

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

JOSEPH BURKE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2011-2142
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
	)	
	)	

---

**FINAL ORDER**

On November 10, 2011, 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, Joseph Burke, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Petitioner made no further submissions. Neither party filed exceptions, which were due on November 25, 2011. 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.

**STATEMENT OF THE ISSUE**

The Statement of the Issue as set forth in the presiding officer's Recommended Order hereby is adopted in its entirety.

**FINDINGS OF FACT**

The Findings of Fact set forth in the presiding officer's Recommended Order hereby are adopted in their entirety.

## CONCLUSIONS OF LAW

The Conclusions of Law set forth in paragraphs 8 through 12 specifically are incorporated by reference as if fully set forth herein.

The Conclusions of Law set forth in Paragraph number 13 hereby are modified to read as follows, in order to supply some missing information:

13. The statute directly on point, Section 121.122(2), Florida Statutes, is express in its meaning and applies to Petitioner. That statute became effective in July 2009, after the Petitioner retired and before he was rehired. Respondent SBA lacks the authority to grant Petitioner the relief he seeks in this proceeding. The result recommended here does not seem to fairly serve a recognizable policy interest, but the SBA must apply the statutes it administers as they are enacted.

## ORDERED

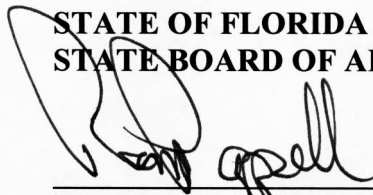
The Petitioner's request that he be entitled to renewed membership in the Florida Retirement System ("FRS"), despite being an FRS Investment Plan retiree initially rehired on or after July 1, 2010, hereby is denied.

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 5<sup>th</sup> day of December, 2011, in Tallahassee, Florida.

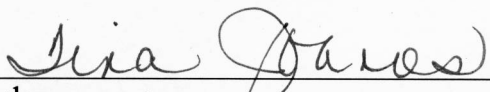
**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



---

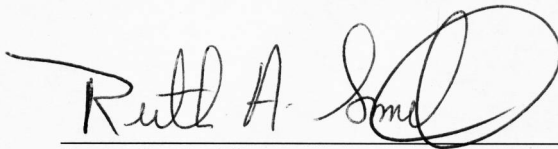
Ron Poppell, Senior Defined Contribution  
Programs Officer  
State Board of Administration  
1801 Hermitage Boulevard, Suite 100  
Tallahassee, Florida 32308  
(850) 488-4406

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 Joseph Burke, [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 December, 2011.



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

RECEIVED  
STATE BOARD OF ADMIN  
1 NOV 14 AM 11:33  
GENERAL COUNSEL'S OFFICE

STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION

JOSEPH BURKE,

Petitioner,

vs.

CASE NO. 2011-~~2042~~<sup>2142</sup>

STATE BOARD OF ADMINISTRATION,

Respondent.

---

**RECOMMENDED ORDER**

This case came before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA), on August 12, 2011, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: Joseph Burke



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 is entitled to renewed membership in the Florida Retirement System (FRS).

00039500-1

**EXHIBIT A**

## **PRELIMINARY STATEMENT**

After learning that he would not be allowed to enroll in the FRS as a rehired retiree, Petitioner filed a request for intervention with Respondent SBA. By letter from Daniel Beard, SBA Director of Policy, Risk Management, & Compliance, Respondent confirmed that Petitioner would not be allowed to participate in the FRS, based on statutory requirements. Petitioner then filed a Petition for Hearing requesting the same relief, and this proceeding followed.

Petitioner attended the hearing by telephone; he and his wife, Heather Burke, testified on his behalf. Respondent presented the testimony of Mr. Beard, and Respondent's Exhibits R-1 through R-7 were admitted into evidence without objection.

A transcript of the informal hearing was filed with the agency and provided to the parties, who were invited to submit proposed recommended orders. Respondent submitted a proposed recommended order; Petitioner made no further filings.

## **UNDISPUTED MATERIAL FACTS**

1. In 2007, Petitioner was employed by the Florida Department of Transportation and was a member of the FRS enrolled in the Pension Plan.
2. Petitioner called the MyFRS Financial Guidance line twice on January 8, 2009 seeking information about switching from the Pension Plan to the Investment Plan and taking a distribution from his Investment Plan account once the switch was completed.
3. During those calls, Petitioner advised the financial guidance line counselor that he might be terminating employment during the first week of February, 2009 and not returning to

FRS-covered employment for at least five (5) years. He indicated he understood he would be forfeiting any unvested portion of his Investment Plan account by doing so, but it was important to him to take with him whatever funds were available at that time.

4. On February 5, 2009, Petitioner terminated all FRS-covered employment.

5. On June 2, 2009, after waiting the required three calendar months past his termination, Petitioner took a total distribution of his FRS Investment Plan account of about [REDACTED]

6. Petitioner was re-hired by the Florida Department of Transportation after July 1, 2010.

7. Petitioner was not employed by any FRS-participating employer after his termination in February, 2009 and before his rehire in 2010.

### CONCLUSIONS OF LAW

8. During the 2009 session, the Florida Legislature revised Section 121.122, Florida Statutes to exclude from renewed membership in the FRS any retiree who becomes reemployed on or after July 1, 2010. That revised section states:

#### **121.122. Renewed membership in system**

(1) Except as provided in s. 121.053, effective July 1, 1991, through June 30, 2010, any retiree of a state-administered retirement system who is initially reemployed in a regularly established position with a covered employer, including an elective public office that does not qualify for the Elected Officer's Class, shall be enrolled as a compulsory member of the Regular Class of the Florida Retirement System. Effective July 1, 1997, through June 30, 2010, any retiree of a state-administered retirement system who is initially reemployed in a position included in the Senior Management Service Class shall be enrolled as a

additional retirement benefit, subject to the following conditions:

(a) Such member must resatisfy the age and service requirements as provided in this chapter for initial membership under the system, unless such member elects to participate in the Senior Management Service Optional Annuity Program in lieu of the Senior Management Service Class, as provided in s. 121.055(6).

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

(c) Such member must meet the reemployment after retirement limitations as provided in s. 121.091(9), as applicable.

(d) Upon renewed membership or reemployment of a retiree, the employer of such member shall pay the applicable employer contributions as required by ss. 112.363, 121.71, 121.74, and 121.76.

(e) Such member is entitled to purchase additional retirement credit in the Regular Class or the Senior Management Service Class, as applicable, for any postretirement service performed in a regularly established position as follows:

1. For regular class service prior to July 1, 1991, by paying the Regular Class applicable employee and employer contributions for the period being claimed, plus 4 percent interest compounded annually from first year of service claimed until July 1, 1975, and 6.5 percent interest compounded thereafter, until full payment is made to the Florida Retirement System Trust Fund; or

2. For Senior Management Service Class prior to June 1, 1997, as provided in s. 121.055(1)(j).

The contribution for postretirement service between July 1, 1985, and July 1, 1991, for which the reemployed retiree contribution was paid, shall be the difference between such contribution and the total applicable contribution for the period being claimed, plus interest. The employer of such member may pay the applicable employer contribution in lieu of the member. If a member does not wish to claim credit for all of the postretirement service for which he or she is eligible, the service the member claims must be the most recent service.

(f) No creditable service for which credit was received, or which remained unclaimed, at retirement may be claimed or applied toward service credit earned following renewed membership. However, service earned as an elected officer with renewed membership in the Elected Officers' Class may be used in



conjunction with creditable service earned under this section, provided the applicable vesting requirements and other existing statutory conditions required by this chapter are met.

(g) Notwithstanding any other limitations provided in this section, a participant of the State University System Optional Retirement Program, the State Community College Optional Retirement Program, or the Senior Management Service Optional Annuity Program who terminated employment and commenced receiving a distribution under the optional program, who initially renews membership as required by this section upon reemployment after retirement, and who had previously earned creditable Florida Retirement System service that was not included in any retirement benefit may include such previous service toward vesting and service credit in the second career benefit provided under renewed membership.

(h) A renewed member who is not receiving the maximum health insurance subsidy provided in s. 112.363 is entitled to earn additional credit toward the maximum health insurance subsidy. Any additional subsidy due because of such additional credit may be received only at the time of payment of the second career retirement benefit. The total health insurance subsidy received by a retiree receiving benefits from initial and renewed membership may not exceed the maximum allowed in s. 112.363.

**(2) A retiree of a state-administered retirement system who is initially reemployed on or after July 1, 2010, is not eligible for renewed membership.**

§121.122, Fla.Stat. (2009)(emphasis added).

9. A “retiree” is defined as “a former participant of the 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)(k), Fla.Stat. (2010). Because Petitioner terminated his FRS employment and took a distribution from his Investment Plan account, he is considered a retiree.

10. A retiree who is reemployed with an FRS-participating employer on or after July

1, 2010 is ineligible to participate in the retirement system.

11. The history of the legislation which made the relevant changes to Section 121.122 in 2009 reflects that the legislature was informed of the potential impact of excluding from participation in the FRS those who had terminated employment and taken a distribution early in their working years. As the agency affected by the change in the statute, Respondent submitted an analysis of House Bill 479 to the Full Appropriations Council on General Government & Health Care which stated:

HB 479 would also close the renewed membership class to retirees of a state-administered retirement system initially reemployed by a Florida Retirement System participating employer on or after January 1, 2010. However, this bill would require employer contributions to be paid on the salary of reemployed retirees who are not enrolled as renewed members to maintain the funding base for the Health Insurance Subsidy Program. In addition, this bill would require the employer to pay any unfunded actuarial liability portion of the employer contribution rate for active members if an unfunded actuarial liability cost re-emerges. The bill does not provide for the paying of the Investment Plan administrative contribution.

Retirees initially reemployed before January 1, 2010, would continue their renewed membership and employers would continue to owe the total employer contribution rate for these renewed members. As the number of retirees who are enrolled as renewed members in the FRS is reduced over time, this would gradually reduce the overall cost to employers.

In the longer-term, these changes could result in savings to the FRS Pension Plan by limiting future liabilities for renewed membership and by altering retirement patterns based upon plans for returning to work within a few months of terminating employment. The actual impact would have to be determined by an actuarial special study conducted by the Division of Retirement's consulting actuary.

Closing the Renewed Membership Class to future participation would impact not only those reemployed retirees who retired at normal retirement, but it would also impact those who retired early.

Under the FRS Pension Plan a member becomes vested with six years of service. A retiree may take an early retirement if vested and within 20 years of the normal retirement age. However, in doing so the benefit is reduced by five percent for each year remaining before the retiree reaches normal retirement age. For retirees of the Special Risk Class, the earliest a member could receive an early retirement benefit would be at age 35 and one month. For retirees of the other membership classes, early retirement benefit would be at age 42 and one month if vested. These early retirement retirees would be ineligible for renewed membership should they return to FRS employment.

Under the FRS Investment Plan, a participant vests after only one year of service. If a member terminates and takes a distribution, he or she is considered a retiree and ineligible for renewed membership in the FRS. **Conceivably, a retiree who participated in the Investment Plan for one year and took a distribution at the age of 24 could later return to work for an FRS employer for 30 years or more and never be eligible for a retirement benefit.** This could impact the ability of FRS employer's (sic) to recruit employees in the future.

Florida State Board of Administration Report to Full Appropriations Council on General Government & Health Care on HB # 479, Feb. 16, 2009, p. 5 (emphasis added).

12. The Staff Analysis of HB #479 dated April 15, 2009 unequivocally states: "The bill eliminates renewed membership in the FRS. Thus, precluding retirees reemployed with the FRS employer from accruing a second retirement benefit." It appears that the legislature was made aware of the potentially harsh results which could be caused by absolutely forbidding those deemed by operation of law to be retirees from ever again participating in the FRS, and with this awareness, enacted Section 121.122 as it currently reads.

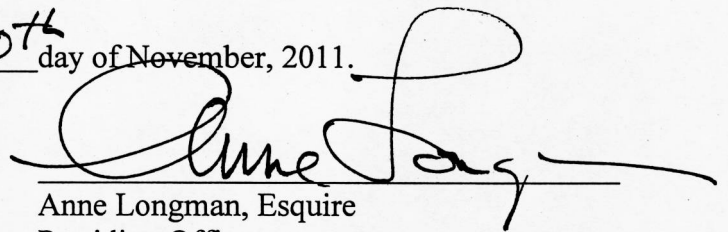
13. The statute directly on point, Section 121.122(2), Florida Statutes, is express in its meaning and applies to the Petitioner. That statute became effective in July 2009, after the Petitioner retired and before he was re-hired.

Petitioner the relief he seeks in this proceeding. The result here does not seem to fairly serve a recognizable policy interest, but the SBA must apply the statutes it administers as they are enacted.

**RECOMMENDATION**

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

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of November, 2011.



Anne Longman, Esquire  
Presiding Officer  
For the State Board of Administration  
Lewis, Longman & Walker, P.A.  
315 South Calhoun Street, Suite 830  
Tallahassee, FL 32301-1872


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.

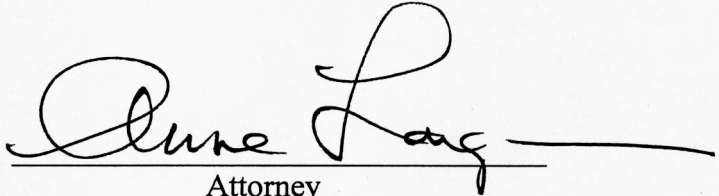
Filed with:  
Agency Clerk  
Office of the General Counsel  
Florida State Board of Administration  
1801 Hermitage Blvd., Suite 100  
Tallahassee, FL 32308  
(850) 488-4406

This 10<sup>th</sup> day of November, 2011.

Joseph Burke

  
Petitioner

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

  
\_\_\_\_\_  
Attorney