

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

STEPHEN R. SCHULTZ,)
)
 Petitioner,)
)
 vs.) Case No. 2005-282
)
 STATE BOARD OF ADMINISTRATION,)
)
 Respondent.)
 _____)

FINAL ORDER

On April 4, 2006, the presiding officer submitted his 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, Stephen R. Schultz, and upon counsel for the Respondent. Both parties were granted fifteen (15) days to file Exceptions for the Recommended Order. Neither party filed Exceptions. On April 26, 2006, the presiding officer filed a second Recommended Order which corrected a scrivener's error as a paragraph had inadvertently been deleted from the original Recommended Order. The effective date of the Recommended Order remained April 4, 2006. The one sentence paragraph does not in any way affect the disposition of this case. A copy of the second 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

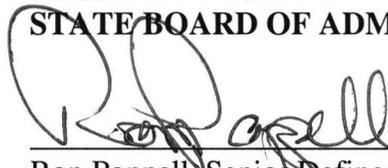
The Recommended Order (Exhibit A) is hereby adopted in its entirety.

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 200, 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.

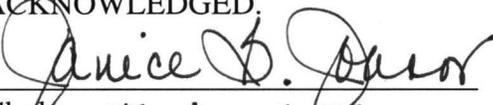
DONE AND ORDERED this 19th day of June, 2006. in Tallahassee, Florida.

**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 Janice S. JOANOS
6/19/06

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Stephen R. Schultz, Ph.D., [REDACTED] Ruth L. Gokel, Assistant General Counsel, State Board of Administration of Florida, 1801 Hermitage Boulevard, Suite 100, Tallahassee, FL 32308; and to Linda Lettera, General Counsel, State Board of Administration of Florida, 1801 Hermitage Boulevard, Suite 100, Tallahassee, FL 32308 this 19th day of June, 2006.

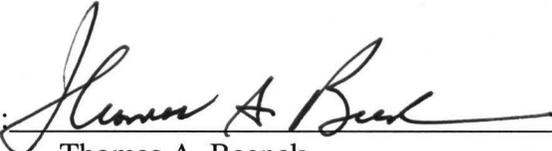
By: 
Thomas A. Beenck
Assistant General Counsel
State Board of Administration of Florida
1801 Hermitage Boulevard
Suite 100
Tallahassee, FL 32308

EXHIBIT A

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION
OFFICE OF INSPECTOR GENERAL

RECEIVED
STATE BOARD OF ADMINISTRATION
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GENERAL COUNSEL'S OFFICE

STEPHEN R. SCHULTZ,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2005-282
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Upon due notice, the State Board of Administration, by its duly designated presiding officer, Bruce R. Meeks, convened a substantial interest hearing, pursuant to Section 120.57(2), Florida Statutes, in this matter on June 28, 2005, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Stephen R. Schultz, Ph.D., pro se



For Respondent: Ruth L. Gokel, Esq.
Office of the General Counsel
State Board of Administration
1801 Hermitage Blvd.
Tallahassee, FL 32308

STATEMENT OF THE ISSUE

Whether Petitioner is entitled to rescind his election to join the FRS Investment Plan and return to

the State Community College System Optional Retirement Program.

PRELIMINARY STATEMENT

On January 18, 2005, Petitioner filed a Request for Intervention with the State Board of Administration (SBA). Upon investigation of the issues raised by the Petitioner, the SBA denied his request based on their interpretation of the facts and law. The adverse decision was communicated to the Petitioner by letter dated February 7, 2005, which further advised him of his right to a hearing on the matter. Petitioner filed a Petition for Hearing which was received on March 2, 2005. By letter entitled Notice of Proceeding, also dated March 2, 2005, the SBA reasserted its denial of Petitioner's request and advised him of his right to challenge their decision via administrative hearing. Petitioner chose to present oral evidence at hearing.

Upon assignment of the instant case, the undersigned issued an Initial Order of Instructions on March 25, 2005. As requested in the initial order, on May 16, 2005, the parties submitted a joint pre-hearing statement of facts, issues and positions. A Notice of Hearing was issued on June 1, 2005, setting June 28, 2005, as the hearing date.

The hearing was convened as noticed. Petitioner appeared telephonically and presented only his own testimony. Respondent's counsel appeared on behalf of the SBA and called no witnesses.

The parties offered the following exhibits which were accepted into evidence:

Parties' Joint Exhibit 1. Retirement Plan Conversion Form for Community College Optional Retirement Program (CCORP) Members (with instructions), executed by Petitioner on September 20, 2003.

Parties' Joint Exhibit 2. Petitioner's Request for Intervention (with attachments), received January 18, 2005.

Parties' Joint Exhibit 3. Petitioner's Petition for Hearing (with attachments), received March 2, 2005.

Parties' Joint Exhibit 4. New FRS options choice kit sent to CCORP participants, dated September 2, 2003.

Parties' Joint Exhibit 5. FRS Investment Plan Opening Balance Confirmation Statement, with a transaction date of October 30, 2003.

Respondent's Exhibit 6. Letter from the Department of Management Services (DMS), Division of Retirement, to St. Petersburg College regarding Stephen R. Schultz and retirement plan discrepancies, dated November 7, 2003.

Parties' Joint Exhibit 7. Letter from the Division of Retirement to Stephen R. Schultz referring to his election to join the FRS Investment Plan and the transfer of his FRS Pension Plan present value of [REDACTED] into the Investment Plan, dated November 14, 2004.

Upon Respondent's request, the presiding officer took official recognition of Chapter 121, Florida Statutes (2002).¹

After hearing testimony, the presiding officer offered an opportunity for the parties to file proposed recommended orders and stated that such would be accepted no later than August 5, 2005. Petitioner and Respondent stated that they both would submit proposed recommended orders. Petitioner and Respondent both waived the usual time periods.

The procedures for filing exceptions prior to entry of the agency's final order were explained as were procedures for appealing to the district court of appeal.

The hearing transcript was received by the SBA on July 26, 2005, and was sent by priority mail to Petitioner on July 27, 2005.

Respondent's Proposed Recommended Order was filed on August 5, 2005. Petitioner did not submit a Proposed Recommended Order.

FINDINGS OF FACT

Based upon the oral and documentary evidence adduced at the hearing and the entire record compiled herein, the following relevant findings of fact are made:

1. Petitioner is employed by St. Petersburg College, having begun his tenure there in January 1994.² St.

Petersburg College is a part of the community college system of Florida.

2. At the time Petitioner began his career at St. Petersburg College, the FRS Pension Plan was the only retirement option available.

3. As a result of legislative action in 1995, a second retirement option - the State Community College System Optional Retirement Program (CCORP) - was made available to eligible community college employees.

4. Petitioner signed an enrollment form to join the CCORP in April 1996. Jt. Ex. 3.

5. Respondent is the state entity charged with implementing the FRS Investment Plan, created by the Florida Legislature in 2000, and implemented beginning in June 2002. The Legislature enacted changes to Chapter 121, Part I, allowing CCORP participants a one-time opportunity to either rejoin the FRS Pension Plan or to join the new FRS Investment Plan.

6. Petitioner received a new retirement options choice kit sent to CCORP participants, allowing him to make one of those choices, around the beginning of September 2003. Jt. Ex. 4. The kit contained a letter to CCORP participants. The body of the letter follows:

The 2003 Florida Legislature made some important changes affecting your retirement plan choices. CCORP participants have **new opportunities** to enroll in an improved Florida Retirement System (FRS). Here are a few key points:

- The FRS now offers a defined contribution plan (FRS Investment Plan) in addition to its traditional defined benefit plan (FRS Pension Plan). There is also a hybrid option that combines both of these plans (you must meet a service requirement to choose this option).
- There is no specific deadline for making a retirement plan change. You may exercise your option at any time during your active working career under the CCORP, although the timing could affect your cost if you decide to transfer to the FRS Pension Plan.
- If you wish to make a retirement plan change from CCORP to either FRS Plan, you must complete the enclosed *Form OCC- 2*. Telephone and Internet enrollment are not available.
- If you choose to change from CCORP to either the FRS Investment Plan or Pension Plan, you will have one **additional** opportunity to elect to switch to the other FRS plan, which you may exercise during your active career under the FRS.
- As a CCORP participant you do not have access to the online CHOICE SERVICE. However, you may call the toll-free MyFRS Financial Guidance Line to receive retirement planning guidance and answers to all your questions on the FRS plans.
- The cover sheet at the front of this kit includes your personal PIN (personal identification number) and other demographic information. **Please keep this cover sheet for your records.**

The enclosures with this letter outline your options and some of the key differences between the CCORP, FRS Investment Plan and FRS Pension Plan. We hope you will use all the available free FRS educational resources to make your decision (see sidebar). We also encourage

you to contact your CCORP provider to understand your benefits and fees.

The kit also included a 1½ page primer with information as follows:

A Primer on Your New Retirement Plan Choices

Recently enacted legislation in CS/CS/SB 958 (Chapter 2003-260, Laws of Florida) provides CCORP participants an opportunity to transfer from the CCORP to the Florida Retirement System (FRS) Pension Plan or Investment Plan. As a CCORP participant, you can exercise this one-time transfer opportunity at any time during your active CCORP career. You will want to explore your options carefully *under all three plans*, and make the informed decision that is best for you.

CCORP - If you decide to remain in the CCORP, your employer will continue to make contributions to the CCORP account set up in your name and you will continue to select investments from the contract providers under your plan (employee contributions are optional). If you have service credit in the FRS Pension Plan for the period between your first eligibility to transfer to the CCORP and the actual date of your transfer (a maximum of 2 months), you may elect to transfer to the CCORP a sum representing the present value of the accumulated benefit obligation for this brief period of service. Upon transfer of this sum, your service credit under the FRS Pension Plan for this period will be nullified.

FRS Investment Plan - If you decide to change from the CCORP to the FRS Investment Plan, you will retain your existing CCORP account balance, but all future employer contributions will be directed to your account in the FRS Investment Plan. Your employer will contribute to an Investment Plan account set up in your name, much like the CCORP, but employee contributions are not permitted. You will decide where the contributions are invested among the Investment Plan's 40 investment funds. Your combined service under the Investment Plan, FRS Pension Plan, and/or CCORP must equal at least 1 year for you to be vested in your employer contributions and associated earnings. The present value of any previous Pension

Plan benefit you may have accrued may also be transferred to the Investment Plan as your opening account balance (no maximum applies). Previous Pension Plan service counts toward the vesting requirement for the Investment Plan, but if you elect to transfer the Pension Plan benefit to the Investment Plan, the transferred amount only vests after you have completed at least 6 years of FRS service (including your service under the Pension Plan and Investment Plan, but excluding your CCORP service).

FRS Pension Plan - If you elect to change to the FRS Pension Plan, your employer will pay the required monthly contributions needed to fund a future lifetime monthly benefit based upon a formula set by Florida law (employee contributions are not permitted). The Pension Plan was the retirement plan you initially choose to "opt out of" by joining the CCORP. It is a defined benefit plan, rather than a defined contribution plan like the CCORP and the FRS Investment Plan. Your current CCORP account will be closed and you must "buy in" to obtain service credit under the Pension Plan. The cost of the buy-in is the present value of the Pension Plan benefit (accumulated benefit obligation) that you would have accrued if you had been in the Pension Plan (rather than the CCORP). You must transfer from your CCORP account a sum representing the buy-in cost. If your current CCORP balance is less than the buy-in cost, you must make up the difference with your own personal funds. If your CCORP balance is greater than the buy-in cost, the excess balance will remain in the CCORP. You must have 6 years of creditable service to vest under the Pension Plan. However, the service credit you purchase under the Pension Plan for your previous CCORP service will count toward this vesting requirement.

FRS Investment Plan Hybrid Option - If you have at least 5 years of previous FRS Pension Plan service, you can choose the FRS Investment Plan Hybrid Option. Under this option, you will retain all service credit you earned under the Pension Plan and your current CCORP account and balance will remain in place. All future employer contributions will be directed to a new account in the Investment Plan. You will be immediately vested in future contributions in the Investment Plan, but you must have at least 6 years of

FRS service (including your service under the Pension Plan and Investment Plan, but excluding your CCORP service) to vest in the Pension Plan service.

More Information

For more in-depth information regarding...

- ...The CCORP - you should contact your current annuity provider or your employer.
- ...The FRS Plans and Your Choices - you can refer to your Retirement Choice Kit, MyFRS.com, or contact the MyFRS Financial Guidance Program at 1-866-446-9377, where you can speak to an Ernst & Young financial planner or Division of Retirement Counselor.

7. Petitioner completed an enrollment form, dated September 20, 2003, and submitted it to the FRS Plan Choice Administrator, where it was received on September 26, 2003. Jt. Ex. 1.

8. Under **Section 1: Plan Choice**, Petitioner checked Option 3 on the enrollment form. This option states that the employee chooses to "Switch prospectively to the FRS Investment Plan, and transfer to the Investment Plan any accrued benefit in the FRS Pension Plan. My current CCORP account will be retained (Please complete Sections 2, 3 and 4)."

Section 3: FRS Investment Plan Fund Selections, states, in pertinent part, "Be sure to use the resources listed on page 1 to help you understand your investment fund choices. Once your contributions are in your account, you can also use the MyFRS Financial Guidance Line or

MyFRS.com to **change** your fund selections at any time. Your plan choice confirmation statement will indicate when you can expect contributions to be in your account."

Section 4: Authorization, states, in pertinent part:

1. IMPORTANT INFORMATION

Before signing the Authorization section below, be sure to read the following information.

I understand that I can find a description of my rights and responsibilities under the FRS Pension Plan Summary Plan Description or the FRS Investment Plan Summary Plan Description and Florida Statutes, available through the MyFRS Financial Guidance Line at 1-866-44-MyFRS (1-866-446-9377; or TTY: 1-888-429-2160) or at MyFRS.com.

* * *

If you selected Choice 3 or 4 in Section 1:

I understand that I have elected to join the FRS Investment Plan prospectively, and that my current CCORP account will remain in place, but future contributions will go into my FRS Investment Plan account at the rate authorized under law for that plan.

I understand that I should review the fund profiles at MyFRS.com and the Investment Fund Summary before choosing specific investment funds as provided in Section 3. I understand that information on investment funds will be provided in electronic format, unless I request hard copies. If I do not choose specific investment funds, I understand that I am authorizing investment of my assets in the FRS Select Moderate Balanced Fund.

* * *

I understand that Sections 121.4501(8)(b)4. and 121.4501(15)(b) of the Florida Statutes incorporate the federal law concept of participant control, established by regulations of the U.S. Department of

Labor under section 404(c) of the Employee Retirement Income Security Act of 1974. I understand that, if I exercise control over the assets in my Investment Plan account pursuant to section 404(c) regulations and all applicable laws governing the operation of the Investment Plan, no program fiduciary shall be liable for any loss to my account which results from my exercise of control.

I also understand that I must complete Form IPBEN-1, Beneficiary Designation Form, for the Investment Plan that can be found online at MyFRS.com or by calling the MyFRS Financial Guidance Line. I further understand that I have a one-time future opportunity to switch to the FRS Pension Plan at any time during my FRS career, and that there will be a buy-in cost for doing so.

A one-page information sheet entitled **Retirement Plan Conversion Form for Community College Optional Retirement Program (CCORP) Members** states, in pertinent part:

Due to recent changes to Florida law, there are now several new retirement plan alternatives available to CCORP participants. These options may be exercised now or at a future time during your career under the CCORP. You may also choose to simply remain in the CCORP and take no further action. The following table summarizes the additional options available to you.

* * *

Option 3 - Change Prospectively to the FRS Investment Plan. If you elect to transfer to the FRS Investment Plan, your current CCORP account and balance will remain in place and all future employer contributions will be directed to your account in the FRS Investment Plan. There is no "buy-in" cost. Your combined service under the Investment Plan, Pension Plan, and/or CCORP must equal at least 1 year for you to be vested in your employer contributions and associated earnings under the Investment Plan. Under this option, the present value of any previous Pension Plan service will be transferred to the Investment Plan as your opening account balance. The transferred amount only

vests after you have completed at least 6 years of FRS service (including your service under the Pension Plan and Investment Plan, but excluding your CCORP service).

(emphasis in original).

9. Petitioner's enrollment in the FRS Investment Plan became effective on October 1, 2003, and his accumulated benefit obligation in the FRS Pension Plan was transferred to his FRS Investment Plan account at the end of October 2003, and he was notified of such by a confirmation letter, dated October 30, 2003. Jt. Ex. 5

10. Petitioner received a letter from the Division of Retirement, dated November 16, 2004, enclosing a copy of his enrollment form and informing Petitioner that his accumulated benefit obligation had been transferred to the FRS Investment Plan. Jt. Ex. 7.

11. Petitioner stated that when he enrolled in the CCORP in 1996, he understood that his choice of the CCORP plan was irrevocable. Indeed, the language in Section 121.051(2)(c)2, Florida Statutes (2002), stated that "The decision to participate in such optional retirement program shall be irrevocable for as long as the employee holds a position eligible for participation." Similarly, the enrollment form used by Petitioner to transfer to the CCORP in 1996 contains the following election choice language:

I elect to withdraw from the FRS and participate in a lifetime monthly annuity program in the CCORP. I understand that my decision to withdraw from the FRS is irrevocable for as long as I hold a position eligible for membership in the CCORP. I also understand information concerning the annuity program will need to be obtained through my employer.

12. The gravamen of Petitioner's claim lies in the meaning of the term "irrevocable." Petitioner testified as follows:

I knew in my mind that my previous agreement was, in fact, irrevocable, so even in going over the document and everything else, I made the assumption that it was irrevocable, that none of this would affect future contributions from my employer, unless, of course - even in the document itself it does refer to that - if I left the (sic) transfer in option three, which I selected, to FRS, my CCORP balance and account will remain in place, and all future contributions will be directed to my FRS investment plan.

Tr. 20.

Further, Petitioner stated that he believed that any changes to his retirement status would involve communication with his employer's Human Resources Department - which did not occur until after he realized there was a problem - and would also require a change in the position he occupied. Tr. 22. He also argued that the poor "readability/understandability" of the terms and language used in the process was detrimental to his interest. Pet. for Hr'g (attach. "Statement of Facts").

13. Notwithstanding his properly executed election to transfer from the CCORP to the FRS Investment Plan, Petitioner was credible in his testimony that he truly did not intend for the result that occurred.

CONCLUSIONS OF LAW

14. The State Board of Administration has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569, 120.57, and 121.4501, Florida Statutes.

15. The parties were duly noticed pursuant to Chapter 120, Florida Statutes.

16. The Petitioner has the burden of proof, by a preponderance of the evidence, in these proceedings to prove he should be restored to the CCORP. Florida Dep't of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). See also Subsection 120.57(1)(j), Florida Statutes.

17. The disposition of this case turns on legislative power. "It is well established that one legislature cannot bind its successors" Straughn v. Camp, 293 So. 2d 689, 694 (Fla. 1974), reh'g denied (May 23, 1974). "The language 'shall not be changed' [or, similarly, 'is irrevocable'] can have no preventive force or effect." J.H. Kirklands v. Town of Bradley, 139 So. 144 (Fla. 1932).

"The legislative power to deal with new situations as they arise cannot thus be limited, even though their action expressly or impliedly repeals former legislative Acts. Furthermore, the legislature can by statute prescribe a new rule, which, if the statute shows an intention so to do, will completely govern the subject dealt with, even though this amounts to an implied repeal of all prior Acts in conflict therewith. . . . [T]here is a presumption that the legislature, in enacting a statute, acted with full knowledge of existing statutes relating to the same subject." Tamiami Trail Tours, Inc. v. J.M. Lee, 194 So. 305 (Fla. 1940) (internal citations omitted).

"To hold otherwise would mean that one legislature could bind a future legislature and interfere with the exercise of its orderly functions. That this cannot be done is [also] too academic to discuss." Ware v. Seminole County, 38 So. 2d 432 (Fla. 1949).

18. Unless taken in a vacuum, Petitioner's arguments regarding the term "irrevocable," the readability and understandability of documents and forms, and lack of involvement of his employer's Human Resources Department, must fail. By his own admission, Petitioner concedes that he did not call the toll-free line or avail himself to other resources because he "thought the [irrevocability of

his transfer to the CCORP] was pretty cut and dried, straightforward." Tr. 21.

19. Clearly, an abundance of information was provided to Petitioner to alert him to the Legislature's decision to permit new retirement options that voided the irrevocability of his earlier choice. This same information was more than sufficient to assist him in making a proper decision which would have been consistent with his desires. However, Petitioner did not heed the information when it mattered most - prior to making an important election decision.

The Legislative is not at fault for striving to provide more and better retirement options to employees, depending upon their individual circumstances, while at the same time allowing employees to maintain the status quo if they so desire.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law it is:

RECOMMENDED that the State Board of Administration enter a Final Order denying Petitioner's request to rescind his election to join the FRS Investment Plan and return to the CCORP.

DONE and ENTERED this 26th day of April 2006, nunc pro tunc, the 4th day of April 2006, in Tallahassee, Leon County, Florida.



Bruce R. Meeks, Esq.
Presiding Officer
State Board of Administration
1801 Hermitage Blvd.
Tallahassee, Florida 32308
(850) 488-4406

Filed with the Agency Clerk of the State Board of Administration this 26th day of April 2006, nunc pro tunc, the 4th day of April 2006.

ENDNOTES

1/ The original Florida Retirement System was exclusively a defined benefit plan, commonly referred to as the "FRS Pension Plan." As a result of legislative action in 2000, the Public Employee Optional Retirement Program (PEORP), a defined contribution plan, commonly referred to as the "FRS Investment Plan," was added as an option. Actual enrollment in the Investment Plan was available for the first time in June 2002. The Florida Retirement System consists of both plans.

2/ Petitioner had prior FRS creditable service from employment with the Marion County School Board from August, 1983 until November 1985.

Copies furnished:

Stephen R. Schultz, Petitioner

Tina Joanos, Agency Clerk
State Board of Administration
1801 Hermitage Blvd.
Tallahassee, Florida 32308

Ruth L. Gokel, Esq.
Assistant General Counsel
State Board of Administration
1801 Hermitage Blvd.
Tallahassee, Florida 32308

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the entity (i.e., State Board of Administration) that will issue the Final Order in this case.