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

SANDRA ARNOLDS-PATRON,

Petitioner,

vs. Case No. 2007-1057

STATE BOARD OF ADMINISTRATION,

Respondent.

## FINAL ORDER

On June 5, 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, Sandra Arnolds-Patron, and upon counsel for the Respondent. Petitioner filed additional items to be considered. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on August 20, 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 receive her employer contributions into the Pension Plan even though she has not vested in those funds is denied because Respondent has no mechanism to reduce the statutory requirement for vesting in the defined benefit plan.

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 200, 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 22nd day of August, 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 Sandra Arnolds-Patron, pro se, [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 22nd day of August, 2008.

Ruth L. Gokel

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

SANDRA ARNOLDS-PATRON,

Petitioner,

v. CASE NO.: 2007-1057

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

# RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer on March 13, 2008, in Tallahassee, Florida. The appearances were as follows:

## APPEARANCES

For Petitioner: Sandra R. Arnolds-Patron
[redacted]
Petitioner

For Respondent: Brian A. Newman, Esquire
Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301

## STATEMENT OF THE ISSUE

The issue is whether there is any mechanism by which Petitioner can now receive the moneys remaining in her Investment Plan account.

Exh. A

## PRELIMINARY STATEMENT

On November 14, 2007, Petitioner filed a Request for Intervention seeking reconsideration of the Respondent's determination that she was not fully vested in her FRS Investment Plan account and therefore could not receive a distribution of those amounts. That request was denied. Petitioner then filed a Petition for Hearing requesting the same relief. That petition was transmitted to the undersigned for informal hearing.

Petitioner attended the informal hearing in person and testified on her own behalf. Respondent presented the testimony of Dan Beard, Director of Policy, Risk Management and Compliance. Petitioner's Exhibit P-1 and Respondent's Exhibits R-1 through R-3 were admitted into evidence without objection.

A transcript of the informal hearing was made, filed with the agency and made available to the parties, who were invited to submit proposed recommended orders within 30 days after the transcript was filed. Respondent filed a proposed recommended order; Petitioner filed additional items she wished to have considered, including photographs and an article concerning special federal tax relief for certain hurricane victims.

## UNDISPUTED MATERIAL FACTS

1. The Petitioner was employed by the Polk County School Board (School Board), was enrolled in the Deferred Retirement Option Program (DROP), and retired in May 2004 with approximately 35 years of service. She received a DROP lump sum benefit and receives a monthly defined benefit check.

2. The School Board is a participating employer in the Florida Retirement System (FRS).

3. In August 2004, Petitioner again became employed as a teacher with the School Board and was given the opportunity to participate in the FRS again.

4. FRS eligible employees may elect to participate in either the FRS defined benefit program (the Pension Plan) or the Public Employee Optional Retirement Program, (the Investment Plan).

5. The Pension Plan has a six year vesting requirement; the Investment Plan has a one year vesting requirement.

6. FRS eligible employees are given an enrollment deadline of 4:00 p.m. ET on the last business day of the fifth month following the month of hire in which to enroll in the Investment Plan.

7. Failure to make a valid election into the Investment Plan prior to the deadline results in the employee defaulting into the Pension Plan.

8. The deadline for Petitioner to enroll in the Investment Plan was February 28, 2005.

9. The Petitioner did not elect to join the Investment Plan during this initial six month enrollment period and therefore defaulted into the Pension Plan

10. FRS participants have a one-time second election which allows them to switch plans. Petitioner used this second election on May 31, 2005 to join the Investment Plan.

11. Accordingly, on June 30, 2005, the present value of her Pension Plan benefit was transferred to her Investment Plan account.

12. On July 1, 2007, Petitioner terminated her employment with the School Board.

13. She had accumulated 3.0 years of creditable service with the FRS during her second tenure of employment with the School Board.

14. Petitioner subsequently learned that she was not fully vested in the amount transferred from her Pension Plan account to her Investment Plan account because she had not earned 6 years of creditable service during her second term of employment.

15. At the time of hearing, Petitioner had approximately $[redacted] in a suspense account, representing the unvested portion of her Investment Plan account (the value of her transferred Pension Plan account for amounts from August 2004 to June 2005).

16. The vested portion of Petitioner's Investment Plan account at the end of her second term of employment was $[redacted] (the value of accumulations in her account for July, 2005 through July, 2007).

17. If she returns to FRS-covered employment before July 1, 2012 and works another three years, Petitioner will be fully vested in her Investment Plan account. If, however, she fails to return to employment within that time frame or takes a distribution of her vested portion, the unvested portion will be forfeited.

## CONCLUSIONS OF LAW

18. The statutory section governing initial elections into the Investment Plan states, in pertinent part:

> 121.4501. Public Employee Optional Retirement Program
>
> (4) Participation; enrollment.--
> ...
>
> (b)...
> 2. With respect to employees who become eligible to participate in the Public Employee Optional Retirement Program by reason of employment in a regularly established position with a district school board employer commencing after July 1, 2002:

a. **Any such employee shall, by default, be enrolled in the defined benefit retirement program of the Florida Retirement System at the commencement of employment, and may, by the last business day of the 5th month following the employee's month of hire, elect to participate in the Public Employee Optional Retirement Program.** The employee's election must be made in writing or by electronic means and must be filed with the third-party administrator. The election to participate in the optional program is irrevocable, except as provided in paragraph (e).

b. **If the employee files such election within the prescribed time period, enrollment in the optional program shall be effective on the first day of employment.** The employer retirement contributions paid through the month of the employee plan change shall be transferred to the optional program, and, effective the first day of the next month, the employer shall pay the applicable contributions based on the employee membership class in the optional program.

c. **Any such employee who fails to elect to participate in the Public Employee Optional Retirement Program within the prescribed time period is deemed to have elected to retain membership in the defined benefit program** of the Florida Retirement System, and the employee's option to elect to participate in the optional program is forfeited.

3. For purposes of this paragraph, "district school board employer" means any district school board that participates in the Florida Retirement System for the benefit of certain employees, or a charter school or charter technical career center that participates in the Florida Retirement System as provided in s. 121.051(2)(d).

§121.4501(4), Fla.Stat. (emphasis added).

19. In accordance with the above statute, the initial election period closed to Petitioner on February 28, 2005. Because she did not timely file an initial election to join the Investment Plan, she defaulted into the Pension Plan.

20. Petitioner did ultimately use her second election to transfer to the Investment Plan from the Pension Plan, but all benefits accrued prior to that second election were unaffected in terms of vesting, pursuant to Section 121.4501(6)(b)(1), Florida Statutes. That provision states, in pertinent part:

> A participant shall be vested in the amount transferred from the defined benefit program, plus interest and earnings thereon and less administrative charges and investment fees, upon meeting the service requirements for the participant's membership class as set forth in s. 121.021(29).

§ 121.4501(6)(b)1., Fla.Stat.

21. Section 121.021(29), Florida Statutes defines the applicable service requirements for a regular class FRS member as "6 or more years of creditable service." Because the Petitioner had less than six years creditable service when she terminated employment in 2007, she had not met this service requirement and was not vested in the amounts transferred from her Pension Plan account to her Investment Plan account. The benefits at issue are subject to the six year vesting requirement because they accrued while Petitioner was in the Pension Plan.

22. As to these unvested amounts, Section 121.4501(6)(b)2. and (c), Florida Statutes state, respectively:

> **(6) Vesting requirements.--**
> ...
> (b) 2. If the participant terminates employment prior to satisfying the vesting requirements, the nonvested accumulation shall be transferred from the participant's accounts to the state board for deposit and investment by the board in the suspense account of the Public Employee Optional Retirement Program Trust Fund of the board. If the terminated participant is reemployed as an eligible employee within 5 years, the state board shall transfer to the participant's account any amount of the moneys previously transferred from the participant's accounts to the suspense account of the Public Employee Optional Retirement Program Trust Fund, plus the actual earnings on such amount while in the suspense account.
>
> (c) Any nonvested accumulations transferred from a participant's account to the suspense account shall be forfeited by the participant if the participant is not reemployed as an eligible employee within 5 years after termination.

§§ 121.4501(6)(b)2. and (c), Fla.Stat. The above statutes provide for the unvested amounts to be held in a suspense account, and invested. If Petitioner does not return to active FRS employment by July 2012 (five years after termination), her unvested account balance will be subject to forfeiture.

23. Had Petitioner filed an initial election within the six month window afforded by statute, she would be fully vested because Section §121.4501(4)(b)2.b., Florida Statutes provides for retroactive effect to the employee's first day of employment.

24. Petitioner asserts that Respondent should view her two tenures of employment with the School Board in the aggregate, as in excess of 38 years of service. Subsections 121.091(13)(g) and (h), Florida Statutes govern renewed membership for those, like Petitioner, who have participated in and received the benefits of the DROP program:

> (g) *Renewed membership.*--DROP participants shall not be eligible for renewed membership in the Florida Retirement System under ss. 121.053 and 121.122 until termination of employment is effectuated as provided in s. 121.021(39)(b).
>
> (h) *Employment limitation after DROP participation.*--Upon satisfying the definition of termination of employment as provided in s. 121.021(39)(b), DROP participants shall be subject to such reemployment limitations as other retirees. Reemployment restrictions applicable to retirees as provided in subsection (9) shall not apply to DROP participants until their employment and participation in the DROP are terminated.

§ 121.091(13), Fla.Stat. Under the above statutes, Petitioner could not begin accruing another retirement benefit under the FRS until she terminated her previous employment. Termination for DROP participants also is prescribed by statute:

25. Section 121.021(39), Florida Statutes states:

> "Termination" for a member electing to participate under the Deferred Retirement Option Program occurs when the Deferred Retirement Option Program participant ceases all employment relationships with employers under this system in accordance with s. 121.091(13), but in the event the Deferred Retirement Option Program participant should be employed by any such employer within the next calendar month, termination will be deemed not to have occurred, except as provided in s. 121.091(13)(b)4.c. A leave of absence shall constitute a continuation of the employment relationship.

§ 121.021(39)(b), Fla.Stat.

26. Because the Petitioner retired from the School Board in May 2004 and was not reemployed until August 2004, she satisfied the definition of "termination" under the applicable statute.

27. Once an FRS member has terminated employment and received retirement benefits (in this case DROP benefits), that member is considered a "retiree." See § 121.021(60), Fla.Stat.

28. Once a "retiree" becomes reemployed by an FRS-participating employer, that employee is considered a "renewed" member in the FRS. Section 121.122, Florida Statutes states, in pertinent part:

> [E]ffective 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 the following conditions:
>
> (1)(a) **Such member shall resatisfy the age and service requirements as provided in this chapter for initial membership under the system**, unless such member elects to participate in the Senior Management Service Optional Annuity Program in lieu of the Senior Management Service Class, as provided in s. 121.055(6).

§ 121.122, Fla.Stat. (emphasis added).

29. Taken together, the statutes applicable to employees in Petitioner's circumstance require that a retired and renewed member must re-satisfy the service requirements for initial membership in the FRS.

30. Agencies such as the State Board of Administration have only those powers conferred on them by statute. See e.g. East Cent. Regional Wastewater Facilities Operation Bd. v. City WPB, 659 So. 2d 402,404 (Fla. 4th DCA 1995); Gardinier Inc. v. Florida Dept. Pollution Control, 300 So. 2d 75,76 (Fla 1st DCA 1974). There does not appear to be any statute which would allow the SBA to

make a special concession in Petitioner's case, despite her ample documentation of hardship and of reasons for not meeting the applicable deadline for making an initial election into the Investment Plan.

31. The SBA is not authorized to depart from the requirements of Chapter 121, Florida Statutes when exercising its jurisdiction. See Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). The Respondent lacks statutory authority to grant the Petitioner's request.

## RECOMMENDATION

Having considered the law and the undisputed facts of record, I can find no basis on which the relief requested by Petitioner can be granted. I therefore recommend that the State Board of Administration issue a final order denying the relief requested.

RESPECTFULLY SUBMITTED this 6th day of August, 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 6th day of August, 2008.

Copies furnished to:

Sandra R. Arnolds-Patron
[redacted]
Petitioner

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