

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

DEAN MIHALKO,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2016-3679
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On February 20, 2017, 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, Dean Mihalko, and upon counsel for the Respondent. This matter was decided after an informal proceeding. Respondent timely filed a Proposed Recommended Order. Petitioner did not file a Proposed Recommended Order. Neither party filed exceptions to the Recommended Order which were due on March 7, 2017. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that the SBA apportion between Petitioner and his employer the required payment of an invalid distribution that Petitioner had taken from his Florida Retirement System ("FRS") Investment Plan account 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.

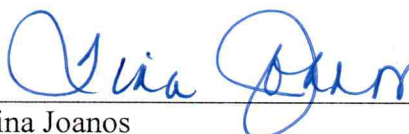
DONE AND ORDERED this 15th day of March, 2017, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Joan B. Hasegan
Chief of Defined Contribution Programs
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 to Dean Mihalko, pro se, both by email transmission, [REDACTED] by U.P.S. to [REDACTED] and by email transmission to Brian Newman, Esq. (brian@penningtonlaw.com) and Brandice Dickson, Esq., (brandi@penningtonlaw.com) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 15th day of March, 2017.



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

DEAN MIHALKO

Petitioner,

vs.

CASE NO. 2016-3679

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 16, 2016, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Dean Mihalko, *pro se*

For Respondent: 
Brandice D. Dickson
Pennington, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue as agreed at hearing is whether Respondent has authority to apportion, as between Petitioner and his employer, the required repayment of an invalid distribution taken from Petitioner's Florida Retirement System (FRS) Investment Plan account.

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone, testified on his own behalf, and presented no other witnesses. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits 1 through 4 and Petitioner's Exhibits 1 through 4 were admitted into evidence without objection.

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

MATERIAL UNDISPUTED FACTS

1. Petitioner joined the FRS defined contribution Investment Plan in February 2003, as an employee of the Martin County Sheriff's Office, an FRS-participating employer.
2. Petitioner was terminated by his FRS-participating employer on January 9, 2015. Petitioner grieved his termination through the process set out by his union's collective bargaining unit, and a hearing on the grievance was held May 19 and 20, 2015.
3. On May 1, 2015, before his grievance was resolved, Petitioner took a total distribution from his FRS Investment Plan account.
4. Petitioner prevailed in his grievance, had his termination reversed, and was reinstated by Order dated January 8, 2016 to a regularly-established Martin County Sheriff's Office position.
5. An SBA audit flagged Petitioner's FRS Investment Plan account as having an invalid "in-service" distribution. Because the grievance proceeding reversed his earlier termination, the total distribution he took on May 1, 2015 was regarded as having been taken in contravention of the statutory restrictions on payment of FRS benefits. Petitioner was given the

option of returning the money he took as a distribution from his FRS Investment Plan account, in order to “undo” that distribution, or terminating employment so as not to run afoul of the invalid distribution statute.

6. Petitioner testified that he understood the applicable statutes required the money he received be repaid if he wanted to continue working in an FRS position, but that he felt it was only fair that his employer pay a portion of the required reimbursement.

CONCLUSIONS OF LAW

7. Benefits are not payable to Investment Plan account members who are employed by an FRS-participating employer. *See* § 121.591(1)(a)3., Fla. Stat. Benefits are not payable until the member has been terminated for three calendar months after termination of employment and the member cannot return to employment with an FRS-participating employer, in any capacity, for six calendar months following termination. §§ 121.591(1)(a)4. and 121.021(39)(a)2., Fla. Stat.

Section 121.591, Florida Statutes states, in pertinent part:

Payment of benefits.

Benefits may not be paid under the Florida Retirement System Investment Plan unless the member has terminated employment as provided in s. 121.021(39)(a) or is deceased and a proper application has been filed as prescribed by the state board or the department.

...

(1) Normal benefits.--Under the investment plan:

(a) Benefits in the form of vested accumulations as described in s. 121.4501(6) are payable under this subsection in accordance with the following terms and conditions:

1. Benefits are payable only to a member, an alternate payee of a qualified domestic relations order, or a beneficiary.
2. Benefits shall be paid by the third-party administrator or designated approved providers in accordance with the law, the contracts, and any applicable board rule or policy.

3. The member must be terminated from all employment with all Florida Retirement System employers, as provided in s. 121.021(39).
4. Benefit payments may not be made until the member has been terminated for 3 calendar months, except that the state board may authorize by rule for the distribution of up to 10 percent of the member's account after being terminated for 1 calendar month if the member has reached the normal retirement date as defined in s. 121.021.

§ 121.591, Fla. Stat. (2015.)

8. When an Investment Plan member takes a distribution (receives benefits) in contravention of Section 121.591(1)(a), Florida Statutes, he is said to have taken an "invalid distribution," and Respondent must seek either the return of the distribution or termination of the member's employment, pursuant to section 121.591(1)(a)5., Florida Statutes.

Section 121.591(1)(a)5., Florida Statutes states, in pertinent part:

If a member or former member of the Florida Retirement System receives an invalid distribution, such person must either repay the full amount within 90 days after receipt of the final notification by the state board or the third-party administrator that the distribution was invalid, or, in lieu of repayment, the member must terminate employment from all participating employers. If such person fails to repay the full invalid distribution within 90 days after receipt of final notification, the person may be deemed retired from the investment plan by the state board and is subject to s. 121.122.

§ 121.591(1)(a)5., Fla.Stat.

9. Rule 19-11.003, Florida Administrative Code governs invalid distributions and states:

(9) Invalid distributions.

(a) If a member or a former member of the FRS Investment Plan receives an invalid distribution, the member or former member is required to repay the entire invalid distribution within 90 days of the member's receipt of a final notification from the SBA, or in lieu of repayment, the member must terminate employment from all participating employers. If the member fails to repay the invalid distribution, or terminate employment, the employer is liable for the repayment of the invalid distribution even if the member signed a statement at the time the member was hired that no benefit had been received from the Plan.

1. If a member repays the entire distribution, the member's repayment will be deposited in the FRS Investment Plan account; the member will be returned to the Investment Plan; and all future employee and employer contributions will be deposited in the funds the member has chosen.

2. If the employer repays the entire distribution, the repayment will be deposited in the Investment Plan Trust Fund and allocated to the Investment Plan's forfeiture account to offset plan expenses. The member will be returned to the Investment Plan; and all future employee and employer contributions will be deposited in the funds the member has chosen.

3. If the member fails to repay the invalid distribution and terminates employment, the SBA will declare the member a retiree and will not pursue the repayment of the invalid distribution pursuant to paragraph (b) above. As a retiree, the member is subject to the provisions of Section 121.122, F.S., if the member is reemployed in the future with an FRS-covered employer in a regularly established position.

19-11.003(9), F.A.C.

10. Because Petitioner was, and is, employed by an FRS-participating employer, his distribution was an invalid "in service" distribution which must either be "undone" by being repaid or must result in termination of his employment. Catherine A. Colford v. Department of Transportation, Pub.Emp.Rel.Comm., CS-2011-027 (Recommended Order April 21, 2011)(Final Order May 9, 2011). Petitioner's invalid distribution must be paid in full or Petitioner (or Petitioner's employer) may alternatively elect to sever Petitioner's employment. If Petitioner's distribution is not repaid, Petitioner is no longer eligible to participate in the FRS.

11. Either Petitioner or his employer may repay the distribution in full, but there does not appear to be any authority under the above-cited statutes and rule for the SBA to deem only a portion payable by either party, or for the SBA to apportion the repayment as between the two.

12. There are statutes which address situations where an FRS participating employer reinstates and makes an employee whole again – including accrual of FRS service credit - after a termination is found to be incorrect and is rescinded. §121.011(3)(g), Fla.Stat. (2016). But, as set

out below, they are inapplicable if the employee has “retired.” Section §121.011(3)(g), Florida Statutes states:

(g) Any member of the Florida Retirement System or any member of an existing system under this chapter who is not retired and who is, has been, or shall be dismissed from employment shall be considered terminated from active membership in such system.

1. If such dismissal is rescinded by proper authority or through legal proceedings, the member is eligible to receive retirement service credit for such period of dismissal if:

a. The dismissal action taken against the member is determined to be incorrect and is negated, the employee is made whole for the period of the dismissal or any portion thereof, and employment is reinstated; and

b. The employer pays into the Retirement System Trust Fund the total required employer contributions for the period for which the employee is made whole, plus interest at 6.5 percent compounded annually until full payment is made. The employee shall pay the total employee contributions, if applicable. The employer shall pay the interest on employee contributions, if applicable.

2. If the dismissal action is subsequently changed to a suspension by proper authority or through legal proceedings, the member is eligible to receive retirement service credit, provided the member's employment is reinstated, restoring the employee-employer relationship, and the employee pays the total required employer and employee contributions and complies with all requirements in paragraph (e).

§ 121.011 (3)(g), Fla.Stat. (2016) (Emphasis added.)

13. Here, Petitioner was deemed retired when he took a distribution from his FRS Investment Plan, because under section 121.591, “a former member of the investment plan who has terminated employment and taken a distribution of vested employee or employer contributions is defined as a “retiree,” except for a mandatory distribution of a *de minimis* account authorized by the state board or a minimum required distribution provided by s. 401(a)(9) of the Internal Revenue Code.” § 121.4501(2)(k), Fla.Stat. (2016). Because Petitioner’s FRS employment was terminated and he took a distribution from his Investment Plan account, he became a “retiree” by operation of

law. A reemployed retiree may not be enrolled as a renewed member of the FRS. § 121.122(2), Fla. Stat. (2016).

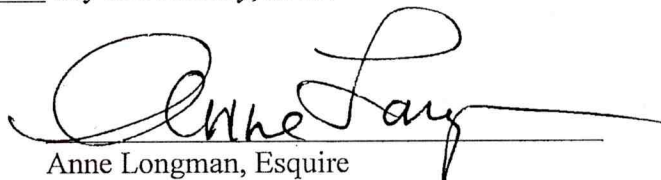
14. In short, Petitioner can either keep the money he received, be deemed a retiree and accrue no further FRS benefits, or he can repay the distribution, continue to work at his present job and add to his Investment Plan account. He cannot do both, and the Respondent cannot compel his employer to make the repayment or any portion of it.

15. The 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.).

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 20th day of February, 2017.



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
nell.bowers@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Dean Mihalko



Petitioner

and via electronic mail only to:

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