STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

KIMBERLY A. CAMPBELL, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	DOAH Case No. 14-2803 SBA Case No. 2013-2901

FINAL ORDER

On September 18, 2014, the Administrative Law Judge, D.R. Alexander (hereafter "ALJ") submitted his Recommended Order to the State Board of Administration (hereafter "SBA") in this proceeding. A copy of the Recommended Order indicates that copies were served upon counsel for the Petitioner and upon counsel for the Respondent. Petitioner and Respondent had agreed that a hearing was unnecessary, and they filed a pre-hearing stipulation, a stipulated record, and proposed recommended orders. Petitioner timely filed exceptions on October 3, 2014. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Senior Defined Contribution Programs Officer for final agency action.

STATEMENT OF THE ISSUE

The State Board of Administration ("SBA") adopts and incorporates in this Final Order the Statement of the Issue in the Recommended Order.

PRELIMINARY STATEMENT

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

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

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

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

Pursuant to Section 120.57(1)(l), Florida Statutes, however, a reviewing agency has the general authority to "reject or modify [an administrative law judge's] conclusions of law

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

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

Since the placement of various sections in Chapter 121, Florida Statutes, forms the basis for many of Petitioner's exceptions and argument, a brief overview of Chapter 121 is useful. Chapter 121, Florida Statues, known as the "Florida Retirement System Act," [Section 121.011, Florida Statutes] is comprised of three parts. Part I, that contains Section 121.011 through and including Section 121.40, Florida Statutes, governs all Florida Retirement System ("FRS") members and specifically FRS Pension Plan members. Part II, that contains Section 121.4501 through and including Section 121.5911, Florida Statutes, governs all Investment Plan members. Part III, comprised of Sections 121.70 through and including Section 121.78, Florida Statutes, governs the contribution rates for both plans[1]. Part I also contains overarching provisions that create(d), merge(d), and govern various retirement plans throughout the State. Sections 121.021(60), 121.012, 121.051, 121.052, 121.053, and 121.122, Florida Statutes at issue in this action all are found in Part I. Section 121.4501(2)(k) is found in Part II. *See*, Chapter 121, Florida Statues.

[1] Part III also contains the following declaration viz. purpose and intent, "The Legislature recognizes and declares that the Florida Retirement System is a single retirement system, consisting of two retirement plans and other nonintegrated programs." § 121.70(1), Florida Statutes.

The stipulated facts clearly state that Petitioner was a member of the FRS Investment Plan, and not the FRS Pension Plan, when she terminated FRS-covered employment on September 30, 2003. A major difference between the FRS Investment Plan and the FRS Pension Plan is the manner in which benefit payments are paid. In the case of the FRS Investment Plan, a member has flexible benefit payment options. A member can, as Petitioner did, take a lump sum payment upon meeting the distribution requirements of the applicable plan. A member also can purchase a guaranteed monthly annuity for life using all or part of the member's balance. In the case of the FRS Pension Plan, the member does not have flexible benefit payment options. A member of the FRS Pension Plan will receive monthly guaranteed payments for life- there is no lump sum option. *See,* Sections 121.091 and 121.591, Florida Statutes. Because of the significant difference in the manner that benefit payments may be made by the two plans when members retire, there has to be a different definition of "retiree" for each of the plans. The definition of "retiree" for FRS Investment Plan members, such as Petitioner, is set forth in Section 121.4501(2)(k), Florida Statutes, which is contained in Part II of Chapter 121, Florida Statutes.

Section 121.122(2), Florida Statutes, which is contained in Part I of Chapter 121, Florida Statutes, states that "[a] retiree of a state-administered retirement system who is initially reemployed on or after July 1, 2010, is not eligible for renewed membership." Both the plain meaning of the statutory provision and logic compel the application of the statutory definition of "retiree" that specifically is applicable to the state-administered retirement plan of which a retiree is a member.

Section 121.053, Florida Statutes, that pertains to the Elected Officers' Class is contained in Part I of Chapter 121. Section 121.053(3)(a), Florida Statutes, states that:

(3) On or after July 1, 2010:

(a) A retiree of a state-administered retirement system who is elected or appointed for the first time to an elective office in a regularly established position with a covered employer may not reenroll in the Florida Retirement System.

A state administered retirement "system" is defined by Section 121.021(3), Florida Statutes, [which is contained in Part I] as "...including...the defined benefit retirement program administered under this part [Part I], referred to as the "Florida Retirement System Pension Plan" ... and the defined contribution retirement program administered under the provisions of part II of this chapter, referred to as the "Florida Retirement System Investment Plan"....

Petitioner's Exception 1: Exception to Finding of Fact 4

Petitioner takes exception to the second sentence of paragraph 4 which states that the relevant definition of "retiree" for members of the FRS Investment Plan is set forth in Section 121.4501(2)(k), Florida Statutes, rather than one of the other definitions contained in Section 121.122, Florida Statutes. Petitioner argues this sentence is a Conclusion of Law and should be stricken. Petitioner does not give any legal basis for her assertion that it is appropriate to strike this language. The statement appears to be a factual synopsis of what the Conclusions of Law state. Interestingly, Petitioner does not take exception to the ALJ's Conclusions of Law in paragraphs 19 and 20 that specifically find that the definition of "retiree" set forth in Section 121.4501(2)(k) is applicable to the Petitioner.

Because Petitioner has not provided a legal basis for her exception, Petitioner's Exception 1 hereby is denied.

Petitioner's Exception 2: Exception to Finding of Fact 5

Petitioner contends that the reference to Section 121.122(2), Florida Statutes, the section that provides that a "retiree" of the FRS who is initially re-employed on or after July 1, 2010, is not eligible for renewed membership, is inappropriate to Petitioner's situation since Petitioner is a compulsory member of the Elected Officer Class of the FRS. Petitioner contends that therefore her situation instead is governed by the provisions of Sections 121.052 and 121.053, Florida Statues. Petitioner's exception is merely a conclusion that is devoid of any legal argument, and therefore is not required to be addressed. Additionally, it should be noted that the ALJ is not making any statement in Paragraph 5 itself that the cited section is applicable to Petitioner. The ALJ is describing the year when Section 121.122(2) was first enacted and is giving a synopsis as to what the section provides.

Accordingly, Petitioner's Exception 2 hereby is rejected.

Petitioner's Exception 3: Exception to Finding of Fact 6

In this exception, Petitioner contends that Section 121.053 is contained in Part I of Chapter 121 and is separate and apart from Section 121.122(2) which "is found" in Part II of Chapter 121. Petitioner then sets forth the provisions of Section 121.012 that state that certain provisions of Part I of Chapter 121 are also applicable to Parts II and III of Chapter 121 (to the extent such provisions are not inconsistent with, or duplicative of provisions in parts II and III). Petitioner states that Section 121.012 is not intended to make provisions of Part II and Part III applicable to Part I of Chapter 121. Petitioner argues it would be a misinterpretation of the legislative intent of Section 121.012 if the provisions of Section 12.122(2), "found" in Part II were to be applied to Section 121.053, which "stands on its own terms in Part I of the Chapter 121, F.S."

Section 121.122(2), Florida Statutes, is not found in Part II of Chapter 121. Instead, such statutory section, like Section 121.053, also is found in Part I. Part II begins with Section 121.4501. *See,* Chapter 121, Florida Statutes. In fact, in Paragraph 24 Petitioner's Proposed Recommended Order dated August 29, 2014, Petitioner specifically states that "Sections 121.053 and 121.122 are contained within part I of Chapter 121." Thus, the statements in this exception are in direct conflict with those contained in Petitioner's Recommended Order.

Further, Petitioner does not address in the exception what Petitioner deems the "clear" legislative intent of Section 121.053, Florida Statutes to be. Section 121.053 addresses participation in the Elected Officers' Class by retired members. In construing a statute, significance and effect must be given to every word, phrase, sentence and part, and words in a statute should not be construed as mere surplusage. *See, e.g., Mendenhall v. State*, 48 So.3d 740 (Fla. 2010). Subsection (3)(a) is part of Section 121.053, and provides as follows:

> (3) On or after July 1, 2010:
>
> (a) A retiree of a state-administered retirement system who is elected or appointed for the first time to an elective office in a regularly established position with a covered employer may not reenroll in the Florida Retirement System.

A state administered retirement "system" is defined by Section 121.021(3) [which is contained in Part I] as "...including...the defined benefit retirement program administered under this part [Part I], referred to as the "Florida Retirement System Pension Plan" ... and the defined contribution retirement program administered under the provisions of part II of this chapter, referred to as the "Florida Retirement System Investment Plan"....

Petitioner never addresses Section 121.053(3)(a) in the exception or what Petitioner believes about its "clear intent" that does not create a prohibition on renewed FRS membership of FRS retirees akin to the prohibition set forth in Section 121.122(32), Florida Statues.

Based on the foregoing, Petitioner's Exception 3 hereby is denied.

Petitioner's Exception 4: Exception to Finding of Fact 7

Petitioner contends that the ALJ's taking official recognition of a 2012 Staff Analysis of an amendment to Section 121.122(2) was inappropriate since such analysis was not included by the parties in the stipulated record and there was no opportunity for either party to address such evidence before the Recommended Order was issued. However, Petitioner has not provided any statutory authority, case law or rule(s) to support this bare argument or that would serve to modify or restrict the provision contained in Section 120.569(2)(g), Florida Statutes, that states in pertinent part that:

> (g) Irrelevant, immaterial or unduly repetitive evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida....

Additionally, Petitioner is reiterating in this exception her previous factual argument that she is not "re-employed" since she is a compulsory member of the Elected Officers Class by virtue of being elected, re-elected or appointed, as provided in Section 121.052, Florida Statutes. As such, Petitioner again asserts that the prohibition on FRS members who are reemployed on or after July 1, 2010 from being re-enrolled as a renewed member of the

FRS do not apply to her. Again, the exception does not state a legal argument, but rather reiterates Petitioner's previous factual arguments.

Therefore, based on the foregoing, Petitioner's Exception 4 hereby is denied.

Petitioner's Exception 5: Exception to Conclusion of Law 16

Petitioner again erroneously states that Section 121.122(3) is contained in Part II of Chapter 121, and further that the conclusion that Section 121.122(3) "applies equally" to elected officials such as Petitioner "improperly applies part II of the statute to part I." As noted previously in the response to Petitioner's Exception 3 above,, Section 122.122(3) is contained in Part I of Chapter 121.

Accordingly, based on the foregoing, Petitioner's Exception 5 hereby is rejected.

Petitioner's Exception 6: Exception to Conclusion of Law 20

In this Exception, it appears that Petitioner is arguing that there is no conflict between Sections 121.4501(2)(k) that defines "retiree" for purposes of members of the FRS Investment Plan as one who has terminated employment and taken a distribution, [and that would thereby make her ineligible to re-enroll in the FRS] and Section 121.052(3) that provides that participation in the Elected Officers' Class is mandatory for all elected officers such as Petitioner. Petitioner argues that any "conflict" that the ALJ "assumed" the Legislature recognized when enacting the prohibition on renewed FRS membership of FRS retirees is the result of the SBA and ALJ failing to recognize that the Elected Officers' Class has its own separate statutory scheme unrelated to either the FRS Investment Plan or the FRS Pension Plan, and further in erroneously trying to apply provisions of Part II of Chapter 121 to Part I of that chapter.

However, Paragraph 33 of Petitioner's Proposed Recommended Order dated August 29, 2014, states as follows:

> Therefore, while the application of the definition of "retiree" in Section 121.4501(2)(k) seemingly conflicts with the general elected officer compulsory participation provisions of Section 121.051 ...it undeniably conflicts with the compulsory participation provisions of Section 121.052 and the 121.012(60) definition of "retiree" which specifically are applicable to elected officials. [emphasis added]

Thus, it appears the ALJ's conclusion in paragraph 20 to the effect that Petitioner is making the argument in documents submitted by the Petitioner to the ALJ that there is a conflict between Section 121.4501(2)(k) and Section 121.052 is a correct statement. The ALJ goes on to state in paragraph 20 that any purported "conflicts" such as that broached by Petitioner, were presumably recognized by the Legislature. The ALJ put the term "conflicts" in quotes in paragraph 20, thereby indicating that the ALJ might not agree any conflicts actually exist.

Further, the "assumption" that the ALJ is making as to the Legislature's recognition of "conflicts" when it enacted the prohibition on renewed FRS membership of FRS retirees is simply a recognized principal of statutory construction which is there exists a presumption that contradictory statutes are not intended by the Legislature. That is, there is a presumption that the Legislature passes statutes with the knowledge of prior existing statutes. *See, e.g., Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So.2d 1 (Fla. 2004). Further, there is a presumption that the Legislature does not intend to retain contradictory enactments or to repeal a law without expressing an intention to do so. *Id.* As such, the Legislature is presumed not to have intended to write a statute that renders void in its

application another statute that has not been amended or repealed. *Saridakis v. State*, 936 So.2d 33 (Fla 4th DCA 2006).

Finally, as explained previously above, the ALJ and the SBA have not applied the provisions that Petitioner has claimed are contained Part II of Chapter 121 to the provisions that Petitioner has claimed reside in Part I of the chapter in violation of any expressed intent of the Legislature.

Based on the foregoing, Petitioner's Exception 6 hereby is denied.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that she be permitted to enroll in the Elected Officers' Class of the FRS as a first-time elected official who previously had retired from the FRS Investment Plan by terminating employment, taking a full distribution, and returning to FRS-covered employment after July 1, 2010, hereby is 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 17th day of December, 2014, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Joan B. Haseman

Joan B. Haseman
Senior Defined Contribution Programs Officer
State Board of Administration
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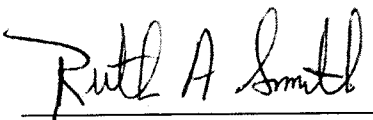
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Tina Joanos

Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by email transmission and U.S. mail to Thomas H. Bateman III, Esq.. (tbateman@lawfla.com) and Mark Herron, Esq. (mherron@lawfla.com), Counsel for Petitioner, at Messer Caparello, P.A., 2618 Centennial Place, Tallahassee, Florida 32308 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 December, 2014.



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