

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

SCOTT SMITH,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2009-1429
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
)	
_____)	

FINAL ORDER

On January 5, 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 Smith, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order, but Petitioner did not. On January 21, 2010, Petitioner submitted some "Supplemental Materials." These materials have been treated as a filing of exceptions. 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.

RULING ON PETITIONER'S EXCEPTION TO THE RECOMMENDED ORDER

Petitioner has filed what he deems as "Supplemental Materials" in support of his argument that if his status as a "retiree" is not changed, he will be denied tenure and will have reduced earnings upon returning to work. A portion of Petitioner's submitted

materials appears to be a few pages from the contract that is applicable to teachers hired by Petitioner's employer. The other portion appears to be some pages from the Summary Plan Description for the FRS Investment Plan. However, Petitioner has not made any argument as to why these materials are helpful to his position.

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."

Petitioner's exception does not identify any disputed portions of the Recommended Order, does not identify any legal basis for the exception, and does not include appropriate and specific citations to the record. Further, as discussed in the Recommended Order, the SBA has no jurisdiction over the decision of Petitioner's employer as to tenure for retirees. Additionally, the definition of "retiree" set forth under section 121.4501(2)(j), Florida Statutes, does not provide any exceptions for individuals who will receive a cut in pay and/or who will be denied tenure if they return to work. Petitioner took a voluntary distribution from his Investment Plan account after he terminated FRS-covered employment, and clearly is within the definition of "retiree" set forth in section 121.4501(2)(j), Florida Statutes.

Accordingly, Petitioner's exception hereby is rejected.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that the State Board of Administration change his 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 28th 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.

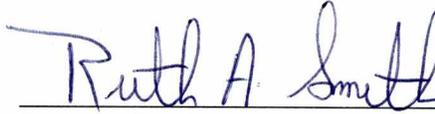


Clerk

TINA JOANOS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Scott Smith, 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 28th day of January, 2010.



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

Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
(850) 488-4406
Fax: (850) 413-1184

In reference to case #: 2009-1429

To whom it may concern:

Enclosed are supplemental materials to help support the argument in the case listed above. These documents support the fact that I will not be allowed tenure and will have restricted earnings in returning to work. These materials were provided to me by a Dawn Ramirez, at Escambia County School District. Her phone number is (850) 469-6256, if she needs to be contacted to authenticate these facts. If you have any questions, please, feel free to contact me.

Thank you,



Scott Smith
[REDACTED]
[REDACTED]
[REDACTED]

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STATE BOARD OF ADMIN
10 JAN 19 PM 6:59
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Reference: Section 121.4501(9), F.S.
Section 19-11.004, F.A.C.

What is my creditable service?

A member receives one month of service credit for each month in which any salary is paid for work performed. Members may not purchase service credit (e.g., for past service, prior service, certain military service, leaves-of-absence, etc.) to increase their FRS Investment Plan retirement benefit. This includes the upgrade of previous service to another membership class (e.g., Senior Management Service Class, Special Risk Class, or Elected Officers' Class). If an FRS covered employee has additional service credit he/she wishes to use towards his/her retirement, he/she must purchase or upgrade such service under the FRS Pension Plan before he/she becomes a member in the FRS Investment Plan.

There are certain types of service such as military, workers' compensation, and suspension and reinstatement that are paid for by the employer and may be creditable for FRS Investment Plan members if certain requirements are met for that type of service. The military service must be as a leave of absence and must be eligible for purchase under the Uniformed Services Employment and Reemployment Act (Chapter 43 of Title 38 of the United States Code).

Reference: Sections 121.021(17), 121.4501(3) and (22), F.S.
Section 19-11.004, F.A.C.

*FRS Rules / Legislation
FL
Statutes*

What are the various types of employment status?

- You are considered a *rehired* employee if: 1) you were formerly employed by an FRS employer in a regularly established position that was covered for FRS purposes, 2) you terminated employment without taking any distribution of benefits, and 3) you later returned to FRS covered employment. Your FRS Investment Plan account balance must have remained in the FRS Investment Plan.

If you return to FRS covered employment, you will return to the FRS Investment Plan, unless you decide to use your one-time second election option (the Second Election; see below) to change to the FRS Pension Plan.

- You are considered a *retired* employee from the FRS Investment Plan if you terminate FRS covered employment and take a distribution of any kind (lump sum, rollover, annuity, etc.). If you return to FRS covered employment, you are considered a "reemployed retiree" or "renewed member" and subject to the laws and rules governing such employees. These laws and rules are enacted by the Florida legislature and implemented by the appropriate agency. They are subject to change.

As a reemployed retiree, you are considered a new employee and are entitled to choose within 5 months following your month of hire which retirement plan you wish to participate in: the FRS Pension Plan or the FRS Investment Plan. However, as a reemployed retiree, you are not entitled to participate in the Special Risk Class, the FRS Pension Plan DROP program, nor are you entitled to receive disability benefits from either plan. If these benefits are important to you, you should consider not taking a distribution upon termination from FRS covered

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1. Teachers will receive experience credit for placement on the Instructional Salary Schedule for all creditable teaching experience subject to the following provisions:
 - a. Instructional employees shall receive credit for experience, for purposes of placement on the Instructional Salary Schedule using applicable Florida Statutes and contract provisions for the year in which the employee was hired.
2. Teachers will receive credit on the Instructional Salary Schedule for active military service, up to a maximum of five (5) years. To receive a year of credit, at least ten (10) months of service must have been rendered as verified by the proper military authorities.
3. Speech Language Pathologists will receive credit on the Instructional Salary Schedule for clinical experience up to a maximum of fifteen (15) years, provided they held or were eligible to hold a valid regular state teaching certificate or license during those years.
4. Teachers will receive additional credit for placement on the Instructional Salary Schedule for these specific types of experience:
 - a. Private school teaching experience, provided they were eligible to receive a teaching certificate
 - b. Public junior college, community college, college or university teaching experience, if the District determines they were eligible for certification or licensure during that time and the experience was equivalent to Pre-K-12 experience;
 - d. Teachers may receive a maximum of twelve (12) years credit for outside work experience in nursing, health education, library/media specialty field, business and/or vocational occupations (which are directly related to the subject matter taught) and counseling, if the District determines they were eligible to be certified or licensed during those years and the experience was equivalent to K-12 experience.

Master Contract

C. Placement for Retired Educators

It is the intent of the parties to treat all retired educators equitably for credit on the salary ~~schedule~~

1. Educators who retired from Escambia District Schools and who return to full time employment in Escambia District Schools shall be placed on Step 5 of Appendix A – Instructional Salary Schedule.

may be reemployed in certain positions without further limitation during the second through twelfth months after retirement. The excepted positions are:

- 
- o District School Boards.—FRS and TRS retirees may be reemployed without limitation as classroom teachers (as defined in s. 1012.01(2)(a), F.S.) on an annual contractual basis. Noncontractual hourly or substitute teaching is allowed without limitation for FRS and TRS retirees. Additionally, noncontractual employment is allowed without further limitation after the first calendar month of retirement for FRS retirees only who are reemployed as education paraprofessionals, transportation assistants, bus drivers, or food service workers.
 - o Florida School for the Deaf and the Blind.—FRS and TRS retirees may be reemployed on a noncontractual basis, without limitation as substitute teachers, substitute residential instructors, or substitute nurses.
 - o Charter Schools.—FRS and TRS retirees may be reemployed as classroom teachers (as defined in s. 1012.01(2)(a), F.S.) on an annual contractual basis, or as substitute or hourly teachers on a noncontractual basis, without limitation.
 - o Developmental Research Schools (University Lab Schools).—FRS and TRS retirees may be reemployed on an annual contractual basis as classroom teachers (as defined in s. 1012.01(2)(a), F.S.), or as substitute or hourly teachers or education paraprofessionals on a noncontractual basis, without limitation.
 - o Community Colleges.—FRS and TRS retirees may be reemployed as adjunct instructors or phased retirement program participants for up to 780 hours.
 - o Universities.—FRS and TRS retirees may be reemployed as adjunct faculty or phased retirement program participants with the State University System for up to 780 hours.

Benefits must be suspended in any month employed if reemployed in a position not eligible for a reemployment exception or for the balance of the 12-month limitation period if the reemployed retiree meets or exceeds the 780 hour limitation.

- A member who retires or ends DROP participation and is serving in elective office or is elected, reelected, or appointed to an elective office is subject to different termination requirements and is exempt from reemployment limitations during the second through twelfth months after termination.
- Elected officers who are dually employed in non-elected and elected regularly established positions are allowed to terminate from the non-elected position and retire, but must be immediately enrolled in the renewed membership class for the Elected Officers' Class.
- A retired justice or judge on temporary assignment to active judicial service pursuant to Article V of the State Constitution is exempt from reemployment limitations after being retired for one calendar month. Such justices or judges are not eligible for renewed membership.

If your retirement without DROP participation is effective on or after July 1, 2010 or your DROP termination date is on or after July 1, 2010, your reemployment limitation period is six calendar months after the six calendar months required to meet the

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employment, unless you are actually retiring and do not plan to return to FRS employment in the future.

Reference: Sections 121.122, 121.4501(2)(f)1. and (2)(j), and 121.591, F.S.
Section 19-11.003(4), F.A.C.

Can I return to employment after I retire?

Retirees may be reemployed by a private employer or by any non-FRS public employer without affecting their retirement benefits. Retirees may not be reemployed with an FRS-participating employer in any capacity (FRS-covered or non-covered) for the first 12 months after taking a distribution without suspending their retirement benefits, except under limited circumstances as described below. Suspension of benefits, in this case, refers to retiree's inability to take additional distributions from their Investment Plan account balance until certain requirements have been met. An Investment Plan member is considered retired once they terminate FRS-covered employment and take a distribution from their account, so if an FRS Investment Plan member is reemployed with an FRS employer prior to taking a distribution of his/her benefits, he or she will not be considered to have retired.

Achieved Normal Retirement

If an Investment Plan retiree has met the normal retirement requirements of the FRS Pension Plan (i.e., age 62 and 6 years of service or 30 years of service or if Special Risk age 55 and 6 years of Special Risk service or 25 years of Special Risk service), they may return to work in certain excepted positions as described below during and through the 12th month after retirement without suspending benefits. Such retiree may return to this limited employment after being off all FRS-covered payrolls for at least one calendar month. The retiree may return to work in any position after being retired for one calendar month if he/she suspends his/her retirement benefits for the remainder of the eleven-months after retirement.

Not Achieved Normal Retirement

If an Investment Plan retiree has not met the normal retirement requirements of the FRS Pension Plan as described above, they may not return to FRS-covered employment in an excepted position until they have been retired for three calendar months (i.e., three calendar months following the month that a distribution was taken). After being retired for three calendar months the retiree may return to employment in one of the excepted positions during the remaining nine months after retirement without suspending their retirement benefits, or the retiree may return to work in any position if he/she suspends his/her retirement benefits for the remainder of the nine-months.

Exceptions to the Reemployment Law

If you retire from the Investment Plan and become reemployed in any of the following positions during your first year of retirement, you may be exempt from the reemployment limitations, or you may be otherwise eligible for a limited exception, as follows:

- A member who retires and is serving in an elective office or is elected, reelected, or appointed to an elective office is exempt from reemployment limitations during the first year of retirement.
- A retired justice or judge on temporary assignment to active judicial service pursuant to Article V of the State Constitution is exempt from the reemployment limitations.
- *Florida District Schools Boards* - After meeting the above requirements, Investment Plan retirees may be reemployed without hourly limitations as classroom teachers on an annual

FAX Transmission

DATE: 1-21-10

TO: Agency Clerk Office of General Counsel
Florida State Board of Administration
From: Scott Smith

Attn: Case # 2009-1429 Re:

Fax # 850 413-1184

Return Fax # 850 269-0035

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STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

SCOTT SMITH,

Petitioner,

vs.

Case No.: 2009-1429

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This cause was heard in an informal proceeding before the undersigned presiding officer on October 20, 2009, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner:

[REDACTED]

Petitioner

For Respondent:

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

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STATEMENT OF THE ISSUE

The issue is whether Respondent State Board of Administration (SBA) should grant the Petitioner's request not to be classified as a retiree.

PRELIMINARY STATEMENT

After he was informed by Respondent SBA that he had received an invalid distribution from his Florida Retirement System (FRS) Investment Plan account in violation of the reemployment after retirement provisions, Petitioner filed a Petition for Hearing requesting that he not be deemed to be a retiree. The instant hearing resulted.

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. Respondent's Exhibits R-1 through R-7 were admitted into evidence without objection at hearing. Following the hearing, a transcript of a telephone call by Petitioner to the MyFRS Guidance Line, during which he asked for distribution of his account, was filed as Exhibit R-8.

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 after the transcript was filed. Respondent filed a proposed recommended order; Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

1. Petitioner joined the FRS Investment Plan effective February 1, 2005, when working for the Volusia County School Board. He terminated this FRS employment on May 25, 2007. On November 28, 2008, he took a full distribution of his Investment Plan account in the amount of approximately [REDACTED]. He was re-employed by the Escambia County School Board, which is also an FRS covered employer, on December 12, 2008. On January 15, 2009, Respondent notified Petitioner that he had taken an invalid distribution from his FRS Investment Plan account, because he was actively employed with an FRS-covered employer within three calendar months of taking a distribution of his Investment Plan account.

2. Respondent advised Petitioner that he could repay the entire distribution amount by February 23, 2009 (this date was later extended to April 30, 2009), or he could opt to terminate employment with the Escambia County School Board.

3. Petitioner chose to terminate his employment with the Escambia County School Board and executed a release to that effect.

4. Respondent notified Petitioner that, because he did not repay the invalid distribution, he could return to FRS-covered employment, but if he did so, he would be considered a reemployed retiree, and subject to the laws and rules governing such employees.

5. Petitioner filed a Petition for Hearing seeking review of the Respondent's determination that he is considered a retiree, because he is concerned about the effect this designation will have on possible future FRS-covered employment, and on whether he can obtain tenure as a teacher.

CONCLUSIONS OF LAW

6. 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.

§ 121.4501(2)(j), Fla.Stat. (emphasis added).

7. Section 121.591(1)(c), Florida Statutes provides:

(1) Normal benefits.--Under the Public Employee Optional Retirement Program:
...

(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, as:

1. A lump-sum distribution to the participant;
2. A lump-sum direct rollover distribution whereby all accrued benefits, plus interest and investment earnings, are paid from the participant's account directly to the custodian of an eligible retirement plan, as defined in s. 402(c)(8)(B) of the Internal Revenue Code, on behalf of the participant; or
3. Periodic distributions, as authorized by the state board.

Section 121.591(1)(c), Fla.Stat.

8. By operation of the above-referenced statutes, when Petitioner terminated FRS-covered employment and took a voluntary distribution of his Investment Plan account, he became a retiree by operation of law for purposes of his FRS status.

9. I have reviewed the transcript of the call placed by Petitioner when he requested distribution of his account, and it appears that he was informed of the consequences of this action: that once he took a distribution, he would be considered a retiree, and that he would not be eligible for special risk class membership benefits, disability benefits or participation in the deferred retirement program (DROP) if he were to be rehired in the FRS system. In addition, all FRS participants have access to extensive educational materials on the MyFRS website.

10. Because Petitioner's distribution was determined to be invalid, he was given the opportunity under section 121.591(1)(a)(5), Florida Statutes, to repay the amount he received and to escape being deemed to be a retiree. Unfortunately he was not able to make this repayment and so remained a retiree by operation of law.

11. With regard to Petitioner's allegation that, as a retiree, he will not now be eligible for tenure if he is rehired as a teacher, the statutes administered by the SBA make no mention of tenure, and the agency has no jurisdiction over this decision.

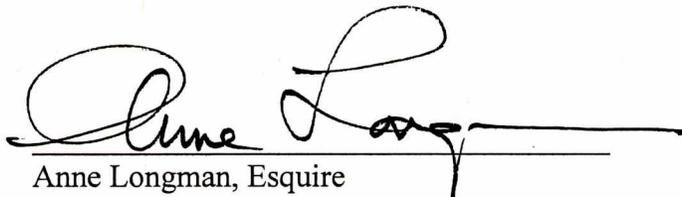
12. Respondent SBA cannot deviate from the Florida Statutes creating and governing the Florida Retirement System. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.).

13. I see no indication that Respondent departed from its governing statutes and rules in Petitioner's 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 5th day of January, 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 5th day of January, 2010.

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

Joanos_Tina

From: UPS Quantum View [auto-notify@ups.com]
Sent: Wednesday, February 10, 2010 10:42 AM
To: Joanos_Tina
Subject: UPS Delivery Notification, Tracking Number [REDACTED]



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[REDACTED]

UPS Service: NEXT DAY AIR
Shipment Type: Letter

Tracking Number: [REDACTED]
Reference Number 1: General Counsel

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