STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

REBECCA HERNANDEZ,

Petitioner,

vs. Case No. 20-1840

DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,

Respondent.
_____/

RECOMMENDED ORDER

A video teleconference hearing was held pursuant to notice with sites in Lauderdale Lakes and Tallahassee, Florida, on July 2, 2020, before Robert L. Kilbride, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Larry Allan Karns, Esquire
Spink, Shrouder & Karns, P.A.
9700 Griffin Road
Cooper City, Florida 33328

For Respondent: Gayla Grant, Esquire
Nikita S. Parker, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
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STATEMENT OF THE ISSUE

Whether Petitioner, Rebecca Hernandez ("Hernandez"), is entitled to the $22,943.81 her late mother, Darlene Rice ("Rice" or "Mother"), paid to buy into the Florida Retirement System Pension Plan ("Pension Plan"), as well as

other monies transferred from Rice's Investment Plan account to the Pension Plan account, or is Hernandez only entitled to the $2,654.17 in employee contributions that Rice paid into the Pension Plan while an active member of that plan.

PRELIMINARY STATEMENT

In a letter dated May 10, 2019, the Department of Management Services, Division of Retirement ("Department"), notified Hernandez of its determination that since her Mother was not vested in the Pension Plan at the time of her death, Hernandez was only entitled to receive the three percent employee contributions that her Mother made into the Pension Plan before she passed away, totaling $2,654.17.

Hernandez disputed the Department's decision and timely requested an administrative hearing. The request for hearing was forwarded to the Division of Administrative Hearings ("DOAH") on April 15, 2020, and the undersigned was assigned to the case. An evidentiary hearing was held on July 2, 2020.

During the hearing, Hernandez did not testify, but submitted 13 exhibits, which were admitted into evidence. The Department offered the testimony of Kathy Gould, Chief of Retirement Calculations, Division of Retirement; Matthew Larrabee ("Milliman Company"), Principal and Consultant Actuary for the Department; Allison Olson, Director of Policy, Risk Management and Compliance, State Board of Administration; and Garry Green, Operations and Management Consultant, Division of Retirement. The Department offered 22 exhibits. Twenty (20) of the Department's exhibits were admitted into evidence.

Both parties requested a Transcript of the proceedings. After being granted an extension of time, the parties submitted their proposed recommended orders, which have been reviewed, researched, and considered by the undersigned in the preparation of this Recommended Order.

After reviewing the proposed recommended orders, the undersigned held a telephone conference with the parties to request memorandums of law on additional legal issues which were discussed. Those memorandums were received and have also been considered by the undersigned.[1]

For purposes of this Recommended Order, all citations to applicable statutes or rules include the statutes or rules in effect at the time of the action or conduct under consideration.

At the outset, it is worth noting, many of the material facts underlying this dispute were readily established at the hearing. That is--monies paid or contributed by Rice to transfer from the Investment Plan to the Pension Plan were determined.[2] Rather, the real crux of the dispute was: did the agency prove its position by a preponderance of the evidence based on the facts applying the plain and ordinary meaning of the Florida Retirement System ("FRS") laws? Was the Department's interpretation and application of FRS laws correct in this very unique and unusual case?

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[1] The legal memorandums provided were very helpful, insightful, and appreciated.

[2] The direct testimony offered by the Department's witnesses, as well as testimony solicited from them on cross examination, was useful and helped to provide an appropriate context and timeline for the dispute. However, the heart of this case is not dependent on how the Department's witnesses or Respondent interpreted the Florida Retirement System ("FRS") laws and rules. In the context of an administrative hearing, questions of law and the proper interpretation of the law, of course, is not their responsibility. It would be an error for the undersigned to rely upon their interpretation of FRS laws. *See generally Lindsay v. Allstate Ins. Co.*, 561 So. 2d 427 (Fla. 3d DCA 1990); *T.J.R. Holding Co., Inc. v. Alachua Cty,* 617 So. 2d 798 (Fla. 1st DCA 1993). Nor is the case resolved by simply concluding that Rice was adequately informed of the Department's position on benefits or the loss of benefits. She no doubt, was fully informed of the Department's position on the issues.

Moreover, do the statutes and definitions relied on by the Department to limit Hernandez's benefits to her mother's three percent payroll deductions lay out a persuasive and sound legal basis to reject Petitioner's claim to additional funds paid into FRS system by her mother, Darlene Rice?

In short, this case presents a classic legal dispute, not as much a factual one.

Nonetheless, the following chronology of events is helpful to establish the back drop for the dispute between Hernandez and the Department.

FINDINGS OF FACT

Based on the evidence presented and the record as a whole, the following facts were established:

1. Darlene Rice was a Broward county teacher and member of FRS beginning September 1, 2011. Sometime in 2016, she became interested in transferring from the FRS Investment Plan to the FRS Pension Plan and actively began to investigate that option.

2. Petitioner, Rebecca Hernandez, is the daughter of Rice and is entitled to Rice's benefits from FRS as determined by the Order of Summary Administration entered by the Circuit Court of Broward County, Florida, on October 2, 2018.

3. Prior to transferring from the Investment Plan and as a part of her investigation, Rice contacted the FRS guidance line, on numerous occasions to seek guidance and inquire about the process to transfer into the Pension Plan. Resp. Ex. 20. The calls were recorded.[3]

4. More precisely, on March 7, 2017, Rice called the FRS guidance line to obtain information and ask questions regarding her contemplated transfer

[3] The undersigned listened to all nine audio recordings.

from the Investment Plan to the Pension Plan. On this call, the representative informed Rice that if she terminated FRS employment prior to having eight years of service, she "could not really recover anything." Resp. Ex. 20.

5. During another call to the FRS guidance line, Rice was told that if she left the Pension Plan before vesting, monies she paid to "buy in" would be lost.

6. Rice also acknowledged during one call that if something happened to her, she understood she would lose everything.[4]

7. Ultimately, after multiple telephone consultations and discussions with the FRS guidance line, Rice made the decision to transfer plans and buy into the Pension Plan.

8. To do so, Rice was required to complete and submit a 2nd Election Retirement Plan Enrollment Form dated March 7, 2017. Resp. Exs. 2 and 16.[5]

9. On March 9, 2017, the Department sent a letter to Rice, confirming her 2nd Election into the Pension Plan. Resp. Ex. 16. The letter included the following:

> You have elected to move from the FRS Investment Plan and buy into the FRS Pension Plan. The effective date of this election is April 1, 2017. This is your final Plan Choice Election under the Florida Retirement System. You must remain in the FRS

[4] The undersigned reasonably infers that this comment was based on what she had been told during previous phone calls to the FRS guidance line. The extensive information and consultation provided to Rice by the FRS guidance line was commendable, useful to her, and no doubt, very well intended. The representatives were patient and thorough with Rice. Regardless, their general admonitions and advice to Rice do not carry the force of law, nor do they necessarily dictate the outcome of this case. Rather, as will be explained, the correct decision in this case is derived by identifying and interpreting the applicable FRS laws and rules to the facts.

[5] The top of the form notified her that "before using your 2nd Election, be sure you understand the impact of changing from one plan to another." By signing the form, at Option 2, Rice also acknowledged language that stated "I want to use my existing Investment Plan account balance and possibly other personal resources to 'buy' into the Pension Plan." Other disclosures were also made to her on page 3 of the form.

> Pension Plan until your retirement from FRS-covered employment. As a member who is switching from the FRS Pension Plan using the available balance in your FRS Investment Plan account. If your account is not sufficient to cover the cost of the buy-in, you will need to submit personal funds.
>
> * * *
>
> If you terminate employment prior to vesting in the Pension Plan benefit (less than 6 or 8 years) you are only entitled to receive:
>
> A refund of your contributions paid into the Pension Plan since April 1, 2017 (the effective date of your 2nd election).
>
> * * *
>
> If you feel that this retirement Plan election was made in error, you may be able to cancel it … Failure to notify us no later than 4:00 PM EST on the last business day of the month following your election month will void your right to cancel this election.

10. Rice's election to transfer from the Investment Plan to the Pension Plan was slated to become effective on April 1, 2017.

11. On April 18, 2017, Rice was informed by the Department that it received her notification of her second election and the accrued liability (costs) to transfer to the Pension Plan was $58,366.00; $35,422.19 was liquidated from her investment account and transferred to the FRS Trust Fund and $22,943.81 was the out of pocket cost to her to complete the transfer. Resp. Ex. 7.

12. On June 6, 2017, the Department sent a letter to Rice confirming receipt of her personal payment of $22,943.81, which finalized her transfer to the Pension Plan effective April 1, 2017. Resp. Ex. 8.

13. Less than a year later, on March 17, 2018, Rice passed away unexpectedly. Her death certificate listed a pulmonary embolism as the

primary cause of death. Pet. Ex. 8.[6] Rice did not have at least eight years of service credit in FRS at the time of her passing.

14. After her mother's passing, Hernandez was contacted by the FRS guidance line to discuss the process and survivor benefits related to the Pension Plan.[7]

15. Naturally, 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. He also regrettably informed Hernandez that she was not entitled to recover the buy-in costs paid by her mother, nor was she entitled to the balance she had in the Investment Plan when the transfer was made.

16. During this telephone discussion, Hernandez lamented that she and her mother had made the decision together to transfer her from one plan to the other.

17. On June 28, 2018, the Department sent a formal letter to Rice's daughter, Hernandez, acknowledging her mother's death and notifying her that since her mother did not have eight years of service, the benefit available to Hernandez was limited to a refund of retirement contributions in the amount of $2,654.17. Resp. Ex. 9.

18. At Hernandez's request, the Department manually calculated the amount Rice paid into the FRS. When Rice transferred to the Pension Plan, the Department's system, which is called the Integrative Retirement Information System ("IRIS"), only showed the accumulation of the contributions that she paid into the Pension Plan after the transfer, since her contributions in the Investment Plan had already been liquidated for the transfer. Resp. Ex. 1.

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[6] The cause of her death is mentioned primarily to show that her death was unexpected. The undersigned infers from the evidence, particularly the CD recordings, that Rice had no forewarning or suspicions regarding her health when she made the transfer.

[7] The date of this phone call is not in the record.

19. Kathy Gould ("Gould"), the Department's Bureau Chief of Retirement Calculations, testified that the manual calculation revealed that a total of $16,042.58 was contributed by Rice since her participation began in the FRS.

20. Based on the calculations and figures provided, her total contributions had two components: (1) $13,388.41 while Rice was in the Investment Plan and (2) $2,654.17 while Rice was in the Pension Plan.

21. In addition to a return of these sums, Petitioner also seeks the return or refund of the "buy in" fee--$22,943.81--Rice paid to transfer to the Pension Plan.

Testimony of Kathy Gould

22. Gould's team handles the calculation of costs involved with transfers from the Investment Plan to the Pension Plan.

23. She testified that there are two plans under the FRS, the Pension Plan and the Investment Plan. At all times related to Rice's tenure under the FRS, the funds for the FRS retirement plans came from employer and employee contributions. Employee contributions are currently three percent of salary.

24. In the Pension Plan a member vests after eight years of service. If a member dies before the member vests, it was her position that the beneficiary would be eligible to receive the accumulated contributions. She referred to the applicable statute, section 121.091(7), Florida Statutes.

25. Conversely, the State Board of Administration administers the Investment plan, and is separate from Respondent. A member vests after only one year in the Investment plan.

26. Exhibit 1 was a screenshot of Rice's profile in the IRIS. This is a computer database that contains the Department's membership information.

27. Rice's total employee balance as reflected in Respondent's Exhibit 1 was $2,654.17. This includes only Rice's payroll contributions while a member of the Pension Plan.

28. Rice's "personal payment" to buy into the Pension Plan was $22,943.81. Gould explained that if a member of the Investment Plan left

after only five months, the member would be entitled to receive the employee's contributions only. Tr. pp. 55-56. This would not include the employer's contributions.

29. After one year, an employee is fully vested in the Investment Plan and would be entitled to all contributions made, both employee and employer, if employment was terminated while still in the Investment Plan.

30. The payment that Rice made to buy into the Pension Plan was in the form of a personal check, not a deduction from her payroll.

31. Respondent's Exhibit 21 is an email Gould prepared for the Department's legal counsel. Gould analyzed Rice's reported salaries while she was a member of the Investment Plan and multiplied them by three percent to provide the total amount that Rice had paid into both plans. This totaled $16,042.58. This was the amount from Rice's first payroll through her last payroll while in the FRS. The amount was the total of both the Investment Plan and the Pension Plan.

32. Gould admitted that there are essentially two types of contributions into the FRS, employer contributions and employee contributions. She acknowledged that the $22,943.81 Rice paid to transfer to the Pension Plan was not an employer contribution.

33. Rice was not in the Investment Plan when she died. When she died, Rice was participating in the Pension Plan. As a result, Gould admitted that the state would pay out any benefits utilizing the statutes relating to the Pension Plan.

34. The calculation of the buy-in amount performed by the Department in Rice's case was done on the "calculator" provided by their actuary, Milliman.

Testimony of Matthew Richard Larrabee

35. Matthew Larrabee ("Larrabee") was called by the Department. He is a pension actuary with Milliman and specializes in governmental pension plans.

36. He discussed the Department's use of a "calculator" that is designed by Milliman. It is provided and created to allow agency staff to determine actuarial pension calculations without relying upon a certified actuary. The actuarial accrued liability ("AAL") determined by the calculator, establishes the "buy-in" or purchase price for a member that chooses to transfer from the Investment Plan to the Pension Plan.

37. The components of the buy-in cost to transfer from the Investment Plan into the Pension Plan consist primarily of the projected monthly annuity amount, the state multiplier percentage for the employee's position, the years of service, and the member's pay level. There is also an assumption of projected pay increases and the life expectancy of the member. Age is also a factor in the formula.

38. The funds collected and related to the transfer into the Pension Plan are deposited into a commingled, legally restricted pension trust.

39. Respondent's Exhibits 4, 5, and 6 were prepared by the Department's staff at different date intervals using the Milliman calculator. These exhibits represent output sheets produced by the calculator, which was developed by Milliman under Larrabee's supervision. The sheets are accurate. They show different actuarial accrued liability amounts based, in part, on age.[8]

40. The final calculation in Respondent's Exhibit 6 is for a transfer date of April 2017 for Rice. The calculated actuarial accrued liability was $58,366.00. Larrabee explained that this calculation is a sound estimation or valuation of the financial present value of the total future retirement benefits for a given member--in this case, Rice.

[8] Different dates are notated on the calculator sheets based on differing dates being considered for the effective transfer date by Rice when the individual sheet was run.

41. The actuarial accrued liability calculation and resulting "buy in" amount is premised on the fact that the actuaries do *not* take into account a potential refund feature, such as the return of funds sought by Hernandez.[9]

42. Larrabee went on to explain that if potential refunds, such as those requested by Hernandez, *were* accounted for in the actuarial calculations, the cost to "buy in" would only be "modestly higher." This is because the mortality rates for people like Rice in their 50's or 60's are "quite low." As a result, the added costs to cover such an infrequent contingency, if that were an option, "would be low."

Allison Olson

43. Allison Olson ("Olson") is the Director of Policy, Risk Management and Compliance for the State Board of Administration ("SBA"). Her duties include the review and determination of compliance with contracts and policies by outside vendors for the FRS Investment Plan. She also reviews complaints that are received from Investment Plan members.

44. The Investment Plan is a defined contribution plan, similar to a traditional 401(k). The SBA is a separate agency from the Department. A member has an option of making an election, as part of their initial choice, to be a member of the Investment Plan. Vesting for the Investment Plan occurs after one year of service. Then the member owns the contributions in their account.

45. Under the Investment Plan, each account is funded by employer contributions as well as a mandatory three percent monthly employee contribution.

46. Members in the FRS with questions about their accounts may consult with representatives on a financial guidance line managed by the SBA vendor.[10]

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[9] No evidence was offered to explain why this type of feature was not built into the actuarial calculation, or why it was not offered as an option to potential transferees.

[10] As previously noted, Rice took advantage of this service on numerous occasions.

47. The Department offered into evidence Respondent's Exhibit 14, an FRS Investment Plan Summary Plan Description (sometimes referred to as an "SPD"). However, this SPD was not issued until July 2018. Because it was issued *after* Rice passed away and there was no proof she ever received it or a prior version, it was excluded as evidence and not considered based on the objection of Petitioner.[11]

Garry Green

48. Gary Green ("Green") is the Chief of Research and Education for Respondent. He handles the administrative aspects of the actuarial contract and services provided by Milliman.

49. The liquidation of an investment plan account is the sale of all assets that the member has in the account. It includes all money, both employer and employee contributions.

50. After applying to transfer from one plan to another, an employee has 60 days to "roll in" her "buy in" money, or to cancel the transfer. The money a member pays to buy-in to the Pension Plan, is deposited into the pension trust fund with all the other assets of the trust fund. His view was that if the member is not vested in the Pension Plan, the contributions used to "buy in" are not refundable.

51. Respondent's Exhibit 6 calculates the actuarial accrued liability of $58,366.00. It is a calculation of the total cost to buy in to the Pension Plan. He explained that it is not a statement of the liquidated assets from Rice's Investment Plan or any funds owed to Rice.

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[11] It should be noted that, aside from notices she received in the enrollment forms she signed or guidance from FRS guidance line representatives, there was no proof presented by Respondent that any of the mandatory educational components required by section 121.4501(10)(a)-(g), Florida Statutes, entitled "Education Components," were complied with, or offered to Rice. This is particularly significant in this case since material "must be prepared under the assumption that the employee is an unsophisticated investor." § 121.4501(10)(e), Fla. Stat.

Additional Facts Established by Discovery

52. Petitioner's Exhibits 9-1 and 9-2 establish that Rice contributed $16,042.58 in employee contributions into the FRS. $2,654.17 was into the Pension Plan and $13,338.41 was while Rice was a member of the Investment Plan.

53. The Department admitted that Rice paid $22,943.81 of her personal funds on or before June 6, 2017, to transfer from the Investment Plan to the Pension Plan. Request for Admission No. 19.

54. The Department admitted that Petitioner is entitled to receive $2,654.17, the amount of contributions after Rice was in the Pension Plan. Request for Admission No. 21.

55. The Department admitted that it received the Order of Summary Administration and Death Certificate. Requests for Admission Nos. 25 and 26.

56. The Department admitted that Rice contributed at least $13,388.41 into the Investment Plan. Request for Admission No. 29.

CONCLUSIONS OF LAW

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

58. Administrative proceedings at DOAH are "de novo." § 120.57(1)(k), Fla. Stat. This means that the undersigned is charged to reconsider the facts and conclusions anew. The Department's decision about Rice's death benefits is considered preliminary, and carries no presumption of correctness. *Miles v. Florida A & M Univ.*, 813 So. 2d 242 (Fla. 1st DCA 2002); *Fla. Dep't of Transp. v. J.W.C. Co.,* 396 So. 2d 778, 785 (Fla. 1st DCA 1981).

59. These fundamental concepts of administrative law become particularly meaningful in this case when viewed in light of the recent change to Article V of the Florida Constitution addressing agency deference, which states:

> SECTION 21. Judicial interpretation of statutes and rules.—In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.

See also, MB Doral, LLC, v. Dep't of Bus. & Prof'l Reg., 895 So. 3d 850, 853 (Fla. 1st DCA 2020).

60. The Department of Management Services is the state agency delegated the authority by the Legislature to administer the FRS pursuant to chapter 121.

61. The Department has the burden of proof in this proceeding. *Amico v. Div. of Ret., Dep't of Admin.*, 352 So. 2d 556 (Fla. 1st DCA 1977); *Seward v. Dep't of Admin., Div. of Ret.*, 366 So. 2d 82 (Fla. 1st DCA 1978).

Introduction

62. This case is unique and requires the analysis and application of an intricate and complex series of FRS statutes and rules. This becomes particularly challenging since there is little case law providing guidance, or interpreting the FRS, including the issues raised in this case.

63. Adding to that, not every factual scenario which may arise involving the recovery rights of a beneficiary upon the early death of an unvested employee is adequately addressed, contemplated, or covered in the FRS laws and rules. This is one of those scenarios.

64. The undersigned has attempted to outline below the relevant statutes and rules cited by the parties, as well as others that have a material bearing on the outcome of this case.

Applicable Statutes

65. Rice did not have eight years of service in the FRS. Accordingly, her death benefits available to her estate are provided by section 121.091(7). This section is found in Part I of the chapter, under *General Provisions*:

Section 121.091(7)

(7) DEATH BENEFITS.

(b) If the employment of a member is terminated by reason of his or her death prior to being vested, except as provided in paragraph (f), there shall be payable to his or her designated beneficiary the member's accumulated contributions.

66. Another section, section 121.021(26), defines "accumulated contributions." This section is also found in Part I of the chapter under *General Provisions.* It provides:

Section 121.021(26)

(26) "Accumulated contributions" means the sum of:

(a) A member's contributions, without interest, subsequent to December 1, 1970; and ....[12]

67. Because these two statutory sections are found in Part I, General Provision, their terms apply to either the Pension or Investment Plans.

68. Other provisions discussed or relied upon by the parties are found in section 121.4501. They are outlined in sequential order below. Interestingly, and of significance to this case, these provisions are found *only in* Part II of the chapter relating to the FRS *Investment Plan*.

69. These provisions state in relevant part:

[12] The three percent payroll deduction was not implemented until 2011. As a result, "accumulated contributions" in Part I could not have meant payroll deductions when it was passed several years prior. *See generally, U.S. v. Steiger*, 318 F.3d 1039, 1051 (11th Cir. 2003)("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 536, 128 L. Ed. 2d 556, 114 S. Ct. 1757 (1994)(citing *Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338, 128 L. Ed. 2d 302, 114 S. Ct. 1588 (1994)(internal quotation marks omitted)). That presumption is made even stronger when, as here, Congress has amended a statute to include certain language in some, but not all, provisions of the statute." *Id.* at 1051.) *See also, U.S. v. Councilman*, 418 F.3d 67 (1st Cir. 2004) and *In Re: Search Warrant*, 362 F.Supp. 2d 1298, 1300 (M.D. Fla. 2006).

Section 121.4501

2(j)

"Member contributions" or "employee contributions" means the sum of all amounts deducted from the salary of a member by his or her employer in accordance with s. 121.71(3) and credited to his or her individual account in the investment plan, plus any earnings on such amounts and any contributions specified in paragraph (5)(e)."

4 (f) 2, 3 and 5:

2. If the employee chooses to move to the pension plan, the employee must transfer from his or her investment plan account, and from other employee moneys as necessary, a sum representing the present value of that employee's accumulated benefit obligation immediately following the time of such movement, determined assuming that attained service equals the sum of service in the pension plan and service in the investment plan. Benefit commencement occurs on the first date the employee is eligible for unreduced benefits, using the discount rate and other relevant actuarial assumptions that were used to value the pension plan liabilities in the most recent actuarial valuation. For any employee who, at the time of the second election, already maintains an accrued benefit amount in the pension plan, the then-present value of the accrued benefit is deemed part of the required transfer amount. The division must ensure that the transfer sum is prepared using a formula and methodology certified by an enrolled actuary. A refund of any employee contributions or additional member payments made which exceed the employee contributions that would have accrued had the member remained in the pension plan and not transferred to the investment plan is not permitted.

3. Notwithstanding subparagraph 2., an employee who chooses to move to the pension plan and who became eligible to participate in the investment plan by reason of employment in a regularly established position with a state employer after June 1, 2002; a district school board employer after September 1, 2002; or a local employer after December 1, 2002, 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. A refund of any employee contributions or additional member payments made which exceed the employee contributions that would have accrued had the member remained in the pension plan and not transferred to the investment plan is not permitted.

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 this paragraph, the excess may not be distributed until the member retires from the pension plan. The excess account balance may be rolled over to the pension plan and used to purchase service credit or upgrade creditable service in the pension plan.

(6)

(6) VESTING REQUIREMENTS.—

(a) A member is fully and immediately vested in all employee contributions paid to the investment plan as provided in s. 121.71, plus interest and earnings thereon and less investment fees and administrative charges.

(b)1. With respect to employer contributions paid on behalf of the member to the investment plan, plus interest and earnings thereon and less investment fees and administrative charges, a member is vested after completing 1 work year with an employer, including any service while the member was a member of the pension plan or an

> optional retirement program authorized under s. 121.051(2)(c) or s. 121.055(6).

Applicable Rules

70. There are several Florida Administrative Code Rules which apply to this case as well. They state, in pertinent part:

> a. **Rule 60S-4.008(1)(a)**:
>
> If the death of an FRS Pension Plan member occurs, other than in-line-of-duty, prior to the member becoming vested, the member's designated beneficiary shall receive a refund of the member's accumulated contributions….
>
> b. **19-11.007(3)(e)**:
>
> For members transferring to the Pension Plan, if the member's Investment Plan account balance was less than the calculated amount required to buy back into the Pension Plan, the election will require a personal payment.

Applicable Case Law

71. Against this backdrop of intricate and complex statutes and rules, the undersigned has weighed and considered several Florida appellate cases which aid in understanding several important principles which apply to the FRS laws.

72. Beginning in 1956, the Florida Supreme Court recognized that pension statutes covering public employees should be liberally construed in favor of the employee. In *Greene v. Gray*, 87 So. 2d 504 (Fla. 1956), the Court first announced this principle by stating:

> The law is therefore settled in this country that the legislature has power to provide deferred compensation or pensions to officers and employees for public services rendered and that such acts

> should be liberally construed in favor of the grantee.

Id. at 507.

73. The Court reconfirmed this principle in Sco*tt v. Williams*, 107 So. 3d 379, 385 (Fla. 2013). There the Court reiterated: "[w]e note, however, that 'pension statutes are to be liberally construed in favor of the intended recipients.' *Bd. of Trustees of Town of Lake Park Firefighters' Pension Plan v. Town of Lake Park*, 966 So. 2d 448, 451 (Fla. 4th DCA 2007)(citing *Greene v. Gray*, 87 So. 2d 504, 507 (Fla.1956))."

74. This principle of law was recently restated in *New v. Department of Management Services., Division of Retirement*, 236 So. 3d 1154 (Fla. 2nd DCA 2018). There the Fifth District Court of Appeal held: "[p]ension statutes must 'be liberally construed in favor of the intended recipients.' *Scott v. Williams*, 107 So. 3d 379, 384–85 (Fla. 2013)(quoting *Bd. of Trustees of Town of Lake Park Firefighters' Pension Plan v. Town of Lake Park*, 966 So. 2d 448, 451 (Fla. 4th DCA 2007))."[13]

75. Other longstanding, but equally important, principles of statutory construction are noteworthy. As stated by the Florida Supreme Court in *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So. 2d 1, 5 (Fla. 2004):

> It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis. *See State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001); *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998). In determining that intent, we have explained that "we look first to the statute's plain meaning." *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996). Normally, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite

[13] The *New* case is also significant in that it recognizes, as does the undersigned in this case, that the language of chapter 121 does not always resolve or address unique issues which arise in the pension statutes. ("Section 121.055(1)(h)(1) alone does not resolve this issue because it does not address the transfer of functions between the state and local governments or the change in the employer of a public employee enrolled in FRS and eligible for SMSC.") *New* at 1157.

> meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)(quoting *A.R. Douglass, Inc., v. McRainey*, 102 Fla. 1141, 137 So. 157, 159 (1931)).

76. In this case, particularly with respect to the application of the phrase "member contributions" found in section 121.4501(2)(j), it is acutely important to consider whether a definitional statute found in only one part of a chapter is applicable to other parts of the same chapter. In short, it is not.

77. In *Bortell v. White Mountains Ins. Group, LTD.*, 2 So. 3d 1041, 1045-46 (Fla. 4th DCA 2009), the court stated:

> First, "[t]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended." *Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006) (quoting *State v. Mark Marks, P.A.*, 698 So. 2d 533, 541 (Fla. 1997)). "When the legislature has used a term ... in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded." *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995).

78. Similarly, in *L.G. v. State*, 939 So. 2d 1141, 1143 (Fla. 1st DCA 2006), the court found that the lower court had erred in interpreting statutes in *pari materia*:

> In so interpreting the statute, the court overlooked pertinent rules of statutory construction, particularly the rule stating that where the legislature has used a term in one part of the statute, but has omitted it from another part of the same provision, the court "will not imply it where it has been excluded." *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995). Stated differently, "it is a basic principle of statutory construction that courts 'are not at liberty to add words to statutes that were not placed there by the Legislature.'" *Seagrave v. State*, 802 So. 2d

> 281, 287 (Fla. 2001)(quoting *Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999)).

79. The court continued:

> The trial court's implicit incorporation of the limiting language of subsection (46) into subsection (44) is contrary to long-recognized principles governing statutory construction. Where the legislature has used a term in one part of the statute and excluded it in another, it is improper to imply the term in a provision where it has been otherwise excluded. Because the legislature did not include language in the probation definition limiting the imposition of probation for certain specified delinquent acts, the lower court erred in so doing.

80. In our case, the definition of "member contributions" in the Investment Plan statute is specifically defined to mean "the sum of all amounts deducted from the salary of a member by his or her employer…." § 121.4501(2)(j), Fla. Stat. This same definition, or a similar explanation of the term "member's contribution," is not found in the Pension Plan part of the statute, section 121.021(26).

81. Without using the same definition or explanation for the phrase, it is reasonable to conclude that the Legislature intended a different meaning. The Legislature's use of different terms in different sections of the same statute is strong evidence that different meanings were intended. *Beshore v. Dep't of Fin. Servs.,* 928 So. 2d 411 (Fla. 1st DCA 2006).

82. In sum, "member contributions" is a specifically defined term in the Investment Plan statute. It is not defined in the Pension Plan statute. The definition used in the Investment Plan statute cannot be carried over and used in the Pension Plan statute.

Ultimate Conclusions of Law and Fact

83. Several reasonable conclusions are established by (1) applying the plain and ordinary meanings of the applicable FRS statutes; (2) applying the

case law which requires a liberal construction of the pension statutes in favor of the intended recipients; and (3) applying several principles of statutory construction.

84. First and foremost, the definition of "member contributions" (defined as the sums of all amounts deducted from the salary of an employee) found in section 121.4501(2)(j) is limited to the question of benefits related *only to the Investment Plan*. It does not control or apply when benefits under the separate Pension Plan are under review. There are several reasons for this conclusion.

85. Considering the instructions announced in *Bortell*, the Legislature unmistakingly chose not to use or extend the more restrictive or limiting definition of "member contributions" found in the Investment Plan part to the Pension Plan part.

86. In particular, the section 121.4501(2)(j) Investment Plan definition of "member's contribution" is not used to define "member contributions" found annexed to "accumulated contributions" in section 121.021(26). It is also notable that there is no definition at all of "member contributions" found in Part I, General Provisions, applicable to Pension Plans.

87. The undersigned must, therefore, utilize the plain and ordinary definition of these unambiguous words. *See, generally, Knowles* and *Bortell*.

88. The phrase in section 121.061(26) defining "accumulated contributions" is "the sum of a member's contributions."

89. The dictionary definition of "contributions" is defined as:

> 1: The act of contributing: such as
>
> a: the giving or supplying of something (such as money or time) as a part or share.

https://merriam-webster.com/dictionary/contributions (last visited September 17, 2020).

90. The dictionary definition of the word "sum" is defined as:

> 2: the whole amount: aggregate
>
> 5a(1): the result of adding numbers

https://merriam-webster.com/dictionary/sum (last visited September 17, 2020).

91. Therefore, the plain meaning of "accumulated contributions" would be: the whole monetary amount Rice gave or supplied to the Pension Plan.

92. While the literature and forms issued by the Department warn that the "buy in" fee may be nonrefundable, there is nothing in the law or rules that states, either directly or indirectly, that a vested amount would not be recoverable.

93. In the absence of any such language, and considering that the pension statutes must be liberally construed in favor of the recipient, the undersigned concludes that Rice's contributions vested in the Investment Plan should be refunded. Likewise, there is nothing in the statutes or rules which indicates that her buy-in fee of $22,943.81 is nonrefundable.

94. Since Rice gave or supplied both the "buy in" fee and vested amounts from her Investment Plan, she is entitled to recover both.

The Amount of $2,654.17

95. The Department concedes that the sum of $2,654.17, representing Rice's contributions to the Pension Plan before she passed away, are recoverable. The undersigned recommends that those funds be remitted to Hernandez.

The Amount of $13,388.41

96. It is undisputed that this amount is the total employee contributions made by Rice while she was still in the Investment Plan. It is also undisputed that she was fully vested in the Investment Plan when she made the transfer to the Pension Plan.

97. In the absence of statutory language in the Pension Plan part limiting the scope of "accumulated contributions," the undersigned must apply its plain meaning and liberally construe section 121.021(26) in favor of the recipient, Hernandez.

98. It is also worth noting that Florida Administrative Code Rule 60S-4.008(1)(a) characterizes the amount recoverable as "a *refund* of the member's accumulated contributions." This term, under a dictionary definition, denotes paying back money to someone. No one disputes that Rice was vested in the Investment Plan when she made the transfer in 2017. Therefore, her vested contributions to the Investment Plan should be paid back as well.

99. Moreover, using the plain and ordinary definition of the words "the sum of a member's contributions," the accumulated amount of Rice's contributions to the Investment Plan are recoverable and the undersigned recommends that $13,388.41 be remitted to Hernandez.

The Amount of $22,943.81

100. The most specific statute addressing benefits due at death prior to vesting is section 121.091(7). That section does not require that an invested decedent should lose or forfeit the "buy in" fee. Nor does the Pension statute limit what the decedent's estate may recover to only amounts deducted from the employee's salary as argued by the Department. The undersigned can only conclude that the Legislature intended a different outcome by *not* using the same definition of "member contributions" found in the Investment Plan statute, section 121.4501(2)(j).

101. The point is fairly straightforward and simple--the undersigned is precluded by law from carrying over the definition of "member contributions" found in section 121.4501(2)(j) to give meaning to words found in another part, sections 121.091(7) and 121.021(26). To do so would be error, and in direct contravention of the law outlined in *Bortell*.

102. Further, in the absence of a clear statute prohibiting the return of the $22,943.81, the Department is asking the undersigned to engraft a meaning onto the plain and ordinary meaning of "accumulated contributions." This would also be an error. *See L.G.,* 939 So. 2d at 1141.

103. The Department has not carried its burden in this case and all sums listed above should be remitted to Hernandez under the unique scenario presented. In this case, it is not particularly relevant to determine how or why the actuarial accrued liability amount was set. In fact, there does not seem to be any dispute about that.

104. Rather, what does matter is that the Department, and now the undersigned, must apply the plain and ordinary meaning of section 121.091(7), and must liberally construe the statute in favor of the intended beneficiary, Hernandez.

Other Matters Raised

105. The undersigned has not overlooked the Department's citation to section 121.012. It correctly points out that the provisions of Part I are also applicable to Part II and III. While this is true, the converse is not true--the provisions of Part II and III are not applicable to Part I.

106. As a result, since Part I does not have a definition of "member's contribution" similar to the definition found in Part II, the provisions of section 121.012 do not chart the outcome of this case.

107. The Department also asserts for the first time in its Proposed Recommended Order that Hernandez lacks standing. This novel argument was not previously adequately raised in a pleading, not argued at the hearing, and was not a part of the Department's proof at hearing. The argument has, therefore, been waived.

108. Regardless, Hernandez does have standing for a variety of reasons, not the least of which is that the Department referred her case to DOAH and mailed her important beneficiary correspondence related to the case. Resp.

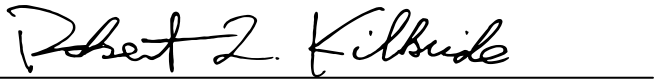
Ex. 9. The Broward Circuit Court also designated her as the beneficiary of Rice's estate.

109. Clearly, her substantial interests were affected and being determined by these proceedings. Hernandez, therefore, meets the test for standing outlined in *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), in that she will suffer an injury in fact and that injury is of the type or nature which this proceeding is designed to protect.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Management Services, Division of Retirement, pay to Rebecca Hernandez, Darlene Rice's daughter and beneficiary, 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 date of the circuit court's Order of Summary Administration, to the date of payment.

DONE AND ENTERED this 21st day of September, 2020, in Tallahassee, Leon County, Florida.



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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.