STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

ROBERT P. BLAESSER, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2011-2106
	)	
STATE BOARD OF ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	
	)	

FINAL ORDER

On October 6, 2011, 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, Robert P. Blaesser, Jr., and upon counsel for the Respondent. Both Petitioner and Respondent filed a Proposed Recommended Order. Petitioner timely filed exceptions on October 18, 2011. Respondent filed a response to the Petitioner's exceptions.

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.

PRELIMINARY STATEMENT

The State Board of Administration adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order.

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."

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, 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."

RULINGS ON PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

Petitioner's Exception 1: Exception to Finding of Fact 3

Petitioner contends that the Recommended Order erred in omitting the "material fact" that when the Petitioner took a distribution for his Investment Plan account on March 29, 2007, Petitioner "believed" he would be able to re-enroll in the FRS if he were to be re-employed by an FRS-participating employer at a later date. Petitioner does not identify any legal basis for the exception. Further, a "material fact" is one which might affect the outcome of the case under governing law. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). As is clear from the Conclusions of Law set forth in the Recommended Order, what Petitioner believed when he retired as to his ability to re-enroll in the FRS is totally irrelevant to the outcome of this matter. The case *Florida Sheriff's Assn. v. Dept. of Admin.*, 408 So.2d 1033 (Fla. 1982), considered whether the Legislature could reduce prospectively from 3% to 2% the credit that special risk law enforcement FRS members earned towards retirement in light of Section 121.011(3)(d), Florida Statutes (the so-called "preservation of rights" provision) which states that:

> [T]he rights of members of the retirement system established by this chapter [Chapter 121, Florida Statutes] are declared to be of a contractual nature entered into between the member and the state and such rights shall be legally enforceable as valid contract rights and shall not be abridged in any way.

The court noted that the preservation of rights provision was not designed to "...bind future legislatures from prospectively altering benefits which accrue for future state service." [emphasis supplied] *Id.* at 1037. Thus, when the Petitioner retired and took a distribution, he had no right at that time to receive any FRS benefits related to any future state service he

might provide. When Petitioner returned to work with an FRS-covered agency, the law had already changed to make it clear that rehired retirees, such as Petitioner, were not entitled to any further FRS participation. Petitioner has cited no case law or statutory provision that would alter the application of the holding in *Florida Sheriff's Assn.* depending on what members of the FRS happen to "believe."

Accordingly, this exception is rejected.

Petitioner's Exception 2: Exception to Finding of Fact 4

Petitioner contends the Recommended Order erred in stating that Section 121.122, Florida Statutes, applies to all retirees from the FRS, regardless of when they have retired. In Finding of Fact 4, the presiding officer is setting forth an appropriate paraphrase of the plain meaning of Section 121.122, Florida Statutes which states that: "[a] retiree of a state-administered retirement system who is initially reemployed on or after July 1, 2010, is not eligible for renewed membership." The provision does not state any member who retires on or after July 1, 2010, and who is also reemployed after that date, is not eligible for renewed membership. The Governmental Affairs Policy Committee, House of Representatives Staff Analysis dated April 15, 2009, of House Bill Number 479 which enacted the amendment to Section 121.122, Florida Statutes, unequivocally states:

> The bill eliminates renewed membership in the FRS. Thus, precluding retirees reemployed with the FRS employer from accruing a second retirement benefit. The bill, however grandfathers in those who are renewed members at the time of the bill's effective date. [emphasis added]

Obviously, if a member was already a "renewed member" on the effective date of the provisions pertaining to rehired retirees (July 1, 2010), that individual would have had to been already retired and rehired before July 1, 2010. This Staff Analysis demonstrates that

Section 121.122 is not vague and ambiguous- it applies to all retirees regardless of when they have retired, unless they already were rehired before July 1, 2010.

There is no dispute that the amendment to Section 121.122, Florida Statutes prohibiting renewed membership in the FRS for retirees was enacted in 2009. And this 2009 date set forth by the Recommended Order is clearly relevant to show that Petitioner was rehired after the statutory amendment was enacted and became effective, and thus such amendment was applicable to his situation and needed to be considered in deciding Petitioner's case.

Accordingly, Petitioner's exception hereby is rejected.

Petitioner's Exception 3: Exception to Finding of Fact 5

Petitioner objects to the presiding officer's failure to indicate that the Respondent exclusively deemed the Petitioner to be a "retiree" pursuant to Section 121.4501(2)(k), Florida Statutes, and never considered the definition set forth in Section 121.021(60), Florida Statutes which defines a "retiree" as "... a former member of the Florida Retirement System or an existing system who has terminated employment and is receiving benefit payments from the system in which he or she was a member." However, the Respondent properly did not consider the definition set forth in Section 121.021(60), Florida Statutes because such definition is not relevant to this particular matter. As such, it was not necessary for the presiding officer to even mention such definition.

The facts clearly show that Petitioner was a member of the FRS Investment Plan, and not the FRS Pension Plan, when he terminated employment. A major difference between the FRS Investment Plan and the FRS Pension Plan is the manner in which benefit payments are made. In the case of the FRS Investment Plan, a member has flexible benefit payment

options. The member can, as Petitioner did, take a lump sum payment which is payable either upon termination of employment or at any future date the member chooses. The member also can purchase guaranteed monthly annuity checks for life using all or part of the member's balance. In the case of the FRS Pension Plan, the member does not have flexible benefit payment options. The member of the FRS Pension Plan will receive monthly guaranteed payments for life- there is no lump sum option. Because of the significant difference in manner that benefit payments may be made by the two plans when members retire, there necessarily has to be a different definition of "retiree" for each of the plans. The definition of "retiree" for FRS Investment Plan members, such as Petitioner is set forth in Section 121.4501(2)(k), Florida Statutes, which provides a "retiree" from the FRS Investment Plan is a former member who has terminated employment and has "taken a distribution of vested employee or employer contributions." That definition was properly applied to Petitioner who clearly terminated employment and took a full distribution of his accrued retirement benefit.

Section 121.122(2), Florida Statutes states that "[a] retiree of a state-administered retirement system who is initially reemployed on or after July 1, 2010, is not eligible for renewed membership." Both the plain meaning of the statutory provision and logic compel the application of the statutory definition of "retiree" that specifically is applicable to the state-administered retirement plan of which a retiree is a member. In the case of members such as Petitioner who retired from the FRS Investment Plan, the appropriate definition of retiree is found in Section 121.4501(2(k), Florida Statutes. Section 121.021(60), Florida Statutes would be applicable only in the case of members who retired from the FRS Pension Plan.

Accordingly, this exception hereby is rejected.

Petitioner's Exception 4: Exception to Conclusion of Law 7

Petitioner objects to the presiding officer's conclusion that "despite being made aware of the harsh results that would be occasioned by absolutely prohibiting FRS retirees from ever again participating in the FRS, the legislature chose to enact Section 121.122, Florida Statutes containing such a prohibition. Petitioner states there is no evidence to support such a conclusion. Petitioner also argues that the presiding officer's citing of legislative history demonstrates that Section 121.122, Florida Statutes is ambiguous. However, the Conclusion of Law does not proffer the legislative history in any attempt to try to alter the plain meaning of Section 121.122, Florida Statutes, nor to indicate that the statutory provision is vague or ambiguous. Instead, the citation to the legislative history is being made merely to show that the Respondent did attempt to advise the Legislature that the law as it eventually was enacted could have severe consequences to FRS-covered employees who only worked a very short period of time and also to employers who might wish to rehire such employees in the future. This information was made available to the Legislature. Thus, the legislative history was relevant to show that even though a harsh result could occur if Section 121.122, Florida Statutes were to be applied in certain circumstances, there was no attempt by the Legislature to make exceptions to the scope of the provision and that, therefore, the statute should be applied exactly as written.

Accordingly, this exception is rejected.

Petitioner's Exception 5: Exception to Conclusion of Law 9

Petitioner objects to the presiding officer's application of the definition of "retiree" set forth in Section 121.4501(2)(k), Florida Statutes to his situation, and her failure to also

consider the definition set forth in Section 121.021(60), Florida Statutes which defines a "retiree" as "... a former member of the Florida Retirement System or an existing system who has terminated employment and is receiving benefit payments from the system in which he or she was a member." Petitioner contends that since he is not presently receiving "benefit payments" from the FRS since he took his benefit in a lump sum at the time he terminated employment in 2007, he would not be deemed a "retiree" pursuant to Section 121.021(60), Florida Statutes, and therefore would not be subject to the provisions of Section 121.122, Florida Statutes as a rehired "retiree."

As discussed previously in response to the Petitioner's Exception 3 above, Petitioner was a member of the FRS Investment Plan, and not the FRS Pension Plan, when he terminated employment. Thus, the definition of "retiree" set forth under Section 121.4501(2)(k), Florida Statutes is appropriately applied to his situation and not the definition of retiree set forth under Section 121.021(60), Florida Statutes. The definition of "retiree" for FRS Investment Plan members, such as Petitioner is set forth in Section 121.4501(2)(k), Florida Statutes, which provides a "retiree" from the FRS Investment Plan is a former member who has terminated employment and has "taken a distribution of vested employee or employer contributions." That definition was properly applied to Petitioner who clearly terminated employment and took a full distribution of his accrued retirement benefit after he terminated employment.

Accordingly, Petitioner's exception hereby is rejected.

Petitioner's Exception 6: Exception to Conclusion of Law 10

Petitioner argues that since his election to take a full distribution of his retirement benefits from his FRS Investment Plan account in 2007 was predicated on a belief that he

would be able to reenroll in the FRS if he was reemployed by an FRS-participating employer at a future date, that the State should now be estopped from denying him renewed membership. This exception does not appear to dispute portions of the Recommended Order but appears to be strictly argument. As such, this exception can be rejected. *See Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277(Fla. 1st DCA 1985). Further, Petitioner does not provide any legal authority to support why he believes estoppel is applicable in the instant case.

Estoppel effectively can be applied "...in all cases where one, by word, act or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induces him to act on this belief injuriously to himself, or to alter his own previous condition to his injury." *Major League Baseball v. Morsani*, 790 So.2d 1071, 1076 (Fla.2001) [emphasis supplied]. Thus, estoppel is demonstrated by the following elements: "1) a representation as to a material fact that is contrary to a later-asserted position; 2) reliance on that representation; and 3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." *Salz v. Department of Administration, Division of Retirement*, 432 So.2d 1376, 1378 (Fla. 3d DCA 1983). Estoppel can effectively be applied against the State only in rare and exceptional circumstances. *See North Am. Co. v. Green*, 120 So.2d 603, 610 (Fla.1959) ("The instances are rare indeed when the doctrine of equitable estoppel can effectively be applied against state action."); *see also State Dep't of Revenue v. Anderson*, 403 So.2d 397, 400 (Fla.1981). Estoppel cannot be applied against the state for conduct resulting from a mistake of law. *Salz, supra.*

There is nothing in the record to even suggest there was any willful conduct on the part of the Respondent or its agents to induce Petitioner to take a full distribution from his

FRS Investment Plan account. At the time of the distribution, there was no indication that the law pertaining to rehired retirees would change. Additionally, Petitioner asserts that he was misled as to the legal requirements applicable to Investment Plan distributions. Thus, Petitioner has not asserted any misrepresentation of a material fact necessary to support a claim of estoppel.

Additionally, as discussed previously, the case *Florida Sheriff's Assn. v. Dept. of Admin.*, 408 So.2d 1033 (Fla. 1982), explained the limit on the Legislature's ability to alter retirement benefits for public employees. The court noted that the preservation of rights provision in Section 121.011(3)(d), Florida Statutes, was not designed to "...bind future legislatures from prospectively altering benefits which accrue for future state service." [emphasis supplied] *Id.* at 1037. Thus, there was no contractual obligation for the State to provide Petitioner with additional FRS benefits for any future services he might provide to the State. When Petitioner returned to work with an FRS-covered agency, the law had already changed to make it clear that rehired retirees, such as Petitioner, were not entitled to any further FRS participation.

Accordingly, this exception hereby is rejected in *toto*.

Petitioner's Exception 7: Exception to Conclusion of Law 11

Petitioner argues that it is improper for the presiding officer to cite a Recommended Order (*Ellis v. State Board of Administration*, SBA Case 2010-1961) that she recently issued. Petitioner fails to cite any legal authority for his position. Further, Respondent issued a Final Order on August 31, 2011, adopting the *Ellis* Recommended Order in its entirety. The citing by the presiding officer of *Ellis* is relevant to demonstrate that the Respondent has consistently interpreted and applied the 2009 amendment to Section 121.122, Florida

Statutes. *See, Amos v. Department of Health and Rehabilitative Services*, 444 So.2d 43, 45 (Fla. 1st DCA 1983), which held that inconsistent results in similar cases, without justification could violate Chapter 120, Florida Statutes (the Administrative Procedures Act) and the equal protection clauses of both the Florida and United States Constitutions. The court noted that persons affected by agency action have "right to locate precedent and have it apply." *Id.*

The legal precedent relied upon in *Ellis,* as well as in this case, is *Florida Sheriff's Assn. v. Dept. of Admin., supra.* As previously noted, *Florida Sheriff's Assn.* makes it clear that Petitioner, at the time he retired and took a distribution from his FRS Investment Plan account had no vested rights to FRS participation related to any future state service.

Petitioner's Exception 8: Exception to Conclusion of Law 12

Petitioner states under the paragraph entitled "Exceptions" that he takes exception to Paragraph 12 of the Conclusions of Law. This paragraph discusses the *Florida Sheriff's Assn. v. Dept. of Admin., supra* case. However, Petitioner fails to include any discussion as to why he objects to presiding officer's discussion of the case.

Since Petitioner does not identify the legal basis for his exception, that exception hereby is rejected.

ORDERED

The Recommended Order (Exhibit A) hereby is adopted in its entirety. The Petitioner's request that he be entitled to renewed membership in the Florida Retirement System (FRS), as retiree who was rehired by an FRS-participating employer after July 1, 2010, 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 20th day of December, 2011, 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 U.S. mail to Robert P. Blaesser, Jr., 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 20th day of December, 2011.

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

ROBERT P. BLAESSER, JR.,

Petitioner,

vs. Case No.: 2011-2106

STATE BOARD OF ADMINISTRATION,

Respondent

RECOMMENDED ORDER

This case was heard in an informal proceeding before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA) on June 28, 2011, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Robert P. Blaesser, Jr., pro se
[redacted]

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

STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to renewed membership in the Florida Retirement System (FRS).

EXHIBIT A

PRELIMINARY STATEMENT

Petitioner submitted a Request for Intervention to the SBA after learning that he would not be permitted to re-enroll in the Florida Retirement System because he had taken a distribution from his Investment Plan account and therefore was considered a rehired retiree. His request asserted that he was not in fact receiving benefits from FRS and therefore could not be deemed a retiree under applicable statutory definitions. By letter of May 11, 2011, from Daniel Beard, SBA Director of Policy, Risk Management and Compliance, Petitioner's request was denied. He then filed a Petition for Hearing requesting the same relief and asserting as additional grounds that the amendment to Section 121.122(2), Florida Statutes which precluded his re-enrollment could not be applied retroactively to him.

Petitioner attended the hearing in person and testified on his own behalf. Respondent presented the testimony of Mr. Beard. Respondent's Exhibits R-1 through R-3 were admitted into evidence without objection.

A transcript of the hearing was filed with the agency and provided to the parties, who were invited to submit proposed recommended orders. Both Petitioner and Respondent submitted proposed recommended orders.

MATERIAL UNDISPUTED FACTS

1. Petitioner was hired by the Seminole County School Board on September 30, 2005 and elected to enroll in the FRS Investment Plan effective April 1, 2006.

2. On November 16, 2006, Petitioner terminated FRS-covered employment and was advised that he could either leave the amount vested in his FRS Investment Plan account or take a distribution.

3. Petitioner took a total distribution from his Investment Plan account on March 29, 2007.

4. In 2009, Section 121.122, Florida Statutes was amended to prohibit retirees who return to work with an FRS-covered agency after July 1, 2010 from participating in the FRS.

5. Petitioner began work as an attorney with the Florida Department of Financial Services, Division of Legal Services, an FRS-covered agency, in April of 2011. After returning to work, he was advised that he could not participate in the FRS because he was considered to have "retired" when he took a distribution from his Investment Plan account in March of 2007.

CONCLUSIONS OF LAW

6. During the 2009 session, the Florida Legislature revised Section 121.122, Florida Statutes to exclude from renewed membership in the FRS any retiree who becomes reemployed on or after July 1, 2010. The 2009 version of that section provides:

> **121.122. Renewed membership in system**
>
> (1) Except as provided in s. 121.053, effective July 1, 1991, through June 30, 2010, any retiree of a state-administered retirement system who is initially reemployed in a regularly established position with a covered employer, including an elective public office that does not qualify for the Elected Officer's Class, shall be enrolled as a compulsory member of the Regular Class of the Florida Retirement System. Effective July 1, 1997, through June 30, 2010, any retiree of a state-administered retirement system who is initially reemployed in a position included in the Senior Management Service Class shall be enrolled as a compulsory member of the Senior Management Service Class of the Florida Retirement System as provided in s. 121.055. A retiree is entitled to receive an additional retirement benefit, subject to the following conditions:
>
> (a) Such member must resatisfy the age and service requirements as provided in this chapter for initial membership under the system, unless such member elects to participate in the Senior Management Service Optional Annuity Program in lieu of the Senior Management Service Class, as provided in s. 121.055(6).

(b) Such member is not entitled to disability benefits as provided in s. 121.091(4).

(c) Such member must meet the reemployment after retirement limitations as provided in s. 121.091(9), as applicable.

(d) Upon renewed membership or reemployment of a retiree, the employer of such member shall pay the applicable employer contributions as required by ss. 112.363, 121.71, 121.74, and 121.76.

(e) Such member is entitled to purchase additional retirement credit in the Regular Class or the Senior Management Service Class, as applicable, for any postretirement service performed in a regularly established position as follows:

1. For regular class service prior to July 1, 1991, by paying the Regular Class applicable employee and employer contributions for the period being claimed, plus 4 percent interest compounded annually from first year of service claimed until July 1, 1975, and 6.5 percent interest compounded thereafter, until full payment is made to the Florida Retirement System Trust Fund; or

2. For Senior Management Service Class prior to June 1, 1997, as provided in s. 121.055(1)(j).

The contribution for postretirement service between July 1, 1985, and July 1, 1991, for which the reemployed retiree contribution was paid, shall be the difference between such contribution and the total applicable contribution for the period being claimed, plus interest. The employer of such member may pay the applicable employer contribution in lieu of the member. If a member does not wish to claim credit for all of the postretirement service for which he or she is eligible, the service the member claims must be the most recent service.

(f) No creditable service for which credit was received, or which remained unclaimed, at retirement may be claimed or applied toward service credit earned following renewed membership. However, service earned as an elected officer with renewed membership in the Elected Officers' Class may be used in conjunction with creditable service earned under this section, provided the applicable vesting requirements and other existing statutory conditions required by this chapter are met.

(g) Notwithstanding any other limitations provided in this section, a participant of the State University System Optional Retirement Program, the State Community College Optional Retirement Program, or the Senior Management Service Optional Annuity Program who terminated employment and commenced receiving a distribution under the optional program, who initially renews membership as required by this section upon reemployment after retirement, and

who had previously earned creditable Florida Retirement System service that was not included in any retirement benefit may include such previous service toward vesting and service credit in the second career benefit provided under renewed membership.

(h) A renewed member who is not receiving the maximum health insurance subsidy provided in s. 112.363 is entitled to earn additional credit toward the maximum health insurance subsidy. Any additional subsidy due because of such additional credit may be received only at the time of payment of the second career retirement benefit. The total health insurance subsidy received by a retiree receiving benefits from initial and renewed membership may not exceed the maximum allowed in s. 112.363.

(2) A retiree of a state-administered retirement system who is initially reemployed on or after July 1, 2010, is not eligible for renewed membership.

§121.122, Fla.Stat. (2009)(emphasis added).

7. The history of the legislation which made the relevant changes to Section 121.122 in 2009 reflects that the legislature was aware of the result of excluding from participation in the FRS those who had terminated employment and taken a distribution early in their working years. As the agency affected by a change in the statute it administers, Respondent submitted an analysis of House Bill 479 to the Full Appropriations Council on General Government & Health Care which stated:

HB 479 would also close the renewed membership class to retirees of a state-administered retirement system initially reemployed by a Florida Retirement System participating employer on or after January 1, 2010. However, this bill would require employer contributions to be paid on the salary of reemployed retirees who are not enrolled as renewed members to maintain the funding base for the Health Insurance Subsidy Program. In addition, this bill would require the employer to pay any unfunded actuarial liability portion of the employer contribution rate for active members if an unfunded actuarial liability cost re-emerges. The bill does not provide for the paying of the Investment Plan administrative contribution.

Retirees initially reemployed before January 1, 2010, would continue their renewed membership and employers would continue to owe the total employer contribution rate for these renewed members. As the number of retirees who are enrolled as renewed members in the FRS is reduced over time, this would gradually reduce the overall cost to employers.

> In the longer-term, these changes could result in savings to the FRS Pension Plan by limiting future liabilities for renewed membership and by altering retirement patterns based upon plans for returning to work within a few months of terminating employment. The actual impact would have to be determined by an actuarial special study conducted by the Division of Retirement's consulting actuary.
>
> Closing the Renewed Membership Class to future participation would impact not only those reemployed retirees who retired at normal retirement, but it would also impact those who retired early.
>
> Under the FRS Pension Plan a member becomes vested with six years of service. A retiree may take an early retirement if vested and within 20 years of the normal retirement age. However, in doing so the benefit is reduced by five percent for each year remaining before the retiree reaches normal retirement age. For retirees of the Special Risk Class, the earliest a member could receive an early retirement benefit would be at age 35 and one month. For retirees of the other membership classes, early retirement benefit would be at age 42 and one month if vested. These early retirement retirees would be ineligible for renewed membership should they return to FRS employment.
>
> Under the FRS Investment Plan, a participant vests after only one year of service. If a member terminates and takes a distribution, he or she is considered a retiree and ineligible for renewed membership in the FRS. **Conceivably, a retiree who participated in the Investment Plan for one year and took a distribution at the age of 24 could later return to work for an FRS employer for 30 years or more and never be eligible for a retirement benefit.** This could impact the ability of FRS employer's (sic) to recruit employees in the future.

Florida State Board of Administration Report to Full Appropriations Council on General Government & Health Care on HB # 479, Feb. 16, 2009, p. 5 (emphasis added). It appears that the legislature was made aware of the harsh results which could be caused by absolutely precluding those deemed by operation of law to be retirees from ever again participating in the FRS, and with this awareness, enacted Section 121.122 as it currently reads.

8. For purposes of the Investment Plan, of which Petitioner was a member, a "retiree" is "a former participant of the optional retirement program [the Investment Plan] who has terminated employment and has taken a distribution as provided is s.121.591, except for a

mandatory distribution of a de minimis account authorized by the state board. § 121.4501(2)(k), Fla.Stat. (2010). Because Petitioner took such a distribution, he is considered a retiree.

9. Petitioner asserts that because the definition of retiree in Section 121.4501(2)(k) is contained in Part II of Chapter 121 (titled Public Employee Optional Retirement Program), and is preceded by the words "[a]s used in this part," it does not apply to the newly enacted prohibition cited above, which is found in Part I of that chapter at Section 121.122(2). But the new prohibition states plainly that it applies to "a retiree of a state-administered retirement system," and the Investment Plan (the Public Employee Optional Retirement Program) is one of the state-administered retirement system plans. Petitioner is a retiree under the terms of the plan to which he belonged, and the fact that he is a retiree of the Investment Plan makes him a retiree of "a state-administered retirement system," and therefore subject to the new prohibition.

10. Petitioner also asserts that when he took a distribution of his Investment Plan account in 2007, this created a contract, either express or implied, that entitled him to renewed membership in the FRS in the event of future reemployment. This issue has been presented previously to this tribunal, and after review of the applicable statutes and laws, and of the general contract precedents cited by Petitioner, I again conclude that there is no such contract right. Once a participant has received the benefit of his FRS Investment Plan account by taking a distribution, any contractual or vested interest which existed between him and the FRS is at an end. Ellis v. State Board of Administration, Case No.: 2010-1961, Recommended Order (August 9, 2011). It is unfortunate that Petitioner believed in 2007, entirely correctly, that under the law in effect at the time, he would be able to reenroll in the FRS if he was once again employed at a later date in a covered position, but Petitioner had no contract right to any renewed employment with any FRS-participating employer, and so could not have had any contract right to renewed

participation in the FRS, under any terms. His previous contract with the FRS had been fully performed.

11. Petitioner argues as well that applying the contested prohibition to him amounts to applying those changes retroactively so as to deprive him of a vested right, *ex post facto,* and is therefore prohibited. In short, he asserts that the Respondent wrongly denied him of a right to have his renewed membership be considered under Chapter 121, Florida Statutes as it was in effect at the time he took his distribution in 2007, and that this attached new legal consequences to events completed before enactment of the revision. However, as stated in Ellis, the "act that incurred this additional burden was his reemployment after July 1, 2010 when the amended terms of Section 121.122(2), Florida Statutes were in effect."

12. The lengthy discussion of the "preservation of rights" provision at Section 121.011(3)(d), Florida Statutes, in Fla. Sheriff's Assn. v. Dept. of Adm., 408 So.2d 1033 (Fla. 1982) in the context of governmental retirement plans in general, is instructive here. It makes clear that the rights of a public employee in a government plan vest at the time he retires, and that Florida's constitutional prohibition of impairment of contracts does not mean that the legislature cannot modify or alter the benefits provided by such plans for active state employees. Petitioner here argues, in essence, that he had a vested right in the FRS reemployment provisions that were in place in 2007. Under Fla Sheriff's Assn., Petitioner vested in the benefits that existed in the 2007 Investment Plan at the time he retired. Although he has not said so, the crux of his argument is that the reemployment provisions of 2007 were a benefit of that plan. As set out previously, I can see no authority for the proposition that future employment under any terms was a benefit of the FRS Investment Plan at the time Petitioner took his distribution and "retired."

13. In accordance with the above analysis, the SBA lacks the authority to grant Petitioner the relief he seeks in this proceeding. As I also noted in the Ellis recommendation, the result here does not seem to fairly serve a recognizable policy interest, but the SBA must apply the statutes it administers as they are enacted.

RECOMMENDATION

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

RESPECTFULLY SUBMITTED this 6th day of October, 2011.

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: 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 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.

Oct. 21, 2

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 6th day of October, 2011.

Copies furnished to:

Robert P. Blaesser, Jr.

[redacted]

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

Attorney

STATE OF FLORIDA

STATE BOARD OF ADMINISTRATION

ROBERT P. BLAESSER, JR.

Petitioner,

vs.

STATE BOARD OF ADMINISTRATION,

Respondent.

_____/

CASE NO.: 2011-2106

EXCEPTIONS TO THE RECOMMENDED ORDER

The Petitioner, ROBERT P. BLAESSER, JR., files the following Exceptions to the Hearing Officer's ("HO") Recommended Order ("RO"):

Exceptions

1. The Petitioner takes exception to paragraphs 3, 4, and 5 of the Material Undisputed Facts; and paragraphs 7, 9, 10, 11, and 12 of the Conclusions of Law.

First Exception as to Findings of Fact

2. In paragraph 3 of the Material Undisputed Facts, the HO mistakenly omitted the material fact that when the Petitioner took a distribution from his Investment Plan on March 29, 2007, he believed that he would be able to reenroll in the FRS if he was once again employed at a later date in a covered position.

Second Exception as to Findings of Fact

3. In paragraph 4 of the Material Undisputed Facts, the HO mistakenly concludes that, "In 2009, Section 121.122, Florida Statutes was amended to prohibit retirees who returned to work with an FRS-covered agency after July 1, 2010 from participating in the FRS", with the

clear implication being that Section 121.122 applies to all retirees, regardless of when they may have retired.

4. However, Section 121.122 does not make clear whether it exclusively applies to employees retiring *after* July 1, 2010, or also applies to those that retired *before* July 1, 2010. Moreover, the HO's finding is interpretive and does not reflect a verbatim recital of the statute.

5. Therefore, since Section 121.122 is vague, ambiguous, and subject to more than one reasonable interpretation, the HO's interpretation of the statute is more appropriately characterized as a conclusion of law and should be stricken from the findings of fact.

Third Exception as to Findings of Fact

6. In paragraph 5 of the Material Undisputed Facts, the HO mistakenly omitted the fact that the Respondent only deemed the Petitioner a "retiree" pursuant to Section 121.4501(2)(k), Florida Statutes. [Respondent's Exhibit 2]

7. However, the Respondent failed to consider the competing definition of "retiree" found at Section 121.021(60), Florida Statutes, which defines a retiree as, "...a former member of the Florida Retirement System or an existing system who has terminated employment and is receiving benefit payments from the system in which he or she was a member". The Legislature's use of different terms in different sections of the same statute is strong evidence that different meanings were intended. *See again Beshore* at 413, *citing to Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006).

8. Consequently, the HO must clarify that the Respondent relied exclusively on the definition of "retiree" found at Section 121.4501(2)(k), Florida Statutes, in determining that the Petitioner was a retiree, and never considered applying the competing definition found at Section 121.021(60), Florida Statutes .

First Exception to the Conclusions of Law

9. In paragraph 7 of the Conclusions of Law, the HO mistakenly concluded that, "...the legislature was made aware of the harsh results which could be caused by absolutely precluding those deemed by operation of law to be retirees from ever again participating in the FRS, and with this awareness, enacted Section 121.122, Florida Statutes, as it currently reads."

10. However, no competent substantial evidence appears in the record to support the conclusion that the Legislature considered the SBA's report or intended the disputed result. The report only proves that the SBA expressed a policy bias against renewed membership before House Bill 479 was voted on by the Legislature. The mere act of passing Section 121.122, is not a clear expression of legislative intent, and as our Court has determined, "...in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively." *See Metro. Dade County,* 737 So.2d at 499 (Fla.1999), citing to *Hassen,* 674 So.2d at 108; *Arrow Air,* 645 So.2d at 425.

11. Moreover, the fact that the HO deems it necessary to look to the SBA's report in order to determine what the legislature intended, is, in and of itself, evidence of the statutes ambiguity. It would not be necessary to search for meaning from supplemental material, but for the fact that Section 121.122 is vague and ambiguous.

12. Therefore, since the SBA's report is no more than a restatement of the policy at issue in this case, it should be disregarded as immaterial and stricken from the Conclusions of Law.

Second Exception to the Conclusions of Law

13. In paragraph 9 of the Conclusions of Law, the HO mistakenly failed to consider the competing definition of "retiree" found at Section 121.021(60), Florida Statutes, which

defines a retiree as, "a former member of the Florida Retirement System or an existing system who has terminated employment and *is receiving benefit payments* from the system in which he or she was a member". [emphasis added]

14. The Petitioner contends that the actual language of the Statute is the best evidence of legislative intent, and that by using the present-tense term "*is receiving*", it is clear that Section 121.122(2) was only intended to apply to former members of the FRS that are presently receiving benefit payments from the retirement system, and not to those who may have taken a distribution from the Investment Plan in the past.

15. The Supreme Court has held that where the Legislature has used a term in one section of a statute but omitted the term from another section, the court will not read the term into the sections where it was omitted. *See Beshore v. Department of Financial Services*, 928 So. 2d 411 (Fla. App. 1 Dist. 2006), at 412, *citing to Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995). The Legislature's use of different terms in different sections of the same statute is strong evidence that different meanings were intended. *See again Beshore* at 413, *citing to Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006). 8. The Petitioner contends that this conflict must be resolved strictly against the drafting party and in favor of the Petitioner by applying the definition of "retiree" found at Section 121.021(60).

16. Therefore, since the Legislature distinguishes between former members that are presently "receiving benefit payments", from those who have previously taken a distribution from the FRS Investment Plan, the HO should reject the definition of retiree found at Section 121.4501(2)(k), and apply the definition of retiree found at Section 121.021(60).

Third Exception to the Conclusions of Law

17. In paragraph 10 of the Conclusions of Law, the HO mistakenly cites to a Recommended Order that she recently issued as being authority for the proposition that, "...any contractual or vested interest which existed between [the Petitioner] and the FRS", ended when he took a distribution from his investment plan. A Recommended Order is not final or appealable, and it is arbitrary, capricious, and an abuse of agency discretion to rely on it in this case. Accordingly, all references to the cited Recommended Order should be stricken from the Conclusions of Law.

Fourth Exception to the Conclusions of Law

18. In paragraph 10 of the Conclusions of Law, the HO mistakenly cites to a Recommended Order that she recently issued as being authority for the proposition that, "Once a participant has received the benefit of his FRS Investment Plan account by taking a distribution, any contractual or vested interest which existed between him and the FRS is at an end". A Recommended Order is not yet final or appealable, and it is arbitrary, capricious, and unreasonable to rely on it as authority in this case. Accordingly, all references to the cited Recommended Order should be stricken from the Conclusions of Law.

Fifth Exception to the Conclusions of Law

19. In paragraph 10 of the Conclusions of Law, the HO mistakenly concludes that absent a, "...contract right to renewed employment, with any FRS-participating employer...", the Petitioner, "...could not have had any contract right to renewed participation in the FRS...", if later reemployed.

20. The right to "renewed employment" and the contractual right to "renewed participation" in the FRS, are separate and distinct issues, and there is no logical relationship between them. Moreover, the right to employment is not at issue in this case.

21. Furthermore, the HO concluded that, "...Petitioner believed in 2007, entirely correctly, that under the law in effect at the time, he would be able to reenroll in the FRS if he was once again employed at a later date in a covered position". This finding support's the Petitioner's argument that the 2007 election to exercise his distribution rights was predicated on the express understanding that renewed membership would be available to him in the event of reemployment, and it was that understanding that induced action on the part of the Petitioner. Injustice can only be avoided in this case by enforcing the renewed membership provisions in effect at that time.

22. The Legislature and the SBA should have expected that the Petitioner (...and those similarly situated), would rely on the renewed membership provisions in deciding whether to take a distribution from the Investment Plan. It is fundamental that where a party changes his or her position based on a material representation, injustice can only be avoided by enforcement of the representation. This is the essence of equitable or promissory estoppel, and to hold otherwise would be to virtually sanction the perpetration of fraud by the State.

23. Therefore, since the Petitioner relied to his detriment on the renewed membership provisions when he made his irrevocable election to take a distribution, and the terms of renewed membership were conditioned upon the Petitioner becoming reemployed at a future time, the State is now bound thereby and should be estopped from denying the existence of a contractual obligation. The condition precedent (i.e. reemployment), has occurred. Therefore, performance on the part of the SBA (i.e. renewed membership in the FRS), is now due.

Sixth Exception to the Conclusions of Law

24. In paragraph 11 of the Conclusions of Law, the HO mistakenly cites to a Recommended Order that she recently issued as being authority for the proposition that the act

that attached new legal consequences to his 2007 decision to take a distribution from his investment account was, "...his reemployment after July 1, 2010...". A Recommended Order is not yet final or appealable, and it is arbitrary, capricious, and unreasonable to rely on it as authority in this case. Accordingly, all references to the cited Recommended Order should be stricken from the Conclusions of Law.

Respectfully submitted this 18th day of October, 2011.

[redacted]
Robert P. Blaesser, Jr.
[redacted]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 18th, 2011, the foregoing EXCEPTIONS TO THE RECOMMENDED ORDER, was furnished by U.S. Mail to: Agency Clerk, Office of the General Counsel, Florida State Board of Administration, 1801 Hermitage Blvd., Suite 100, Tallahassee, FL 32308; Anne Longman, Esq., Presiding Officer for the State Board of Administration, Lewis, Longman & Walker, P.A., P.O. Box 16098, Tallahassee, FL 32317; Brian A. Newman, Esq., Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095.

[redacted]
Robert P. Blaesser, Jr.