STATE OF FLORIDA
DEPARTMENT OF MANAGEMENT SERVICES

REBECCA HERNANDEZ,

Petitioner,

v.

DOAH # 20-1840
OGC # 19-39623
Final Order # 21-0005

STATE OF FLORIDA,
DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,

Respondent.
_____/

FINAL ORDER

THIS MATTER has come before the undersigned for the purpose of issuing a Final Order, in accordance with section 120.569(1), Florida Statutes (2020).

On September 21, 2020, Robert L. Kilbride, Administrative Law Judge ("ALJ"), issued a Recommended Order recommending that the State of Florida, Department of Management Services, Division of Retirement ("Department"), enter a Final Order granting Petitioner, Rebecca Hernandez's ("Ms. Hernandez") request to be paid the sums of $2,654.17, $13,388.41 and $22,943.81, totaling $38,986.39, plus the appropriate statutory rates of interest which have accrued from October 2, 2018. The Department timely filed Exceptions to the Recommended Order on October 6, 2020. Florida Administrative Code Rule 28-106.217(3) provides that any party may file responses to another party's exceptions within 10 days from the date the exceptions were filed with the agency. The Petitioner's Objections to the Department's Exceptions in this case were due on October 16, 2020. The Petitioner filed Objections to Respondent's Exceptions on November 2, 2020. The Petitioner's Objections were filed 17 days after the deadline contained in rule 28-106.217, Florida Administrative Code, and therefore were untimely filed. Although the

Department was not required to consider the Objections because they were not timely filed, the Department has considered the Objections raised by the Petitioner. *See Redfern v. Dep't of Prof'l Reg.*, 498 So. 2d 1313, 1314–15 (Fla. 1st DCA 1986). After a thorough review of the record and being fully advised in the premises, the Department hereby makes the following findings of fact and conclusions of law.

Standard of Review

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

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

RULING ON EXCEPTIONS

The Department filed Exceptions to the Recommended Order, which will be disposed of below.

FINDINGS OF FACTS

Following a thorough review of the record, the Findings of Facts set forth in the Recommended Order are hereby adopted in their entirety and are incorporated herein by reference.

Exception 1

Respondent takes Exception to Finding of Fact 14 because Ms. Hernandez contacted FRS guidance first and only after first contacting the FRS did she receive a return call. Finding of Fact 14 found only that Ms. Hernandez was contacted by the FRS guidance line to discuss the process and survivor benefits related to the Pension Plan, which is supported by the record. This Exception is overruled because the finding is supported by competent substantial evidence. (*See* Respondent's Exhibit 20, No. 3180880).

Exception 2

Respondent takes Exception to Finding of Fact 15 to the extent it finds that Ms. Hernandez was "shocked and dismayed" when the representative informed her that she was only entitled to the total contributions her mother made while she was working and in the Pension Plan. This Exception is overruled because the finding is supported by competent substantial evidence.

Exception 3

Respondent takes Exception to Finding of Fact 16 to the extent it finds that Ms. Hernandez assisted Ms. Rice in making any decisions regarding Ms. Rice's retirement account. This Exception is overruled because the finding is supported by competent substantial evidence.

Exception 4

Respondent takes Exception to Finding of Fact 20. Finding of Fact 20 simply makes a finding regarding the total amount of contributions Ms. Rice paid while participating in the Investment Plan and the Pension Plan. Finding of Fact 20 does not make a finding regarding whether the contributions Ms. Rice made while she was participating in the Investment Plan are still considered contributions. Therefore, this Exception is overruled because the finding is supported by competent substantial evidence.

Exception 5

Respondent takes Exception to Footnote 11, which is referenced in Finding of Fact 47, to the extent it finds that there was no proof presented that the Respondent complied with the "Educational Components" requirements contained in section 121.4501(10), Florida Statutes. Footnote 11 does in fact contain a finding that Ms. Rice received the notices in the enrollment forms she signed as well as guidance from FRS guidance line representatives, which is supported by the record. This Exception is overruled because the finding is supported by competent substantial evidence.

CONCLUSIONS OF LAW

Following a thorough review of the record and applicable laws, the Conclusions of Law set forth in the Recommended Order are either adopted and incorporated herein by reference or rejected or modified as noted below.

Conclusions of Law 57–60 are hereby adopted and incorporated herein by reference.

It should be noted that in Conclusion of Law 61, the ALJ incorrectly determined that the Department had the burden of proof in this case. The first case cited by the ALJ is *Amico v. Division of Retirement, Department of Administration*, 352 So. 2d 556 (Fla. 1st DCA 1977). That case dealt with a termination of disability benefits that were being paid by the Division. *Id.* at 557. In other words, the Division was seeking to change the status quo for the member. *See id.* The second case cited, *Seward v. Department of Administration, Division of Retirement*, 366 So. 2d 82, 83–84 (Fla. 1st DCA 1978), dealt with a declaratory statement that, among other things, asked the Department to determine whether the petitioner—a former law enforcement officer—or the Department had the burden of proof at a termination of disability benefits hearing. The court held that the burden was on the Department to prove the affirmative of the issue. *Id.* at 84. Here, it is Petitioner who asserts the affirmative issue that she is entitled to a refund of the monies the

deceased member spent to buy-in to the Pension Plan, so she shoulders the burden of proof. *See Young v. Dep't of Cmty. Affairs*, 625 So. 2d 831, 833 (Fla. 1993) ("[T]he burden of proof in administrative proceedings is on the party asserting the affirmative of an issue, unless the burden is established otherwise by statute.") (quoting *Balino v. Dep't of HRS*, 348 So. 2d 349, 350 (Fla. 1st DCA 1977)). However, since this is not an area of the law over which the Department has substantive jurisdiction, Conclusion of Law 61 as contained in the Recommended Order will not be modified and is incorporated herein by reference.

Conclusions of Law 62 and 64 are hereby adopted and incorporated herein by reference.

Exception 6

Conclusions of Law 63 and 65 are hereby adopted and incorporated herein by reference, and Respondent's Exceptions are hereby overruled. As the ALJ alluded to in Conclusion of Law 59, the addition of article V, section 21 of the Florida Constitution abolished the deference courts, including ALJs, gave to agency interpretations of statute or rule in the past. *MB Doral, LLC v. Dep't of Bus. & Prof'l Reg., Div. of Alcoholic Beverages & Tobacco*, 295 So. 3d 850, 853 (Fla. 1st DCA 2020) (citing *S. Baptist Hosp. of Fla. v. Agency for Health Care Admin.*, 270 So. 3d 488, 502 (Fla. 1st DCA 2019)).

Exception 7

Respondent takes Exception to Footnote 12 referenced in Conclusion of Law 66 to the extent it finds that "accumulated contributions" could not have meant payroll deductions because the three percent payroll deduction was not implemented until 2011. Conclusion of Law 66 is hereby rejected as it is legally incorrect, and the Respondent's Exception is sustained.

When the FRS was created in 1970, employee contributions were in fact required. *See* §§ 121.061(1), Fla. Stat. (1970 Supp.) (mentioning "contributions required of members under this chapter"), 121.071(1) ("Regular members shall contribute each pay period . . . .").

Contributions were discontinued five years later in 1975 and were not reinstituted until 2011. *See* § 121.071(2)(a), Fla. Stat. (2011). In 1975, the Legislature amended section 121.071(1), Florida Statutes, to read:

> Until January 1, 1975, regular members shall contribute each pay period at the rate of 4 percent of gross compensation, and special risk members shall contribute each pay period at the rate of 6 percent of gross compensation. Effective January 1, 1975, regular members and special risk members shall make no contribution to the system.

The current version of section 121.71(2), Florida Statutes, which applies to both the Pension Plan and the Investment Plan, provides, in relevant part:

> The employer shall deduct the contribution from the employee's monthly salary, and the contribution shall be submitted to the division. These contributions shall be reported as employer-paid employee contributions, and credited to the account of the employee. . . . The employee does not have the option of choosing to receive the contributed amounts directly instead of having them paid by the employer to the plan. Such contributions are mandatory, and each employee is considered to have consented to payroll deductions.

In addition, the citation in the Recommend Order to section 121.021(26), Florida Statutes, is incomplete. That section also provides that "the following words and phrases as used in this chapter have the respective meanings set forth *unless a different meaning is plainly required by the context*." § 121.021(26), Fla. Stat. (emphasis added). Therefore, Conclusion of Law 66 (including footnote 12) is hereby rejected, and the following Conclusion of Law 66 is substituted as follows:

"The definition section of chapter 121, which is found in section 121.021, Florida Statutes, defines "accumulated contributions" to mean "the sum of . . . [a] member's contributions, without

interest." § 121.021(26), Fla. Stat. This definition is the same as it existed in 1970 when the FRS was created. *Cf.* § 121.021(26), Fla. Stat. (1970 supp.). Additionally, section 121.021, Florida Statutes, states the definitions found in that section apply to those defined terms as they appear throughout chapter 121 "unless a different meaning is plainly required by the context."

Therefore, for the reasons stated herein, the Department finds that its substituted Conclusion of Law is as or more reasonable than the Conclusion reached by the ALJ.

Exception 8

The Respondent takes Exception to Conclusions of Law 66–69 to the extent the ALJ is attempting to split chapter 121, Florida Statutes, into three different parts. Conclusion of Law 66 has been rejected and replaced as discussed above, and Conclusions of Law 67–69 are adopted and incorporated herein by reference, and the Respondent's Exceptions are hereby overruled.

Conclusions of Law 70–75, 77–79 and 83 are hereby adopted and incorporated herein by reference; however, the Department notes that some of the Conclusions of Law are irrelevant to the outcome in this proceeding.

Exception 9

The Respondent takes Exception to Conclusions of Law 76, 80–82 and 84–85 to the extent the Conclusions of Law determine that "member contributions" as defined in section 121.4501(2)(j), Florida Statutes, do not apply to the Pension Plan provisions contained in parts I and III of chapter 121, Florida Statutes. The Exception to Conclusion of Law 76 is overruled.

However, Conclusions of Law 80–82 and 84–86 are rejected, and the following Conclusions of Law are substituted in their place, which are inserted after Conclusion of Law 83 as follows:

"Although the definition of "member contributions" contained in section 121.4501(2)(j), Florida Statutes, may only apply to the Investment Plan Statutes, which are contained in part II of chapter 121, Florida Statutes, that does not determine the outcome of this case.

The statutory language contained in section 121.4501(4)(f), Florida Statutes, governs the process for an eligible employee, such as Ms. Rice, to transfer from the Investment Plan to the Pension Plan. Section 121.4501(4)(f)3., Florida Statutes, is the provision applicable to Ms. Rice's transfer to the Pension Plan. That subparagraph provides that an employee who chooses to transfer to the Pension Plan from the Investment Plan must transfer from his or her Investment Plan account and from other employee moneys as necessary, a sum representing the employee's actuarial accrued liability.[1]

Section 121.4501(4)(f)5., Florida Statutes, further delineates that this process of moving from the Investment Plan to the Pension Plan, is the process to "buy-in" to the Pension Plan. This "buy-in" amount required in order to transfer from the Investment Plan to the Pension Plan is separate and distinct from an employee's "contributions" to the Pension Plan; these "Contributions" (to the Pension Plan), only begin once that employee is a participating member of the Pension Plan. It is vital to note that the applicable statutory sections do not define or refer to the monies used to transfer from the Investment Plan to the Pension Plan as "contributions" or "accumulated contributions"; instead, the relevant statutory provisions clearly and unambiguously refer to these funds as a "sum" and ultimately, the "buy-in" requirements."

Section 121.061(1), Florida Statutes, addresses the funding of the FRS and in so doing, states that

[1] It's important to note that the term "contribution" is not utilized when referring to the sum and buy-in amount that the employee must transfer to the Pension Plan, regardless of whether the amount comes from his or her investment plan account or from other sources.

> [c]ommencing December 1, 1970, all employers withholding *contributions required of members under this chapter* for purposes of providing retirement benefits and social security benefits to or on behalf of such members shall budget, set aside, and pay over to the administrator, for deposit into the proper retirement and social security trust funds, matching payments for retirement and social security contributions as required by this chapter.

Section 121.71, Florida Statutes, which sets out the uniform contribution rates that are required to be paid by both FRS members, such as Ms. Rice, and FRS employers, provides in relevant part:

> (2) Based on the uniform rates set forth in subsections (3), (4), and (5), *employees* and employers *shall make monthly contributions* to the Division of Retirement as required in s. 121.061(1), . . . [b]eginning July 1, 2011, each *employee shall contribute the contributions* required in subsection (3). The employer shall deduct the contribution from the employee's monthly salary.
>
> (3) Required employee retirement contribution rates for each membership class and subclass of the Florida Retirement System for both retirement plans are as follows:

Membership Class	Percentage of Gross Compensation, Effective July 1, 2011
Regular Class	3.00%

A reading of all of the relevant provisions of chapter 121, Florida Statutes, together removes any doubt that the use of the word "contributions," when referring to the Pension Plan, refers exclusively to the monthly payroll contributions that an employee, such as Ms. Rice, is required by statute to make once the employee is a member of the Pension Plan. "Contributions" does not include the amounts that were transferred, whether from the Investment Plan or elsewhere, to the Pension Plan in order for that employee to move from the Investment Plan to the Pension Plan.[2] Thus, the Recommended Order's focus on the distinction between the terms "member contributions" and "employee contributions" defined in section 121.4501(2)(j), Florida

[2] In fact, the statute specifically uses the words "sum" and "buy-in" instead of "contribution" in the relevant portion of the statute when discussing the process to transfer from the Investment Plan to the Pension Plan.

Statutes, and "accumulated contributions" in section 121.091(7), Florida Statutes, and section 121.021(26), Florida Statutes, overlooks other relevant statutory provisions in chapter 121, Florida Statutes, that are dispositive to the outcome of this case. *See Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198–99 (Fla. 2007) (holding that courts are required to give effect to every word, phrase, sentence, and part of the statute, if possible, and words in a statute should not be construed as mere surplusage; further, related statutory provisions must be read together to achieve a consistent whole, and where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another).

Therefore, for the reasons stated herein, the Department finds that its substituted Conclusions of Law is as or more reasonable than the Conclusions reached by the ALJ.

Exception 10

The Respondent takes Exception to Conclusion of Law 87 to the extent it finds that the plain and ordinary meanings of "accumulated contributions" must be utilized. This Exception is sustained, and Conclusion of Law 87 is rejected. In addition, Conclusion of Law 88 is rejected as it contains an incorrect statutory citation and does not cite the complete relevant provision of the statute. The following Conclusions of Law are substituted for Conclusions of Law 87 and 88:

"As previously noted, section 121.021(26), Florida Statutes, defines "accumulated contributions" to mean the sum of "[a] member's contributions, without interest." The meaning of the term "contribution" is easily understood by reading other relevant parts of chapter 121, Florida Statutes. For instance, section 121.71(2), Florida Statutes, provides that "employees and employers shall make monthly contributions to" fund the FRS in the amounts set forth in subsection (3) through (5). *See also* §§ 121.071(2)(a), Fla. Stat. ("Effective July 1, 2011, each employer and employee shall pay retirement *contributions* as specified in s. 121.71." (emphasis

added)), 121.071(5), Fla. Stat. ("*Contributions* made in accordance with subsections (1), (2), (3), and (4) and s. 121.71 shall be paid into the system trust funds in accordance with rules adopted by the administrator." (emphasis added)). Therefore, chapter 121, Florida Statutes, is clear: the "accumulated contributions" are the sum, without interest, of those monthly payments that are required by statute."

The dictionary definitions of the terms do not apply because Florida law is unequivocal, that the only "contributions" a member can make pursuant to chapter 121, Florida Statutes, are those contributions that are made by monthly payroll deduction. *See* §§ 121.70, and 121.71, Fla. Stat. As set forth above, the FRS began as a member contributory system in 1970. Although member contributions were not required between 1975 and 2011, the definition of "accumulated contributions" has been the same since 1970. Likewise, section 121.091(7), Florida Statutes, has provided, since 1970, that upon the death of a non-vested member, the *only* payment to which a beneficiary is entitled, is a refund of the member's accumulated contributions. *See Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (holding that "[c]ourts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power").

For these reasons, the Department finds that its substituted Conclusions of Law are as or more reasonable than the Conclusions reached by the ALJ.

Conclusions of Law 89 and 90 are hereby rejected. The definitions contained in the Merriam-Webster Dictionary for the words "contribution" and "sum" are not applicable to the current case, for the reasons set forth above in the Department's substituted Conclusions of Law 87 and 88. *See id.* Here, the entirety of chapter 121, Florida Statutes, must be read together, giving effect to all statutory provisions and construing related statutory provisions in harmony with one

another. *See Heart of Adoptions, Inc.*, 963 So. 2d at 198–99. Therefore, for the reasons stated herein, the Department finds that its substituted Conclusions of Law are as or more reasonable than the Conclusions reached by the ALJ.

Exception 11

The Respondent takes Exception to Conclusion of Law 91, which determined that the applicable meaning of "accumulated contributions" would be the whole monetary amount Ms. Rice gave or supplied to the Pension Plan. This Exception is sustained; Conclusion of Law 91 is rejected, and the following Conclusion of Law is substituted in its place:

"Section 121.021(26), Florida Statutes, defines "accumulated contributions" to mean the sum of a member's contributions, without interest, subsequent to December 1, 1970 (unless a different meaning is plainly required by the context). Furthermore, section 121.4501(4)(f)3., Florida Statutes, requires that an employee transferring from the Investment Plan to the Pension Plan, must transfer from his or her Investment Plan account and from other employee moneys as necessary, a sum representing the employee's actuarial accrued liability; this sum is further referred to as the "buy-in" amount required in order for the employee to transfer from the Investment Plan to the Pension Plan. § 121.4501(4)(f)5., Fla. Stat. Conspicuously, this "buy in" is not referred to as a "contribution," and as discussed previously, this "buy-in" amount is completely separate and distinct from the term "contribution(s)."[3] When the term "contribution(s)" is utilized referring to the Pension Plan, that term refers exclusively to the monthly payroll contributions from an employee's (such as Ms. Rice) monthly salary once the employee is a member of the Pension Plan. *See* §§ 121.071(2)(a), 121.70, and 121.71(2) and (3), Fla. Stat."

[3] It is important to note that the term "contribution" is not utilized when referring to the "sum" or "buy-in" amount that the employee must transfer to the Pension Plan from the Investment Plan, regardless of whether that amount comes from his or her investment plan account or from other sources.

Therefore, for the reasons stated herein, the Department finds that its substituted Conclusion of Law is as or more reasonable than the Conclusion reached by the ALJ.

Exception 12

The Respondent takes Exception to Conclusion of Law 92 to the extent it determines that there is nothing in the law or rules that states that a vested amount would not be recoverable. Despite the ALJ's conclusion that since "there is nothing in the law or rules that states, either directly or indirectly, that a vested amount would not be recoverable," such a proposition runs contrary to well-established Florida law that agencies only have the power which is expressly provided in statute. *See Robinson v. Dep't of Health*, 89 So. 3d 1079, 1082–83 (Fla. 1st DCA 2012). Further, in order for the Department to have the statutory power that the ALJ discusses in this Conclusion, it is axiomatic that the Legislature would be required to provide the Department with that express power. *See Holly*, 450 So. 2d at 219. Lastly and equally as important, the determinative issue in this case was not whether Ms. Rice was "vested" in the Investment Plan or not; it was undisputed that Ms. Rice was not vested in the Pension Plan. Therefore, the Exception is sustained; Conclusion of Law 92 is modified to reject the part of the Conclusion that references whether vested amounts are recoverable, and the following Conclusion of Law is substituted in its place:

"The literature and forms issued by the Department warn that the "buy-in" fee may be nonrefundable."

Therefore, for the reasons stated herein, the Department finds that its substituted Conclusion of Law is as or more reasonable than the Conclusion reached by the ALJ.

Exception 13

The Respondent takes Exception to Conclusions of Law 93 and 94 to the extent they determined that the monies liquidated from the investment plan and the additional buy-in fee are refundable as contributions. This Exception is sustained, and the following Conclusions of Law are substituted in their place:

"Section 121.091(7)(a), Florida Statutes, provides that "[i]f the employment of a member is terminated by reason of his or her death prior to being vested, . . . there shall be payable to his or her designated beneficiary the member's accumulated contributions." Once a member's Investment Plan account is liquidated and the buy-in funds are used to transfer to the Pension Plan, no part of those funds are considered to be "contributions." Instead, they have been liquidated to be utilized as the "buy-in" amount. *See also* § 121.4501(4)(f)3., and 5., Fla. Stat. Further, there is no statutory provision which would permit defining any additional out of pocket buy-in amount as "contributions." Thus, the term "accumulated contributions" contained in section 121.091(7)(a), Florida Statutes, cannot be expanded to include the "buy-in" amount."

The ALJ's Conclusion that because there is not an express prohibition on refunding Ms. Rice's buy-in fee in statute or rule, the Department should refund those amounts to Ms. Rice, is an abrogation of the Legislature's authority and would require the Department to write language into the controlling statutes that is not present, something that neither the ALJ nor this Department has the authority to do. *See Holly*, 450 So. 2d at 219; *Robinson*, 89 So. 3d at 1082–83; *see also Fla. Birth-Related Neurological Injury Comp. Ass'n v. Dep't of Admin. Hearings*, 29 So. 3d 992, 997–98 (Fla. 2010) (holding that even where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the statute, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity).

Therefore, for the reasons stated herein, the Department finds that its substituted Conclusions of Law are as or more reasonable than the Conclusions reached by the ALJ.

Conclusion of Law 95 and 96 are adopted and incorporated herein by reference.

Exception 14

The Respondent takes Exception to Conclusion of Law 97 to the extent it finds that the plain and ordinary meaning of "accumulated contributions" must be utilized in the absence of statutory language limiting its scope. The Respondent's Exception is sustained; Conclusion of Law 97 is rejected, and the following Conclusion of Law is substituted in its place:

"Section 121.4501(4)(f), Florida Statutes, is clear and unambiguous; the money used to transfer from the Investment Plan to the Pension Plan, regardless of the source, is a "sum" and "buy-in" amount, *see* § 121.4501(4)(f)3. and 5., Fla. Stat., not a "contribution."[4] Subsections (2) and (3) of section 121.71, Florida Statutes, mandate the monthly payroll "contributions" that an employee, such as Ms. Rice, are required to make once that employee is a member of the Pension Plan. Further, section 121.091(7)(a), Florida Statutes, provides that upon death of a member, a beneficiary is entitled to the member's "accumulated contributions." Since the "sum" and "buy-in" amount utilized in the controlling statutory provision governing the transfer from the Investment Plan to the Pension Plan are not "contributions" based upon the plain and express statutory language, there is no statutory authority that permits the terms "sum" or "buy-in" to be used synonymously with the term "contributions." *See* § 121.4501(4)(f)3. and 5., Fla. Stat."

As discussed in Exceptions 9, 12 and 13 above, neither the ALJ nor the Department may write language into the controlling statutes that is not present. *See Holly*, 450 So. 2d at 219; *see also Fla. Birth-Related Neurological Injury Comp. Ass'n*, 29 So. 3d at 997–98. The Department

[4] The term "contribution" is absent from the relevant provisions discussing the amounts required to be transferred from the Investment Plan to the Pension Plan when transferring between the two plans.

is required to give effect to every word, phrase, sentence, and part of the statute, while at the same time reading related statutory provisions together to achieve a consistent whole, giving full effect to all statutory provisions and construing related statutory provisions in harmony with one another; the Department cannot disregard the express statutory language and instead refer to dictionary definitions and then apply those dictionary definitions in isolation to the rest of chapter 121, Florida Statutes. *See Heart of Adoptions, Inc.*, 963 So. 2d at 198–99.

Therefore, for the reasons stated herein, the Department finds that its substituted Conclusion of Law is as or more reasonable than the Conclusion reached by the ALJ.

Exception 15

The Respondent takes Exception to Conclusions of Law 98 and 99 to the extent they determined that the monies liquidated from the Investment Plan and the additional buy-in amount paid by Ms. Rice are refundable as "contributions." This Exception is sustained; Conclusions of Law 98 and 99 are rejected, and the following Conclusions of Law are substituted in their place:

"Florida Administrative Code Rule 60S-4.008(1)(a) provides that if a Pension Plan member dies prior to becoming vested, the member's beneficiary is entitled to a refund of the member's "accumulated contributions." The language in this rule is consistent with the language in section 121.091(7)(a), Florida Statutes, and supports the conclusion that Petitioner is entitled only to the monthly contributions Ms. Rice made to the Pension Plan after joining it.

As previously discussed, the money transferred from the Investment Plan to the Pension Plan (required in order for an employee to transfer from the Investment Plan to the Pension Plan) is statutorily referred to as the "sum" and "buy-in" amount, it is not referred to as a "contribution"; thus, it would be contrary to the clear and unambiguous language of chapter 121, Florida Statutes,

to characterize or define the "sum" or buy-in" amount as a "contribution." *See* § 121.4501(4)(f)3. and 5., Florida Statutes."

Therefore, for the reasons stated herein, the Department finds that its substituted Conclusions of Law are as or more reasonable than the Conclusions reached by the ALJ.

Exception 16

The Respondent takes Exception to Conclusion of Law 100 to the extent it finds that whether or not Ms. Rice was vested at the time of her death has a substantial effect on the outcome of the case. The Respondent also takes Exception to the position that the Petitioner is entitled to recover the amounts utilized by Ms. Rice to transfer to the Pension Plan. The Respondent's Exceptions are sustained, and Conclusion of Law 100 is hereby rejected; the following Conclusion of Law is substituted in its place:

"The term "member contributions" is irrelevant and not applicable to the "sum" or "buy-in" amount provisions found in subparagraphs 2., 3., and 5. of section 121.4501(4)(f), Florida Statutes. This "sum" and "buy-in" amount is the statutorily mandated amount required in order for an employee to transfer from the Investment Plan into the Pension Plan; these amounts are not defined or referred to in the applicable statutes as a "contribution." Further, there is no statutory provision that permits the "sum" or "buy-in" amounts to be refunded upon the death of an unvested Pension Plan member; the statutes only permit the member's "accumulated contributions" to be returned. *See* §§ 121.091(7)(a) and 121.021(26)(a), Fla. Stat."

As mentioned in Exceptions 9, 12, 13 and 14 above, neither the ALJ nor the Department may write language into the controlling statutes that is not present. *See Holly*, 450 So. 2d at 219; *see also Fla. Birth-Related Neurological Injury Comp. Ass'n*, 29 So. 2d at 997–98. Therefore, for

the reasons stated herein, the Department finds that its substituted Conclusion of Law is as or more reasonable than the Conclusion reached by the ALJ.

Conclusion of Law 101 is hereby adopted and incorporated herein by reference; however, it is irrelevant and does not determine the outcome of this proceeding.

Exception 17

The Respondent takes Exception to Conclusion of Law 102 to the extent it finds that it would be error to not utilize the plain and ordinary meaning of the word "accumulated contributions" in this matter. This Exception is sustained; Conclusion of Law 102 is hereby rejected, as there is no statutory provision which permits the "sum" and "buy-in" amounts required to transfer from the Investment Plan to the Pension Plan, to be defined as "accumulated contributions." The following Conclusion of Law is substituted in its place:

"The "sum" and "buy-in" amounts appearing in subparagraphs 3. and 5. of section 121.4501(4)(f), Florida Statutes, which are required to transfer from the Investment Plan to the Pension Plan, are not a "contribution" as that term is utilized in chapter 121, Florida Statutes; thus, there is no statutory authority which would permit this "sum" and "buy-in" amounts to be defined as "accumulated contributions." *See* §§ 121.021(26)(a), 121.091(7)(a), Fla. Stat.; *see also* § 121.71(2) and (3), Fla. Stat."

Therefore, for the reasons stated herein, the Department finds that its substituted Conclusion of Law is as or more reasonable than the Conclusion reached by the ALJ.

Exception 18

The Respondent takes Exception to Conclusion of Law 103 to the extent it finds that the Respondent has not carried its burden in this case and that Ms. Hernandez is entitled to a return of all sums utilized to transfer Ms. Rice from the Investment Plan to the Pension Plan. This Exception

is sustained; Conclusion of Law 103 is hereby rejected, and the following Conclusion of Law is substituted in its place:

"Pursuant to the relevant statutory language, Ms. Hernandez is only entitled to a return of the monies Ms. Rice paid as contributions while she was a member in the Pension Plan, which is $2,654.17. There is no legal authority which permits any additional amounts to be refunded.

In addition, in 1976, as a result of the adoption of article X, section 14 of the Florida Constitution, the state and all political subdivisions are now required to fund all publicly funded pension plans in an actuarially sound manner to avoid shifting the costs of public pensions to future generations. Article X, section 14 of the Florida Constitution provides that a government unit responsible for any retirement or pension, supported in whole or in part by public funds, shall not provide any increase in benefits to members unless the government unit has made a provision for the funding of any increase in benefits on a sound actuarial basis. In response to the adoption of this provision, the legislature enacted part VII of chapter 112, Florida Statutes.

Section 112.61, Florida Statutes, provides:

> It is the intent of the Legislature in implementing the provisions of s. 14, Art. X of the State Constitution, relating to governmental retirement systems, that such retirement systems or plans be managed, administered, operated, and funded in such a manner as to maximize the protection of public employee retirement benefits. Inherent in this intent is the recognition that the pension liabilities attributable to the benefits promised public employees be fairly, orderly, and equitably funded by the current, as well as future, taxpayers. Accordingly, except as herein provided, it is the intent of this act to prohibit the use of any procedure, methodology, or assumptions the effect of which is to transfer to future taxpayers any portion of the costs which may reasonably have been expected to be paid by the current taxpayers. Actuarial experience may be used to fund additional benefits, provided that the present value of such benefits does not exceed the net actuarial experience accumulated from all sources of gains and losses. This act hereby establishes minimum standards for the operation and funding of public employee retirement systems and plans.

Section 112.62, Florida Statutes, provides:

> The provisions of this part are applicable to any and all units, agencies, branches, departments, boards, and institutions of state, county, special district, and municipal governments which participate in, operate, or administer a retirement system or plan for public employees, funded in whole or in part by public funds. The provisions of this part supplement and, to the extent there are conflicts, prevail over the provisions of existing laws and local ordinances relating to such retirement systems or plans.

Section 112.625, Florida Statutes, provides, in relevant part:

> As used in this act:
>
> (4) "Benefit increase" means a change or amendment in the plan design or benefit structure which results in increased benefits for plan members or beneficiaries.

The provisions above bar members from directly contributing additional funds to either the Investment Plan or the Pension Plan. In addition, the provisions above bar any change to the FRS that results in a benefit increase to members that is not funded on a sound actuarial basis or that would result in the shifting of liabilities to future taxpayers. The refund of buy-in costs to members has never been permitted, has not been funded on a sound actuarial basis, and would require a change or amendment to the plan design or benefit structure of the FRS. Therefore, the refund to Petitioner of any amount over and above Ms. Rice's contributions to the Pension Plan as defined by statute would result in a benefit increase to members, or in this case, a beneficiary, in violation of the provisions of the Florida Constitution and Florida Statutes cited above, because, stated differently, no evidence in the record indicates that the benefit increase that would result from refunding Petitioner the amount Ms. Rice used to buy-in to the Pension Fund is funded in a sound actuarial manner. That benefit increase would be contrary to the requirements of the Florida Constitution and the relevant provisions of chapter 112 of the Florida Statutes."

In fact, the unrebutted testimony from the plan actuary, Matthew Larrabee, demonstrated that there is an unfunded cost to the system to allow a refund of all purchase monies as

contemplated by the ALJ's recommendation. (*See* Hearing Transcript at 100–09 (memorialized in Findings of Fact 41 and 42).)

Therefore, for the reasons stated herein, the Department finds that its substituted Conclusion of Law is as or more reasonable than the Conclusion reached by the ALJ.

It is noted that as stated in Conclusion of Law 61, the Petitioner had the burden of proof. However, since this is not an area of the law over which the Department has substantive jurisdiction, Conclusion of Law 103 solely on this burden of proof issue, as contained in the Recommended Order, will not be modified.

Conclusion of Law 104 is hereby rejected. As discussed herein, the plain and ordinary meaning of the words "accumulated" and "contributions" as defined in the Meriam-Webster Dictionary do not apply to this case. The following Conclusion of Law is substituted in its place:

"Section 121.4501(4)(f), Florida Statutes, governs the process for an eligible employee, such as Ms. Rice, to transfer from the Investment Plan to the Pension Plan.

Subparagraphs 3. and 5. of section 121.4501(4)(f), Florida Statutes, provide:

> 3. . . . [A]n employee who chooses to move to the pension plan . . . must transfer from his or her investment plan account, and from other employee moneys as necessary, a sum representing the employee's actuarial accrued liability.
>
> 5. If the employee chooses to transfer from the investment plan to the pension plan and retains an excess account balance in the investment plan after satisfying the buy-in requirements under his paragraph, the excess may not be distributed until the member retires from the pension plan.

Section 121.061(1), Florida Statutes, addresses the funding of the FRS and in so doing, states in relevant part:

> [c]ommencing December 1, 1970, all employers withholding *contributions required of members* under this chapter for purposes of providing retirement benefits and social security benefits to or on behalf of such members shall budget, set aside, and pay over to the administrator, for deposit into the proper retirement

> and social security trust funds, matching payments for retirement and social security contributions as required by this chapter.

(Emphasis added.)

Section 121.70, Florida Statutes, which sets out the "legislative purpose and intent" for the FRS contribution rates, states in relevant part: "employees and employers shall make *contributions* based upon uniform contribution rates determined as a percentage of the *employee's gross monthly compensation* for the employee's class or subclass of Florida Retirement System membership." (Emphasis added.)

Section 121.71, Florida Statutes, which sets out the uniform contribution rates that are required to be paid by both FRS members, such as Ms. Rice, and FRS employers, provides in relevant part:

> (2) Based on the uniform rates set forth in subsections (3), (4), and (5), employees and employers shall make monthly contributions to the Division of Retirement as required in s. 121.061(1) . . . . Beginning July 1, 2011, each employee shall contribute the contributions required in subsection (3). The employer shall deduct the contribution from the employee's monthly salary . . . .
>
> (3) Required employee retirement contribution rates for each membership class and subclass of the Florida Retirement System for both retirement plans are as follows:

Membership Class	Percentage of Gross Compensation, Effective July 1, 2011
Regular Class	3.00%

Finally, section 121.091(7), Florida Statutes, which governs death benefits of a member prior to becoming vested, provides: "[i]f the employment of a member is terminated by reason of his or her death prior to being vested . . . there shall be payable to his or her designated beneficiary the member's accumulated contributions." As previously noted, "accumulated contributions" is defined, for purposes of this chapter, as a "member's contributions, without interest."

Therefore, reading all of these provisions of chapter 121, Florida Statutes, collectively, together, it is clear that the use of the word "contributions," when referring to the Pension Plan, refers solely and exclusively to the monthly payroll contributions that an employee, such as Ms. Rice, are required by statute to make once the employee is a member of the Pension Plan. "Contributions" does not include the amounts that were transferred, whether from the Investment Plan or elsewhere, to the Pension Plan in order for that employee to become a member of the Pension Plan."

Therefore, for the reasons stated herein, the Department finds that its substituted Conclusion of Law made herein is as or more reasonable than the Conclusion reached by the ALJ.

Exception 19

The Respondent takes Exception to Conclusion of Law 105 to the extent it finds that part III of chapter 121, Florida Statutes, does not apply to part I of that chapter. This Exception is sustained. Section 121.70(1), Florida Statutes, provides in relevant part: "This part provides for a uniform system for funding benefits provided under the Florida Retirement System Pension Plan established under part I of this chapter (referred to in this part as the pension plan) and under the Florida Retirement System Investment Plan established under part II of this chapter . . . ." Therefore, Conclusion of Law 105 is hereby rejected insofar as it states that the provisions of part III of chapter 121, Florida Statutes, are not applicable to part I. Otherwise, it is hereby adopted and incorporated herein by reference.

Therefore, for the reasons stated herein, the Department finds that its substituted Conclusion of Law made herein is as or more reasonable than the Conclusion reached by the ALJ.

Conclusions of Law 106 through 109 are hereby adopted and incorporated herein by reference.

Recommendation

The Recommendation contained in the Recommended Order is hereby rejected and the following is substituted in its place:

"Based on the foregoing Findings of Fact and Conclusions of Law, the State of Florida, Department of Management Services, Division of Retirement, should pay to Rebecca Hernandez, Darlene Rice's daughter and beneficiary, the sum of $2,654.17.

Lastly, the Department notes that no authority is given in the Recommended Order for the determination that interest should be paid, and in fact there is no legal authority which permits such a finding. A recommended order and final agency action are not the equivalent of a money judgment for which interest can be awarded. *See Bank of Cent. Fla. v. Dep't of Banking & Fin.*, 470 So. 2d 742, 746 (Fla. 1st DCA 1985); *see also Pruden v. Herbert Contractors, Inc.*, 988 So. 2d 135, 136–37 (Fla. 1st DCA 2008)."

It is hereby **ORDERED AND ADJUDGED:**

1. The Recommended Order issued in this case is adopted and incorporated herein by reference, except as modified above.

2. Based upon the Findings of Fact and Conclusions of Law contained in the Recommended Order as adopted by the State of Florida, Department of Management Services in this Final Order, Petitioner's request for a refund of the member's contributions in the amount of $2,654.17 is **GRANTED.** The Petitioner's request for a refund of the member's contributions made while participating in the Investment Plan, in the amount of $13,338.41, is hereby **DENIED.** The Petitioner's request for a refund of the member's additional out of pocket buy-in amount used to transfer from the Investment Plan to the Pension Plan in the amount of $22,943.81, is hereby **DENIED.**

3. This Final Order shall become effective on the date of filing with the Agency Clerk of the State of Florida, Department of Management Services.

DONE and ORDERED on this 4/13/2021 | 4:51 PM EDT

DocuSigned by:
Tami Fillyaw
991459A211104A3...

Tami Fillyaw, Chief of Staff
Department of Management Services
4050 Esplanade Way, Suite 285
Tallahassee, Florida 32399-0950

NOTICE OF RIGHT TO APPEAL

Unless expressly waived by a party such as in a stipulation or in other similar forms of settlement, any party substantially affected by this final order may seek judicial review by filing an original notice of appeal with the agency clerk of the department of management services, and a copy, accompanied by filing fees prescribed by law, with the clerk of the appropriate district court of appeal. The notice of appeal must be filed within thirty (30) days of rendition of this order, in accordance with Rule 9.110, Florida Rules of Appellate Procedure, and Section 120.68, Florida Statutes.

Certificate of Clerk:

Filed in the Office of the Agency
Clerk of the Department of Management
Services on this 4/13/2021 | 4:53 PM EDT

DocuSigned by:
kristy Peltier
4FF6BE303958454...

Kristy Peltier, Agency Clerk

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