

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

DARRELL HARRIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	SBA Case No. 2016-3560
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
_____	)	

**FINAL ORDER**

On June 3, 2016, 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, Darrell Harris, 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 June 20, 2016. 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 received an invalid distribution from his Florida Retirement System (FRS) Investment Plan account. Petitioner was a vested member of the FRS Investment Plan at the time he terminated his FRS-covered employment with the Hendry County School Board in June 2015. When he took his total account distribution in November 2015, he

still was employed by the Hendry County Board of County Commissioners, an FRS-participating employer, and thus he did not meet the distribution requirements of Section 121.591, Florida Statutes. Because he received an invalid in-service distribution, he is required either to terminate employment with all FRS-participating employers for 6 calendar months or to repay the invalid distribution within 90 days from the date of this Final Order.

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.

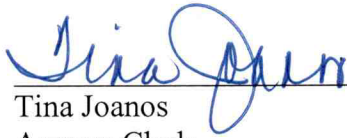
DONE AND ORDERED this 27<sup>th</sup> day of July 2016, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



**Joan B. Haseaman**  
Chief of Defined Contribution Programs  
State Board of Administration  
1801 Hermitage Boulevard, Suite 100  
Tallahassee, Florida 32308  
(850) 488-4406

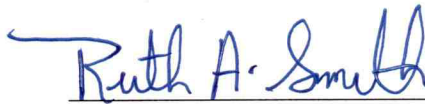
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos  
Agency Clerk

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Darrell Harris, pro se, by [REDACTED] and by email transmission to Brian Newman, Esq. ([brian@penningtonlaw.com](mailto:brian@penningtonlaw.com)) and Brandice Dickson, Esq., ([brandi@penningtonlaw.com](mailto:brandi@penningtonlaw.com)) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 27<sup>th</sup> day of July, 2016.



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

DARRELL HARRIS,

Petitioner,

vs.

Case No.: 2016-3560

STATE BOARD OF ADMINISTRATION,

Respondent.

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**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 April 4, 2016, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner:

Darrell Harris, pro se  


For Respondent:

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

**STATEMENT OF THE ISSUE**

The issue is whether Petitioner received an “in service” distribution and must either repay the distribution or terminate employment with all FRS-participating employers.

**EXHIBIT A**

## **PRELIMINARY STATEMENT**

Petitioner attended the hearing by telephone, testified on his own behalf, and presented the testimony of Joe Timm, a Financial Advisor with Edward Jones. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 and R-2 were admitted into evidence without objection. Respondent filed Supplemental Exhibits R-3 through R-7 following the hearing, and those exhibits are admitted without objection.

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

## **MATERIAL UNDISPUTED FACTS**

1. Petitioner was elected to the Hendry County School Board in the 1970's, left to work for a non-FRS employer for a period, and then returned to FRS employment in 1995, again as a Hendry County School Board employee. He was a member of the FRS defined benefit Pension Plan. In 2000, while so employed, he was elected to the Hendry County Board of County Commissioners, a seat he still holds.

2. After his election in 2000, he was asked to declare which position, school board employee or county commissioner, he wished to base his ongoing FRS retirement plan on. He chose his school board position, as it would produce a greater benefit. He states that he was told he would accrue no benefit from his county commission position, although Respondent presented his letter to the FRS Division of Retirement on March 7, 2001 which states "I wish to remain in the regular class of the Florida Retirement System in both of my positions, Warehouse Specialist

with the Hendry County School Board and my elected official position with the Hendry County Board of County Commissioners.”

3. In June, 2015, after over 20 years, employment with the Hendry County School Board, Petitioner decided to retire from that position. He assumed he would not be accruing any benefit from his county commission position.

4. On June 1, 2015, Petitioner switched FRS plans and joined the FRS defined contribution Investment Plan, planning to roll his funds into an Individual Retirement Account (IRA).

5. On June 30, 2015, Petitioner terminated his employment with the Hendry County School Board.

6. On November 9, 2015 Petitioner received a total distribution from his FRS Investment Plan account in the amount of [REDACTED] When he requested this distribution, Petitioner informed Respondent he was not actively employed with any FRS-participating employer as part of a standard colloquy over the telephone.

7. During an audit of FRS Investment Plan records, Respondent discovered that Petitioner was employed by the Hendry County Board of County Commissioners at the time he took his Investment Plan distribution. Petitioner remains employed by the Hendry County Board of County Commissioners to date, and his term does not end until 2018.

8. The Hendry County Board of County Commissioners is an FRS-participating employer.

9. Petitioner asserts that he should not have been permitted by Respondent to take a distribution of his retirement plan account if that was in fact not permissible due to his continuing position as a county commissioner; and that he should not be forced to return the distribution he

received unless he is reinstated in the Pension Plan and his second election deemed voided and still available for his use in the future. Benefits are not payable to Investment Plan account members who are actively employed by an FRS-participating employer and until the member has been terminated for 3 calendar months.

### CONCLUSIONS OF LAW

10. Section 121.591, Florida Statutes provides that:

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)(emphasis added).

11. 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” must either return the distribution or terminate his employment. Rule 19-11.003, Florida Administrative Code controls this situation:

(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, F.A.C.

12. Because Petitioner was, and is, employed by an FRS-participating employer, his distribution was an invalid “in service” distribution which must be cured either by repayment or termination of employment. Petitioner’s request to repay the invalid distribution only if he can be reinstated to the FRS Pension Plan and have his second election renewed cannot be granted as Florida law provides only a single opportunity to move between plans. § 121.4501(4)(g), Fla.



Stat. (2015). Petitioner has already used his single opportunity to switch between plans and the statute does not provide for another election.

13. The FRS Summary Plan Description for the Investment Plan addresses the dual membership situation in which Petitioner finds himself:

If an employee works in two or more jobs at the same time that are covered by different FRS membership classes, the employee may be a member of only one class, which will be determined as follows:

- If the jobs are covered by different membership classes, and none of which is the Elected Officers' Class, the member will be in the class in which he or she is employed for more than half the time. When the employment is split equally, the member may choose the class of membership he or she prefers.
- If the jobs are covered by different FRS membership classes, and one of which is the Elected Officers' Class, the member may choose to participate in any one class for which he or she is eligible.

If the member is required or chooses to be a member of the Regular Class, his or her total salaries from all positions will be reported for retirement purposes. When the member is required or chooses to be a member of the Special Risk Class, the Special Risk Administrative Support Class, the SMSC, or the EOC, only salary from that position will be reported for retirement purposes.

Reference: Sections 121.4501(2)(e) and (f), (3), and (4), and 121.051(9), F.S. Sections 19-11.006 and 11.007, F.A.C.

14. The SBA is not authorized to depart from the requirements of Chapter 121, Florida Statutes, the statutes it is charged to implement, when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). Further, the SBA's construction and application of those statutes are entitled to great weight and will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. 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 DCA1998). It is unfortunate that Petitioner appears to have misunderstood that his choice of a class of FRS membership had no effect on his still being an FRS employee even after he terminated the position from which

that class derived, but I see no indication that he was misled or misinformed by any action of Respondent. Respondent lacks the statutory authority to grant 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 3<sup>d</sup> day of June, 2016.



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  
[alongman@llw-law.com](mailto:alongman@llw-law.com)

**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](mailto:Tina.joanos@sbafla.com)  
[mini.watson@sbafla.com](mailto:mini.watson@sbafla.com)  
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Darrell Harris



Petitioner

and via electronic mail only to:

Brian A. Newman, Esquire  
Brandice D. Dickson, Esquire  
Pennington, P.A.  
215 S. Monroe Street, Suite 200  
Tallahassee, Florida 32301  
slindsey@penningtonlaw.com

Counsel for Respondent