

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

PETER MCCARTHY,

Petitioner,

vs.

STATE BOARD OF ADMINISTRATION,

Respondent.

SBA Case No. 2022-0580

FINAL ORDER

On May 18, 2023, the Presiding Officer submitted her Recommended Order to the State Board of Administration ("SBA") in this proceeding. The Recommended Order indicates that copies were served upon the *pro se* Petitioner, Peter McCarthy, and upon counsel for the Respondent. On May 18, 2023, the day the Recommended Order was issued, Petitioner sent in a letter to the SBA, containing a discussion of his personal background and pleading for the opportunity to become a member of the Florida Retirement System ("FRS") Pension Plan. For purposes of this Final Order, Petitioner's letter will be treated as exceptions to the Recommended Order. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

STATEMENT OF THE ISSUE

The Statement of the Issue as set forth in the presiding officer's Recommended Order hereby is adopted in its entirety.

PRELIMINARY STATEMENT

The Preliminary Statement as set forth in the presiding officer's Recommended Order hereby is adopted in its entirety.

STANDARDS OF AGENCY REVIEW OF RECOMMENDED ORDERS

The findings of fact of a presiding officer 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."

An agency reviewing a presiding officer's recommended order may not reweigh evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of presiding officers as the triers of the facts. *Belleau v. Dept of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Maynard v. Unemployment Appeals Comm.*, 609 So.2d 143, 145 (Fla. 4th DCA 1993). Thus, if the record discloses **any** competent substantial evidence supporting finding of

fact in the Recommended Order, the Final Order will be bound by such factual finding.
[emphasis added]

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.” Florida courts have consistently applied the “substantive jurisdiction limitation” to prohibit an agency from reviewing conclusions of law that are based upon the presiding officer’s application of legal concepts, such as collateral estoppel and hearsay, but not from reviewing conclusions of law containing the presiding officer’s interpretation of a statute or rule over which the Legislature has provided the agency with administrative authority. *See Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140, 1141-42 (Fla. 2d DCA 2001); *Barfield v. Dep’t of Health*, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001). When rejecting or modifying any conclusion of law, the reviewing agency must state with particularity its reasons for the rejection or modification and further must make a finding that the substituted conclusion of law is as reasonable, or more reasonable, than that which was rejected or modified.

With respect to exceptions, “[t]he final order shall include an explicit ruling on each exception, but 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.” Section 120.57(1)(k), Florida Statutes.

RULINGS ON PETITIONER'S EXCEPTIONS TO THE
RECOMMENDED ORDER

None of Petitioner's statements in his May 18th letter identifies any disputed portions of the Recommended Order by page number or paragraph; identifies any legal basis for the exceptions; and none set forth appropriate and specific citations to the record. On that basis alone, the Respondent SBA is not required to address anything set forth in Petitioner's letter.

Further, Petitioner states in his letter that he does not wish to dispute any of the facts set forth in the Recommended Order. Additionally, Petitioner states that he is not disputing any positions taken by the SBA in the matter. Instead, Petitioner is asking that the SBA ignore applicable law and allow him to enroll in the FRS Pension Plan. As an administrative entity of the State of Florida, the SBA has no statutory authority to do so.

Based on the foregoing, Petitioner's exceptions hereby are rejected *in toto*.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. There is no statutory authority that would allow Petitioner to elect membership in the FRS Pension Plan when he was reemployed with an FRS-covered employer after having taken a total distribution from his formerly existing FRS Investment Plan account and becoming a retiree. Accordingly, Petitioner is not entitled to the relief requested.

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 18th day of August 2023, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Daniel Beard

Chief of Defined Contribution Programs
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 to Peter McCarthy, *pro se*, both by email transmission to [REDACTED] and by U.P.S. to [REDACTED] and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) and jmcvaney@ausley.com, Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 18th day of August, 2023.



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

EXCEPTIONS

05/18/2023

Peter McCarthy

Hello Team,

Thank you for your time. Not that it matters, but I feel compelled to share a portion of my story with you. I grew up in the Chicago and the surrounding areas as a youth. I was surrounded by gangs, drugs, violence, etc. I made many mistakes as a youth that landed me in trouble with the law and eventually into drug addiction and alcoholism. I suffer from PTSD and other disabilities due to my upbringing. I attended a "bootcamp" for troubled teens and obtained my GED at the age of 16, because I could not make it school. I then fell hard into addiction from age 17 to 28. At age 28, I sought out help and received that help. I moved to Florida to continue a positive and sober life. I enrolled, graduated, and put myself thru college and obtained my Bachelor of Science in Human Services with a focus on addiction studies in 2018. I have been sober since 09/10/2011. I dedicate my life to helping members of our community, state, country, or wherever I can. The job I held for Miami Dade County in 2019 was Juvenile Drug Court Case manager working with troubled teens. I have been working in the Human Services field since 2012. My only goal in life is to serve and mentor others in our State to achieve sobriety and greatness daily. I got married in 2018 and have 3 beautiful sons and an amazing wife. It deeply sadness me that the state and people I serve day in, and day out are not willing to give me the opportunity to have a pension. I could have shown documentation that I am dyslexic or have disabilities and did not fully understand everything with my taking a disbursement. However, I did not and choose to be human. I claimed and claim that I did not fully understand the situation. I offered to make it correct and asked for a chance to have a pension with the state and people I serve. I am greatly disappointed at the decision and how it will affect myself and most importantly my family. I have no choice to accept this decision, however it deeply sadness me that this is how the people of the state that truly serve the people of the state are treated. I often work for free in the community outside of my paid employment and will continue to dedicate my life to helping others. I wish you all a blessed day and truly hope you never feel the heartache I feel today for making a mistake, not understanding, or whatever we call this situation, and should you ever be in this situation a similar one that your state or people have mercy on you and forgive you. Give you the maximum benefit of doubt and see the good in you and all you do for others to grant you redemption and happiness to move forward as I am not given that opportunity today.

I do not wish to dispute the facts as they are clearly stated from the opposing party. I take full ownership for taking my disbursement mindfully or not. However, it is very clear in all the telephone transcripts that I repeatedly state that I took my disbursement in 2019. The argument states that the phone representatives did not have access to my file or the proper information. That is not accurate as they all stated they could see my 2019 file and not my 2022 file. Furthermore, after I stated I took a disbursement, they should have been trained enough to tell me that there was no or even a possible change that I would not be eligible for a pension, and they did not. I was juggling several job offers at the time of my offer of employment with Broward County. My final decision to work with Broward County was due to the benefits and pension. I respect and fully understand why the FRS governs the way they do. Although, I can only say my thought process, it means little if not interrupted the way I thought it to be. When I closed my account in 2019, I did with an understanding that my account was under \$1000.00, and it would not have any further repercussions to future FRS benefits. I am aware that there is a portion of FRS literature that states if the person has less than \$1000.00 and waits a certain period the account would be closed automatically due to the low source of funds in the account. I did not need the \$500.00 dollars desperately at the time of closure that I could not have waited the time for the account to close on its own. I understand the opposing party is holding me responsible for a serious of questions I answered. I understand my defense of not understanding is not strong. However, it is the truth. How many of you have just "agreed" to terms when downloading a new phone app and not fully understanding the language?

In conclusion, I am not disputing the "evidence" against me. I am not disputing the position of the FRS or SAB. My best defense is "it was a mistake, or I did not know or understand" what I was doing upon closing the account in 2019. I agree, not very strong case. However, it is the truth. My moral character would not be going to such great

lengths to have a pension if I understood I forfeited that opportunity in 2019. My personal recovery has taught me to be accountable for myself and my decisions. I am taking full accountability for being in this situation. I have offered to pay back the money taken for disbursement. I have plead my case via telephone. My personal recovery has also taught me to be caring and compassionate toward others. No human is perfect. Some things can be corrected, and others cannot. I strongly feel this is something that can be corrected and again plead for the opportunity to have a pension, continue serving our people, continue to live a productive life, and be the best person I can be. May you please allow me to learn, move forward, and restore the privilege of having a pension with the State of Florida? I have a 4-year-old. A 2-year-old, and my wife gave birth on 05/0/2023 to our 3rd son. It is my only desire to serve the people of Florida, be the best father and husband I can, and retire with a pension from Florida in many years to enjoy watching my family strive.

With Gratitude,

A handwritten signature in black ink, appearing to read 'Peter McCarthy', written over a horizontal line.

Peter McCarthy

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

PETER MCCARTHY,

Petitioner,

vs.

Case No. 2022-0580

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, on March 7, 2023, with all parties appearing telephonically before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA). The appearances were as follows:

APPEARANCES

For Petitioner:	Peter McCarthy, <u>pro se</u>
For Respondent:	Deborah Minnis Ausley McMullen, P.A. 123 South Calhoun Street (32301) PO Box 391 Tallahassee, FL 32302

STATEMENT OF THE ISSUE

The issue is whether Petitioner may elect membership in the Florida Retirement System (FRS) defined benefit Pension Plan despite his reemployment with an FRS covered employer after taking a total distribution of his existing FRS defined contribution Investment Plan account.

EXHIBIT A

PRELIMINARY STATEMENT

At the hearing, Petitioner testified on his own behalf and presented no other witnesses. Respondent presented the testimony of Allison Olson, SBA Director of Policy, Risk Management, and Compliance. Respondent's Exhibits R-1 through R-5 were admitted into evidence. I requested Respondent to make and file transcripts of telephone calls between Petitioner and the MyFRS Financial Guidance Line. Those transcripts were filed and served and are now a part of the record as part of Respondent's Exhibit R-4.

A transcript of the hearing was made, filed with the agency, and provided to the parties on March 23, 2023. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. The following recommendation is based upon the undersigned's consideration of the complete record in this case and all materials submitted by the parties.

UNDISPUTED MATERIAL FACTS

1. Petitioner was employed with Miami-Dade County and terminated this FRS-covered employment on October 23, 2019. He was a member of the defined contribution Investment Plan.

2. On November 6, 2019, the Petitioner telephoned the MyFRS Financial Guidance Line and advised the EY Financial Planner that he was moving to California and wanted to close his account.

3. On April 27, 2020, the Investment Plan Administrator received and processed a distribution request from the Petitioner of his Investment Plan account balance. Petitioner made the request via the MyFRS.com website. Because he had worked for Miami-Dade County for only a brief period, his total distribution was less than \$1,000.

4. In order to complete the distribution process, the Petitioner was required to respond to the following series of questions:

a. Question #1, in pertinent part, reads and Petitioner responded as follows:

1. The following requires careful review. You must respond to each of the following questions. If you fail to respond to each question, your distribution will not be processed.

Does the FRS have your correct date of termination on file, including all temporary, part time, Other Personal Services (OPS), and any regularly established position? Your FRS records show your date of termination is 10/23/2019. **Answer: Yes**

b. Question #2 reads, and Petitioner responded as follows:

2. The FRS offers all FRS members free, unbiased financial guidance services from financial planners who do not sell any investments and can assist you with clarifying specific FRS guidelines regarding this distribution as well as other financial planning topics. Would you like to speak to an FRS Financial Planner before proceeding with your distribution? **Answer: No.**

c. Question #3 reads, and Petitioner responded as follows:

3. Your distribution is being processed in good faith, based on information you provide. Florida Statutes prohibits in-service distributions. You must not be actively employed or pending reemployment with any FRS-covered employer in any type of position at the time of this distribution. This includes, but not limited to, all regularly established, full-time, part time, temporary, Other Personal Services (OPS), adjunct professors, or substitute teaching positions. This also includes any paid or unpaid positions, service arrangements or employment by or through a third-party providing services to an FRS employer.

If you take a distribution of your vested Investment Plan benefit, any unvested Pension Plan years of service and the accumulated benefit associated with that service will be forfeited.

When you take a distribution from your Investment Plan account, you are retired from the FRS and cannot be reemployed by any FRS participating employer in any position within 6 calendar months from the date the distribution is processed. This includes, but not limited to, all regularly established, full-time, part-time, temporary, Other Personal Services (OPS), adjunct professors, or substitute teaching positions. This also includes any paid or unpaid positions, service arrangements or employment by or through a third-party providing services to an FRS employer. If you are reemployed within 6 calendar months of your retirement date, your distribution will be considered invalid. Florida law states that you and

any FRS participating agency that employs you are jointly liable for returning any funds distributed.

If you receive an in-service and/or invalid distribution, you will have 90 days to repay the full amount of the distribution to the FRS. In lieu of repayment, you may terminate all employment with FRS participating agencies. If full repayment is not made within 90 days, or you do not terminate employment the State Board of Administration of Florida may declare you a retiree and/or pursue its legal options.

By proceeding with your distribution, you certify that you are currently eligible to receive this distribution. You also understand that if it is later determined you were not eligible you will have to repay the invalid distribution.

Is there any reason why you are not eligible to receive this distribution?

Answer: No.

(Emphasis added)

d. Question #4 reads, and Petitioner responded as follows:

4. If you are reemployed with an FRS-participating employer in any position during the first 7-12 calendar months of the retirement and still have a vested Investment Plan benefit, you will not be able to receive additional Investment Plan distributions until either you terminate employment or complete 12 calendar months of retirement.

If you take a distribution and later return to covered-FRS employment, you will considered a "retiree" for any possible future FRS membership.

Do you understand the reemployment limitations and the consequences of taking a distribution at this time. **Answer: Yes.**

(Emphasis added)

5. Petitioner returned to FRS-eligible employment some three years later, when he was employed with Broward County on October 24, 2022.

6. Pursuant to Section 121.021(60), Florida Statutes, a "retiree" is a former member of FRS who has terminated employment and is receiving benefits from the system he was a member of. Petitioner was in the FRS Investment Plan and took distribution of his account; he thus became a "retiree" by operation of law.

7. Petitioner now wishes to be a member of the Pension Plan rather than the Investment Plan. He asserts that after he returned to Florida from California and began working with Broward County, he was advised by EY Financial Planners via telephone conversations that he would be permitted to do so. At that time, his new employment file was not in the FRS system.

8. When his file was finally in the system, Petitioner was advised that he was not eligible to elect Pension Plan membership because he had taken distribution of his Investment Plan account in 2019.

9. Petitioner's initial calls with the MyFRS Financial Guidance Line led him to believe he was eligible to elect to transfer into the Pension Plan because he had not vested in his previous Investment Plan account, having worked for only eight months. But these calls occurred years after Petitioner took the distribution from his Investment Plan account, and before his new employment record had been updated in the FRS system.

CONCLUSIONS OF LAW

10. Pursuant to Section 121.122(3), Florida Statutes, as a retiree, Petitioner is not entitled to elect enrollment into the Pension Plan.

11. Section 121.122(3), Florida Statutes, provides in relevant part:

(3) A retiree of the investment plan, the State University System Optional Retirement Program, the Senior Management Service Optional Annuity Program, or the State Community College System Program who is reemployed with a covered employer in a regularly established position on or after July 1, 2017 **shall be enrolled as a renewed member of the investment plan** ..

(j) **Notwithstanding s. 121.4501(4)(f), the renewed member is not eligible to elect membership in the pension plan.**

(Emphasis added.)

12. The express terms of this governing statute make Petitioner ineligible to elect membership into the Pension Plan.

13. As an administrative entity of the State of Florida, Respondent has only those powers conferred upon it by the legislature. See, e.g., *Pesta v. Dep't of Corrections*, 63 So.3d 788 (Fla. 1st DCA 2011). The Florida Administrative Procedure Act expressly provides that statutory language describing the powers and functions of such an entity are to be construed to extend "no further than...the specific powers and duties conferred by the enabling statute." §§ 120.52(8) and 120.536(1), Fla. Stat.

14. I am aware that this is a very consequential matter to Petitioner, who is in the early stages of what could be a long career, and I have reviewed the record here very carefully. I find nothing that shows Petitioner was misled in any way that is relevant to his current legal situation. In his initial calls with the MyFRS Financial Guidance Line representatives, he certainly was led to expect that he would have another election that would permit him to choose the Pension Plan, but this was before those representatives could see his current file, and he was told this. When they learned that he had taken a voluntary distribution, he was told explicitly that his only option as a "retiree," was to be in the Investment Plan. While this may not make much sense to someone who worked for only eight months in his previous FRS employment, was not vested, and had received a less than \$1,000 distribution, it appears to be in accord with the law, and Respondent therefore has no authority to allow Petitioner to enroll in the Pension Plan.

RECOMMENDATION

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

Dated this 18th day of May 2023.

Anne Longman, Esquire
Presiding Officer
For the State Board of Administration
Lewis, Longman & Walker, P.A.
106 East College Avenue, Suite 1500
Tallahassee, FL 32301

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions must be filed with the Agency Clerk of the State Board of Administration and served on opposing counsel at the addresses shown below. The SBA then will enter a Final Order which will set out the final agency decision in this case.

Filed via electronic delivery with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
Tina.joanos@sbafla.com
mini.watson@sbafla.com
Nell.Bowers@sbafla.com
Ruthie.Bianco@sbafla.com
Allison.Olson@sbafla.com
(850) 488-4406

COPIES FURNISHED via email and U.S. mail to:

Peter J. McCarthy



Petitioner

and via electronic mail only to:

Deborah Minnis, Esquire
Ruth E. Vafek, Esquire
123 South Calhoun Street
P.O. Box 391
Tallahassee, Florida 32301
dminnis@ausley.com
rvafek@ausley.com
jmcvaney@ausley.com