

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

LOURDES SUAREZ,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2007-960
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
_____	)	

**FINAL ORDER**

On November 24, 2008, 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 Ariel Sagre, Esq., Counsel for Petitioner, Lourdes Suarez, and upon counsel for the Respondent. Neither party filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on December 9, 2008. A copy of the 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. The Petitioner's request that she not be declared a "retiree" under Section 121.4501(2)(j), or under Section 121.021(39), Florida Statutes, 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 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 10<sup>th</sup> day of December, 2008, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

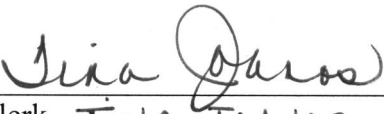


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Ron Poppell, Senior Defined Contribution  
Programs Officer  
State Board of Administration  
1801 Hermitage Boulevard, Suite 100  
Tallahassee, Florida 32308  
(850) 488-4406

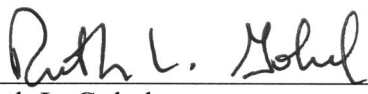
FILED ON THIS DATE PURSUANT TO  
SECTION 120.52, FLORIDA STATUTES  
WITH THE DESIGNATED CLERK OF THE

STATE BOARD OF ADMINISTRATION,  
RECEIPT OF WHICH IS HEREBY  
ACKNOWLEDGED.

  
Clerk TINA JOANOS

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order was sent by UPS courier service to Ariel Sagre, Esq., Sagre Law Firm, P.A., 5201 Blue Lagoon Drive, 8<sup>th</sup> Floor, Miami, Florida 33126, 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 10th day of December, 2008.

  
Ruth L. Gokel  
Assistant General Counsel  
State Board of Administration of Florida  
1801 Hermitage Boulevard  
Suite 100  
Tallahassee, FL 32308

STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION

LOURDES SUAREZ,

Petitioner,

v.

CASE NO.: 2007-960

STATE BOARD OF ADMINISTRATION,

Respondent.

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**RECOMMENDED ORDER**

This case was heard in an informal proceeding before the undersigned Presiding Officer on June 13, 2008, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: Ariel Sagre, Esquire  
Sagre Law Firm, P.A.  
5201 Blue Lagoon Drive  
8th Floor  
Miami, Florida 33126

For Respondent: Brandice D. Dickson, Esquire  
Pennington, Moore, Wilkinson,  
Bell & Dunbar, P.A.  
215 S. Monroe Street, Suite 200  
Tallahassee, Florida 32301

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GENERAL COUNSEL'S OFFICE

**STATEMENT OF THE ISSUE**

Petitioner has raised various issues with regard to her present status with the Florida Retirement System (FRS) and a distribution she took from her Investment Plan account after she was terminated by Miami-Dade County. The issue to be resolved in this proceeding, however, is whether

Petitioner was properly declared a retiree by the Respondent, State Board of Administration (SBA).

### **PRELIMINARY STATEMENT**

On April 29, 2008, Petitioner, through her attorney, submitted a Petition for Hearing seeking a determination that the decision by the SBA that she had taken an invalid distribution was not justified. This followed a series of communications between Petitioner and Respondent with regard to this distribution.

Petitioner attended the informal hearing by telephone and was represented by counsel. Petitioner's husband, Mr. Alfredo Fernandez, testified on her behalf. Respondent presented the testimony of Dan Beard, Director of Policy, Risk Management and Compliance, and Respondent's Exhibits R-1 through R-5, consisting of official records and documents reflecting contacts by and between Respondent and Petitioner, were admitted into evidence without objection. At hearing, Petitioner's counsel stated that the issue to be decided was what exactly it meant to be terminated and whether being fired equated to being terminated under the applicable law as to when an FRS participant (or former participant) may be deemed to be a retiree.

A transcript of the informal hearing was made, filed with the agency and made available to the parties, who were invited to submit proposed recommended orders within 30 days after the transcript was filed. Respondent filed a Proposed Recommended Order; Petitioner made no further filings.

### **UNDISPUTED MATERIAL FACTS**

1. Petitioner was employed by Miami-Dade County, a Florida Retirement System (FRS) participating employer, effective March 1, 2005.

2. She was terminated by Miami-Dade County on January 23, 2007.
3. On May, 10, 2007 Ms. Suarez requested and received a complete distribution from her FRS Public Employee Optional Retirement Program (Investment Plan) account.
4. Pursuant to mediation with her employer, Petitioner was reinstated and returned to work with Miami-Dade County in June, 2007.
5. During an audit of FRS Investment Plan records, Ms. Suarez's distribution was discovered and determined to have been an impermissible "in service" distribution, based on a finding that she was actually on a leave of absence during the time it was taken. Under section 121.021(39)(a), Florida Statutes, a leave of absence constitutes a continuation of the FRS employment relationship. Petitioner's employer, Miami-Dade County, had reported (apparently erroneously) that she had been terminated as of January 23, 2007, thus allowing the distribution to occur. A letter of August 15, 2007 from Respondent recited these circumstances and asked Petitioner to return the money she had received in total distribution of her account or terminate her employment by September 21, 2007. It appears that she did not do either. There is no evidence before me as to how Petitioner's initial termination, the mediation and her subsequent reinstatement came to be regarded as a leave of absence.
6. Ms. Suarez was again terminated by Miami-Dade County on December 14, 2007.
7. Because her FRS employment had terminated and she had taken a distribution, Ms. Suarez was declared a "retiree" by Respondent and is no longer responsible for repaying the distribution from her Investment Plan account.
8. As of the April 2008 payroll, Ms. Suarez had not been reemployed by any FRS

participating employer.

## CONCLUSIONS OF LAW

9. Respondent declared Ms. Suarez a "retiree" based on Section 121.4501(2)(j), Florida

Statutes. That section provides:

(j) "Retiree" means a former participant of the Florida Retirement System Public Employee Optional Retirement Program who has terminated employment and has taken a distribution as provided in s. 121.591, except for a mandatory distribution of a de minimis account authorized by the state board.

§ 121.4501(2)(j), Fla.Stat. (2007).

10. Section 121.591, Florida Statutes states, in pertinent part:

Benefits payable under the Public Employee Optional Retirement Program of the Florida Retirement System.-- Benefits may not be paid under this section unless the member has terminated employment as provided in s. 121.021(39)(a) or is deceased and a proper application has been filed in the manner prescribed by the state board or the department....

(1) Normal benefits.--Under the Public Employee Optional Retirement Program:

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

\*\*\*

3. To receive benefits under this subsection, the participant must be terminated from all employment with all Florida Retirement System employers, as provided in s. 121.021(39).

§ 121.591, Fla.Stat. (2007).

11. Section 121.021(39), Florida Statutes states:

(39)(a) "Termination" occurs, except as provided in paragraph (b), when a member ceases all employment relationships with employers under this system, as defined in subsection (10), but in the event a member should be employed by any such employer within the next calendar month, termination shall be deemed not to have occurred. A

leave of absence shall constitute a continuation of the employment relationship, except that a leave of absence without pay due to disability may constitute termination for a member, if such member makes application for and is approved for disability retirement in accordance with s. 121.091(4). The department or board may require other evidence of termination as it deems necessary.

§ 121.021(39), Fla.Stat. (2007).

12. There is no dispute that Ms. Suarez is a former FRS participant in the Investment Plan who took a distribution from her Investment Plan account. Only one who is no longer working for an FRS employer can take such a distribution.

13. Petitioner has requested that she not be declared a retiree, asserting that one can achieve "retiree" status under Section 121.4501(2)(j) only by voluntarily terminating employment, and that because she was fired, she does not meet the definition of "terminated" under Section 121.021(39), Florida Statutes.

14. It is clear that Petitioner has terminated employment with all FRS system employers and has taken a distribution of her Investment Plan account. Under these circumstances, the statutes cited above declare her to be a retiree in the eyes of the FRS Investment Plan.

15. The fact that Petitioner's termination was not voluntary does not change the statutory categories created by the legislature, and those statutes contain no requirement that termination be voluntary. Read together, they demand, in general terms, that a participant who has taken a distribution and is no longer working for an FRS employer be deemed to be retired.

16. The Florida Retirement System, and Petitioner's rights and responsibilities under that system are created by statute. The SBA's construction and application of the statutes it is charged to implement will be followed unless proven to be clearly erroneous or amounting to an abuse of

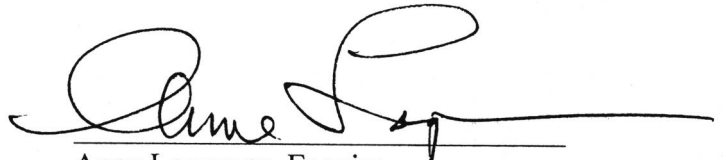


discretion. Level 3 Communications v. C.V. Jacobs, 841 So.2d 447, 450 (Fla. 2002); Okeechobee Health Care v. Collins, 726 So.2d 775 (Fla. 1st DCA 1998).

### RECOMMENDATION

In light of the undisputed facts and applicable law, I recommend that Respondent, State Board of Administration, issue a final order denying the relief requested.

RESPECTFULLY SUBMITTED this 2<sup>th</sup> day of November, 2008.



Anne Longman, Esquire  
Presiding Officer  
For the State Board of Administration  
Lewis, Longman & Walker, P.A.  
P.O. Box 16098  
Tallahassee, FL 32317

### NOTICE: 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, which should be filed with the Agency Clerk of the State Board of Administration. The SBA then will enter a Final Order which will set out the final agency decision in this case.

Filed with:

Agency Clerk  
Office of the General Counsel  
Florida State Board of Administration  
1801 Hermitage Blvd., Suite 100  
Tallahassee, FL 32308  
(850) 488-4406

This 2<sup>th</sup> day of November, 2008.

Copies furnished to:

Ariel Sagre, Esquire  
Sagre Law Firm, P.A.  
5201 Blue Lagoon Drive  
8th Floor  
Miami, Florida 33126

Petitioner

Brian A. Newman, Esquire  
Brandice D. Dickson, Esquire  
Pennington, Moore, Wilkinson,  
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Post Office Box 10095  
Tallahassee, Florida 32302-2095

Respondent