

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

CHARLEMAGNE GILLES,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2020-0405
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
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FINAL ORDER

On August 18, 2021, 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, Charlemagne Gilles, and upon counsel for the Respondent. This matter was decided after an informal proceeding. Neither party filed exceptions to the Recommended Order, which were due on September 2, 2021. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending, for final agency action, before the Chief of Defined Contribution Programs.

ORDERED

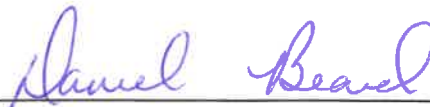
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner received an invalid distribution from his Florida Retirement System (FRS) Investment Plan account. Petitioner was a vested member of the FRS Investment Plan at the time he terminated his FRS-covered employment with the Broward County School Board, an FRS-participating employer. He took a distribution from his FRS Investment Plan account on October 16, 2020. He was hired by another FRS-participating employer on September 21, 2020, a few weeks before his request for a distribution. Thus, his

distribution was in violation of Section 121.591, Florida Statutes. Because he received an invalid in-service distribution, he is required either to terminate employment with all FRS-participating employers for 6 calendar months or to repay the invalid distribution within 90 days from the date of this Final Order. There are no provisions that would allow the 90 day repayment period to be waived even for a showing of hardship.

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 16 day of November, 2021, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Daniel Beard
Chief, Defined Contribution Programs
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

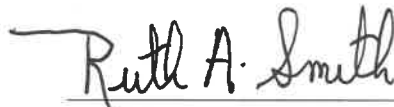
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



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, Charlemagne Gilles, both by email transmission to Cgilles615@msn.com and by U.P.S. to 326 NW Aurora, Port St. Lucie, Florida 34983; and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) and Ruth Vafek (rvafek@ausley.com; jmcvaney@ausley.com). Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 16th day of November, 2021.



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

CHARLEMAGNE GILLES,

Petitioner,

vs.

CASE NO. 2020-0495

STATE BOARD OF ADMINISTRATION.

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, on June 22, 2021, 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: Charlemagne Gilles, *pro se*
326 NW Aurora
Port St. Lucie, Florida 34983

For Respondent: Ruth Vafek
Ausley McMullen, P.A.
123 South Calhoun Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue is whether Petitioner must suffer the consequences of having taken an invalid distribution he requested and received from the Florida Retirement System (FRS) Investment Plan in October of 2020.

PRELIMINARY STATEMENT

Petitioner testified on his own behalf and presented no other witnesses. Respondent presented the testimony of Allison Olson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-6 were admitted into evidence over objection.

A transcript of the hearing was made, filed with the agency clerk on July 14, 2021, and provided to the parties on that same date. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. The following recommendation is based on my consideration of the complete record in this case and all materials submitted by the parties.

UNDISPUTED FACTS

1. Petitioner was employed in an FRS-covered position with the Broward County School Board (BCSB) and was a member of the FRS Investment Plan.
2. Effective April 14, 2020, Petitioner terminated employment with the BCSB.
3. On October 16, 2020, Petitioner called the MyFRS Financial Guidance Line and asked about taking a distribution from his Investment Plan account. He indicated that he was no longer working, and inquired whether he was eligible to receive a distribution. The EY Financial Planner informed Petitioner that the FRS system showed that Petitioner had left FRS employment in April, and assisted him with his distribution request. During the same call, the Financial Planner informed Petitioner that he was not permitted to work with an FRS-participating employer for six months following the distribution, and that taking the distribution in October of 2020 would mean

Petitioner was ineligible to return to employment with an FRS employer until May of 2021. He also told Petitioner that, if he returned to work with an FRS employer prior to the end of six calendar months following the distribution, he would have to pay back all the money distributed. Unknown to the Guidance Line representative, at the time of this conversation, Petitioner already was employed by another FRS-covered employer.

4. On that same date, October 16, 2020, Petitioner logged into his MyFRS.com account and finalized a request for a distribution of \$6,250.00.

5. The online distribution request process again informed Petitioner as follows:

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 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.

...

By proceeding with this 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 to you will have to repay the invalid distribution.

6. During the distribution request process, Petitioner answered “No” in response to the question, “Is there any reason why you are not eligible to receive this distribution?”

7. After Petitioner received the requested distribution, the SBA became aware that he was actually employed by the St. Lucie County School Board (SLCSB), starting September 21, 2020. The SLCSB is an FRS-covered employer.

8. The SBA requested that Petitioner repay the distribution he had received.

9. On or about February 1, 2021, Petitioner submitted a letter that the SBA treated as a Request for Intervention. Petitioner stated he did not understand the repayment demand and that he did not have the money to repay the distribution. Petitioner’s request for relief from repayment was denied.

10. On or about February 21, 2021, Petitioner filed a Petition for Hearing, stating that he “did not know that every district school in the country goes with FRS” and that the repayment requirement “should be reversed totally because the circumstances in which your final decision was based is not timely and appropriate with the pandemic.” This administrative proceeding followed.

CONCLUSIONS OF LAW

11. The burden of proof in an administrative proceeding, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue. Dep’t of Transp. v. J.W.C. Co., 396 So.2d 778 (Fla. 1st DCA 1981).

12. Section 121.591, Florida Statutes, provides in relevant part:

Benefits may not be paid under the Florida Retirement System Investment Plan unless the member has terminated employment as provided in s. 121.021(39)(a) or is deceased and a proper application has been filed as prescribed by the state board or the department. Benefits, including employee contributions, **are not payable under the investment plan for 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 except** a requested distribution for retirement, a mandatory de minimis distribution authorized by the administrator, or a required minimum distribution provided pursuant to the Internal Revenue Code....

(1) NORMAL BENEFITS.- Under the investment plan:

(a) Benefits in the form of vested accumulations as described in s. 121.4501(6) are payable under this subsection in accordance with the following terms and conditions:

1. Benefits are payable only to a member, an alternate payee of a qualified domestic relations order, or a beneficiary.
2. Benefits shall be paid by the third-party administrator or designated approved providers in accordance with the law, the contracts, and any applicable board rule or policy.
3. **The member must be terminated from all employment with all Florida Retirement System employers**, as provided in s. 121.021(39).
4. Benefit payments may not be made until the member has been terminated for 3 calendar months, except that the state board may authorize by rule for the distribution of up to 10 percent of the member’s account after being terminated for

1 calendar month if the member has reached the normal retirement date as defined in s. 121.021.

5. If a member or former member of the Florida Retirement System receives an invalid distribution, such person must either repay the full amount within 90 days after receipt of final notification by the state board or the third-party administrator that the distribution was invalid, or, in lieu of repayment, the member must terminate employment from all participating employers. If such person fails to repay the full invalid distribution within 90 days after receipt of final notification, the person may be deemed retired from the investment plan by the state board and is subject to s. 121.122....

(Emphasis added).

13. Section 121.021(39)(a) defines “termination” as follows:

“Termination” occurs, except as provided in paragraph (b), **when a member ceases all employment relationships with participating employers, however:**

...

2. For retirements effective on or after July 1, 2010, **if a member is employed by any such employer within the next 6 calendar months, termination shall be deemed not to have occurred.** A leave of absence constitutes a continuation of the employment relationship, except that a leave of absence without pay due to disability may constitute termination if such member makes application for and is approved for disability retirement in accordance with s. 121.091(4). The department or state board may require other evidence of termination as it deems necessary.

(Emphasis added).

14. According to the applicable statutes and rules which govern Respondent as well as Petitioner, the SBA is unable to permit Petitioner to forego repayment of the distribution taken while he was employed by an FRS-covered employer. That law, as cited above, expressly prohibits in-service distributions even for undisputed employee hardships and medical expenses.

15. 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”); Pesta v. Dep’t of

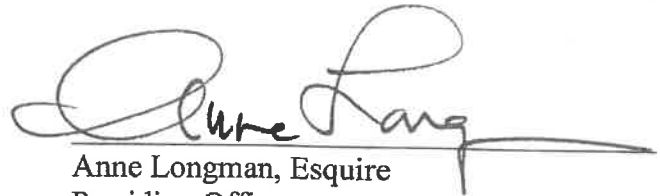
Corr., 63 So.3d 788, 790 (Fla. 1st DCA 2011) (observing that administrative agencies have only such powers as statutes confer).

16. Respondent SBA is bound by Florida law, as enacted by the Florida legislature, to administer the FRS Investment Plan as provided by statute, and does not have discretion to modify or grant exceptions to applicable statutory requirements. In this case, those requirements mean that the SBA cannot grant Petitioner's request to waive repayment of the distribution he received while employed by an FRS-covered employer, regardless of the undoubted hardships he is undergoing.

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 18th day of August, 2021.



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.ioanos@sbafla.com
mini.watson@sbafla.com
Nell.Bowers@sbafla.com
Ruthie.Bianco@sbafla.com
Allison.Olson@sbafla.com
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Charlemagne Gilles
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Port St. Lucie, FL 34983
Cgilles615@msn.com
Petitioner

and via electronic mail only to:

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Ruth E. Vafek, Esquire
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jmcvaney@ausley.com