

**STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES**

LEE HAYES BYRON,

Petitioner,

vs.

Final Order No.: 20-0063

DOAH Case No.: 19-6581

**DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,**

Respondent.

FINAL ORDER

This matter comes before the Department of Management Services (“Department”) for entry of a Final Order in accordance with section 120.569(1), Florida Statutes.

On June 26, 2020, Hetal Desai, Administrative Law Judge (“ALJ”), issued a Recommended Order recommending the Department enter a Final Order rescinding Petitioner Lee Hayes Byron (“Ms. Byron”)’s Second Election and either (1) return the buy in monies to the Investment Plan; (2) transfer the buy in monies from her pension plan to SUSORP; or (3) refund these monies to Ms. Byron. After a thorough review of the record, including the exceptions filed by the Department, and being fully advised in the premises, the Department hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACTS

Following a thorough review of the record, the Findings of Facts set forth in the Recommended Order are hereby adopted in their entirety and are incorporated herein by reference, except to the extent they may be modified by the ruling on exceptions below.

CONCLUSIONS OF LAW

Following a thorough review of the record and applicable laws, the Conclusions of Law set forth in the Recommended Order are adopted in their entirety and are incorporated herein by reference, except to the extent they may be modified by the ruling on exceptions below.

RULING ON EXCEPTIONS

The Department filed sixteen (16) exceptions to the Recommended Order, which will be disposed of below:

Standard of Review

As provided in Section 120.57(1)(l), Florida Statutes:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

Exception 1

The Department takes exception to finding of fact number 1 insofar as it indicates Ms. Byron accepted a position that was optional for the State University System Optional Retirement Program (“SUSORP”). This exception is overruled because the finding is supported by competent substantial evidence.

Exception 2

The Department takes exception to finding of fact 2 because it allegedly cites the wrong statutes. This exception is sustained for the purpose of correcting the statutory citations. This finding of fact should cite to section 121.025, Florida Statutes, instead of section 121.125, Florida Statutes. Likewise, this finding cites section 121.035, Florida Statutes, but it should cite section 121.35, Florida Statutes.

Exception 3

The Department takes exception to finding of fact 5 insofar as it finds that a member may provide additional funds into the Investment Plan. This exception is overruled because the finding is supported by competent substantial evidence.

Exception 4

The Department takes exception to finding of fact 16 to the extent it finds that the Department approved the “Comparison Brochure” for SUSORP-eligible employees. The finding of fact does not state that the Department approved the document. Rather, it states that the SBA is responsible for providing educational information about retirement options to eligible employees in coordination with the Department, as provided for in sections 121.4501(10)(a) and (10)(c)(7), Florida Statutes. This exception is overruled because the finding is supported by competent substantial evidence.

Exception 5

The Department takes exception to finding of fact 17 to the extent it finds that failure to elect to participate in SUSORP within 90 days will result in a default to the Investment Plan. This exception is overruled because the finding is supported by competent substantial evidence.

Exception 6

The Department takes exception to finding of fact 23 to the extent it finds that Mr. Ashe was an agent of the Department. This exception is overruled because the finding is supported by competent substantial evidence.

Exception 7

The Department takes exception to finding of fact 30 to the extent it finds that the Confirmation directed members to call the Division of Retirement. This exception is overruled because the finding is supported by competent substantial evidence.

Exception 8

The Department takes exception to the last sentence in conclusion of law 53 that provides “but contrary to what was stated by the AXA representative, contrary to the Comparison Brochure, and contrary to the position taken by the Division in the SUSORP Handout.” Conclusion of law 53 will be upheld because it correctly states the law applicable to this case, i.e., that there is no current requirement that an Investment Plan member buy into and elect the Pension Plan prior to participating in SUSORP. This exception is overruled because there is not a substituted conclusion of law that is as reasonable or more reasonable than the ALJ’s conclusion of law 53.

Exception 9

The Department takes exception to conclusion of law 55 because it contains an incorrect citation. This exception is sustained for the purpose of correcting the statutory citation. The correct citation should be section 121.35, Florida Statutes, and not section 121.035, Florida Statutes, which does not exist.

Exception 10

The Department takes exception to conclusion 56 to the extent it makes a finding of fact that the Petitioner alleged that she was misled as to a requirement that she buy into the Pension Plan. This exception is overruled because the finding is supported by competent substantial evidence.

Exception 11

The Department takes exception to conclusion 60 to the extent it makes a finding of fact that the Comparison Brochure was printed in coordination with the Department. This exception regarding the finding of fact contained in the conclusion is sustained because the record does not reflect that the finding is supported by competent substantial evidence.

Exception 12

The Department takes exception to conclusion of law 61 to the extent it implies that the Department was responsible for the dissemination of the Comparison Brochure. The conclusion of law contained in the recommended order finds that the Department is “responsible for the dissemination of information regarding the requirements of SUSORP.” Section 121.35(6)(a), Florida Statutes, states that the optional retirement program, i.e. SUSORP “shall be administered by the department.” To the extent this conclusion of law finds that the Department is responsible for the dissemination of the Comparison Brochure the exception is sustained. The plain language of section 121.35(6)(a), Florida Statutes, reflects only that the Department is responsible for the dissemination of information regarding SUSORP requirements, not the dissemination of the specific Comparison Brochure.

Exception 13

The Department takes exception to conclusions 62 and 63 as irrelevant to the proceeding. This exception is overruled because the findings of fact contained within the conclusion are supported by competent substantial evidence and because there is not substituted conclusions of law that are as or more reasonable then the conclusions of law contained in the recommended order paragraphs 62 and 63.

Exception 14

The Department takes exception to conclusions of law 64, 65, and 66 to the extent it finds that Ms. Byron was misled regarding the Pension Plan buy in requirement and to the extent any misrepresentations were made by the Department. This exception is overruled because the findings of fact are supported by competent substantial evidence and because there is not a substituted conclusion of law that is as reasonable or more reasonable than the ALJ's conclusions of law 64, 65 and 66.

Exception 15

The Department takes exception to conclusion of law 68 to the extent it finds that the law permits Ms. Byron's Investment Plan monies to rollover to the SUSORP. Based on the ultimate conclusion and relief granted by this final order, this exception is overruled as moot. The buy-in monies will be returned to Ms. Byron's Investment Plan and will not be rolled over into SUSORP.

Exception 16

The Department takes exception to conclusion of law 69 to the extent it suggests that the Department refund Ms. Byron's monies because doing so would make the Petitioner a retiree and potentially disqualify her from future participation in the FRS in a non-SUSORP eligible position. Based on the ultimate conclusion and relief granted by this final order, this exception is overruled.

As found by the ALJ, the Department is estopped from accepting Ms. Byron's Second Election and the Second Election will be reversed.

Conclusion

As found by the ALJ, the Department is estopped from preventing Ms. Byron from reversing her Second Election. The Second Election will be reversed. Further, Ms. Byron's payment(s) made into the Pension Plan will be sent back to their original source(s), i.e. the monies Ms. Byron transferred to the Pension Plan from her Investment Plan account shall be sent back to the Investment Plan, and the additional buy-in monies received by the Pension Plan directly from Ms. Byron will be returned to Ms. Byron. This outcome meets both the 1st and 3rd prong of the ALJ's recommendation, i.e., "return the buy in monies to the Investment Plan;" and "refund these monies to Petitioner."

It is hereby **ORDERED AND ADJUDGED:**

1. The Recommended Order issued in this case is adopted and incorporated herein by reference except to the extent modified above by the rulings on exceptions;
2. The Department shall reverse the Second Election;
3. The Department shall return Ms. Byron's monies used to buy into the Pension Plan to the source they came from (i.e. the amount received from the Investment Plan will be returned to the Investment Plan and the amount received directly from Ms. Byron will be returned to Ms. Byron directly);
4. This Final Order shall have no effect on the Petitioner's SUSORP account or her ability to participate in the SUSORP or the FRS (Pension Plan or Investment Plan) in the future (and to elect to utilize her Second Election in the future if she so chooses; and

5. The Final Order shall become effective on the date of filing with the Department's Agency Clerk.

DONE and ORDERED on this 11/3/2020 | 11:35 AM EST

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JONATHAN R. SATTER

Agency Secretary
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4050 Esplanade Way
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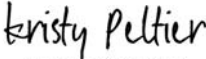
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NOTICE OF RIGHT TO APPEAL

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 the 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, Florida Rules of Appellate Procedure, and Section 120.68, Florida Statutes.

Certificate of Clerk:

Filed in the Office of the Agency
Clerk of the Department of Management
Services on this 11/6/2020 | 2:49 PM EST

DocuSigned by:

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Kristy Peltier
Agency Clerk