on March 30, 2011, stated her desire to change to the Investment Plan, and was told that she had to be earning service credit on the day her second election form was processed in order to make a valid second election.

CONCLUSIONS OF LAW

5. To make a valid second election to move from the Pension Plan to the Investment Plan, the member must be earning service credit in an employer-employee relationship with an FRS-covered employer when the second election is made. Section 121.4501(4)(g), Florida Statutes (2011) provides:

> After the period during which an eligible employee had the choice to elect the pension plan or the investment plan, or the month following the receipt of the eligible employee's plan election, if sooner, the employee shall have one opportunity, at the employee's discretion, to choose to move from the pension plan to the investment plan or from the investment plan to the pension plan. Eligible employees may elect to move between plans only if they are earning service credit in an employer-employee relationship consistent with s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections are effective on

> the first day of the month following the receipt of the election by the third-party administrator and are not subject to the requirements regarding an employer-employee relationship or receipt of contributions for the eligible employee in the effective month, except when the election is received by the third-party administrator. This paragraph is contingent upon approval by the Internal Revenue Service.

(Emphasis added). Petitioner did not inquire about using her second election until March 30, 2011. By March 30, 2011, she had already been unexpectedly terminated on March 24, 2011, and was no longer earning service credit in an employer-employee relationship -- so although Petitioner had over eight years to use her second election to change from the Pension Plan to the Investment Plan, she had no opportunity to do so after learning that she would be terminated. (Although not discussed in either party's proposed recommended order, I note that Exhibit 4 contains a phone log of contacts between the MyFRS Guidance Line and Petitioner. It shows two calls on April 4, 2006 where Petitioner received assistance with comparing the Pension Plan and Investment Plan and with the beneficiary rules, and a call on May 11, 2010 where she requested help logging into the system.) The above statute provides no way for Petitioner to make a valid second election unless she is once again employed by an FRS participating entity. Petitioner has testified that it is unlikely that she will be able to return to employment due to her increasingly failing health, and therefore will likely not ever be able to use her second election.

6. Petitioner contends that the facts and circumstances of this case warrant a waiver or variance of the active employment requirement under section 120.542, Florida Statutes. Section 120.542 authorizes an agency to depart from the requirements of a rule under certain circumstances. Here, however, it is the above-referenced statutes governing second elections,

not an SBA rule, which preclude the agency from granting Petitioner the relief she seeks. As such, section 120.542 has no application in this proceeding.

7. Petitioner also argues that an amendment to section 121.4501 in 2011 (as compared to the 2009 version of the statute) relieves her of the obligation to be actively employed and earning service credit to submit a valid second election. In 2009, Section 121.4501(4)(e), Florida Statues stated:

> After the period during which an eligible employee had the choice to elect the defined benefit program or the Public Employee Optional Retirement Program, or the month following the receipt of the eligible employee's plan election, if sooner, the employee shall have one opportunity, at the employee's discretion, to choose to move from the defined benefit program to the Public Employee Optional Retirement Program or from the Public Employee Optional Retirement Program to the defined benefit program. Eligible employees may elect to move between Florida Retirement System programs only if they are earning service credit in an employer-employee relationship consistent with the requirements under s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections shall be effective on the first day of the month following the receipt of the election by the third-party administrator and are not subject to the requirements regarding an employer-employee relationship or receipt of contributions for the eligible employee in the effective month, except that the employee must meet the conditions of the previous sentence when the election is received by the third-party administrator. This paragraph shall be contingent upon approval from the Internal Revenue Service for including the choice described herein within the programs offered by the Florida Retirement System.

(Emphasis added). The 2011 version of the underlined portion of the same section reads:

> 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.

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The very slight wording difference between the 2009 and 2011 versions of the applicable statute creates no material difference in meaning; both require the FRS member to be actively employed by an FRS-covered employer when a second election is submitted.

8. The extensive 2011 amendments to the statutes governing the Florida Retirement System also required, at Section 41 of Chapter 68-2011, Laws of Florida, that the SBA request ongoing approval in the form of a private letter ruling from the IRS or a legal opinion from a qualified tax attorney, with regard to whether any part of the act would cause the FRS or any part of it to be disqualified for tax purposes under the Internal Revenue Code. If the IRS notifies the SBA that a portion of the act will cause disqualification under the Code, then the portion that would cause the disqualification does not apply.

9. Petitioner contends that Respondent SBA last complied with this requirement in 2001 and 2002 and has not done so with regard to the 2011 amendments, and that this compels SBA to allow her to be relieved from the statutory requirement that she be actively working when submitting a second election. But as referenced above and discussed in more detail below, the 2011 amendments did not alter the active employment requirement, and so whether the SBA has once again sought or obtained IRS approval is irrelevant to this proceeding.

10. In 2001, Section 120.4501(4)(e), Florida Statutes provided:

> After the period during which <u>an eligible employee</u> had the choice to elect the defined benefit program or the Public Employee Optional Retirement Program, the employee shall have one opportunity, at the employee's discretion, to choose to move from the defined benefit program to the Public Employee Optional Retirement Program or from the Public Employee Optional Retirement Program to the defined benefit program. This

> paragraph shall be contingent upon approval from the Internal Revenue Service for including the choice described herein within the programs offered by the Florida Retirement System.
> 1. If the employee chooses to move to the Public Employee Optional Retirement Program, the applicable provisions of this section shall govern the transfer.
> 2. If the employee chooses to move to the defined benefit program, the employee must transfer from his or her Public Employee Optional Retirement Program account and from other employee moneys as necessary, a sum representing all contributions that would have been made to the defined benefit plan for that employee and the actual return that would have been earned on those contributions had they been invested in the defined benefit program.

(Emphasis added). An "eligible employee," in 2001, was defined by section 121.4501(2)(d) as:

> (d) "Eligible employee" means an officer or employee, as defined in s. 121.021(11), who:
> 1. Is a member of, or is eligible for membership in, the Florida Retirement System;
> 2. Participates in, or is eligible to participate in, the Senior Management Service Optional Annuity Program as established under s. 121.055(6); or
> 3. Is eligible to participate in, but does not participate in, the State University System Optional Retirement Program established under s. 121 .35 or the State Community College System Optional Retirement Program established under s. 121.051(2)(c).

(Emphasis added). Section 121.021(11), Florida Statutes (2001) provided:

> "Officer or employee" means any person receiving salary payments for work performed in a regularly established position and, if employed by a city or special district, employed in a covered group.

11. In the 2001 version of the relevant statute, section 121.4501, by reference to section 121.021(11), required active FRS-covered employment to submit a valid second election, and there has been no substantive change to this requirement since IRS approval was obtained. I

cannot conclude that the law forbids the SBA from applying this requirement, in the absence of any indication from the IRS that it is a disqualifying provision.

12. Respondent SBA is charged with implementing Chapter 121, Florida Statutes, and is not authorized to depart from the requirements of those statutes when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). Petitioner asserts, without elaboration or citation to case law, that "the Americans with Disabilities Act, the Family and Medical Leave Act and federal common law" require the SBA to grant Petitioner's request, based on the circumstances of her disability and termination. The record shows that Petitioner was on approved medical leave during the days leading up to her termination, and I note as well that the record contains references to ongoing disputes with her former employer which ultimately could conceivably provide redress as to the circumstances of her termination and therefore impact her FRS status. But this tribunal has no jurisdiction to address those issues, and there are no facts before me at present that provide a basis for negating the Florida statutory requirements regarding second elections.

13. Respondent's construction and application of Chapter 121 are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. See, 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). The SBA's construction and application of the active employment requirement for second elections has been consistent since the beginning of the Investment Plan, and the applicable statutes place a clear

obligation on Petitioner to submit a second election while employed by an FRS-covered employer. It is unfortunate that Petitioner did not exercise her second election in the years preceding her disability, and that she now can access her FRS retirement assets only through her Pension Plan benefit, but this is the statutory structure of the Florida Retirement System, and the SBA must apply it consistently as to all FRS participants.

RESPECTFULLY SUBMITTED this 5th day of December, 2011.

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

NOTICE: 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, which 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 with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
(850) 488-4406

This 5th day of December, 2011.

Copies furnished to:

Angelia J. Sheridan
[redacted]
Petitioner

Brian A. Newman, Esquire
Brandice D. Dickson
Pennington, Moore, Wilkinson Bell & Dunbar
Post Office Box 10095
Tallahassee, FL 32302-2095
Attorneys for Respondent

[signature]
Attorney

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GENERAL COUNSEL'S OFFICE

STATE OF FLORIDA
FLORIDA STATE BOARD OF ADMINISTRATION

ANGELIA J. SHERIDAN,
Petitioner,

v.

STATE BOARD OF ADMINISTRATION, CASE NO. 2011-2100
Respondent.
_________________________________/

PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

Comes now the Petitioner, Angelia Sheridan, pursuant to Section 120.57, Florida Statutes and files Petitioner's Exceptions to the Recommended Order issued December 5, 2011, by the Presiding Officer, Anne Longman, Esquire, for The State Board of Administration. Pursuant to Fla. Adm. Code R. 28-106.217, Petitioner takes issue with the conclusions of law reached by the Administrative Law Judge, identifies the disputed portion of the recommended order by page number and paragraph, identifies the legal basis for her exceptions, and cites the record as appropriate.

Exception No. 1 to the recommended Conclusion of Law, Page 3 - 6, Paragraphs 5 through 7, as set forth in the Administrative Law Judge's Recommended Order, pursuant to Section 120.57, Fla. Stat.

Petitioner disputes the conclusion that, " an FRS member is required to be actively employed by an FRS-covered employee when a second election is submitted." That is the SBA's misinterpretation of the statute. Petitioner complied with the requirements of Section 121.4501(4)(g, *formerly e*) Florida Statues, 2009, 2010 and 2011. Petitioner pointed out that the removal of the 2009 requirement, conclusively resolved and nullified the SBA's interpretation. The requirement deleted after 2009 stated, "... the employee must meet the conditions of the previous sentence when the election is received by the third-party administrator." The "previous sentence" referred to in the deleted portion of the statute refers to that sentence underlined in Paragraph 7 of the Recommended Order, by the ALJ in the 2009 and 2011 versions. The removal of the requirement means that an employee in 2011 is not required to meet those conditions when

the election is received by the third-party administrator. There exists no prudent, thoughtful nor reasonable rationale for the SBA's interpretation of a timing requirement prohibiting Petitioner's second election.

Exception No. 2 to the recommended Conclusion of Law, Pages 6 - 8, Paragraphs 8 through 11, as set forth in the Administrative Law Judge's Recommended Order, pursuant to Section 120.57, Fla. Stat.

Petitioner disputes the conclusion at Paragraph 11 that, "the law (does not forbid) the SBA from applying this requirement, in the absence of any indication from the IRS that it is a disqualifying condition." Contrarily, Section 121.4501(4)(g), Florida Statues (2011), clearly states, **"This paragraph is contingent upon approval by the Internal Revenue Service."** (Emphasis added.) **Yet, the SBA did not obtain approval from the IRS for this paragraph.** Moreover the SBA did not comply with footnote one of Section 121.4501, Florida Statues (2011), which states,

> "[1]Note.—Section 41, ch. 2011-68, provides that:
>
> "(1) Effective upon this act becoming a law, the State Board of Administration and the Department of Management Services shall request, as soon as practicable, a determination letter and private letter ruling from the United States Internal Revenue Service. If the United States Internal Revenue Service refuses to act upon a request for a private letter ruling, then a legal opinion from a qualified tax attorney or firm may be substituted for such private letter ruling." Again, the SBA failed to comply with the legislature's requirement.

The SBA rigidly enforces its misinterpretation of a timing requirement in Section 121.4501(e) resulting in catastrophic effect on me, a long term disabled senior employee. Yet, the SBA has repeatedly failed to comply with the Florida Legislature's repeated instruction for the SBA to obtain approval of the Section and subsection. See testimony of Mr. Beard, transcript pages 30 through 38.

Exception No. 3 to the recommended Conclusion of Law, Pages 8 and 9, Paragraphs 12 and 13, as set forth in the Administrative Law Judge's Recommended Order, pursuant to Section 120.57, Fla. Stat.

Petitioner disputes the conclusion and implication in Paragraphs 11 and 12 that the SBA has implemented Chapter 121 without departing from the requirements. As stated above, the SBA has implemented an erroneous misconstruction of the rules and has blatantly disobeyed the requirements of the legislature.

Exception No. 4 to the recommended Conclusion of Law, Page 9, Paragraph 13, as set forth in the Administrative Law Judge's Recommended Order, pursuant to Section 120.57, Fla. Stat.

Petitioner disputes the conclusion that, "… the SBA must apply (the Florida Retirement System) consistently as to all FRS participants." The American with Disabilities Act, Family Medical Leave Act, civil rights and other Federal laws protect the rights of people with disabilities and require a reasonable accommodation for the employee's disability. I was afforded no accommodation for my disability by SBA, instead, my right to exercise my second election was terminated like a penalty or forfeiture for being disabled.

Exception No. 5 to the recommended Conclusion of Law, Page 4, Paragraph 6, as set forth in the Administrative Law Judge's Recommended Order, pursuant to Section 120.57, Fla. Stat.

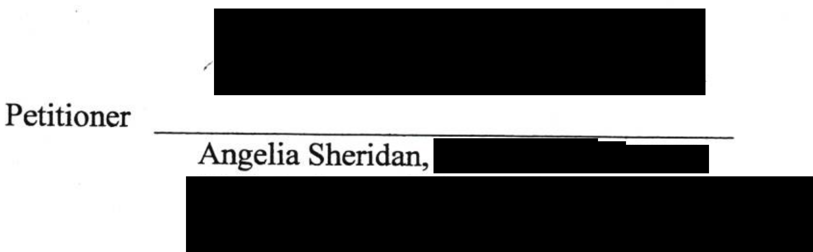
Petitioner disputes the conclusion that, "… section 120.542 (Florida Statues) has no application in this proceeding." The common law, Section 2.01, Florida Statutes is analogous to the rationale of Section 120.542, Florida Statues. Both require avoiding absurd and manifestly unjust results such as reached in this matter. There exists no prudent, thoughtful nor reasonable rationale for the SBA's prohibiting Petitioner's second election. See transcript, pages 37 through 39. The retirement procedure must be fair and just.

In the instant case, the SBA did not follow the statutory requirements and should not be allowed to choose arbitrarily which provision to implement. To forfeit the employment benefit of a disabled and terminated employee constitutes a taking without due process.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Petitioner Angelia Sheridan respectfully requests that the STATE BOARD OF ADMINISTRATION reject the RECOMMENDED ORDER and issue a final decision consistent with Petitioner's exceptions stated herein.

RESPECTFULLY SUBMITTED this 19th day of December 2011.



Petitioner ______________________________

Angelia Sheridan,

CERTIFICATE OF SERVICE

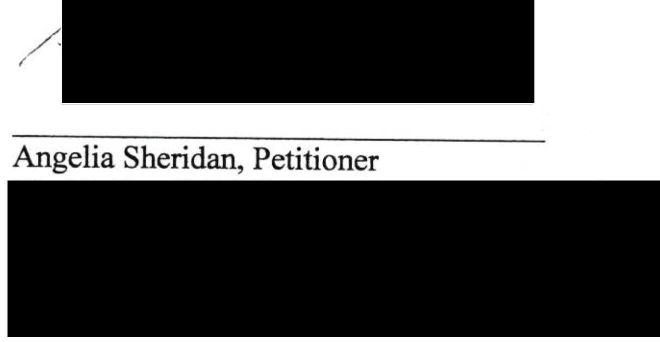
I hereby certify that the foregoing has been filed and served via United States Mail this 19th day of December, 2011 on the following:

Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308

and by email < tina.joanos@sbafla.com>

Brian A. Newman, Esquire
PENNINGTON, MOORE, WILKINSON, BELL & DUNBAR, P.A.
Post Office Box 10095
Tallahassee, FL 32302-2095

and by email <brian@penningtonlaw.com>



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Angelia Sheridan, Petitioner