

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

MICHELLE S. MAXWELL, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE BOARD OF ADMINISTRATION, )  
 )  
 Respondent. )  
 )  
 )  
 )  
 \_\_\_\_\_ )

Case No. 2011-2300

**FINAL ORDER**

On June 20, 2012, 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, Michelle S. Maxwell, 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 July 5, 2012. 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.

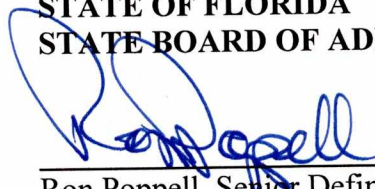
**ORDERED**

The Recommended Order (Exhibit A) hereby is adopted in its entirety. The Petitioner's request that she be entitled to renewed membership in the Florida Retirement System (FRS), as retiree who was rehired by an FRS-participating employer in a regularly established position 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 10<sup>th</sup> day of July, 2012, in Tallahassee, Florida.

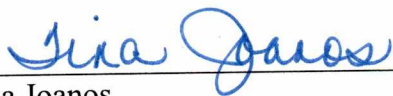
**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



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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.

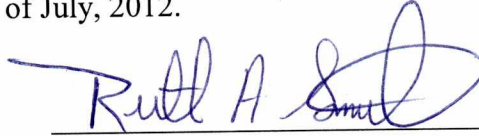


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Tina Joanos  
Agency Clerk

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Michelle S. Maxwell, [REDACTED], [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 10<sup>th</sup> day of July, 2012.



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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

MICHELLE S. MAXWELL,

Petitioner,

vs.

Case No.: 2011-2300

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 February 16, 2012, in Tallahassee, Florida. The appearances were as follows:

For Petitioner: Michelle S. Maxwell

[REDACTED]

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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**STATEMENT OF THE ISSUE**

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

**EXHIBIT A**

## PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone and testified on her own behalf. Respondent offered the testimony of Daniel Beard, SBA Director of Policy, Risk Management, and Compliance, Defined Contribution Programs. Respondent's Exhibits R-1 through R-4 were admitted into evidence at the hearing 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 30 days after the transcript was filed. Respondent filed a Proposed Recommended Order; Petitioner made no further filings.

## MATERIAL UNDISPUTED FACTS

1. Petitioner was employed by the Public Defender's Office in the Ninth Judicial Circuit, Orlando, Florida on October 3, 2006 and defaulted into the FRS Pension Plan effective May 1, 2007.
2. On June 1, 2007 Petitioner used her one-time second election to switch from the FRS Pension Plan to the FRS Investment Plan, making her a member of that plan effective July 1, 2007.
3. Petitioner terminated employment with the Public Defender's Office in the Ninth Judicial Circuit on May 30, 2008.
4. Petitioner requested, and on May 26, 2009 received, a total distribution from her Investment Plan account.
5. Petitioner returned to FRS-covered employment with the Monroe County Sheriff's Department on May 30, 2011.

6. Petitioner was not employed by any FRS-participating employer between her May, 2008 termination from the Ninth Judicial Circuit Public Defender's Office and her hiring by the Monroe County Sheriff's Department.

7. Petitioner was informed upon her return to FRS-covered employment that she was not eligible to participate in the FRS as a rehired retiree due to the 2009 amendments to Section 121.122, Florida Statutes.

8. Petitioner filed a petition for hearing requesting that she be allowed to participate in the FRS, and 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 was reemployed on or after July 1, 2010. That revised section states:

#### **121.122. Renewed membership in system**

(1) Except as provided in s. 121.053, effective July 1, 1991, through June 30, 2010, any retiree of a state-administered retirement system who is initially reemployed in a regularly established position with a covered employer, including an elective public office that does not qualify for the Elected Officer's Class, shall be enrolled as a compulsory member of the Regular Class of the Florida Retirement System. Effective July 1, 1997, through June 30, 2010, any retiree of a state-administered retirement system who is initially reemployed in a position included in the Senior Management Service Class shall be enrolled as a compulsory member of the Senior Management Service Class of the Florida Retirement System as provided in s. 121.055. A retiree is entitled to receive an additional retirement benefit, subject to the following conditions:

(a) Such member must resatisfy the age and service requirements as provided in this chapter for initial membership under the system, unless such member elects to participate in the Senior Management Service Optional Annuity Program in lieu of the Senior Management Service Class, as provided in s. 121.055(6).

(b) Such member is not entitled to disability benefits as provided in s. 121.091(4).

(c) Such member must meet the reemployment after retirement limitations as provided in s. 121.091(9), as applicable.

(d) Upon renewed membership or reemployment of a retiree, the employer of such member shall pay the applicable employer contributions as required by ss. 112.363, 121.71, 121.74, and 121.76.

(e) Such member is entitled to purchase additional retirement credit in the Regular Class or the Senior Management Service Class, as applicable, for any postretirement service performed in a regularly established position as follows:

1. For regular class service prior to July 1, 1991, by paying the Regular Class applicable employee and employer contributions for the period being claimed, plus 4 percent interest compounded annually from first year of service claimed until July 1, 1975, and 6.5 percent interest compounded thereafter, until full payment is made to the Florida Retirement System Trust Fund; or

2. For Senior Management Service Class prior to June 1, 1997, as provided in s. 121.055(1)(j).

The contribution for postretirement service between July 1, 1985, and July 1, 1991, for which the reemployed retiree contribution was paid, shall be the difference between such contribution and the total applicable contribution for the period being claimed, plus interest. The employer of such member may pay the applicable employer contribution in lieu of the member. If a member does not wish to claim credit for all of the postretirement service for which he or she is eligible, the service the member claims must be the most recent service.

(f) No creditable service for which credit was received, or which remained unclaimed, at retirement may be claimed or applied toward service credit earned following renewed membership. However, service earned as an elected officer with renewed membership in the Elected Officers' Class may be used in conjunction with creditable service earned under this section, provided the applicable vesting requirements and other existing statutory conditions required by this chapter are met.

(g) Notwithstanding any other limitations provided in this section, a participant of the State University System Optional Retirement Program, the State Community College Optional Retirement Program, or the Senior Management Service Optional Annuity Program who terminated employment and commenced

receiving a distribution under the optional program, who initially renews membership as required by this section upon reemployment after retirement, and who had previously earned creditable Florida Retirement System service that was not included in any retirement benefit may include such previous service toward vesting and service credit in the second career benefit provided under renewed membership.

(h) A renewed member who is not receiving the maximum health insurance subsidy provided in s. 112.363 is entitled to earn additional credit toward the maximum health insurance subsidy. Any additional subsidy due because of such additional credit may be received only at the time of payment of the second career retirement benefit. The total health insurance subsidy received by a retiree receiving benefits from initial and renewed membership may not exceed the maximum allowed in s. 112.363.

**(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)(emphasis added.)

10. For FRS Investment Plan purposes, a retiree is “a former participant of the 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.” §121.4501(2)(k), Fla.Stat. (2010). Because Petitioner terminated FRS employment and took a distribution from her Investment Plan account, she was and is considered a retiree by operation of law. Petitioner was not reemployed by an FRS-participating employer in a regularly established position prior to July 1, 2010.

11. The express terms of Section 121.122(2), Florida Statutes are applicable here and Petitioner is ineligible, by those terms, to participate in the FRS.

12. Petitioner asserts that she has vested rights under the FRS system at the time of her retirement and that the 2009 amendments to Section 121.122 are unconstitutional because they retroactively divest previously retired employees of future participation in the FRS without notice.



13. The arguments presented by Petitioner have previously been considered by the SBA in cases presented by other FRS members who made the decision to retire, or who took a distribution and therefore retired by operation of law before the applicable 2009 amendments were enacted, and then returned to FRS-covered employment. See *Austin v. State Board of Administration*, Case No. 2011-2037 (Recommended Order, October 26, 2011; Final Order November 21, 2011); *Blaesser v. State Board of Administration*, Case No. 2011-2106 (Recommended Order, October 6, 2011; Final Order October 28, 2011); *Burke v. State Board of Administration*, Case No. 2011-2042 (Recommended Order, November 10, 2011; Final Order December 5, 2011); *Frisard v. State Board of Administration*, Case No. 2011-2019 (Recommended Order, July 11, 2011; Final Order August 17, 2011).

14. I have carefully reviewed the arguments and cases cited by Petitioner and can find no convincing rationale to depart from the conclusion reached in the cases referred to above. The lengthy discussion of the “preservation of rights” provision at Section 121.011(3)(d), Florida Statutes, in Fla. Sheriff’s Assn. v. Dept. of Adm., 408 So.2d 1033 (Fla. 1982) in the context of governmental retirement plans in general, is instructive here. It makes clear that the rights of a public employee in a government plan vest at the time she retires, and that Florida’s constitutional prohibition of impairment of contracts does not mean that the legislature cannot modify or alter the benefits provided by such plans for active state employees. Petitioner here argues, in essence, that she had a vested right in the FRS reemployment provisions that were in place when she retired on May 26, 2009. Under Fla. Sheriff’s Assn., Petitioner vested in the benefits that existed in the Investment Plan at the time she retired. Although she has not said so, the crux of her argument is that the reemployment provisions of the pre-2009 amendment plan were a benefit of that plan. As set out previously, I can see no authority for the proposition that

future employment under any terms was a benefit of the FRS Investment Plan at the time Petitioner took her distribution and “retired.”

15. Petitioner specifically asserts that the operation of the 2009 statutory amendment, “retroactively divests previously retired employees from future participation in the retirement plan without notice and is therefore, unconstitutional.” The addition of an argument based on notice does not add anything pertinent to the analysis compelled by the Fla. Sheriff’s Assn. case. As set out by Petitioner in her Prehearing Statement:

Employees now leaving the FRS System are provided with a ‘My FRS Termination Kit,’ that outlines, in detail via pictorial graphs and stated in bold ‘if you return to FRS-covered employment **on or after** July 1, 2010, you will not be eligible for future membership in the FRS.’ When Maxwell left the employment of the Public Defender’s Office, she was not informed of the policy because the policy was not in effect at the time of her retirement.

The SBA informs FRS participants in accordance with the current state of the law, and can only follow the law as it is enacted by the legislature.

16. The history of the legislation which made the relevant changes to Section 121.122 in 2009 reflects that the legislature was aware of the result of excluding from participation in the FRS those who had terminated employment and taken a distribution early in their working years. 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 Care 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 re-emerges. The bill does not provide for the paying of the Investment Plan administrative contribution.

Retirees initially reemployed 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). It appears that the legislature was made aware of the harsh results 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.

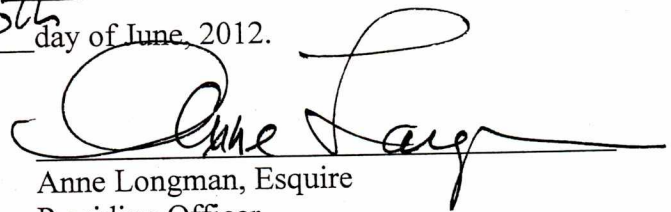
17. Respondent SBA cannot deviate from the Florida Statutes creating and governing the Florida Retirement System, *Balezentis v. Department of Management Services, Division of Retirement*, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and its construction and application of Chapter 121, Florida Statutes, the statute it is charged to implement, 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 DCA 1998).

18 The Fla. Sheriff's Assn. case remains the governing law as articulated by the Florida Supreme Court, and it controls in this case.

### 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 June, 2012.



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: 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 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.

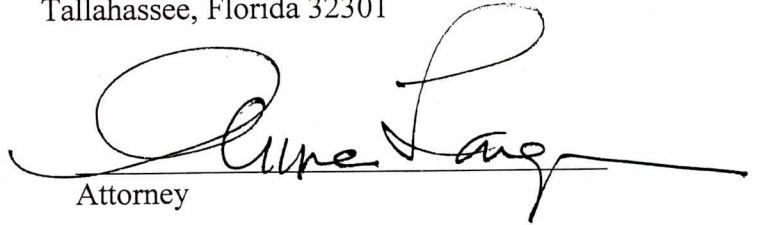
Filed with:  
Agency Clerk  
Office of the General Counsel  
Florida State Board of Administration  
1801 Hermitage Blvd., Suite 100  
Tallahassee, FL 32308  
(850) 488-4406

This 20<sup>th</sup> day of June, 2012.

Copies furnished to:



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

  
Attorney