

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

THOMAS ALLEN RADFORD, JR.,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2008-1174
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
_____)	

FINAL ORDER

On September 26, 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, Thomas Allen Radford, Jr., and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on October 10, 2008. 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 that he not be required to terminate his employment with the Department of Children and Family Services and that neither he nor the Department of Children and Family Services be required to repay Petitioner's distribution 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 14th day of October, 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.

TINA JOANAS
Clerk 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by U.S. Mail, certified, return receipt requested, to Thomas A. Radford, Jr., 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 14th day of October, 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

THOMAS ALLEN RADFORD, JR.,

Petitioner,

v.

CASE NO.: 2008-1174

STATE BOARD OF ADMINISTRATION,


Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned Presiding Officer on April 28, 2008, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Thomas Allen Radford, Jr.


Petitioner

For Respondent: Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, Florida 32301

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GENERAL COUNSEL'S OFFICE

STATEMENT OF THE ISSUE

The issue is whether the Respondent, State Board of Administration (SBA) should require that Petitioner either repay a distribution taken from his Investment Plan account or terminate his FRS employment.

1
Exhibit A

PRELIMINARY STATEMENT

An audit of Florida Retirement System (FRS) Public Employee Optional Retirement Plan (commonly known as the Investment Plan) records revealed that Petitioner had received a distribution of his Investment Plan account and returned to FRS covered employment before three calendar months had elapsed. He received a letter from the SBA stating: “[T]herefore, the total distribution of \$ [REDACTED] must be returned to the FRS Investment Plan by April 21, 2008 or you must terminate your employment by April 21, 2008. Mr. Radford filed a Petition challenging this action, which was transmitted to the undersigned for informal hearing.

Petitioner attended the hearing by telephone and testified in his own behalf. The Respondent presented the testimony of Dan Beard, Director of Policy, Risk Management and Compliance. Petitioner's Exhibits P-1 through P-4 and Respondent's Exhibits R-1 through R-9 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 the transcript was filed. Respondent filed a Proposed Recommended Order; Petitioner made no further filings.

UNDISPUTED MATERIAL FACTS

1. Petitioner joined the Florida Retirement System Investment Plan effective March 1, 2005.
2. He terminated his employment with the Polk County School Board on July 1, 2007.

3. He took a full distribution of his Investment Plan account on November 12, 2007.
4. Petitioner then accepted employment with the State of Florida, Department of Children and Families (DCF), an FRS participating employer, beginning February 8, 2008.
5. The Division of Retirement conducted an audit that compared the date of Petitioner's distribution from his Investment Plan account to the date of his employment with DCF.
6. Based on that audit, the Division of Retirement determined that the Petitioner received an invalid distribution because he became re-employed with an FRS-participating employer sooner than three calendar months after having taken his distribution.
7. The Petitioner was sent a letter by the Respondent notifying him that he had taken an invalid distribution and that he would either have to pay back the full amount of the distribution or terminate his position with the DCF.
8. Upon becoming employed with the DCF, Petitioner executed a form titled "Florida Retirement System (FRS) – New Employee Certification Form.”
9. On that form, Petitioner acknowledged that he was previously terminated on July 31, 2007, that he had been a member of the FRS Investment Plan, and that he was being hired by DCF on February 8, 2008.
10. On that form, Petitioner also was asked whether he was retired from any State of Florida administered retirement plan, and the term “retired” was explained, by reference to a footnote, as “You are retired if you ... have taken any distribution under the FRS Investment Plan....”
11. By his signature, Petitioner certified that he had not taken any distribution under the FRS Investment Plan. This form also states at II b., “If I am reemployed ... at any time from the 4th through the 12th month after taking a distribution from the Investment Plan... my monthly retirement

benefit **must be suspended....**" This sentence also refers to another footnote that states: "The Division of Retirement and the Investment Plan administrator have the right to request a return of distributions received in violation of the reemployment provisions."

12. Petitioner testified that he believes a DCF Human Resources employee instructed him to fill out the form in the way he did.

13. Petitioner also executed a form titled "New/Transferring Employee Acknowledgement Form," on which he certified that he had not retired from any FRS employer within the past 12 months.

14. Petitioner remains employed with the State of Florida, Department of Children and Families and, at 28 years of age, has not yet reached normal retirement date.

CONCLUSIONS OF LAW

15. The relevant Florida Statutes include the following:

121.091. Benefits payable under the system

(9) Employment after retirement; limitation.--

(c) The provisions of this subsection apply to retirees, as defined in s. 121.4501(2)(j), of the Public Employee Optional Retirement Program created in part II, subject to the following conditions:

1. Such retirees may not be reemployed with an employer participating in the Florida Retirement System as provided in paragraph (b) until such person has been retired for 3 calendar months, unless the participant has reached the normal retirement requirements of the defined benefit plan as provided in s. 121.021(29).

2. Such retiree employed in violation of this subsection and any employing agency that knowingly employs or appoints such person shall be jointly and severally liable for reimbursement of any benefits paid to the retirement trust fund from which the benefits were paid, including the Retirement System Trust Fund and the Public Employee Optional Retirement Program Trust Fund, as appropriate. To avoid

liability, such employing agency must have a written statement from the retiree that he or she is not retired from a state-administered retirement system.

§ 121.091(9)(c), Fla.Stat.

19. The term “retiree” is defined at section 121.4501(2)(j):

“Retiree” means a former participant of the Florida Retirement System Public Employee Optional Retirement Program who has terminated employment and has taken a distribution as provided in §121.591

16. Section 121.021(56), Florida Statutes defines "calendar month" to mean "one of the 12 divisions of a year as determined by the Gregorian calendar (e.g., January, April, etc.)."

17. In accordance with a plain meaning reading of the above statutes, Petitioner was reemployed with an FRS participating employer before three calendar months had elapsed from the time he became “retired,” i.e. terminated his previous employment and took a distribution from his Investment Plan account, and so was employed in violation of section 121.091(9)(c), Florida Statutes. He therefore is liable under the same statute for reimbursement of any benefits paid to him.

Id.

18. Petitioner asserts that he was misled by the lack of a clear definition of “calendar month,” and so did not understand when the statutory three month period would elapse. I conclude that amid the welter of requirements concerning distributions and reemployment, the meaning of the term “calendar month” is sufficiently clear on its face to inform the reader that it means something other than 30 days.

19. The above seems to be all the law required under the facts of this case for me to reach a recommendation, but there are numerous other provisions, exceptions, caveats, qualifications and the like which would need to be taken into account by an FRS participant trying to plan his or her

employment, reemployment, plan choice and receipt of benefits decisions so as to act responsibly with regard to his or her retirement assets. It is not clear what relevance the three month waiting period before reemployment has when it is grafted onto another, 12 month waiting period, and when the consequences of violating the waiting period are expressed in terms of “suspending” retirement benefits. This language does not fit readily with what may occur under the Investment Plan, where a participant may take a complete distribution of his account, leaving no further benefits to be “suspended.”

20. In this instance, Petitioner took a distribution from his Investment Plan account after waiting longer than the required period (three calendar months) following termination of his initial FRS-participating employment, so the distribution was valid when he took it. He now must repay this money because he took a job with another FRS participating employer within three calendar months after the distribution in violation of statute. Petitioner apparently attempted to determine how the reemployment provisions would apply to him, but even diligent reading of the FRS website, the statutes, rules and the Summary Plan Description, including the full page table of examples and consequences set out at page 19 titled “Can I return to employment after I retire?” in that document, might not have turned up the correct answer. But he did sign more than one document when beginning his FRS reemployment that indicated something was amiss and which certified to circumstances which were not accurate. Whether Petitioner was misled by his new employer to fill out the forms in this way is a matter involving DCF, which is not a party to this proceeding.

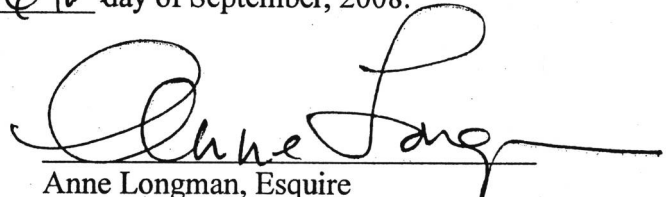
21. There does not appear to be any statutory authority under which Respondent SBA can legally grant the relief requested by the Petitioner, and agencies have only those powers conferred on them by statute. See e.g. East Cent. Regional Wastewater Facilities Operation Bd. v. City WPB, 659

So. 2d 402,404 (Fla. 4th DCA 1995); Gardinier Inc. v. Florida Dept. Pollution Control, 300 So. 2d 75,76 (Fla 1st DCA 1974).

RECOMMENDATION

Having considered the law and the undisputed facts of record, I find no basis on which the relief requested by Petitioner can be granted. I therefore recommend that Respondent, State Board of Administration, issue a final order denying the relief requested.

RESPECTFULLY SUBMITTED this 26th day of September, 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 26th day of September, 2008.

Copies furnished to:

Thomas Allen Radford, Jr.



Petitioner

Brian A. Newman, Esquire
Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.

Post Office Box 10095
Tallahassee, Florida 32302-2095
Respondent