

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

WISSEM MEDJOUR, ET AL., AS
PARTICIPANTS IN THE CITY OF
HALLANDALE BEACH POLICE OFFICERS'
AND FIREFIGHTERS' PENSION PLAN,

Petitioners,

Case No. 19-6607

vs.

CITY OF HALLANDALE BEACH,

Respondent.

_____ /

RECOMMENDED ORDER

On September 3 and 4 and October 2, 2020, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by Zoom.

APPEARANCES

For Petitioner Wissem Medjoub:

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Michael Braverman, P.A.
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For Petitioners Matthew Lewis, Jose Pan, Manny Gonzalez, and Alberto Wiener Ari:

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Law Office of Brendan M. Coyle, P.A.
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For Petitioners Pietro Roccisano and Eric Bruce:

Teri Guttman Valdes, Esquire
Teri Guttman Valdes, LLC
1501 Venera Avenue, Suite 300
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For Respondent:

Brett J. Schneider, Esquire
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STATEMENT OF THE ISSUES

The issues are whether any Petitioner has proved by clear and convincing evidence that he timely submitted a request to purchase "Additional Accrual Service" (AAS) credit to the Board of Trustees (Board) of the City of Hallandale Beach Police Officers' and Firefighters' Pension Plan (Plan) in writing or at a public meeting and whether the Board prohibited such Petitioner from purchasing the requested AAS credit.

PRELIMINARY STATEMENT

This case arises from the settlement of Case 18-019266 in the Circuit Court of the 17th Judicial Circuit, in Broward County, between Respondent, as plaintiff, and the Board, as defendant. Respondent commenced the litigation in August 2018 to prohibit the implementation of legal opinions of Board counsel unrelated to the purchase of AAS credit, but amended its complaint in August 2019 to prohibit the implementation of a legal opinion of Board counsel allegedly supporting the untimely sale of AAS credit for less than the cost specified in the Plan.

Entering into a settlement agreement (Settlement Agreement), which was approved by the court on December 2, 2019, Respondent and the Board

agreed that the 19 claimants named in Appendix B¹ to the Settlement Agreement would have their rights determined by a DOAH administrative law judge, who "shall apply and determine the AAS claims in accordance with the standards for estoppel claims as described in Appendix C," although the more detailed statement of the issues stated the issues set forth above, not the issue of equitable estoppel.² The Board has entered into a contract with

¹ Appendix B identifies the 19 approved claimants: Luis Acosta, Garth Bonner, Eric Bruce, Janira Camero, Gabriel Castillo, Miguel Cordova, Yvette De La Torre, David DeCosta, Gary di Lella, John Faul, Anthony Gonzalez, Manny Gonzalez, Matthew Lewis, Wissem Medjoub, Jose Pan, Pietro Roccisano, Philip Rothman, Stephen Sanfilippo, and Alberto Wiener [Ari].

² Appendix C is entitled, "Procedure for Administrative Hearings regarding AAS Provisions," and states:

Any hearings conducted pursuant to [the settlement agreement] shall be conducted in accordance with Chapter 28-106 of the Florida Administrative Code, except as specifically set forth below.

1. [Respondent] shall be given at least 30 days' written notice of any hearing;
2. [Respondent] shall be provided with copies of any documentary evidence to be presented by a claimant at hearing at least 14 days prior to the hearing. Failure to timely provide [Respondent] with any such documentation will result in the claimant being barred from using such documentation at hearing;
3. [Respondent] will be allowed to present evidence and testimony at any such hearing concerning its position; and
4. In order to prevail at hearing, the claimant must establish equitable estoppel by clear and convincing evidence that he/she timely submitted a request to purchase AAS to the Board, either in writing or at a public meeting, and that the Board prohibited the member from making the purchase. A claimant's uncorroborated testimony is insufficient evidence to support a claim of estoppel.

Typically, equitable estoppel would require a petitioner to prove by clear and convincing evidence that the Board is asserting a material fact contrary to its previous representation of such fact, the claimant relied on the previous representation, and the claimant changed his position in reliance on the previous representation and his reliance on it. *See, e.g., Goodwin v. Blu Murray Ins. Ag., Inc.*, 939 So. 2d 1098, 1103 (Fla. 5th DCA 2006). Noting the obvious differences between equitable estoppel and the issues presented in Appendix C, the administrative law judge issued on February 19, 2020, a Notice of the Proposed Statement of

DOAH calling for an administrative law judge to conduct a hearing and issue to the Board a recommended order.

Requests for an administrative hearing were filed by Petitioners, as identified above in Appearances. The administrative law judge declined to allow any person not listed in Appendix B of the Settlement Agreement to participate as a party in the proceeding.

At the hearing, Petitioners called eight witnesses: Ken Cowley, Jim Bunce, Eric Bruce, Pietro Roccisano, Wissem Medjoub, Alberto Ari, Jose Pan, and Manny Gonzalez. Respondent called one witness: Radu Dodea, who is its human resources director. For ease of reference, each of Petitioners' exhibits was marked by the name of the counsel offering the exhibit. Mr. Braverman offered into evidence eight exhibits: Braverman Exhibits 1-6, 9, and 12. Mr. Coyle offered into evidence 16 exhibits: Coyle Exhibits 1-7 and 9-17. Ms. Valdes offered into evidence 25 exhibits: Valdez Exhibits 2-5 and 7-27. Respondent offered into evidence four exhibits: Respondent Exhibits 1-4. All exhibits were admitted.

The court reporter filed the transcript on October 8, 2020. The parties filed proposed recommended orders on December 18, 2020.

the Issue, which alerted the parties to the differences, notwithstanding the mention of "equitable estoppel" in the court's order and paragraph 4 of Appendix C, and allowed the parties to comment on the appropriate issues for the proceeding. After considering the comments, the administrative law judge announced the issues as set forth in the Statement of the Issues, which omits equitable estoppel.

However, the administrative law judge was unable to harmonize the responsibilities assigned to the DOAH administrative law judge to weigh the evidence with the prohibition of a finding supported only by the uncorroborated testimony of a claimant, so the administrative law judge advised the parties during the hearing that he declined to implement the final sentence of Appendix C.

FINDINGS OF FACT

1. At all material times, Respondent has maintained city police and fire departments.³ Respondent sponsors the Plan to provide defined benefits, mostly on retirement, to members of the Plan, who are current and former city police officers and firefighters.

2. Respondent primarily documents the Plan in ordinances that it enacts from time to time--as relevant in this case, in 2008 and 2011.⁴ Changes to the Plan may result from negotiations between Respondent and the police and firefighters unions, and the collective bargaining agreement may document the new provision until it is enacted by ordinance. The relevant agreement is the Collective Bargaining Agreement between Respondent and the Hallandale Beach Professional Fire Fighters Metro Broward Local 3080 District 10 for October 1, 2005 through September 30, 2008, as executed on October 3, 2006 (CBA).⁵

3. The Plan and the funds associated with the Plan are "under the exclusive administration and management" of the Board.⁶ The "responsibility for the proper effective operation of the ... Plan and for making^[7] the provisions of this Ordinance is vested in [the] Board."⁸ The

³ Subsequent to the timeframe at issue, the city fire department merged with the Broward County fire department.

⁴ For most of the time in question, the relevant Plan was documented in City of Hallandale Beach Ord. Nos. 2008-29 and 2011-11. Provisions material to this case were unchanged in the 2011 ordinance. References to the "Plan" are to the 2011 ordinance due to its superior formatting and ease of use. All references to "section" or "§," such as "section 8.08," are to the Plan, as codified by the ordinance, unless the reference is to Florida Statutes.

⁵ Presumably, Respondent negotiated identical language in the collective bargaining agreement with the police union, but this contract is not part of the record.

⁶ § 2.01.

⁷ "Making" probably means "implementing," because Respondent, not the Board, "makes" or enacts ordinances.

⁸ § 3.01.

Board consists of one trustee elected by the police, one trustee elected by the firefighters, two trustees appointed by Respondent, and a fifth trustee, who is selected by the other four trustees and appointed by Respondent.⁹

4. The Plan authorizes the Board "to take such action as may be necessary to carry out the provisions of the Plan and all decisions of the Board ... , made in good faith, ... shall be final, binding and conclusive on all parties."¹⁰ The Board may "establish and maintain communication with [Respondent's] departments and other agencies of government as is necessary for the management of the ... Plan," but the Board must "determine all questions relating to and process all applications for ... benefits."¹¹ However, "[i]f an action of the Board has an impact on [Respondent's] contribution the action must be approved by the City Commission. [Respondent] retains the right to obtain independent actuarial services to determine financial impact." Despite this exception to the Board's administrative authority, only the Board, not Respondent, is a fiduciary of the Plan, so as to be subject to the obligation "to discharge its responsibilities solely in the interest of the members and beneficiaries of the Plan for the exclusive purpose of providing benefits to the members and their beneficiaries and to defray the reasonable expenses of the Plan."¹²

5. As authorized by the Plan,¹³ the Board retained, at all material times, the services of independent counsel, actuarial firms, and pension services

⁹ § 3.02. *See also* §§ 175.061(1)(b)2.; 185.05(1)(b)2., Fla. Stat. Chapter 175 applies to a city pension plan for firefighters, and chapter 185 applies to a city pension plan for police officers.

¹⁰ § 3.09.

¹¹ § 3.11(f) and (g).

¹² § 3.10. This section continues: "The [Board] shall exercise those fiduciary responsibilities with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a similar character and with similar aims."

¹³ § 3.12.

companies to assist in the administration of the Plan. Board counsel and a representative of the pension services company routinely attended Board meetings.

6. The Plan's primary retirement benefit, which is payable for the remaining life of the member, but not less than ten years,¹⁴ is based on a formula that, for a vested member,¹⁵ multiplies the member's final average compensation by the member's credited years of service by the applicable annual accrual rate, which is typically 3.2%.¹⁶ For instance, the lifetime benefit payable to a member earning annual compensation of \$50,000 with 20 years of service at an accrual rate of 3.2% would be \$32,000 annually or \$2667 monthly.¹⁷

7. The Plan's funding is more complicated and requires the services of an actuary to calculate the assets and liabilities of the Plan, which are held by a trust.¹⁸ For a fully funded plan providing a defined benefit, the assets--the

¹⁴ § 6.04.

¹⁵ The vesting period for the Plan is generally ten years. §§ 1.31, 1.32, and 8.01.

¹⁶ § 6.02.

¹⁷ The annual benefit is the product of \$50,000 x 20 x .032.

¹⁸ For an excellent discussion of the responsibilities of an actuary in determining the proper funding of a pension plan, see *Vinson & Elkins v. Comm'r of Int. Rev.*, 99 T.C. 9, 15-16 (1992), which cites the following legislative history concerning the treatment of actuaries in The Employee Retirement Income Security Act of 1974:

In estimating pension costs, actuaries must make assumptions ("actuarial assumptions") about a number of future events, such as the rate of return on investments ("interest"), employees' future earnings, and employee mortality and turnover. Actuaries also must choose from a number of methods to calculate future plan liabilities. The amounts required to fund any given pension plan can vary significantly according to the mix of these actuarial assumptions and methods. As a result, the assumptions and methods used by actuaries are basic to the application of minimum funding standards for defined benefit pension plans. [citations omitted]

contributions of the plan sponsor; the contributions of members; for a local pension plan for police officers and firefighters, the plan's share of state excise taxes that are imposed on insurers¹⁹ or local excise taxes that may be imposed on local insurance premiums;²⁰ forfeitures, usually of the sponsor's contributions on behalf of members whose service terminated prior to vesting;²¹ and the expected investment returns on these contributions and forfeitures, from receipt until payout--will provide adequate funds for the plan's trust to pay all liabilities, or benefits, when due. The benefits include projections and estimates of how many members will become vested; the retirement benefits due based on the members' final compensation levels, years of service, and form of benefit--disability, early retirement, normal retirement, and enhanced retirement benefits, such as from additional accrual rate or additional years of service; and the remaining life expectancies of members when they start receiving retirement benefits.²²

¹⁹ §§ 175.1215 and 185.105, Fla. Stat.

²⁰ §§ 175.101 and 185.08, Fla. Stat.

²¹ The Plan seems to preclude a forfeiture of the sponsor's contributions on behalf of even an unvested member. Section 8.03 provides that "[e]very member shall have the right to receive, in lieu of all benefits under the plan, a return of the member's accumulated contributions." If the member terminates with less than five years' service, the member is entitled "to a return of the contributions" without interest. If the member terminates with more than five years' service and elects a lump-sum "return of contributions," the member receives interest. Section 1.01 defines "accumulated contributions" as "the sum of all amounts deducted from a member's compensation or picked up on behalf of a member." Section 4.01 states that Respondent "shall pick-up, rather than deduct from each member's pay," specified percentages of pensionable earnings, so the pick-up amount appears to be Respondent's contribution on behalf of a member.

As discussed below, this case presents another category of forfeitures--members' payments for additional accrual rate that cannot be applied due to insufficient years of service at the time of retirement.

²² See, e.g., *Vinson & Elkins*, 99 T.C. at 13 ("The amount estimated to fund a defined benefit plan is calculated by the plan's actuary and is determined based upon actuarial assumptions about a number of future events, such as rates of return on investments, the benefit commencement date, future earnings, and member mortality, among other things.").

8. This case involves an optional enhanced retirement benefit in the form of additional accrual rate. As noted below, eligible members have previously been able to purchase additional accrual rate, but this case concerns a pricing change that went into effect for police officers hired after January 1, 2006, and firefighters hired after January 1, 2007.²³ Section 8.08 authorizes such persons to purchase up to five years' additional accrual rate--so as to add 3.2% accrual rate to the Plan's 3.2% accrual rate, for a total 6.4% accrual rate--for each year of service that the member completes from his or her 16th through 20th years of service or, if fewer than five years' accrual rate is purchased, for the purchased number of years constituting the final years of service within the 16th through 20th years of service.²⁴ Taking the example in paragraph 6, if a member purchased five years' additional accrual rate and retired with 20 years of service, the benefit would be \$40,000 annually or \$3333 monthly.²⁵ In this illustration, the enhanced retirement benefit would increase the member's monthly benefit by \$666 and would produce a retirement benefit, at 20 years' service, that would be the equivalent of the retirement benefit, at 25 years' service, without the additional accrual rate purchase.²⁶

²³ The difference of one year reflects the one-year difference in the commencement date of each union's collective bargaining agreement.

²⁴ Section 8.08 does not so clearly limit the member purchasing fewer than five years' additional accrual rate to the corresponding number of years in the member's 16th through 20th years of service, but the parties seem to share this interpretation. Thus, it appears that a member purchasing three years' additional accrual rate would be required to apply the additional rate to the member's 18th through 20th years of service.

²⁵ The 3.2% accrual rate for the first 15 years at \$50,000 would produce an annual benefit of \$24,000, and the 6.4% accrual rate for the final five years at \$50,000 would produce an annual benefit of \$16,000.

²⁶ The total annual benefit of \$40,000, as calculated in the preceding footnote illustrating the effect of five years' additional accrual rate, is identical to the total annual benefit of a 3.2% accrual rate for 25 years at \$50,000.

9. Section 8.08 imposes three conditions on the purchase of additional accrual rate. The member must have been employed as a police officer or firefighter with Respondent for at least one year, the member "must exercise this option within [90] days after completion of probation," and the member "shall contribute the full actuarial cost of the benefit for each of year enhanced multiplier purchased," which the member may pay over ten years or prior to entry into DROP,²⁷ whichever occurs first. During the time in question, it appears that probation ran one year from the date of hire.

10. Section 8.07 authorizes an eligible member to purchase additional years of service based on prior years of service with certain employers, such as the military or other law enforcement agencies. Section 8.07 limits this "buyback" of prior service to four years' qualifying service and requires a member to pay 8.4% of the member's current annual compensation for each year of prior service purchased. Section 8.07 allows a member five years to pay the purchase price and limits a member to the purchase of no more than a total of five years' additional accrual rate and additional years of service.

11. Nomenclature problems render some of the minutes of Board meetings discussed below difficult to understand. The problem starts with "AAS," which misleadingly refers to "service," not rate, so as to encourage the reference to the purchase of additional accrual "rate" as the purchase of "service," which properly applies only to the purchase of additional years of service. The confusion is compounded by the use of the term, "buyback" to apply to the purchase of additional accrual rate, as well as to the purchase of additional years of service. The sense of reacquisition in the term, "buyback" limits its use to the purchase of additional years of service, because a member is not reacquiring anything when she purchases additional accrual rate. The Plan appropriately describes the purchase of additional years of service as a "buyback," but does not use this term to describe the purchase of

²⁷ DROP is the Deferred Retirement Option Program.

additional accrual rate, although the Plan elsewhere uses "buyback" to refer to the purchase of both additional years of service and additional accrual rate.²⁸

12. Distinguishing between these two enhanced benefits was less important for police officers hired on or before January 1, 2006, and firefighters hired on or before January 1, 2007. For them, each year of additional accrual rate cost 8.4% of compensation and payment of the purchase price was limited to five years--the same terms that applied and apply to the purchase of each year of additional service. Another common feature between the two optional benefits is their monetary value to the member. At all material times, for identically situated members, the purchase of an additional year of accrual rate has resulted in the same increased benefit as the purchase of an additional year of service.²⁹ Respondent introduced the 2005 and 2006 changes to end its subsidy of members' purchases of additional accrual rate,³⁰ but obviously chose not to end its subsidy of members' purchases of additional years of service--an option that is obviously available only to new hires with qualifying past employment.

13. Calculating the full actuarial cost of additional accrual rate should not have been inordinately difficult. Compensation levels for the members would have been relatively easy to project due to the nature of their

²⁸ § 1.01 ("Accumulated contributions shall ... include buy-back amounts paid under sections 8.07 and 8.08.").

²⁹ Assume that the members are the same age, retire on the same date with 20 years of service, commence benefits at retirement, and earned \$50,000 at all times during employment with Respondent. As noted above, the annual retirement benefit for such a member who did not purchase additional accrual rate or additional years of service would be \$32,000. The purchase of one year of additional accrual rate would raise the member's annual retirement benefit to \$33,600: $(\$50,000 \times 19 \text{ years} \times .032) + (\$50,000 \times 1 \text{ year} \times .064)$. The purchase of one year of additional year of service also would raise the member's annual retirement benefit to \$33,600: $(\$50,000 \times 21 \times .032)$.

³⁰ Minutes of Board meeting on Aug. 27, 2007.

employment with expected raises based mostly on years of service. Normal retirement under the Plan is the earlier of 25 years of service or 52 years of age with at least ten years of service, and there is no mandatory retirement age.³¹ A member's age at retirement would not have been difficult to project due to the necessity that, for additional accrual rate, a member must work at least through her 16th through 20th years of service and the knowledge of the age of a member at the time of her employment. A member's age at retirement is especially important because a lifetime enhanced monthly benefit of, say, \$666 is far more costly to the Plan, for a member who is 52 years old at retirement than for a member who is 70 years old at retirement, given the large difference in remaining life expectancies between these two retirees. With this information, coupled with standard mortality tables and an assumed investment return, an actuary could readily determine the sum required to support the enhanced monthly benefit payment.

14. Estimating the contribution required to generate the sum determined in the preceding paragraph also should have been straightforward. If a member paid the contribution in a lump sum, the main task would be settling upon a reasonable investment return from the contribution until payout, more than 19 years later. If a member paid the contribution by installments over ten years, the investment return would apply to each payment, upon receipt, as payments made in the first year would produce more total investment return than payments made in the tenth year.

15. As detailed below, two issues emerged that interfered with the rollout of the revisions to the purchase of additional accrual rate. The first issue, which was first seen in April 2007, was whether a vested member forfeited her payment or payments if she retired prior to the 16th through 20th years of service. If a member forfeits her payment or payments, an actuary could

³¹ § 6.01.

consider projected forfeitures in calculating the full actuarial cost of the additional accrual rate purchase; this would lower the cost to a member, whose enhanced benefit would be partly paid by such forfeitures. This issue may have been more theoretical, unless the Plan had had sufficient experience with such forfeitures to allow an actuarial assumption as to the amount that would be forfeited over a specific interval. In any event, Plan provisions clearly would have supported the Board's determination that such forfeitures were not permitted by the Plan.³²

16. The second issue, with which the Board wrestled from at least September 2008³³ through February 2009,³⁴ is whether a member who pays the full actuarial cost by installments must pay interest on the installments. This issue raises questions about the communications between the Board and its actuaries,³⁵ who, if asked, should have promptly advised the Board that their actuarial calculations already captured the time value of money, so as to dispense with the necessity of charging interest.³⁶

³² See footnote 21.

³³ Minutes of Board meeting on Sept. 8, 2008.

³⁴ Minutes of Board meeting on Feb. 23, 2009.

³⁵ A couple of years later, relations between the Board and its actuaries were decidedly suboptimal when the actuary informed the Board that his firm would require an additional \$100 per calculation of the full actuarial cost of additional accrual rate, the Board told the actuary that his firm needed to live up to its contract, a motion to approve the fee increase died for lack of a second, and the actuary told the Board that the firm would resign, if the Board failed to approve the fee increase. Minutes of Board meeting on Oct. 10, 2011.

³⁶ This assumes that Respondent or the trust did not effectively lend the purchase price to the member--perhaps, to simplify the actuarial calculations--and, if not, that the actuaries made some attempt at pricing the full actuarial cost based on how long the trust held each installment payment. Because the full actuarial costs reflects the amount necessary to produce the defined benefit, the member who pays over ten years already will pay more than the member who pays in a lump sum at the time of purchase; the former's final year's installment payments will support investment return for nine fewer years than any payments in the year of purchase. Charging interest on deferred payments would have imposed duplicative exactions upon the member. Nevertheless, the available minutes do not document how the Board resolved this issue.

17. Given one year's probation for new hires, the above-described changes to Section 8.08 would have applied to police officers starting in 2007 and firefighters starting in 2008. Although Respondent did not enact the first ordinance with these changes until 2008, the operative language had been incorporated into the CBA, which adequately captures the new provisions governing additional accrual rate purchases, so as to permit immediate implementation. The CBA provides:

For employees hired after 01/01/2007, modify the Additional Accrual Service (AAS) Buyback percent the employee pays from 8.4% to the actual actuarial cost of the benefit and allow the member to pay for this in 10 years instead of 5 years.

Effective 11/01/2006, continue the current prior service credit buyback provision^[37]

18. The record contains no minutes for Board meetings prior to 2007, but, in minutes of a meeting in early January 2007, the Board recognized that it could not provide a member with the purchase price of additional accrual rate until an actuary calculated the full actuarial cost.³⁸ This was a good start.

19. The next month's Board meeting, though, provided evidence of poor communications with the actuaries on the crucial issue of Plan provisions. In February 2007, an actuary performing an audit of the trust fund complained that the Plan was unclear in its treatment of the "buyback [of] service," and he could not reconcile his determination of the present value of benefits with the same determination by another actuary, who had a different interpretation of this buyback provision. Due to confused use of nomenclature, as described above, it is unclear whether this complaint pertained to additional accrual rate, additional years of service, or both

³⁷ Coyle Ex. 11, Bates Stamp, p. 296.

³⁸ Minutes of Board meeting on Jan. 8, 2007.

optional benefits, but, given the recent change as to the accrual rate, it likely pertained to the optional benefit at issue in this case. The response of the Board's counsel was not to refer the actuary to language in the ordinance or a collective bargaining agreement, but to a recommended clarification of the "service buyback" within the Summary Plan Description,³⁹ which, as the name implies, is intended to be merely a synopsis of provisions in the operative Plan, not a source of Plan provisions.⁴⁰

20. In a Board meeting in April 2007, a Board trustee asked whether a vested member who terminated service was entitled to a refund of the member's contributions as part of a "five year buyback," which likely referred to the additional accrual rate purchase, as a member may purchase five years of that optional benefit, but only four years of additional years of service. Construing the question to pertain to the purchase of additional accrual rate, Board counsel referred to a Draft Summary Plan Description from October 2006 that provided clearly that such contributions were forfeited if a member elected to receive a retirement benefit prior to the completion of the 16th through 20th years of service, but member contributions were not forfeited if the member elected to receive a refund of all contributions instead of a pension benefit.⁴¹ Rather than accept this substantive guidance or argue for a different policy, another Board trustee

³⁹ Minutes of Board meeting on Feb. 26, 2007.

⁴⁰ Nor may a collective bargaining agreement have been the sole alternative source of important Plan provisions. On one occasion, the minutes state that an important provision regarding DROP was addressed only in "a contract"--presumably, a collective bargaining agreement--not in any "ordinance," and Mr. Antonio suggested that Respondent and the union enter into a "letter of understanding" on the matter. Minutes of Board meeting of Oct. 15, 2007.

⁴¹ Neither the Draft Summary Plan Description nor any written opinion of Board counsel is part of the record. It seems odd that a vested member would not receive a refund of her payments, but an unvested member would. *See* footnote 22. The last sentence of section 1.01, which defines the "accumulated contributions" that are to be returned to a member, states: "Accumulated contributions shall also include buy-back amounts paid under sections 8.07 and 8.08."

responded that Respondent had never adopted this Draft Summary Plan Description. The discussion ended, and the forfeiture issue remained unresolved for an extended period of time, even though Board counsel had provided the Board with an unequivocal opinion that a vested member forfeited her payments, and the implementation of this opinion would not have impacted--i.e., increased--Respondent's contribution, as addressed in Section 3.16. The Board's nondecision on forfeitures deprived the actuaries of important information needed to price the full actuarial cost of additional accrual rate purchased.

21. Poor communications with the actuaries may have resulted from direct communications that they received, not from Board representatives, but from representatives of Respondent. At times during the hearing, Petitioners' witnesses described how well the Plan was administered when Respondent's employee, Marc Antonio, was available to prepare cost worksheets for the optional benefits and help new hires complete their applications. In 2007, Mr. Antonio was an assistant City manager; by August 24, 2009, he was in the Finance Department. But Mr. Antonio was still regularly attending Board meetings during the period that the full actuarial cost was in effect, and neither he nor the Board was able to provide this information to interested members.

22. The record does not reveal whether Mr. Antonio contributed to confusion among the actuaries. However, another employee of Respondent did. According to Board minutes in 2018, Mr. Cowley recalled speaking ten years earlier to a former human resources director who had become active in Plan business. Mr. Cowley mentioned to the director the need of the Board to be able to present full actuarial costs to members seeking to purchase additional accrual rate, but any deadlines for producing this information "kept getting pushed back." A Board trustee familiar with the director added

that he had "always deferred sharing the specifics of the buyback procedures and had trouble conveying the information to the actuary."⁴²

23. Nevertheless, in early 2007, the actuaries began to develop a method to calculate the full actuarial cost of the purchase of additional accrual rate. Minutes of a Board meeting on August 27, 2007, reveal that, at the previous month's meeting, the Board had been presented with a draft ordinance, perhaps of the Plan or at least Section 8.08, as well as "buy-back tables" that appear to pertain to the purchase of additional accrual rate for a member who retired at age 52. An actuary referred to these tables as applicable to members purchasing "additional service," but these comments pertain to the purchase of additional accrual rate.

24. Mr. Antonio replied that the "dynamic created by eligibility makes the cost very difficult to ... estimate,"⁴³ perhaps accurately commenting on the impact of the member's age at retirement on the full actuarial cost of the optional benefit. The actuary asked that each member seeking to purchase additional accrual rate be required to submit an application. At the time a Board trustee, Mr. Cowley asked for the chart as a guide for all members, even though the chart would overstate the cost for older members at retirement. Mr. Antonio seemed to discourage the broader use of a chart designed for a 52-year-old retiree, but incorrectly explained that, while he thought the chart would be accurate, the benefit and cost could be difficult to explain to members--obviously true if someone tried to explain the cost to a 65-year-old retiree based on a chart prepared for a 52-year-old retiree. The actuary said that she would expand the chart to include older members at retirement, and the Board agreed that members older than the oldest age used in the revised chart would apply for an individual calculation of the full actuarial cost. Mr. Antonio concluded the discussion by saying that he

⁴² Minutes of Board meeting on Nov. 26, 2018.

⁴³ Minutes of Board meeting on Aug. 27, 2007.

wanted "the chart" to be a fixed cost to members with Respondent bearing the financial burden of what he termed, "minor variations in experience." It seems as though Mr. Antonio was referring to the relatively minor cost of preparing a chart, rather than to a directive that the full actuarial cost disregard the age of the retiree--as before, at the expense of Respondent.

25. The actuaries expended considerable time preparing the age-based "Buy Back Tables,"⁴⁴ and the work proved to be much more difficult than they had initially expected. During a Board meeting in October 2007, the actuary, by letter, asked the Board to approve an increase in actuarial fees for this service from the quoted \$2500 to \$3000 to \$19,424 for 89 hours of work already completed. The letter explained that "the unusual nature of the Plan's buyback provision" had necessitated "much more extensive testing than is required for other plans." Even though this optional benefit should have been rolled out for police officers months earlier, the Board deferred action on the request.⁴⁵

26. These are all of the minutes of Board meetings in 2007 that are in the record. For all of 2007, the development of the full actuarial cost of additional accrual rate purchase indisputably remained a work in progress. Regardless, Respondent contends, in derogation of the Board's minutes, that an interested member could, in late 2007, obtain the full actuarial cost of additional accrual rate. In support of this fanciful contention, Respondent produced four exhibits.

27. Respondent Exhibits 1 through 3 purport to be worksheets showing the calculation of the full actuarial cost of additional accrual rate purchased

⁴⁴ If Mr. Antonio's "fixed cost" reply ended the investigation into charging the full actuarial cost for the purchase of additional service years, this reference to "Buy Back Tables" is to the purchase of additional accrual rate. Otherwise, the tables might pertain to the purchase of additional accrual rate and additional years of service.

⁴⁵ Minutes of Board meeting on Oct. 15, 2007.

by three police officers: John Cameron,⁴⁶ Marco McAdam,⁴⁷ and Victor Lynch,⁴⁸ respectively. In each case, the worksheet indicates that the member had completed probation less than 90 days earlier. The Cameron and McAdam worksheets depict four years' additional service and one year's additional accrual rate, and the Lynch worksheet depicts five years' additional accrual rate. There is no evidence about the authorship of these worksheets or, for the Cameron and McAdam worksheets, that the members were able to purchase the service and rate credit at the prices quoted. Respondent Exhibits 1 and 2 are thus entitled to no weight.

28. By contrast, the Lynch worksheet is supported by Respondent Exhibit 4, which is documentation of actual payroll deductions. Both documents are consistent, showing a total cost of \$55,840.50, 260 payroll deductions of \$214.77 each, and a start date of October 15, 2007. However, Respondent Exhibits 3 and 4 do not support Respondent's claim that, in the fall of 2007, members were able to obtain the full actuarial cost of additional accrual rate purchases, and, if they failed to do so, it was due to a lack of interest in this optional benefit. Given the timing of the Lynch worksheet and the request of the actuary for Board approval of fees over six times higher than the actuary had quoted for working up the full actuarial cost, the Lynch worksheet likely was a prototype that the actuary prepared in trying to develop a method for calculating full actuarial costs. Noticeably missing from the record is any indication that the calculations for the prototype Lynch worksheet proved reliable or the workup could be used for other members. Judging from the absence of Board-approved purchases the

⁴⁶ Resp. Ex. 1.

⁴⁷ Resp. Ex. 2.

⁴⁸ Resp. Ex. 3.

following year, either the Lynch calculations were unreliable or at least premature.

29. Minutes of a Board meeting years later, in November 2018, address the Lynch worksheet. In this meeting, Mr. Dodea told Petitioner Roccisano that Mr. Dodea had found one early calculation of full actuarial cost--a calculation done by actuary, Chad Little, in 2008 for Victor Lynch, which the Board had approved. It seems that Mr. Dodea was off by one year in his description of Respondent Exhibit 3. Aptly, Petitioner Roccisano replied that all that this proved is that Mr. Lynch had found a "different channel" by which to obtain a calculation of the full actuarial cost of his purchase of additional accrual rate.⁴⁹

30. The minutes of the Board meeting in January 2008 revealed progress in the preparation of an age chart for determining the full actuarial cost of additional accrual rate for a span of ages at retirement. The Board agreed that any member over the ages shown on the chart should receive an individual calculation.⁵⁰

31. The next Board meeting for which minutes are available took place in August 2008, and they confirm that, besides Mr. Lynch, no one had obtained the full actuarial cost of additional accrual rate, so as to be able to make an informed purchase decision. An actuary stated that he would charge \$600 for each such "buyback" calculation. Told that members had been waiting "for over a year" for an estimate of the full actuarial cost of a purchase of additional accrual rate, the Board agreed to send the information for these members to the actuary for calculations of their purchase prices. The motion

⁴⁹ These minutes suggest that, contrary to Mr. Dodea's testimony (Tr., pp. 598, 601), he did not discover the Lynch worksheet on the day prior to the last day of the hearing, but, at best, he "rediscovered" it at that time. Given the treatment of the Lynch worksheet, Respondent's failure to disclose the existence of this exhibit in a more timely fashion is immaterial.

⁵⁰ Minutes of Board meeting on Jan. 14, 2008.

that passed specifically approved sending the information for members who "are past their one year anniversary since 9/30/06 through 9/30/08."⁵¹

32. In September 2008, a Board trustee raised the issue of interest on installment payments for "buyback purchases" and stated that the installment payments must not impact the trust assets. "Buyback purchases" may refer to the purchase of additional accrual rate, additional years of service, or both. Interest on the purchase of additional years of service makes sense, because 8.4% per year purchased does not seem to reflect the time value of money. Again, the full actuarial cost of additional accrual rate purchased should reflect the time value of money, although nothing in the record clearly confirms that actuaries calculated a considerably higher full actuarial cost for installment payments than for a lump sum.⁵² This issue should have been resolved at this time--ideally based on the approach of the actuary calculating the full actuarial cost, but practically with a decision either to charge interest or not to charge interest. Instead, as detailed below, this issue lingered, unresolved, until February 2009.

33. The same Board trustee raised the forfeiture issue by suggesting that members be allowed to obtain a refund of their payments toward additional accrual rate, presumably if they were unable to qualify for the rate due to insufficient years of service. The minutes state: "The City does not agree,

⁵¹ Minutes of Board meeting on Aug. 11, 2008.

⁵² Nine years later, in 2017, an actuarial letter prepared for Petitioner Manny Gonzalez alludes to this issue. Coyle Ex. 1, Bates Stamp, p. 5. The letter quotes nearly \$80,000 as the cost of five years' additional accrual rate for retirement benefits commencing 11 years later. Given that the full actuarial cost likely approximated Mr. Gonzalez's annual salary, the letter unrealistically "recommend[s] ... payment ... be made as a lump sum within six months of the request." This seems like wishful thinking by the actuary, but was it to spare the actuary the task of recalculating the full actuarial cost if paid over ten years, running a simple installment payment plan with interest, running a simple installment payment plan without interest (and ignoring the time value of money), or avoiding the interest issue with Respondent?

until they can resolve a separate issue related to interest on buyback payments over time."

34. This quote marks the end of a documented, evidently brief discussion about interest and forfeitures--over one-and-one-half years after the Board initially referred the matter to its actuaries. The Board does not explicitly defer to Respondent's objection to refunds and claim that it must resolve the interest issue, but, characteristically, the Board took no action. At this point, both of these issues were overripe for resolution,⁵³ and the Board's failure to proceed appears at least partly attributable to Respondent's refusal to agree--even though, two years earlier, Respondent had completed its relevant work when it incorporated the change, in implementable form, in the CBA.

35. The next Board meeting for which minutes are available took place in January 2009. The actuary discussed the calculations of the full actuarial cost of additional accrual rate purchases--work that was still "in the process." Someone asked whether a vested member would receive a refund of the purchase price if the member's services terminated, presumably prior to the 16th year of service. The Board attorney said that the member would receive a refund, but Mr. Antonio disagreed, adding that Respondent was negotiating this issue with the unions. A Board trustee raised the issue of interest, and Mr. Antonio replied that Respondent was negotiating this with the union. No one on the Board displayed the initiative to resolve the issues at this time. A Board trustee mentioned that two persons were "currently buying back time" and were not paying interest. Once again, a lack of clarity with nomenclature precludes a finding that Mr. Lynch had been joined by

⁵³ It seems that these issues should have arisen and been resolved under the prior Plan provisions authorizing the purchase of either optional benefit at 8.4% of compensation per year purchased, even though the maximum repayment period for both options was only five years. It is unclear if the provision as to the 16th through 20th years of service previously applied to the purchase of additional accrual rate, but, if not, the forfeiture issue would have arisen at least when an unvested member terminated service.

another lucky member; again, a member "buys back time" when purchasing additional years of service and buys rate when purchasing additional accrual rate. Rather than resolve the issue, the Board agreed on an impractical temporary fix: to provide members with two purchase prices--one with interest and one without interest. At the end of the minutes, a Board trustee noted that new employees did not know the cost of additional accrual rate, and the "Board must first retain an actuary"⁵⁴--precisely what the Board had done two years earlier.

36. At the Board meeting on the following month, the same Board trustee complained about the "buyback" calculations that had recently been completed for 14 members. Because Respondent had failed to indicate whether these installment payments would be charged interest, the calculations were done in the alternative, and the difference between each pair of calculations was "huge," thus demonstrating the impracticality of this "solution." However, this discussion concluded with an observation that "[s]ome members have already started buying back time."⁵⁵

37. At a meeting in August 2009, the Board deferred the approval of "buyback statements" that had been prepared by an actuary.⁵⁶ At the Board meeting the following month, the Board discussed a request of a member currently "buying back time." Without terminating employment, the member wanted to stop the purchase and obtain a refund of all payments previously made. The member added that he was under the old purchase price of 8.4%, suggesting that he was purchasing additional accrual rate, not years of service. The Board deferred action, but relieved the member from the responsibility of making further payments.⁵⁷

⁵⁴ Minutes of Board meeting on Jan. 5, 2008.

⁵⁵ Minutes of Board meeting on Feb. 23, 2009.

⁵⁶ Minutes of Board meeting on Aug. 24, 2009.

⁵⁷ Minutes of Board meeting on Sept. 29, 2009.

38. The next Board meeting for which minutes are available took place in January 2010. Board counsel informed the Board that the actuary had increased the cost of a calculation of additional accrual rate purchase to \$350, but all other calculations would remain \$100 per calculation.⁵⁸ It seems, finally, that the Board had sorted out the remaining problems that had prevented the presentation of the full actuarial cost to a member purchasing additional accrual rate.

39. By mid 2010, another issue had arisen, though. In July 2010, the Board considered the timeliness of a request to purchase an optional benefit relative to the expiration of probation. As noted above, a request for either optional benefit must be filed within 90 days of the completion of probation. An employee of the Board or Respondent advised the Board that members had been told to wait to purchase additional years of service until Respondent entered into a new collective bargaining agreement with the unions and, now that the parties had concluded a new agreement,⁵⁹ the members wanted to proceed with their purchases of additional years of service. The Board agreed that it would allow these purchases to take place, but would need a list of these members.⁶⁰

40. In August 2010, the Board was informed that a vested member had complained to the Florida Division of Retirement that, upon termination of employment, he had not received a refund of his payments for additional accrual rate. The Board declined to change its earlier decision, which evidently was not to refund the payments. In response to the business taken up at the July 2010 meeting, Mr. Dodea distributed a list of members who

⁵⁸ Minutes of Board meeting on Jan. 11, 2010.

⁵⁹ It is possible that a new collective bargaining agreement had resolved the issues of forfeitability of payments for additional accrual rate by a vested member and whether the installment payments bore interest. But the record contains no collective bargaining agreements subsequent to the CBA.

⁶⁰ Minutes of Board meeting on July 12, 2010.

wanted to purchase additional years of service, even though they were past 90 days from the end of their probation. Board counsel advised the Board that this process was being undertaken because, when the probation had ended for these members, a "final contract" was not in place.⁶¹

41. In any event, in October 2010, Board counsel presented lists of members who wanted to purchase additional accrual rate or additional years of service, but who were past 90 days from the end of their probation. The minutes reflect that Respondent had questioned by what authority the Board could "impasse [bypass?] the Ordinance," which probably means disregard the 90-day limitation periods, and Board counsel replied that Respondent would not have to amend the ordinance to authorize this extension of these two 90-day deadlines. Apparently mollified, Respondent insisted that the Board communicate a firm deadline to members by which they would have to elect one or both options.

42. In other related business, the actuarial firm reported that it had completed its "first buyback calculation." But the actuary asked if the calculation was based on the member's base pay or pay with benefits. Suggestive of a program that was rolling out, finally, the Board told the actuary to use base pay--and not to charge interest on the installment payments.⁶²

43. In April 2015, Board counsel stated that letters that the Board had sent to eligible members "a couple of years ago," advising them of the

⁶¹ Minutes of Board meeting on Aug. 23, 2010.

Regardless of the status of any effort to document a collective bargaining agreement, the law unsurprisingly requires that, at all times, the provisions of a pension plan of the type at issue be documented, not open-ended. Section 175.261(2)(a)1. requires an annual filing with the Division of Retirement of "each and every instrument constituting or evidencing the plan." Chapter 175 applies to firefighters, and this requirement applies to "local law" plans, not "chapter" plans, which merely incorporate the relevant provisions of chapter 175. *See* § 175.032(4), (14) (definitions of "chapter plan" and "local law plan"). Similar provisions govern police pensions. *See* § 185.221(2)(a)1.

⁶² Minutes of Board meeting on Oct. 11, 2010.

reopening of the window to purchase optional credit, had limited the reopening to the purchase of additional years of service. As noted above, four and one-half years earlier, the Board had approved such letters to members interested in purchasing either option. It seems that Board staff or the pension services representative had taken two years to mail or email these letters and had mistakenly dropped the option for the purchase of additional accrual rate. Board counsel asked if the Board wished to reopen the window for members interested in purchasing either option, and the Board agreed to do so.⁶³ In May 2015, the Board clarified that, when the purchase window was reopened, the purchase price for additional years of service would be based on the member's current income, not the member's income in 2010.⁶⁴

44. In its August 2015 meeting, Board staff informed the Board that buyback applications for the purchase of additional accrual rate and additional years of service had been emailed to all members with a deadline of September 18, 2015. Board staff advised that it would forward timely filed applications to the actuary for the calculation of the purchase price and then forward the price to the member, who would decide whether to complete the purchase.⁶⁵ Minutes of the next month's Board meeting indicate that this process was continuing.⁶⁶

45. In its August 2018 meeting, the Board was addressed by Petitioner Roccisano, who complained that the purchase price that he had been given for additional accrual time was based on current conditions, not the conditions when he first had the right to purchase additional accrual rate. By now a former Board trustee, Mr. Cowley confirmed that "the City" never

⁶³ Minutes of Board meeting on Apr. 6, 2015.

⁶⁴ Minutes of Board meeting on May 18, 2015.

⁶⁵ Minutes of Board meeting on Aug. 24, 2015.

⁶⁶ Minutes of Board meeting on Sept. 30, 2015.

decided on the cost method, which "prohibited" a member from completing a timely purchase of additional accrual rate.⁶⁷

46. Its own minutes reveal a Board that, sluggish, reactive, and aimless, failed to discharge its responsibility to implement the revision in the Plan requiring that members pay the full actuarial cost of additional accrual rate purchased. There were suggestions during the hearing that perhaps problems with certain actuaries or certain plan services representatives impeded this effort, but these advisors, like Board counsel, served the Board, and, if they failed to discharge their duties, it was the Board's job to replace them promptly with professionals who would timely do their jobs. From the minutes, the more prominent problem involving a third party was Respondent--specifically, the Board's reliance on Respondent's approval for administrative decisions that are assigned to the Board, not the Plan's sponsor. Respondent discharged its responsibilities with the documentation in the CBA of the changes to the purchase of additional accrual rate, as later enacted in Section 8.08, but the Board failed to discharge its responsibilities in the timely implementation of these changes--for years, not weeks or months. For these reasons, the Board prohibited members from purchasing additional accrual rate at all material times.

47. On the other hand, no Petitioner ever submitted to the Board a request to purchase additional accrual rate in writing or at a Board meeting.

⁶⁷ Minutes of Board meeting on Aug. 13, 2018. These comments get to the crux of the dispute from the perspective of Petitioners. They do not merely seek another reopening of the window to purchase additional accrual rate; now that this purchase is priced at full actuarial cost, Respondent may not even oppose such a remedy. Petitioners want to purchase additional accrual rate at the full actuarial cost, but as it would have been calculated when each petitioner first became eligible to purchase additional accrual rate--say, 12 or 13 years ago, not now. This administrative proceeding cannot reach such an issue. The Board did not contract with DOAH to address this issue and such a remedy likely represents damages, which are reserved for the judicial branch, not the mere application of basic principles of actuarial science, where investment returns, like time, wait for none of us, even the ever-youthful Petitioner Roccisano.

48. The facts pertaining to each Petitioner are very similar. While still on probation, each Petitioner learned from more senior police officers or firefighters about the optional benefit for the purchase of additional accrual rate. If a police officer, the Petitioner contacted Mr. Cowley; if a firefighter, the Petitioner contacted Jim Bunce. Mr. Cowley was a Board trustee at all material times until at least early 2010. Mr. Bunce became a Board trustee by September 29, 2009, and remains on the Board; from 2007 until 2020, Mr. Bunce was the district president of the firefighters' union.

49. Prior to the expiration of 90 days following the end of probation, each Petitioner contacted Mr. Cowley or Mr. Bunce, depending on whether Petitioner was a police officer or firefighter, and asked about purchasing additional accrual rate. In each case, Mr. Cowley or Mr. Bunce told the Petitioner that the optional benefit was not available due to problems in calculating the cost of the benefit and the absence of a procedure for applying for the benefit; each Petitioner was advised--or directed--to be patient. Sometimes, a Petitioner contacted an employee of Respondent, but was told the same thing.

50. Petitioners completed their probations from March 12, 2008, in the case of Petitioner Pan, through June 8, 2010, in the case of Petitioner Bruce. At least 12 other members, who completed their probations from 2008 to 2012, are identically situated to Petitioners.

CONCLUSIONS OF LAW

51. Pursuant to the contract between DOAH and the Board, DOAH has jurisdiction. §§ 120.569, 120.57(1), and 120.65(6).

52. Pursuant to Appendix C of the Settlement Agreement, each Petitioner must prove the material allegations by clear and convincing evidence. Clear and convincing evidence is evidence that is "precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction,

without hesitation, about the matter in issue." *Robles-Martinez v. Diaz, Reus & Targ, LLP*, 88 So. 3d 177, 179 n.3 (Fla. 3d DCA 2011) (citing Fla. Std. Jury Instr. (Civ.) 405.4).

53. As detailed above, Petitioners proved that the Board's ineptitude prohibited them from requesting the purchase of additional accrual rate. It is the exclusive responsibility of the Board to administer the Plan. §§ 175.071(5) (local firefighters' plans), 185.06(4) (local police officers' plans). Petitioners were prohibited from purchasing additional accrual rate because the Board failed to discharge this crucial responsibility.

54. However, no Petitioner proved that he requested such a purchase in writing to the Board or orally at a Board meeting. This issue is derived directly from the Settlement Agreement and may not be revised, even to state accurately an issue of equitable estoppel.⁶⁸ If construed as requiring an unconditional choice by a petitioner to purchase--cost unknown--additional accrual rate, this issue has raised an insurmountable barrier, because a member cannot make an informed decision without knowing whether the benefit would cost \$15,000 or \$80,000. If construed as requiring only an expression of interest by a Petitioner, this issue exploits that status of each of these Petitioners as a new hire within a profession where lives depend on compliance with the chain of command, and the last thing that such a person would want to do is appear as a troublemaker to a high-ranking member of his department sitting on the Board and directing him to stand by.

RECOMMENDATION

It is

RECOMMENDED that the Board enter a final order determining that Petitioners have failed to prove that they timely submitted a request to

⁶⁸ See footnote 2.

purchase additional accrual rate in writing to the Board or orally at a Board meeting.

DONE AND ENTERED this 11th day of February, 2021, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
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this 11th day of February, 2021.

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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.