STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

JANET DEL VECCHIO HARMSEN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	SBA Case No. 2014-3030
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

On September 18, 2014, 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, Janet Del Vecchio Harmsen, and upon counsel for the Respondent. Both Petitioner and Respondent timely filed a Proposed Recommended Order. No exceptions to the Recommended Order, which were due October 3, 2014, were filed by either party. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending, for final agency action, before the Senior Defined Contribution Programs Officer.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. Petitioner's request for a post-termination distribution of the non-vested portion of her FRS Investment Plan account that is comprised of the funds transferred from her FRS Pension Plan account that were earned during 1.25 years of creditable service, hereby is denied. These funds were properly forfeited by the SBA since Petitioner failed to return to active FRS-covered employment within five (5) years of the date she had terminated employment.

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 23rd day of October, 2014, in Tallahassee, Florida.

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

Joan B Haseman

Joan B. Haseman
Senior Defined Contribution Programs Officer
Office 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

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 Janet Del Vecchio Harmsen, 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 23rd day of October, 2014.

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

JANET DEL VECCHIO HARMSEN

Petitioner, CASE NO. 2014-3030

vs.

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 July 14, 2014, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: [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 funds in her Investment Plan account or whether these funds are a nonvested accumulation and properly deemed forfeited by Respondent.

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner attended the hearing in person. Petitioner and one witness, Edward Howlette, testified on her behalf. Respondent presented the testimony of Daniel Beard, Director of Policy, Risk Management, and Compliance, State Board of Administration. Petitioner's Exhibits 1 - 2 and Respondent's Exhibits 1 - 5 were admitted into evidence at the hearing. By agreement of the parties, Respondent's Exhibit 6, a recorded telephone call between Petitioner and the MyFRS Financial Guidance Line from May 26, 2009, was transcribed post-hearing and admitted into evidence.

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. Petitioner and Respondent each filed a proposed recommended order.

UNDISPUTED MATERIAL FACTS

1. Petitioner was a member of the Florida Retirement System (FRS) defined benefit Pension Plan.

2. Petitioner terminated employment with her FRS participating employer after vesting in the Pension Plan and began receiving a Pension Plan benefit from her first round of FRS employment.

3. Petitioner returned to FRS-covered employment on December 17, 2007 and was given until June 30, 2008 to choose between membership in the Pension Plan and the FRS defined contribution Investment Plan. Petitioner did not affirmatively elect between plans prior to the deadline, and defaulted into renewed membership in the FRS Pension Plan.

4. On December 1, 2008, Petitioner telephoned the MyFRS Financial Guidance Line and advised that she was terminating her employment soon and wanted to access the funds in her current retirement account.

5. Petitioner was advised on that call that she had .75 years of creditable service in her new FRS tenure and was therefore not yet vested as there was a six year vesting requirement for Pension Plan members.

6. Petitioner was also advised on that call that she could execute a second election form to switch to the FRS Investment Plan, but that use of the second election would not serve as a vehicle to vest the funds in her Pension Plan account because the funds in her account would remain subject to the six year vesting requirement even if she switched plans. It does not appear that Petitioner filed a second election at this time, and so she remained in the Pension Plan, and her FRS employment terminated in December 2008.

7. On May 26, 2009, Petitioner again telephoned the MyFRS Financial Guidance Line. At this time she was again employed in an FRS-covered job and had about a year toward a second pension. During that call, she advised that she did not want to be in the FRS Pension Plan and instead wanted the "lump sum" option. Petitioner was again advised that she could use the second election form to switch from the Pension Plan to the Investment Plan, but that the funds transferred over to the Investment Plan would be subject to a six year vesting requirement.

8. On May 28, 2009, Petitioner submitted a second election form to switch from the Pension Plan to the Investment Plan. That form includes an acknowledgment:

> You understand and acknowledge that you have elected to switch to the FRS Investment Plan and that any accrued value you may have in the FRS Pension Plan will be transferred to the FRS Investment Plan as your opening account value. You understand that any Pension Plan accrued value transferred to your account will be subject to the 6-year vesting requirement of the FRS Pension Plan. You can find out the accrued value of your FRS Pension Plan account by calling the MyFRS Financial Guidance Line and selecting Option 3 to connect to the Division of

Retirement. You understand the initial transfer amount is an estimate and that your account will be reconciled within 60 days of that transfer pursuant to Florida law using your actual FRS membership record. The reconciled amount could be more or less than the estimate you receive and your account will be adjusted accordingly. You are also directing that all future employer contributions be deposited in my FRS Investment Plan account.

9. Two and one half weeks after Petitioner switched to the FRS Investment Plan, she terminated employment. On that date, June 11, 2009, Petitioner had accumulated 1.25 years of service credit during her second career with an FRS-covered employer.

10. On April 1, 2014, Petitioner requested a distribution of her Investment Plan account.

11. In response to that request, Petitioner was advised that she was 100% vested in the contributions paid into her Investment Plan account for the single month of June 2009, but she was not yet vested in — and could not receive a distribution of — the balance of the benefits transferred from the Pension Plan to the Investment Plan.

12. The value of the non-vested benefits transferred from the Pension Plan to the Investment Plan was $[redacted] as of May 7, 2014. It is these funds Petitioner requests be distributed to her.

13. Upon Petitioner's termination of employment with her FRS-covered employer in June 2009, the non-vested benefits in her Investment Plan account were transferred to a suspense account. By operation of statute, suspense accounts are forfeited if the employee does not return to FRS-covered employment within five years of termination of employment. Petitioner has not returned to FRS-covered employment since June 2009, so that five year period has now elapsed.

14. Petitioner asserts that she was wrongly placed into the Pension Plan for her second career because she orally advised either her human resources representative or her supervisor upon her hire in December, 2007 by the Florida Department of Transportation that she wanted to

be in the Investment Plan and not the Pension Plan. When she began employment with another FRS-covered employer in April, 2009, she asserts she again orally informed her employer that she wanted to be in the Investment Plan and not the Pension Plan.

15. Respondent has no record either in its files or from its investigation into the Petitioner's human resource files at her FRS-covered employers that she ever timely elected to join the Investment Plan prior to May, 2009.

16. Petitioner has presented no documentation that she made an election prior to May 2009 to be placed in the Investment Plan. At the hearing, she testified that she was advised by either her employer or the MyFRS Financial Guidance Line that a May 2009 second election would not only switch her to the Investment Plan going forward, but would also have retroactive effect back to December 2007.

17. The transcripts of calls between Petitioner and the MyFRS Financial Guidance Line of December 2008 and May 2009 show that Petitioner was repeatedly and consistently advised that a second election would have no retroactive effect and that any funds transferred from the Pension Plan would remain subject to the six year vesting requirement.

CONCLUSIONS OF LAW

18. The statutory section governing initial elections into the Investment Plan states, in pertinent part:

> 121.4501. Public Employee Optional Retirement Program
>
> (4) Participation; enrollment.—
>
> (a)...
>
> 2. With respect to employees who become eligible to participate in the Public Employee Optional Retirement Program by reason of employment in a regularly established position with a state employer commencing after April 1, 2002:a. 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).**
>
> ...
>
> c. **Any such employee who fails to elect to participate in the Public Employee Optional Retirement Program within the prescribed time period is deemed to have elected to retain membership in the defined benefit program** of the Florida Retirement System, and the employee's option to elect to participate in the optional program is forfeited.

§121.4501(4)(a), Fla. Stat. (2007)(emphasis added).

20. Pursuant to the above statute, the initial election period closed to Petitioner on June 30, 2008. Petitioner states that she orally informed her supervisor or human resources representative of her desire to elect into the Investment Plan, but the statute required Petitioner to make her election by filing an election in writing with Respondent's third party administrator. Because she did not file an initial election to join the Investment Plan, she was defaulted into the Pension Plan. She did ultimately use her second election to transfer into the Investment Plan from the Pension Plan, but all benefits accrued prior to that second election were unaffected thereby as to vesting requirements.

21. Those benefits accumulated from December 2007 through May 2009, while Petitioner was a member of the Pension Plan, are subject to a six year vesting requirement, as provided in Section 121.4501(6)(b)(1), Fla.Stat. :

> A participant shall be vested in the amount transferred from the defined benefit program, plus interest and earnings thereon and less administrative charges and investment fees, upon meeting the service requirements for the participant's membership class as set forth in s. 121.021(29).

§ 121.4501 (6)(b)1 ., Fla. Stat. (2007)

22. Section 121.021(29), Florida Statutes during the time periods applicable here defines the service required for vesting as six or more years of creditable service. Because

Petitioner had fewer than six years creditable service when she terminated employment in 2009, she was not vested in the benefits transferred from the Pension Plan to the Investment Plan.

23. Because she did not return to active FRS employment by June 11, 2014 (five years after termination), her unvested account balance had to be forfeited, as required by Section 121. 4501(6)(b)2. and (c), Florida Statutes:

> **(6) Vesting requirements.—**
> ...
> (b) 2. If the participant terminates employment prior to satisfying the vesting requirements, the nonvested accumulation shall be transferred from the participant's accounts to the state board for deposit and investment by the board in the suspense account of the Public Employee Optional Retirement Program Trust Fund of the board. If the terminated participant is reemployed as an eligible employee within 5 years, the state board shall transfer to the participant's account any amount of the moneys previously transferred from the participant's accounts to the suspense account of the Public Employee Optional Retirement Program Trust Fund, plus the actual earnings on such amount while in the suspense account.
>
> (c) Any nonvested accumulations transferred from a participant's account to the suspense account shall be forfeited by the participant if the participant is not reemployed as an eligible employee within 5 years after termination.

§§ 121.4501(6)(b)2. and (6)(c), Fla.Stat. (2009)

24. Petitioner requests that her Investment Plan account funds not be forfeited because she requested membership in the Investment Plan and because she cannot now return to work due to medical issues. Had she filed her initial election within the six month window afforded by statute, she would be fully vested in those funds. Section §121.4501(4)(b)2.b., Florida Statutes provides for an initial election to have retroactive effect to the employee's first day of employment, but it applies only if the election is made during the employee's first six months of employment. There is no evidence in the record that Petitioner ever made an effective initial election, and no statutory provision permitting extension of the five year return-to-work provision for medical or hardship reasons.

25. Nor can Petitioner's two tenures be combined to produce in excess of six years of service. Once an FRS member has terminated employment and received retirement benefits, that member is considered a retiree by operation of law. See § 121.021(60), Fla.Stat. Once a retiree becomes reemployed by an FRS-participating employer, that employee is considered a renewed FRS member. Section 121.122, Florida Statutes states, in pertinent part:

> Except as provided in s. 121.053, effective July 1, 1991, any retiree of a state-administered retirement system who is employed in a regularly established position with a covered employer shall be enrolled as a compulsory member of the Regular Class of the Florida Retirement System or, effective July 1, 1997, any retiree of a state-administered retirement system who is employed 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, and shall be entitled to receive an additional retirement benefit, subject to the following conditions:
>
> (1)(a) **Such member shall 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).

§ 121.122, Fla. Stat. (emphasis added).

26. A retired and renewed member must re-satisfy the service requirements as provided for initial membership in the FRS, in order to be vested in a second benefit.

27. It is unfortunate that Petitioner has now forfeited funds which could have been hers if she had made a timely initial election into the Investment Plan, but I see no authority for Respondent to grant the relief she requests. In addition, I note that Section 121.4501(8)(g), Florida Statutes provides:

> It is presumed that all action taken 5 or more years before the complaint is submitted was taken at the request of the member and with the member's full knowledge and consent. To overcome this presumption, the member must present documentary evidence or an audio recording demonstrating otherwise.

Petitioner has not presented any evidence which would overcome this presumption.

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 18th day of September, 2014.

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.Beard@sbafla.com
(850) 488-4406

This 18th day of September, 2014.

Copies furnished to:

Via U.S. Mail

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