

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

ADAM ELLIS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2010-1961
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
_____)	

FINAL ORDER

On August 9, 2011, 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, Adam Ellis, and upon counsel for the Respondent. Both Petitioner and Respondent filed a Proposed Recommended Order. Neither party filed exceptions, which were due on August 24, 2011. 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.

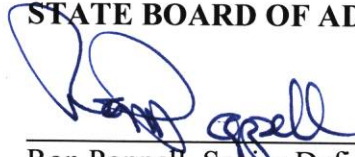
ORDERED

The Recommended Order (Exhibit A) hereby is adopted in its entirety. The Petitioner's request that he be allowed to enroll in the Florida Retirement System (FRS) Investment Plan as a retiree initially re-employed with an FRS participating employer on or 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 31st day of August, 2011, 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

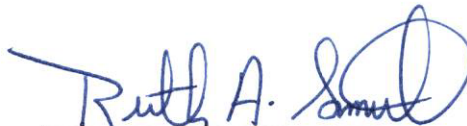
FILED ON THIS DATE PURSUANT TO
SECTION 120.52, FLORIDA STATUTES
WITH THE DESIGNATED CLERK OF THE
STATE BOARD OF ADMINISTRATION,
RECEIPT OF WHICH IS HEREBY
ACKNOWLEDGED.



Agency Clerk
TINA JOANES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Adam Ellis, 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 31st day of August, 2011.



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

ADAM ELLIS,

Petitioner,

vs.

Case No. 2010-1961

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on May 9, 2011, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Adam Ellis, Pro Se



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 Petitioner may be enrolled as a renewed member in the Florida Retirement System (FRS).

EXHIBIT A

PRELIMINARY STATEMENT

In a request for intervention submitted November 17, 2010, Petitioner asked to be allowed to enroll in the FRS. By letter of November 30, 2010 from Daniel Beard, SBA Director of Policy, Risk Management, and Compliance, Petitioner was informed that because he had quit his previous FRS employment, had taken a distribution from his FRS Investment Plan account and was rehired after July 1, 2010, he was not eligible to re-enroll in the FRS. Petitioner then filed a petition requesting the same relief, and this hearing followed.

Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented the testimony of Mr. Beard. Respondent's Exhibits R-1 through R-3 were admitted into evidence without objection.

A transcript of the hearing was filed with the agency and provided to the parties, who were given 30 days to submit proposed recommended orders. Both Petitioner and Respondent submitted proposed recommended orders.

UNDISPUTED MATERIAL FACTS

1. In 2009, Petitioner was an employee of the Office of the Public Defender, First Judicial Circuit and was a member of the FRS enrolled in the defined contribution Investment Plan.
2. Petitioner terminated his employment and on June 10, 2009, took a total distribution of his Investment Plan account.
3. The Florida Legislature amended Section 121.122, Florida Statutes, governing renewed membership in the FRS, in 2009.
4. Petitioner was rehired by the Office of the Public Defender on August 6, 2010.

CONCLUSIONS OF LAW

5. 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.

6. That section provides:

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).

7. Section 121.4501(2)(k), Florida Statutes defines retiree as a former participant of the Investment Plan who has terminated employment and has taken a distribution as provided in section 121.591, except for a mandatory distribution of a de minimis account authorized by the SBA. Because Petitioner terminated FRS-covered employment and took a distribution from his Investment Plan account, he is considered a retiree by operation of law.

8. Under the express terms of the applicable statute as amended in 2009 to add subsection (2) of section 121.122, a retiree who becomes initially reemployed with an FRS participating employer on or after July 1, 2010 is ineligible to participate in the retirement system. §121.122(2), Fla. Stat.

9. 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. The SBA is not authorized to depart from this statutory mandate.

10. In his petition, Petitioner complained of the fundamental unfairness of applying the amended version of the law to alter the present consequences of a previous action. Respondent correctly points out that this forum has no power to create or enforce an equitable remedy, regardless of the unfairness of a result.

11. Petitioner also asserts that Section 121.122(2), Florida Statutes is an impermissible ex post facto law if applied to deprive him of his right to participate in the FRS, citing Hiss v. Hampton, 338 F.Supp 1412 (U.S. Dist. Court, DC 1972) for the proposition that “[a]n ex post facto law, “is one which renders an act punishable in a manner in which it was not punishable when it was committed.” Id. at 1148. It is true that denying Petitioner the ability to participate in the FRS today for taking a distribution at a time when it would not have incurred the present complete proscription against further participation, is imposing an additional, unanticipated burden on the decision Petitioner made in 2009. But the act which incurred this additional burden was his reemployment after July 1, 2010 when the amended terms of Section 121.122(2), Florida Statutes were in effect. As pointed out in another case cited by Petitioner, even in the presence of a “rights provision,” a future legislature cannot be precluded from “prospectively altering benefits which accrue for future state service. To hold otherwise would mean that no future legislature could in any way alter future benefits of active employees for future services, except in a manner favorable to the employee. Florida Sheriff’s Ass’n. v. Dept. of Adm., Div. of Retirement, 408 So.2d 1033 (Fla.1982).

12. It is undisputed that on June 10, 2009, when Petitioner received a distribution from his FRS Investment Plan account, Section 121.122 allowed Petitioner to re-enroll if he were

to become again employed with an FRS-covered employer, and that the statute was modified after Petitioner had received a distribution. But no legal right has been articulated to me that would allow Petitioner, once his benefit was paid to him, to return to FRS-covered employment and again participate in the FRS as if the previous version of Chapter 121 controlled.

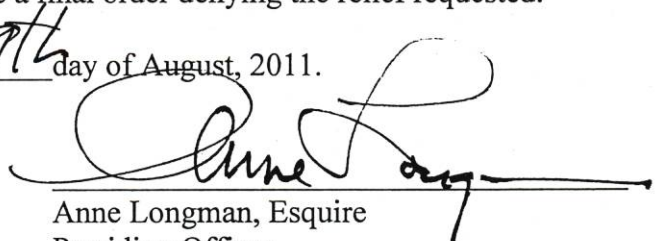
13. The cases cited by Petitioner for the proposition that the "contract" between the Respondent and Petitioner could not be altered once Petitioner vested in his FRS benefit do not control here. Once Petitioner received the benefit of his FRS Investment Plan account by taking a distribution, whatever contractual or vested interest which had existed between him and the FRS was at an end -- there was therefore no contract left to be altered.

14. The SBA cannot deviate from the statutes creating and governing the Florida Retirement System, and Petitioner's rights and responsibilities under them. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). It is unfortunate and illogical that Petitioner would be precluded from ever again participating in the FRS because of an action that he took at a time when he could not have known the consequences of that action, but I see no legal basis here for any other result.

RECOMMENDATION

Having considered the law and the undisputed facts of record, I recommend that the Respondent, State Board of Administration issue a final order denying the relief requested.

RESPECTFULLY SUBMITTED this 9th day of August, 2011.



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 9th day of August, 2011.

Copies furnished to:

Adam Ellis



Petitioner

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