STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF FRUITLAND PARK, FLORIDA,

Petitioner,

vs. Case No. 20-0644

DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,

Respondent.
_____/

RECOMMENDED ORDER

On June 7 and 8, 2021, Administrative Law Judge Lisa Shearer Nelson of the Division of Administrative Hearings (DOAH) conducted a disputed-fact hearing pursuant to section 120.57(1), Florida Statutes (2020), by Zoom teleconference.

APPEARANCES

For Petitioner: Glenn E. Thomas, Esquire
Lewis, Longman & Walker, P.A.
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For Respondent: Thomas E. Wright, Esquire
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Office of the General Counsel
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STATEMENT OF THE ISSUE

The issue to be determined is whether Petitioner, City of Fruitland Park (Fruitland Park or the City), is required to reimburse Respondent,

Department of Management Services, Division of Retirement (DMS or Respondent), for the overpayment of retirement benefits paid to Michael Fewless.

PRELIMINARY STATEMENT

On December 9, 2019, David DiSalvo, as the Director of the Division of Retirement, notified the Mayor of Fruitland Park that as a participating employer in the Florida Retirement System (FRS), Fruitland Park was jointly and severally liable for repayment of benefits to the FRS Trust Fund in the amount of $541,780.03, because it had hired Michael Fewless as its Chief of Police during the six months following his retirement from an FRS employer. The letter also informed the Mayor that Fruitland Park was also responsible for the difference in retirement contributions due during Mr. Fewless's Deferred Retirement Option Program (DROP) participation period of June 2011 through August 2015, when Mr. Fewless was employed by the Orange County Sheriff's Office, based on the special risk membership class associated with his former position, and for required contributions due for the period that Mr. Fewless was employed by Fruitland Park from September 2015 through August 2018.

On December 19, 2019, the City filed a Petition for Formal Administrative Hearing, disputing that it owed the repayment of benefits paid to Mr. Fewless. On February 5, 2020, the case was referred to DOAH for the assignment of an administrative law judge.

The case was set for hearing to take place on May 4 through 6, 2020, at the Lake County Courthouse. However, due to the COVID-19 pandemic, the parties were advised by Order dated April 16, 2020, that the Lake County Courthouse was no longer available to hold a hearing pursuant to Administrative Order A2020-12-D by the local Circuit Chief Judge. The

parties were directed to provide a joint status report no later than April 21, 2020, as to whether they wished to continue the case to a later date, or would rather conduct the hearing on the dates scheduled using Zoom technology. In response, the parties stated their preference for a live hearing and provided additional dates. The case was rescheduled for August 18 through 20, 2020, and by subsequent Order dated July 29, 2020, the parties were advised that it would be conducted by Zoom.

The case was continued three additional times, based on discovery issues hampered by the pandemic, and the unavailability of a crucial witness due to health concerns. Ultimately, the case was rescheduled for June 7 through 9, 2021. It commenced on June 7 and was completed on June 8, 2021. The parties filed a Joint Pre-hearing Stipulation in which certain facts were identified as admitted. Those stipulated facts are included in the Findings of Fact below.

Michael Fewless, Gary LaVenia, Kathy Gould, Joyce Morgan, and David Kent testified for Fruitland Park, and Petitioner's Exhibits 1 through 33 and 38 through 44 were admitted into evidence without objection. Ira Gaines, Tannette Gayle, and Kathy Gould testified for DMS, and Respondent's Exhibits 1 through 15 were admitted, also without objection.

The Transcript of the hearing was filed on July 27, 2021, and the parties filed their Proposed Recommended Orders on August 9, 2021. All references to Florida Statutes are to the 2015 codification, unless otherwise indicated.

FINDINGS OF FACT

1. FRS is a retirement program for state and local government employees administered pursuant to chapter 121, Florida Statutes. All state agencies

participate in FRS. Local governments have the option of joining the plan if they meet certain requirements set out in statute and rule.

2. Fruitland Park is a small city in the State of Florida, having approximately 10,200 residents. Its annual budget is approximately $11,000,000.

3. Fruitland Park joined the FRS as a participating employer effective February 1, 2015. Tannette Gayle was the City's Treasurer while the City investigated joining FRS and completed the process to do so, and was responsible for coordinating the process. Ms. Gayle left the City's employ in June or July of 2015.

4. Prior to the City's participation in the FRS, Ira Gaines, from the Division of Retirement, provided presentations to City employees to explain the benefits provided by the FRS program. The presentation included question and answer sessions.

5. Gary LaVenia, the City's Manager, has been employed by Fruitland Park for approximately six and a half years. Mr. LaVenia came to Fruitland Park as the City was preparing to join FRS. He was not involved in the City's decision to join FRS or the process leading up to the City's participation in the plan.

6. Prior to becoming an FRS employer, Fruitland Park had a different retirement program, referred to as the ICMA retirement program. Upon joining FRS, some senior management officials opted to remain with ICMA rather than joining FRS.

7. Mr. LaVenia attended a question and answer session provided by Mr. Gaines when the City decided to join FRS. He left the Q&A session believing that senior staff were not required to join FRS and could continue to be placed in the ICMA retirement program. Mr. LaVenia's understanding was correct for existing employees, but not for new hires. Mr. Gaines did not state that new employees could join the ICMA plan if the City joined FRS.

8. In order to join the FRS, the Fruitland Park City Commission passed Resolution 2014-014, which authorized the City Manager to enter into agreements with DMS in order for general employees and police officers to participate in the FRS. The Resolution stated in pertinent Part:

> Section 2. It is hereby declared to be the policy and purpose of the City Commission of Fruitland Park, Florida that all its General Employees and police officers, except those excluded by law, shall participate in the Florida Retirement System as authorized by Chapter 121, Florida Statutes. All General Employees and police officers shall be compulsory members of the Florida Retirement System as of the effective date of participation in the Florida Retirement System so stated herein.

9. On February 12, 2014, Stephen Bardin, a Benefits Administrator for FRS, confirmed Fruitland Park's membership in the FRS effective February 1, 2015, for covered groups of police and general employees, and further stated, "[e]ach employee filling a full-time or part-time regularly established position will be a compulsory member of the FRS." Gayle Tannette, who served as City Treasurer when the City joined the FRS, requested and received confirmation on or about March 9, 2015, that all employees hired after February 1, 2015, must join FRS, regardless of age. She shared that information with Gary LaVenia.

10. There are some instances where positions, such as the Chief of Police, can be designated as senior management and the person holding the position may opt out of participation with the FRS. However, the position has to be so designated and a specific document must be submitted in order for the person to be excluded from the FRS. Here, the City did not designate the Chief of Police position as a senior management position. Even where a senior management position employee opts out of FRS participation, the employee is still occupying a compulsory membership position with an FRS employer.

11. Chapter 121 provides a method for FRS employers to avoid liability for hiring FRS retirees who do not wait the required six months before becoming reemployed. The employer procures a form or letter signed by the employee attesting that they are not a retiree under the FRS.

12. Michael Fewless was a member of the Orange County Sheriff's Department from February 1985 through August 1, 2015. Beginning in June 2011, he participated in DROP, until he terminated his employment with the Orange County Sheriff's Department.

13. DROP is a benefit offered to FRS pension plan participants wherein the member effectively retires for FRS purposes, but may continue employment for up to five years. During this period, the member's benefits are "paid" into an interest-bearing account for the member's benefit until he or she actually terminates employment. Upon termination, the member begins collecting monthly benefits and may either collect the accrued DROP benefits or roll them into another qualified plan, such as an Individual Retirement Account (IRA).

14. Mr. Fewless interviewed and was selected for the position of Chief of Police for Fruitland Park. He was introduced as the new Chief of Police selection at a City Commission meeting on July 9, 2015, and sworn in at the next meeting on July 23, 2015. Mr. Fewless began his employment with Fruitland Park on August 3, 2015.

15. The City was aware when Mr. Fewless was hired that he was retiring from Orange County, which is an FRS employer. Mr. Fewless did not realize that Fruitland Park was a participating employer with FRS when he first applied for the position as Chief of Police. At some point, when FRS was mentioned, he advised someone (presumably the interview team) that he

could not work for an FRS employer because he was retiring from Orange County Sheriff's Office, which was also an FRS employer.[1]

16. People who interviewed for the Chief of Police position were informed by the city manager that they could either participate in the FRS retirement program or become a member of the ICMA retirement program. Mr. Fewless was provided this information during his interview. However, the ability to participate in the ICMA program was limited to those people who were already employees when Fruitland Park joined FRS. New employees hired after the City joined FRS did not have the option to choose the ICMA program as an alternative to FRS. Mr. Fewless was advised that he could join the ICMA program as opposed to the FRS program in error.

17. Mr. Fewless wanted to make sure that if he took the job with Fruitland Park, he would not be jeopardizing his retirement. Between July 1 and August 3, 2015, Mr. Fewless called the FRS Hotline at least twice, with questions regarding this employment with Fruitland Park. One of those calls was on July 9, 2015, before he was introduced as the next Chief of Police at the Fruitland Park City Commission meeting. During this call, he spoke with David Kent about reemployment. Mr. Kent worked in the section that assisted local governments and some agencies with joining FRS, and Fruitland Park was the first "join" upon which he worked.

18. There are varying accounts as to the contents of these calls. However, whether or not Mr. Fewless was actually told that he could work at an FRS employer as long as he did not join the FRS Plan is not relevant to the City's liability as asserted by DMS. It is clear from the evidence submitted that Mr. Fewless truly believed that to be the case. It is equally clear that the City had been provided information, prior to hiring Mr. Fewless, that any new

[1] Ironically, waiting six months to start at Fruitland Park might not have been a barrier for Mr. Fewless's employment. Mr. LaVenia testified credibly that had Mr. Fewless said he had to wait six months, Mr. LaVenia would have brought the issue to the City Commission, because Mr. Fewless was an excellent candidate and the person serving as an interim chief was doing a fine job, so time was not of the essence.

general employee or member of the police force would have to be placed in the FRS Plan. Moreover, Mr. Fewless made the calls to the FRS Hotline on his own behalf, and not on behalf of the City.

19. Mr. Fewless also consulted with Anita Geraci, an attorney who provided legal services to the City. Ms. Geraci provided the following response:

> Chief Fewless:
>
> I received your question concerning the City's pension and FRS from Captain English.
>
> I reviewed the FRS website for guidance. Attached is a response given to FAQ that relates to the Investment Plan portion of the FRS. If you are not in the Investment Plan, but rather are in the Pension Plan portion of FRS than the attached does not necessarily apply to you.
>
> Also I have attached two brochures the state publishes that may be helpful to you. One relates to the Investment Plan and the other to the Pension Plan. As you will see in both brochures, it states, "After becoming an FRS retiree, being hired by a private employer or a non-FRS public employer will have no impact on your [Investment Plan distributions or Pension Plan benefits] (except for disability retirement, see below)."
>
> From the information I reviewed, including Florida Statutes, and FAC, it does not appear your participation in the City's pension will have a negative effect on your FRS retirement program, whether Investment Plan or Pension Plan. There is a 6 month waiting period for employment; however it appears that the waiting period *is only applicable if your new employer is a FRS employer*.
>
> I strongly recommend you call MyFRS for guidance to make sure this is accurate. (emphasis added).

20. Based upon the information he learned from the FRS Hotline and the information provided by Fruitland Park, Mr. Fewless believed that he could be a member of the ICMA retirement program when he began his employment with the City. Fruitland Park placed him in this retirement program. His employment was not reported to FRS, and no documentation was submitted in order for him to opt out of FRS (which, in any event, he could not do, given that the position was not designated as senior management and the City would still be considered as a participating employer). Likewise, neither the City nor Mr. Fewless made contributions on his behalf to the FRS.

21. Mr. Fewless also called the hotline shortly after his employment to ask whether the date he was sworn in as Chief of Police made a difference in terms of his retirement. He was not informed at that time that there was any problem presented by his employment with the City. However, the person who answered his call represented herself as an employee of Ernst and Young, as opposed to the Division of Retirement, and Mr. Fewless did not specifically state that Fruitland Park was an FRS employer.

22. No employee of the City spoke with anyone at the Division of Retirement regarding Mr. Fewless's employment after his retirement from Orange County under the FRS. No documentation was submitted by the City to DMS to determine whether he was a state retiree.

23. In the summer of 2018, FRS conducted an audit of Fruitland Park's retirement account. As a result of the audit, in August 2018, Respondent notified Fruitland Park and Mr. Fewless that Mr. Fewless was a mandatory participant in FRS, and that his employment by the City in August 2015 violated the termination provisions of the FRS for those persons who participate in the DROP program.

24. DMS voided Mr. Fewless's DROP participation and retirement, and reinstated him as a participant in FRS. It also suspended his retirement benefit payments. By letter dated August 16, 2018, DMS directed the City to

make the required contributions for the period of service beginning with the date Mr. Fewless started his employment with the City, as well as the difference in retirement contributions for the time period he participated in DROP while employed by the Orange County Sheriff's Office from June 2011 through July 2015, based upon the special risk membership class associated with his former position. It is noted that the bulk of the payments attributed to DROP participation were for a period when the City was not a participant in the FRS.

25. Fruitland Park was not directed by DMS to repay any retirement benefits received by Mr. Fewless until the Notice of Agency Action upon which this case is based.

26. Mr. Fewless petitioned for, and received, a section 120.57(1) hearing in response to the notice of intended agency action that would have required him to repay his DROP payout and the retirement benefits he had received.

27. After the administrative hearing, on October 11, 2019, DMS and Mr. Fewless entered into a Settlement Agreement in order to resolve the issues related to his termination of DROP and his retirement benefits. As part of the Settlement Agreement, Mr. Fewless agreed to dismiss his petition and enter into a repayment agreement. DMS agreed that Mr. Fewless was entitled to a new benefit calculation based on the additional service credit he earned for the years he participated in DROP, and the years he worked for Fruitland Park. Mr. Fewless's recalculated pension benefit (excluding the time he was employed by Fruitland Park) was determined to be $7,082.36. In addition, the Settlement Agreement provided that the Division was to release to him all withheld monthly benefits from September 2018 to the time the Settlement Agreement was entered, in the amount of $81,940.56. The Settlement Agreement also provided a repayment component, stating:

> d. Monthly benefit and Repayment Amount. Since the City of Fruitland Park has not yet paid all outstanding contributions related to Mr. Fewless's employment with the City of Fruitland Park,

> Mr. Fewless's current benefit calculation is $7,082.36 per month. Mr. and Mrs. Fewless agree to a $644.57 monthly deduction from every monthly FRS retirement benefit Mr. and Mrs. Fewless [are] entitled to receive until such time as the FRS Trust Fund is made whole as provided herein. This deduction will result in a monthly retirement benefit to Mr. and Mrs. Fewless in the amount of $6,417.79 per month. The $664.57 monthly deduction will be taken from every monthly retirement benefit from September 2018 and forward until such time as the FRS Trust Fund recovers $541,708.03 in aggregate from Mr. and Mrs. Fewless and the City of Fruitland Park, or until Mr. and Mrs. Fewless are deceased. The Division, in exchange, will agree that the exclusive mechanism for recovery of the overpayment money from Mr. and Mrs. Fewless shall be the $664.57 amount agreed upon herein, provided that Mr. and Mrs. Fewless comply with the terms of this Settlement.

28. Kathy Gould, the Bureau Chief for the bureau that performs retirement calculations, acknowledged at hearing that the amount being collected from Mr. Fewless's benefits will never recoup the debt owed in his lifetime, and that, despite statutory language to the contrary, DMS felt it had the discretion to make sure that there is no additional hardship on members. However, also part of the Settlement Agreement is the obligation on the part of DMS to seek reimbursement for the entire debt from Fruitland Park. The Settlement Agreement states:

> f. Good Faith Effort to Pursue City of Fruitland Park. The Division agrees it will pursue the City of Fruitland Park in good faith for the full amount of the overpayment money ($541.708.03) and contributions (yet to be determined) owed to the FRS Trust Fund related to Mr. Fewless's employment with the City of Fruitland Park. The Division will send an intended final agency action letter to the City of Fruitland Park within thirty (30) days of dismissal of the petition indicating that

> it owes to the FRS Trust Fund the full amount of the overpayment money and the contributions. If the City of Fruitland Park challenges the Division's intended final agency action, the Division agrees to pursue any litigation in good faith through final hearing or settlement, and will attempt to recover the full amounts referenced therein. If the Division is successful in recovering $541,708.03 in aggregate from Mr. and Mrs. Fewless and the City of Fruitland Park, through litigation or settlement, the $644.57 monthly deduction will cease prospectively as the FRS Trust Fund will have been made whole. If the Division is successful in recovering all contributions due from the City of Fruitland Park, the result will be a higher benefit from September 2018 and forward because he will have obtained all service credit he is due. If the Division is successful in recovering the entire $541,708.03 exclusively from the City of Fruitland Park, *the Division agrees to refund Mr. and Mrs. Fewless all monthly deductions that were withheld pursuant to this settlement.* (emphasis added).[2]

29. In conjunction with entering into the Settlement Agreement, the General Counsel for DMS provided a Settlement Description Letter for Michael Fewless Settlement Agreement to the Department of Financial Services, Bureau Chief of Auditing. The letter stated that "Mr. Fewless has a colorable claim against Retirement for Estoppel." However, there is no indication, either in the Settlement Letter or in the evidence presented at hearing, that the City was misled in any way regarding Mr. Fewless's status when it hired him as Chief of Police.

[2] According to the terms of the Settlement Agreement, if DMS recovers from the City all that it seeks, Mr. Fewless will emerge from the settlement benefiting both from receiving the DROP money *and* a pension benefit calculated as if he never participated in DROP. While this result does not appear to be authorized by chapter 121, the legality of the Settlement Agreement is beyond the scope of this Recommended Order.

30. DMS then issued its Notice of Intended Agency Action against the City, informing the City that it was jointly and severally liable for Mr. Fewless's DROP payment, as well as the retirement benefits received.

CONCLUSIONS OF LAW

31. DOAH has jurisdiction over the subject matter and the parties to this action pursuant to sections 120.569 and 120.57(1).

32. The burden of proof in an administrative hearing is on the party asserting the affirmative of the issue unless the burden is established by statute. *Wilson v. Dep't of Admin., Div. of Ret.*, 538 So. 2d 139, 141-42 (Fla. 4th DCA 1989); *Balino v. Dep't of HRS*, 348 So. 2d 349 (Fla. 1st DCA 1977). In this case, DMS is asserting that the City must reimburse FRS for the money paid to Mr. Fewless and that the City is required to pay other sums based on Mr. Fewless's employment with the City in violation of DROP termination requirements. DMS, therefore, has the burden of proof to demonstrate its entitlement to the funds it is seeking.

33. The City, on the other hand, is seeking to avoid payment by establishing the affirmative defense of estoppel, which, in this case, also requires the establishment of an agency relationship between Mr. Fewless and the City at the time Mr. Fewless made inquiries regarding his retirement status to DMS. It is the City's burden to establish any affirmative defense.

34. DMS is the state agency charged with the responsibility of administering the state retirement system pursuant to sections 121.025 and 121.031.

35. Generally, chapter 121 sets the parameters for the implementation of the FRS. The following statutory provisions are particularly relevant to this proceeding. Section 121.011 addresses the preservation of rights for those employees that belong to a different retirement plan and become eligible for participation in FRS under some circumstances. It provides in pertinent part:

(3) PRESERVATION OF RIGHTS.—

(b) The rights of members of any retirement system established by local or special act or municipal ordinance shall not be impaired, nor shall their benefits be reduced by virtue of any part of this chapter.

1. If an eligible member of any such retirement system elects to transfer to the Florida Retirement System in a referendum held in accordance with this chapter by the governing body administering such local retirement system, he or she shall be transferred to the Florida Retirement System on the date that his or her unit is accepted for membership therein and shall be subject to the provisions of the Florida Retirement System established by this chapter and at retirement have his or her benefits calculated in accordance with the provisions of s. 121.091. However, the governing body shall preserve the rights of employees of any existing local retirement system not electing to transfer to the Florida Retirement System.

2. Whenever any employee of a governmental entity which has a local retirement system becomes eligible to participate in the Florida Retirement System by virtue of the consolidation or merger of governments or the transfer of functions between units of government, such employee shall elect either to continue to participate in the local retirement system or to become a member of the Florida Retirement System. For any such employee who elects to continue to be a member of the local retirement system, the Florida Retirement System employer is authorized to make the required employer contributions to the local retirement system and may make appropriate deductions from the employee's salary as required by the local plan to preserve his or her retirement benefits.

36. Section 121.011 would govern the transfer of *existing* employees at the time that Fruitland Park joined FRS. It would not govern the treatment of new hires.

37. Section 121.021 provides definitions for terms used in chapter 121, and provides the following definitions that are relevant to this proceeding:

> (10) "Employer" means any agency, branch, department, institution, university, institution of higher education, or board of the state, or any county agency, branch, department board, district, school board, municipality, metropolitan planning organization, or special district of the state which participates in the system for the benefit of certain of its employees, or a charter school or charter technical career center that participates as provided in s. 121.051(2)(d). Employers are not agents of the department, the state board, or the Division of Retirement, and the department, the state board, and the division are not responsible for erroneous information provided by representatives of employers.
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> (11) "Officer or employee" means any person receiving salary payments for work performed in a regularly established position and, if employed by a municipality, a metropolitan planning district, or a special district, employed in a covered group. The term does not apply to state employees covered by a leasing agreement under s. 110.191, other public employees covered by a leasing agreement, or a coemployer relationship.
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> * * *
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> (15) "Special risk member" or "Special Risk Class member" means a member of the Florida Retirement System who meets the eligibility and criteria required under s. 121.0515 for participation in the Special Risk Class.
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> * * *

> (39)(b) "Termination" for a member electing to participate in the Deferred Retirement Option Program occurs when the program participant ceases all employment relationships with participating employers in accordance with s. 121.091(13), however:
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> 2. For termination dates occurring on or after July 1, 2010, if the member becomes employed by any such employer within the next 6 calendar months, termination will be deemed not to have occurred, except as provided in s. 121.091(13)(b)4.c. A leave of absence constitutes a continuation of the employment relationship.
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> * * *
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> (44) "DROP participant" means any member who elects to retire and participate in the Deferred Retirement Option Program as provided in s. 121.091(13).
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> * * *
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> (52) "Regularly established position" means:
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> (b) With respect to a local agency employer (district school board, county agency, Florida College System institution, municipality, metropolitan planning organization, charter school, charter technical career center, or special district), other than a water management district operating pursuant to chapter 373, a regularly established position that will be in existence for a period beyond 6 consecutive months, except as provided by rule.

38. Section 121.051(1)(a) provides that, with the exception of certain elected officials, participation in the FRS is compulsory for all officers and employees. Section 121.055 addresses the senior management service class within the FRS, and provides in relevant part:

(1)(b)1. Except as provided in subparagraph 2., effective January 1, 1990, participation in the Senior Management Service Class is compulsory for the president of each community college, the manager of each participating municipality or county, and all appointed district school superintendents. Effective January 1, 1994, additional positions may be designated for inclusion in the Senior Management Service Class if:

a. Positions to be included in the class are designated by the local agency employer. Notice of intent to designate positions for inclusion in the class must be published once a week for 2 consecutive weeks in a newspaper of general circulation published in the county or counties affected, as provided in chapter 50.

b. Up to 10 nonelective full-time positions may be designated by each local agency employer reporting to the department; for local agencies with 100 or more regularly established positions, additional nonelective full-time positions may be designated, not to exceed 1 percent of the regularly established positions within the agency.

c. Each position added to the class must be a managerial or policymaking position filled by an employee who is not subject to continuing contract and serves at the pleasure of the local employer without civil service protection, and who:
(I) Heads an organizational unit; or
(II) Has responsibility to effect or recommend personnel, budget, expenditure, or policy decisions in his or her areas of responsibility.

2. In lieu of participation in the Senior Management Service Class, members of the Senior Management Service subparagraph 1., may withdraw from the Florida Retirement System altogether. …

39. It is clear, from the evidence presented in this proceeding, that the City could have, but did not, designate the position of Chief of Police as a member of the senior management service class, and if it had, the person in that position could withdraw from FRS. However, even assuming that the City had chosen to designate the position, it would not change the result in this case because the issue is not whether Mr. Fewless was required to be a member of the FRS, but whether the City was an FRS employer at the time that he became a City employee. Section 121.091(9) provides:

> (9) EMPLOYMENT AFTER RETIREMENTL LIMITATION.—
>
> (a) Any person who is retired under this chapter, except under the disability retirement provisions of subsection (4), may be employed by an employer *that does not participate in a state-administered retirement system* and receive compensation from that employment without limiting or restricting in any way the retirement benefits payable to that person.
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> * * *
>
> (c) Any person whose retirement is effective on or after July 1, 2010, or whose participation in the Deferred Retirement Option Program terminates on or after July 1, 2010, who is retired under this chapter, except under the disability retirement provisions of subsection (4) or as provided in s. 121.053, may be reemployed by an employer that participates in a state-administered retirement system and receive retirement benefits and compensation from that employer. However, a person *may not be reemployed by an employer participating in the Florida Retirement System before meeting the definition of termination in s. 121.021* and may not receive both a salary from the employer and retirement benefits for 6 calendar months after meeting the definition of termination, except as provided in paragraph (f).

> However, a DROP participant shall continue employment and receive a salary during the period of participation in the Deferred Retirement Option Program, as provided in subsection (13).
>
> 1. The reemployed retiree may not renew membership in the Florida Retirement System.
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> 2. The employer shall pay retirement contributions in amount equal to the unfunded actuarial liability portion of the employer contribution that would be required for active members of the Florida Retirement System in addition to the contributions required by s. 121.76.
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> 3. A retiree initially reemployed in violation of this paragraph and an employer that employs or appoints such person are jointly and severally liable for reimbursement of any retirement benefits paid to the retirement trust fund from which the benefits were paid, including the Florida Retirement Trust Fund and the Florida Retirement Investment Plan Trust Fund, as appropriate. The employer must have a written statement from the employee that he or she is not retired from a state-administered retirement system. Retirement benefits shall remain suspended until repayment is made. Benefits suspended beyond the end of the retiree's 6-month reemployment limitation period shall apply toward the repayment of benefits received in violation of this paragraph. (emphasis added)

40. Section 121.091(13) describes the DROP program, the eligibility requirements, and the limitations on employment once a participant terminates his or her employment. Section 121.091(13)(c)5.d. and (13)(c)6. provides:

> d. A DROP participant who fails to terminate all employment relationships as provided in s. 121.021(39) shall be deemed as not retired, and the DROP election is null and void. Florida

> Retirement System membership shall be reestablished retroactively to the date of the commencement of DROP, and each employer with whom the member continues employment must pay to the Florida Retirement System Trust Fund the difference between the DROP contributions paid in paragraph (1) and the contributions required for the applicable Florida Retirement System class of membership during the period the member participated in DROP, plus 6.5 percent interest compounded annually.
>
> 6. The retirement benefits of any DROP participant who terminates all employment relationships as provided in s. 121.021(39) but is reemployed in violation of the reemployment provisions of subsection (9) are suspended during those months in which the retiree is in violation. Any retiree in violation of this subparagraph and any employer that employs or appoints such person without notifying the division to suspend retirement benefits are jointly and severally liable for any benefits paid during the retirement limitation period. The employer must have a written statement from the retiree that he or she is not retired from a state-administered retirement system. Any retirement benefits received by a retiree while employed in violation of the reemployment limitations must be repaid to the Florida Retirement System Trust Fund, and his or her retirement benefits shall remain suspended until payment is made. Benefits suspended beyond the end of the reemployment limitation apply toward repayment of benefits received in violation of the reemployment limitation.

41. This case is not about whether Mr. Fewless has any liability to FRS based on his violation of the termination provisions related to DROP, but rather, whether Fruitland Park has liability for employing him in violation of those provisions.

42. DMS has met its burden of proof that the City is liable under section 121.091(13) to repay any benefits paid to Mr. Fewless (here, the DROP

benefit, his monthly pension benefit, and his health insurance subsidy), as well as the difference between the DROP contributions paid by his employer while in DROP and the contributions required for the applicable FRS class of membership during the period the member participated in DROP, plus 6.5 percent interest compounded annually.

43. The City and Mr. Fewless focused on whether there was another retirement plan in which Mr. Fewless could be placed instead of the FRS. The issue, however, is not whether Mr. Fewless participated in FRS while employed by Fruitland Park, but whether Fruitland Park was a participant in FRS at the time that Mr. Fewless was hired. It clearly was.

44. The City argues that DMS is equitably estopped from seeking payment from the City because of the alleged representations that DMS employees made to Mr. Fewless when he called to enquire about his retirement and how it would be affected if he took the job as Chief of Police for Fruitland Park. The elements of equitable estoppel are: 1) representation about a material affect that is contrary to a later-asserted position; 2) reasonable reliance on that representation; and 3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. *Council Bros. v. City of Tallahassee,* 634 So. 2d 264, 266 (Fla. 1st DCA 1994). Equitable estoppel is not normally applied to governmental entities without extraordinary circumstances, and will not be applied based on mistakes of law, as opposed to mistakes of fact. *Hamilton Downs Horsetrack, LLC v. Dep't of Bus. & Prof'l Reg.,* 226 So. 3d 1046 (Fla. 1st DCA 2017); *Salz v. Dep't of Admin., Div. of Ret.,* 432 So. 2d 1376, 1378 (Fla. 3d DCA 1983).

45. Equitable estoppel does not apply in this instance for several reasons: first, DMS has taken the position with the City, both before and after the telephone calls by Mr. Fewless, that a person retiring from an FRS position cannot be reemployed by an entity that participates in FRS. It has also

steadfastly maintained that participation in FRS was compulsory for new hires once the City joined FRS.

46. Second, the only statements upon which the City could rely are the statements made to Mr. Fewless in his calls to DMS. City personnel were not a part of those calls, were not present when Mr. Fewless made them, and could only rely on Mr. Fewless's understanding of those calls. There is no credible, persuasive evidence that DMS represented to *the City* that they could employ Mr. Fewless and place him in a separate retirement plan, and that by doing so, he would not be violating his DROP termination.

47. Third, there is no credible evidence that the City changed its position in reliance on any statement made to Mr. Fewless. Mr. LaVenia advised Mr. Fewless that he could join the ICMA program as opposed to FRS during the interview process, before Mr. Fewless called FRS. Similarly, the City offered the job to Mr. Fewless before the telephone calls to DMS. In short, the City established its position, from which it did not change, before Mr. Fewless called FRS to inquire about his retirement and reemployment.

48. Fourth, the statements that Mr. Fewless attributes to Mr. Kent are statements of law, as opposed to fact. Petitioner compares the statements to those in *Salz v. Department of Administration, Division of Retirement, supra*. In *Salz*, the agency informed a plan member that she could purchase credit for retirement for years she taught at an out-of-state, private school when the law only allowed for the purchase of credits for teaching at public schools. She purchased the credits and the Division consistently represented to her the number of years of creditable service she had, and she made her retirement decisions based on these representations. As stated by the court, the representations regarding how many years of creditable service she possessed were representations of fact.

49. Similarly, in *Kuge v. Department of Administration, Division of Retirement,* 449 So. 2d 389 (Fla. 3d DCA 1984), the Department provided to an employee an estimate of how long she would have to work in order to vest

for retirement purposes. The representations regarding how much creditable service she had "were representations of fact, not of law. It is true that such representations were based on a misunderstanding of the law applicable to the case, but this does not convert the factual representations into legal representations." *Id*. at 391. Here, Mr. Fewless's questions dealt with the *effect* certain actions would have on his retirement. Questioning the effect of one's actions is not the same as asking how many years of service a person has accrued, or asking for the calculation of a person's pension. Questioning the effect of a person's course of action necessarily requires an analysis of how the law reacts to the possible course of action, which is by its nature a legal conclusion.

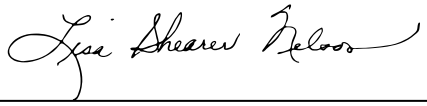
50. The City also contends that Mr. Fewless was its agent when he called FRS. However, Mr. Fewless testified that he was acting on his own behalf when he called FRS, and at the time of the July 9, 2015, telephone call, Mr. Fewless had not been introduced to the City Commission as the person selected for the Chief of Police position, much less begun his responsibilities on behalf of the city.

51. While the law clearly requires that the City pay the amount DMS is seeking in this case, it is equally clear that the result is a harsh one for a city as small as Fruitland Park. It is noted that DMS went to significant lengths to ameliorate the effects of Mr. Fewless's DROP termination violation on Mr. Fewless and his wife. However, equity does not occur in a vacuum, and the effects of the agency's intended action in this case will have a significant effect on the fiscal health of a small community. It is recommended that DMS allow the City to repay the FRS trust fund on an installment plan, over the course of three to five years, so as to lessen what may be devastating effects on the financial position of the City.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department uphold its initial decision to require the City of Fruitland Park to pay back the retirement benefits that Mr. Fewless received, including his DROP benefit, monthly retirement benefits for September 2015 through August 2018, and health insurance subsidy for the same time period. It is also RECOMMENDED that the City be required to pay the other contributions listed as unpaid in DMS's December 2, 2019, notice of intended agency action. Finally, it is RECOMMENDED that, given the amount of funds involved, that DMS allow the funds to be repaid in installments over a three-to-five-year period.

DONE AND ENTERED this 25th day of August, 2021, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of August, 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.