

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

| | | |
|--------------------------------|---|--------------------|
| MATTHEW GISONDI, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | Case No. 2013-2675 |
| |) | |
| STATE BOARD OF ADMINISTRATION, |) | |
| |) | |
| Respondent. |) | |
| |) | |
| _____ |) | |

FINAL ORDER

On July 19, 2013, the Administrative Law Judge 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, Matthew Gisondi, 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 August 6, 2013. 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 he be entitled to renewed membership in the Florida Retirement

System ("FRS"), as a retiree who was rehired by an FRS-participating employer after July 1, 2010, 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.

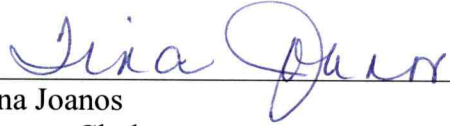
DONE AND ORDERED this 26th day of November, 2013, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



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

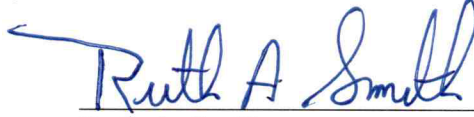
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



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 Matthew Gisondi, 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 26th day of November, 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

MATTHEW GISONDI,

Petitioner,

vs.

Case No.: 2013-2675

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 April 30, 2013, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Matthew D. Gisondi

[REDACTED]
[REDACTED]

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

STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to renewed membership in the Florida Retirement System (FRS).

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented the testimony of Daniel Beard, Director of Policy, Risk Management, and Compliance, State Board of Administration. Petitioner offered no exhibits. Respondent's Exhibits 1 through 3 were admitted into evidence without objection.

A transcript of the hearing was made, filed with the agency and served on Petitioner on May 24, 2013; however, neither the transcript nor the Notice of Filing the transcript was served on either Respondent's counsel or the Presiding Officer until July 17, 2013. The parties were directed at hearing to submit Proposed Recommended Orders within 30 days after the transcript was filed. Petitioner has made no further filings. Respondent had no way of knowing that the transcript had been filed and so had not yet filed a Proposed Recommended Order when it was discovered that the transcript had not been served on Respondent or myself. Respondent's attorney filed a Proposed Recommended Order the day she received the transcript, and I accept that pleading as part of the record.

MATERIAL UNDISPUTED FACTS

1. Petitioner was employed by the State of Florida Department of Transportation on from January 2007 through July 2008 and elected to enroll in the FRS Investment Plan, a defined contribution plan.
2. On July 3, 2008, Petitioner terminated FRS-covered employment.
3. Petitioner took a total distribution from his Investment Plan account on November 20, 2008. When he took this distribution, he became a retiree as a matter of law, under the terms of Chapter 121, Florida Statutes.

4. The operative portion of the definition of “retiree” has not changed since November 20, 2008.

5. In 2009, section 121.122, Florida Statutes was amended to prohibit retirees who return to work with an FRS-covered agency after July 1, 2010 from participating in the FRS.

6. Petitioner returned to work with an FRS-covered agency in January 2013. After returning to work, he was advised that he could not participate in the FRS because he was considered to have “retired” when he took a distribution from his Investment Plan account in November 2008.

7. Petitioner filed a Request for Intervention requesting that the 2009 amendment not apply to him because: (1) the current definition of a “retiree” was not the definition of “retiree” at the time he took his distribution; (2) he was not informed at the time he took his distribution that he would be considered a “retiree”; (3) the result is harsh; or (4) he was not informed by Respondent prior to July 1, 2010 that the law respecting rehired retirees had changed.

8. This request was denied and a Petition for Hearing raising the same issues was timely filed. This administrative proceeding followed.

CONCLUSIONS OF LAW

9. During the 2009 legislative session, the Florida Legislature revised Section 121.122, Florida Statutes to exclude from renewed membership in the FRS any retiree who becomes reemployed on or after July 1, 2010. The amended statute states in pertinent part that:

121.122. Renewed membership in system

(2) A retiree of a state-administered retirement system who is initially reemployed on or after July 1, 2010, is not eligible for renewed membership.

§ 121.122, Fla. Stat. (2009)

10. A “retiree” is, and was in 2008, defined as a former participant of the optional retirement program (another name for the Investment Plan) who has terminated employment and has taken a distribution as provided in section 121.591, Florida Statutes.¹ § 121.4501(2)(k), Fla. Stat. Petitioner is considered a retiree because he terminated FRS-covered employment and withdrew money from his Investment Plan account in 2008. He is ineligible for renewed membership in the FRS under the 2009 amendment to section 121.122, Florida Statutes because he did not return to work with an FRS-covered agency before July 1, 2010. Prior to distribution of his Investment Plan account, Petitioner was required to acknowledge that he would be considered a “retiree” under the FRS.

11. Petitioner argues that application of the 2009 amendment to him is unduly harsh because he was not told that he would be denied renewed FRS membership when he made the decision to take a distribution in 2008. His assertion is correct - he was not told he would be ineligible for FRS benefits upon return to FRS-covered service because that was not the state of the law in 2008, and no one knew that the law would be changed. Petitioner contends that the result here could not have been intended by the Legislature when it adopted the 2009 amendment.

12. But the legislative history of the passage of the 2009 amendment makes clear that the Legislature was aware of the potentially harsh result the change in the law could have as to

¹ Compare §§ 121.4501(2)(j), Fla.Stat. [“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 s. 121.591, except for a mandatory distribution of a de minimis account authorized by the state board.”(effective July 1, 2008 through June 30, 2009)] with 121.4501(2)(k), Fla.Stat. [“Retiree’ means a former member of the investment plan who has terminated employment and taken a distribution of vested employee or employer contributions as provided in s. 121.591, 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.” (effective July 1, 2012).

existing early retirees. As the agency affected by a change in the statute it administers, Respondent submitted an analysis of House Bill 479 to the Full Appropriations Council on General Government & Health Case which stated:

HB 479 would also close the renewed membership class to retirees of a state-administered retirement system initially reemployed by a Florida Retirement System participating employer on or after January 1, 2010. However, this bill would require employer contributions to be paid on the salary of reemployed retirees who are not enrolled as renewed members to maintain the funding base for the Health Insurance Subsidy Program. In addition, this bill would require the employer to pay any unfunded actuarial liability portion of the employer contribution rate for active members if an unfunded actuarial liability cost reemerges. The bill does not provide for the paying of the Investment Plan administrative contribution.

Retirees initially employed before January 1, 2010, would continue their renewed membership and employers would continue to owe the total employer contribution rate for these renewed members. As the number of retirees who are enrolled as renewed members in the FRS is reduced over time, this would gradually reduce the overall cost to employers. In the longer-term, these changes could result in savings to the FRS Pension Plan by limiting future liabilities for renewed membership and by altering retirement patterns based upon plans for returning to work within a few months of terminating employment. The actual impact would have to be determined by an actuarial special study conducted by the Division of Retirement's consulting actuary.

Closing the Renewed Membership Class to future participation would impact not only those reemployed retirees who retired at normal retirement, but it would also impact those who retired early.

Under the FRS Pension Plan a member becomes vested with six years of service. A retiree may take an early retirement if vested and within 20 years of the normal retirement age. However, in doing so the benefit is reduced by five percent for each year remaining before the retiree reaches normal retirement age. For retirees of the Special Risk Class, the earliest a member could receive an early retirement benefit would be at age 35 and one month. For retirees of the other membership classes, early retirement benefit would be at age 42 and one month if vested.

These early retirement retirees would be ineligible for renewed membership should they return to FRS employment.

Under the FRS Investment Plan, a participant vests after only one year of service. If a member terminates and takes a distribution, he or she is considered a retiree and ineligible for renewed membership in the FRS. Conceivably, a retiree who participated in the Investment Plan for one year and took a distribution at the age of 24 could later return to work for an FRS employer for 30 years or more and never be eligible for a retirement benefit. This could impact the ability of FRS employer's (sic) to recruit employees in the future.

Florida State Board of Administration Report to Full Appropriations Council on General Government & Health Care on HB # 479, Feb. 16, 2009, p. 5 (emphasis added). Thus, the Legislature was made aware of the harsh result which could be caused by absolutely precluding those deemed by operation of law to be retirees from ever again participating in the FRS, and with this awareness, enacted section 121.122 as it currently reads.

13. Denial of Petitioner's request in this case is consistent with the denial of other similar requests the Respondent has received from former FRS members who made the decision to retire before the 2009 amendment was enacted. See Blaesser v. State Board of Administration, Case No. 2011-2106 (Recommended Order, October 6, 2011; Final Order October 28, 2011); affirmed, 2012 WL 4094804 (Fla. 1st DCA 2012)(holding application of 2009 amendment is not unconstitutional as applied to a rehiree who retired before the amendment was adopted), review denied __ So.3d __ (Fla. February 11, 2013).

14. Petitioner does not have a "vested" right to future benefits under the FRS after he retired. See, Fla. Sheriff's Assn. v. Dept. of Adm., 408 So.2d 1033 (Fla.1982)(holding that Florida's constitutional prohibition of impairment of contracts does not prohibit the legislature from modifying or altering prospective FRS benefits). See also Scott v. Williams, __ So.3d

___, 2013 WL 173955 (Fla. 2013). Nor does Petitioner have any vested right to renewed membership in the FRS if he was rightfully classified as a rehired retiree.

15. There is no question that Petitioner meets the definition of a “retiree” and that he returned to work with an FRS-covered agency well after the 2009 amendment became effective. His exclusion from the FRS is required by the plain meaning of the 2009 amendment and was intended by the Legislature. Although the Respondent cannot determine any constitutional issue raised by Petitioner, the 2009 amendment at issue has been found to be constitutional in Blaesser under facts that are indistinguishable from the facts here.

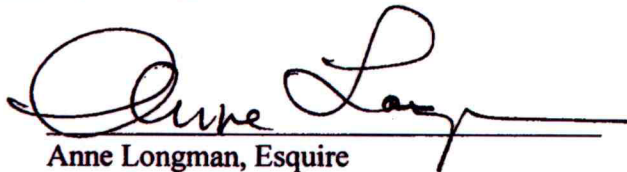
16. Finally, Petitioner asserts that Respondent had an obligation to contact him after the relevant statute was amended and before it went into effect. He has made no legal argument to support this assertion, and I see none, as it appears to be a variant of a vest rights argument previously rejected (see paragraph 14).

17. It is unfortunate that by taking out the relatively small amount of money in his Investment Plan account, Petitioner became retired by operation of law, and because of intervening statutory changes is now precluded, absent further action by the legislature, from ever again participating in the FRS. Petitioner knew that he was “retiring” by taking a distribution, but that effect of his action changed when section 121.122 was amended in 2009 to preclude membership to rehired retirees. Respondent SBA lacks the authority to grant Petitioner the relief he seeks in this proceeding.

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 19th day of July, 2013.



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

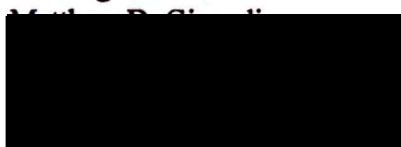
All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions must be filed with the Agency Clerk of the State Board of Administration and served on opposing counsel at the addresses shown below. The SBA then will enter a Final Order which 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
Daniel.B Beard@sbafla.com
(850) 488-4406

This 19th day of July, 2013.

Copies furnished to:

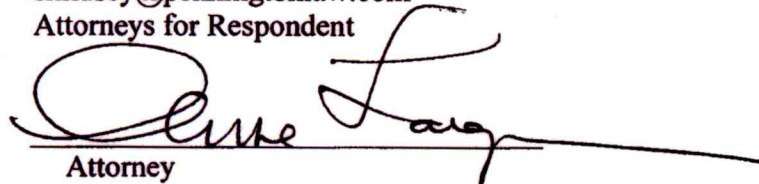
Via Regular Mail



Petitioner

Via electronic mail:

Brian A. Newman, Esquire
Brandice D. Dickson
Pennington, P.A.
Post Office Box 10095
Tallahassee, FL 32302-2095
slindsey@penningtonlaw.com
Attorneys for Respondent



Attorney