

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

TONIA JACKSON,)	
)	
Petitioner,)	
)	
vs.)	Case No. 2006-510
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
)	
)	
)	
_____)	

FINAL ORDER

On April 6, 2007, 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, Tonia Jackson, and upon counsel for the Respondent. Respondent filed a Proposed Recommended Order. Neither party filed Exceptions, which were due on April 23, 2007. 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 to have her invalid distribution be governed by an alleged settlement agreement with Respondent 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.

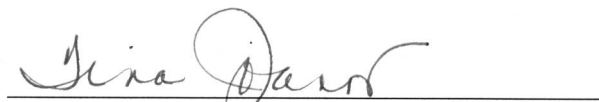
DONE AND ORDERED this 30th day of April, 2007, in Tallahassee, Florida.

**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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent by UPS to Tonia Jackson, 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 30th day of April, 2007.



Linda Lettera
General Counsel
State Board of Administration of Florida
1801 Hermitage Boulevard
Suite 100
Tallahassee, FL 32308

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

TONIA JACKSON,

CASE NO.: 2006-510

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 for the State Board of Administration on February 13, 2007 in Tallahassee, Florida. The Petitioner appeared by telephone and the Respondent in person, as follows:

APPEARANCES

For Petitioner:

Tonia Jackson


For Respondent:

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

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding is whether an invalid distribution made to the Petitioner is governed by an alleged settlement agreement with the State Board of Administration (SBA), and if not, whether the invalid distribution is subject to the provisions of section 121.591(1)(a)5, Florida Statutes, as amended in 2006 to provide that repayment must be made within a 90 day period.

PRELIMINARY STATEMENT

Petitioner filed a Request for Intervention on September 1, 2006. The SBA investigated the issues raised by the Petitioner and decided that her contentions were not supported by the facts. That decision was communicated to the Petitioner by a letter dated September 15, 2006, which also advised of her right to a hearing to contest the SBA's determination. Petitioner filed a Petition for Hearing, which was received on October 6, 2006 and ultimately transmitted to the undersigned for informal hearing.

Petitioner testified at the hearing. Respondent presented the testimony of Dan Beard of the SBA. Respondent's exhibits R-1 through R-9, consisting of official agency records and communications by and to the Petitioner, were admitted into evidence without objection. There were no disputes as to the material facts in this case.

A transcript of the proceedings was made, filed and made available to the parties. Respondent timely filed a Proposed Recommended Order; Petitioner made no further submissions following the hearing.

UNDISPUTED MATERIAL FACTS

1. Petitioner elected to participate in the Florida Retirement System Investment Plan ("Investment Plan") on July 1, 2003 while she was an employee of the Department of Corrections ("DOC"). (TR: 5, 7).

2. On September 30, 2003, Petitioner's employment with the DOC was terminated. (TR: 5, 7).

3. On November 1, 2003, Petitioner was hired by the Broward County Sheriff's Office ("BCSO"), and on November 12, 2003 she received a distribution from the Investment Plan in the amount of \$ [REDACTED] which she had previously requested. (TR: 5, 7).

4. The Petitioner was notified on October 21, 2005 that the distribution of the Investment Plan to her was considered an "in-service" distribution and was invalid under the applicable statutes. (TR: 5; Ex. R-1, R-3).

5. Petitioner was notified that the distribution would have to be returned to the FRS Investment Plan. (TR: 5; Ex. R-1 B.). Petitioner ultimately acknowledged that the distribution was invalid and spoke with Walter Kelleher at the SBA regarding a re-payment plan. (TR: 9, 10, 25).

6. The SBA offered to settle the matter with Petitioner and prepared a Release to that effect. (TR: 6; Ex. R-1; Ex. R-1 A.).

7. The Release called for Petitioner to, among other things, repay the distribution no later than the year 2011 and sign and fax the Release back to the SBA no later than February 27, 2006. (TR: 6; Ex. R-1 A.). By letter dated February 27, 2006, Petitioner stated that she was "in no

way liable” for the erroneous payment. (Ex. R-2).

8. Petitioner apparently signed the Release on April 26, 2006, but did not fax it to the SBA until August 4, 2006. (TR: 7, 10). On August 22, 2006, the SBA notified Petitioner that section 121.591(1)(a), Florida Statutes had been amended effective July 1, 2006, to require repayment of invalid distributions within 90 days and gave her final notification that repayment would have to be made by November 30, 2006. (Ex. R-4).

9. Petitioner submitted a Request for Intervention on September 1, 2006, asking to be permitted to repay under the terms of the previously offered settlement and Release. On September 15, 2006, the SBA notified Petitioner that it had reviewed her case and could not honor her request. (TR: 6; Ex. R-5).

CONCLUSIONS OF LAW

10. Section 121.4501(8)(a) obligates the SBA to administer the Investment Plan. The SBA is not authorized to depart from the requirements of its governing statutes when exercising its jurisdiction. 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, are entitled to great weight and will be followed unless clearly erroneous or an abuse of discretion. See 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).

11. The parties have stipulated that the distribution to Petitioner was invalid and must be repaid. Therefore the only issue to be determined is whether the SBA’s action in rejecting Petitioner’s late submission of the signed Release and requiring her to repay within 90 days was

clearly erroneous or an abuse of discretion.

No Contract was Formed

12. Petitioner does not have a valid, enforceable settlement agreement with the SBA. The undisputed facts show that she did not meet the conditions of the settlement offer proposed by the SBA. She initially rejected any settlement and then did not execute and return the Release until over five months beyond the period the settlement offer was open.

13. An offeror has the right to set the terms and mode of acceptance in the offer, and acceptance must match up with the terms stated in the offer, or there is no contract formed. Webster Lumber Co. v. Lincoln, 115 So.498 (Fla.1927). An enforceable contract will be formed only if acceptance is made to an offer "in the mode, at the place, and within the time expressly or impliedly stated within the offer." Gillespie v. Bodkin, 902 So.2d 849 (Fla. 1st DCA 2005); Koplin v. Bennett, 155 So.2d 568 (Fla. 1st DCA 1963). In this case, Petitioner was to sign a release and fax it to the Respondent no later than February 27, 2006. Because the Petitioner failed to execute and fax the release back to the SBA prior to the February 27, 2006 deadline, the offer to settle the matter on the terms proposed by the SBA expired without a contract being formed.

14. An offer is no longer valid if it has been rejected. 11 Fla.Jur.2d Contracts § 31. Because Petitioner rejected the SBA's offer on February 27, 2006, no contract was formed when she later executed the release in an attempt to revive a settlement agreement.

The Statutory Amendment May Be Applied Retroactively To This Case

15. As amended effective July 1, 2006, section 121.591(1)(a)5, Florida Statutes mandates that all members and former members of the FRS Investment Plan who receive invalid distributions

must repay the distribution within 90 days of notice from the SBA, or may be deemed retired from the Public Employee Optional Retirement Program.

16. The section reads, in pertinent part:

(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:

...

5. If a member or former member of the Florida Retirement System receives an invalid distribution from the Public Employee Optional Retirement Program Trust Fund, such person shall repay the full invalid distribution to the trust fund within 90 days after receipt of final notification by the State Board of Administration or the third-party administrator that the distribution was invalid. If such person fails to repay the full invalid distribution within 90 days after receipt of final notification, the person may be deemed retired from the Public Employee Optional Retirement Program by the state board, as provided pursuant to s. 121.4501(2)(j), and shall be subject to the provisions of s. 121.122. If such person is deemed retired by the state board, any joint and several liability set out in s. 121.091(9)(c)2. becomes null and void, and the state board, the Department of Management Services, or the employing agency is not liable for gains on payroll contributions that have not been deposited to the person's account in the Public Employee Optional Retirement Program, pending resolution of the invalid distribution. The member or former member who has been deemed retired or who has been determined by the board to have taken an invalid distribution may appeal the agency decision through the complaint process as provided under s. 121.4501(9)(f)3. As used in this subparagraph, the term "invalid distribution" means any distribution from an account in the Public Employee Optional Retirement Program which is taken in violation of the provisions of this section, s. 121.091(9), or s. 121.4501.

Section 121.591(1)(a)(5), Fla.Stat. (2006).

17. Prior to enactment of Section 121.591(1)(a)(5), Florida Statutes (2006), Chapter 121

was silent as to the time for repayment of invalid distributions from the Investment Plan, but did prohibit distribution of benefits to members who were employed by any FRS employer at the time of distribution. See § 121.591(1)3., Fla.Stat. (2003).

18. Petitioner testified that she knew the distribution to her was invalid and that she was obligated to repay it. Where a statute does not implicate rights, but instead dictates procedure for a remedy, it can be applied retroactively:

Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes.

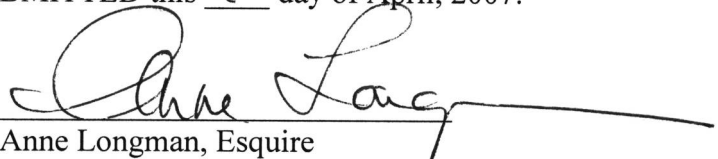
City of Lakeland v. Catinella, 129 So.2d 133 (Fla. 1961) at 136.

19. The 2006 statutory amendment did not alter Petitioner's obligation; it provided a time limit for her to make the required repayment. Because Petitioner had not repaid the invalid distribution monies due to the SBA, when the new remedies provided in the 2006 amendments to section 121.591(1)(a)5, Fla. Stat. became effective, she became subject to those provisions.

RECOMMENDATION

Having considered the foregoing Undisputed Material Facts and Conclusions of Law, it is recommended that a final order be entered by the State Board of Administration denying Petitioner the relief requested.

RESPECTFULLY SUBMITTED this 6th day of April, 2007.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
P.O. Box 10788
Tallahassee, FL 32302

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the Agency Clerk of the State Board of Administration.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Proposed Recommended Order has been furnished by electronic mail and U.S. Mail this 6th day of April, 2007.



Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
P.O. Box 10788
Tallahassee, FL 32302

Filed with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

This 6th day of April, 2007.

Copies furnished:

Tonia Jackson



(for Petitioner)

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Pennington Moore Wilkinson Bell & Dunbar
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Tallahassee, FL 32302-2095