

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

MODENA COBB,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2012-2489
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
)	
)	

FINAL ORDER

On October 31, 2012, 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, Modena Cobb, 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 November 15, 2012. 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

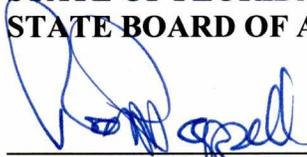
The Recommended Order (Exhibit A) hereby is adopted in its entirety. The Petitioner's request that she be deemed 100% vested in benefits transferred from her Florida Retirement System ("FRS") Pension Plan account to her FRS Investment Plan account when

Petitioner had terminated employment with only 4.10 years of service credit, 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 1st day of February, 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

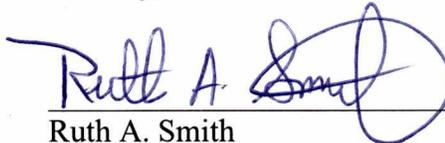
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



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 Modena Cobb, pro se, [REDACTED], [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 1st day of February, 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

MODENA COBB,

Case No. 2012-2489

Petitioner,

vs.

STATE BOARD OF ADMINISTRATION,

Respondent.

RECEIVED
STATE BOARD OF ADMIN
12 NOV -1 AM 11:50
GENERAL COUNSEL'S OFFICE

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 August 16, 2012, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner:

Modena Cobb


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 100% vested in her Investment Plan account.

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone with her daughter-in-law, Jennifer Cobb, and both testified on her behalf. Respondent presented the testimony of Daniel Beard, Director of Policy, Risk Management, and Compliance, Defined Contribution Programs, State Board of Administration. Respondent's Exhibits R-1 through R-3 were admitted into evidence without objection at the hearing. At my direction, additional recorded calls were transcribed and the transcripts, marked Exhibits R-4 through R-6, were provided to the parties and received into evidence after the hearing. After reviewing them I determined there was no need for further proceedings.

A transcript of the hearing was made, filed with the agency, and provided to the parties, who were invited to submit proposed recommended orders by October 29, 2012. Respondent filed a proposed recommended order; Petitioner made no further filings.

MATERIAL UNDISPUTED FACTS

1. Petitioner was employed by the Palm Beach County School Board and was a member of the Florida Retirement System (FRS) Pension Plan. She enrolled in the Deferred Retirement Option Plan (DROP) from February 1, 2006 until November 17, 2006, then retired and began receiving a monthly benefit payment. She returned to the FRS as a renewed member on October 22, 2007.

2. The school board is now, and for all periods relevant to this case has been, a participating FRS employer.

3. In October 2007, when Petitioner returned as a teacher with the school board, she

was given the opportunity to again participate in the FRS.

4. At that time, FRS renewed members could elect to participate in either the FRS defined benefit program (the Pension Plan) or the defined contribution Public Employee Optional Retirement Program, (the Investment Plan).

5. The Pension Plan has a six year vesting requirement; the Investment Plan has a one year vesting requirement.

6. Employees are given a set period of time to elect between the two plans, and if they do not make a valid enrollment into the Investment Plan prior to the deadline, they default into the Pension Plan.

7. Petitioner's deadline to enroll in the Investment Plan was June 30, 2008. She did not elect to join the Investment Plan during that initial enrollment period and therefore defaulted into the Pension Plan.

8. About two years later, on December 30, 2010, Petitioner used her one-time second election to join the Investment Plan, after calling the MyFRS Financial Guidance Line and having her options explained to her. During that telephone call, the Petitioner expressed her understanding that if she remained in the Pension Plan and did not utilize her second election, she would have to work a full six years to be vested in any benefit for her second career. She also expressed her understanding that if she utilized her second election to move to the Investment Plan, all service credit earned prior to her election would still be subject to the six year vesting period. Petitioner decided to utilize her second election at that time because although she thought she would be employed in her second career at least six years, if that did

not happen, she wanted some benefit rather than no benefit.

9. After Petitioner utilized her second election, the present value of her Pension Plan benefit was transferred to her Investment Plan account on January 31, 2011.

10. Due to unforeseen medical circumstances, on September 9, 2011, the Petitioner terminated her employment with the school board.

11. At that time, she had accumulated 4.10 years of creditable service with the FRS during her second tenure of employment with the school board.

12. Subsequently, she learned that she was not fully vested in the amount she had transferred from her Pension Plan account to her Investment Plan account because she had not earned six years of creditable service during her second tenure.

13. At the time of hearing, Petitioner had approximately [REDACTED] unvested Investment Plan monies in a suspense account, representing the value of her Pension Plan account that accumulated between October 2007 and December 2010.

14. As of the close of the market on July 20, 2012, Petitioner had [REDACTED] in her Investment Plan account in which she is 100% vested.

15. If she returns to FRS-covered employment before September 9, 2016 and works another 1.9 years, Petitioner will be fully vested in her Investment Plan account. If, however, she fails to return to employment within that time frame or takes a distribution of her vested portion, the unvested portion will be forfeited.

16. Petitioner asserts that she will be unable to return to any FRS-covered employment prior to September 9, 2016 due to medical reasons. Respondent does not dispute

this assertion.

17. Petitioner is currently receiving a monthly benefit as a result of having retired from FRS-covered employment while a member of the FRS Pension Plan. That benefit is not in dispute in this proceeding.

CONCLUSIONS OF LAW

18. The statutory section governing initial elections into the Investment Plan states, in pertinent part:

121.4501. Public Employee Optional Retirement Program

(4) Participation; enrollment.—

...

(b)...

2. With respect to employees who become eligible to participate in the Public Employee Optional Retirement Program by reason of employment in a regularly established position with a district school board employer commencing after July 1, 2002:

a. **Any such employee shall, by default, be enrolled in the defined benefit retirement program of the Florida Retirement System at the commencement of employment, and may, by the last business day of the 5th month following the employee's month of hire, elect to participate in the Public Employee Optional Retirement Program.** The employee's election must be made in writing or by electronic means and must be filed with the third-party administrator. The election to participate in the optional program is irrevocable, except as provided in paragraph (e).

b. **If the employee files such election within the prescribed time period, enrollment in the optional program shall be effective on the first day of employment.** The employer retirement contributions paid through the month of the employee plan change shall be transferred to the optional program, and, effective the first day of the next month, the employer shall pay the applicable contributions based on the employee membership class in the optional program.

c. **Any such employee who fails to elect to participate in the Public Employee Optional Retirement Program within the prescribed time period is deemed to**

have elected to retain membership in the defined benefit program of the Florida Retirement System, and the employee's option to elect to participate in the optional program is forfeited.

3. For purposes of this paragraph, "district school board employer" means any district school board that participates in the Florida Retirement System for the benefit of certain employees, or a charter school or charter technical career center that participates in the Florida Retirement System as provided in s. 121.051(2)(d).

§121.4501(4), Fla.Stat. (emphasis added).

19. In accordance with the above statute, Petitioner's initial election period closed on June 30, 2008. Because she did not file an initial election to join the Investment Plan, she defaulted into the Pension Plan.

20. Under Section 121.021(29), Florida Statutes, the vesting period for the Pension Plan is "6 or more years of creditable service." With regard to amounts transferred from the Pension Plan to the Investment Plan, Section 121.4501(6)(b)1,2. and (c), Florida Statutes (2010) provide, in relevant part:

(6) Vesting requirements.—

...
(b) 1. [a] participant shall be vested in the amount transferred upon meeting the service requirements for the participant's membership class as set forth in s. 121.021(29).

2. If the participant terminates employment before satisfying the vesting requirements, the nonvested accumulation must be transferred from the participant's accounts to the state board for deposit and investment by the board in the suspense account created within the Public Employee Optional Retirement Program Trust Fund. If the terminated participant is reemployed as an eligible employee within 5 years, the state board shall transfer to the participant's account any amount of the moneys previously transferred from the participant's accounts to the suspense account, plus the actual earnings on such amount while in the suspense account.

(c) Any nonvested accumulations transferred from a participant's account to the

suspense account shall be forfeited by the participant if the participant is not reemployed as an eligible employee within 5 years after termination.

§§ 121.4501(6)(b)1,2. and (c), Fla.Stat. (2010).

After Petitioner used her second election to transfer into the Investment Plan from the Pension Plan, all benefits accrued prior to that second election were unaffected by that election in terms of vesting requirements. Only those benefits represented by the pre-second election period that accrued during the membership in the Pension Plan (October 2007 through December 2010) are at issue in this matter.

21. Those benefits were accumulated while the Petitioner was a member of the Pension Plan, and benefits transferred from the Pension Plan are subject to a six year vesting requirement, as stated in Section 121.4501(6)(b)(1), Fla.Stat.

22. Petitioner requests that she be vested in all benefits shown in her Investment Plan account, but a portion of those funds has not met the six year vesting requirement applicable to them.

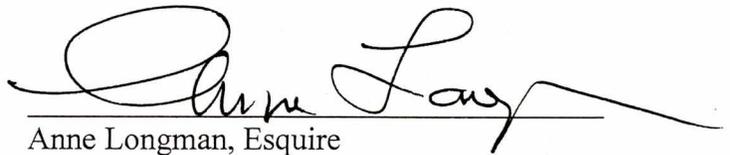
23. Petitioner carries the burden to demonstrate compliance with all applicable statutory requirements governing vesting. Young v. Department of Community Affairs, 625 So.2d 837 (Fla. 1993); Department of Transportation v. J.W.C., 396 So.2d 778 (Fla. 1st DCA 1981), and there is no statute or rule that provides for an exception to the vesting requirement. 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, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.) and its construction and application of Chapter 121, Florida Statutes, the statutes 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). Respondent has no statutory authority to grant the Petitioner's request.

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 31st day of October, 2012.



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.

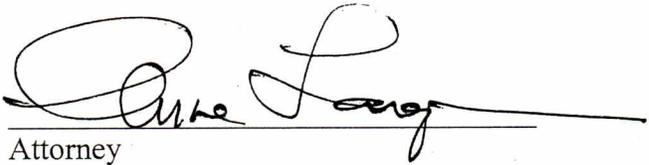
Filed with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
(850) 488-4406

This 31st day of October, 2012.

Copies furnished to:

Modena Cobb
[REDACTED]

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


Attorney