**STATE OF FLORIDA**
**STATE BOARD OF ADMINISTRATION**

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| JEFFREY SAPON,<br><br>Petitioner,<br><br>vs.<br><br>STATE BOARD OF ADMINISTRATION,<br><br>Respondent. | ) | Case No. 2013-2711 |

## FINAL ORDER

On September 6, 2013, 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, Jeffrey Sapon, and upon counsel for the Respondent. Respondent timely filed a Proposed Recommended Order within 30 days after the hearing transcript was filed. Petitioner did not file a Proposed Recommended Order. On September 14, 2013, Petitioner timely filed what he deemed to be "Exceptions" to the Recommended Order. 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.

## EXCEPTIONS

Section 120.57(1)(k), Florida Statutes, provides that "...an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended

order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

The findings of fact in a recommended order cannot be rejected or modified by a reviewing agency in its final order "...unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings were not based upon competent substantial evidence...." *See* Section 120.57(1)(l), Florida Statutes. *Accord, Dunham v. Highlands Cty. School Brd.*, 652 So.2d 894 (Fla. 2nd DCA 1995); *Dietz v. Florida Unemployment Appeals Comm.,* 634 So.2d 272 (Fla. 4th DCA 1994); *Florida Dept. of Corrections v. Bradley,* 510 So.2d 1122 (Fla. 1st DCA 1987). A seminal case defining the "competent substantial evidence" standard is *De Groot v. Sheffield,* 95 So.2d 912, 916 (Fla. 1957), in which the Florida Supreme Court defined it as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred" or such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached."

Pursuant to Section 120.57(1)(l), Florida Statutes, however, a reviewing agency has the general authority to "reject or modify conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." Florida courts have consistently applied this section's "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the administrative law judge's application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the administrative law judge's interpretation of a statute or rule over which the Legislature has provided the agency administrative authority. *See, Deep Lagoon Boat*

*Club, Ltd. v. Sheridan,* 784 So.2d 1140, 1141-42 (Fla. 2nd DCA 2001); *Barfield v. Dept. of Health*, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001).

## RULINGS ON EXCEPTIONS

In his exceptions, the Petitioner does not clearly identify the disputed portions of the recommended order by page number or paragraph, does not identify the legal basis for the exceptions, and does not include appropriate and specific citations to the record. On that basis alone, Petitioner's exceptions may be rejected.

Petitioner's exceptions merely re-argue his position that the Florida Legislature's decision in 2011 to change the Florida Retirement System ("FRS") from a non-contributory plan to a contributory plan, such that Petitioner now is required to put his 3% of salary contribution to the FRS Investment Plan at risk, is not "fair" or "ethical." This change to the FRS specifically was found by the Florida Supreme Court to be constitutional. The Court stated that the Legislature has the authority "...to amend a retirement plan prospectively, so long as any benefits tied to service performed prior to the amendment date are not lost or impaired." *Scott v. Williams,* 107 So.3d 379, 388-389 (Fla. 2013). Petitioner has cited no legal authority to support his argument that since he deems the constitutional change in the FRS to be "unfair" as applied to him, then he is entitled to rescind his irrevocable election into the FRS Investment Plan and be returned to the FRS Pension Plan.

Petitioner further states that no cautionary language was provided to him to indicate that a change requiring employee contributions could occur to the FRS at any time. However, Petitioner has cited no legal requirement that such language be given.

Further, Petitioner has not established that he would have made a different choice had he been given such a warning.

Petitioner claims that the 2011 amendments to the FRS requiring a 3% of salary employee contribution to the FRS was a "breach of agreement" to those participating in the FRS. Petitioner is merely restating an argument made during the hearing. As the Recommended Order notes, the *Scott v. Williams* case made it clear that there was no breach of agreement occasioned by the legislative change to the FRS. The Court stated that the 2011 amendment was a prospective change that was:

> ...within the authority of the Legislature to make. The preservation of rights statute does not create binding contract rights for existing employees to future retirement benefits based on the FRS plan that was in place prior to July 1, 2011. *Id.* at 389.

Further, as the Recommended Order notes, the jurisdiction to determine the constitutionality of the 2011 amendment to the FRS is not within the purview of an administrative forum. Such jurisdiction properly lies within the judicial branch of government. *Palm Harbor Special Fire Control Dist. V. Kelly,* 516 So.2d 249 (Fla. 1987). Thus, any constitutional issues Petitioner wishes to broach concerning his situation must be directed to a different forum.

Finally, Petitioner states in his exceptions that it was "insulting" that Respondent stated that Petitioner might consider placing his 3% employee contribution into a money market fund offered in the FRS Investment Plan to reduce or eliminate risk. Petitioner has not stated why this fact has any legal significance to his case.

Accordingly, all of Petitioner's exceptions hereby are rejected.

## ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request to rescind his irrevocable second election into the Florida Retirement System ("FRS") Investment Plan, in light of the amendments to Chapter 121, Florida Statutes which require members of the FRS to contribute 3% of their salary to their retirement plan accounts, hereby 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 29th day of October, 2013, 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.

Tina Joanos
Agency Clerk

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order was sent by UPS to Jeffrey Sapon, [redacted] Florida 33321, 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 29th day of October 2013.

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

**Joanos_Tina** Exceptions to Recommended Order

**From:** Jeff Sapon <jsapon@broward.edu>
**Sent:** Saturday, September 14, 2013 10:24 AM
**To:** Daniel.beard@sbalfa.com; Joanos_Tina
**Cc:** slindsey@penningtonlaw.com
**Subject:** FW: exceptions

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**From:** Jeff Sapon
**Sent:** Saturday, September 14, 2013 10:20 AM
**To:** Daniel.beard@sbalfa.com; tina.joanos@sbafla.com
**Cc:** slindsey@penningtonlaw.com
**Subject:** exceptions

To whom it may concern,

I object to the recommendation set forth by Anne Longman, Esquire. Although the issue of concern is in fact a new law, it is not a fair or ethical one; as demonstrated by me at the hearing held on May 23,2013.

The undisputed facts regarding the FRS forms claimed by the respondent are true however, at the time of the agreement there is no wording cautioning individuals that such a drastic change may occur to any FRS plan at anytime. therefore it is a breach of an agreement regardless of unconstitutional or otherwise.

In my opinion the facts and grievances that I provided at the hearing and to the respondent are also undisputed facts also.

In addition, I found it very insulting that the respondent stated that I should place my 3% earned income at a 100% risk in a money market fund, why should be forced to do so.

In conclusion, I am appealing if the recommendation stands.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

JEFFREY SAPON,

Petitioner,

vs. Case No.: 2013-2711

STATE BOARD OF ADMINISTRATION,

Respondent.

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## RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on May 23, 2013, at the SBA offices, 1801 Hermitage Blvd. Suite 100, Tallahassee, Florida. The appearances were as follows:

### APPEARANCES

For Petitioner: Jeffrey W. Sapon, pro se
[redacted]

For Respondent: Brandice D. Dickson, Esquire
Pennington, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301

### STATEMENT OF THE ISSUE

The issue is whether in light of the 2011 amendments to Chapter 121, Florida Statutes, requiring Florida Retirement System (FRS) members to contribute 3% of their salary to their retirement accounts, Petitioner may rescind his second election into the Investment Plan, in whole or in part.



**EXHIBIT A**

## PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented the testimony of Daniel Beard, Director of Policy, Risk Management, and Compliance, State Board of Administration. Petitioner offered no exhibits. Respondent's Exhibits R-1 through R-4 were admitted into evidence without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties, who were invited to submit proposed recommended orders within 30 days. Respondent filed a proposed recommended order; Petitioner made no further filings.

## MATERIAL UNDISPUTED FACTS

1. Petitioner was employed with an FRS participating employer and was given a deadline to make an initial election between the FRS Pension Plan, a defined benefit plan, and the FRS Investment Plan, a defined contribution plan, of August 31, 2002.

2. Petitioner initially enrolled in the Pension Plan, but on November 29, 2007, he completed and signed a 2nd Election Retirement Plan Enrollment Form requesting to switch from the FRS Pension Plan to the FRS Investment Plan.

3. That form required Petitioner acknowledge that he understood:

> **that my one-time 2nd Election is irrevocable and that I must remain in the plan I chose in Section 1 until my FRS-covered employment ends and I retire.**

[emphasis in original].

4. Petitioner's request was effective on January 1, 2008 and the [then] present value of his FRS Pension Plan benefit was transferred to his new FRS Investment Plan account. His second election was irrevocable.

5. On July 1, 2011, amendments to the statutes governing the FRS, Chapter 121, became effective and required all current employees enrolled in the FRS to contribute 3% of their salary to their retirement account, irrespective of whether they were Pension Plan or Investment Plan participants.

6. On March 11, 2013, Petitioner submitted a Request for Intervention seeking to rescind his election into the FRS Investment Plan in light of the newly contributory nature of the FRS. This request was denied by SBA letter of March 19, 2013 from Daniel Beard. Petitioner then filed a Petition for Hearing asserting that the 3% contribution provision has the unconstitutional effect of putting parts of his salary at market risk, thus impermissibly altering his contract with the FRS.

7. Petitioner requests, in the alternative, that the legal defect he alleges be cured by allowing his reinstatement into the Pension Plan without qualification; that his total 3% contributions to date be deducted or included in the cost of buying back into the Pension Plan; or that all of the 3% of salary contributions to his FRS account be placed in a Pension Plan account, with all other funds and contributions remaining in his Investment Plan account.

## CONCLUSIONS OF LAW

8. Prior to the amendments at issue, at all times applicable here, both FRS plans were funded solely by employer contributions that were based on the member's salary and membership class. For Investment Plan accounts, those contributions are directed to individual member accounts, and the member allocates those contributions and account balances among various investment funds. *Compare* §§121.70 and 121.71, Fla.Stat. (2010) *with* §§121.70 and 121.71, Fla.Stat. (2011).

9. The amendments at issue now require, in addition to employer contributions, that the member contribute 3% of his salary to his individual member account. *See* §121.571 and §121.71, Fla.Stat. (2011). With Investment Plan participants, the member retains control at all times as to allocation of all contributions. *See* §121.4501(5), Fla.Stat. (2011).

10. Subject to vesting requirements, the member's Investment Plan retirement benefit is the value of the account at termination. *See* §121.4501(6) and (7), Fla.Stat. (2011). Unlike the Pension Plan, there is no fixed benefit level at retirement unless the member chooses to annuitize some or all of his account balance. When a fully vested Pension Plan-enrolled employee retires, he receives a monthly check for his lifetime. *See* §121.091 Fla.Stat. (2011). When a vested Investment Plan-enrolled employee retires, he receives a distribution, either total or partial, from his account. *See* §121.591, Fla.Stat. (2011).

11. Petitioner asserts that the Legislature's decision to change the FRS from a non-contributory plan to a contributory plan is unfair, as it requires him to put his own contributions at risk, when previously only the non-salary employer contributions to his account were at risk from market fluctuations[1]. The Florida Supreme Court has already declared the relevant amendments to the FRS constitutional and, in so doing, stated, "We recognize[d] the authority of the Legislature to amend a retirement plan prospectively, so long as any benefits tied to service performed prior to the amendment date are not lost or impaired." Scott v. Williams, 107 So.3d 379, 388-389 (Fla. 2013). The Court also stated:

> **We further hold that the 2011 amendments requiring a 3% employee contribution as of July 1, 2011**, and continuing thereafter, and the elimination of the COLA for service performed after that date **are prospective changes within the authority of the Legislature to make.** The preservation of rights statute does

[1] Petitioner asserts that he was unaware until the time of the hearing that he could direct his 3% contribution into the money market fund provided as a choice to Investment Plan members within the FRS.

not create binding contract rights for existing employees to future retirement benefits based upon the FRS plan that was in place prior to July 1, 2011.

Scott v. Williams, 107 So.3d at 389 (emphases added).

12. Petitioner has isolated a facet of the implementation of the 3% contribution provision that was not directly addressed in the Scott decision. For FRS participants who have made a prior, irrevocable second election into the Investment Plan, the consequences of that election have changed, albeit only to the extent of 3% of a member's salary. Prior to July 1, 2011, if an Investment Plan member had decided on that plan because only a certain proportion of his total compensation (salary and pension contributions) would be exposed to market risk, that proportion has changed, and arguably the basis for his decision has changed as well, but he cannot undo his decision, as the second election is irrevocable.

13. Petitioner's perception that he, and others in his situation, have been dealt with unfairly by the Legislature is understandable. But the issue he raises is ultimately controlled by the same principle articulated in Scott -- the Florida Supreme Court has held that there is no contract right to benefits established prior to retirement.

14. I note as well that even if Petitioner's argument, that the amendment at issue infringed upon one or more of his rights, constitutional or otherwise, had merit, it is not properly made in this forum as no agency has jurisdiction to make such a determination and is obligated to enforce the law. Jurisdiction to determine a statute void or otherwise unenforceable resides exclusively with the judicial branch of government. Palm Harbor Special Fire Control Dist. V. Kelly, 516 So.2d 249 (Fla. 1987).

15. At bottom, what Petitioner seeks is a way to be reinstated, either in whole or in part, to the Pension Plan. His ability to do this is controlled by the applicable statutes and rules,

as duly enacted and adopted, and as applied to all members of the FRS. Unfortunately, those statutes and rules provide no basis for the relief Petitioner seeks here.

## RECOMMENDATION

Having considered the law and the undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order denying the relief requested.

RESPECTFULLY SUBMITTED this 6th day of September, 2013.

Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
315 South Calhoun Street, Suite 830
Tallahassee, FL 32301-1872

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: 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. Any exceptions must be filed with the Agency Clerk of the State Board of Administration and served on opposing counsel at the addresses shown below. The SBA then will enter a Final Order which will set out the final agency decision in this case.

Filed via electronic delivery with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
Tina.joanos@sbafla.com
Daniel.Beard@sbafla.com
(850) 488-4406

This 6th day of September, 2013.

Copies furnished to:
Via U.S. Mail
Jeffrey Sapon
[redacted]
Petitioner

Via electronic delivery:
Brian A. Newman, Esquire
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Attorneys for Respondent

Anne Long
Attorney