STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

BENJAMIN HERMAN, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	Case No. 2010-1951

FINAL ORDER

On June 17, 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, Benjamin Herman, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Petitioner made no further submissions. Neither party filed exceptions, which were due on July 5, 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.

STATEMENT OF THE ISSUE

The Statement of the Issue as set forth in the presiding officer's Recommended Order hereby is adopted in its entirety.

FINDINGS OF FACT

The Findings of Fact set forth in the presiding officer's Recommended Order hereby are adopted in their entirety.

CONCLUSIONS OF LAW

The Conclusions of Law set forth in paragraph 6 specifically are incorporated by reference as if fully set forth herein.

The Conclusions of Law set forth in Paragraph number 7 hereby are modified to read as follows:

7. Petitioner, who was originally hired in August 2004, enrolled in the Investment Plan at Indian River State College effective February 1, 2005. He terminated employment with Indian River State College on June 16, 2005. Pursuant to Section 121.4501(6), a member of the FRS Investment Plan is vested after completing one (1) work year with an employer. For purposes of Chapter 121, Florida Statutes, a "work year" is defined as "...the period of time an employee is required to work during the plan year to receive a full year of retirement credit, as provided by rule." Section 121.021(54), Florida Statutes. For academic or instruction employees such as the Petitioner, Rule 60S-2.002(b)(1), Florida Administrative Code, indicates that the work year "...shall be the number of months in the full contract year or nine months, whichever is greater...". Petitioner worked nine months for Indian River State College. As such, Petitioner was vested in the Investment Plan. When Petitioner terminated employment with Indian River State College, he did not take a distribution from his Investment Plan account. Under Section 121.4501(2)(k), Florida Statutes, a "retiree" is a former Investment Plan member who has terminated employment and taken a distribution. Petitioner was not a retiree, and thus still was a member of the Investment Plan when he became employed by USF in August 2010.

Paragraphs 8, 9 and 10 of the Conclusions of Law hereby are rejected. This Final Order substitutes and adopts the following Conclusions of Law:

8. Section 121.35(3)(g), Florida Statutes allows an employee who becomes eligible to elect to participate in SUSORP and who already is a member of the FRS Pension Plan to transfer to SUSORP. However, there is no comparable statutory authority that allows such an individual who is a member of the FRS Investment Plan to transfer directly from the Investment Plan to SUSORP.

9. Section 121.4501(4)(a)2.a., Florida Statutes states that an Investment Plan member's decision to participate in the Investment Plan generally is irrevocable (except for a one-time second election to transfer to the FRS Pension Plan). This statutory section provides:

> Any such employee shall, by default, be enrolled in the defined benefit program of the Florida Retirement System at the commencement of employment, and may, by the last business day of the 5th month following the employee's month of here, elect to participate in the Public Employee Optional Retirement Program. The employee's election must be made in writing or by electronic means and must be filed with the third-party administrator. **The election to participate in the optional program is irrevocable, except as provided in paragraph (c).** [emphasis added]

10. In view of the fact that, pursuant to Section 121.4501(4)(a)2.a., Florida Statutes, an Investment Plan election generally is irrevocable, and there is no statutory authority that allows an Investment Plan member to transfer directly into SUSORP, Respondent concludes that if an employee, such as the Petitioner, who is participating in the FRS Investment Plan terminates employment and does not retire, that employee must continue membership in the FRS Investment Plan upon any subsequent employment with an FRS employer.

Paragraph 11 of the Conclusions of Law is incorporated by reference as if fully set forth herein.

The Conclusions of Law set forth in paragraph 12 of the Recommended Order are modified to read as follows:

12. The Respondent is charged with implementing Chapter 121, Florida Statutes. It is not authorized to depart from the requirements of these statutes when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla. Div. Admin. Hrgs.). There is no statutory provision that expressly authorizes a direct transfer from the Investment Plan into SUSORP. Moreover, Section 121.4501, Florida Statutes expressly provides that an election to participate in the Investment Plan is irrevocable. As such, in order for Petitioner to enroll in SUSORP upon his employment with USF, he would have been required to use his second election to buy back into the FRS Pension Plan, and then he would have been able to, pursuant to the provisions of Section 121.35(3)(g), Florida Statutes, to transfer to SUSORP. However, Petitioner failed to do so, and his deadline to enroll in SUSORP has expired.

ORDERED

Petitioner's request that he be permitted to enroll in the State University Optional Retirement System ("SUSORP"), despite the fact he already had elected to participate in the FRS Investment Plan during his previous employment, 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 17th 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.

Clerk TINA JOANOS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Benjamin Herman, 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 17th 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

BENJAMIN HERMAN,

Petitioner,

vs. Case No. 2010-1951

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding before a presiding officer Glenn E. Thomas for the State of Florida, State Board of Administration (SBA) on February 25, 2011, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Benjamin Herman, Pro Se
[redacted]

For Respondent: Brian A. Newman, Esquire
Brandice D. Dickson, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

EXHIBIT A

STATEMENT OF THE ISSUE

The issue is whether Petitioner should be allowed to enroll in the State University System Optional Retirement Plan (SUSORP), despite having elected to participate in the Florida Retirement System (FRS) Public Employee Optional Retirement Program (known informally as the Investment Plan), during previous employment.

PRELIMINARY STATEMENT

Petitioner filed a request for intervention with the SBA on November 8, 2010 requesting that he be allowed to enroll in the SUSORP notwithstanding his current membership in the Investment Plan. That request was denied. Petitioner then filed a Petition for Hearing requesting the same relief, and this administrative proceeding followed.

Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented the testimony of Petitioner and Daniel Beard, Director of Policy, Risk Management, and Compliance for the State Board of Administration. Respondent's exhibit's R-1 through R-6 were admitted into evidence without objection.

A transcript of the hearing was filed with the agency and copies provided to the parties, who were given thirty days from receipt to submit proposed recommended orders. Respondent submitted a proposed recommended order; Petitioner made no further submissions.

UNDISPUTED MATERIAL FACTS

1. Petitioner worked for Indian River State College, an FRS-participating employer, beginning in August, 2004, and so was able to choose between the Pension Plan and the

Investment Plan. In his position at Indian River State College, the SUSORP was not an available option.

2. Petitioner timely submitted an EZ Retirement Plan Enrollment form on January 20, 2005 electing membership in the Investment Plan. This election became final and irrevocable, apart from exercise of his one-time second election, on January 31, 2005.

3. Petitioner terminated his employment with Indian River State College on June 16, 2005. He returned to FRS-covered employment on August 7, 2010 when he was hired by the University of South Florida (USF).

4. After being hired by USF, Petitioner timely attempted to enroll in the SUSORP, which was an option for his position. On September 15, 2010, Petitioner was notified by the Division of Retirement that he was not eligible to participate in the SUSORP because he was already a member of the Investment Plan.

5. Petitioner then filed a request for intervention with Respondent asking to be allowed to transfer from the Investment Plan to the SUSORP. That request was denied by Respondent SBA, on the grounds that there is no statutory authority for an FRS participant to switch directly from the Investment Plan to the SUSORP, and that therefore Petitioner would have needed to use his second election to buy back into the Pension Plan (at a cost of approximately $[redacted]), and that he could then have enrolled in SUSORP from the Pension Plan, if he had done so within the election period that followed his hiring by USF.

CONCLUSIONS OF LAW

6. Section 121.4501(4)(a)2.a., Florida Statutes governs initial elections to join the Investment Plan. This provision states that initial elections to join the Investment Plan are

irrevocable except for a one-time second election to transfer to the Pension Plan. Section 121.4501(4)(a)2.a. provides in pertinent part:

> **(4) Participation; enrollment.--**
>
> (a) 1. With respect to an eligible employee who is employed in a regularly established position on June 1, 2002, by a state employer:
>
> a. Any such employee may elect to participate in the Public Employee Optional Retirement Program in lieu of retaining his or her membership in the defined benefit program of the Florida Retirement System. The election must be made in writing or by electronic means and must be filed with the third-party administrator by August 31, 2002, or, in the case of an active employee who is on a leave of absence on April 1, 2002, by the last business day of the 5th month following the month the leave of absence concludes. This election is irrevocable, except as provided in paragraph (e)... (emphasis added).

12. Section 121.4501(4)(e) – commonly referred to as the "second election" provision - provides in pertinent part:

> (e) After the period during which an eligible employee had the choice to elect the defined benefit program or the optional retirement program, or the month following the receipt of the eligible employee's plan election, if sooner, the employee shall have one opportunity, at the employee's discretion, to choose to move from the defined benefit program to the optional retirement program or from the optional retirement program to the defined benefit program. Eligible employees may elect to move between Florida Retirement System programs only if they are earning service credit in an employer-employee relationship consistent with s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections are effective on the first day of the month following the receipt of the election by the third-party administrator and are not subject to the requirements regarding an employer-employee relationship or receipt of contributions for the eligible employee in the effective month, except when the election is received by the third-party administrator. This paragraph is contingent upon approval from the Internal Revenue Service for including the choice described herein within the programs offered by the Florida Retirement System.

(emphasis added).

7. Petitioner enrolled in the Investment Plan at Indian River State College but never met the one year vesting requirement of that plan, as he was employed there for only nine months and so was not entitled to any benefit under that plan. Petitioner had not retired from the

Investment Plan at the time he was employed by USF and thus remained a member of that plan. (An Investment Plan member "retires" when he takes money out of his account. Petitioner could not have done this as he was not vested.)

8. Respondent cites section 121.35(3)(h), Florida Statutes, providing that a "participant in the [SUSORP] may not participate in more than one state-administered retirement system, plan, or class simultaneously," for the proposition that Petitioner may not now become a SUSORP participant. While it is clear that an FRS employee may not participate in more than one plan simultaneously, it is not clear that having been a member of the Investment Plan precludes later enrollment in the SUSORP.

Respondent appears to expand the "no more than one plan" prohibition in a manner that would encompass retirement elections that are expressly permitted under other sections. Chapter 121 does not, for instance, prohibit a member who transfers from the Pension Plan to the Investment Plan from maintaining two separate retirement benefits. Under section 121.4501(3)(b) an employee who is a member of the Pension Plan at the time of his or her election to participate in the Investment Plan retains all retirement service credit earned under the Pension Plan and is entitled to a deferred benefit upon termination that is separate from the benefit to which he or she is entitled under the Investment Plan. Any such member, although maintaining two separate accounts under separate state retirement plans, is not considered to be participating in these plans "simultaneously" because the plans encompass separate periods of service.

Section 121.4501(3)(b) makes it clear that a member's election to participate in the Investment Plan terminates their "active membership" in the Pension Plan, and the member's service under the Investment Plan will not be creditable under the Pension Plan for purposes of

accruing additional benefits. While this section prohibits "active membership" in two plans simultaneously it does not prohibit a member from participating in two FRS plans during separate periods of employment.

9. Although an agency's interpretation of the statute that it is charged with enforcing is entitled to great deference, Level 3 Communications, LLC v. Jacobs, 841 So.2d 447, 450 (Fla.2003), a court is not required to defer to a construction that is unreasonable or is clearly erroneous. e.g. Osorio v. Board of Professional Surveyors and Mappers, 898 So.2d 188 (Fla. 5th DCA 2005). Where an agency's interpretation conflicts with the plain and ordinary meaning of the statute, deference is not required. Verizon Fla., Inc. v. Jacobs, 810 So.2d 906, 908 (Fla.2002). In addition, where the language of the statute under interpretation is unambiguous and has a plain and ordinary meaning, the plain meaning should be given effect. Florida Hosp. v. Agency for Health Care Admin., 823 So.2d 844, 848 (Fla. 1st DCA 2002).

Section 121.35(3)(h), Florida Statutes clearly prohibits a member from simultaneously accruing benefits under two state retirement systems. It is not at all clear that the section is intended to prohibit a member from accruing benefits under separate plans during separate periods of employment, a practice expressly permitted under section 121.4501. Under the plain language of the statute, Section 121.35(3)(h) would not prohibit Petitioner from participating in the SUPSORP upon reemployment unless the Petitioner was attempting to simultaneously continue accruing additional benefits under the Investment Plan.

10. While section 121.35 may not prohibit Petitioner from participating in the SUSORP; that is not to say there is not additional statutory authority to support the position of Respondent. It is the Respondent's contention that if an employee who is participating in the FRS investment plan terminates employment prior to vesting, upon any subsequent employment

with an FRS employer, the employee must continue membership in the FRS Investment Plan. To support this conclusion, Respondent relies on section 121.4501(4)(a)(2)(a), which states:

> Any such employee shall, by default, be enrolled in the defined benefit retirement program of the Florida Retirement System at the commencement of employment, and may, by the last business day of the 5th month following the employee's month of hire, elect to participate in the Public Employee Optional Retirement Program. The employee's election must be made in writing or by electronic means and must be filed with the third-party administrator. **The election to participate in the optional program is irrevocable, except as provided in paragraph (e). (Emphasis added).**

Under the Respondents interpretation of this provision, Mr. Herman's election to participate in the Investment Plan was irrevocable notwithstanding a subsequent change in employment.

It appears there is no provision of Chapter 121 that directly addresses the circumstances present here, in which an employee of an FRS employer terminates employment prior to vesting and is later reemployed by another FRS employer. The Petitioner argues that he is entitled to another opportunity to elect to participate in the SUSORP, while the Respondent argues that his initial irrevocable election to participate in the Investment Plan survives any termination of employment, regardless of whether the member has vested. In support of this interpretation, Respondent points out that Petitioner's "account" in the investment plan survived his termination. In other words, he maintained an account balance after his termination of employment, and he was able to manage that account. But I note also that if he had not been reemployed by an FRS-participating employer within five years, he would have simply forfeited his unvested Investment Plan account.

11. The Respondent's construction and application of Chapter 121 is entitled to great weight and will be followed unless proven to be clearly erroneous or amounting to an abuse of discretion. See Level 3 Communications v. C.V. Jacobs, *supra*; Okeechobee Health Care v.

Collins, 726 So.2d 775 (Fla. 1st DCA 1998). If the agency's interpretation is within the range of possible and reasonable interpretations, it is not clearly erroneous. See Florida Department of Education v. Cooper, 858 So.2d 394, (Fla. 1st DCA 2003). The interpretation of section 121.4501(4)(a)(2)(a) urged by Respondent appears to be within the range of possible and reasonable interpretations and is therefore not clearly erroneous.

12. The Respondent is charged with implementing Chapter 121, Florida Statutes. It is not authorized to depart from the requirements of these statutes when exercising its jurisdiction. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). There is no statutory provision expressly authorizing a direct transfer from the Investment Plan to the SUSORP. Moreover, Chapter 121 clearly provides that an election to participate in the investment plan is irrevocable. But it is not clear that Petitioner was here seeking to transfer per se, he may instead have been trying to simply abandon his previous unvested Investment Plan account and start over in the SUSORP without paying the $[redacted] required to first switch into the Pension Plan, as his initial Petition asked to "directly enroll into the State University System Optional Retirement Plan from the FRS Investment Retirement Plan with no loss of personal funds."

RECOMMENDATION

Although Respondent seemingly could have chosen an interpretation of the applicable statutes that in this circumstance would have had a more equitable effect, it has not done so, and I cannot find that the interpretation it did choose is outside the range of possible interpretations. Having considered the undisputed facts and the applicable law, I therefore conclude that the Respondent, State Board of Administration has not exceeded its authority in denying Petitioner the relief he has requested.

RESPECTFULLY SUBMITTED this 17th day of June, 2011.

Anne Longman, Esquire
Glenn Thomas, 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 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 17th day of June, 2011.

Copies furnished to:
Benjamin C. Herman
[redacted]

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