

**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**

SARA A. MIRANDA BERMUDEZ, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE BOARD OF ADMINISTRATION, )  
 )  
 Respondent )  
 )  
 )  
 )  
 \_\_\_\_\_ )

Case No. 2009-1606

**FINAL ORDER**

On March 16, 2010, 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, Sara A. Miranda Bermudez, and upon counsel for the Respondent. Respondent and Petitioner both filed a Proposed Recommended Order, and Petitioner filed an Amended Proposed Recommended Order. On April 1, 2010, Petitioner filed Exceptions. The Exceptions were due on March 31, 2010. 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.

**EXCEPTIONS**

Petitioner's Exceptions, although untimely, are not stricken. A governmental entity does have discretion to extend the time for filing exceptions to a recommended order. *See, Hamilton County Board of County Commissioners v. TSI Southeast, Inc., 587*

So.2d 1378 (Fla. 1<sup>st</sup> DCA 1991). Here, since the Exceptions were filed only one day late, they will be accepted.

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. 2<sup>nd</sup> DCA 1995); *Dietz v. Florida Unemployment Appeals Comm.*, 634 So.2d 272 (Fla. 4<sup>th</sup> DCA 1994); *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122 (Fla. 1<sup>st</sup> DCA 1987). A seminal case defining the "competent substantial evidence" standard is *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957), in which the Florida Supreme Court defined it as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred" or such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached."

## **RULINGS ON EXCEPTIONS**

### **Introductory Statement**

Petitioner begins her exceptions with what she deems as an "Introductory Statement." However, this statement simply reiterates Petitioner's prior arguments that already have been rejected by the presiding officer. Specifically, the Introductory

Statement claims Petitioner was misled by the Respondent and that, therefore, Respondent should be estopped from claiming Petitioner received an invalid distribution. Thus, the Introductory Statement seems to take exception with the presiding officer's conclusions of law and recommendation. Petitioner does not provide any legal argument as to why she believes estoppel is applicable in the instant case, nor does she set forth appropriate and specific citations to the record.

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 distribution while

she was employed in an OPS position. The record demonstrates that Petitioner never posed the question as to whether she would be permitted, pursuant to statute, to take a distribution of her Investment Plan account funds while she was employed in an OPS position. Further, the record demonstrates that Petitioner was never advised by the Respondent or its authorized agent that she could take such a distribution. Additionally, Petitioner asserts that she 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.

Accordingly, the contentions in Petitioner's Introductory Statement hereby are rejected to the extent that Petitioner is using them to take exception to any part of the Recommended Order.

**Petitioner's Exception to Finding of Fact 7**

Petitioner takes exception to the presiding officer's finding of fact in paragraph 7 of the Recommended Order which states that when Petitioner received the total distribution of her Investment Plan account, she had not terminated all employment with FRS employers for the required three month period. Petitioner asserts this finding of fact is incomplete because the presiding officer failed to note that Petitioner took her distribution only after assurances from Respondent that the distribution would not be invalid. Petitioner has failed to provide any appropriate or specific citations to the record to substantiate her assertion. Petitioner's exception to Finding of Fact 7 therefore is rejected.

**Petitioner's Exception to Finding of Fact 9**

Petitioner objects to the presiding officer's finding that Petitioner did not state during Petitioner's February 21, 2008 telephone call to the MyFRS Financial Guidance

Line (“Guidance Line”) that she had accepted an OPS job with an FRS covered agency. There is substantial competent evidence to support the presiding officer’s finding of fact. Joint Exhibit 5, a transcript of the February 21, 2008 telephone call, contains the following dialog between Petitioner and the Guidance Line Representative, on Page 5, Lines 13-22:

REPRESENTATIVE: ... how long were you actually thinking about staying with the FRS?

MS. BERMUDEZ: With the FRS -- actually, I was offered a job outside of the state.

REPRESENTATIVE: So you’re thinking about switching over and preserving what you have gained and then transferring out of the FRS?

MS. BERMUDEZ: That’s correct.

The dialog continues on page 6 of Joint Exhibit 5. Lines 7-13 state:

REPRESENTATIVE: So Okay. So you are leaving the state; correct? To another job?

MS. BERMUDEZ: Uh-huh.

REPRESENTATIVE: All right.

MS. BERMUDEZ: I was offered a job in the state, but the position is an OPS position so I don’t have any FRS benefits.

Later in the call, Petitioner states that she planned on leaving the money in her Investment Plan account for perhaps “ten more years.” Joint Exhibit 5, Page 15, lines 1-4.

It is clear from this telephone call that Petitioner did not say she had accepted an OPS position in Florida. Instead, she clearly stated she was taking a job in another state. It is also clear Petitioner did not express any intent during this telephone call to take a distribution at any time in the near future. Instead, she stated she was planning on leaving the money in her account for potentially 10 years.

Petitioner cites an earlier (February 11, 2008) call to the Guidance Line in which she indicated that she was applying for a job that would be an OPS position in Florida. However, from the transcript of the later telephone conversation that occurred on February 21, 2008 between Petitioner and the Guidance Line Representative, it would appear that Petitioner did not accept the OPS position to which she made reference in the February 11<sup>th</sup> call, but instead was going to be taking a job in another state. The out-of-state job which Petitioner told the Representative she took clearly would not be with an FRS-covered employer.

Petitioner further asserts that the February 11, 2008 telephone call demonstrates that Respondent affirmatively represented to Petitioner that the OPS position would not affect her retirement. As discussed by the presiding officer in Finding of Fact 13, the OPS position clearly would not affect Petitioner's retirement benefits because there would be no accrual of additional benefits while Petitioner remained in the OPS position. During the February 11, 2008 call, Petitioner never broached the possibility of taking a distribution. Petitioner never asked the question during this call or any of the other telephone calls she made to the Guidance Line as to whether or not the OPS position would affect her ability to take a distribution.

Accordingly, Petitioner's exception to Finding of Fact 9 hereby is rejected.

**Petitioner's Exception to Finding of Fact 10**

Petitioner contends that the presiding officer's finding that Petitioner did not disclose her OPS position at the time she was seeking a distribution erroneously puts the burden of disclosure of such fact on Petitioner. Petitioner claims she had already disclosed previously that she was "considering" taking an OPS position. Petitioner does

not identify the legal basis for the exception. Additionally, as discussed previously, Petitioner made the statement during a telephone call to the Guidance Line that she was taking, not “considering,” an out-of-state job. This statement would be inconsistent with her actually taking an in-state OPS position. There is competent substantial evidence to support the presiding officer’s finding of fact.

Accordingly, Petitioner’s exception to Finding of Fact 10 hereby is rejected.

**Petitioner’s Exception to Finding of Fact 11**

Petitioner takes exception to the presiding officer’s finding that during Petitioner’s June 30, 2008 call to the Guidance Line, during which Petitioner asked for assistance in processing her distribution request, Petitioner did not mention that she currently was employed in an OPS position. Petitioner merely stated she had resigned her FRS-covered job.

Based on the record, particularly Joint Exhibit 8 (the transcript of the June 30, 2008 telephone call), there is substantial competent evidence to support the presiding officer’s findings. Additionally, Petitioner does not identify the legal basis for the exception.

Accordingly, Petitioner’s exception to Finding of Fact 11 hereby is rejected.

**Petitioner’s Exception to Finding of Fact 12**

Petitioner contends that the finding in paragraph 12 that the script offered by Respondent is “part of the usual process employed by Respondent when distributions are requested on line” is not supported by the record. However, Respondent’s Exhibit 3 and pages 37 through 48 of the Hearing Transcript show that the script was part of the records kept in the ordinary course of business by a third-party contract administrator of the

Respondent. Petitioner further contends that she rightfully and lawfully relied on representations of the Respondent in taking her distribution while being employed in an OPS position. However, Petitioner does not identify any legal basis for her contention.

Accordingly, Petitioner's exception to Finding of Fact 12 hereby is rejected.

**Petitioner's Exception to Finding of Fact 13**

Petitioner takes exception with the presiding officer's findings in paragraph 13, but she does not specify what that exception is, or whether her exception pertains to all or only part of the paragraph. Petitioner has not identified any legal basis for the exception and has not included appropriate and specific citations to the record.

Accordingly, Petitioner's exception to Finding of Fact 13 hereby is rejected.

**Petitioner's Exception to Conclusion of Law 18**

Petitioner takes exception to the presiding officer's conclusions that there is no dispute of material fact in this case and that the Respondent followed the law in finding there was an invalid distribution to Petitioner. Petitioner fails to provide a legal basis for the exception, and does not include appropriate and specific citations to the record.

Accordingly, Petitioner's exception to Conclusion of Law 18 hereby is rejected.

**Petitioner's Exception to Conclusion of Law 19**

Petitioner takes exception to the presiding officer's conclusion that there is no basis for estoppel or other equitable remedy in this case. Petitioner fails to provide a legal basis for the exception, and does not include appropriate and specific citations to the record

Accordingly, Petitioner's exception to Conclusion of Law 19 hereby is rejected.



**Petitioner's Exception to Conclusion of Law 20**

Petitioner takes exception to the presiding officer's conclusions that Petitioner incorrectly represented her employment status, and that no representations were made by respondent. Petitioner fails to provide a legal basis for the exception, and does not include appropriate and specific citations to the record. Additionally, the record demonstrates that Petitioner never told Respondent or its representatives that she had taken an OPS position. She may have indicated she was "considering" an OPS position. But, the only position she clearly stated that she had taken was an out-of-state position.

Accordingly, Petitioner's exception to Conclusion of Law 20 hereby is rejected.

**ORDERED**

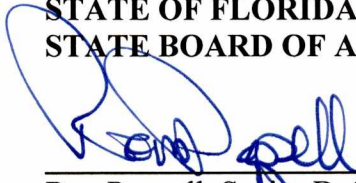
The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner's distribution from her FRS Investment Plan account, taken while she worked in an Other Personnel Services (OPS) position, was an invalid, in-service distribution. Therefore, Petitioner must repay the entire distribution amount.

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 9th day of April, 2010, in Tallahassee, Florida.

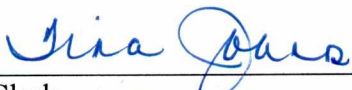
**STATE OF FLORIDA  
STATE BOARD OF ADMINISTRATION**



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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.

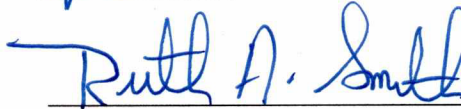


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Clerk TINA JOANOS

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order was sent by UPS to Sara A. Miranda Bermudez, pro se, [REDACTED], [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 9th day of April, 2010.



Ruth A. Smith  
Assistant General Counsel  
State Board of Administration of Florida  
1801 Hermitage Boulevard  
Suite 100  
Tallahassee, FL 32308

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STATE BOARD OF ADMINISTRATION

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SARA A. MIRANDA BERMUDEZ,

Petitioner,

vs.

CASE NO. 2008-1606

STATE BOARD OF ADMINISTRATION,

Respondent.

**PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER OF THE  
ADMINISTRATIVE LAW JUDGE**

Petitioner SARA A. MIRANDA BERMUDEZ hereby files these exceptions to the Recommended Order of the Administrative Law Judge in the above-captioned case, dated March 16, 2010 by Administrative Law Judge Anne Longman, Esquire.

**I. INTRODUCTORY STATEMENT**

This case is one of equity and fairness. Respondent State Board of Administration seeks reimbursement in the amount of [REDACTED] as a result of a retirement disbursement given to the Petitioner while the Petitioner was employed as a hearing officer for the Agency for Workforce Innovation. The Petitioner was employed in the capacity of an Other Personnel Services (OPS) employee and was informed by the Respondent that such status allowed her to accept the

distribution and continue working without penalty. The only reason for the Petitioner's acceptance of the disbursement is the Respondent's unequivocal assurance that receipt of the disbursement while employed as an OPS employee did not violate any of the regulations of the Florida Retirement System Investment Plan.

Resolution of this case turns on the doctrine of estoppel. The theory of estoppels rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result. Injustice will result if Petitioner's request to retain her employment and waive the Respondent's demand for recoupment is denied because the denial will be the result of the Petitioner's reliance on and full compliance with the Respondent's instructions.

By administering false information, Respondent engaged in conduct that resulted in a misrepresentation of fact for purposes of the doctrine of estoppel. The recognition of such a misrepresentation in this context does not impugn the integrity of the Respondent, but does protect the Petitioner from injustice. Estoppel will not impair the exercise of the Respondent's powers and is necessary to prevent loss to Petitioner. Estoppel in this case furthers the policies of the Florida Retirement System, whose intent is to allow Florida State employees to reap the financial benefits of their tenure with the State at a later juncture. Consequently, the Respondent is and should be estopped from denying Petitioner's request to retain her current employment as well as the disbursement she was entitled to receive in the amount of \$ [REDACTED].

## **II. EXCEPTIONS TO THE ALJ'S UNDISPUTED MATERIAL FACTS**

1. Petitioner does not except to the Administrative Law Judge's Undisputed Material Facts numbered 1 through 6 of the Recommended Order .

2. Petitioner excepts to the completeness of the ALJ's findings in paragraph 7 of the Recommended Order because the ALJ neglects to note that the Petitioner obtained her distribution without the requisite three-month separation from employment due to the Respondent's assurance that such behavior would not constitute an invalid distribution since the Petitioner was an OPS employee and not a contracted State employee with full retirement benefits.

3. Petitioner maintains the contentions set out in paragraph 8 of the ALJ's Recommended Order.

4. Petitioner excepts to the ALJ's findings in paragraph 9 of the Recommended Order. The ALJ references a phone call the Petitioner placed to a representative from the MyFRS Financial Guidance Line on February 21, 2008. The ALJ finds "the Petitioner did not say that she had accepted an OPS job with an FRS-covered agency." The record shows the Petitioner informed the Respondent of the possibility of acceptance of such a position, as evidenced in the following portion of the call:

*REPRESENTATIVE: Okay. So you were thinking about leaving service in the  
Next few months.*

*MS. BERMUDEZ: Actually, I was offered a job yesterday.*

*REPRESENTATIVE: Okay.*

*MS. BERMUDEZ: So, when I leave, I leave everything (inaudible).*

*REPRESENTATIVE: So, while you're attending law school, you're going to be employed; correct?*

*MS. BERMUDEZ: Excuse me?*

*REPRESENTATIVE: You're going to be employed—*

*MS. BERMUDEZ: I've already finished law school. What I'm going to do, I'm going to take—they offered me a job as an administrative judge.*

*(J-5, p. 15,16)*

In so doing, the Petitioner met her burden of disclosure to the Agency about her plans for future employment. Accordingly, the burden shifted to the Respondent to inform the Petitioner of the potential position's status with respect to the Florida Retirement System Plan. However, the Petitioner did not request specific assurance of this information during the call on February 21, 2008 because of a prior conversation with a MyFRS Financial Guidance Line on February 11, 2008. While the ALJ finds the Petitioner "did not ask whether she could take a distribution from her Investment Plan account while she was employed in an OPS position," the record demonstrates the Petitioner clearly asks how acceptance of an OPS position would affect her retirement rights, which inherently includes the right to receive a disbursement. Petitioner relies upon the following portion of the February 11, 2008 call to support this assertion:

*MS. BERMUDEZ: I have two questions. My first question is that—well, I'm applying for a job, which is outside of the Florida Retirement System, its an OPS position, and I was wondering how will, you know, resigning my career service position to an OPS position affect my retirement.*

*REPRESENTATIVE: OPS, as in—*

*MS. BERMUDEZ: Other Personnel Services.*

*REPRESENTATIVE: Okay. Is this agency going to be within the Florida Retirement System?*

*MS. BERMUDEZ: They don't have Florida Retirement system. No benefits at all.*

*REPRESENTATIVE: Okay. They are with the—*

*MS. BERMUDEZ: They are within the state though.*

*REPRESENTATIVE: Right.*

*MS. BERMUDEZ: The position is what's going to change.*

*REPRESENTATIVE: Right. And what's the name of the company?*

*MS. BERMUDEZ: It's Agency for Workforce Innovations.*

*REPRESENTATIVE: What county is that in?*

*MS. BERMUDEZ: Dade County.*



*REPRESENTATIVE: Okay. So let's just check to see if it's a part of the Florida Retirement System.*

*MS. BERMUDEZ: They don't—*

*REPRESENTATIVE: Okay. If you're not going to be receiving any Retirement benefits, it's not going to affect your retirement at all. (emphasis added).*

*MS. BERMUDEZ: Okay.*

*REPRESENTATIVE: Your retirement will stay just as it is.*

*MS. BERMUDEZ: Okay.*

*REPRESENTATIVE: And then—*

*MS. BERMUDEZ: So, if I get hired again by a career service position—*

*REPRESENTATIVE: If you get hired **back** with the Florida Retirement System, then your benefits will continue to accrue. But, right now, it's pretty much frozen; okay? (emphasis added).*

*(J-3, p. 3,4)*

Contrary to the ALJ's findings, the evidence shows the Petitioner disclosed the possibility of becoming employed with the Agency for Workforce Innovation and the Respondent's failure,

to inform the Petitioner of AWI's status as an FRS-covered employer. Additionally, the evidence shows the Respondent affirmatively represented to the Petitioner that because of the lack of benefits she would be receiving, the OPS position would not affect her retirement rights at all.

5. Petitioner excepts to the ALJ's findings in Paragraph 10 of the Recommended Order insofar as the ALJ places the duty of disclosing the Petitioner's acceptance of the OPS position on the Petitioner. The ALJ fails to note that the Respondent did not inquire about the Petitioner's employment status even though the Petitioner had previously disclosed to the Respondent on two prior occasions that she was considering working for the Agency for Workforce Innovation. The ALJ does not consider that the Petitioner did not feel the need to recite this fact because she had already been assured by the Respondent that an OPS position would not affect her retirement rights at all.

6. Petitioner excepts to the ALJ's findings in Paragraph 11 of the Recommended Order and re-asserts the above exception.

7. Petitioner excepts to the ALJ's finding in paragraph 12 that the script offered by the Respondent is "part of the usual process employed by Respondent when distributions are requested on line". The record does not support this assertion. Additionally, the ALJ states she "[does] not regard whether this colloquy in fact occurred or [Petitioner's] response to it as necessary to [the ALJ's] recommendation". However, Petitioner contends that in the absence of the script, Petitioner rightfully and lawfully relied upon the representations of Respondent in deciding whether to accept a disbursement while employed in an OPS position.

8. Petitioner excepts to the ALJ's finding in paragraph 13 and re-asserts exception number 4

9. Petitioner does not except to the Administrative Law Judge's Undisputed Material Facts numbered 14.

### **III. EXCEPTIONS TO ALJ'S CONCLUSION OF LAW**

10. Petitioner does not except to the Florida Statutes relied upon by the Administrative Law Judge in paragraphs 15,16, and 17 of the Recommended Order.

11. Petitioner excepts to ALJ's finding in paragraph 18 that there is no dispute of material fact in this case and declares Respondent erred in administering false information to the Petitioner which the Petitioner relied upon to accept her distribution.

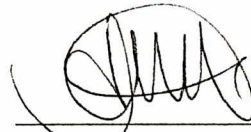
12. Petitioner excepts to ALJ's finding in paragraph 19 and re-affirms exceptions 4 and 11.

13. Petitioner excepts to the ALJ's finding in paragraph 20 of the Recommended Order stating "Petitioner incorrectly represented that she was not employed in an OPS position". It has already been established that the Petitioner disclosed to the Respondent her consideration of accepting such a position. Petitioner also excepts to the ALJ's finding that "no representations were made to [the Petitioner] by the Respondent" and re-contentends the Respondent assured Petitioner that an OPS position would not affect the Petitioner's retirement rights at all.

**IV. EXCEPTION TO ALJ's RECOMMENDATION**

Based on the above, Petitioner excepts to the Recommendation of the Administrative Law Judge and alternately proposes that the Petitioner be permitted to REMAIN EMPLOYED as a career-service hearing officer for the Agency for Workforce Innovation, with all accompanying rights and duties, and to RETAIN THE DISTRIBUTION she received from FRS.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of March 2010.



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SARA A MIRANDA BERMUDEZ

[REDACTED]

[REDACTED]

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Petitioner's Exceptions to the Administrative Law Judge's Recommended Order has been filed with and/or served this 30th day of March 2010 on:

**VIA CERTIFIED U.S. MAIL**

Agency Clerk

Office of the General Counsel

Florida State Board of Administration

1801 Hermitage Boulevard, Suite 100

Tallahassee, Florida 32308

Attorneys for Respondent

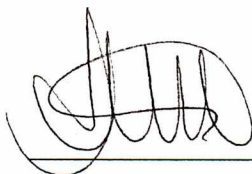
Brian A. Newman, Esquire

Brandice D. Dickson

Pennington, Moore, Wilkinson Bell & Dunbar

Post Office Box 10095

Tallahassee, FL 32302-2095



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SARA A. MIRANDA-BERMUDEZ

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SARA A. MIRANDA BERMUDEZ,

Petitioner,

vs.

Case No.: 2009-1606

STATE BOARD OF ADMINISTRATION,


Respondent.

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**RECOMMENDED ORDER**

This cause was heard in an informal hearing before the undersigned presiding officer on December 15, 2009, in Tallahassee, Florida. The appearances were as follows:

**APPEARANCES**

For Petitioner: Sara A. Miranda Bermudez  


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 received an invalid in-service distribution when she cashed out her Investment Plan account while working in an Other Personal Services (OPS) position for the Agency for Workforce Innovation (AWI).

## PRELIMINARY STATEMENT

In a September 22, 2009 letter from Dan Beard, Director of Policy, Risk Management & Compliance, Office of Defined Contribution Programs, State Board of Administration (SBA), Petitioner was informed that an audit had determined that she had taken an in-service distribution from her Investment Plan account, and that she would either have to repay the distribution in full or terminate her employment with AWI. Petitioner disputed this determination by filing a Petition for Administrative Hearing Involving Disputed Issues of Fact. After review, Respondent determined that this Petition did not raise disputed issues of material fact, and referred it to the undersigned for an informal hearing.

Petitioner attended the hearing by telephone and testified on her own behalf. Respondent presented testimony from the Petitioner and from Daniel Beard. Respondent offered ten exhibits. Respondent's Exhibit 1, 2, 4, 5, 6, 7, 8, and 10 were received in evidence without objection. Petitioner objected to Respondent's Exhibits 3 (an online script which must be followed to obtain a distribution) and 9 (a log of calls between the MyFRS Financial Guidance Line and Petitioner). I accept these exhibits over Petitioner's objection, but have not relied on either of them in making my recommendation.

After the hearing, Respondent provided and filed transcripts of recordings of nine MyFRS Financial Guidance Line telephone calls between the Petitioner and Ernst & Young representatives. These are marked as Joint Exhibits 1-9; there have been no objections to them, and they are hereby admitted into evidence.

A transcript of the hearing was filed with the agency and made available to the parties, who were invited to submit proposed recommended orders. Both parties filed Proposed

Recommended Orders, and Petitioner, after receiving and reviewing the transcripts filed as Joint Exhibits 1-9, filed an Amended Proposed Recommended Order. All of these submissions have been taken into consideration in reaching my recommendation.

### **UNDISPUTED MATERIAL FACTS**

1. Petitioner began working for the State of Florida Department of Corrections, a Florida Retirement System (FRS) employer, in March, 2003. She was a member of the Pension Plan within the FRS.

2. Petitioner called the MyFRS Financial Guidance Line and spoke to an Ernst & Young representative on nine different dates from April 2, 2007 through January 1, 2009. The transcripts of these calls, Joint Exhibits 1-9, reflect Petitioner's continuing interest in leaving state employment, switching from the Pension Plan to the Investment Plan and cashing out her retirement account.

3. While still employed with the Department of Corrections as a full-time career service corrections officer on February 22, 2008, Petitioner switched from the Pension Plan to the Investment Plan.

4. On March 10, 2008, Petitioner terminated her employment with the Department of Corrections; on March 11, 2008, Petitioner started work for the Agency for Workforce Innovation in an OPS position.

5. Petitioner remained employed by AWI in an OPS position until August 7, 2008 when she transferred to a full-time, career service position with AWI.

6. Petitioner has remained an employee of AWI since August 7, 2008 without any break in employment.



7. Petitioner requested, and on July 2, 2008 received, a total distribution of her Investment Plan account in the amount of [REDACTED]. As noted above, Petitioner was later notified that this was an invalid distribution, because benefits cannot be paid until the member has terminated all employment with all FRS employers for at least three calendar months. When Petitioner obtained her distribution, she was working for AWI in an OPS position, and therefore had not had the requisite three month separation.

8. Petitioner contends that she was misled during three of her calls to the MyFRS Guidance Line into thinking that she could take a distribution from her Investment Plan account while she was employed in an OPS position. Specifically, Petitioner contends that she was misled during the calls occurring on February 21, 2008, May 12, 2008, and June 30, 2008.

9. Petitioner called the MyFRS Financial Guidance Line on February 21, 2008. The purpose of her call was to request assistance with filling out the second election form online so she could transfer from the Pension Plan to the Investment Plan. Petitioner stated during the call that she was leaving the state because she was offered a job outside of Florida. Petitioner also stated that she was offered a job in Florida, but it was an OPS position and had no FRS benefits. Petitioner did not say that she had accepted an OPS job with an FRS-covered agency and did not ask whether she could take a distribution from her Investment Plan account while she was employed in an OPS position. She stated she was going to switch plans and then figure out what to do because she had a lot of debt and wanted to repay her law school loans. She had been offered a job as an administrative judge and was contemplating taking this position while she studied for the bar exam.

10. Petitioner called the MyFRS Financial Guidance Line on May 12, 2008 to obtain information about requesting a distribution from her Investment Plan account. At the time of this

call, Petitioner was newly employed in an OPS position, but did not disclose her OPS employment status during this call. Petitioner was told that she could request a distribution from her account once she was “off the payroll for the appropriate amount of time,” and acknowledged her awareness of the three-month termination requirement.

11. Petitioner called the MyFRS Financial Guidance Line on June 30, 2008. During this call, she asked for assistance with processing her online request for a distribution from her Investment Plan account. Again, Petitioner did not mention that she was currently employed in an OPS position. Instead she stated simply that “I resigned my FRS-covered job on March 11, 2008. I just wanted to know if the three calendar months, they’ve calculated that already.” Based on this representation, the Ernst & Young representative stated that the earliest she could request a distribution was July 1, 2008.

12. Petitioner requested a distribution from her Investment Plan account on July 1, 2008. She made this request online. Petitioner testified that she did not recall what questions she was asked when her online request for a distribution was processed, or what her answers were, but the script that was used at that time consisted of a list of questions that included the following:

You must not be actively employed or pending reemployment with an FRS-covered employer in any capacity at the time of this distribution. Prohibited FRS employment includes temporary, part-time, OPS, or any regularly established position with any FRS employer. Your distribution is being processed, in good faith, based on information you provide. If it is later determined that this distribution is invalid, Florida law states that a member or former member and any employing agency who knowingly employs them is jointly liable for returning and funds distributed. If you receive an invalid distribution, you have 90 days to repay the full amount of the invalid distribution to the FRS. If full payment is not made within 90 days, the Florida State Board of Administration may declare you a retiree and/or pursue its legal options. Knowing you will be required to repay this distribution if it is determined to be invalid, are you currently working for, seeking or pending employment with an FRS public employer in the next several months? (Emphasis added).

I accept the above as a part of the usual process employed by Respondent when distributions are requested on line. Plaintiff does not remember responding to this question specifically, but I do not regard whether this colloquy in fact occurred or her response to it as necessary to my recommendation.

13. I have thoroughly reviewed the transcripts of all recorded calls between Petitioner and the counselors of the MyFRS Guidance Line which were submitted as exhibits in this case. Petitioner focuses on the call of February 11, 2008, long before her distribution request of July 1, 2008, and asserts that it shows she was “unequivocally assured by the representative that a position as Other Personnel Services (OPS) employee for the Agency for Workforce Innovation (AWI) would not affect [her] retirement rights.” (Petitioner’s Amended Proposed Recommended Order) The portion of the call she highlights is as follows:

*Ms. Bermudez: I have two questions. My first question is that –well, I’m applying for a job, which is outside of the Florida Retirement System, its an OPS position, and I was wondering how will, you know, resigning my career service position to an OPS position affect my retirement.*

*REPRESENTATIVE: OPS, as in—*

*MS. BERMUDEZ: Other Personnel Services.*

*REPRESENTATIVE: Okay. Is this agency going to be within the Florida Retirement System?*

*MS. BERMUDEZ: They don’t have Florida Retirement system. No benefits at all.*

*REPRESENTATIVE: Okay. They are with the—*

*MS. BERMUDEZ: They are within the state though.*

*REPRESENTATIVE: Right.*

*MS. BERMUDEZ: The position is what's going to change.*

*REPRESENTATIVE: Right. And what's the name of the company?*

*MS. BERMUDEZ: It's Agency for Workforce Innovations.*

*REPRESENTATIVE: What county is that in?*

*MS. BERMUDEZ: Dade County*

*REPRESENTATIVE: Okay. So let's just check to see if it's a part of the Florida Retirement System.*

*MS. BERMUDEZ: They don't—*

*REPRESENTATIVE: Okay. If you're not going to be receiving any Retirement benefits, it's not going to affect your retirement at all.*

*MS. BERMUDEZ: Okay.*

*REPRESENTATIVE: Your retirement will stay just as it is.*

*MS. BERMUDEZ: Okay.*

*REPRESENTATIVE: And then—*

*MS. BERMUDEZ: So, if I get hired again by a career service position—*

*REPRESENTATIVE: If you get hired back with the Florida Retirement System, then your benefits will continue to accrue. But, right now, it's pretty much frozen; okay?*

Neither the above language nor any other part of the calls I have reviewed indicates that Petitioner was told she could be employed by an FRS-covered employer, even in an OPS

position, and still receive a distribution. As an initial matter, Petitioner is not asking in the above part of the conversation whether she can take a distribution while in an OPS position, she is asking how taking the position will affect her retirement. She states, rather than asking, that the agency in question does not have the Florida Retirement System. When the Guidance Line counselor starts to check to see if AWI is part of the FRS, Petitioner says, "They don't," and he responds that if she is not going to be receiving benefits, it won't affect her retirement at all, that for now her benefits are frozen. This is certainly true, as she would not be accruing additional benefits while in the OPS position. Nothing in this part of the conversation is about taking a distribution, and it seems that Petitioner and the counselor are talking past each other rather than directly addressing the question of whether an OPS position, within an FRS-covered agency, which pays no retirement benefits, is still FRS-covered employment which will prevent her taking a distribution. Petitioner clearly believed that the fact that her employment was in the OPS category meant, in and of itself, that it was outside of the FRS system, although she was never told this.

14. After completing and submitting the online request for a distribution, Petitioner received a distribution from her Investment Plan account in the amount of [REDACTED].

#### CONCLUSIONS OF LAW

15. Florida law does not allow withdrawals of retirement benefits from an Investment Plan account until termination from all FRS-covered employment (whether OPS or career service) for three calendar months. Section 121.4501(7), Florida Statutes provides:

- (7) Benefits.--Under the Public Employee Optional Retirement Program:
  - (a) Benefits shall be provided in accordance with s. 401(a) of the Internal Revenue Code.
  - (b) Benefits shall accrue in individual accounts that are participant-directed, portable, and funded by employer contributions and earnings thereon.

(c) Benefits shall be payable in accordance with the provisions of s. 121.591.

§ 121.4501(7), Fla.Stat. (emphasis added). (All citations are to the statutory language in effect in 2008.) Section 121.591, Florida Statutes provides, in pertinent part:

Benefits may not be paid under this section unless the member has terminated employment as provided in s. 121.021(39)(a) or is deceased and a proper application has been filed in the manner prescribed by the state board or the department.

§ 121.591, Fla.Stat. Section 121.591(1)(a), Florida Statutes provides, 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:

1. To the extent vested, benefits shall be payable only to a participant.
2. Benefits shall be paid by the third-party administrator or designated approved providers in accordance with the law, the contracts, and any applicable board rule or policy.
3. To receive benefits under this subsection, the participant must be terminated from all employment with all Florida Retirement System employers, as provided in s. 121.021(39).
4. Benefit payments may not be made until the participant has been terminated for 3 calendar months, except that the board may authorize by rule for the distribution of up to 10 percent of the participant's account after being terminated for 1 calendar month if a participant has reached the normal retirement requirements of the defined benefit plan, as provided in s. 121.021(29).

§ 121.591(1)(a), Fla.Stat. (emphasis added). Section 121.021(39)(a), Florida Statutes provides, in pertinent part:

(39)(a) "Termination" occurs, except as provided in paragraph (b), when a member ceases all employment relationships with employers under this system, as defined in subsection (10), but in the event a member should be employed by any such employer within the next calendar month, termination shall be deemed not to have occurred.

§ 121.021(39)(a), Fla.Stat. (emphasis added). In Section 121.021(10), Florida Statutes, "employer" is defined to include all agencies, branches and boards of the state, without regard to the type of employment.

16. The rules of the State Board of Administration governing the Investment Plan (formally known as the Public Employee Option Retirement Program), in which Petitioner was enrolled when she took a distribution, are clear that termination of all employment with FRS-covered agencies, including employment in an OPS position, is required before a distribution can be taken from the Investment Plan. Rule 19-11.003, Florida Administrative Code, provides in pertinent part as follows:

19-11.003. Distributions from FRS Investment Plan Accounts.

(1) Purpose. The purpose of this rule is to clarify the provisions regarding distributions from FRS Investment Plan accounts. Distributions from FRS Investment Plan accounts are made either after the account-holder terminates employment or at the account-holder's death.

(2) Forms. All forms identified in this rule may be obtained by calling the (toll-free) MyFRS Financial Guidance Line at 1(866)446-9377, or by accessing the MyFRS website at [www.MyFRS.com](http://www.MyFRS.com), clicking on Resources, and then on Forms.

(3) Distributions available after the member terminates FRS-covered employment.

(a) An FRS Investment Plan member shall not be entitled to a distribution from his account unless he has been terminated from all FRS-covered employment, including temporary, part-time, Other Personal Services (OPS) and any regularly established position with an FRS employer, for three (3) calendar months following the month of termination. Example: If a member terminates on May 15, the three (3) calendar months are June, July, and August. Therefore, the member cannot request a distribution until September. The termination form is called "Employment Termination Form," Form ETF-2, rev. 01/09 and can be found on the MyFRS website. This form has instructions and a section for employer certification.

(b) Upon the expiration of the three (3) calendar months after termination, the member may request a distribution from the FRS Investment Plan Administrator by calling the toll free MyFRS Financial Guidance Line at 1(866)446-9377, Option 4. (Emphasis added.)

17. The above rules of the SBA, which, under Section 121.4501(8), Florida Statutes, administers the Investment Plan, rather than the rules of the Department of Management Services, Division of Retirement (Chapter 60S, Florida Administrative Code) which are cited by Petitioner, govern this situation and require a three calendar month termination from all

employment with any FRS-covered agency, including OPS employment, before a distribution is taken from the Investment Plan.

18. The Respondent is charged with implementing Chapter 121, Florida Statutes when administering the Investment Plan, and must do so in accord with its duly adopted rules. I see no dispute as to any material fact in this case, nor any evidence that Respondent failed to follow the law in declaring Petitioner's receipt of her Investment Plan account funds to be an invalid, in-service distribution.

19. Petitioner also asserts that Respondent SBA is estopped to apply the statutory three-month termination requirement to her because she "fully-disclosed her employment status to the Respondent at all times material to this case." But the undisputed facts demonstrate that Petitioner did not ask whether she could withdraw her Investment Plan funds while she was employed in an OPS position and was never told that she could. As such, there has been no misrepresentation to Petitioner and no basis for the application of estoppel or other equitable remedy in this case.

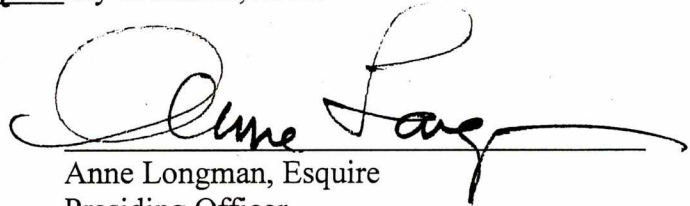
20. It appears that Petitioner incorrectly represented that she was not employed in an OPS position when she requested her distribution, and in any event, the undisputed material facts show that no representations were made to her by Respondent. It is unfortunate that she may have formed conclusions based on the fact that her OPS position did not accrue FRS benefits, and assumed that this meant it was not employment with an FRS-covered employer, but this does not mean that she was misled.



**RECOMMENDATION**

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

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of March, 2010.



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 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 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 16<sup>th</sup> day of March, 2010.

Copies furnished to:



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