

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

SAMMY HANAFLI,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No.2016-3543
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
_____	)	

**FINAL ORDER**

On September 9, 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, Sammy Hanafi, 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. A copy of the Recommended Order is attached hereto as Exhibit A to this Final Order and incorporated to the extent described herein. Petitioner timely filed what he deemed as a Personal Statement (Exhibit C) which will be treated as constituting exceptions to the Recommended Order. Respondent did not file any exceptions. Respondent filed a supplemental brief on August 15, 2016 discussing the issue as to whether Pension Plan members who transfer to the Investment Plan and terminate prior to meeting the Pension Plan vesting schedule are entitled to a refund of their employee contributions made to the Pension Plan. Respondent further supplemented

the record on September 13, 2016, by filing an Affidavit of Garry Green, Chief of Research and Education for the Florida Division of Retirement. A copy of this affidavit is attached hereto as Exhibit B. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

### **STATEMENT OF THE ISSUE**

Respondent, State Board of Administration (“SBA”) adopts and incorporates in this Final Order the Statement of the Issue in the Recommended Order.

### **PRELIMINARY STATEMENT**

The SBA adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order.

### **STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS**

The findings of fact of a presiding officer cannot be rejected or modified by a reviewing agency in its final order “...unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings were not based upon competent substantial evidence....” See Section 120.57(1)(l), Florida Statutes. *Accord, Dunham v. Highlands Cty. School Brd*, 652 So.2d 894 (Fla 2<sup>nd</sup> DCA 1995); *Dietz v. Florida Unemployment Appeals Comm*, 634 So.2d 272 (Fla. 4<sup>th</sup> DCA 1994); *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122 (Fla. 1<sup>st</sup> DCA 1987). A seminal case defining the “competent substantial evidence” standard is *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957), in which the Florida Supreme Court defined it as “such evidence as will establish a substantial basis of fact from which the fact at issue

can be reasonably inferred” or such evidence as is “sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.”

An agency reviewing a presiding officer’s recommended order may not reweigh evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of presiding officers as the triers of the facts. *Belleau v. Dept of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1<sup>st</sup> DCA 1997); *Maynard v. Unemployment Appeals Comm.*, 609 So.2d 143, 145 (Fla. 4<sup>th</sup> DCA 1993). Thus, if the record discloses any competent substantial evidence supporting finding of fact in the Recommended Order, the Final Order will be bound by such factual finding.

Pursuant to Section 120.57(1)(l), Florida Statutes, however, a reviewing agency has the general authority to “reject or modify conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction.” Florida courts have consistently applied the “substantive jurisdiction limitation” to prohibit an agency from reviewing conclusions of law that are based upon the presiding officer’s application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the presiding officer’s interpretation of a statute or rule over which the Legislature has provided the agency with administrative authority. *See Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140, 1141-42 (Fla. 2d DCA 2001); *Barfield v. Dep’t of Health*, 805 So.2d 1008, 1011 (Fla. 1<sup>st</sup> DCA 2001). When rejecting or modifying any conclusion of law, the reviewing agency must state with particularity its reasons for the rejection or modification and further must make a finding that the substituted conclusion of law is as reasonable, or more reasonable, than that which was rejected or modified. Further, an

agency's interpretation of the statutes and rules it administers is entitled to great weight, even if it is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. *See, State Bd. of Optometry v. Fla. Soc'y of Ophthalmology*, 538 So.2d 878, 884 (Fla. 1<sup>st</sup> DCA 1998). An agency's interpretation will be rejected only where it is proven such interpretation is clearly erroneous or amounts 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. 1<sup>st</sup> DCA 1998).

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides that "...an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

### **MATERIAL UNDISPUTED FACTS**

The Material Undisputed Facts in the presiding officer's Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

### **RULINGS ON PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER**

Petitioner has filed what he has entitled as a "Personal Statement." Because this Personal Statement was filed after the issuance of the Recommended Order, this Personal Statement will be deemed as exceptions to the Recommended Order.

None of the statements contained within Petitioner's Personal Statement clearly identify the disputed portion of the Recommended Order by page number or paragraph. None of the statements identify any legal basis for the exception. And further, none of the statements includes appropriate and specific citations to the record. As such, it is not necessary for the SBA to rule on anything contained within the Personal Statement.

Petitioner has stated in his Personal Statement that Florida statutes and materials provided or made available to him did not address the refund of any required employee contributions he made while a member of the Pension Plan. However, the 2<sup>nd</sup> Election Retirement Plan Enrollment Form that Petitioner signed and acknowledged on June 19, 2014 when he elected to change from the Pension Plan to the Investment Plan specifically indicates that "... any accrued Pension Plan accrued value transferred to [Petitioner's] Investment Plan account will be subject to the vesting requirement of the FRS Pension Plan." [Respondent's Exhibit 2, page 3]. If Petitioner had any questions regarding this provision, he had the opportunity to contact the MyFRS Financial Guidance line at the telephone number prominently listed on each page of the 2<sup>nd</sup> Election form.

Accordingly, Petitioner's Exception hereby is rejected.

#### **RULINGS ON CONCLUSIONS OF LAW IN THE RECOMMENDED ORDER**

The Conclusions of Law in paragraphs 6. through 8. of the Recommended Order hereby are rejected and replaced with the following:

6. Petitioner is seeking a refund of his employee contributions made while he was a member of the Pension Plan. Section 121.091(5)(a), Florida Statutes creates an

entitlement to a return of accumulated employee contributions to the Pension Plan under certain conditions, and provides, in pertinent part, as follows:

(5) TERMINATION BENEFITS.—A member whose employment is terminated prior to retirement retains membership rights to previously earned member-noncontributory service credit, and to member-contributory service credit, if the member leaves the member contributions on deposit in his or her retirement account. If a terminated member receives a refund of member contributions, such member may reinstate membership rights to the previously earned service credit represented by the refund by completing 1 year of creditable service and repaying the refunded member contributions, plus interest.

(a) A member whose employment is terminated for any reason other than death or retirement before becoming vested is entitled to the return of his or her accumulated contributions as of the date of termination. Effective July 1, 2011, upon termination of employment from all participating employers for 3 calendar months as defined in s. 121.021(39)(c) for any reason other than retirement, a member may receive a refund of all contributions he or she has made to the pension plan, subject to the restrictions otherwise provided in this chapter. \*\*\*

[emphasis added]

Thus, it is clear from the foregoing provisions that there may be restrictions imposed on the ability of a member to receive a return of employee contributions made to the Pension Plan. When a member transfers from the Pension Plan to the Investment Plan, the amount transferred is not the sum of employer and employee contributions made while the member was participating in the Pension Plan, but rather is the present value of the employee's accumulated benefit obligation under the Pension Plan. Section 121.4501(3)(b)(1), Florida Statutes provides, in pertinent part, as follows:

(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. \*\*\*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.

b. A benefit commencement age, based on the member's estimated creditable service as of the estimate date.

c. Except as provided under sub-subparagraph d., for a member initially enrolled:

(I) Before July 1, 2011, the benefit commencement age is the younger of the following, but may not be younger than the member's age as of the estimate date:

(A) Age 62; or

(B) The age the member would attain if the member completed 30 years of service with an employer, assuming the member worked continuously from the estimate date, and disregarding any vesting requirement that would otherwise apply under the pension plan.

(II) On or after July 1, 2011, the benefit commencement age is the younger of the following, but may not be younger than the member's age as of the estimate date:

(A) Age 65; or

(B) The age the member would attain if the member completed 33 years of service with an employer, assuming the member worked continuously from the estimate date, and disregarding any vesting requirement that would otherwise apply under the pension plan.

\* \* \*

e. The calculation must disregard vesting requirements and early retirement reduction factors that would otherwise apply under the pension plan.

[emphasis added]

Because the amount transferred to the member's Investment Plan account is based on the member's creditable service and estimated final compensation, the amount transferred from a member's Pension Plan account either may be less than, or more than, the sum of employer and employee contributions made, depending, in part, on the member's length of service. [Exhibit B, Affidavit of Garry Green, paragraph 7]

7. When a member signs a second election enrollment form to switch from the Pension Plan to the Investment Plan, the member specifically acknowledges that he or she understands that he or she is transferring, not the total of employer and employee contributions made while a member of the Pension Plan but rather the "...present value, if any, of [the member's] existing FRS Pension benefit to the FRS Investment Plan." [emphasis added] [Respondent's Exhibit 3, 2<sup>nd</sup> Election Retirement Plan Enrollment Form, page 1]. As such, the member is cashing out his or her future Pension Plan benefit with the transfer of the member's accumulated benefit obligation to the member's new Investment Plan account. The amounts transferred are subject to the vesting requirements of the Pension Plan, as provided under Section 121.4501(6)(c), Florida Statutes. And, in fact, the 2<sup>nd</sup> Election Enrollment Plan Enrollment Form specifically notes that if a member has elected to switch from the Pension Plan to the Investment Plan, that member understands that



“... any accrued value [the member] may have in the Pension Plan will be transferred to the Investment Plan as [the member’s] opening balance and any Pension Plan accrued value transferred to [the member’s] Investment Plan account will be subject to the vesting requirement of the FRS Pension Plan.” [Respondent’s Exhibit 3, 2<sup>nd</sup> Election Retirement Plan Enrollment Form, page 3].

8. Thus, the Petitioner’s Pension Plan funds that were transferred to the Investment Plan at Petitioner’s request will be segregated from other funds in Petitioner’s account going forward and will be subject, in total, to the applicable six (6) year vesting requirement. Because Petitioner now has terminated FRS-covered employment before meeting the applicable six (6) year vesting requirement, these funds will remain in a suspense account and will be forfeited if he does not return to FRS-covered employment within five (5) years of his termination date of January 20, 2016, as provided under Section 121.4501(6)(d), Florida Statutes.

The Conclusions of Law in paragraph 9. of the Presiding Officer’s Recommended Order are adopted and are specifically incorporated by reference as if fully set forth herein.

The Conclusions of Law in paragraph 10. hereby are revised as follows:

10. Respondent has no intent or interest in depriving any FRS member of contributions paid from their salary to the FRS. However, it is clear from applicable law and from information set forth in the second election form signed by Petitioner that any accrued value the Petitioner had in the Pension Plan was transferred to the Petitioner’s Investment Plan account as his opening balance. Such Pension Plan accrued value

transferred is subject to the vesting requirement of the FRS Pension Plan, and no portion thereof can be refunded to Petitioner.

**ORDERED**

The Recommended Order (Exhibit A), subject to the modifications as stated above hereby is adopted. Petitioner has failed to show that he is entitled to the relief requested. The Petitioner's request that he be entitled to a refund of contributions he made to the Florida Retirement System Pension Plan prior to the time he filed his second election to join the FRS Investment Plan hereby is denied since Petitioner terminated employment before he met the applicable six (6) year vesting requirement of the Pension Plan.

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 8<sup>th</sup> day of December, 2016, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

*Joan Haseman*

**Joan 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*

Tina Joanos,  
Agency Clerk

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order was sent to Sammy Hanafi, pro se, both by email transmission,

[REDACTED] and by email transmission to Brian Newman, Esq. ([brian@penningtonlaw.com](mailto:brian@penningtonlaw.com)) and Brandice Dickson, Esq., ([brandi@penningtonlaw.com](mailto:brandi@penningtonlaw.com)) at Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Florida 32302-2095, this 8<sup>th</sup> day of December, 2016.



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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

SAMMY HANAFI,

Petitioner,

v.

CASE NO.: 2016-3543

STATE BOARD OF ADMINISTRATION,

Respondent.

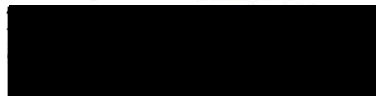
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**RECOMMENDED ORDER**

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on April 5, 2016, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: Sammy Hanafi, pro se



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

**STATEMENT OF THE ISSUE**

The issue is whether Petitioner may obtain refund of employee contributions he made to the Florida Retirement System (FRS) Pension Plan after having transferred to the Investment Plan and terminated employment prior to vesting in those amounts.

## **PRELIMINARY STATEMENT**

Petitioner attended the hearing by telephone, testified on his own behalf, and presented no other witnesses. Respondent presented the testimony of Mini Watson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits 1 through 9 were admitted into evidence without objection.

A transcript of the informal hearing was made, filed with the agency, and provided to the parties, who were invited to submit proposed recommended orders within thirty days. Respondent filed a proposed recommended order; Petitioner made no further filings. On June 14, 2016 I requested further briefing on the issue of whether Pension Plan members who transfer to the Investment Plan and terminate prior to vesting are entitled to refund of their employee contributions made to the Pension Plan. Respondent's brief was filed on August 25, 2016.

### **MATERIAL UNDISPUTED FACTS**

1. Petitioner became a member of the FRS by virtue of his employment with the Reedy Creek Improvement District in 2010. He had until April 29, 2011 to make an initial election between the defined benefit Pension Plan and the defined contribution Investment Plan.

2. Petitioner elected to join the Pension Plan effective May 1, 2011 and became subject to the six year vesting requirement of that plan.

3. On June 19, 2014, Petitioner completed and signed a second election form and transferred from the Pension Plan to the Investment Plan effective July 1, 2014. That second election form stated, in pertinent part:

You understand and acknowledge the following: You have elected to switch to the Investment Plan and any accrued value you may have in the FRS Pension Plan will be transferred to the Investment Plan as your opening balance and any Pension Plan accrued value transferred to the your Investment Plan account will be subject to the vesting requirement of the FRS Pension Plan.

(Emphasis added)

4. Petitioner terminated his employment with the Reedy Creek Improvement District the month after his second election became effective. 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.

5. Petitioner requested the return of his employee contributions to the Pension Plan pursuant to section 121.091(5)(a), Florida Statutes. This request was denied. Petitioner requested a hearing on the denial of his request and this administrative proceeding followed.

#### **CONCLUSIONS OF LAW**

6. Section 121.091(5)(a) Florida Statutes creates an entitlement to return of accumulated employee contributions to the Pension Plan. Likewise Section 121.04501(6)(a) makes an Investment Plan member fully and immediately vested in all employee contributions paid to the Investment Plan, plus interest and earnings.

Respondent asserts that because an accumulated benefit obligation calculated based on creditable service and average final compensation is the amount transferred to the Investment Plan when a member switches plans, and because that amount is not divided into employer and employee contributions, no refund may be had. Respondent cites the final clause of section

121.091(5)(a) as imposing a qualification on the entitlement to refund of Pension Plan contributions:

(5) TERMINATION BENEFITS. – A member whose employment is terminated prior to retirement retains membership rights to previously earned member-non-contributory service credit, and to member-contributory service credit, if the member leaves the member contributions on deposit in his or her retirement account. If a terminated member receives a refund of member contributions, such member may reinstate membership rights to the previously earned service credit represented by the refund by completing 1 year of creditable service and repaying the refunded member contributions, plus interest.

(a) A member whose employment is terminated for any reason other than death or retirement before becoming vested is entitled to the return of his or her accumulated contributions as of the date of termination. Effective July 1, 2011, upon termination of employment from all participating employers for 3 calendar months as defined in s. 121.021(39)(c) for any reason other than retirement, a member may receive a refund of all contributions he or she has made to the pension plan, subject to the restrictions otherwise provided in this chapter.

§121.091(5)(a), Fla. Stat. (Emphasis added.)

But the only restriction Respondent cites is section 121.4501(3)(b)(1):

(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...

§ 121.4501(3), Fla. Stat.



I can find nothing in the above that eliminates or qualifies the entitlement to refund expressed in section 121.091(5)(a).

7. Florida law expressly makes the employee contributions which were required as of 2011, when the mandatory FRS system changed from noncontributory to contributory, refundable. This is reiterated on the MyFRS website under a section comparing the two plans as to vesting.

For the Pension Plan:

Employee contributions are always 100% vested. This means that if you terminate employment prior to meeting the vesting requirements of the Pension Plan, you will be entitled to a refund of your employee contributions. However, taking such a refund may not be a sound financial decision because, if you return to FRS employment at a later date and wish to restore all service associated with the refund, you will be required to work for 1 year to become eligible to purchase back the refunded service plus interest.  
(Emphasis added.)

For the Investment Plan:

Employee contributions are always 100% vested. This means that if you terminate employment prior to meeting the vesting requirements of the Investment Plan, you will be entitled to a distribution of your employee contributions. However, taking such a distribution may not be a sound financial decision because you will forfeit any unvested employer contributions and service credit associated with the service and be declared a retiree. As a retiree you will not be eligible for future FRS membership if you return to FRS-covered employment.  
(Emphasis added.)

The assertion that a member loses entitlement to refund of his own contributions when he switches from the Pension Plan to the Investment Plan does not comport with express provisions of the Florida Statutes cited above or with the information on the MyFRS website. I note in addition that with regard to the funding of benefits, section 121.70(1) provides:

**121.70 Legislative purpose and intent. –**

(1) This part provides for a uniform system for funding benefits provided under the Florida Retirement System Pension Plan established under part I of this chapter (referred to in this part as the pension plan) and under the Florida Retirement System Investment Plan established under part II of this chapter (referred to in this part as the investment plan). The Legislature recognizes and declares that the Florida Retirement System is a single retirement system, consisting of two retirement plans and other nonintegrated programs.

§ 121.70(1) Fla. Stat. (Emphasis added.)

8. The Pension Plan funds that were transferred to the Investment Plan at Petitioner's request remain subject to Petitioner's Pension Plan vesting requirement. § 121.4501(6)(c)1., Fla. Stat. (2015). They are segregated from funds accrued going forward. Because Petitioner has terminated FRS-covered employment before reaching the six year point, these funds will remain in a suspense account and will be forfeited if he does not return to FRS-covered employment within five years of his termination date. § 121.4501(6)(d), Fla. Stat. (2015). To refuse him refund of his employee contribution portion of that segregated amount is not consistent with the applicable statutes or the intent expressed by the legislature that the FRS be a uniform system and that employee contributions be refundable. Mandatory employee contributions from salary payments are to be refunded when an FRS member terminates prior to vesting. It makes no sense that a transfer from the Pension Plan to the Investment Plan would nullify the express requirements of statute and expressed legislative intent, leading to the anomalous result that Pension Plan members who transfer to the Investment Plan and then terminate are the only FRS members who get nothing from their own contributions.

9. The SBA must comply with the Florida Statutes creating and governing the Florida

Retirement System. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). Its construction and application of Chapter 121, Florida Statutes, the statute it is charged to implement, 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 DCA 1998).

10. I am confident that Respondent has no intent to or interest in depriving Petitioner or any other FRS member of contributions from their salary paid to the FRS, and trust that the SBA is interpreting the relevant statutes so as to most effectively and efficiently administer the Investment Plan. I acknowledge also that the prior recommendation and Final Order in Tashek Hamlette v. State Board of Administration, Case No. 2014-2996, (Recommended Order August 1, 2014) are to the contrary. But on fuller examination, Respondent's construction appears to run head-on into express provisions of Florida law.

### **RECOMMENDATION**

Having considered the law and the undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order granting the relief requested by refunding the employee contributions made to Petitioner's Pension Plan account.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of September, 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  
[alongman@llw-law.com](mailto:alongman@llw-law.com)

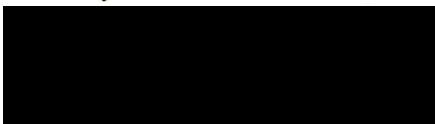
NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

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)  
[mini.watson@sbafla.com](mailto:mini.watson@sbafla.com)  
(850) 488-4406

COPIES FURNISHED via mail and electronic mail to:

Sammy Hanafi



Petitioner

and via electronic mail only to:

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[brian@penningtonlaw.com](mailto:brian@penningtonlaw.com)

Counsel for Respondent

**AFFIDAVIT OF GARRY GREEN**

STATE OF FLORIDA  
COUNTY OF LEON

I, Garry Green, am over eighteen years old. The following statements are made of my own personal knowledge.

1. I am the Chief of Research and Education. I have been responsible for Research and Education for 14 years. I have worked for the Division of Retirement for 28 years. A true and accurate copy of my work history with the Division of Retirement is attached hereto.

2. My job responsibilities include having a thorough working knowledge and application of the provisions of section 121.4501(3)(b), Florida Statutes with regard to the present value of an FRS member's accumulated benefit obligation (commonly known as an "ABO") under the Pension Plan as well as the proper application of the Investment Plan's and Pension Plan's vesting requirements.

3. When a Pension Plan member elects to transfer to the Investment Plan the election provides for the transfer of the ABO of any previous Pension Plan service, and the Division of Retirement is charged with calculating the present value of the member's ABO. The ABO is the amount of money transferred from the Pension Plan to the Investment Plan when a Pension Plan member elects to transfer to the Investment Plan and has previous Pension Plan service. The ABO transferred amount becomes the opening balance of the member's Investment Plan account and the funds are invested in accordance with the member's instructions. The ABO is subject to the vesting requirements of the Pension Plan.

4. An ABO is calculated based upon the member's creditable service and average final compensation under the Pension Plan. See, § 121.4501(3)(b), Fla. Stat. ABO calculations are

**EXHIBIT B**

made by credentialed actuaries who are contracted to perform these calculations by the Division of Retirement.

5. The Pension Plan is funded by contributions from FRS-participating employers and, beginning in 2011, contributions from employees as well. See, § 121.71(3) and (4), Fla. Stat.

6. Pension Plan members who terminate all employment with FRS-participating employers for three calendar months may request (and receive) a refund of their employee contributions even if they have not met the vesting requirements of the Pension Plan at termination. The Division of Retirement maintains a record of employee contributions and the sum total of employee contributions is the amount paid to a member when a refund is requested and properly payable.

7. An ABO calculation is not, however, segregated into employee and employer contributions. An ABO calculation is determined based upon creditable service and average final compensation. Employer and employee contributions are not factors applied in an ABO calculation. As a result, an ABO calculation may exceed the sum of the employer and employee contributions or be less than the member's total employer and employee contributions.

8. For example, assume that a regular class Pension Plan member has 2.40 years of creditable service and has an annual salary of \$40,000. Also, assume that the FRS employee contributions for the member total \$2,809, i.e. 3% of her total wages since March 2012 of \$80,042. The ABO calculation for this member would be approximately \$1,328, which is less than her total FRS employee contributions. This example is based upon an actual second election Investment Plan transfer where an ABO was calculated and transferred to the Investment Plan.

9. As the example above illustrates, when an employee requests a second election Investment Plan transfer, she is requesting that her Pension Plan benefit be converted to an ABO

present value sum, a value that bears no relationship whatsoever to the FRS contributions (both employer and employee) that have been made on her behalf. For these reasons, the Division of Retirement does not segregate a member's ABO into employee and employer contributions when a second election transfer to the Investment Plan occurs.

10. Once the ABO funds are transferred to the Investment Plan, they are invested in accordance with the member's directions. The member bears all of the risk and reward associated with the market performance of the investments she chooses. It is quite possible that an ABO could exceed the member's Pension Plan employee contributions when the ABO funds are transferred to the Investment Plan, but then fall below the value of the Pension Plan employee contributions due to market losses.

11. Florida law authorizes the Pension Plan to refund employee contributions after the member has terminated all employment with FRS-covered employers for three calendar months. In order to receive a refund, however, a Pension Plan member must waive all creditable service represented by the refunded contributions. Sec. § 121.071(2)(b), Fla. Stat. Once a member has elected Investment Plan membership and transferred an ABO representing earned service credit, she cannot receive a refund of only employee contributions to waive the creditable service represented as if she were still a Pension Plan member. An ABO calculation represents the present value of the member's future Pension Plan benefit. When a member requests an ABO transfer to the Investment Plan, she is, in effect, cashing-out her future Pension Plan benefit today. The member cannot thereafter waive the creditable service because it is represented by both her employee and employer contributions that she has already used to be invested in accordance with her instructions to the Investment Plan.

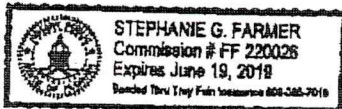


12. For all of these reasons, the Division of Retirement interprets the Florida law governing second elections and ABO calculations to require that ABO funds transferred to the Investment Plan in connection with a second election remain subject to the applicable Pension Plan vesting requirements.

FURTHER AFFIANT SAYETH NAUGHT

Garry Green  
GARRY GREEN

SWORN TO AND SUBSCRIBED before me in the State and County last aforesaid this 12 day of September, 2016 by Garry Green, who is personally known to me or has produced the following identification \_\_\_\_\_.



Stephanie G. Farmer  
NOTARY PUBLIC

Printed Name: Stephanie G. Farmer

My Commission Expires: June 19, 2019

Commission Number: FF 220026

(SEAL)

# Exceptions to R/o



## Personal Statement

This personal statement is regarding my case vs. Florida FRS for receiving contributions made while under the pension and investment plan as a member of the Florida FRS. There is a series of conflicting information noted within the Florida FRS paperwork and Florida statutes that does not provide a clear picture of refund of employers own contributions.

Florida Statute 121.091(5)(a) explains "(a) A member whose employment is terminated for any reason other than death or retirement before becoming vested is entitled to the return of his or her accumulated contributions as of the date of termination. Effective July 1, 2011, upon termination of employment from all participating employers for 3 calendar months as defined in s. 121.021(39)(c) for any reason other than retirement, a member may receive a refund of all contributions he or she has made to the pension plan, subject to the restrictions otherwise provided in this chapter. The refund may be received as a lump-sum payment, a rollover to a qualified plan, or a combination of these methods. Partial refunds are not permitted. The refund may not include any interest earnings on the contributions for a member of the pension plan. Employer contributions made on behalf of the member are not refundable. A member may not receive a refund of employee contributions if a pending or an approved qualified domestic relations order is filed against his or her retirement account. By obtaining a refund of contributions, a member waives all rights under the Florida Retirement System and the health insurance subsidy to the service credit represented by the refunded contributions, except the right to purchase his or her prior service credit in accordance with s. 121.081(2)."

Further investigation into Florida statute 121.4501(6)(d)(e) explain specifics regarding forfeiture of non-vested contributions, but provide no information regarding vested contribution forfeiture:

(d) Any non-vested 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.

(e) If the member elects to receive any of his or her vested employee or employer contributions upon termination of employment as provided in s. 121.021(39)(a), except for a mandatory distribution of a de minimis account authorized by the state board or a minimum required distribution provided by s. 401(a)(9) of the Internal Revenue Code, the member shall forfeit all nonvested employer contributions, and accompanying service credit, paid on behalf of the member to the investment plan.

It was my understanding that my own contributions were always deemed 100% vested within the FRS, and there is no specific language that explains the forfeiture of such vested funds either in Florida FRS paperwork, the Florida FRS website, or Florida FRS financial guidelines that would also further align with Florida law.

Exhibit R-1 which is a letter that was sent from FRS to myself upon request for disbursement of my own contributions explained on page 2, second to last paragraph that "We have reviewed calls to guidance line. You were informed you must be vested in both the pension plan and investment plan in order to receive the entire balance of your account and that you not be eligible to receive any employee contribution made prior to 2nd election effective date." This is actually not factual information and this exhibit should not be used to further provide proof that I was

explained the forfeiture of my own contributions or any vesting requirements. When examining exhibit R-9, the actual transcript between myself and the Florida FRS financial guidance center, no such information exists that would support the information stated in exhibit R-1, and I will reinforce that I was not sufficiently explained that I have forfeited my own contributions made into the pension plan.

When examining exhibit R-3 which occurred on 8-1-2014, it is not until then am I somewhat explained the vesting requirements and that I am not entitled to the own contributions I have made to the system.

#### Conclusion

I am further reinforcing my statement that I was not sufficiently explained that I will be forfeiting my own contributions I have made to the Florida FRS upon transfer from the pension to the investment plan. No clear language exists in Florida Statute or the Florida FRS website that explains the forfeiture of my own vested balance that I have funded myself through my own employee contributions for this present situation. Furthermore, the language in the Florida FRS retirement paperwork creates conflict when examining Florida Statutes 121.091 and 121.4501. We are in dire need of these funds at this time, and any assistance in the timely refund of my own contributions from the Florida FRS system will be greatly appreciated.

Thank you

Sammy Hanafi