STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

COLLEEN HYLTON-JULIUS,

Petitioner,

v.

DOAH CASE NO.: 11-4534
DMS CASE NO:

DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT,

Final Order No. DMS – 12-0015

Respondent.
_____/

FINAL ORDER

PRELIMINARY STATEMENT

In 2011, Petitioner Colleen Hylton-Julius, requested a determination by the Division of Retirement (Division) on whether she was entitled to change her type of retirement from early retirement service to disability retirement after receiving her retirement benefits. The Division issued a Final Agency Action letter on June 23, 2011, denying Petitioner's request to retroactively change her retirement type. Petitioner disagreed with Respondent's determination and requested a formal hearing before the Division of Administrative Hearings (DOAH). Petitioner elected to appear before DOAH remotely, via teleconference from Lauderdale Lakes, Florida.

At the hearing held on December 7, 2011, Petitioner was represented by Counsel and testified on her own behalf. Petitioner offered five exhibits into evidence, all of which were admitted. Respondent presented the testimony of one witness and offered eight exhibits into evidence, all of which were admitted. Additionally, official recognition was taken of Florida Administrative Code Rule 60S-4.002 and section 121.091, Florida Statutes.

A transcript of the hearing was prepared and delivered on January 12, 2012. Additionally, each Party made post-hearing submissions. After the hearing, both the Petitioner and Respondent filed Proposed Recommended Orders.

The Administrative Law Judge (Judge) issued a Recommended Order on February 9, 2012, which is incorporated by reference into this Final Order and attached as "Exhibit A." The Petitioner filed exceptions to the Recommended Order. The ruling on those exceptions, Findings of Fact, Conclusions of Law are set forth below.

RULING ON THE PETITIONER'S EXCEPTIONS TO THE FINDINGS OF FACT

The Petitioner timely filed thirteen exceptions to the Findings of Fact set forth in the Recommended Order. These exceptions do not "clearly identify the disputed portion of the recommended order by page number or paragraph," nor do they "identify the legal basis for the exception." Instead, the Petitioner appears to be offering substitute language. Therefore, the exceptions fail to meet the requirements of section 120.57(1)(k), Florida Statutes. As such, the Department is not required to address them in the Final Order. However, even if the exceptions were to be given consideration, they would be denied for the reasons stated below.

1. Exception one (which is labeled as "7.") - It is unclear from the Petitioner's Exceptions to the Judge's Recommended Order what fact is actually in dispute. If this exception is to the Recommended Order paragraph 7., then the fact being rejected is Judge's finding that "[o]n April 13, 2009, the Division received Petitioner's filled-out application for service retirement." An agency may not reject or modify a hearing officer's findings of fact unless there is a determination that the findings of fact were not based on competent substantial evidence. See §120.57(1)(l), Fla. Stat. (2011).

In this case, both parties stipulated to the fact stated in paragraph 7. in the Joint Pre-hearing Statement filed on November 22, 2011, so there is competent substantial evidence for the Judge's finding of fact. Therefore, this exception is denied.

2. Exception two (which is labeled as "8.") - This exception appears to address the Finding of Fact paragraph 8., which simply describes the language on the Petitioner's retirement application. Since this application was admitted into evidence as Respondent's Exhibit 1, there is competent substantial evidence for the Judge's finding of fact. Further, the Petitioner's exception merely reiterates the arguments repeatedly presented at the hearing, which the Judge considered in drafting her Recommended Order. It is well established that a hearing officer is not required to believe testimony of a witness, even if it is unrebutted. See, e.g., Fox v. Dep't of Health, 994 So. 2d 416 (Fla. 1st DCA 2008). "It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of the witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Bejarano v. State Dep't of Educ., Div.of Vocational Rehabilitation, 901 So. 2d 891, 892 (Fla. 4th DCA 2005) quoting Heifetz v. Dep't of Bus. Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). These arguments were already presented to the Judge at the hearing and rejected. Therefore, this exception is denied.

3.- 9. Exceptions three through nine (which are labeled as paragraphs "9.", "10.", "11.", "12.", "13.", "14." and "15.") - These exceptions are all the same, so they will be addressed as one. The Petitioner fails to specify the facts to which she took exception; however, all the findings of fact in those paragraphs 9. – 15. of the Recommended Order are evidenced by the pre-hearing stipulation, testimony at the

hearing, and/or evidence admitted at the hearing. The language in the exceptions reiterates the arguments presented at the hearing, which the Judge considered in drafting her Recommended Order and rejected. See id. Additionally, the Petitioner's exceptions are inconsistent with one another; the offered substitute facts are restatements of the Judge's findings of fact that the Petitioner specifically took exception to. Therefore, these exceptions are denied.

10. Exception ten (which is labeled as paragraph "16.") - It is unclear from the Petitioner's Exceptions to the Judge's Recommended Order what fact is actually in dispute; however, it seems to be the finding of fact as to the date on the Petitioner's retirement check and the date it was cashed by the Petitioner. In the Petitioner's Exceptions 3. - 9., Petitioner agrees with Judge's finding of fact that the first retirement check was not cashed until July 28, 2010. Therefore, the exception must be to the finding of fact as to when the retirement check was dated. The Judge's finding is supported by testimony of the Respondent's witness at the hearing, and therefore is based on competent, substantial evidence. Further, this exception also seeks to reiterate the arguments presented at the hearing, which the Judge considered in drafting her Recommended Order and rejected. See id. Therefore, this exception is denied.

11. Exception 11 (which is labeled as paragraph "17.") - It is unclear from the Petitioner's Exceptions to the Judge's Recommended Order what fact is actually in dispute. It appears this exception is to the statement that the Petitioner's retirement status was final when she cashed her benefit. This statement was stipulated to in the Joint Pre-hearing Statement filed on November 22, 2011. Also, this exception is virtually identical

to Exception ten. On those grounds and because there was competent substantial evidence for the Judge's finding of fact, this exception is denied.

12. Exception 12 (which is labeled "18.") – It is unclear from the Petitioner's Exceptions to the Judge's Recommended Order what fact is actually in dispute. It seems that Petitioner may be taking exception to the finding of fact that when the Petitioner contacted the Secretary of the Department by email, it was the first time she requested disability retirement. The Judge explicitly found the Petitioner's testimony that she contacted the Department in a March 11, 2000 letter not credible. The language in the exception reiterates the arguments presented at the hearing, which the Judge considered in drafting her Recommended Order and rejected. See id. Therefore, this exception is denied.

13. Exception 13 (which is labeled "19.") – It is unclear from the Petitioner's Exceptions to the Judge's Recommended Order what fact is actually in dispute. It appears that this exception relates to a finding of fact as to the date the Division denied the Petitioner's request to change her type of retirement. This date was stipulated to in the Joint Pre-hearing Statement filed on November 22, 2011, and no contrary evidence was ever raised at the hearing. Therefore, this exception is denied.

RULING ON THE PETITIONER'S EXCEPTIONS TO THE CONCLUSIONS OF LAW

The Petitioner timely filed five exceptions to the Conclusions of Law set forth in the Recommended Order. These exceptions do not "clearly identify the disputed portion of the recommended order by page number or paragraph," nor do they "identify the legal basis for the exception." Instead, the Petitioner appears to be offering substitute language. Therefore, the exceptions fail to meet the requirements of section

120.57(1)(k), Florida Statutes. As such, the Department is not required to address them in the final order. However, even if the exceptions were to be given consideration, they would be denied for the reasons stated below.

1. Exception one (which is labeled "24.") – This exception appears to address the recitation of rule 60S-4.002(4). The application of this rule to the Division was stipulated to in the Joint Pre-hearing Statement filed on November 22, 2011, and the Judge took official recognition of this rule in her Recommended Order. The Petitioner's exception does not state a legal argument, but rather reiterates Petitioner's previous factual arguments. Therefore, all findings of fact objected to in this exception are improper. The Petitioner had the burden of proof in the administrative hearing, which was to prove by a preponderance of evidence that the Division erred. See § 120.57(1)(j), Fla. Stat.; see also Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139, 141-142 (Fla. 4th DCA 1989) ("[T]he burden of proof is on the party asserting the affirmative defense of an issue before an administrative tribunal.") The Judge determined that the "Petitioner failed to present sufficient credible evidence that the Division made any statement of fact that misled Petitioner during her application process." The determination by the Judge that the evidence was not credible is supported by the Petitioner's testimony that she never requested a disability application from the Division nor can she remember who made the representations to her. An administrative agency may reject conclusions of law without limitation; however, an agency may not reject an administrative hearing officer's findings of fact, as long as those findings are supported by competent substantial evidence in the record. Abrams v. Seminole County School Bd., 73 So. 3d 285, 294 (Fla. 5th DCA 2011). An agency cannot reject a finding that is substantially one of fact simply

by treating it as a legal conclusion. Id. Based on the Judge's finding of fact, the Department agrees with the Judge's Conclusions of law. Therefore, this exception is denied.

2. Exception two (which is labeled "25.") - It is unclear from the Petitioner's Exceptions to the Judge's Recommended Order what legal conclusion is actually in dispute. This exception appears to be to the Conclusion of Law that there is insufficient credible evidence that the Division received a letter dated March 11, 2010. The burden of proof is on the party asserting the affirmative defense of an issue before an administrative tribunal. See Wilson, 538 So. 2d at 141-142. There was no evidence on record or presented by the Petitioner that the letter was properly mailed. Without modifying the Judge's Finding of Fact, the Department agrees with the Judge's Conclusion of Law in this section. Therefore, this exception is denied.

3. Exception three (which is labeled "26.") – It is unclear from the Petitioner's Exceptions to the Judge's Recommended Order what legal conclusion is actually in dispute. It seems this exception is made to the Conclusion of Law relating to the applicability of equitable estoppel in this case. The Petitioner fails to object to the legal application of equitable estoppel, but rather argues factual issues relating to the application of legal principles. Therefore, this exception is denied.

4. Exception four (which is labeled "27.") – It is unclear from the Petitioner's Exceptions to the Judge's Recommended Order what legal conclusion is actually in dispute. It appears that this exception relates to the determination that the petitioner failed to present credible evidence that the Division made a statement that misled Petitioner during the application process. The Judge's determination is a mixture

of law and fact. As stated earlier, determining the credibility of witnesses is one of the Judge's principal functions. See, e.g., Bejarano, 901 So. 2d at 892. Evidence admitted at the hearing, including some documents signed by the Petitioner, explained the proper application process. The documents also explicitly stated when an applicant's retirement is final and can no longer be changed. Therefore, there is competent, substantial evidence for the Judge's Finding of Fact as to the credibility of the evidence. Given this finding of fact, the Department agrees with the Judge's legal conclusion that estoppel is inapplicable to this case. Therefore, this exception is denied.

5. Exception five (which is labeled "28.") – It is unclear from the Petitioner's Exceptions to the Judge's Recommended Order what legal conclusion is actually in dispute. This exception is to the following legal conclusions: a) the Petitioner was aware that her retirement was final when she cashed her benefit; b) that the Petitioner was aware of this based on the language in at least two of the documents she signed and submitted to the Division; and c) that she cannot change her retirement type now that her retirement is final. The Petitioner offers in the exception only a factual argument as to the March 11, 2010 letter and a legal argument based on the presumed factual argument. The Judge did not find sufficient, credible evidence proving that this letter was received by the Division. This is a rehashing of the factual argument presented in Petitioner's factual exception above and presented at trial. For the reasons explained above, the Department accepts the Judge's legal conclusion. Based on that conclusion, the cases cited in this exception are inapplicable. Therefore, the exception is denied.

CONCLUSIONS

The Department concludes as follows:

1. The Department accepts the Findings of Fact set forth in the Recommended Order, including footnotes, which are incorporated herein by reference.

2. The Department denies all of the Petitioner's Exceptions to the Findings of Fact in the Recommended Order.

3. The Department accepts the Conclusions of Law as set forth in the Recommended Order, which are incorporated herein by reference.

4. The Department denies all of the Petitioner's Exceptions to the Conclusions of Law in the Recommended Order.

Accordingly, it is hereby **ORDERED** that:

The Department DENIES the request of the Petitioner, Colleen Hylton-Julius, to change her type of retirement from early service retirement benefit to disability retirement benefit.

DONE AND ORDERED this 1 day of May 2012, in Tallahassee, Leon County, Florida.

Scott Stewart
Interim Secretary
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NOTICE OF RIGHT TO APPEAL

Unless expressly waived by a party such as in a stipulation or in other similar forms of settlement, any party substantially affected by this final order may seek judicial review by filing an original Notice of Appeal with the Agency Clerk of the Department of Management Services, and a copy, accompanied by filing fees prescribed by law, with the Clerk of the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days of rendition of this order, in accordance with Rule 9.110, Fla. R. App. P., and section 120.68, Florida Statutes.

I HEREBY CERTIFY that this Final Order was filed in the official records of the Department of Management Services, and copies distributed by U.S. Mail to the parties below, on the 2nd day of May, 2012.

Debbie Shoup
Clerk
Department of Management Services

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