

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

SCOTT MCNICOL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	SBA Case No. 2016-3552
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
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**FINAL ORDER**

On July 14, 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, Scott McNicol, 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 July 29, 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’s request to be allowed renewed membership in the Florida Retirement System (FRS) even though he had become a “retiree” of the FRS when had terminated his former FRS employment and had taken a distribution from his FRS Investment Plan account in

April 2010 and he further did not return to FRS-covered employment until after July 1, 2010, hereby is denied. Section 121.122(2), Florida Statutes clearly provides, without exception, that a retiree of the FRS who is initially reemployed on or after July 1, 2010, is not eligible for renewed membership in the FRS.

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.

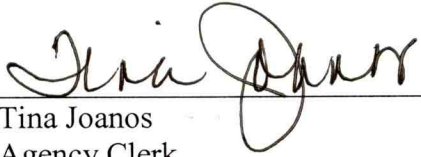
DONE AND ORDERED this 6<sup>th</sup> day of September 2016, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



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

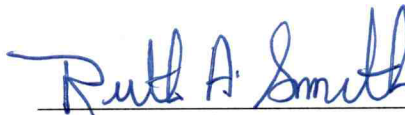
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos  
Agency Clerk

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Scott McNicol, pro se, both by email transmission, [REDACTED] and by U.P.S. to [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 6th day of September, 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

SCOTT MCNICOL,

Petitioner,

vs.

CASE NO. 2016-3552

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 May 26, 2016, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: Scott McNicol, pro se



For Respondent: Brian A. Newman, Esquire  
Pennington, P.A.  
Post Office Box 10095  
Tallahassee, Florida 32302-2095

**STATEMENT OF THE ISSUE**

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

## **PRELIMINARY STATEMENT**

Petitioner attended the hearing in person and testified on his own behalf. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-3 were admitted into evidence without objection.

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

## **MATERIAL UNDISPUTED FACTS**

1. On February 23, 2006, Petitioner was hired by the Volusia County School Board, an FRS-participating employer, as a teacher.
2. Petitioner had until August 31, 2006 to make an initial election between the defined benefit Pension Plan and defined contribution Investment Plan. On September 1, 2006 he used his initial election to enroll in the Investment Plan.
3. Petitioner terminated employment with the Volusia County School Board on December 8, 2009 and then, on April 6, 2010, took a distribution of his Investment Plan account.
4. Petitioner did not return to FRS-covered employment before July 1, 2010.<sup>1</sup> He is

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1. Petitioner testified that he was reemployed in an FRS-covered position in August of 2012. According to records the Respondent reviewed, he did not return to FRS-covered employment until September of 2015. It is immaterial which date is correct because Petitioner had to return to FRS-covered employment before July 1, 2010 in order to avoid the prohibition on renewed FRS membership. Petitioner's date of re-employment is accepted as accurate for this proceeding.



now beginning his fifth year of employment with the Seminole County School Board as a teacher.

5. Petitioner filed a Request for Intervention with Respondent on February 3, 2016 asking for renewed membership in the FRS after his employer told him that he was not eligible to again be an FRS member. This request was denied, and Petitioner filed a Petition for Hearing requesting the same relief; this administrative proceeding followed.

### CONCLUSIONS OF LAW

6. 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. 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)

7. For purposes of the relevant statutes, a “retiree” is defined as “a former participant of the optional retirement program who has terminated employment and has taken a distribution as provided in s.121591, 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 his FRS employment and took a distribution from his Investment Plan account, he is considered a “retiree.” Florida law now provides that a “retiree” who becomes reemployed with an FRS participating employer on or after July 1, 2010 is ineligible to participate in the FRS. Blaesser v. State Bd. of Admin., 134 So. 3d 1013 (Fla. 1st DCA 2012).

8. Petitioner contends that the prohibition on renewed FRS membership should not be applied to him because he has not, in fact, actually retired. Petitioner’s argument was considered and rejected by the Second District in Campbell v. State Bd. of Admin., 184 So. 3d 579 (2nd DCA 2016). There, the court recognized that the underlying purpose of the 2009 amendment was “to alleviate the financial burden imposed on state and local FRS employers when employees return to work after retiring and become eligible for secondary FRS retirement benefits.” Id. at 582,



citing Fla. H.R. Comm. on Gov't Ops. Approp., HB 479 (2009) Staff Analysis 1 (April 15, 2009).

Although this legislative history suggests that retirees collecting a bona fide second retirement were the target of the new prohibition on renewed FRS membership, the Campbell court held that the amendment had broader application:

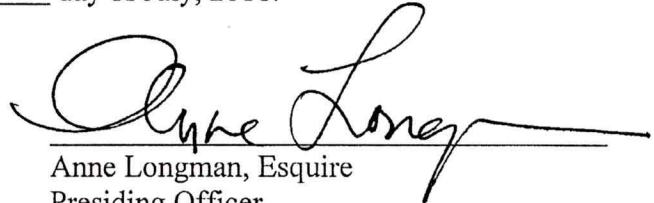
...the current language of chapter 121 extends beyond individuals who ultimately obtain a second retirement after becoming eligible to receive FRS benefits. Judge Campbell's receipt of a little more than \$8,000 from her investment plan account after working for the state attorney's office for less than three years was sufficient under the current statutory language to preclude her from being eligible for any FRS benefits for the remainder of her Florida career. Chapter 121 currently precludes any individual who chooses to make a withdrawal from their FRS account after terminating employment with an FRS employer from reenrolling in the FRS regardless of the significance of the withdrawal, the length of their prior employment, or the potential burden imposed and state and local FRS employers.

Id. at 582 (emphasis added). Although the application of the 2009 amendment to Petitioner (and others similarly situated) may be harsh, the law apparently applies to all retirees, even those who have not retired in any traditional or functional sense. The SBA has no authority to review the circumstances of a member's retirement beyond a determination of whether a retirement has occurred as defined by the applicable statutes; if the member terminated employment, received a distribution and did not return to FRS-covered work before July 1, 2010, the prohibition on renewed membership applies. See Campbell at 582 ("The statute does not provide the SBA any discretion to consider the particular circumstances of returning employees in deciding whether their membership in the FRS should be renewed."). It is unfortunate that a young, working school teacher would be precluded from earning a Florida retirement benefit but this appears to be his status under current law.

## 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 14<sup>th</sup> day of July, 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

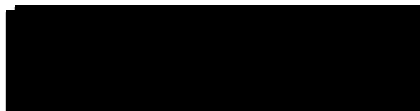
## NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

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:

Scott McNicol



Petitioner

and via electronic mail only to:

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215 S. Monroe Street, Suite 200  
Tallahassee, Florida 32301  
[slindsey@penningtonlaw.com](mailto:slindsey@penningtonlaw.com)

Counsel for Respondent