STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

AMY BETH CRANDALL, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	Case No. 2009-1561

FINAL ORDER

On November 19, 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, Amy Beth Crandall, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Respondent timely filed exceptions on December 4, 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.

RULINGS ON RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER

Respondent's Exception 1: Exception to Conclusion of Law 13

Respondent asserts that paragraph 13 of the Recommended Order is incorrect when it states that a former participant who has "taken" a mandatory distribution of a de miminus amount is not deemed to be a retiree under section 121.4501(2)(j), Florida

Statutes. Respondent argues that the use of the term "taken" in such paragraph is incorrect, as such term implies that a participant has an option as to whether or not to receive the mandatory distribution.

The definitions of the word "mandatory" as set forth in Black's Law Dictionary, 6th Edition, include the words "imperative," and "obligatory." Based on the plain meaning of the term "mandatory," it is the case that a participant does not have an option as to the receipt of a mandatory distribution. The participant can only "receive" a mandatory distribution once such distribution is authorized by the State Board of Administration ("SBA") or Department of Management Services ("DMS").

Further, the Investment Plan is intended to be a qualified retirement plan under Internal Revenue Code ("IRC") Section 401(a) and the regulations thereunder. See Section 121.4501(1), Florida Statutes. Thus, provisions under IRC Section 401(a) must be considered in the administration of the Investment Plan. A "mandatory distribution" from a qualified retirement plan is a distribution from the plan that is made without the participant's consent and that is made to a participant before the participant attains the later of age 62 or normal retirement age. See Internal Revenue Bulletin: 2005-3, January 18, 2005, Q-2; IRC Section 401(a)(31)(B); IRC Regulation Section 1.401(a)(31)-1. Plans often contain these mandatory distributions to avoid administering small accounts of terminated employees. *See, e.g.*, Lee Tucker, *New Requirement for Automatic Rollovers of Small Cash-Outs from Qualified Plan*, 2006.

As such, Respondent's Exception 1 hereby is accepted, and the word "taken" in paragraph 13 hereby is replaced with the word "received."

Respondent's Exception 2: Exception to Conclusion of Law 16

Respondent objects to Conclusion of law 16 to the extent it implies that a "mandatory distribution" is a distribution that the SBA or DMS is required by law to make to a plan participant. The presiding officer states in paragraph 16 that it is "less clear" what constitutes a mandatory distribution, and then goes on to state that section 121.591 does not mandate the SBA to cash out a participant's account.

Respondent argues that "mandatory distribution" does not connote a distribution that the SBA must make to a participant but rather is a distribution that a participant is required to receive after such distribution is authorized by the SBA or DMS.

Under the *in pari materia* principle of statutory construction, when two statutes relate to the same thing or to the same subject or object, the statutes are construed together so as to harmonize both statutes and give effect to the Legislature's intent. See Maggio v. Fla. Dept. of Labor and Employment Security, 899 So.2d 1074 (Fla. 2005); McGhee v. Volusia County, 679 So.2d 729, 730 n. 1 (Fla.1996) (the doctrine of *in pari materia* requires courts to construe related statutes together so that they are harmonized).

Clearly, section 121.4501(2)(j) and 121.591, Florida Statutes, refer to the same object- retirement plan benefits. Construing these two provisions in harmony, it is clear that the "cash-out" of a de minimus amount referred to in section 121.591, Florida Statues is the same as the "mandatory distribution" of a de minimus amount referred to in section 121.4501(2)(j), Florida Statues. As noted above under the discussion under Respondent's Exception 1, the "mandatory distribution" is not one the SBA (or DMS) is required to make, but rather is a distribution made without the participant's consent.

As noted above, provisions of the IRC are applicable to qualified plans such as the Investment Plan. IRC Sections 401(a)(31) and 411(a)(11) permit (but do not require) plans that are qualified under IRC Section 401(a) to include provisions allowing for the immediate distribution of a separating participant's benefit without such participant's consent where the present value of the nonforfeitable accrued benefit is $5,000 or less. This $5,000 also is referred to as the "cash-out" limit. See IRC Regulation Section 1.411(a)(11)(c)(3). As noted above under the discussion under Respondent's Exception 1, such distributions are defined as "mandatory distributions" because they are made to participants without the participants' consent. Section 121.591, Florida Statutes, which allows the SBA to cash out a de minimus account of not more than $5,000, is consistent with IRC Sections 401(a)(31) and 411(a)(11).

As noted in paragraph 17 of the Findings of Fact in the Recommended Order, the Investment Plan Summary Plan Description indicates that the mandatory de minimus distribution amount for the Investment Plan is $1,000, which certainly is within the authorized "cash out" amount of not more than $5,000 set forth under section 121.591, Florida Statutes.

Respondent notes that Petitioner's situation does not involve a "mandatory distribution," since it was Petitioner who submitted a request that her entire Investment Plan account be paid to her after she terminated employment. For reasons noted under the response to Respondent's Exception 1, a "mandatory distribution" was not made in Petitioner's situation. She took a distribution of her own volition. No distribution was made to her without her consent.

Respondent further argues that any provisions regarding "mandatory distributions" could not be applicable to the instant case, since if Petitioner had not elected to take a distribution after she terminated employment, her Investment Plan account would not have been distributed to her. Respondent notes that Petitioner's account could not be eligible for a "mandatory distribution," because, under section 121.591, Florida Statutes, a participant must be terminated for at least 6 months before a mandatory distribution may be made. In Petitioner's situation, she received her distribution about five (5) months after her date of termination. Thus, Petitioner's account had a zero balance at the time she had been terminated six (6) months, so there would have been nothing to distribute to Petitioner at the six month required time period. Further, as noted in the Summary Plan Description, only Investment Plan accounts of $1,000 or less are subject to mandatory distribution. Petitioner's account, which had a balance of [redacted] exceeded the $1,000 threshold by [redacted] Thus, if Petitioner had not taken the distribution in September 2006, her Investment Plan account would have continued, and would have been available for additional employer contributions once she returned to FRS-covered employment. Hence, this clearly is a case that does not involve mandatory distributions. As such, any consideration as to whether or not rules exist concerning mandatory distributions is irrelevant to the instant case.

Accordingly, Respondent's Exception 2 hereby is accepted and paragraph 16 of the Recommended Order is rejected in toto.

Respondent's Exception 3: Exception to Conclusion of Law 17

Respondent objects to the portion of the conclusion that states that the Summary Plan Description for the Investment Plan does not comport with section 121.591, Florida Statutes, as to the dollar amount for a de minimus distribution, but does to the extent both the statute and Summary Plan description mention an authorized action that the SBA can take, rather than a mandatory action the SBA is required to take.

As noted previously, while the SBA is authorized by statute to make mandatory distributions of de minimus Investment Plan Accounts of $5,000 or less to a plan participant, it has chosen to reduce the threshold to $1,000 or less. This $1,000 threshold is well within the $5,000 or less limit established by the statute. Thus, the Summary Plan Description clearly comports with section 121.591, Florida Statutes as to the dollar amount of a mandatory distribution.

Further, both the Summary Plan Description and section 121.591, Florida Statutes clearly do speak to mandatory distributions. As stated previously, the term "mandatory distribution" does not mean a distribution that the plan sponsor is required to make to a plan participant. Instead, it refers to a distribution that is made to a plan participant, without that participant's consent. Section 121.591 speaks to the "cash out" of a de minimus account, which as noted previously, is a mandatory distribution from that account. Similarly, the Summary Plan Description speaks of an "automatic distribution," which is one which the participant cannot refuse to accept- i.e., a mandatory distribution.

Paragraph 17 mischaracterizes what constitutes a "mandatory distribution" for purposes of section 121.591, Florida Statutes. Accordingly, Respondent's Exception 3

hereby is accepted and paragraph 17 of the Recommended Order hereby is rejected in toto.

Respondent's Exception 4: Exception to Conclusion of Law 21

Respondent objects to the conclusion that the applicable statutes must be construed to deem Petitioner's request to take a full distribution of her Investment Plan Account in the amount of [redacted] as a "mandatory" distribution to Petitioner because the SBA was required to pay the amount to Petitioner once she requested the distribution. It is clear from the discussion under the responses to Respondent's Exceptions 1 through 3 above, Petitioner's distribution cannot be deemed to be a "mandatory" distribution, because such distribution was made at the Petitioner's request, with Petitioner's full consent. As noted previously, a "mandatory distribution" is a distribution made without a plan participant's consent. Thus, the conclusion in paragraph 21 that Petitioner's distribution was "mandatory" is incorrect as a matter of law. As such, Petitioner is considered a "retiree" for purposes of section 121.4501, Florida Statutes because she terminated employment and voluntarily took a distribution from her Investment Plan.

Sections 121.021(39)(a), 121.091(13), 121.122, 121.591 and 121.4501(2)(j), Florida Statutes, when construed together, plainly state that a retiree is not eligible to receive special risk, DROP and disability benefits if that retiree returns to FRS-covered employment. The plain meaning of these statutory sections do not support the presiding officer's conclusion regarding the legislative intent of such sections and should be rejected. *See* Maggio v. Fla. Dept. of Labor and Employment Security, 899 So.2d 1074 (Fla. 2005).

While this may produce an unfortunate result for Petitioner, Petitioner cannot complain she was not made aware of the consequences of her taking the distribution on other potential benefits if she ever retuned to FRS-covered employment, as Finding of Fact 4 demonstrates the consequences of taking her Investment Plan account were explained to Petitioner prior to her taking of the distribution. There is nothing in the Record to suggest Petitioner was mislead by the SBA, or anyone acting on its behalf, as to the consequences of her decision, or that Petitioner was prevented from asking further questions if she was unclear as to the potential consequences of her action. For whatever reason, Petitioner chose to take the money out of her Investment Plan account, rather than allowing it to remain therein for her retirement.

The SBA is not authorized to depart from the requirements of Chapter 121, Florida Statutes, when exercising its jurisdiction. Balezentis v. Department of Management Services, 2005 WL 517476 (Fla. Div. Admin. Hrgs.) There are no provisions that allow the SBA to ignore the statutory provisions that are applicable to Petitioner's situation, and which clearly find Petitioner to be a "retiree."

Accordingly, Respondent's Exception 4 hereby is accepted, and paragraph 21 of the Recommended Order hereby is rejected in toto.

Respondent's Exception 5: Exception to Conclusion of Law 22

Respondent objects to the presiding officer's conclusion in paragraph 22 that the distribution voluntarily requested by Petitioner must be deemed a mandatory distribution of a de minimus account, and that Petitioner, therefore, is not a "retiree."

As noted previously above, the distribution made to Petitioner clearly was not a mandatory distribution. The distribution was made at Petitioner's direction and with Petitioner's full consent.

There is no authority to deem Petitioner's distribution as mandatory. A mandatory distribution by statute can only be made only without the participant's consent. Similarly, by statute, a mandatory distribution can only be made once a participant has been terminated for six (6) months. Here, Petitioner received her distribution after she had been terminated for five (5) months. Additionally, the SBA's Summary Plan Description states that a mandatory distribution can only occur if the Investment Plan account is $1,000 or less (within the $5,000 or less threshold set forth by statute). Here, Petitioner's account was more than $1,000. Thus, had Petitioner not taken the voluntary distribution after she terminated employment, she would not, and could not validly, have received a mandatory distribution. The SBA is without authority to deem Petitioner's Investment Plan account as one to which a mandatory distribution would be applicable, because the applicable statutory provisions require otherwise.

Accordingly, Respondent's Exception 5 hereby is accepted and paragraph 22 of the Recommended Order hereby is rejected in toto.

ORDERED

The Recommended Order (Exhibit A), subject to the modifications as stated above under the Rulings on Exceptions, is adopted. The Petitioner's request that the State Board of Administration change her status as a "retiree" 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 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 15th day of January, 2010, 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 Amy Beth Crandall, 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 15th day of January, 2010.

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

AMY BETH CRANDALL,

Petitioner,

vs. CASE NO. 2009-1561

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned presiding officer on August 10, 2009, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Amy Beth Crandall
[redacted]
Petitioner

For Respondent: 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 Petitioner was correctly deemed by Respondent State Board of Administration (SBA) to be a retiree under the Florida Retirement System (FRS).

PRELIMINARY STATEMENT

Petitioner made inquiries to elected officials in or around June, 2009 concerning her having been given retiree status in the FRS and the effects of this status on her future benefits, and seeking to have her status changed. These inquiries were forwarded to Respondent for

EXHIBIT A

investigation and response, and the requested change of status was denied by letter of June 17, 2009. Petitioner then filed a Petition for Hearing requesting the same relief, and this hearing ensued.

Petitioner attended the informal hearing in person and testified in her own behalf. Respondent presented the testimony of Daniel Beard, SBA Director of Policy, Risk Management and Compliance. Respondent's Exhibits R-1 through R-4 were admitted into evidence. A transcript of the informal hearing was 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 made no further filings.

UNDISPUTED MATERIAL FACTS

1. Petitioner was employed beginning in 2005 by the Veterans Administration in Port Charlotte, Florida as a recreation assistant. She was a state employee in this position, and was eligible for participation in the FRS.

2. On July 25, 2005, during her initial election window, Petitioner elected to participate in the FRS Investment Plan (formally known as the Public Employee Optional Retirement Program) rather than the Pension Plan.

3. Petitioner resigned her position on April 13, 2006, and on September 5, 2006, took a distribution of her entire FRS Investment Plan account in the amount of $[redacted].

4. Prior to taking this distribution, Petitioner called the MyFRS Guidance Line and spoke to a telephone counselor. During a general discussion relating to obtaining her Investment Plan monies, she was advised that doing so would make her ineligible for participation in the Deferred Retirement Option Program (DROP), for disability retirement benefits and for classification as a special risk employee if she ever returned to FRS-covered employment, as she

would be considered a reemployed retiree. Petitioner does not deny having this conversation but states that the relevant information was lumped in with a discussion of taxes that would be due and that she did not understand the consequences to any future FRS employment.

5. Petitioner returned to FRS-covered employment at 25 years of age when she began working for the Highlands County Board of County Commissioners in its Emergency Medical Services department in March, 2009. She received a letter from the Highlands County human resource department informing her that the Florida Department of Management Services considered her to be a retiree who had been rehired, based on her having cashed out her previous Investment Plan account.

6. Petitioner is a young woman now working as an emergency medical technician, and is concerned that although she may be in this position for as much as 30 more years, she cannot receive special risk, DROP and disability benefits to which she would otherwise be entitled. She has offered to repay the money she received, with interest, and asks that she not be deemed a retiree.

CONCLUSIONS OF LAW

7. 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. (Emphasis added.)

8. Section 121.591, Florida Statutes provides in relevant part:

> Benefits may not be paid under this section unless the member has terminated employment as provided in § 121.021(39)(a).....

Section 121.021 (39)(a), Florida Statutes, defines termination:

'Termination' occurs ... when a member ceases all employment relationships with employers under this system....

Section 212.591(1)(c), states that under the Public Employee Optional Retirement Program [the Investment Plan], normal benefits are to be paid:

(c) Upon receipt by the third-party administrator of a properly executed application for distribution of benefits, the total accumulated benefit shall be payable to the participant...

9. By operation of the above-referenced statutes, when Petitioner terminated her employment, submitted a proper application for distribution of her Investment Plan account and received that distribution, her FRS status converted to retiree unless the distribution was a mandatory cash out of a de minimis account under 121.4501 (2)(j), Florida Statutes.

10. Upon her reemployment with an FRS participating employer, she became a renewed member and subject to Section 121.122, Florida Statutes. That section states, in pertinent part:

121.122. 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 ... subject to the following conditions:

(1)...

(b) Such member shall not be entitled to disability benefits as provided in s. 121.091(4).

11. In addition, Section 121.091(13), Florida Statutes prohibits renewed FRS members from participating in DROP.

12. Taken together, the above- referenced statutes make a rehired retiree ineligible for Special Risk Service, DROP participation or disability retirement benefits.

13. There is one exception to the general rule: under section 121.4501(2)(j), Florida Statutes, a former participant who has terminated employment and taken a mandatory distribution of a de minimis account is not deemed to be a retiree.

14. Section 121.591, Florida Statutes, provides in pertinent part:

> The State Board of Administration and the Department of Management Services, as appropriate, are authorized to cash out a de minimis account of a participant who has been terminated from Florida Retirement System covered employment for a minimum of 6 calendar months. A de minimis account is an account containing employer contributions and accumulated earnings of not more than $5,000 made under the provisions of this chapter.

§ 121.591, Fla.Stat.

15. By my reading, the above section clearly and simply defines a de minimis account to be one which contains less than $5,000. There is no dispute that Petitioner's account was less than $5,000.

16. It is less clear what constitutes a mandatory distribution, as this term is not defined by statute or rule. Section 121.591, Florida Statutes authorizes Respondent to cash out a participant's account if it is less than $5,000 and if the participant has been terminated from FRS employment for six months, but it does not mandate this action. This same section states that the SBA "shall adopt rules establishing procedures for application for retirement benefits...." There appear to be no SBA rules that provide a definition of a mandatory distribution or detail how such distributions are paid.

17. Likewise, there is no mention in the Summary Plan Description of a mandatory distribution. The Investment Plan Summary Plan Description states at page 23:

> If your account balance at termination is a de minimis amount as determined by the SBA, it could be subject to an automatic distribution. **A de minimis amount has been set for accounts with vested balances of $1,000 or less.** No distribution will be made, however, until you have been terminated from all employment with FRS-covered employers for at least six calendar months. *** If

you return to FRS-covered employment after receiving a de minimis distribution, you are not considered a reemployed retiree and will not be subject to the limitations applicable to such employees. (Emphasis in original.)

So in the Plan Description, a de minimis account (stated to be less than $1,000) is described as one which "could be subject to automatic distribution." Although this summary does not square with the controlling statutes as to the amount of a de minimus account, it is consistent with section 121.591 in speaking of an automatic distribution as an action which Respondent is authorized to take, rather than one which is mandatory, and so does not help to define that term as it is used in section 121.4501(2)(j).

18. Respondent asserts that under Section 121.4501(2)(j), Florida Statutes, the distribution at issue was not a "mandatory distribution" because Petitioner requested it and because Petitioner was not a participant who had been terminated from FRS-covered employment for a minimum of six calendar months when she cashed out her account.

19. Petitioner counters that her account clearly met the statutory de minimis definition, that it apparently could have been cashed out by Respondent in any event once six months had passed, and that penalizing her for requesting and receiving this money approximately a month and a half before it otherwise could have been paid to her elevates form over substance and unduly penalizes her. I note as well that once Petitioner waited three months after termination and requested her account be disbursed to her, it was mandatory that Respondent distribute the account. In addition, if Petitioner had violated the re-employment time frames, she would have been deemed to have received an invalid distribution, and could have repaid it and escaped the consequences she is now bearing.

20. Respondent SBA must follow the statutes it is charged with administering, but pension statutes are to be construed liberally in favor of the intended recipients. Bd. of Trustees,

etc. Firefighters' Pension Plan v. Town of Lake Park, 966 So.2d 448 (Fla. 4th DCA 2007), citing Greene v. Gray, 87 So.2d 504, 507 (Fla. 1956).

21. In this case, the distribution Petitioner took was de minimis as defined by statute and was mandatory in that it could have been paid to her in any event. The legislature could not have intended that a distribution statutorily defined as de minimis, that may be cashed out by operation of law, becomes an act that, because requested by the participant, instead works to forever foreclose that participant from receiving the enhanced benefits that accompany a high risk job.

22. Under the circumstances of this case, and given that Respondent apparently has not yet adopted a rule setting out its current procedures on de minimis distributions, I conclude that the governing statutes must be construed to deem Petitioner's cash out of her Investment Plan account as a mandatory distribution of a de minimis account and therefore an exception to the general rule that would make her a retiree.

RECOMMENDATION

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

RESPECTFULLY SUBMITTED this 19th 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 19th day of November, 2009.

Copies furnished to:

[redacted]
Petitioner

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

Anne Long
Attorney

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

AMY BETH CRANDALL,

Petitioner,

vs. CASE NO. 2009-1561

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER

Respondent, STATE BOARD OF ADMINISTRATION ("SBA"), submits the following exceptions to the conclusions of law of the Recommended Order entered November 19, 2009, and says:

Exceptions to Conclusions of Law

1. **Respondent excepts to the conclusion of law on page 5 at paragraph 13, to wit:**

> There is one exception to the general rule: under section 121.4501(2)(j), Florida Statutes, a former participant who has terminated employment and taken a mandatory distribution of a de minimis account is not deemed to be a retiree.

The conclusion that one can "take" a mandatory distribution is incorrect as a matter of law. Only the State Board of Administration or the Department of Management Services, as appropriate, are authorized to effectuate a mandatory distribution. § 121.591, Fla.Stat. A participant is not authorized to opt between a voluntary or mandatory distribution or otherwise "take" a mandatory distribution; rather, a participant prohibit a mandatory distribution after either the SBA or the DMS has authorized same.

2. Respondent excepts to the conclusion of law on page 5 at paragraph 16, to wit:

> It is less clear what constitutes a mandatory distribution, as this term is not defined by statute or rule. Section 121.591, Florida Statutes authorizes Respondent to cash out a participant's account if it is less than $5,000 and if the participant has been terminated from FRS employment for six months, but it does not mandate this action. This same section states that the SBA "shall adopt rules establishing procedures for application for retirement benefits..." There appear to be no SBA rules that provide a definition of a mandatory distribution or detail how such distributions are paid.

This conclusion of law incorrectly construes "mandatory" to mean the compulsory distribution by the SBA or DMS of an account less than $5,000; the term "mandatory" simply refers to the FRS participants' inability to prohibit a distribution of an account less than $5,000. Thus, this conclusion of law confuses the issue at bar with that of a mandatory distribution. Here, the distribution was *requested* by the Petitioner and was not compulsorily thrust upon her unilaterally by SBA or DMS action. As a result, there is no reason for examination or consideration of whether the SBA has or has not adopted rules respecting mandatory distributions. This simply is not a case involving mandatory distributions.

Further, the conclusion of law makes reference to the adoption of rules by the SBA establishing procedures for application for retirement benefits, but does not carry out the thought to observe that detailed rules *have* been adopted respecting *application* for benefits. The record evidence below demonstrates that those rules were followed in full and there is no dispute regarding that issue. The Petitioner applied for a distribution and it was made to her. There is no evidence in the record that her account was eligible for a mandatory distribution, namely because she had no account at the six month mark post-termination.

3. Respondent excepts to the conclusion of law on page 5 at paragraph 17, to wit:

> Likewise, there is no mention in the Summary Plan Description of a mandatory distribution. The Investment Plan Summary Plan Description states at page 23:
>
> > If your account balance at termination is a de minimis amount as determined by the SBA, it could be subject to an automatic distribution. **A de minimis amount has been set for accounts with vested balances of $1,000 or less.** No distribution will be made, however, until you have been terminated from all employment with FRS-covered employers for at least six calendar months. *** If you return to FRS-covered employment after receiving a de minimis distribution, you are not considered a reemployed retiree and will not be subject to the limitations applicable to such employees. (Emphasis in original).
>
> So in the Plan Description, a de minimis account (stated to be less than $1,000) is described as one which "could be subject to automatic distribution." Although this summary does not square with the controlling statutes as to the amount of a de minimus account, it is consistent with section 121.591 in speaking of an automatic distribution as an action which Respondent is authorized to take, rather than one which is mandatory, and so odes not help to define that term as it is used in section 121.4501(2)(j).

Respondent excepts to this conclusion of law because it is without factual basis in the record or the recommended order. The de minimis amount that the SBA has determined could be subject to automatic [mandatory] distribution is well within the limit set by the Legislature. In that respect, the Summary Plan Description and Section 121.591, Florida Statutes can be read in harmony.

Respondent also excepts to this conclusion of law because it is actually a finding of fact that is not supported by competent substantial evidence in the record. The Investment Plan Summary Plan Description excerpt noted in the Recommended Order clearly references a mandatory distribution in that it describes the instance in which a participant's account will be subject to "an automatic distribution." That the SBA has chosen to set the de minimis amount at

$1,000 (well within the $5,000 limit set by Section 121.591, Florida Statutes) is of no moment and the absence of a rule to that affect is thus immaterial.

In any event, the conclusion of law further confuses the case at bar with that of a case involving mandatory distributions. There is no evidence in the record to suggest that the distribution at bar was mandatory; rather, all of the record evidence demonstrates that it was voluntarily requested by the Petitioner herself. The conclusion again mischaracterizes what is "mandatory" under Section 121.591, Florida Statutes. That section clearly states that the SBA or the DMS can "cash out" a participant's account if it is less than $5,000 and the participant cannot prohibit that distribution. In that respect, the distribution is mandatory. To characterize the SBA or DMS's discretion in determining *whether* it will so distribute in correct as a matter of law.

4. Respondent excepts to the conclusion of law on page 7 at paragraph 21, to wit:

> In this case, the distribution Petitioner took was de minimis as defined by statute and was mandatory in that it could have been paid to her in any event. The legislature could not have intended that a distribution statutorily defined as de minimis, that may be cashed out by operation of law, becomes an act that, because requested by the participant, instead works to forever foreclose that participant from receiving the enhanced benefits that accompany a high risk job.

Respondent excepts to this conclusion because it is incorrect as a matter of law. While it is true that the Respondent was bound to distribute the Petitioner's account upon request, and it did so, it is the fact that it was the Petitioner's request – and not a unilateral act of the SBA – that caused the distribution to be made. The legislature must have intended the result of such a request to be foreclosure of certain benefits upon rehire because it expressed as much in Sections 121.021(39)(a), 121.091(13), 121.122, 121.591, and 121.4501(2)(j), Florida Statutes.

Respondent has no authority under rule or statute to grant a request to eschew the effect of those statutes.

Additionally, the Recommended Order does not contain any citation to authority that demonstrates the Respondent has the authority to grant the relief requested by the Petitioner. In point of fact, the citations dictate that the relief requested must be denied.

5. Respondent excepts to the conclusion of law on page 7 at paragraph 22, to wit:

> Under the circumstances of this case, and given that Respondent apparently has not yet adopted a rule setting out its current procedures on de minimis distributions, I conclude that the governing statutes must be construed to deem Petitioner's cash out of her Investment Plan account as a mandatory distribution of a de minimis account and therefore an exception to the general rule that would make her a retiree.

Respondent excepts to this conclusion because whether the SBA has adopted rules respecting de minimis distributions is immaterial. The distribution was requested by the Petitioner thus – regardless of amount – the SBA's adopted rules regarding distributions applied in this case. Further, the governing statutes expressly state that in order for a distribution to be deemed mandatory, the participant must have been terminated from employment for at least 6 months. That is not the case here. As such, the Respondent is without the authority to deem her account one as to which the mandatory distribution statute would apply.

WHEREFORE, the Respondent requests its exceptions be granted and that a Final Order be issued dismissing the petition.

Respectfully submitted,

Brian A. Newman
Florida Bar No.: 0004758
Brandice D. Dickson
Florida Bar No.: 300100
PENNINGTON, MOORE, WILKINSON, BELL
& DUNBAR, P.A.
215 S. Monroe Street, Suite 200
Post Office Box 10095
Tallahassee, FL 32302-2095
Telephone: (850) 222-3533
Facsimile: (850) 222-2126
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been filed via HAND DELIVERY this 4th day of December, 2009 on:

Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308

Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
2600 Centennial Place, Suite 100
Tallahassee, Florida 32308

And served via U.S. MAIL this 4th day of December, 2009 on:

Amy Beth Crandall
[redacted]

Attorney

Joanos_Tina

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Sent: Monday, January 18, 2010 3:25 PM
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