

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

DANIEL P. KEES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2007-858
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
_____	)	

**FINAL ORDER**

On March 14, 2008, the presiding officer submitted her Recommended Order to the State Board of Administration in this proceeding. A copy of the Recommended Order indicates that copies were served upon the pro se Petitioner, Daniel Kees, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on March 31, 2008. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Senior Defined Contribution Programs Officer for final agency action.

**ORDERED**

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to be allowed to return his distribution from the FRS Investment Plan and be reinstated to the Special Risk Class for purposes of contributions to his FRS Investment Plan account is denied. Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the

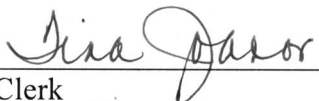
filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the State Board of Administration in the Office of the General Counsel, State Board of Administration, 1801 Hermitage Boulevard, Suite 100, Tallahassee, Florida, 32308, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days from the date the Final Order is filed with the Clerk of the State Board of Administration.

DONE AND ORDERED this 1st day of April, 2008, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

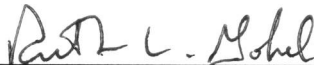
  
\_\_\_\_\_  
Ron Poppell, Senior Defined Contribution  
Programs Officer  
State Board of Administration  
1801 Hermitage Boulevard, Suite 100  
Tallahassee, Florida 32308  
(850) 488-4406

FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

  
\_\_\_\_\_  
Clerk  
TINA JOANOS

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order was sent by UPS to Daniel Kees, [REDACTED], and by U.S. mail to Brian Newman and Brandice Dickson, Esq., at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 1st day of April, 2008.



Ruth L. Gokel  
Assistant General Counsel  
State Board of Administration of Florida  
1801 Hermitage Boulevard  
Suite 100  
Tallahassee, FL 32308

STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION

DANIEL P. KEES,

CASE NO.: 2007-858

Petitioner,

v.

STATE BOARD OF ADMINISTRATION,

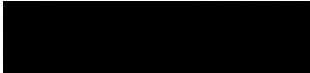
Respondent.

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**RECOMMENDED ORDER**

This case was heard in an informal proceeding before the undersigned Presiding Officer for the STATE BOARD OF ADMINISTRATION (SBA) on October 30, 2007, in Tallahassee, Florida. The Petitioner and the Respondent appeared in person as follows:

**APPEARANCES**

For Petitioner: Daniel P. Kees, Pro Se  
  
Petitioner

For Respondent: Brandice D. Dickson, Esquire  
Pennington, Moore, Wilkinson,  
Bell & Dunbar, P.A.  
Post Office Box 10095  
Tallahassee, Florida 32302-2095

**STATEMENT OF THE ISSUE**

The issue is whether the SBA should grant the Petitioner's request to be allowed to return a distribution to him from his Florida Retirement System (FRS) Investment Plan account and be

Exhibit A

reinstated to the Special Risk Service Class for purposes of contributions to his FRS plan account.

### **PRELIMINARY STATEMENT**

On March 30, 2007, Petitioner filed a Request for Intervention seeking reconsideration of the Respondent's decision not to allow him to be classified as Special Risk Service Class or return funds he received as a distribution from his FRS Investment Plan account. The SBA investigated and denied this request. Petitioner then filed a Petition for Hearing requesting the same relief, which was transmitted to the undersigned for informal hearing.

Petitioner attended the informal hearing in person and testified on his own behalf. The SBA presented the testimony of Dan Beard, Director of Policy, Risk Management and Compliance. Petitioner's Exhibits P-1 and P-2 and Respondent's Exhibits R-1 through R-4 were admitted into evidence without objection. A transcript of the informal hearing was made, filed with the agency on December 18, 2007 and made available to the parties. The parties were invited to submit proposed recommended orders within 30 days after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings.

### **UNDISPUTED MATERIAL FACTS**

1. Petitioner was employed by the Florida Department of Environmental Protection (FDEP), Division of Law Enforcement and therefore was in the Special Risk Service Class for purposes of the FRS.
2. A dispute arose between Petitioner and the FDEP regarding his continued employment after he was accused of criminal wrongdoing.

3. The Petitioner understood that the dispute with the FDEP would result in his termination.

4. Due to his impending termination, the Petitioner decided to switch from the FRS Pension Plan to the FRS Investment Plan, so that he would be able to access funds to ensure his financial solvency while contesting his termination.

5. On May 4, 2004, the Petitioner sought advice from his legal counsel and from the counselors made available to FRS plan participants by telephone through the MyFRS Financial Guidance Line.

6. The Petitioner advised the MyFRS Financial Guidance Line counselor of his impending termination, the need to access funds, the possibility of reinstatement, and that he would seek to be classified once again as Special Risk if he was ultimately reinstated.

7. The counselor advised Petitioner that if he received a distribution from his FRS account, it would be "impossible to return to high risk."

8. The Petitioner had approximately four hours to make the decision whether to initiate a distribution. In those four hours, he consulted with his lawyers and the Respondent's telephone advisor.

9. Later that day, the Petitioner switched from the Pension Plan to the Investment Plan in order to be able to initiate a later distribution from his FRS plan account.

10. On May 5, 2004, Petitioner was terminated by the FDEP.

11. On September 29, 2004, Petitioner took a total distribution of his FRS Investment Plan account.

12. In July 2006, the Petitioner was exonerated of the criminal charges which caused his termination from the FDEP.

13. Petitioner subsequently sought to be reinstated with the FDEP and participated in an arbitration proceeding styled: In the Matter of Arbitration Between State of Florida (Department of Environmental Protection)(Department of Management Services) and I.U.P.A. Florida, Local 6000 AFL-CIO International Union of Police Associations, RE: Daniel P. Kees, Case No. 04-03120 in January, 2007.

14. During the arbitration proceeding, both Petitioner and the FDEP were represented by counsel.

15. That proceeding resulted in an agreement dated January 16, 2007 which states: "The parties agree to the following resolution of the above matter in full settlement of all outstanding issues."

16. The settlement provides, in pertinent part:

1. The Grievant/Employee, Daniel P. Kees, shall be reinstated as a Law Enforcement Officer Employed with the Employer, Department of Environmental Protection beginning with the date of his dismissal 5-5-2004.

2. The Grievant/Employee agrees to waive all back pay and interest for the time period of the pendency of the arbitration until he returns to work.

3. The Employer agrees that the grievant shall accumulate both annual leave, sick leave and pension benefit from the date of his Final Letter of May 5, 2004. The State or Employer shall not pay for the Grievant/Employee's pension from May 5, 2004 until he returns to work. The Grievant/Employee shall be allowed to pay the Employer's or State's portion of the pension from May 5, 2004 up to the maximum allowed by statute.

4. The Employer also agrees that the Grievant/Employee is fully employed for purposes of Special Risk retirement from May 5, 2004.

17. The State Board of Administration was not a party to the Settlement Agreement between the Petitioner and the FDEP.

18. The Petitioner was reinstated by his employer in January 2007.

19. Because the Petitioner's employment was terminated and he took a distribution from his Investment Plan account, the Respondent considers him a retiree by operation of statute. As a retiree who has returned to FRS covered employment, Respondent also considers him a renewed or reemployed retiree, and such reemployed retirees are not entitled, among other things, to participate in Special Risk Class.

20. When the Petitioner returned to work with the DEP in March 2007, he was classified as Regular Class for purposes of contributions to his FRS plan account.

21. Petitioner asserts that he should be classified as Special Risk because he did not retire; rather, he was terminated and then reinstated. Petitioner further argues that he is able to pay back the funds taken as a distribution from his Investment Plan account, and so could take action to "unretire" if necessary.

22. The Respondent has denied Petitioner's requests to allow him to pay the distributed funds back into his FRS plan account in order to undo his retirement and to reclassify him as Special Risk.

### **CONCLUSIONS OF LAW**

23. Section 121.4501(2)(j), Florida Statutes provides:

(j) "Retiree" means a former participant of the Florida Retirement System Public Employee Optional Retirement Program who has terminated employment and has taken a distribution as provided in s. 121.591, except for a mandatory distribution of a de minimis account authorized by the state board.



24. When Petitioner was terminated and then took distribution of the funds in his Investment Plan account, his status with regard to the FRS became "retiree."

25. Section 121.122, Florida Statutes states, in pertinent part:

Renewed membership in system.--Except as provided in s. 121.053, effective July 1, 1991, any retiree of a state-administered retirement system who is employed in a regularly established position with a covered employer shall be enrolled as a compulsory member of the Regular Class of the Florida Retirement System ... and shall be entitled to receive an additional retirement benefit, subject to [certain conditions]

26. Prior to taking distribution of his Investment Plan account, Petitioner was advised by the Respondent's telephone counselor that taking the distribution would foreclose the possibility of returning to Special Risk status should he be reinstated.

27. When weighing his options, the Petitioner had available to him the advice of his own legal counsel and was aware of the position the Respondent would take in the future, and has taken in this proceeding, with respect to denying his request to be classified as Special Risk.

28. Respondent SBA did not participate in the arbitration proceeding that resulted in the settlement agreement the Petitioner reached with the FDEP, and was not a party to that agreement.

29. The Petitioner cites Section 121.011 (3)(g), Florida Statutes as support for his assertion that he is entitled to be viewed as a reinstated employee rather than as a renewed or reemployed employee and therefore is entitled to once again receive Special Risk retirement service credit. That section states:

(3)(g) Any member of the Florida Retirement System or any member of an existing system under this chapter who is not retired and who is, has been, or shall be dismissed from employment shall be considered terminated from active membership in such system.

1. If such dismissal is rescinded by proper authority or through legal proceedings, the member is eligible to receive retirement service credit for such period of dismissal provided:

a. The dismissal action taken against the member is determined to be incorrect and is negated, the employee is made whole for the period of the dismissal or any portion thereof, and employment is reinstated; and

b. The employer pays into the Retirement System Trust Fund the total required employer contributions for the period for which the employee is made whole, plus interest at 6.5 percent compounded annually until full payment is made. The employee shall pay the total employee contributions, plus interest, if applicable.

2. If the dismissal action is subsequently changed to a suspension by proper authority or through legal proceedings the member is eligible to receive retirement service credit, provided the member's employment is reinstated, restoring the employee-employer relationship and the employee pays the total required employer and employee contributions and complies with all requirements in paragraph (e).

(Emphasis added.)

30. The above statute appears to be inapplicable to this case. The Petitioner is considered to be retired by operation of section 121.4501(2)(j) Florida Statutes, and if this is in fact correct, the rest of the above section never comes into play. ("Any member...who is not retired" §121.011(3)(g)) I note as well that this section in general has to do with treatment of service credit for a period of dismissal (at §(1)) or of suspension, (at §(2)), and adds nothing per se to the analysis of whether an employee is eligible to be put back in Special Risk Class after a dismissal is rescinded, for his FRS employment going forward.

31. The agreement entered into by Petitioner pursuant to arbitration on January 16,

2007, does expressly address this issue: the employer (FDEP) agreed at paragraph four that Petitioner was to be "fully employed for purposes of Special Risk retirement" from May 5, 2004.

32. The Respondent's position is that Petitioner's action of taking a distribution from his Investment Plan account to support himself while contesting his dismissal is sufficient, standing alone, to render him a retiree by operation of law, and that his reinstatement by his employer does not in any way change this analysis, even if Petitioner stands ready to repay the distribution and thereby return the FRS to the status quo ante from a monetary perspective.

33. The governing statutes contemplate that a retiree may return to FRS-covered employment. In such cases, the employee is deemed to be a "renewed member" of the FRS and is placed, pursuant to statute, in the Regular Class of the Florida Retirement System. See Section 121.122, Fla.Stat. (2006).

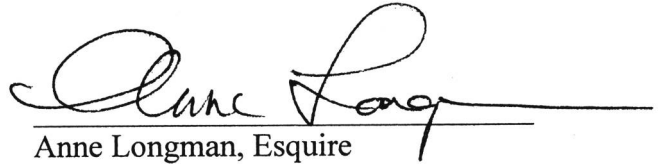
34. As far as the Petitioner's request that he be allowed to "unretire" by paying back the distribution from his Investment Plan, I have found no statutory authority for the Respondent to do so.

35. The settlement agreement entered into by Petitioner and the State of Florida Department of Environmental Protection and Department of Management Services shows a clear intent that he be returned to Special Risk as part of the overall settlement of his employment dispute. Unfortunately it does not appear that the SBA has any authority to carry out this part of the agreement, to which it was not a party. Petitioner may have a remedy in a court of general jurisdiction to enforce his settlement agreement and thereby receive the full benefit of the compromise reached in the arbitration proceeding of January, 2007, but this agency does not have this authority.

**RECOMMENDATION**

Having considered the law and the undisputed facts in this matter, it appears that there is no mechanism available to this agency by which the relief requested by Petitioner can be granted in this forum, and I must recommend that a final order be entered by Respondent, State Board of Administration, denying Petitioner the relief requested.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of March, 2008.



Anne Longman, Esquire  
Presiding Officer  
For the State Board of Administration  
Lewis, Longman & Walker, P.A.  
P.O. Box 16098  
Tallahassee, FL 32317

NOTICE: THIS IS NOT A FINAL ORDER

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order, which should be filed with the Agency Clerk of the State Board of Administration. The SBA then will enter a Final Order which will set out the final agency decision in this case.

Filed with:  
Agency Clerk  
Office of the General Counsel  
Florida State Board of Administration  
1801 Hermitage Blvd., Suite 100  
Tallahassee, FL 32308  
(850) 488-4406

This 14<sup>th</sup> day of March, 2008.

Copies furnished to:

Daniel P. Kees



Petitioner

Brian A. Newman, Esquire  
Brandice D. Dickson, Esquire  
Pennington, Moore, Wilkinson,  
Bell & Dunbar, P.A.  
Post Office Box 10095  
Tallahassee, Florida 32302-2095  
Respondent