STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

MARVIN KARLINS, Petitioner, vs. STATE BOARD OF ADMINISTRATION, Respondent.	)	Case No. 2013-2674

FINAL ORDER

On July 12, 2013, 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, Marvin Karlins, and upon counsel for the Respondent. Both Petitioner and Respondent filed a Proposed Recommended Order. Petitioner timely filed exceptions to the Recommended Order on July 24, 2013. 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.

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact in a recommended order 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 2nd DCA

1995); *Dietz v. Florida Unemployment Appeals Comm*, 634 So.2d 272 (Fla. 4th DCA 1994); *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122 (Fla. 1st 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."

Pursuant to Section 120.57(1)(l), Florida Statutes, 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."

RULING ON PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

Petitioner has filed a paragraph setting forth several unnumbered exceptions to the Recommended Order. 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."

None of the Petitioner's exceptions identify the disputed portions of the Recommended Order by page number or paragraph, identify any legal basis for the exceptions, or include appropriate and specific citations to the record. Petitioner's

exceptions are merely a reiteration of certain of his arguments made in pleadings and/or during the hearing.

Petitioner first states that it is his "belief" that because the SBA failed to make a certain request when it sought its first determination letter from the Internal Revenue Service that the Florida Retirement System ("FRS") Investment Plan is a qualified employee retirement plan under Section 401(a) of the Internal Revenue Code, that failure "justifies" his request to receive a Required Minimum Distribution ("RMD") as a plan member who is over 70 1/2 years old and still working, as this is the "normal IRS practice for 70 1/2 individuals." Petitioner does not cite any legal authority to support his "beliefs." Additionally, Petitioner does not address how his "beliefs" comport with the provisions of Section 121.591, Florida Statutes that specifically allow benefits to be paid from the FRS Investment Plan only when a member has "terminated employment" and those of Title 26 U.S.C. §401(a)(9)(C)(i) that specifically state that the "required beginning date" for an RMD from a qualified retirement plan occurs April 1, of the calendar year in which the employee attains 70 1/2 or the calendar year in which the employee retires, whichever is later [emphasis added].

As he did in the pleadings he filed and during the hearing, Petitioner's next exception makes the unsupported statement that the SBA requires that once an RMD is paid, payments must continue in the future. As the Recommended Order notes, the Petitioner does not cite any legal authority for this position. His exception fails to address and refute the conclusion of law in the Recommended Order that he has not established the elements necessary for the doctrine of estoppel to apply to his position.

Petitioner then states that his position that he should receive an RMD is supported by the fact that the SBA did not request a return of the funds erroneously paid as an RMD. Again, this is mere argument, and is not supported by any legal authority.

Petitioner then goes on to state that once employee contributions were required by the Florida Retirement System the nature of the FRS Investment Plan "changed," and the SBA would need to seek "specific IRS permission" to deny RMDs to 70 ½ year old members. Again, Petitioner proffers no legal authority for his bare assertion.

Finally, it appears Petitioner may be challenging the constitutionality of the statutory provisions creating the FRS Investment Plan. This is a new argument that Petitioner never broached either in his pleadings or during the hearing. This argument does not address any part of the Recommended Order. Further, administrative agencies are not the appropriate forum in which to consider the constitutionality of a statute. *Florida Marine Fisheries Commission v. Pringle*, 736 So.2d 17 (Fla. 1st DCA 1999); *Communications Workers of America, Inc. v. City of Gainesville,* 697 So.2d 167 (Fla. 1st DCA 1997); *Myers v. Hawkins*, 362 So.2d 926, 936 (Fla. 1978); *Department of Revenue v. Amrep Corp.*, 358 So.2d 1343 (Fla.1978); *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So.2d 695 (Fla.1978); *Department of Revenue v. Young American Builders*, 330 So.2d 864 (Fla. 1st DCA 1976).

For the foregoing reasons, all of Petitioner's exceptions hereby are rejected.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's request that he be entitled to receive a Required Minimum Distribution from his FRS Investment Plan account without first terminating employment with his FRS-participating employer 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 17th day of September, 2013, 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.

Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Marvin Karlins, Ph.D., pro se, [redacted] 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 17th day of September, 2013.

Ruth A. Smith

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

MARVIN KARLINS,

Petitioner,

vs. Case No. 2013-2674

STATE BOARD OF ADMINISTRATION,

Respondent.

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 26, 2013, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Marvin Karlins, Ph.D., pro se
[redacted]

For Respondent: Brian A. Newman, Esquire
Pennington, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

EXHIBIT A

STATEMENT OF THE ISSUE

The issue is whether Petitioner may receive a Required Minimum Distribution from his Investment Plan account without first terminating Florida Retirement System (FRS) covered employment.

PRELIMINARY STATEMENT

The pending petitions of Marvin Karlins and Jerry Koehler were filed on the same day, and the issues, material facts, and arguments in both cases are substantially identical. The cases were consolidated for the purpose of hearing only, and Petitioner Karlins represented both himself and Mr. Koehler pursuant to authority given by Mr. Koehler by email of March 6, 2013. Petitioner Karlins attended the joint hearing in person and testified on both Petitioners' behalf. Respondent presented the testimony of Daniel Beard, Director of Policy, Risk Management, and Compliance, State Board of Administration. Petitioner's Exhibits 1-14 and Respondent's Exhibits 1-10 were received in evidence.

A transcript of the hearing was made, filed with the agency, and provided to the parties, who were invited to submit proposed recommended orders within 30 days. Both Respondent and Petitioner Karlins filed a proposed recommended order.

MATERIAL UNDISPUTED FACTS

1. Petitioner is a tenured professor at the University of South Florida (USF), and is an FRS participant.

2 Petitioner is a member of the FRS defined contribution Investment Plan.

3. Petitioner is now over 70 ½ years old.

4. On or about September 8, 2012, Petitioner's employer, USF, erroneously reported that Petitioner had terminated employment with the university.

5. This report prompted Respondent to generate a letter to Petitioner on September 12, 2012, advising him that he would receive a Required Minimum Distribution (RMD) from his Investment Plan account. This notice estimated the amount of the RMD that Petitioner would receive, and stated that he would receive an RMD no later than December 31, 2012. Petitioner states that he never received this notice.

6. Petitioner received an RMD payment from his Investment Plan account, and at some point both he and Respondent realized that USF had notified the SBA, incorrectly, that his employment with the university had been terminated. Petitioner is still employed by USF and has not terminated his employment. Petitioner has not returned this RMD payment to the SBA, and Respondent has not sought its return.

7. Petitioner Karlins asserts that having begun paying him an RMD, Respondent is obligated to continue doing so, even though Petitioner is still employed. He is concerned that the Internal Revenue Service (IRS) will question why he received one RMD and then no more, and that this will prompt an IRS audit of his tax returns, to which he will be obligated to use time and money responding. Respondent states that Petitioner cannot take a distribution from his Investment Plan account until he has terminated all employment with FRS-participating employers, and that it is not responsible for mistakes made by his employer in reporting his employment status.

8. Petitioner also asserts that the SBA was grossly negligent in its interactions with him in not checking to determine if he had actually stopped working and in sending letters which he states neither he nor others similarly situated ever received.

CONCLUSIONS OF LAW

9. Section 121.591, Florida Statutes provides in pertinent part that:

> 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).

Termination occurs under this section when a member ceases all employment relationships with all FRS participating employers. Petitioner cannot take a distribution from his Investment Plan account until he has terminated all employment with all FRS participating employers. There is no exception to this requirement, (referred to hereafter as the "termination-before-distribution" requirement).

10. Section 121.591 also states that there are only three circumstances under which a distribution from an FRS retirement account can be paid: 1) retirement, 2) a de minimus distribution (accounts of less than $5,000), or 3) a required minimum distribution under the Internal Revenue Code. It provides, in pertinent part:

> 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.

Benefits are not payable to the member due to unforeseen circumstances creating a financial hardship, or for any reason other than retirement, a de minimis account distribution, or an RMD.

11. All of the listed distribution scenarios require the member to terminate all employment with all FRS participating employers before the distribution is made.

12. An RMD must be issued to FRS members who: 1) are over 70½, 2) have terminated FRS covered employment, but 3) have not yet requested the annual minimum distribution from their Investment Plan account. Under Title 26 U.S.C. § 401(a)(9)(C)(i), the "required beginning date" for an RMD occurs April 1 of the calendar year in which the employee attains 70½, or the calendar year in which the employee retires, whichever is later.

13. Petitioner contends that 2012 amendments to section 121.591 by HB 7079 (Chapter 2012-222, Laws of Florida) create exceptions to the termination-before-distribution requirement, and authorize him to take an RMD without terminating employment. The part of the amendment he references is underlined below:

> 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. ~~Before termination of employment,~~ Benefits, including employee contributions, are not payable under the investment plan for employee hardships, unforeseen emergencies, loans, medical expenses, educational expenses, purchase of a 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 ~~prior to termination from all employment relationships with participating employers.~~

§ 121.591 Fla. Stat. (2012)

Although somewhat difficult to parse, this amendment identifies the three ways in which a distribution can be made under the Florida Retirement System; it does not create any exceptions to the termination-before-distribution requirement, when read in context with all plan requirements.

14. Petitioner has apparently read the above statute to mean that if the IRS provides or allows an RMD under any circumstances, the SBA must also provide or allow it. It is not

necessary here to set out all the complexities of the IRS regulations applicable to retirement plans which, like those within the FRS, have to obtain and retain tax-exempt status. Even if federal law allows some kinds of in-service distributions of retirement assets under certain circumstances or types of plans, this does not mean that the Florida legislature must provide or has provided for these distributions in the FRS. The general rule stated in section 121.591, that FRS benefits may not be paid unless the member is no longer employed is not countermanded by anything in the last three clauses of that section.

15. Petitioner also argues that once an RMD has been paid to an FRS member, those payments must continue. Petitioner does not cite any legal authority to justify this position, but he appears to rely on the doctrine of estoppel.

16. Petitioner readily admits that the report of his termination from USF – the report that prompted Respondent to issue the RMD payment to him – was incorrect. Petitioner has not separated from employment with the university and maintains his tenured faculty position; nor has he identified any misstatement made by the SBA. Respondent SBA is not bound by any misstatement made by USF or any other participating FRS employer. "Employers are not agents of the... state board... and [it] is not responsible for erroneous information provided by representatives of employers." § 121.021(10), Fla. Stat. (2012).

17. Petitioner here cannot establish the elements essential to apply the doctrine of estoppel. The party he seeks to estop, the SBA, made no misrepresentation of fact, and so he could not have relied to his detriment on any such representation. As such, the doctrine of estoppel has no application here. Salz v. Department of Administration, Division of Retirement, 432 So. 2d 1376, 1378 (Fla. 3rd DCA 1983) *citing* Department of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981).

18 Petitioner cites a portion of the Investment Plan Summary Plan Description to support the contention that an RMD once paid must continue annually. Petitioner omits the example provided in the Summary Plan Description that provides context and clearly contemplates the member's termination of FRS-covered employment. The two pertinent portions of the Summary Plan Description provide:

> You are not required to begin receiving your benefits at termination of employment but can defer receiving them until a later date. In the calendar year you reach age 70½ or terminate employment (whichever is later), the Investment Plan Administrator will notify you that you must start withdrawing a minimum amount (Required Minimum Distribution [RMD]). You have the option of deferring your first RMD payment until April 1st of the following year if you call the Investment Plan Administrator, and request the deferral by November 30. After the first RMD payment, a distribution must be paid to you by December 31st of each year. Ongoing a notice will be mailed to you in January each year an RMD is due.
>
> For example: You are no longer employed under the FRS and reach age 70½ on August 20, 2012. You must receive the RMD for 2012 from your retirement account by December 31, 2012, unless you request a deferral of this first RMD payment until April 1, 2013. However, you will receive your next RMD for 2013 by December 31, 2013.

(Emphasis added).

19. Petitioner also contends he may be damaged by the RMD payment he received because it could prompt an IRS audit. While it is certainly possible that this could occur and is regrettable, even if Petitioner is subject to an audit, this does not establish a claim for damages, and in any event, such a claim is not cognizable in a proceeding before an agency of the executive branch of government. Florida Power and Light Company v. Glazer, 671 So. 2d 211, 214 (Fla. 1996). If Petitioner wishes to bring a claim for damages against the SBA, that claim must be asserted in a court of law.

20. Finally, Petitioner contends that he did not receive advance notice of the RMD, although Respondent SBA asserts such notices were sent. I cannot and do not need to decide this potential dispute of fact, because even if Petitioner's assertion is taken as established, such a failure would not authorize the SBA to make future RMD payments before he terminated FRS-covered employment.

21. Respondent SBA cannot deviate from 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.), and its construction and application of Chapter 121, Florida Statutes, the statute 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). It would perhaps make more sense if FRS participants of Petitioner's age and employment status were able to take distributions of their employment assets, but Respondent SBA cannot administer the FRS Investment Plan except as provided by statute, and so may not allow such withdrawals.

RECOMMENDATION

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

RESPECTFULLY SUBMITTED this 12th day of July, 2013.

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.joanos@sbafla.com
Daniel.Beard@sbafla.com
(850) 488-4406

This 12th day of July, 2013.

Copies furnished to:
Via Regular Mail
Marvin Karlins
[redacted]
Petitioner

Via electronic mail:
Brian A. Newman, Esquire
Brandice D. Dickson
Pennington, P.A.
Post Office Box 10095
Tallahassee, FL 32302-2095
slindsey@penningtonlaw.com
Attorneys for Respondent

Attorney