

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

MICHAEL L. NADLER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2008-1105
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
_____	)	

**FINAL ORDER**

On July 17, 2008, 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, Michael L. Nadler, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. 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 to withdraw funds from his Investment Plan account despite the fact that he performs intermittent work in a non-recurring position for an FRS-covered employer 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 4<sup>th</sup> day of August, 2008, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



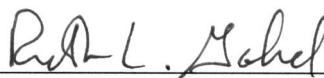
\_\_\_\_\_  
Ron Poppell, Senior Defined Contribution  
Programs Officer  
State Board of Administration  
1801 Hermitage Boulevard, Suite 100  
Tallahassee, Florida 32308  
(850) 488-4406

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 Michael L. Nadler, 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 4~~th~~ day of August, 2008.



\_\_\_\_\_  
Ruth L. Gokel  
Assistant General Counsel  
State Board of Administration of Florida  
1801 Hermitage Boulevard  
Suite 100  
Tallahassee, FL 32308

STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION

MICHAEL L. NADLER,

Petitioner,

v.

CASE NO.: 2008-1105

STATE BOARD OF ADMINISTRATION,

Respondent.

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**RECOMMENDED ORDER**

This case was heard in an informal proceeding before the undersigned Presiding Officer on April 15, 2008, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner:

Michael Nadler, pro se  


For Respondent:

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

RECEIVED  
STATE BOARD OF ADMIN  
08 JUL 18 PM 3:00  
GENERAL COUNSEL'S OFFICE

**STATEMENT OF THE ISSUE**

The issue is whether the State Board of Administration (SBA) should grant Petitioner's request to withdraw funds from his Investment Plan account despite the fact that he performs intermittent work in a non-recurring position for an employer which participates in the Florida Retirement System (FRS).

## **PRELIMINARY STATEMENT**

On December 28, 2007, Petitioner filed a Request for Intervention seeking to withdraw funds from his Investment Plan account. That request was denied based on his being employed by the University of South Florida (USF), an FRS-covered agency. Petitioner then filed a Petition for Hearing requesting the same relief, which was transmitted to the undersigned for informal hearing.

Petitioner attended the informal hearing via telephone and testified on his own behalf. The SBA presented the testimony of Dan Beard, Director of Policy, Risk Management and Compliance. Exhibits R-1 through R-4 and P-1, consisting of official records and documents reflecting contacts by and between Petitioner and Respondent and USF, were admitted into evidence without objection.

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

## **UNDISPUTED MATERIAL FACTS**

1. Petitioner became a member of the FRS Investment Plan in March, 2004 while working with the Hillsborough County School Board. He terminated that position after having earned 4.3 years of creditable service.
2. At the time he terminated employment, portions of his Investment Plan account were vested and portions were unvested.
3. The Petitioner is now employed by a private, non-FRS participating employer. He also works periodically for USF teaching GMAT preparation review courses on Saturdays.
4. Petitioner is paid by USF through university payroll on a non-recurring basis, by lump-sum payments when his assignments are completed. He receives a W-2 at the end of the year

from USF and all normal payroll taxes are withheld from his paychecks. Petitioner is considered to be an "OPS" or "other personal services" employee by the university.

5. Petitioner is generally hired for the Spring and Fall semesters under separate contracts. His schedule for the Fall of 2007 was September 15 – October 20 and November 3 – December 15. His schedule for the Spring of 2008 was February 16 – March 29 and April 19 - May 24. His teaching schedule is approved by his supervisor, Leonor O'Relly, and he is hired and paid as needed.

6. Petitioner teaches from a curriculum that has been approved by Ms. O'Relly, and USF provides a classroom for his use during the course at no cost to him. Petitioner is not allowed to promote his personal services, or the products or services of any company to the students.

7. Petitioner has been providing the described services to USF since 2000, generally at about 90 hours a year. He earns no service credit with the FRS for this work and is accruing no retirement benefits from it.

8. Petitioner has inquired about obtaining a distribution of the vested portion of his Investment Plan account (some \$ [REDACTED]) and understands that if he takes a distribution of the vested portion of his account, the unvested portion (some \$ [REDACTED]) will be forfeited pursuant to SBA rule. He still wishes to withdraw this money, so as to consolidate his retirement assets and because he does not believe that he will ever again be earning FRS service credit.

## CONCLUSIONS OF LAW

9. Pursuant to Section 121.4501(7)(c), Florida Statutes, benefits under the Investment Plan are payable in accordance with the provisions of Section 121.591, Florida Statutes. Section 121.591(1)(a)3. provides that in order to receive benefits from the Public Employee Optional Retirement Program (the Investment Plan), “the participant must be terminated from all employment with all Florida Retirement System employers, as provided in s. 121.021(39).”

10. Section 121.021(39)(a) provides that termination occurs “when a member ceases all employment relationships with employers under this system, as defined in subsection (10), but in the event a member should be employed by any such employer within the next calendar month, termination shall be deemed not to have occurred.” A university is included in the definition of “employer” in section 121.021(10).

11. Section 121.021(50) defines “Independent contractor” as:

[A]n individual who is not subject to the control and direction of the employer for whom work is being performed, with respect not only to what shall be done but to how it shall be done. If the employer has the right to exert such control, an employee-employer relationship exists, and, for purposes of this chapter, the person is an employee and not an independent contractor.

See also, 60S-6.001(32), Florida. Administrative Code, further defining an employee as one who has set hours of work, is supervised by his employer, and is furnished the necessary facilities by his employer.

12. Applying the above statutes and rules to the facts of record, it appears that Petitioner has been an employee of USF, rather than an independent contractor, but only for certain discrete periods of time. There are or have been periods when he has ceased all employment relationships

with USF and has not been rehired in the succeeding month, and so has terminated his employment with all FRS employers consistent with section 121.021(39)(a), Florida Statutes

13. In its letter of February 7, 2008 denying Petitioner's request for intervention, Respondent cites section 121.591(1), Florida Statutes, which, in addition to the above requirement, provides at (a)4 that "Benefit payments may not be made until the participant has been terminated for 3 calendar months..." This requirement is reiterated in Rule 19-11.003(3)(a), Florida Administrative Code.

14. The record does not contain documentation of a date when Petitioner filed an application seeking distribution of the funds in his Investment Plan account, and does not show if such an application was in fact filed. His request for intervention of December 28, 2007 refers to conversations with CitiStreet, the SBA third party administrator, and FRS, and reflects the fact that he was told he could not obtain his vested funds because he was currently employed by an FRS employer.

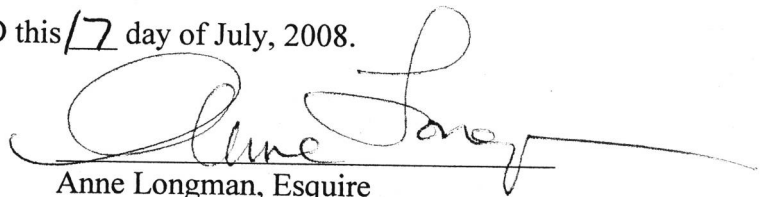
15. On the basis of the facts before me in this case, I cannot conclude that Petitioner could never meet the applicable statutory requirements for payment of the vested balance of his Investment Plan account. I note that there apparently have been three month periods when Petitioner was not employed by USF (June through August) and may therefore have been both fully terminated from all FRS employment and terminated for three calendar months and thus eligible to obtain a distribution from his Investment Plan account. (See example cited in Rule 19-11.003(3)(a), Florida Administrative Code: "If a participant terminates on May 15, the three calendar months are June, July, and August.") This circumstance could again pertain at some point in the future.



## RECOMMENDATION

Having considered the law and the undisputed facts of record, I cannot recommend that Petitioner be allowed to take the distribution he requests at this time, as I cannot determine if he has filed a proper application which meets the timeframes required by statute. Nor can I know with certainty that he would not, as a matter of law, be able to meet those requirements, if he did file a properly timed application. I therefore recommend that the Petition be dismissed without prejudice to its being renewed based on a different factual circumstances.

RESPECTFULLY SUBMITTED this 17 day of July, 2008.



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 should be filed with the Agency Clerk of the State Board of Administration. 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 17<sup>th</sup> day of July, 2008.

Copies furnished to:

Michael Nadler



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