

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEE HAYES BYRON,

Petitioner,

vs.

Case No. 19-6581

DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,

Respondent.

_____ /

RECOMMENDED ORDER

On April 29, 2020, Hetal Desai, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing in Tallahassee, Florida by Zoom. All parties participated by separate web or telephone connections due to the coronavirus pandemic.

APPEARANCES

Petitioner: Lee Hayes Bryon, pro se
2414 River Ridge Drive
Sarasota, Florida 34239

Respondent: Thomas E. Wright, Esquire
Office of the General Counsel
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950

STATEMENT OF ISSUES

Whether Respondent is estopped from denying Petitioner's request to rescind her choice to change retirement plans (2nd Election) and requiring

her to remain in the Florida Retirement System (FRS) Pension Plan; and, if so, what are Petitioner's options?

Because of the complicated nature of FRS and Petitioner's unique circumstances, the issues and parties' positions are summarized herein. After being hired by the University of Florida, Petitioner had three retirement plan options: (1) State University System Optional Retirement Program (SUSORP), (2) FRS Investment Plan (Investment Plan), or (3) FRS Pension Plan (Pension Plan). Petitioner had been an FRS member in a previous job and switched from the Investment Plan to the Pension Plan solely because she was told she could only participate in SUSORP if she first became a Pension Plan member. The Division now admits there is no authority for this requirement, but argues it is not responsible for Petitioner's decision to switch from the Investment Plan to the Pension Plan. Rather, it blames another state agency and non-government agents for her belief that she could not participate in SUSORP unless she first bought into the Pension Plan.

Ultimately, the issues in this proceeding are: (1) whether Petitioner was required to switch from the Investment Plan to the Pension Plan to participate in SUSORP; (2) whether the Division is responsible for Petitioner's belief that this was a requirement; and (3) if so, whether Petitioner's funds used to buy into the Pension Plan can be returned to the Investment Plan or transferred to her SUSORP account.

PROCEDURAL HISTORY

On May 30, 2018, Petitioner, Lee Hayes Byron, elected to switch her FRS plan from the Investment Plan to the Pension Plan. On November 1, 2019, Respondent, Department of Management Services, Division of Retirement (the Division), issued a letter to Petitioner denying her request to essentially

rescind this election and/or have her "cost associated with buying into the FRS Pension Plan from the FRS Investment Plan transferred to SUSORP."

On November 25, 2019, Ms. Byron submitted a request for an administrative hearing to the Division. Respondent forwarded Petitioner's request to DOAH on December 11, 2019. The matter was originally scheduled for hearing for February 5, 2020, but was continued three times: once at the Division's request and twice due to the state of emergency related to the COVID-19 health crisis.

A final hearing was held on April 29, 2020, by Zoom. Petitioner testified on her own behalf and Petitioner's Exhibits P1 through P7 were admitted into evidence without objection.¹ The Division offered the testimony of Joyce Morgan (Division Bureau Chief of Contributions), and Respondent's Exhibits R1 through R8 were admitted into evidence without objection.

The final hearing was recorded by a court reporter, but neither party ordered a transcript. Petitioner requested 30 days to submit her proposed recommended order, and the Division had no objections to Petitioner's request. By requesting and agreeing to the extension of time, the parties waived the requirements in section 120.57(3)(e), Florida Statutes (2019), for the rendering of a recommended order within 30 days of the hearing. *See Fla. Admin. Code. R. 28-106.216(2).*²

¹ Exhibit P7 is a disk with numerous audio files of telephone conversations between Petitioner and Division employees, other State employees, representatives, and agents.

² All references to statutes and administrative rules are to the 2019 versions of the Florida Statutes and Florida Administrative Code unless otherwise noted.

Accordingly, the proposed recommended orders were due no later than May 29, 2020. Both parties submitted timely Proposed Recommended Orders (PROs), which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACTS

PARTIES AND PROGRAMS

1. Petitioner, Lee Hayes Byron, is currently employed by the University of Florida and eligible to participate in the Investment Plan, Pension Plan, or SUSORP. She is in an optional (not a mandatory) SUSORP position.

2. Respondent, the Division, is a part of the Department of Management Services (DMS). The Division, as part of DMS, is the state entity responsible for oversight and administration of the Pension Plan and SUSORP. *See* §§ 121.125 and 121.035, Fla. Stat. The Division authorizes provider companies to assist SUSORP members with investments. *See* § 121.035, Fla. Stat.; Fla. Admin. Code R. 60U-1.011(4).

3. The State Board of Administration of Florida (SBA) is the state agency responsible for oversight and administration of the Investment Plan.³ SBA is not a party to this proceeding. In coordination with DMS, SBA is responsible for dissemination of information regarding the FRS plans. *See* § 121.4501(10), Fla. Stat.

4. SUSORP is a defined contribution plan authorized by section 121.35, Florida Statutes. The plan is an optional retirement plan in which

³ There was evidence that prior to attempting to undo her election with the Division, Petitioner requested an agency hearing with SBA, which was held on May 21, 2019. The SBA Hearing Officer recommended that SBA grant Petitioner relief by allowing her to rescind the 2nd election. On September 17, 2019, SBA issued a Final Order rejecting the SBA Hearing Officer's recommendation. Petitioner has appealed the SBA's Final Order, which is now pending at the Second District Court of Appeal in the matter of *Lee Hayes Byron v. State Board of Administration*, Case No. 2D19-3930.

"eligible employees" of the State University System can elect to participate in lieu of the Pension Plan or Investment Plan. One of the benefits SUSORP offers over the FRS plans is the employer contribution rate is greater.

5. SUSORP and the Investment Plan require an employee to contribute a minimum pretax contribution and allow additional funds to be contributed. Both the Investment Plan and SUSORP allow the employee to allocate the money in the plan account among approved investment funds.⁴

6. The ultimate benefit from the Investment Plan and SUSORP received by the employee upon retirement depends on both the amount contributed and the financial markets. The employee is responsible for managing his or her SUSORP or Investment Plan account through approved providers.

7. In comparison, the Pension Plan requires a fixed pretax contribution by an employee. The Pension Plan is responsible for investing the contributions and accumulated funds in the member's pension account. Upon retirement, the employee receives a lifetime monthly benefit using a formula based on his or her length of service and salary. The employee has no control over how the money in the pension account is invested but is guaranteed a fixed, predictable benefit.

PETITIONER'S FRS HISTORY

8. Ms. Byron originally enrolled in FRS as an employee of Sarasota County on July 11, 2005. At that time she had the option to participate in either the Investment Plan or Pension Plan.

9. On December 28, 2005, Ms. Byron made a timely election to participate in the FRS Investment Plan, effective January 1, 2006. As part of the FRS system, she had one more chance to switch to the Pension Plan. The subsequent decision to change FRS plans is referred to as the "2nd Election."

10. On April 20, 2018, Petitioner began employment with the University of Florida in a SUSORP-eligible position. At this point, as explained in the

⁴ SBA recommends acceptable SUSORP investment products to the DMS; the DMS has final approval of such products. *See* § 121.035(6)(c), Fla. Stat.

Conclusions of Law, Petitioner would begin participation in SUSORP unless she opted to remain in the FRS System (in either the Investment Plan or Pension Plan) or failed to enroll in a SUSORP-approved investment fund. *See* § 121.35(3), Fla. Stat.

INFORMATION AND COMMUNICATIONS

11. A handout distributed by the Division titled, "Florida Retirement System (FRS) Investment Plan • Members With a Remaining FRS Election Inquiring About State University System Optional Retirement Program (SUSORP) Membership" (SUSORP Handout) provides information for an Investment Plan member who wants to participate in SUSORP. The SUSORP handout states in relevant part:

- **You will need to use your 2nd (and last) election to transfer from the Investment Plan to the Pension Plan before you will be eligible to elect participation in the SUSORP.**

* * *

- There is a cost associated with using your 2nd election to transfer to the Pension Plan.

* * *

- The estimated transfer cost is calculated using your salary, service credit, membership class, and other actuarial assumptions used in the annual FRS actuarial valuation. The payment for the amount of the transfer cost is required to complete the transfer to establish your Pension Plan membership. **The amount of money liquidated from your Investment Plan account to pay for your transfer cost will not transfer to the SUSORP.**
- If the value of your Investment Plan account is less than the transfer cost, you may use personal resources including a direct transfer from a qualified plan ... to make up the difference.

Any personal resources paid will not transfer to the SUSORP.

* * *

- Your membership in SUSORP will not begin until you have completed the transfer process and will be entirely funded by future (after the transfer) employer and employee contributions submitted on your behalf.

* * *

- Your SUSORP account will begin with a zero balance and will be funded by future employer and employee contributions.

12. The Division's witness, Ms. Morgan, confirmed the SUSORP Handout is a Division document. Ms. Morgan further stated that although this version of the SUSORP Handout was not provided to Petitioner, it was the Division's position at the time she was eligible for participation in SUSORP.

13. Ms. Morgan also conceded that there is no statutory authority for the requirement that an employee would need to use his or her 2nd Election to transfer from the Investment Plan to the Pension Plan before becoming eligible to elect participation in SUSORP. As explained in the Conclusions of Law, this is an unpromulgated requirement that has no statutory authority, and therefore cannot be applied to determine Petitioner's substantial interests.

14. The Division approves provider companies to provide information and investment products to SUSORP members. *See* Fla. Admin. Code R. 60U-1.012(1)(a). AXA Advisors (AXA) is one of the provider companies listed on the SUSORP Enrollment Form. *See* Form ORP-ENROLL-1, available at <https://www.flrules.org/Gateway/reference.asp?No=Ref-06117>.

15. On April 24, 2018, Petitioner received an email from Patrick Ashe with AXA. Mr. Ashe described AXA as a resource to help Petitioner select the best retirement plan: Pension, Investment, or SUSORP. Mr. Ashe eventually spoke to Ms. Byron on the phone and sent her FRS information. He also provided her with contact information for the Division and an FRS general phone number.

16. On May 3, 2018, Mr. Ashe provided Petitioner with a document titled, "Welcome to the Florida Retirement System for State University System SUSORP-Eligible Employees" (Comparison Brochure), dated January 2018. The Division alleges the Comparison Brochure is published by SBA, not the Division. Although SBA is responsible for providing educational information about retirement options to eligible employees, it must do so in coordination with DMS. *See* § 121.4501(10)(a) and (10)(c)7., Fla. Stat. Regardless of who published the Comparison Brochure, it is clear that it is an official document used to advise SUSORP members, and AXA was authorized to advise Ms. Byron regarding her FRS retirement options and SUSORP.

17. The Comparison Brochure explains the differences between SUSORP, the Investment Plan, and the Pension Plan. The Comparison Brochure also provides deadlines for the election to participate in each plan. According to the Comparison Brochure, from the date of hire, a SUSORP-eligible employee has 90 days to choose to participate in SUSORP. If he or she does not elect to participate in SUSORP, the employee has until 4:00 p.m. (E.S.T.) on the last business day of the eighth month after the month of hire to choose between the Investment Plan and the Pension Plan. If the employee does not make an election, FRS automatically enrolls the employee in the Investment Plan. As explained in the Conclusions of Law, this is contrary to the SUSORP statute.

18. Regarding changes made after an initial election, the Comparison Brochure provides:

	SUSORP Plan	Investment Plan	Pension Plan
Can I change plans after I make my initial election?	No. If you elect the SUSORP, you will remain in this plan for as long as you remain at this employer in a SUSORP-eligible position.	You have a one-time 2nd Election that you can use during your FRS career to change to the other FRS retirement plan, provided you are actively employed by an FRS-participating employer at the time your 2nd Election is received. ⁴ (Footnote in original, see ¶20 below).	

19. The Comparison Brochure explains that once an employee chooses to participate in SUSORP, the employee cannot change to a different plan, and will remain in SUSORP as long as the employee is in a SUSORP eligible position. Once an employee elects to participate in the Investment Plan or the Pension Plan, he or she has only one opportunity (the 2nd Election) during his or her entire FRS career to change between the Investment and Pension Plans.

20. Regarding changing to SUSORP from the Investment Plan or Pension Plan, footnote 4 in the Comparison Brochure explains:

If you are enrolled in the Investment Plan and move to a SUSORP-eligible position, you must use your 2nd Election (if available) to buy back into the Pension Plan in order to enroll in the SUSORP. You are not permitted to make a direct transfer from the Investment Plan to the SUSORP (unless in a mandatory SUSPORP position).

Again, during the hearing, Ms. Morgan admitted there was no statutory authority for the requirement that Petitioner use her 2nd Election to buy into the Pension Plan before she could enroll in SUSORP.

21. On May 4, 2018, Mr. Ashe sent Ms. Byron a follow-up email that explained the procedure to switch from the Investment Plan to the Pension Plan so she could enroll in SUSORP:

It sounds like you are currently in the Investment Plan so if you decide to stay in that plan just verify

with [FRS] that you want to make sure you automatically are re-enrolled in that plan. *If you elect to switch to either the Pension or the SUSORP plan then we would just fill out the 1 page 2nd election form and fax that to FRS to utilize the switch. That would put you in the Pension Plan. From there if you would like to enroll in the SUSORP plan then I will get those forms to you and we will get that set up. ...* The main factor on whether the switch would be in your best interest would be based on the differential between the

Pension and Investment Plans at your current number of years in the FRS system.

* * *

In the Investment Plan the university is contributing 3.3% to match your mandatory 3% contribution and in the SUSORP plan they would contribute 5.14% in addition to your 3% contribution. *The differential involved in switching to the Pension Plan so that you could then enroll in the SUSORP plan would be the major factor in whether picking up the extra employer contribution would be beneficial in the long run.* (emphasis added).

22. Mr. Ashe's email erroneously indicated Ms. Byron must use her 2nd Election to go into the Pension Plan before she could enroll in SUSORP. He also acknowledged she should weigh whether the cost to buy into the Pension Plan was worth the extra contributions available if she ultimately decided to go into SUSORP. In this email, Mr. Ashe reiterated he had the authority to provide the SUSORP paperwork and "get that set up."

23. Ms. Byron testified she believed Mr. Ashe was authorized by the Division to advise and enroll her into SUSORP. Although the Division argues other people who spoke with Ms. Byron were not Division employees, it does make this same assertion regarding Mr. Ashe. *See* Resp. PRO, ¶¶ 44-47 (claiming Ernst and Young's employee was an SBA agent, not a Division

agent). Given that AXA was a approved by the Division as a provider company, the undersigned finds that AXA and Mr. Ashe were authorized by the Division to provide Ms. Byron with information about SUSORP and administer her SUSORP account. *See* § 121.35(6), Fla. Stat.

24. On May 29, 2018, Ms. Byron called the FRS Financial Guidance Line and was put in contact with "Mike with Ernst & Young." During the call, Ms. Byron explained to Mike that she was in the Investment Plan, but wanted to "move to the SUSORP." Specifically, she called because she understood she would "have to maybe pay a fee to get into the pension plan and then move to the SUSORP." She had been told that she should call the FRS Financial Guidance Line to figure out what that fee might be. Mike confirmed Petitioner would need to be a member of the Pension Plan before getting into SUSORP. Again, this information is not accurate and contrary to the SUSORP statute and Division rules. He also stated there is a 90-day window for her to move to SUSORP. During the call, Mike could not give Petitioner a quote for the buy in cost of switching from the Investment Plan to the Pension Plan and indicated it could take up to six weeks to get that information. He also informed her it could take a full month to process the paperwork and payment amount to become a Pension Plan member. He urged her to submit the 2nd Election form to switch from the Investment Plan to the Pension Plan before the end of the month (May 31, 2018), and then not to pay the cost if she concluded it is was too much or did not want to go forward with the switch.

Ms. Byron: Okay. So, what is the risk of submitting the [2nd Election] form? I know I only get one chance to make the change. If I submit the form and change my mind, does that count as my chance?

Mr. Mike: I mean, you have the full month following to rescind.

* * *

Ms. Byron: And if I don't submit the form, then nothing happens. If I do submit the form, and I don't want to pay it, I have to not pay it and nothing happens ... [i]f it automatically happens and I still don't want to do it, I have a month.

Mr. Mike: Yeah.

25. Based on the information she received from Mr. Ashe and her conversation with Mike, Ms. Byron understood she had 90 days, or until July 19, 2018, to buy into the Pension Plan and then elect to participate in SUSORP. Because she had been led to believe only Pension Plan participants could elect to participate in SUSORP, she reasonably concluded she would need to use her 2nd Election to change from the Investment Plan to the Pension Plan before she could participate in SUSORP.

26. On May 31, 2018, Ms. Byron submitted a "2nd Election Retirement Plan Enrollment Form" (2nd Election form) by facsimile to the number designated on that form. Ms. Byron selected the following option:

Option 1: Change from the FRS Investment Plan or Hybrid Option to the FRS Pension Plan. I want to transfer from the Investment Plan to the Pension Plan and use my existing Investment Plan account balance and possibly other personal resources to 'buy' into the Pension Plan.

The 2nd Election form does not make any reference to SUSORP.

27. On May 31, 2018, Petitioner called the FRS Financial Guidance Line to confirm that the 2nd Election form was received by FRS. During this call, Ms. Byron was transferred to Misty, who identified herself as an Investment Plan administrator. Ms. Byron indicated she wants to make sure the 2nd Election form had been received, but Misty could not confirm this. Misty explains it may take a few hours to show up "in her system." Ms. Byron was

concerned she may not be talking to the right person.

Ms. Byron: Okay. Now, am I –are you sure I'm with the right person? Because I'm switching from investment to the pension with the intention of eventually switching to SUSORP.

Ms. Misty: You're switching from investment plan to pension with the intention of switching to the [sic] something entirely outside of the pension?

Ms. Byron: To SUSORP.

Ms. Misty: Okay. I don't know what that is, I apologize. Let's go ahead and get you over to pension just to be sure since they are a separate department.

* * *

Ms. Byron: Who's in charge of switching from the investment to the pension?

Ms. Misty: *We* [SBA and the Division] *would both be involved in it.* (emphasis added).

She then instructed Ms. Byron to press Option 4 for the Pension department when she returned back to the automated system.

28. From this conversation and the other conversations Ms. Byron had with people on the FRS Financial Guidance Line, the undersigned finds both the Division (as the agency administering the Pension Plan) and SBA (as the agency administering the Investment Plan) were responsible for processing Ms. Byron's 2nd Election form.

29. On June 4, 2018, FRS sent Ms. Byron a "Confirmation of 2nd Election – Pension Plan" (Confirmation). It indicated that her election to move from the Investment Plan to the Pension Plan was effective as of June 1, 2018, but that it was not finalized. The Confirmation informed Petitioner "you will need to buy into the FRS Pension Plan using the available balance in your FRS

Investment Plan account. If your account is not sufficient to cover the cost of the buy in, you will need to submit personal funds."

30. Although the Confirmation did not state whether it was sent from SBA or the Division, the second page indicated:

If you feel this retirement Plan election was made in error, you may be able to cancel it. Please call the MyFRS Financial Guidance Line at 1-866-446-937, Option 2. Failure to notify us no later than 4:00 PM EST on the last business day of the month following your election month will void your right to cancel this election.

The Confirmation directed members to contact the Division (not SBA) at the same number, Option 3, for specific questions.

31. Based on the date of the submittal of her 2nd Election form (May 31, 2018), Ms. Byron had until June 29, 2018, to rescind her 2nd Election form, and thereby reverse her decision to go from the Investment Plan to the Pension Plan.

32. At this point, however, even though she had executed the 2nd Election form, Petitioner's election transfer from the Investment Plan to the Pension Plan was not final because she had not submitted the buy in payment. The Confirmation did not address what would happen if the buy in amount was not submitted, or if it was, what would happen if an employee canceled the 2nd Election and did not remain in the Pension Plan. The Confirmation did not make any reference to SUSORP.

33. On June 18, 2018, Ms. Byron spoke with Leah at the Division. In this call, Ms. Byron explained she received the Confirmation, but she had not received a bill for the buy in amount. Leah replied that a letter with the amount was generated on June 14, 2018, but has not been mailed out. Ms. Byron was concerned about the last day she has to rescind the election.

Ms. Byron: So what is my deadline for canceling? I'm just panicking about if it's – if it's not what I want to do because I don't have the bill yet, when

can I cancel the second election?

Ms. Leah: Typically they give you a 60-day period. Let me double check. One moment. Okay. So you'll have until no later than the last business day of the month following the election.

34. During the call, Ms. Byron pressed Leah on the letter with the buy in figure, and questioned her as to why the Confirmation was sent if the election was not final. Leah determined the letter was issued by the Investment Plan (SBA), not by the Pension Plan (the Division), and transferred Ms. Byron to Rick with the Investment Plan.

35. It is apparent from the audio recording that Ms. Byron was exasperated (justifiably), but remained patient. Once transferred to Rick, Ms. Byron was informed that any questions regarding the buy in had to go through the Pension Plan. Rick offered to transfer her back to the "pension department."

36. On June 21, 2018, before the deadline to rescind her 2nd Election, Mr. Ashe sent Ms. Byron two documents: (1) a SUSORP enrollment form, and (2) a risk tolerance questionnaire to identify Ms. Byron's investment strategy for SUSORP. There was no discussion of the buy in payment to transfer into the Pension Plan.

37. On July 3, 2018, Ms. Byron called the FRS Financial Guidance Line and was transferred to Durriya with Ernst & Young. During this call, Ms. Byron explained she received an invoice for the buy in amount to switch to the Pension Plan and needed a "letter of acceptance" for the financial firm handling her Investment Plan to release the funds. Durriya said could not help her and offered to transfer Ms. Byron to someone else.

38. Durriya transferred Ms. Byron to Phyllis at the Division who was able to help her. Phyllis stated she would request for the letter and it would be mailed to Ms. Byron as soon as possible.

Ms. Byron expressed concern that the letter might not get to her by July 19, 2018, the date she needed to elect to participate in SUSORP.

Ms. Byron: So help me with the deadline. I was hired April 20th. *I have made my intention known to go into the SUSORP*, but I can't physically do that with the money until all of this happens. And I'm worried it won't happen by July 20th, July 19th, which is my deadline for selection. Am I going to be okay?

Ms. Phyllis: Let's see. Okay. So you have until August 16th for us [the Division], but you need it by July 19th?

Ms. Byron: That's when my selection of the – which plan I want to be in has to be in. And I submitted my, *I want to be in SUSORP [], but I can't physically be in ... SUSORP until all the money's there* [Pension Plan]. Does that matter?

* * *

Ms. Phyllis: Okay. *So, basically you are switching from investment to pension and then to SUSORP, right?*

Ms. Byron: Yeah. (emphasis added).

39. Phyllis did not advise Petitioner she could start participation in SUSORP without first switching from the Investment Plan to the Pension Plan or buying into the Pension Plan. At this point, Petitioner's 2nd Election was not finalized because she had not submitted the buy in funds. Had she been informed that she did not have to be in the Pension Plan first, Petitioner could have simply not submitted the buy in funds, kept her existing funds in the Investment Plan, and started in SUSORP.

40. Rather, Phyllis advised she would place a notation in the system that Ms. Byron was attempting to make an election to participate in SUSORP,

and "asked them to rush it." Ms. Byron then asked Phyllis about the deadline for her to get into SUSORP. Phyllis could not help her, but offered to transfer her to the Optional Retirement Program department. What is clear from the call is that Ms. Byron is very concerned about getting the buy in funds to the Division to participate in the Pension Plan because she believed she had to be a Pension Plan member before the SUSORP election deadline.

41. On August 3, 2018 (after both the deadline to rescind her 2nd Election form and the deadline to enroll in SUSORP had passed), Ms. Byron contacted the Division and spoke to Leah. At the outset of the call, Ms. Byron informed Leah that called to see if her 2nd Election status was final because she had submitted the funds to buy into the Pension Plan. Although it is unclear from the record how much Petitioner paid to buy into the Pension Plan, she used her entire savings from her Investment Plan plus additional monies. The Investment Plan was valued at approximately \$138,000.

42. Leah confirmed the switch from the Investment Plan to the Pension Plan had gone through, and advised Ms. Byron that she had 13 years of service under the Pension Plan. Ms. Byron was audibly upset and stated, "Well, I actually didn't want to end up in the pension, I wanted to end up in the SUSORP, so how do I make sure that that choice is recorded? We had to do the pension first and transfer it to SUSORP." From the audio recording, it is clear Leah was confused.

43. Leah then placed Ms. Byron on hold and had a separate call with another Division employee, Phyllis. Leah relayed the conversation with Ms. Byron to Phyllis and Phyllis suggested Leah call another extension. Leah then checked back in with Ms. Byron to let her know she was still looking for someone who can help her. Ms. Byron agreed to stay on hold.

44. On a separate line (which Ms. Byron could not hear), Leah received an automated recording announcing that she had reached the "Florida Division of Retirement Optional Program O-R-P unit." Leah then spoke with Jim at the Division. Leah explained to Jim that Ms. Byron did not want to remain in

the Pension Plan, but rather wanted to transfer to SUSORP. Leah remained confused.

[Mr. Jim]: You don't transfer to SUSORP. You're either in it or you're not in it. There is no way to buy into it ... there's no way to get from investment by going through pension to get to SUSORP. You take a job that's eligible for SUSORP and you make the choice to be in it or not.

* * *

Ms. Leah: Well, she had questions about the forms that she would need to submit, but doesn't look like she's going to be –

Mr. Jim: Just put up the wall. She's not going to be able to do it.

45. What Jim told Leah is consistent with the SUSORP statute: it does not matter whether one is in the Investment Plan or Pension Plan; one is in SUSORP when he or she is eligible. Jim seemed to be telling Leah that what Ms. Byron wanted (to have her retirement funds in SUSORP) was not possible, but that Leah should not do anything about it. Jim agreed to speak with Ms. Bryon but joked with Leah that it was Friday, and he had one hour left on his shift. He also sarcastically told Leah she may want to stay on the line as it might be "entertaining or educational." Again, Ms. Byron did not hear this conversation between Leah and Jim.

46. Leah then patched Ms. Bryon through to Jim. At this point, Ms. Byron, Jim, and Leah were all on the call.

Ms. Byron: I submitted my second election form to go from investment to pension with the intention of going into SUSORP and I need to check if you have all my forms necessary to make that happen.

Jim: So, you've just taken a job with one of the universities?

Ms. Byron: Yes.

Mr. Jim: Okay. It looks like everything's in place.

47. Jim informed Ms. Byron a letter of acceptance to SUSORP was mailed to her on July 5, 2018, and that she could call back to make sure everything had been processed in a few days. He did not tell Ms. Byron what he had explained to Leah: "You don't transfer to SUSORP. You're either in it or you're not in it."

48. After Ms. Byron ended the call, Jim and Leah continued to discuss Ms. Byron's situation.

Mr. Jim: Great. Understand now, Ms. Byron just spent a whole bunch of money. That money's gone except that it purchased her some years of pension service.

Ms. Leah: Right.

Mr. Jim: Okay. Her new SUSORP account starts at zero. Oh, did I hear a great intake of breath?

Ms. Leah: Are you serious?

Mr. Jim: Absolutely serious.

49. At no point during the conversation between Ms. Byron and Leah or Jim was Ms. Byron informed she did not have to use her 2nd Election and buy into the Pension Plan before she could participate in SUSORP. In fact, at no time during these numerous emails and telephone conversations did anyone affiliated with DMS, the Division, AXA, Ernst & Young, or SBA tell Ms. Byron that she was essentially enrolled in SUSORP (unless she choose to go with an FRS plan or failed to pick a provider) when she started the position at the University of Florida. No one told her that she did not need to exercise her 2nd Election or buy into the Pension Plan to participate in

SUSORP.

CONCLUSIONS OF LAW

50. The Division of Administrative Hearings has jurisdiction over the subject matter of, and the parties to, this proceeding. *See* §§ 120.569 and 120.57(1), Fla. Stat.

51. The Division is part of DMS and is responsible for the administration of both the Pension Plan and SUSORP. § 121.025, Fla. Stat. (noting DMS "shall be the administrator of the retirement and pension systems assigned or transferred to [it] by law.").

ELECTION TO PARTICIPATE IN SUSORP

52. Section 121.35, **Optional retirement program for the State University System**, provides, in pertinent part, as follows:

(2) ELIGIBILITY FOR PARTICIPATION IN OPTIONAL PROGRAM.—

(a) Participation in the optional retirement program provided by this section shall be limited to persons who are otherwise eligible for membership or renewed membership in the Florida Retirement System and who are employed in one of the following State University System positions:

1. Positions classified as instructional and research faculty which are exempt from the career service under the provisions of s. 110.205(2)(d).

* * *

(3) ELECTION OF OPTIONAL PROGRAM.—

* * *

(c) Any employee who becomes eligible to participate in the optional retirement program on or after January 1, 1993, shall be a compulsory participant of the program unless such employee

elects membership in the Florida Retirement System. Such election shall be made in writing and filed with the personnel officer of the employer. Any eligible employee who fails to make such election within the prescribed time period shall be deemed to have elected to participate in the optional retirement program.

* * *

2. Any employee whose optional retirement program eligibility results from a change in status due to the subsequent designation of the employee's position as one of those specified in paragraph (2)(a) *or due to the employee's appointment, promotion, transfer, or reclassification to a position specified in paragraph (2)(a) shall be enrolled in the optional retirement program upon such change in status* and shall be notified by the employer of such action. If, within *90 days after the date of such notification, the employee elects to retain membership in the Florida Retirement System*, such continuation of membership shall be retroactive to the date of the change in status.

3. Notwithstanding the provisions of this paragraph, effective July 1, 1997, *any employee who is eligible to participate in the Optional Retirement Program and who fails to execute a contract with one of the approved companies and to notify the department in writing as provided in subsection (4) within 90 days after the date of eligibility shall be deemed to have elected membership in the Florida Retirement System, except as provided in s. 121.051(1)(a). (emphasis added).*

53. The statutory language clearly indicates an FRS member that becomes eligible for a SUSORP position automatically is enrolled in SUSORP unless he or she (1) chooses to remain in the FRS system or (2) fails to contract with one of the approved companies (such as AXA) within 90 days.⁵ Again, as the

⁵ This is consistent with section 121.4501(4)(a)2., which provides:

Division admitted, there is no Division requirement that an existing Investment Plan member buy into and elect to switch to the Pension Plan prior to participating in SUSORP. This is consistent with the information Jim provided to Leah on August 3, 2018, 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.

54. In fact, nothing in section 121.35, or elsewhere in chapter 121, requires an Investment Plan participant to utilize his or her 2nd Election to transfer to the Pension Plan before joining SUSORP. The Division concedes as much noting that "Section 121.4501(4), Fla. Stat. governs transfers between the Investment Plan and Pension Plan. It does not appear to have any provision that requires a transfer from the IP to the Pension Plan for a member who becomes eligible to participate in the SUSORP." Resp. PRO, ¶¶ 45 and 46. The Division (which administers SUSORP) does not cite to any authority, nor could the undersigned find any statute or rule, requiring that SUSORP participants first be Pension Plan members. Although the Division denies responsibility for the misrepresentation, the Division acknowledges that informing Petitioner she had to buy into the Pension Plan before participating in SUSORP was a misrepresentation that has no statutory basis. Resp. PRO, ¶¶ 44-47.

55. Not only was the requirement that Ms. Byron use her 2nd Election to participate in SUSORP without statutory basis, but it is actually contrary to the language in section 121.035. The Administrative Procedure Act prohibits the Division (which is responsible for the administration of SUSORP and the Pension Plan) and the undersigned from imposing an unwritten rule or a rule that is an invalid exercise of delegated legislative authority:

With respect to employees who become eligible to participate in the investment plan pursuant to [] s. 121.35(3)(i), the employee may elect to participate in the investment plan in lieu of retaining his or her membership in the [SUSORP]. The election must be made in writing or by electronic means and must be filed with the third-party administrator.

An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. This subparagraph does not preclude application of valid adopted rules and applicable provisions of law to the facts.

§ 120.57(1)(e)1., Fla. Stat.; *also see generally, One Beacon Ins. v. Ag. for Health Care Admin.*, 958 So. 2d 1127 (Fla. 1st DCA 2007)(noting where there is a conflict between a statute and an administrative rule, the statute takes precedence). Therefore, based on this record, there was no justification for conditioning Ms. Byron's participation in SUSORP on first buying into the Pension Plan.

ESTOPPEL

56. Petitioner argues the Division should be estopped from denying the rescission of her 2nd Election based on the misrepresentation to her that she was required to buy into the Pension Plan before becoming a SUSORP participant. The Division argues it is not responsible for this misrepresentation.

57. "As a general rule, equitable estoppel will be applied against the state only in rare instances and under exceptional circumstances." *Dep't of Rev. v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981). Detrimental reliance or estoppel based on government communication requires:

- (a) a representation as to a material fact that is contrary to a later-asserted position;
- (b) reliance on that representation; and,
- (c) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.

Council Bros., Inc. v. City of Tallahassee, 634 So. 2d 264, 266 (Fla. 1st DCA 1994). Equitable estoppel must include some positive act upon which

Ms. Byron had a right to rely and did rely to her detriment. *See Hoffman v. State, Dep't of Mgmt. Servs., Div. of Ret.*, 964 So. 2d 163, 166 (Fla. 1st DCA 2007); *Wise v. Dep't of Mgmt. Servs., Div. of Ret.*, 930 So. 2d 867, 873 (Fla. 2d DCA 2006).

58. Ms. Byron must prove the elements of estoppel by clear and convincing evidence. *Hoffman*, 964 So. 2d at 166. "Clear and convincing" evidence requires the following:

[T]hat the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

59. The representation can be based on an agency's mistake. *See Council Bros.*, 634 So. 2d at 267; and *Salz v. Dept. of Adm., Div. of Ret.*, 432 So. 2d 1376 (Fla. 3d DCA 1983). In *Salz*, a teacher was informed in writing by the Teachers Retirement System (TRS) that she could purchase eight years of credit for her out-of-state teaching time to apply toward her Florida retirement. The teacher made plans for her retirement based upon that representation. Subsequently, the Division advised that the representation had been made in error. The appellate court rejected the same argument made in this case: the official who initially gave the misrepresentation was not authorized to do so. The court held that the Division, which was authorized by statute to administer the TRS, was estopped from denying the teacher the credit.⁶

⁶ The Division did not argue in the hearing and does not argue in its PRO that estoppel should not apply because the misinformation provided to Petitioner was a mistake of law, not fact. Even if it had, this defense would be inapplicable. In *Kuge v. Division of Retirement*,

60. The Division argues Ernst & Young, not the Division, misinformed Ms. Byron that she was required to be a Pension Plan member before she could elect to be in SUSORP. Resp. PRO, ¶¶ 44-45. Ms. Byron, however, was first told of this requirement by Mr. Ashe (AXA), an approved SUSORP provider. That misrepresentation, however, was reinforced by the Comparison Brochure, which was printed by SBA in coordination with DMS. Section 121.4501 specifically provides as follows:

(10) EDUCATION COMPONENT.—

(a) The state board, *in coordination with the department*, shall provide for an education component for eligible employees in a manner consistent with this subsection.

(b) The education component must provide system members with impartial and balanced information about plan choices. The education component must involve multimedia formats. Program comparisons must, to the greatest extent possible, be based upon the retirement income that different retirement programs may provide to the member. The state board shall monitor the performance of the contract to ensure that the program is conducted in accordance with the contract, applicable law, and the rules of the state board.

(c) The state board, *in coordination with the department*, shall provide for an initial and ongoing transfer education component to provide system members with information necessary to make informed plan choice decisions. The transfer education component must include, but is not limited to, information on:

449 So. 2d 389 (Fla. 3d DCA 1984), the Division gave an employee information regarding credit calculations, which the employee used in making an employment decision. Later, the Division denied the credit because the calculation was contrary to statute. The Division argued the mistake could not be grounds for estoppel because it was a "mistake of law." The court expressly rejected this contention, noting that, "[i]t is true that such representations were based on a misunderstanding of the law applicable to [the employee's] case, but this does not convert the factual representations into legal representations." *Id.* at 391–392.

* * *

7. The program choices available to employees of the State University System and the comparative benefits of each available program, if applicable. (emphasis added).

61. Moreover, DMS, not SBA, is statutorily responsible for administering SUSORP and is responsible for the dissemination of information regarding the requirements of SUSORP. Section 121.35 provides:

(1) OPTIONAL RETIREMENT PROGRAM ESTABLISHED.—The Department of Management Services shall establish an optional retirement program under which contracts providing retirement and death benefits may be purchased for eligible members of the State University System who elect to participate in the program.

* * *

(6) ADMINISTRATION OF PROGRAM.—
(a) The optional retirement program authorized by this section *shall be administered by the department*. The department shall adopt rules establishing the responsibilities of the institutions in the State University System in administering the optional retirement program. (emphasis added).

62. Even if a Division employee did not provide Ms. Byron the original misrepresentation, Division employees allowed Ms. Byron to continue to believe that she must be a Pension Plan member to enter SUSORP. The Division participated in the FRS Financial Guidance Line. This process was not transparent, and there was little, if any, coordination. Ms. Byron was passed around among divisions, departments, state employees, and outside agents when she tried to obtain help and information. Had she been properly advised, Petitioner could have either not made the 2nd Election, or could

have rescinded the 2nd Election within the proper timeframe or withheld the buy in costs so that her 2nd Election would not become final.

63. Instead, no one she spoke with from the FRS Financial Guidance Line or the Division corrected this misrepresentation even though Ms. Byron mentioned it repeatedly. She got the proverbial runaround. Jim, a Division employee, in particular seemed to understand Petitioner's plight but was cavalier and unhelpful. Even though at that point, Ms. Byron had already made her decision and missed the deadline to change it, he advised that the Division "put up a wall" rather than explain to Ms. Byron what had happened.

64. There was clear and convincing evidence that the Division's representatives, agents, and vendors made misstatements that affirmatively led Ms. Byron to erroneously believe she must buy into the Pension Plan to participate in SUSORP. This is sufficient to establish estoppel against the Division. *See Hamilton Downs Horsetrack, LLC v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering*, 226 So. 3d 1046, 1052 (Fla. 1st DCA 2017) (finding estoppel where government officials assured horse track there was "nothing wrong" with a race and that there were "no rules" governing flag-drop racing—a statement consistent with what horse track had previously been told by the Division, but then months later, the Division changed its position).

65. In *Wise*, the appellate court found equitable estoppel against the Division, reversing its final order. There, the Division failed to inform the employee of her job status as required by statute, and the employee took certain actions based on that omission. The administrative law judge, whose recommended order was rejected by the Division, found that the Division's failure to provide the proper notice and documentation were omissions equivalent to tacit representations. *Wise*, 930 So. 2d at 871-873. Here, the Division not only made explicit misrepresentations through AXA and the

Comparison Brochure, it tacitly allowed Ms. Byron to believe the mistaken requirement.

66. There is no dispute regarding the second and third prongs to establish estoppel against the Division. The unrefuted evidence at the hearing supports a finding that Ms. Byron relied on the flawed representation when she made her 2nd Election and used her existing retirement funds to change from the Investment Plan to the Pension Plan. This was to her substantial detriment. As such, the Division is estopped from denying her request to rescind her 2nd Election.

REMEDY

67. The effect of rescinding Petitioner's 2nd Election would be to return the Investment Plan funds Petitioner used to buy into the Pension Plan back to the Investment Plan. The Division argues that it is willing to release her from the Pension Plan, but that it cannot transfer the funds back to the Investment Plan because that plan is overseen by SBA. *See* § 121.4501, Fla. Stat. (authorizing SBA to establish and administer the Investment Plan).⁷ Although it seems like the most appropriate remedy, the undersigned has no authority to require SBA (a non-party) to "readmit" Ms. Byron into the Investment Plan.

68. If SBA does not allow Ms. Byron to return to the Investment Plan, DMS and the Division should allow Petitioner to "rollover" or move these monies to SUSORP. Section 121.35(4) allows the Division to accept such a rollover:

(f) The Optional Retirement Trust Fund [SUSORP] may accept for deposit into member contracts contributions in the form of rollovers or direct trustee-to-trustee transfers by or on behalf of members who are reasonably determined by the department to be eligible for rollover or transfer to the optional retirement program pursuant to the

⁷ This seems to be the subject matter of Petitioner's case against SBA currently before the Second District Court of Appeal. *See* Pet. PRO, ¶ 5.

Internal Revenue Code if such contributions are made in accordance with rules adopted by the department. Such contributions shall be accounted for in accordance with any applicable requirements of the Internal Revenue Code and department rules.

69. Alternatively, if the monies from the Pension Plan cannot be transferred to SUSORP, the Division should refund the monies to Petitioner. The undersigned makes no conclusions as to whether Petitioner would be allowed to transfer the buy in funds from her Pension Plan to another eligible retirement plan, as defined in 26 U.S.C. § 402(c)(8)(B) (the Internal Revenue Code), or whether there would be any tax implications for such a rollover or distribution.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Management Services, Division of Retirement, enter a final order rescinding Petitioner's 2nd 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 Petitioner.

DONE AND ENTERED this 26th day of June, 2020, in Tallahassee, Leon
County, Florida.



HETAL DESAI
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.