

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

BREE ROJAS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	SBA Case No. 2022-0315
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
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**FINAL ORDER**

On January 24, 2023, the Presiding Officer submitted his Recommended Order to the State Board of Administration (hereafter “SBA”) in this proceeding. A copy of the Recommended Order indicates that copies were served upon the *pro se* Petitioner, Bree Rojas. Neither party filed exceptions to the Recommended Order, which were due February 8, 2023. 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) hereby is adopted in its entirety. Petitioner was employed with a Florida Retirement System (“FRS”) participating employer at the time she requested and received a distribution from her FRS Investment Plan account. Thus, she received an invalid distribution under Sections 121.591 and 121.091(9)(c), Florida Statutes. By law, the Petitioner is required either to repay the invalid distribution or to terminate employment with all FRS-participating employers for six calendar months.

There are no exceptions to the foregoing requirement, even for a showing of hardship.

Thus, Petitioner's request for relief 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 23<sup>rd</sup> day of February 2023, in Tallahassee,  
Florida.


**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



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**Daniel Beard**  
Chief of Defined Contribution Programs  
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,  
Agency Clerk

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order was sent to the *pro se* Petitioner, Bree Rojas, both by email transmission to [bholley02@gmail.com](mailto:bholley02@gmail.com) and by U.P.S. to 904 Popsash Circle, Clewiston, Florida 33440; and by email transmission to Deborah Minnis, Esq. ([dminnis@ausley.com](mailto:dminnis@ausley.com)), ([jmcvaney@ausley.com](mailto:jmcvaney@ausley.com), Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 23rd day of February, 2023.



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**

BREE ROJAS,

Petitioner,

vs.

Case No.: 2022-0315

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, on October 4, 2022, at 10:00 a.m., with all parties appearing telephonically before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA). The appearances were as follows:

**APPEARANCES**

For Petitioner:       Bree Rojas, *pro se*  
                              904 Popash Cir.  
                              Clewiston, FL 33440

For Respondent:       Deborah S. Minnis  
                              Ausley & McMullen, P.A.  
                              Post Office Box 391  
                              Tallahassee, Florida 32302

**STATEMENT OF THE ISSUE**

The issue to be determined is whether a statutory provision, which requires the recipient of an invalid distribution from the Florida Retirement System (FRS) Investment Plan to repay the distribution within 90 days or terminate FRS-covered employment, can be waived by Respondent, based on Petitioner's circumstances.

## PRELIMINARY STATEMENT

Pursuant to Section 120.57(2), Florida Statutes, this case was heard in an informal proceeding on October 4, 2022, at 10:00 a.m. All parties attended the hearing by telephone. Petitioner testified on her own behalf and presented no exhibits or other witnesses. Respondent presented the testimony of Allison Olson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-13 were admitted into evidence without objection.

A transcript of the hearing was made, filed with the agency, and provided to the parties on October 24, 2022. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. The following recommendation is based upon the undersigned's consideration of the complete record in this case and all materials submitted by the parties.

## FINDINGS OF FACT

1. Respondent's call records indicate that in February 2019 Petitioner contacted the Florida Retirement System by phone to inquire about obtaining a distribution from the System. At that time, Petitioner was employed with an FRS employer and actively participating in the FRS Pension Plan. She contacted FRS again on October 9, 2019, to inquire about switching from the Pension Plan to the Investment Plan using her second election.
2. Petitioner resigned from her FRS employer, effective January 13, 2020.
3. On January 14, 2020, Petitioner attempted to use her second election to change from the FRS Pension Plan to the Investment Plan. However, Petitioner was advised that she was unable to switch plans because a member must be employed with an FRS employer and earning service credit under FRS, at the time the second election is used.

4. In November 2020 Petitioner was reemployed with the Hendry County School Board - an FRS-participating employer – and earning credit under FRS. She called FRS in November and December of 2020, requesting to use her second election to switch to the Investment Plan. Although initially the FRS system reported her status as terminated, Petitioner was able to use her second election and successfully switch to the Investment Plan on December 14, 2020.

5. On December 18, 2020, Petitioner terminated her employment with the Hendry County School Board.

6. On January 4, 2021, Petitioner was re-hired by Hendry County School Board as a substitute teacher, which is a position that is not eligible for participation in FRS.

7. Petitioner spoke with a financial planner at the MyFRS Financial Guidance line on March 8, 2021, about obtaining a distribution from her Investment Plan account. She told the financial planner that she had not worked for an FRS employer since December 2020. The financial planner advised Petitioner that taking a distribution would mean she was “retired,” and as an FRS retiree she would not be eligible to work for an FRS employer for six months from the date she took the distribution. Petitioner acknowledged the restriction on reemployment.

8. On April 1, 2021, while still employed with the Hendry County School Board as a substitute teacher, Petitioner logged into her Investment Plan account on MyFRS.com and established a distribution to be paid from her Investment Plan account effective on that date.

9. The MyFRS.com system required Petitioner to answer several questions in order to complete her transaction. Among those questions were the following:

Question 1: Does FRS have your correct date of termination on file, including any temporary, part time, Other Personal Services (OPS), and any regularly established positions? Your FRS records show your date of termination is 12/18/2020.

Petitioner answered “yes” to this question.

Question 3: Your distribution is being processed in good faith, based on information you provide. Florida Statutes prohibit in-service distributions. You must not be actively employed or pending reemployment with any FRS-covered employer in any type of position at the time of this distribution. This includes temporary, part-time, or OPS positions that are not covered for FRS retirement. ...

When you take a distribution from your Investment Plan account, you are retired from the FRS and cannot be reemployed by any FRS participating employer in any position within 6 calendar months or before 11/01/2021. This includes positions that are not covered for FRS retirement including temporary, part-time, and OPS positions. If you are reemployed within 6 calendar months of your retirement date, your distribution will be considered invalid. Florida law states that you and any FRS participating agency that employs you are jointly liable for returning any funds distributed....

By proceeding with your distribution, you certify that you are currently eligible to receive this distribution. You also understand that if it is later determined you were not eligible you will have to repay the invalid distribution.

Is there any reason why you are not eligible to receive this distribution?

Petitioner answered “no” to question 3; after which the distribution from her FRS Investment Plan account was processed.

10. Petitioner acknowledged the availability of assistance if she had any questions regarding her distribution. Question 2 advised Petitioner of the ability to receive “free, unbiased guidance services from financial planners” prior to proceeding with the distribution and asked if she would like to speak to an FRS Financial Planner before proceeding with her distribution. Petitioner responded “no.”

11. On July 14, 2021, while still employed as a substitute teacher, Petitioner called the MyFRS Financial Guidance Line and asked a financial planner about repaying the distribution because she was considering reemployment. She was advised by the Financial

Planner, who was unaware Petitioner was currently employed with an FRS eligible employer, that her employment restriction ran from May to October.

12. On November 1, 2021, Petitioner accepted a full-time, FRS eligible position with the Hendry County School Board.

11. During an audit of the FRS Investment Plan, it was determined that Petitioner had not been eligible to receive a distribution from her Investment Plan account on April 1, 2021, because she was actively employed with an FRS employer at the time.

12. On July 26, 2022, Respondent notified Petitioner that her distribution had been impermissible, and that Florida law required her to either repay the distribution within 90 days or terminate her employment with the Hendry County School Board by October 24, 2022. She was advised that if she chose to terminate her employment, she could return to work with an FRS employer on or after May 1, 2023. She was further advised that if she repaid the amount of the distribution, her Investment Plan account would be restored, she would no longer be considered retired and she could continue her employment with the School District.

13. Petitioner timely filed a request for a hearing.

### **CONCLUSIONS OF LAW**

14. Because she was employed with an FRS employer at the time she received the distribution from her FRS Investment Account, the April 1, 2021, distribution violated s. 121.591, and s. 121.091(9)(c), Florida Statutes. Both provisions are clear that benefits cannot be paid under the Florida Retirement System Investment Plan unless the member has terminated employment as provided in s. 121.021(39)(a).

15. Under s. 121.021(39)(a), Florida Statutes, termination does not occur until a member ceases all employment with an FRS eligible employer. There are no applicable



exceptions to the termination requirement under the investment plan. There is also no provision under Chapter 121, permitting in-service distributions based on employee hardships, unforeseeable emergencies, loans, medical expenses, educational expenses, purchase of a principal residence, payments necessary to prevent eviction or foreclosure on an employee's principal residence, or any other reason.

16. Any distribution to which a member is not entitled at the time of payment is an "invalid distribution." *See* Rule 19-11.001 (34), F.A.C. Because Petitioner was employed with an FRS eligible employer at the time of her distribution from the FRS Investment Plan, she received an invalid distribution.

17. Petitioner's central argument is that she did not understand her employment as a substitute teacher is considered "employment" with an FRS employer. While all parties certainly sympathize with her predicament, her argument is not supportable. While it may be that Petitioner misunderstood the distribution requirements, she presented no evidence sufficient to overcome the statutory prohibition on taking a distribution before terminating her employment with an FRS employer. She also presented no credible evidence that her misunderstanding was due to material misrepresentations by Respondent or its agents. Indeed, Petitioner ignored multiple safeguards designed to prevent the situation with which she is now faced.

18. There are certainly provisions of Chapter 121 that can lead to confusion, but the language used by MyFRS.com to prevent invalid distributions is unambiguous. Question 3 first states, "Florida Statutes prohibit in-service distributions." Expanding on this prohibition, so there is no uncertainty, Question 3 continues: "You must not be actively employed or pending re-employment with *any FRS-covered employer in any type of position* at the time of this distribution. This includes temporary, part-time, or OPS positions that are not covered for FRS

retirement.” (Emphasis added.) I find it difficult to fathom that Question 3 failed to persuade Petitioner to, at a minimum, pause and seek additional clarification. But, even if Petitioner’s claim of confusion was genuine, it would still provide no legal justification for the Board to waive or forego its statutory obligations with respect to invalid distributions.

19. Any member or former member of FRS who receives an invalid distribution is required by law to either repay the full amount within 90 days or terminate employment from all FRS-participating employers. F.S. § 121.591(1)(a)(5). If the individual fails to repay the entire invalid distribution within 90 days after receipt of final notification, he or she may be deemed retired from FRS and would then be subject to the provisions of s. 121.122 (and, thereunder, subject to the reemployment provisions of s. 121.091(9) and the termination requirements under s. 121.021(39)) regarding reemployment after retirement. If the member is deemed retired, the joint and several liability set out in s. 121.091(9)(d)2. is void, and neither the State nor the employer will be liable for gains on the member’s Investment Plan account until the invalid distribution is resolved. *Id.*

20. While the law is relatively clear in its description of the options available to the Petitioner with respect to the resolution of her invalid distribution, the consequences of her failure to elect either resolution option are more complex. Some guidance on the practical implications of s. 121.591(1)(a)(5) is provided by Rule 19-11.003(10)(a), F.A.C., which provides, in relevant part:

If the member fails to repay the invalid distribution, or terminate employment, the employer is liable for the repayment of the invalid distribution even if the member signed a statement at the time the member was hired that no benefit had been received from the Plan.

21. The clarification offered by Rule 19-11.003 is important in the context of Petitioner’s request for relief, as she has made it clear that she has no ability to repay the amount

of her distribution (\$70,000) and has no desire to voluntarily terminate employment. Based on the language in the Rule, should Petitioner refuse to repay the distribution or terminate employment, the Hendry County School Board would then be required to either terminate Petitioner's employment involuntarily, or repay the total amount of her distribution.

22. Florida Statutes creating and governing the Florida Retirement System, and Petitioner's rights and responsibilities under them, are clear and the SBA cannot deviate from them. *Balezentis v. Dep't of Mgmt. Servs., Div. of Retirement*, Case No. 04-3263, 2005 WL 517476 (Fla. Div. Admin. Hrgs. March 2, 2005) (noting that agency "is not authorized to depart from the requirements of its organic statute when it exercises its jurisdiction").

23. Respondent lacks the authority to deem Petitioner's distribution from her FRS Investment Plan account valid. Neither does Respondent have authority to waive requirements that are mandated by both state and federal law.

24. Accordingly, Petitioner's request for relief must be denied.

### RECOMMENDATION

Having considered the law and undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order denying the relief requested.

DATED this 24<sup>th</sup> day of January 2023.



Glenn E. Thomas, Esquire  
Presiding Officer  
For the State Board of Administration  
Lewis, Longman & Walker, P.A.  
106 East College Avenue, Suite 1500  
Tallahassee, FL 32301

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)  
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