STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

SCOTT E. SWEELY, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	Case No. 2010-1695

FINAL ORDER

On September 10, 2010, 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, Scott E. Sweely, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order, but Petitioner did not. 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 he be deemed to be completely vested in all of his Florida Retirement System (FRS) Investment Plan assets 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 5th day of October, 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 Scott E. Sweely, [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 5th day of October, 2010.

Ruth A. Smith

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

SCOTT E. SWEELY,

Petitioner,

v. CASE NO. 2010-1695

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned presiding officer on April 16, 2010, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: [redacted]

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

STATEMENT OF THE ISSUE

The issue is whether Petitioner should be deemed completely vested in all his Florida Retirement System (FRS) Investment Plan assets.

PRELIMINARY STATEMENT

On January 26, 2010, Scott Sweely filed a Request for Intervention, asserting that he should be deemed to be vested in his entire Investment Plan account balance. The State Board of Administration (SBA) denied Mr. Sweely's request by letter from Dan Beard, Director of Policy,

EXHIBIT A

Risk Management, & Compliance, Office of Defined Contribution Programs, explaining that $2,953.81 of his Investment Plan account represented benefits transferred from the FRS Pension Plan and was thus subject to the six year Pension Plan vesting requirement. Mr. Sweely then filed a Petition for Hearing contesting this decision and this administrative proceeding ensued. In his Petition, Mr. Sweely requested that "funds erroneously transferred from my 401(a) account [with the Village of Wellington] into the FRS Pension Plan ... be transferred into my FRS Investment Plan."

Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented the testimony of Mr. Beard. Petitioner's exhibits P-1 and P-2 and Respondent's exhibits R-1 through R-6 were admitted into evidence without objection. After the hearing, Respondent offered additional exhibits R-8 through R-10 which also have been admitted with no objection from Petitioner. Respondent also offered the deposition testimony of Joyce Morgan, Benefits Administrator for the Enrollment Section of the Department of Management Services, Division of Retirement which was taken with Petitioner in attendance on July 9, 2010. Ms. Morgan's deposition transcript, with exhibits 1 – 4 was filed with the agency on July 23, 2010, and has been accepted as part of the record of this proceeding with no objection from Petitioner.

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 filing of Ms. Morgan's deposition transcript. Respondent filed a proposed recommended order; Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

1. Petitioner was employed by the Village of Wellington and participated in its retirement plan. The Village of Wellington joined the FRS effective January 1, 2008.

2. Joyce Morgan is a Benefits Administrator for the Enrollment Section of the Department of Management Services, Division of Retirement (Division), which is responsible for facilitating enrollment of entities such as the Village of Wellington in the FRS.

3. During the enrollment process, Ms. Morgan issued a letter to the Village of Wellington on January 24, 2007, explaining the employee options regarding purchase of past service, as follows:

> When an employer purchases past service for its employees, the same time period must be purchased for all eligible employees. If the Village elects to purchase past service, the current retirement plan must be amended to allow the employees the option to revert their contributions back to the Village. Each current employee filling a full-time or part-time regularly established position will need to complete a ballot and elect to receive an accrued benefit **or** elect to return his or her contributions to the Village and allow the Village to purchase the past service. If the employee chooses to receive an accrued benefit, he or she will not be entitled to past service, pursuant to Section 121.081(1)(h), F.S. If an employee receives a refund of only his or her contributions, plus interest as provided by the plan, the Division will not consider the refund to be an accrued benefit.
>
> If the Village decides to purchase past service, the Form DPR-100, *Certification of Salaries*, will need to be completed for each eligible employee filling a full-time or part-time regularly established position.
>
> Past service is calculated by the contribution rate in effect at the time the service was performed, multiplied by the salary earned, plus 6.5% interest compounded annually, pursuant to Rule 60S-3.004(1)(b), F.A.C. To assist with the process of purchasing past service, a sample resolution for amending the Village's current retirement plan has been enclosed. All Form DPR-100 must be received by the Division no later than 15 days after the Village's joining date.

4. On November 14, 2007, Petitioner signed an Election of Coverage Ballot with Past Service form. On this form, Petitioner chose the following election:

> I elect to withdraw from the Village of Wellington's retirement plan without receiving an accrued benefit and join the Florida Retirement System. I will allow the funds to revert back to the Village of Wellington for the Village of Wellington to purchase past service under the Florida Retirement System.

Petitioner could not have chosen any other option on this form, as he was not yet vested in the Village of Wellington's plan, and he noted on the form, "I have no vote not vested."

5. On December 18, 2007, the Village of Wellington executed an agreement with the Division providing, among other things, that it would purchase past service for its general employees who were in its employ on January 1, 2008 for $5,358,210.14.

6. The Village of Wellington purchased 1.67 years of past service for Mr. Sweely at the cost of $5,713.50. The cost to purchase past service for Mr. Sweely was based upon his gross salary, not money that had been contributed on his behalf to the Village of Wellington pension plan.

7. The $5,713.50 the Village of Wellington paid to purchase past service for Mr. Sweely was deposited into the FRS Trust Fund, the trust that provides benefits for the FRS Pension Plan.

8. Ms. Morgan testified that there is no provision in Chapter 121 that would authorize a joining agency to purchase past service from the Investment Plan.

9. The City of Wellington joined the FRS in January, 2008. All employees had five months to choose between the FRS Pension Plan (the defined benefit plan) and the Investment Plan (the defined contribution plan). On June 16, 2008, Mr. Sweely elected to enroll in the FRS Investment Plan.

10. On July 31, 2008, the present value or accumulated benefit obligation (ABO) of the Pension Plan service purchased by the City of Wellington on Petitioner's behalf was transferred from the FRS Pension Plan to the FRS Investment Plan. The ABO is an actuarial calculation that takes into consideration different factors such as the member's age and years of service. This is a different calculation than the statutory formula applied to determine the cost to

purchase past service.

11. On this same date, July 31, 2008, and in addition to the ABO, the money that had been contributed on Mr. Sweely's behalf from January 1, 2008 until he made his initial election to join the Investment Plan was transferred to the Investment Plan.

12. Petitioner terminated FRS employment on December 7, 2009 with 3.67 years of FRS Service.

13. Petitioner is completely vested in the retirement contributions paid to his FRS Investment Plan account from January 1, 2008 through December 2009. These funds are subject to a one year vesting requirement and were valued at $[redacted] as of February 8, 2010.

14. Petitioner has an unvested account balance of $[redacted] (valued as of February 8, 2010) representing funds transferred from the Pension Plan to the Investment Plan. These funds are the subject of the present dispute, as Petitioner believes that he is losing a benefit he earned while employed with the Village of Wellington.

CONCLUSIONS OF LAW

15. Section 121.4501(6)(b)(1), Florida Statutes provides:

> 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).

Section 121.021(29)(a)1., Florida Statutes defines the vesting requirements as "6 or more years of creditable service." Taken together, these statutes create a six year vesting period for any funds transferred from the Pension Plan to the Investment Plan. Put differently, the vesting period applicable to Pension Plan accounts travels with any money transferred to the Investment Plan, even though the vesting period for the Investment Plan is one year.

16. The past service purchased for Mr. Sweely by the Village of Wellington was in fact purchased from the Pension Plan, even though he chose the FRS Investment Plan within the initial election period.

17. In order to participate in the Investment Plan, the member must be an "eligible employee." § 121.4501(1), Fla. Stat. An "eligible employee" is a member of the FRS or is eligible for membership in the FRS. § 121.4501(1)(f), Fla. Stat. Petitioner was not an eligible employee until his employer officially joined the FRS on January 1, 2008. There is no provision in the statutes creating and governing the Investment Plan (known formally as the Public Employee Optional Retirement Program) that authorizes a newly participating entity to purchase past service in the Investment Plan. See generally §§ 121.4501 – 121.5911, Fla. Stat. Instead, as occurred in this case, when the City of Wellington decided to participate in the FRS, it used existing retirement plan assets to create a benefit for its employees, but this benefit could only be created in the FRS Pension Plan, and subject to its terms and conditions. Once he became an "eligible employee," Petitioner was able to choose membership in the Investment Plan, but he could not convert the money paid to the Pension Plan by the City into a benefit carrying a one year vesting period.

18. As reflected in Ms. Morgan's testimony, all entities come into the FRS through the Pension Plan – a participant's optional initial election of the Investment Plan is retroactive to the effective date of the City's enrollment, but this does not change the six year vesting period for the funds that came initially into the Pension Plan.

19. Section 121.4501(8)(a) obligates the SBA to administer the Investment Plan in accordance with the requirements of Florida law. The SBA is not authorized to depart from the requirements of the applicable statutes when exercising its jurisdiction, Balezentis v. Department

of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and the SBA's construction and application of Chapter 121, Florida Statutes, the statute it is charged to implement, are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. See Level 3 Communications v. C.V. Jacobs, 841 So. 2d 447, 450 (Fla. 2002); Okeechobee Health Care v. Collins, 726 So. 2d 775 (Fla. 1st DCA 1998).

20. It is understandable that the complex transactions required for the City of Wellington to move from its own retirement plan to the FRS would create the impression in Petitioner that he had not been given the full benefit to which he was entitled by law. I see no evidence that this is the case.

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 18th day of September, 2010.

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 10th day of September 2010.

Copies furnished to:

[redacted]
Petitioner

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