STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TOWN OF MIAMI LAKES, FLORIDA,

Petitioner,

vs. Case No. 20-4937

DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this case was conducted before Administrative Law Judge June C. McKinney by Zoom conference with locations in Miami and Tallahassee, Florida, on October 26, 2021.

APPEARANCES

For Petitioner: Onier Llopiz, Esquire
Joan Carlos Wizel, Esquire
Lydecker Diaz
1221 Brickell Avenue, 19th Floor
Miami, Florida 33131

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

STATEMENT OF THE ISSUES

The issues to be determined are whether Dawn Jenkins ("Jenkins") failed to meet the Deferred Retirement Option Program ("DROP") termination requirements set forth in chapter 121, Florida Statutes; and, if so, whether

Petitioner, Town of Miami Lakes ("Miami Lakes," the "Town," or "Petitioner"), is required to reimburse Respondent, Department of Management Services ("DMS"), Division of Retirement ("DOR" or "Respondent"), for the overpayment of retirement benefits paid to Jenkins.

PRELIMINARY STATEMENT

DMS issued a final agency action notice letter dated October 2, 2020, notifying the Town that due to the hiring of Jenkins on September 13, 2018, her Florida Retirement System ("FRS") termination requirement of ceasing all employment with an FRS employer for six calendar months was never satisfied; and, as a result, whenever a participating employer employs a retired FRS member in violation of the termination requirements, both employee and the participating employer are liable for repayment of the money to the FRS Trust Fund in accordance with section 121.091(9)(c)3. The notice letter included an invoice requiring the Town to pay DMS the full amount of the "overpayment of benefits" to Jenkins.

The Town timely filed a Petition for Formal Hearing contesting the agency action, and the matter was referred to the Division of Administrative Hearings ("DOAH") on November 9, 2020. The matter was originally set for final hearing for February 2 through 4, 2021. However, the parties requested, and were granted, several continuances for good cause.

Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation, which contained certain stipulated facts. Those stipulated facts have been incorporated herein to the extent they were deemed relevant.

The final hearing proceeded as scheduled on October 26, 2021.

At hearing, the parties stipulated that the depositions and prior hearing transcript obtained from witnesses in *Jenkins v. Department of Management Services, Division of Retirement*, Case No. 19-1692 (Fla. DOAH Feb. 18, 2020) (Order Closing File and Relinquishing Jurisdiction), would constitute additional testimony of witnesses for the purposes of this case. The identity of the witnesses is set forth in the Transcript, Petitioner's Exhibit 1. In this case, Respondent also presented the testimony of Joyce Morgan and Kathy Gould. Petitioner's Exhibits 1 through 27 were admitted into evidence. Respondent's Exhibits 1 through 21 were admitted into evidence.

At the close of the hearing, the parties stipulated that the proposed recommended orders would be due ten days after the filing of the transcript. The Transcript of the final hearing was filed on November 16, 2021, which started the timeline for submission of proposed recommended orders. DOAH issued a Notice of Filing Transcript the same day. On November 29, 2021, Respondent timely filed its Proposed Recommended Order, which has been considered in the preparation of this Recommended Order. Petitioner filed its Proposed Recommended Order on November 30, 2021. Petitioner also filed Petitioner's Motion to Deem its Filed Proposed Recommended Order as Timely, or Alternatively, for a One-Day Extension to File the Proposed Recommended Order. In response, Respondent filed Respondent's Motion to Strike. Next, Petitioner filed Petitioner's Response in Opposition to Respondent's Motion to Strike. Petitioner's Proposed Recommended Order was filed untimely, but the undersigned grants Petitioner's motion for a one-day extension, and Petitioner's Proposed Recommended Order has been considered in preparation of this Recommended Order.

Unless otherwise indicated, all statutory references are to the versions in effect at the time of the alleged violations.

FINDINGS OF FACT

1. DMS is the state agency delegated to administer FRS. The Florida Legislature created DOR to manage the retirement plans and programs under FRS within DMS.

2. FRS is a retirement program for state and local government employees administered pursuant to chapter 121. All state agencies participate in FRS. Local governments have the option of joining the plan if they meet certain requirements set out in statute and rule. Participating employers agree to follow chapter 121 and Florida Administrative Code Chapter 60S when they join FRS.

3. Petitioner is the Town, a State of Florida municipal government located within Miami-Dade County and duly charted on December 5, 2000. In January 2004, the Town joined FRS as a participating employer.

4. Jenkins was a member of FRS through her employment with Miami-Dade County Public Schools. Jenkins entered DROP and received two one-year extensions (totaling seven years) until her retirement, effective June 8, 2018.

5. Before entering DROP, Jenkins signed a DP-Term form on May 7, 2018. The DROP termination notification form specified that Jenkins had to "terminate all employment relationships with all participating FRS employers for the first 6 calendar months after [her] DROP termination date."

6. Clary Garcia Ramos ("Clary") is a Town employee. In her regularly established position, Clary teaches yoga part time at a community center for the Town and is paid $25.00 per hour per class. She has worked for Miami Lakes for approximately 15 years and is covered under the FRS.

7. In the fall of 2018, Clary was having bilateral knee replacement surgery and asked her longtime friend Jenkins to help her out and cover her yoga classes with the Town while she was out after her surgery.

8. Clary and Jenkins have known each other for approximately 15 years and obtained their yoga education together.

9. Jenkins, a certified yoga instructor, agreed to help Clary out with her classes for September and October 2018.

10. Miami Lakes did not post a position opening nor conduct interviews for a back-up, part-time yoga instructor.

11. Before Jenkins started filling in for Clary, Jenkins was instructed to fill out paperwork to start the position. She first filled out an employment application dated August 22, 2015, and then a second one with the corrected date of August 22, 2018, for the position of yoga instructor.

12. On the completed application, Jenkins informed the Town that she had retired from Miami-Dade County Public Schools with "40 years of service" on June 8, 2018.

13. The last detachable page of the application allowed the Town to perform Jenkins' required background screening since she would be teaching yoga with seniors, a vulnerable population. Only the last page of the application pertains to a background check.

14. On or about August 31, 2018, Jenkins received an offer of employment letter signed by Town Manager Alex Rey ("Rey") regarding the position she was filling in for Clary. The letter stated:

> SUBJECT: EMPLOYMENT LETTER
>
> Dear Ms. Jenkins:
>
> On behalf of the Town of Miami Lakes, I would like to offer you the position of Back up-Part-Time Instructor, Yoga. Instructors work under the supervision of the Leisure Services Manager and are required to select, plan, and teach cultural classes for youth and adults. Your supervisor will determine your schedule for yoga classes.
>
> This position start date is September [12], 2018 and the rate of pay will be $26.00 per hour. Each time

> you are scheduled to work, you will be required to submit a time sheet to your supervisor. This position qualifies for participation under the Florida Retirement System (FRS), and 3% employee contribution is mandatory. This employment offer is contingent upon satisfactory results of the following pre-employment requirements:
>
> • Criminal Background check and Drug Screening
> • Proof of required education, certifications and/or licenses
>
> This is an exciting step for the Town of Miami Lakes, and we look forward to you joining our team. Should this offer be considered acceptable, please sign below and return [i]t to the attention of Cynthia Alejo, Human Resources Specialist, to complete your pre-employment process.

Jenkins signed the employment offer letter and accepted the FRS position from Miami Lakes on September 4, 2018.

15. Rey was the town manager for Miami Lakes during all times material to this case. He was the chief executive of the Town and oversaw human resources. Cynthia Alejo ("Alejo") was the Town's part-time human resources specialist, who served as the assistant to Rey in the Human Resources Department.

16. Alejo used Clary's offer letter as a template when she drafted the employment offer letter that Jenkins signed.

17. Ismael Diaz ("Diaz"), the Town's comptroller and chief financial officer, was off work during October 2018 on vacation.

18. While Clary was out recuperating, Jenkins performed yoga instruction to the seniors for the Town in her place. Jenkins was paid a rate of pay of $26.00 per hour per class. However, while in Clary's position, Jenkins did not receive the benefits available for employees or receive orientation or training for new employees.

19. Jenkins taught 16 one-hour yoga classes to senior citizens from September 13, 2018, until October 11, 2018.

20. Jenkins was paid and received, as agreed in the terms of her employment offer letter, a total of $442.00 for the yoga classes she taught for the Town.

21. The Town erroneously reported Jenkins to FRS. The Town's monthly reports specifically included Jenkins under a preretirement code, which alerted DOR internally that a person who had retired was being reported within the first 12 months after retirement.

22. Each month that Jenkins worked, the Town reported her wages to DOR and made retirement contributions to DOR with the payroll reports.

23. During the period when the Town reported Jenkins to DOR as an employee for three consecutive months on its retirement reports, the wrong codes registered errors.

24. DOR notified the Town that Jenkins should not be reported in that way.

25. The Town could have corrected the errors. However, the Town never provided a correction report to change Jenkins' status. Instead, by the Town continuously reporting Jenkins as an employee, a DOR review of Jenkins' retirement status was triggered.

26. Eventually, Jenkins found out that she was being reported as an employee to DOR by the Town and her DROP retirement funds were in jeopardy.

27. On or about December 3, 2018, Jenkins complained to DMS, Office of Inspector General, regarding her potential violation of FRS rules. Jenkins was informed in writing that her complaint was being referred to DOR for review.

28. Jenkins also telephoned DMS several times, including December 3, 10, and 11, 2018, and February 8, 2019, requesting a review of her reemployment status and possible voiding of DROP. Jenkins requested to speak with an

FRS specialist regarding her FRS retirement issue by email on December 10, 2018.

29. At one point, Jenkins spoke to Kathy Gould, DOR bureau chief of calculations, and informed her that the reporting of her as an employee was a mistake and she was just covering for a friend who was out after having surgery.

30. Because of the variety of Jenkins' requests to review her retirement issue, which included the inspector general complaint and the multiple payroll report errors reported for Jenkins, DOR investigated Jenkins' retirement status.

31. June Moore ("Moore"), from the retirement calculations section at DOR, handled Jenkins' review for DOR. On or about December 13, 2018, Moore started looking into the Jenkins' retirement issue and contacted the Town's comptroller, Diaz, by email requesting Jenkins' personnel action form when she was hired and informing the Town that Jenkins was reemployed with Miami Lakes and "in violation of [her] termination date."

32. That same day, Diaz emailed Alejo, copying Moore, to update Alejo that he had spoken with Moore and told her the Town had also issued Jenkins an offer letter. In the email, Diaz asked Alejo to provide Moore's requested information and suggested that the situation be mitigated so that Jenkins did not suffer any financial loss. Diaz also suggested that Jenkins could perhaps return the $400.00 earned.

33. Moore responded 30 minutes later by email, "We are still reviewing this account. Once we receive the documents from your agency we will let you know what the outcome is."

34. The next day, Alejo sent Moore Jenkins' two personnel action forms dated September 25, 2018, and October 12, 2018, and the August 31, 2018, offer letter that had been executed by Jenkins. Alejo stated in the email that:

> [Jenkins] was also under the impression that as a temporary employee, this would not affect her

> retirement. As Mr. Diaz mentions, Ms. Jenkins is willing to return all funds back to the Town and instead be considered a volunteer. While we don't know if that's a possibility, we are willing to help in any way so that Ms. Jenkins does not suffer a financial loss.

35. Both personnel action forms dated September 25, 2018, and October 12, 2018, listed Jenkins as a temporary part-time, hourly wage, non-exempt employee. Each form had FRS checked under the benefits section. Additionally, the September form had "temporary coverage for Clary" written on it and the October form had checked resigned with notice and "temp position" written on it.

36. Jenkins also received an Internal Revenue Service W-2 wage and tax statement from Miami Lakes for her services of working as a yoga instructor at the Town in Clary's place.

37. On or about February 12, 2019, Alejo sent a memorandum to Diaz that was contrary to all the previous employment records the Town had regarding Jenkins' employment. The memorandum changed Jenkins' status to a volunteer and referenced her $26 per hour payments as a stipend. The memorandum stated:

> After a review of our records, it has come to my attention that Ms. Dawn Jenkins, who assisted the Town of Miami Lakes (the "Town") as a senior fitness class volunteer during September 19, 2018 thru October 11, 2018 and was inadvertently classified as a Town of Miami Lakes employee. Additionally, a review of our records reveals that Ms. Jenkins did not receive a salary for her services. The only monetary contribution from the Town was in the form of a $26.00 daily stipend.
>
> Ms. Jenkins became a volunteer following her friend's knee incident which required surgery. The Town required Ms. Jenkins to complete an application and consent to a criminal background

> search, which is standard policy for any volunteer that engages with vulnerable children or adults.
>
> Upon receipt of Ms. Jenkins application, the Town in error, reported Ms. Jenkins wages to the Florida Retirement System ("FRS"). The error was discovered within a month or so, and by that time, Ms. Jenkins had already stopped volunteering and was thereby removed from our payroll system.
>
> As a follow-up, the Town will need the assistance of the FRS administration to correct the error reported. FRS is under the impression that Ms. Jenkins abused the system by seeking re-employment after retirement. As detailed in this memorandum, this is not the case. Ms. Jenkins, at no time during the period of September 19 thru October 11, 2018 served the Town as a salaried employee. Should you have any questions, please do not hesitate to contact us.

38. On February 19, 2019, DOR issued a final agency action letter, notifying Jenkins that she was "subject to the termination requirement found in [section] 121.021(39)(b), Florida Statutes," and that she was required to "repay all retirement benefits previously paid to [her], as provided in Rule 60S-4.012, Florida Administrative Code," in the amount of $445,013.04.

39. Jenkins petitioned for, and received, a section 120.57(1), Florida Statutes, hearing in response to the notice of intended agency action that would have required her to repay her DROP payout and the retirement benefits she had received. The DOAH case number assigned to that proceeding is 19-1692.

40. Case No. 19-1692 was litigated through the final hearing. At that final hearing, the parties presented evidence and testimony of the same witnesses in this proceeding.

41. After the administrative hearing on December 20, 2019, DMS and Jenkins entered into a Settlement Agreement to resolve the issues related to her termination of DROP and retirement benefits. As part of the Settlement

Agreement, Jenkins' benefit amount was recalculated based on the additional service credit she earned for the years she participated in DROP. The Settlement Agreement also deducted $464.86 monthly from Jenkins' retirement benefits for a lifetime to repay $445,013.04, the overpayment amount in DROP benefits.

42. In addition, a part of the Settlement Agreement obligated DMS to seek reimbursement for the entire debt, $445,013.04, from Miami Lakes.

43. After settling the case with DMS, Jenkins voluntarily dismissed Case No. 19-1692 with prejudice.

44. On October 2, 2020, DMS then issued its Notice of Intended Agency Action against the Town, informing Miami Lakes that due to hiring Jenkins on September 12, 2018, her FRS termination requirement of ceasing all employment with an FRS employer for six calendar months was never satisfied and, as a result, whenever a participating employer employs a retired FRS member in violation of the termination requirements, both the employee and the participating employer are liable for repayment of the money to the FRS Trust Fund in accordance with section 121.091(9)(c)3. The notice included an invoice demanding payment from the Town of the full amount of the "overpayment of benefits" to Jenkins.

45. The Town timely filed a Petition for Formal Hearing contesting the agency action letter.

Ultimate Findings of Fact

46. Upon careful consideration of the entire record, it is determined that DMS has demonstrated by the preponderance of the evidence that Jenkins was an employee of Miami Lakes instructing yoga from September 2018 to October 2018, while Clary was out recuperating.

47. It is interesting to note that, even though Jenkins testified at hearing, she did not believe providing services to the Town to help a friend who was having knee surgery was violating the DROP agreement, and she did not

realize that Miami Lakes was a participating employer with FRS when she substituted for Clary while she was out recuperating. Jenkins did admit that she understood the DP-Term form she signed, which specified that she could not work for any FRS entities.

48. Jenkins was also honest and forthright and admitted at hearing that she did not read the September 4, 2018, employment offer letter that she signed when she accepted the FRS position. Had she read the employment letter, she would have been put on notice that the position she was taking was "under the Florida Retirement System, and 3% employee contribution is mandatory."

49. At hearing, Alejo testified that it was her first time processing an employee covering for another employee. Notwithstanding her lack of experience, the evidence establishes Jenkins was employed with Miami Lakes.

50. In this matter, Miami Lakes was notified of Jenkins' retirement on June 8, 2018, from Miami-Dade County Public Schools on her employment application before she started the position. Also, the Town offered Jenkins employment through Rey, the Town's human resources chief executive. The employment offer letter informed Jenkins who her supervisor was and specified participation in FRS, which both Rey and Jenkins signed. Additionally, the Town checked FRS twice under Jenkins' benefit sections on both her personnel action forms. Likewise, the September personnel action form had "temporary coverage for Clary" written on it and the other form had "temp position" written on it.

51. The evidence also demonstrates that the Town reported Jenkins' wages as an employee three months in a row and made retirement contributions to DOR on three consecutive payroll reports.

52. At hearing, Dr. Joyce Morgan credibly testified that even after DOR notified Miami Lakes that there was an error in reporting Jenkins, they continued to report her in November and December 2018, and the Town

never attempted to correct the error or contact DOR to get help in correcting any errors.[1]

53. In addition, the Town properly issued Jenkins a W-2 tax statement as an employee for instructing yoga for Miami Lakes not a 1099 statement.

54. At hearing, the record not only shows Miami Lakes hired Jenkins as an employee, but was fully aware of her employee status with the Town. The evidence demonstrates that Diaz, the comptroller, confirmed by his December 13, 2018, email that Jenkins' status was a Town employee when he informed Moore that Jenkins had executed an employment offer letter and Diaz attempted to assist mitigate Jenkins' financial loss with DOR by suggesting her pay be returned to the Town.

55. Additionally, Alejo further established Miami Lakes' full knowledge of Jenkins' status as an employee with the Town in her email of December 14, 2018, when she admitted she did not know if it were possible, but offered to help Jenkins not suffer a financial loss by suggesting to Moore to change Jenkins' title so Jenkins could be considered a volunteer and return the money paid.

56. The record also demonstrates that it was not until almost two months later in February 2019, that the Town's Human Resource Department actually reclassified Jenkins' title to a senior fitness volunteer and renamed her "rate of pay" that had formally been $26.00 per hour in the employment offer letter to a "$26.00 daily stipend" in an internal memorandum[2] that Alejo sent to Diaz.

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[1] The undersigned is not persuaded that the Town's reporting error was caused because Comptroller Diaz was out on vacation during October 2018, because the errors were not corrected after Diaz returned and have not been corrected as of the date of the hearing. Additionally, the Town's errors are not determinative of Jenkins' employment status. Any contention that correcting the error in the payroll report would have an impact on changing Jenkins' employee status is misplaced. To that end, the payroll report does not determine Jenkins' employment status.

[2] The undersigned rejects the memorandum as reliable evidence to help determine Jenkins' employment status since the record demonstrates that Alejo had been working on Jenkins' behalf to help her from receiving a financial loss for approximately two months.

57. An internal title change by the Town did not change Jenkins' status as a temporary yoga employee for Miami Lakes. Additionally, the record shows that the Town did not process Jenkins as it did for other volunteers.

58. At hearing, Rey testified that there were categories of volunteers: resident volunteers that served on different committees and volunteers through agreements. Rey explained that volunteers with the Town are non-paid persons and the Town only reimburses volunteers for supplies by providing the funds or obtaining a receipt for reimbursement, neither of which occurred with Jenkins.

59. Rey also testified that upon learning there was an issue with Jenkins' employment, he explained to Jenkins that she had been hired by Miami Lakes as a "temporary employee to cover for a limited period of time."

60. Rey also testified that Jenkins was never considered a volunteer for the Town.

61. Therefore, the greater weight of the evidence in this cause establishes that Miami Lakes employed Jenkins as a temporary yoga instructor. Hence, Jenkins was reemployed by an FRS employer, Miami Lakes.

CONCLUSIONS OF LAW

62. DOAH has jurisdiction over the subject matter of, and the parties to, this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2021).

63. In an administrative proceeding, the burden of proof is on the party asserting the affirmative of the issue unless the burden is established by statute. *Wilson v. Dep't of Admin., Div. of Ret.,* 538 So. 2d 139 (Fla. 4th DCA 1989); *Balino v. Dep't of HRS*, 348 So. 2d 349 (Fla. 1st DCA 1977). In this matter, DMS is asserting that Jenkins violated the termination provisions, and Miami Lakes is jointly and severally liable and must reimburse FRS for the money paid to Jenkins in violation of her DROP termination

requirements. DMS, as the party asserting that Petitioner repay, has the burden of proof to demonstrate its entitlement to the monies it is seeking.

64. Section 120.57(1)(j) requires that evidence be considered by the preponderance of the evidence standard. A preponderance of the evidence is defined as "the greater weight of the evidence," or evidence that "more likely than not" tends to prove a certain outcome. *Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000).

65. Chapter 121 sets the parameters for the implementation of FRS. The Legislature established limitations on individuals who participate in DROP. After termination of employment and before a participant can return to employment with an FRS employer, there is a six-month waiting period. Termination is defined in section 121.021(39)(b) and states, in pertinent part:

> (b) "Termination" for a member electing to participate in the Deferred Retirement Option Program occurs when the program participant ceases all employment relationships with participating employers in accordance with s. 121.091(13), however:
>
> * * *
>
> 2. For termination dates occurring on or after July 1, 2010, if the member becomes employed by any such employer within the next 6 calendar months, termination will be deemed not to have occurred, except as provided in s. 121.091(13)(b)4.c. A leave of absence constitutes a continuation of the employment relationship.

66. In this matter, the evidence demonstrates Jenkins retired from DROP on June 8, 2018, and she was reemployed with Miami Lakes on September 13, 2018. Therefore, Jenkins failed to cease all employment relationships with FRS participating employers for the first six calendar months of her DROP. Consequently, Jenkins is in violation of her termination date.

67. Section 121.091(9)(c) provides, in relevant part:

> (c) Any person whose retirement is effective on or after July 1, 2010, or whose participation in the Deferred Retirement Option Program terminates on or after July 1, 2010, who is retired under this chapter, except under the disability retirement provisions of subsection (4) or as provided in s. 121.053, may be reemployed by an employer that participates in a state-administered retirement system and receive retirement benefits and compensation from that employer. However, a person may not be reemployed by an employer participating in the Florida Retirement System before meeting the definition of termination in s. 121.021 and may not receive both a salary from the employer and retirement benefits for 6 calendar months after meeting the definition of termination, except as provided in paragraph (f). However, a DROP participant shall continue employment and receive a salary during the period of participation in the Deferred Retirement Option Program, as provided in subsection (13).
>
> 1. The reemployed retiree may not renew membership in the Florida Retirement System, except as provided in s. 121.122
>
> 2. The employer shall pay retirement contributions in an amount equal to the unfunded actuarial liability portion of the employer contribution that would be required for active members of the Florida Retirement System in addition to the contributions required by s. 121.76.
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> 3. A retiree initially reemployed in violation of this paragraph and an employer that employs or appoints such person are jointly and severally liable for reimbursement of any retirement benefits paid to the retirement trust fund from which the benefits were paid, including the Florida Retirement System Trust Fund and the Florida Retirement System Investment Plan Trust Fund, as appropriate. The employer must have a written statement from the employee that he or she is not

> retired from a state-administered retirement system. Retirement benefits shall remain suspended until repayment is made. Benefits suspended beyond the end of the retiree's 6-month reemployment limitation period shall apply toward the repayment of benefits received in violation of this paragraph.

68. Section 121.091(13)(c)5. provides, in relevant part:

> d. A DROP participant who fails to terminate all employment relationships as provided in s. 121.021(39) shall be deemed as not retired, and the DROP election is null and void. Florida Retirement System membership shall be reestablished retroactively to the date of the commencement of DROP, and each employer with whom the member continues employment must pay to the Florida Retirement System Trust Fund the difference between the DROP contributions paid in paragraph (i) and the contributions required for the applicable Florida Retirement System class of membership during the period the member participated in DROP, plus 6.5 percent interest compounded annually.

69. The record shows that Jenkins and DMS entered into a Settlement Agreement, and Jenkins is repaying her overpayment amount in DROP benefits at the rate of $464.86 monthly for a lifetime--$445,013.04 is owed.

70. However, this case is not about Jenkins' liability to FRS based on her violation of the termination provisions related to DROP, but rather, whether Miami Lakes has liability for employing her in violation of those provisions.

71. The Florida Legislature has directed that whenever a participating employer employs a retired FRS member in violation of the termination requirements, both the employee and participating employer are liable for repayment of the money to the FRS Trust Fund pursuant to section 121.091(9)(c)3.

72. Section 121.091(9)(c)3. also provides a method for FRS employers to avoid liability for hiring FRS retirees who do not wait the required six

months before becoming reemployed. The established method is the employer procures a form or letter signed by the employee attesting that they are not a retiree under the FRS. In this cause, the record is void of evidence the Town obtained such a letter from Jenkins. Instead, the evidence shows Jenkins informed the Town on her application that she had retired from Miami-Dade County Public Schools on June 18, 2018, after working 40 years.

73. The Town contends that the exceptions DOR have established for DROP termination requirements are applicable in this matter. Specifically, in paragraph 55 of Respondent's Proposed Recommended Order, the Town maintains that Jenkins "was a volunteer or may be deemed an independent contractor," which are both exceptions to the termination requirements. However, the undersigned is not convinced by such arguments. For the reasons set forth in the Findings of Fact above, the record has demonstrated that Jenkins was an hourly employee of Miami Lakes when she covered the yoga classes for her friend Clary.

74. Contrary to Petitioner's claims, section 121.021(11) has also been met in this case. Section 121.021(11) provides, in pertinent part:

> (11) "Officer or employee" means any person receiving salary payments for work performed in a regularly established position and, if employed by a municipality, a metropolitan planning organization, or a special district, employed in a covered group. The term does not apply to state employees covered by a leasing agreement under s. 110.191, other public employees covered by a leasing agreement, or a coemployer relationship.

The Findings of Fact above show Jenkins worked in Clary's regularly established position of yoga instructor with a designated supervisor employed by the municipality, Miami Lakes. In fact, the salary she received for the position was higher than what Clary was earning in the same position. Hence, the evidence tends to prove Jenkins employment satisfies the standard for employee set forth by the Legislature.

75. Section 121.021(52) defines regularly established position and provides, in pertinent part:

> "Regularly established position" means:
>
> * * *
>
> (b) With respect to a local agency employer (district school board, county agency, Florida College System institution, municipality, metropolitan planning organization, charter school, charter technical career center, or special district), other than a water management district operating pursuant to chapter 373, a regularly established position that will be in existence for a period beyond 6 consecutive months, except as provided by rule.

76. The Legislature's requirement for a regularly established position has been met as well in this case. Additionally, Clary had taught in the position for years before Jenkins filled out her Town application in August 2018, and Clary returned to teaching after October 2018. Jenkins was a "temp[orary] employee" as written on the personnel form, who worked in Clary's place while she was out recuperating, and Jenkins was brought on board so that there would be no stopping the classes for the seniors. The Town's yoga program and instructor position is well-established and long term, well beyond six consecutive months. No evidence was presented at hearing that the yoga instruction position was ending. Therefore, the greater weight of the evidence establishes Jenkins took on the yoga instruction duties as an employee for a municipality in a regularly established position.

77. Petitioner also contends that Jenkins was receiving a stipend and not getting paid. This claim is without merit since the evidence at hearing contradicts such a position. After all, the record demonstrates that Jenkins was an hourly employee with an executed employment offer letter that stated, "the rate of pay will be $26.00 per hour." Additionally, Town Manager Rey testified that Jenkins was hired as an hourly employee. Even though the

Town was understanding of the predicament Jenkins was facing with DOR voiding her DROP benefits, and the Town made supportive efforts to try and help Jenkins not to suffer a financial loss, the record is void of any credible evidence to support the money she received from the Town was a stipend.

78. The undersigned is not persuaded by the Town's reliance on Florida Supreme Court cases, *Roper v. Florida Public Utilities Co.*, 179 So. 904, 905 (Fla. 1938), and *Louisville & N.R. v. Allen, 67 Fla.* 257, 65 So. 2d 8 (1914), contending that DMS cannot seek payment from Miami Lakes based on the premise that once a plaintiff has settled with one of the persons jointly and severally liable to the plaintiff for all damages, it operates as a release of the other joint tortfeasor. To the contrary, in matters such as this case, the Florida Legislature has carved out a category of liability for employers in section 121.091(9)(c)3.

79. Likewise, the Town's assertion that Jenkins' Settlement Agreement discharges "the debt of Jenkins who is alleged to be jointly and severally liable to the Department for repayment of the overpayment retirement funds" fails in this matter. Again, the Legislature has specifically addressed the joint and several liability for the repayment of the overpayment of retirement funds in circumstances such as this case in section 121.091(9)(c)3. Accordingly, DOR has met its burden of proof and the law clearly requires that Miami Lakes is liable to pay the amount DMS is seeking in this case, $445.013.04. However, it is recommended that DMS allow Miami Lakes to repay the FRS trust fund on an installment plan, over the course of three to five years, to lessen what may be a financial strain on the Town.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Management Services, Division of Retirement, enter a final order that:

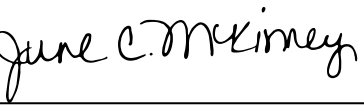
1. Finds that Jenkins' reemployment with Miami Lakes, an FRS municipality, failed to meet the DROP termination requirements;

2. Upholds DMS's October 2, 2020, notice of intended agency action that the Town of Miami Lakes is jointly and severally liable for repayment;

3. Requires the Town of Miami Lakes to pay back the total overpayment of Jenkins' benefits in the amount of $445.013.04; and

4. Allows the Town of Miami Lakes to repay the overpayment in installments over a three- to five-year period.

DONE AND ENTERED this 20th day of December, 2021, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
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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.