STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

WILLIE JAMES,

Petitioner,

vs.

STATE BOARD OF ADMINISTRATION,

Respondent.

and

ORANGE COUNTY,

Intervenor.

DOAH Case No. 16-5326
SBA Case No. 2016-3725

FILED
2017 MAR 15 AM 10: 30
DIVISION OF ADMINISTRATIVE HEARINGS

FINAL ORDER

On December 21, 2016, 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, upon counsel for the Respondent, and upon counsel for the Intervenor. Both Petitioner and Respondent timely filed Proposed Recommended Orders. Petitioner timely filed exceptions on January 5, 2017. Counsel for Intervenor timely filed a Response in Opposition to Petitioner's Exceptions to the Recommended Order on January 17, 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.

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 an Administrative Law Judge ("ALJ") 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 an ALJ'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 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." Florida courts have consistently applied the "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the ALJ's application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the ALJ'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 AND ON INTERVENOR'S RESPONSE THERETO

Petitioner's Exception 1: Petitioner Did Not Take an Invalid Distribution

In the first part of Petitioner's Exception 1, Petitioner merely states that he takes exception with the conclusion of the Recommended Order that Petitioner took an invalid distribution from his Investment Plan account. This statement is merely a synopsis of Petitioner's argument during the proceeding. Petitioner does not offer any legal support for his statement that the Recommended Order reaches the "legally unsupported conclusion" that the settlement agreement entered into between Petitioner and his employer retroactively rendered a valid distribution invalid. Since the first part of Petitioner's Exception 1 does not clearly identify the disputed portion of the recommended order by page number or paragraph, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record, the first part of Petitioner's Exception 1 may be rejected *in toto*.

In the second portion of Petitioner's Exception 1, Petitioner makes the claim that it is "improper" for the ALJ to cite the *Colford v. Department of Transportation* case[1] in the Recommended Order. Again, Petitioner fails to cite any legal authority for his claim. Further, Petitioner's counsel, while objecting to introduction of *Colford* during the actual hearing, specifically stated during the hearing that it was appropriate for the SBA or Intervenor to argue that *Colford* was "authority" or "persuasive authority" in their proposed recommended orders and further stated that the time to properly present *Colford* to the ALJ was at the time of presentation of the proposed recommended orders. [Hearing Transcript, page 7, lines 9-16]. Thus, Petitioner was well aware that the SBA and Intervenor intended to ask the ALJ to recognize the case, and the Petitioner had ample opportunity to present his views on the *Colford* case. Petitioner stated on the record that he was agreeable to having *Colford* set forth as authority. Official recognition may be taken by a tribunal on its own, or a tribunal may excuse the failure of a party requesting official recognition of a matter to timely give written notice that recognition is to be sought, provided the adverse party does have notice and an opportunity to be heard concerning any objections it may have to recognition. *See, The Scripps Research Institute, Inc. v. The Scripps Research Institute*, 916 So.2d 988, 990 (Florida 4th DCA 2005). Thus, this portion of the Petitioner's Exception 1 that objects to the citing of the *Colford* case in the ALJ's Recommended Order hereby is rejected.

Petitioner then argues in Exception 1 that *Colford* is distinguishable from his case. Petitioner notes that in *Colford*, the employee was terminated but later won her job back as a result of an internal grievance process. In contrast, Petitioner was not reinstated via an

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[1] Pub. Emp. Rel. Comm., Case No. CS-2011-0278 (Recommended Order April 21, 2011, Final Order May 9, 2011)

internal process but rather had to actually file a lawsuit to obtain his position back. Additionally, the Petitioner argues that in *Colford*, the employee returned to work before the requisite six (6) month time frame had elapsed after being retired, so it was necessary for her employer to terminate her in order to be in compliance with the six (6) month requirement. Petitioner argued that he returned to work well after the expiration of six months after his termination date. Petitioner made the same arguments in his Proposed Recommended Order, but the ALJ was not persuaded by these arguments. The ALJ noted that the settlement agreement Petitioner entered into with his employer by its very terms had the effect of a rescission of the termination. That is, the settlement agreement had the effect of undoing the termination and restoring the former status of the parties thereto. Similarly, in *Colford*, the terminated employee was reinstated with back pay, as if the termination never had occurred. As the ALJ found in the Recommended Order for this case, *Colford* and the instant case are "strikingly similar" and require a "similar result." Thus, the portion of the Petitioner's Exception 1 that states that *Colford* is distinguishable from Petitioner's case hereby is rejected.

<u>Intervenor's Response in Opposition to Petitioner's Exception 1</u>

Intervenor argues that it objects to the portion of Petitioner's Exception 1 that appears to state that the *Colford* case cannot be used as authority by the ALJ in making his determination. Intervenor points out that Petitioner's legal counsel actually stated that the *Colford* case could be cited in the Proposed Recommend Orders presented to the ALJ. As was discussed above, it was appropriate for the *Colford* to be cited. Thus, this portion of Intervenor's Response is accepted.

Intervenor further states that the issue in this case is whether or not the distributions taken were later rendered invalid when the Petitioner's termination date was revoked. Intervenor states that the same issue was present in the *Colford* case. As discussed above, the issues in *Colford* and the instant case are virtually identical. Thus, this portion of Intervenor's Response is accepted.

Petitioner's Exception 2: Petitioner States that the SBA Lacks the Authority to Direct Petitioner's Employer to Terminate Petitioner

Petitioner's Exception 2 does not clearly identify the disputed portion of the recommended order by page number or paragraph, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record." On that basis alone, Petitioner's Exception 2 may be rejected *in toto.*

Petitioner fails to recognize that certain authority does exist in the SBA to take actions to ensure the continuation of the tax qualified status of the Investment Plan. In order for a retirement plan such as the Investment Plan to remain a qualified retirement plan so that certain Federal income tax benefits can be received, the plan must be administered in a manner that meets the criteria set forth under Section 401(a) of the Internal Revenue Code. Section 1.401-1(a)(2) of the Federal Income Tax Regulations provides that a qualified plan is a definite written program and arrangement that is communicated to employees and that is established and maintained by an employer to provide for the livelihood of the employees or their beneficiaries after the retirement of such employees through the payment of benefits [emphasis added]. The official justification for the requirement that benefits be paid after retirement is that the government wants to make certain that a retirement plan participant's retirement savings are actually saved until retirement and not squandered away before retirement eligibility. Under Section 1.401-1(b)(1)(i), a qualified

plan must be established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits for employees over a period of years, usually for life, after retirement. As such, distributions from a qualified defined contribution plan such as the Florida Retirement System ("FRS") Investment Plan generally cannot be made until one of the following occurs:

(a) The employee terminates and reaches retirement age as defined under the plan;

(b) The employee dies, at which time the employee's beneficiary is eligible for distributions;

(c) The employee separates from service; or.

(d) The plan is terminated and is not replaced by another defined contribution plan.

Section 121.4501(13)(a), Florida Statutes, specifically states that the Investment Plan is to be administered in a manner that complies with the applicable Internal Revenue Code provisions. This requirement is essential so that the tax qualified status of the plan is not jeopardized, which would have an adverse impact on all members of the Investment Plan as well as the State of Florida. In keeping with the Federal law requirements for distributions from qualified retirement plans, Section 121.591, Florida Statutes, provides as follows:

> Payment of benefits.—Benefits may not be paid under the Florida Retirement System Investment Plan unless the member has terminated employment as provided in s. 121.021(39)(a) or is deceased and a proper application has been filed as prescribed by the state board or the department.
> ***
> (1) NORMAL BENEFITS.—Under the investment plan:
>
> (a) Benefits in the form of vested accumulations as described in s. 121.4501(6) are payable under this subsection in accordance with the following terms and conditions:
>
> 1. Benefits are payable only to a member, an alternate payee of a qualified domestic relations order, or a beneficiary.

2. Benefits shall be paid by the third-party administrator or designated approved providers in accordance with the law, the contracts, and any applicable board rule or policy.

3. The member must be terminated from all employment with all Florida Retirement System employers, as provided in s. 121.021(39).

4. Benefit payments may not be made until the member has been terminated for 3 calendar months, except that the state board may authorize by rule for the distribution of up to 10 percent of the member's account after being terminated for 1 calendar month if the member has reached the normal retirement date as defined in s. 121.021.

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5. If a member or former member of the Florida Retirement System receives an invalid distribution, such person must either repay the full amount within 90 days after receipt of final notification by the state board or the third-party administrator that the distribution was invalid, or, in lieu of repayment, the member must terminate employment from all participating employers. If such person fails to repay the full invalid distribution within 90 days after receipt of final notification, <u>the person may be deemed retired from the investment plan by the state board and is subject to s. 121.122 [renewed membership in the Florida Retirement System].</u> If such person is deemed retired, any joint and several liability set out in s. 121.091(9)(d)2. is void, and the state board, the department, or the employing agency is not liable for gains on payroll contributions that have not been deposited to the person's account in the investment plan, pending resolution of the invalid distribution. The member or former member who has been deemed retired or who has been determined by the state board to have taken an invalid distribution may appeal the agency decision through the complaint process as provided under s. 121.4501(9)(g)3. As used in this subparagraph, the term "invalid distribution" means any distribution from an account in the investment plan which is taken in violation of this section, s. 121.091(9), or s. 121.4501. [emphasis added].

The applicable statutory provisions make it clear that benefits may be paid to an Investment Plan member <u>only</u> if that member terminates employment. If an employee receives a distribution that is not in compliance with applicable law, the SBA, in order to preserve the tax qualified status of the Investment Plan for the benefit of all plan members,

is given the authority by law to deem such an employee as "retired." Pursuant to Section 121.4501(2)(k), Florida Statutes, this means that the employee is both terminated from employment and has received a distribution. The authority vested in the SBA prevents situations in which employees try to circumvent the retirement plan qualification requirements of Federal law by continuing to work after taking distributions of all or part of their retirement benefits. When termination of employment occurs, a member cannot again participate in the FRS. Section 121.122(2), Florida Statutes, specifically provides that:

> (2) A retiree of a state-administered retirement system who is initially reemployed in a regularly established position on or after July 1, 2010, may not be enrolled as a renewed member. [emphasis added]

In Petitioner's situation, Petitioner withdrew almost $475,000 from his Investment Plan account after he had been terminated from his employment. [Hearing Exhibits 3, 4 and 5]. In order to obtain the distributions, Petitioner had to verify that he was not "pending reemployment." Petitioner made such verification even though, at the time of the distribution, Petitioner had a lawsuit pending against his employer seeking reinstatement. [Hearing Exhibit 7, page 9, lines 3-25; page 10, lines 1-17]. Petitioner and his employer settled the lawsuit. The purpose of the settlement agreement was to effectuate the equivalent of a rescission of the termination. That is, the agreement was designed to return Petitioner to his former position in a manner that would give Petitioner the exact same benefits as if the termination never had occurred. Under the settlement terms, the Petitioner retained his seniority, pay and benefits and would continue to remain a member of the FRS. [Hearing Transcript, p. 24, lines 13-25; page 25, lines 1-10; Hearing Exhibit 6]. While Petitioner was offered the opportunity to modify his settlement agreement with his employer so that he would be in compliance with applicable law, he refused to do so. Petitioner still wants to

participate in the FRS while keeping all of the retirement benefits (amounting to approximately $475,000) that had been distributed to him. Thus, he wants to be "retired" for the purposes of keeping all of the funds that were distributed to him, while at the same time being "not retired" for purpose of accruing further retirement benefits. Such a course of action clearly is in violation of applicable law. As such, the SBA is obligated by law to ensure that the distributed funds are repaid if Petitioner refuses to pay the total distributions made to him or to voluntarily terminate. The mechanism the SBA utilizes is to invoice the employer for the improper distributions made when the employee refuses to terminate employment or to repay the invalid distributions. To avoid this liability, the employer can choose to terminate the employee. Without a mechanism in place for the SBA to remedy an improper distribution, the entire Investment Plan would become disqualified under the Internal Revenue Code, and all plan members, as well as the State of Florida, would lose all Federal tax savings. If termination of Petitioner's employment occurs and Petitioner later is entitled to return to work after a minimum period of six (6) months, Petitioner will be unable to accrue further FRS benefits. Accordingly, Petitioner's Exception 2 hereby is rejected.

Intervenor's Response in Opposition to Petitioner's Exception 2

Intervenor notes that statutory and case law provide the SBA with the requisite authority to ensure the improperly distributed funds are repaid or that termination of employment occurs. The statutory authority cited by Intervenor is discussed above in the Response to Petitioner's Exception 2. Intervenor further cites the *Colford* case, *supra*, to bolster its argument that Petitioner must be terminated. *Colford* is discussed above in the Response to Petitioner's Exception 1. To the extent that Intervenor's arguments support the

statutory authority of the SBA to utilize a procedure to correct an in-service distribution whenever an employee who has received an invalid in-service distribution from his Investment Plan account and refuses either to repay that invalid distribution or to terminate employment for six (6) calendar months, Intervenor's arguments are accepted.

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.

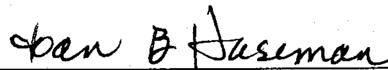
ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. Unless the total amount of the distributions received by Petitioner are repaid within ninety (90) days from the date of this Final Order, Petitioner will be declared a "retiree" and, as such, will be ineligible for future participation in the FRS. Any retirement contributions received from Petitioner and the County after his first distribution of September 4, 2015 must be returned. Additionally, any service credit awarded for the period from March 2014 through June 2016 must be vacated. Finally, it will be necessary for Petitioner's employment to be terminated for a period of six (6) months. Petitioner's request for a hearing hereby is dismissed.

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

DONE AND ORDERED this 13th day of March, 2017, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION



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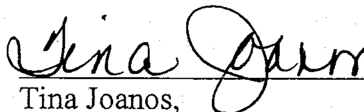
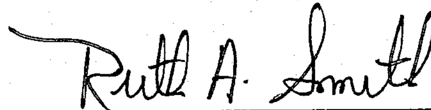
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos,
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by electronic mail to phyllis@thegirleylawfirm.com and by UPS to Jerry Girley, Esq., Counsel for Petitioner, The Girley Law Firm, P.A., 125 East Marks Street, Orlando, Florida 32803; by electronic mail to sarah.reiner@gray-robinson.com and by UPS to Sarah P. Reiner, Esq., Counsel for Intervenor, Gray Robinson, P.A, 301 East Pine Street, Suite 1400, Orlando, Florida 32801; and by email transmission to Brian Newman, Esq. (brian@penningtonlaw.com) and Brandice Dickson, Esq., (brandi@penningtonlaw.com) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 13th day of March, 2017.



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