

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

KEVIN NOELL,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2012-2595
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
)	

FINAL ORDER

On February 26, 2013, the Administrative Law Judge 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, Kevin Noell, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions, which were due on March 12, 2013. 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) hereby is adopted in its entirety. The Petitioner's request that he be entitled to renewed membership in the Florida Retirement System ("FRS"), as a retiree who was rehired by an FRS-participating employer 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 22nd day of March, 2013, 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

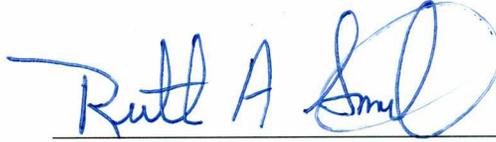
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Kevin Noell, 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 22nd day of March, 2013.



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

KEVIN NOELL,
Petitioner,

vs.

Case No.: 2012-2595

STATE BOARD OF ADMINISTRATION,
Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on December 19, 2012 at the SBA offices, 1801 Hermitage Blvd. Suite 100, Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Kevin Noell

[REDACTED]

For Respondent: Brian A. Newman, Esquire
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).

EXHIBIT A

PRELIMINARY STATEMENT

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, State Board of Administration. Respondent's Exhibits R-1 through R-3 were admitted into evidence over Petitioner's hearsay objection to Exhibit R-2, a letter of October 3, 2012 from Mr. Beard to Petitioner denying his request to enroll in the FRS. At conclusion of the hearing, I gave Mr. Noell until January 7, 2013 to inform me as to whether he wanted to hold his case in abeyance given a pending similar case before the Florida Supreme Court. He indicated he wished to proceed in this matter.

A transcript of the hearing was made, filed with the agency, and provided to the parties, who were invited to submit proposed recommended orders within 30 days. Respondent filed a proposed recommended order; Petitioner has made no further filing.

MATERIAL UNDISPUTED FACTS

1. Petitioner was hired by the Justice Administration – State Attorney Division on July 29, 2005 and elected to enroll in the FRS defined contribution Investment Plan effective October 25, 2005.
2. On September 21, 2007, Petitioner terminated FRS-covered employment.
3. Petitioner took a total distribution from his Investment Plan account on January 4, 2008.
4. Petitioner began work with the Collier County Attorney, an FRS-covered agency, on October 1, 2012. After returning to work, he was advised that he could not participate in the FRS because he was considered to have “retired” when he took a distribution from his Investment Plan account in January of 2008.

5. Petitioner filed a Request for Intervention asking that a 2009 amendment to Section 121.122, Florida Statutes, which made him ineligible for renewed membership in FRS not apply to him because he did not meet the definition of a “retiree.” This request was denied and a substantially similar Petition for Hearing timely filed. This administrative proceeding followed.

CONCLUSIONS OF LAW

6. 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. The amended statute states in pertinent part:

121.122. Renewed membership in system

(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)

7. 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 section 121.591, Florida Statutes.” § 121.4501(2)(k), Fla. Stat. (2007). The optional retirement program is the FRS Investment Plan. Thus, Petitioner is a retiree by operation of law because he terminated FRS-covered employment and took a distribution from his Investment Plan account in 2008. He is ineligible for renewed membership in the FRS under the 2009 amendment to section 121.122, Florida Statutes because he did not return to work with an FRS-covered agency before July 1, 2010.

8. Petitioner argues that application of the 2009 amendment to him is unduly harsh because he was not told that he would be denied renewed FRS membership when he made the decision to terminate FRS-covered employment in 2007. He could not have been so informed

because that was not the state of the law in 2007. Petitioner contends that the result here could not have been intended by the Legislature when it adopted the 2009 amendment.

9. The legislative history of the passage of the 2009 amendment to Section 121.122 makes clear that the Legislature was aware of the results of excluding from FRS participation those who had terminated and taken a distribution early in their working years. As the agency affected by a change in the statute it administers, Respondent submitted an analysis of House Bill 479 to the Full Appropriations Council on General Government & Health Case 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 reemerges. The bill does not provide for the paying of the Investment Plan administrative contribution.

Retirees initially employed 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). It appears the Legislature was made aware of the harsh result which could be caused by absolutely precluding 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.

10. The arguments presented by Petitioner have previously been considered by the SBA in cases presented by other FRS members who made the decision to retire, or who took a distribution and therefore retired by operation of law before the applicable 2009 amendments were enacted, and then returned to FRS-covered employment. See *Austin v. State Board of Administration*, Case No. 2011-2037 (Recommended Order, October 26, 2011; Final Order November 21, 2011); *Blaesser v. State Board of Administration*, Case No. 2011-2106 (Recommended Order, October 6, 2011; Final Order October 28, 2011); *Burke v. State Board of*

Administration, Case No. 2011-2042 (Recommended Order, November 10, 2011; Final Order December 5, 2011); *Frisard v. State Board of Administration*, Case No. 2011-2019 (Recommended Order, July 11, 2011; Final Order August 17, 2011). See, Fla. Sheriff's Assn. v. Dept. of Adm., 408 So.2d 1033 (Fla.1982)(Florida's constitutional prohibition of impairment of contracts does not prohibit the legislature from modifying or altering prospective FRS benefits). See also Scott v. Williams, Case No. SC12-520, (Fla. 2013).

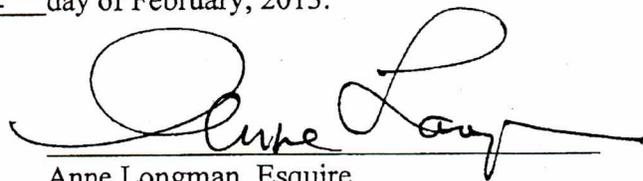
11. Petitioner meets the definition of a "retiree," and he returned to work with an FRS-covered agency well after the 2009 amendment became effective. The result here is required by the plain meaning of the 2009 amendment and was intended by the Legislature. The 2009 amendment has been found to be constitutional in Blaesser under facts that are indistinguishable from the facts here.

12. The SBA therefore lacks authority to grant Petitioner the relief he seeks in this proceeding.

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 26th day of February, 2013.



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 OF RIGHT TO SUBMIT EXCEPTIONS: 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. Any exceptions 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 via electronic delivery with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
Tina.joanos@sbafla.com
Daniel.beard@sbalfa.com
(850) 488-4406

This 16th day of February, 2013.

Copies furnished to:
Via U.S. Mail:



Petitioner

Via electronic delivery:
Brian A. Newman, Esquire
Brandice D. Dickson
Pennington, Moore, Wilkinson Bell & Dunbar
Post Office Box 10095
Tallahassee, FL 32302-2095
slindsey@penningtonlaw.com
Attorneys for Respondent

A handwritten signature in black ink, appearing to read "Chris Long", written over a horizontal line.