

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

FRANTZ SAINVIL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2008-1286
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
_____	)	

**FINAL ORDER**

On February 12, 2009, 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, Frantz Sainvil, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on February 27, 2009. 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.

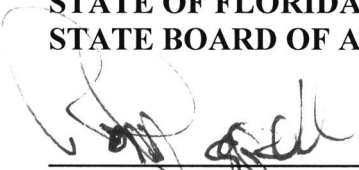
**ORDERED**

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's attempted Second Election into the FRS Investment Plan when he was not employed in a regularly established FRS position is invalid and his request for relief is denied.

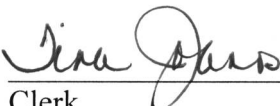
Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the State Board of Administration in the Office of the 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 3rd day of March, 2009, in Tallahassee, Florida.

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

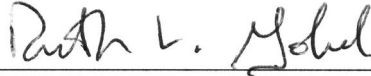
  
\_\_\_\_\_  
Ron Poppell, Senior Defined Contribution  
Programs Officer  
State Board of Administration  
1801 Hermitage Boulevard, Suite 100  
Tallahassee, Florida 32308  
(850) 488-4406

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.

  
\_\_\_\_\_  
Clerk  
TINA JOANOS

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order was sent by UPS to Frantz Sainvil, 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 3rd day of March, 2009.



\_\_\_\_\_  
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

FRANTZ SAINVIL,

Case No.: 2008-1286

Petitioner,

v.

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 October 6, 2008, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner:

Frantz Sainvil  


Petitioner

For Respondent:

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

RECEIVED  
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GENERAL COUNSEL'S OFFICE

**STATEMENT OF THE ISSUE**

The issue is whether the Petitioner's attempted second election into the Investment Plan was valid given he submitted his 2nd Election Enrollment Form at a time when he was not in a regularly established position.

## **PRELIMINARY STATEMENT**

On July 10, 2008, Petitioner submitted a Request for Intervention asking to be allowed to enroll in the Florida Retirement System (FRS) Investment Plan. This request was denied by letter of August 12, 2008 from the State Board of Administration (SBA) to Petitioner; and Petitioner then filed a Petition for Hearing which resulted in the instant proceeding.

Petitioner attended the informal hearing by telephone and testified on his own behalf. Respondent presented the testimony of Dan Beard, Director of Policy, Risk Management & Compliance, and offered Exhibits R-1 through R-6, which were admitted into evidence without objection. Respondent's Exhibit R-7 was marked for identification and was submitted after the hearing, with notice to Petitioner. That exhibit is also admitted.

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. Respondent submitted a proposed recommended order; Petitioner made no further filings.

## **UNDISPUTED MATERIAL FACTS**

1. The Petitioner began employment with an FRS participating employer in October 1997.
2. Between September 2002 and February 2003, the Petitioner was given the opportunity to enroll in the FRS Investment Plan (formally known as the Public Employee Optional Retirement Plan).
3. The Petitioner did not enroll in the Investment Plan during the enrollment period and defaulted to the FRS Pension Plan (also known as the defined benefit plan).

4. Petitioner called the MyFRS Financial Guidance Line on October 9, 2007 and spoke with an Ernst & Young advisor regarding switching from the Pension Plan to the Investment Plan, because he was contemplating leaving his current employer and working for a community college.

The following exchange took place during that call:

MR. SAINVIL: So, okay, if I switch – if I switch today to the private plan that means you are not going to contribute to the account any more?

E&Y ADVISOR: Okay. I think there is a misunderstanding. You keep saying private plan. Private plan is outside the Florida Retirement System.

MR. SAINVIL: No, no, no, okay, if I switch to the –

E&Y ADVISOR: To the investment?

MR. SAINVIL: Yeah.

E&Y ADVISOR: Okay. Yes, they are going to contribute 9 percent of your gross monthly salary into this account.

MR. SAINVIL: But if I don't switch to it, what, what, what are the contributions?

E&Y ADVISOR: The contributions do not affect what your pension benefit is, that is what I'm trying to – if they contributed 20,000 a year or \$2 a year, you are still going to get the same pension benefit. Your present value is still going to be the same. So you can't you can't choose a plan based on the contribution because the contributions, there are no – the contributions don't matter when determining your pension benefits.

...

MR. SAINVIL: But if I switch today to the investment account, that mean the, my Florida Retirement System is not going to give me that money any more, that is what you mean, right?

E&Y ADVISOR: No, they are going to contribute no matter if you are in the pension or you are in the investment plan. As long as you are in the Florida Retirement System they are going to contribute to your account.

MR. SAINVIL: All right. Send me –

E&Y ADVISOR: I am going to send you the information so you can look over it.

MR. SAINVIL: Okay.

E&Y ADVISOR: I'm saying that you have one time to switch. You can switch now or you can switch later. Because you claim to be a conservative investor means you don't really like risk. Since you don't like risk you don't have to switch now, you can switch later, **as long as you switch before you leave the Florida Retirement System you could always take this money and put it in a private plan later on.**

MR. SAINVIL: **Okay.**

E&Y ADVISOR: **As long as you are in the investment plan when you leave the Florida Retirement System you could always take the moneys with you.**

(Emphasis added).

5. Petitioner also asked whether Broward County Community College was an FRS-participating employer and the FRS counselor advised that it was. Petitioner never stated that he was going to move from a full time to a part time position or otherwise discussed the nature of the new position he planned to take.

6. Petitioner testified that he did not understand that some positions with an FRS-participating employer may not be regularly established positions, and therefore are not eligible for FRS coverage.

7. The Petitioner terminated his FRS-covered position on May 6, 2008 and has not been in an FRS-covered position since that time. He is working as a temporary adjunct teacher at three community colleges, but none of those jobs is a regularly established position.

8. Petitioner submitted a second election form on June 20, 2008 seeking to switch from the Pension Plan to the Investment Plan. This election was found to be invalid because it was not made while Petitioner was in an FRS-covered position.

### CONCLUSIONS OF LAW

9. Section 121.4501(4)(e), Florida Statutes governs an FRS plan participant's movement between plans:

(e) After the period during which an eligible employee had the choice to elect the defined benefit program or the Public Employee Optional Retirement Program, or the month following the receipt of the eligible employee's plan election, if sooner, the employee shall have one opportunity, at the employee's discretion, to choose to move from the defined benefit program to the Public Employee Optional Retirement Program or from the Public Employee Optional Retirement Program to the defined benefit program. Eligible employees may elect to move between Florida Retirement System programs only if they are earning service credit in an employer-employee relationship consistent with the requirements under s. 121.021(17)(b), excluding leaves of absence without pay. Effective July 1, 2005, such elections shall be effective on the first day of the month following the receipt of the election by the third-party administrator and are not subject to the requirements regarding an employer-employee relationship or receipt of contributions for the eligible employee in the effective month, except that the employee must meet the conditions of the previous sentence when the election is received by the third-party administrator. This paragraph shall be contingent upon approval from the Internal Revenue Service for including the choice described herein within the programs offered by the Florida Retirement System.

§ 121.4501(4)(e), Fla.Stat.

10. FRS-covered employees may move between plans only while the employee is an



"eligible employee," as set out above. An employee is "eligible" only if he is an officer or employee as defined in 121.021(11), Florida Statutes. See §121.4501(2)(f). Section 121.021(11), Florida Statutes defines an officer or employee as a person who is "receiving salary payments for work performed in a regularly established position."

11. A "regularly established position" is defined as "a ...position which will be in existence for a period beyond 6 consecutive months, except as provided by rule." § 121.021(52), Fla.Stat.

12. Rule 60S-1.004, Florida Administrative Code states, in pertinent part:

60S-1.004. Participation.

...

**(5) An employee who is filling a temporary position shall not be eligible for membership in the Florida Retirement System.** Records documenting the intended length of a temporary position and the dates of employment of an employee in such position must be maintained by the agency. An employer employing a person in a temporary position shall advise the employee at the time of his employment that he is filling a temporary position and cannot participate in the Florida Retirement System or claim this temporary employment later for retirement purposes. A position shall not be considered temporary due to the uncertainty of the employee's intention to continue employment. **A position meeting the definition below shall be a temporary position.**

(a) A temporary position in a state agency is an employment position which is compensated from an other personal services (OPS) account as provided for in Section 216.011(1)(x), F.S.

(b) A temporary position in a local agency is:

1. An employment position which will not exist beyond 6 consecutive calendar months; or

2. An employment position which is listed below in paragraph (d) regardless of whether it will exist beyond 6 consecutive months.

(c) When an employment position in a local agency is extended beyond 6 consecutive calendar months, with the exception of those listed in paragraph (d) below, it shall become a regularly established position for retirement purposes and the employer shall enroll the current employee and all subsequent employees filling the position into the retirement system and shall begin to make the necessary contributions on the first day of the seventh calendar month, or on the first day of the month following the month in which the decision is made to extend the position beyond 6 months, if earlier. When a temporary position extends beyond 6 months and there is no documentation substantiating that the position was originally established as a temporary position to last for 6 months or less, the employee filling such position will be enrolled from the initial date of employment and retirement contributions shall be due retroactively to that date.

(d) The following types of positions in a local agency are considered temporary positions for retirement purposes. Documents to support such temporary positions listed below must be maintained in the agency's records (see subsection 60S-5.007(2), F.A.C.).

...

**3. Temporary Instructional Positions (positions which are established with no expectation of continuation beyond one semester or one trimester at a time, to teach in a community college, public school, or vocational institution; effective July 1, 1991, such positions may include paper graders, tutors, notetakers, and lab tutors at community colleges).**

Rule 60S-1.004, F.A.C. (emphasis added).

13. Petitioner was not in a regularly established position at the time he made his second election in June 2008. Pursuant to Rule 60S-1.004, Florida Administrative Code, the positions held by Petitioner at the time he submitted his second election for processing were temporary positions expressly excluded from the FRS, and he therefore was not eligible to move from the Pension Plan to the Investment Plan at that time.

14. Petitioner acknowledged during the hearing that he did not inquire of his employer whether his position would be an FRS-covered position. He did ask the FRS counselor if his employer was an FRS-participant, and was told, correctly, that it was. It does not appear that he

specifically posed the critical question: whether these part time positions would be covered by FRS, and so that aspect of his situation was not discussed.

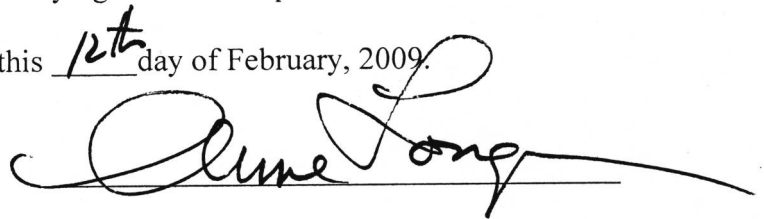
15. The Florida Statutes creating and governing the Florida Retirement System, and Petitioner's rights and responsibilities under them, are clear and the SBA cannot deviate from them. Balezentis v. Department of Management Services, Division of Retirement, 2005 WL 517476 (Fla.Div.Admin.Hrgs.). The SBA's 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).

16. It is unfortunate that Petitioner made diligent attempts to understand how his employment move would affect his retirement options and still was unable to extract the relevant information from available resources. Respondent SBA lacks the authority, however, to allow petitioner to make a second election without meeting the requirement of having been in a regularly established position, as defined by applicable statutes and rules, at the time of making the election.

### 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 12<sup>th</sup> day of February, 2009.



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 12<sup>th</sup> day of February, 2009.

Copies furnished to:

Frantz Sainvil



Brian A. Newman, Esquire  
Brandice D. Dickson  
Pennington, Moore, Wilkinson Bell & Dunbar  
Post Office Box 10095  
Tallahassee, FL 32302-2095  
Attorneys for Respondent

  
Attorney

**Shipment Receipt**

(Keep this for your records.)

**Transaction Date** 04 Mar 2009**Address Information****Ship To:**  
Frantz Sainvil  
7020 Nova Drive  
Apartment 104-D  
DAVIE FL 33317-7126  
Residential**Shipper:**  
STATE BOARD OF ADMINISTRATION  
Tina Joanos  
850 413-1197  
1801 Hermitage Blvd, #100  
Tallahassee FL 32308

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**Shipment Information****Service:** UPS Next Day Air Saver  
**\*Guaranteed By:** End of Day, Thurs. 5 Mar. 2009  
**Quantum View Notify<sup>SM</sup> 1:** tina.joanos@sbafla.com  
Ship; Delivery  
**E-mail Failure Notification:** tina.joanos@sbafla.com**Fuel Surcharge:**

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**Package Information****Package 1 of 1**  
**Tracking Number:** 1ZF62F201397620487  
**Package Type:** UPS Letter  
**Actual Weight:** Letter  
**Billable Weight:** Letter  
**Reference # 1:** General Counsel

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**Billing Information****Bill Shipping Charges to:** Shipper's Account F62F20**All Shipping Charges in USD**

\* For delivery and guarantee information, see the [UPS Service Guide](#). To speak to a customer service representative, call 1-800-PICK-UPS for domestic services and 1-800-782-7892 for international services.