

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

DONALD GILBERT,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2009-1548
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
_____)	

FINAL ORDER

On November 2, 2009, 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, Donald Gilbert, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on November 17, 2009. 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

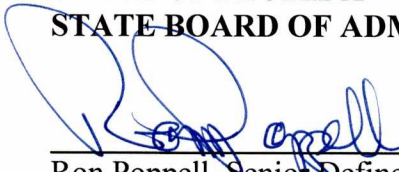
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that the State Board of Administration pay a federal law levy from Petitioner's Investment Plan account is denied.

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 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 19th day of November, 2009, 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

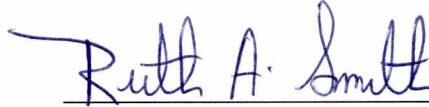
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Clerk TINA JOANDE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Donald Gilbert, 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 19th day of November, 2009.



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

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

DONALD GILBERT,

CASE NO. 2009-1548

Petitioner,

v.

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned presiding officer on July 27, 2009, in Tallahassee, Florida at the offices of the State Board of Administration (SBA). The appearances were as follows:

APPEARANCES

For Petitioner:

Donald Gilbert


For Respondent:

Brian A. Newman, 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 an Internal Revenue Service (IRS) Notice of Levy issued to Respondent on Petitioner's Investment Plan account should be satisfied.

EXHIBIT A

*rec'd 11/3/09
agency clerk
JQ*

PRELIMINARY STATEMENT

On May 26, 2009, Respondent received a Request for Intervention from Petitioner contesting the SBA's failure to pay a federal tax levy from his Florida Retirement System (FRS) Investment Plan account. Respondent investigated this request and denied it by letter of May 28, 2009. This informal hearing ensued after Petitioner filed a Petition for Hearing raising the same issue. Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented testimony from Petitioner and Daniel Beard, SBA Director of Policy, Risk Management & Compliance, Office of Defined Contribution Programs. Respondent offered eighteen exhibits which were received in evidence without objection. A transcript of the hearing was filed with the agency and made available 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.

UNDISPUTED MATERIAL FACTS

1. Petitioner is a member of the FRS Investment Plan.
2. Petitioner is currently employed by the Broward County Sheriff's Office. He has worked there for over 20 years and has not had any breaks in service during that time.
3. In February of 2009, Respondent received a Notice of Levy on Petitioner's account from the Internal Revenue Service in the amount of \$31,138.94.
4. After receiving the Notice of Tax Levy, Dan Beard, SBA Director of Policy, Risk Management & Compliance, Office of Defined Benefit Programs, called the Internal Revenue Service and advised the IRS agent that Petitioner was actively employed and therefore not currently eligible to receive a distribution from his Investment Plan account. The IRS agent told Mr. Beard

that because the money could not be removed by Petitioner until he retired, the Notice of Levy should not be paid at this time. The IRS agent rejected Mr. Beard's suggestion that a "hold" be placed on the account pending the Petitioner's retirement. The IRS agent said another levy would be issued if the IRS desired to attach Petitioner's retirement benefits at the time of his retirement.

5. Petitioner asserts that Respondent should pay the IRS levy from the monies in his Investment Plan account. He points out that the Summary Plan Description for the Investment Plan states that Investment Plan accounts are not subject to assignment, execution, attachment, or any legal process, except for a Qualified Domestic Relations Order (QDRO), income deduction orders as provided in Section 61.1301, Florida Statutes, and federal income tax levies. He notes that a QDRO in favor of his former wife was satisfied by disbursement from his Investment Plan account and queries why the same treatment would not apply to an IRS levy, which is mentioned in the same sentence in the Summary Plan Description as an exception to the general rule that Investment Plan accounts are not subject to legal process.

CONCLUSIONS OF LAW

6. Section 121.4501(1), Florida Statutes, states that the Public Employee Optional Retirement Program (the Investment Plan) is to be in compliance with Section 401(a) of the Internal Revenue Code (IRC) and its related regulations. By qualifying under Section 401(a), the Plan will have favorable tax status. If a plan loses its qualified status, it can produce severe adverse tax consequences for participants. For example, a plan participant could be subject to income tax on deferrals even if the participant employee had no current right to receive the deferrals. Compliance with IRC Section 401(a) is not just required by §121.4504(1), it is critical to the Investment Plan's viability.

7. Under IRC Section 401(a)(13), a retirement plan will not be a qualified plan unless the benefits provided under the plan may not be assigned, alienated, or subject to garnishment, attachment, levy, or any legal process. Thus, a plan is required to preclude voluntary and involuntary assignments in order to remain a qualified plan.

8. But there are allowable exceptions to this so-called anti-alienation provision. The exceptions may include, generally, qualified domestic relations orders and federal tax levies and judgments. See IRC Section 401(a)(13)(a) and (B), and § 121.591(4), Fla. Stat.

9. Federal law does not require state governmental plans to recognize QDRO's, but Florida has decided to do so pursuant to Section 121.591, Florida Statutes. Once a QDRO is recognized by a state plan, however, there are some federal provisions related to QDRO's that must be considered. A QDRO must be a court order and made pursuant to state domestic relations law. It cannot be a private agreement between the parties. IRC Section 414(p)(1).

10. Under IRC Section 414(p)(10) and Treasury Reg. section 1.401(a)-13(g)(3), a plan will still meet the requirements for qualification under section 401(a) even if it provides payments pursuant to a QDRO to an alternate payee (e.g., a former spouse) prior to the time the plan can make payments to the plan participant.

11. The public policy behind allowing QDROs to be an exception to the anti-alienation provision appears to be a desire to prevent retirement plan participants from evading family support obligations that could not be met by other means.

12. IRS tax levies also are an exception to the anti-alienation provision. Pursuant to Treasury Reg. Section 1.401(a)-13(d)(1), plan benefits are subject to attachment by the IRS. But Treasury Reg. Section 301.6331-1(a) provides that these levies extend only to property rights and

obligations that exist at the time of the levy. Thus, while the IRS may have a right to levy, that does not mean that it will automatically pursue a particular asset; the issue that must be taken into account is whether the participant has a present entitlement to any monies.

13. The current version of the IRS Manual, Chapter 5.11, Section 6.2 directs how levies on funds in pension or retirement plans are to be executed. The manual at (7) states: “The taxpayer may be able to withdraw money in a lump sum from a (pension) plan. If the taxpayer has the right to do so, a levy can reach that right. However, remember that a levy only reaches the taxpayer’s present rights.” (Emphasis supplied). In this case, Petitioner does not have a present right to withdraw funds, in a lump sum or otherwise, from his account, because he is not retired.

14. IRS Chief Counsel’s memo, ILM 200102021, reaches the same conclusion and states that the IRS cannot enforce a levy on a retirement plan benefit until payments are due under the plan.

15. Petitioner has not retired and does not have a present right to access his Investment Plan assets. Under applicable law and policy, and consistent with the directions of the authorized IRS agent, the IRS tax levy issued in February of 2009 is not currently enforceable as to Petitioner’s Investment Plan assets.

16. It is understandable that Petitioner would have construed the language of the Summary Plan Description, which tracks the language of section 121.591(4), Florida Statutes, to mean that the IRS levy would be treated in the same manner as the QDRO issued in his divorce case, but this does not mean that the plan description of this complex area of law and regulation is misleading. The statute and plan description both state that benefits payable are not subject to execution except for QDRO’s, certain income deduction orders and federal income tax levies

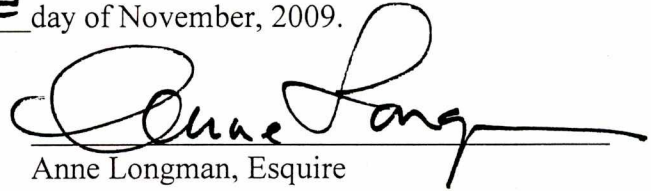
(Summary Plan Description at 34). In this case the Petitioner's benefits were not currently payable. The summary also specifically states that Respondent may be required to follow the provisions of a QDRO, thus implying that, in the case of a QDRO, a levy may be recognized even if there is no current participant right to distributions from the account.

I note also that the action complained of by Petitioner is not an action of the SBA, but an action of the IRS, taken in accordance with its own controlling statutes and regulations, over which this tribunal has no jurisdiction.

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 2d day of November, 2009.



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 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 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 2d day of November, 2009.

Copies furnished to:

[REDACTED]

Petitioner

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



Attorney

Joanos_Tina

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Sent: Friday, November 20, 2009 10:25 AM
To: Joanos_Tina
Subject: UPS Delivery Notification, Tracking Number [REDACTED]



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