

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

JASON HARHEN,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2016-3622
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On August 2, 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, Jason Harhen, 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 August 17, 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 that he be fully vested in the funds in his Florida Retirement System ("FRS") Investment Plan account that were comprised of funds that had been transferred from his FRS Pension Plan account when he used his second election to switch plans is

denied since Petitioner terminated his FRS employment at a time when he had only a total of 5.84 years of the then required 6 year service credit vesting threshold.

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 6th 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

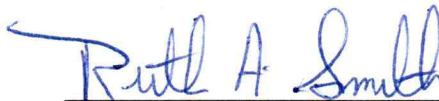
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Jason Harhen, pro se, both by email transmission, [REDACTED] and by U.S. Mail [REDACTED], and by email transmission to Brian Newman, Esq. (brian@penningtonlaw.com) and Brandice Dickson, Esq., (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

JASON HARHEN,

Petitioner,

v.

CASE NO.: 2016-3622

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 June 7, 2016, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Jason Harhen, pro se
P. O. Box 24862
Christianstep, VI 00824

For Respondent: Brandice D. Dickson, Esq.
Pennington, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

STATEMENT OF THE ISSUE

The issue is whether Petitioner can be deemed fully vested in account funds which were transferred from his Florida Retirement System (FRS) Pension Plan account when he used his second election to switch from the Pension Plan to the FRS Investment Plan and then terminated

FRS employment with 5.84 years of service credit.

PRELIMINARY STATEMENT

Petitioner attended the hearing by telephone and testified on his own behalf. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits 1 through 7 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. Petitioner became a member of the Florida Retirement System when he was employed on March 3, 2010 by the Osceola County Sheriff's Department. By statute, he had until August 31, 2010 to make an initial election between the FRS defined benefit Pension Plan and the FRS defined contribution Investment Plan.

2. Petitioner defaulted into the FRS Pension Plan effective September 1, 2010. The vesting requirement for FRS Pension Plan applicable to members enrolled at this time is six years.

3. On September 30, 2015, Petitioner spoke with a MyFRS Financial Guidance Line representative, Dylan, regarding vesting requirements of the two FRS plans:

MR. HARHEN: Okay. Cool. Yeah, I appreciate you calling back. I just have a question. I'm in the retirement system now and I'm coming up on my sixth year. I'm currently in the pension program.

MR. DYLAN: Uh-huh.

MR. HARHEN: Now if I understand it correctly, after six years, I would be vested in the pension program?

MR. DYLAN: As long as you started prior to July of 2011. Let's take a look.

MR. HARHEN: I did.

...
MR. DYLAN: Yep. So six years would be your vesting period then.

MR. HARHEN: Cool. Now if I were to switch over to the investment side, how would that change my vesting period or would it affect it at all?

MR. DYLAN: You would want to make sure that you at least hit your six years first. Because if you moved over before you hit your six years of service, then you would have an unvested opening account balance. So in other words, let's say you have five and a half, you move -- you know, you file your second election form, you move it over into the investment plan, you still have to wait until your sixth year in order to have that money become vested. Because even though you're moving the money over from pension to investment, the money that you've accumulated, you know, up until five and a half years has been in the pension and that still falls under the six-year vesting requirement. So, you know, long story short is that you'd want to make sure that you at least hit your sixth year of service before you made that switch. Afterwards, though, as long as you hit your six years, you're going to be fully vested in your contributions and your employer contributions.

MR. HARHEN: Okay, cool. So if I -- if on my six year and one day or whatever, I do make the switch, then there's no additional vesting period for -- there's not like a penalty vesting period for making the switch?

MR. DYLAN: No, the vesting period for the investment plan is one year of service, so, you know, if you made the switch now, because you have more than one year of service everything that you contributed and your employer contributed, would go into your investment plan and that would be vested from this point forward. But long story short, there's no penalty vesting period, right. It doesn't start over. You don't have to do one year from the time that you switched.

MR. HARHEN: Okay. Cool. So if I were to switch like now, for example, I'm covered because I've already got way over my year?

MR. DYLAN: You would be able to have your --

MR. HARHEN: Except that -- right, except I get what you're saying about the vesting on the balance.

MR. DYLAN: Yeah. So the first five and a half years, that's the part that I would be worried about. If you were planning on leaving relatively soon, I would plain and simple, wait until your six years of service and then switch over, okay?

MR. HARHEN: Understood.

MR. DYLAN: Because that way you're not falling into any portion being unvested.

MR. HARHEN: Okay. That makes sense. So if I were to -- let's say theoretically I were to switch over on my sixth year and one day and then leave on my sixth year, second day, then I would be fully vested?

MR. DYLAN: Right.

MR. HARHEN: Cool.

(emphasis added).

4. On October 5, 2015, Petitioner completed and signed a second election form electing to transfer from the Pension Plan to the Investment Plan effective November 1, 2015.

That second election form stated:

IMPORTANT INFORMATION: Review Carefully. You understand that your one-time 2nd Election is irrevocable and that you must remain in the plan you chose in Section 1 until your FRS-covered employment ends and you retire.

...

If you selected Option 2 in Section 1 (Switch to the Investment Plan): You understand and acknowledge the following: You have elected to switch to the Investment Plan and any accrued value you may have in the Pension Plan will be transferred to the Investment Plan as your opening balance and **any Pension Plan accrued value transferred to your Investment Plan account will be subject to the vesting requirement of the FRS Pension Plan.**

...

(emphasis added).

5. Petitioner terminated his employment with the Osceola County Sheriff's Department on November 19, 2015 with 5.84 years of service credit. Because Petitioner terminated his employment with his FRS-participating employer prior to meeting the vesting

requirements of the Pension Plan, the unvested account balance in his Investment Plan was placed in a suspense account, and he was so advised.

6. On March 21, 2016, Petitioner received an FRS Investment Plan Notice of Suspense which reiterated what Petitioner had been told on the September 30, 2105 call with the MyFRS Financial Guidance Line and further explained that he would forfeit any unvested portions of his benefit if he did not return to FRS-covered employment within five years of the date of his termination.

CONCLUSIONS OF LAW

7. At the time Petitioner began his FRS-covered employment, the vesting requirement in the Pension Plan was six years. §121.021(45)(a), Fla.Stat. (2015). Members enrolled in the FRS Pension Plan have a one time second election to use any time prior to their retirement to switch to the FRS Investment Plan. §121.4501 (4)(g)1., Fla.Stat. (2015). Pension Plan members like Petitioner, who use their second election to switch into the Investment Plan, are subject to the Transfer of Benefit requirements of section 121.4501(3), Florida Statutes. That section states:

(3) Retirement service credit; transfer of benefits.--

(a) An eligible employee who is employed in a regularly established position by a state employer on June 1, 2002; by a district school board employer on September 1, 2002; or by a local employer on December 1, 2002, and who is a member of the pension plan at the time of his or her election to participate in the investment plan shall retain all retirement service credit earned under the pension plan as credited under the system and is entitled to a deferred benefit upon termination. However, election to enroll in the investment plan terminates the active membership of the employee in the pension plan, and the service of a member in the investment plan is not creditable under the pension plan for purposes of benefit accrual but is creditable for purposes of vesting.

(b) Notwithstanding paragraph (a), an eligible employee who elects to participate in the investment plan and establishes one or more individual member accounts may elect to transfer to the investment plan a sum representing the present value of

the employee's accumulated benefit obligation under the pension plan. Upon transfer, all service credit earned under the pension plan is nullified for purposes of entitlement to a future benefit under the pension plan. A member may not transfer the accumulated benefit obligation balance from the pension plan after the time period for enrolling in the investment plan has expired.

1. For purposes of this subsection, the present value of the member's accumulated benefit obligation is based upon the member's estimated creditable service and estimated average final compensation under the pension plan, subject to recomputation under subparagraph 2. For state employees, initial estimates shall be based upon creditable service and average final compensation as of midnight on June 30, 2002; for district school board employees, initial estimates shall be based upon creditable service and average final compensation as of midnight on September 30, 2002; and for local government employees, initial estimates shall be based upon creditable service and average final compensation as of midnight on December 31, 2002. The dates specified are the "estimate date" for these employees. The actuarial present value of the employee's accumulated benefit obligation shall be based on the following:

a. The discount rate and other relevant actuarial assumptions used to value the Florida Retirement System Trust Fund at the time the amount to be transferred is determined, consistent with the factors provided in sub-subparagraphs b. and c.

§121.4501(3)(b), Fla.Stat. (emphasis added).

8. The second election form reiterates the above statute and advises that "any Pension Plan accrued value transferred to your Investment Plan account will be subject to the vesting requirement of the FRS Pension Plan."

9. Here, the accrued value transferred from the Petitioner's Pension Plan to his Investment Plan was subject to a six year vesting requirement. Because Petitioner used his second election to change from the Pension Plan to the Investment Plan prior to reaching the six year vesting requirement, his Investment Plan account has been placed in suspense pending his return within five years to FRS-covered employment.

If the member terminates employment before satisfying the vesting requirements, the nonvested accumulation must be transferred from

the member's accounts to the state board for deposit and investment by the state board in the suspense account created within the Florida Retirement System Investment Plan Trust Fund. If the terminated member is reemployed as an eligible employee within 5 years, the state board shall transfer to the member's accounts any amount previously transferred from the member's accounts to the suspense account, plus the actual earnings on such amount while in the suspense account.

(6)(d) Any nonvested accumulations transferred from a member's account to the state board's suspense account shall be forfeited, including accompanying service credit, by the member if the member is not reemployed as an eligible employee within 5 years after termination.

§121.4501(6)(c)2 and (6)(d), Fla.Stat. (2015.)

10. Petitioner asserts that he understood the MyFRS Financial Guidance Line representative to have told him that switching to the FRS Investment Plan would eliminate his six year vesting requirement. The transcript memorializing the conversation simply does not bear this out, as the representative very carefully and repeatedly emphasized he would need to meet the six year vesting period to be vested in his transferred funds. It is unfortunate that Petitioner seems to have misunderstood the vesting requirements, but I see no indication that he was misled or given any erroneous information.

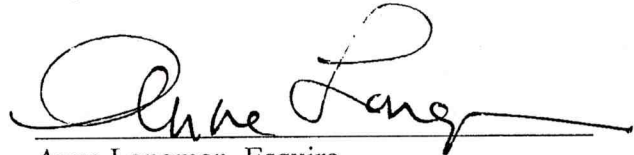
11. The SBA is not authorized to depart from the requirements of Chapter 121, Florida Statutes, the statutes it is charged to implement, when exercising its jurisdiction, Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.), and the SBA's construction and application of those statutes are entitled to great weight and 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 DCA1998).

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 2d day of August, 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
mini.watson@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Jason Harhen



Petitioner

and via electronic mail only to:

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Counsel for Respondent