STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KIMBERLY A. CAMPBELL,

Petitioner,

vs. Case No. 14-2803

STATE BOARD OF ADMINISTRATION,

Respondent.
_____/

RECOMMENDED ORDER

This matter came before D.R. Alexander, an administrative law judge of the Division of Administrative Hearings (DOAH), on a stipulated record and written argument submitted by counsel.

APPEARANCES

For Petitioner: Thomas H. Bateman, III, Esquire
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For Respondent: Brian A. Newman, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioner, an elected circuit court judge, is entitled to renewed membership or is otherwise entitled to participate in the Florida Retirement System (FRS).

PRELIMINARY STATEMENT

The procedural history of this case is somewhat disjointed. On November 14, 2013, the State Board of Administration (SBA) advised Petitioner by letter that her request to enroll in the FRS had been denied. Petitioner timely requested a hearing, and her Petition for Hearing (Petition) was transmitted to DOAH and assigned Case No. 13-4781. Later, she filed a Corrected First Amended Petition for a Formal Administrative Hearing (Amended Petition). On May 30, 2014, the parties requested that jurisdiction in the case be returned to the agency "to facilitate settlement discussions." An Order closing the file was issued on June 2, 2014.

Without referring to the first case, on June 17, 2014, the original Petition was again transmitted by SBA to DOAH and was assigned Case No. 14-2803. The disposition of the first case is not known.

After a final hearing was scheduled, the parties agreed a hearing was unnecessary, and they would file a pre-hearing stipulation, a stipulated record, and proposed recommended orders.

The parties submitted Joint Exhibits 1-6 which are accepted in evidence. Exhibits 1 and 2 are the depositions of Petitioner and Daniel Beard, SBA Director of Policy, Risk Management, and Compliance, respectively. Exhibit 3 is a copy of the Amended

Petition filed in Case No. 13-4781, which according to the parties' Joint Pre-hearing Stipulation, they now rely upon, rather than the original Petition referred to DOAH.

The parties filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. The FRS Plan

1. There are two classes of members in the FRS: all officers or employees, except elected officers; and elected officers, including circuit judges. See §§ 121.051(1)(a) and 121.052, Fla. Stat. (2014). The second class is identified as the Elected Officers' Class (EOC). See § 121.052(1), Fla. Stat.

2. Members of the FRS may elect to participate in either the Defined Benefit Retirement Program (Pension Plan) or the Public Employee Optional Retirement Program (Investment Plan). The Investment Plan has a one-year vesting requirement, thus enabling a vested participant to receive a distribution of his or her account at any time after leaving FRS-covered employment.

3. Upon retirement, a vested Pension Plan member receives a monthly benefit for his or her lifetime whereas a vested Investment Plan member receives a lump-sum distribution of accumulated benefits from his or her account. Under both plans, a member must terminate all FRS-covered employment in order to receive a benefit.

4. "Retiree" is defined at least three times in chapter 121, none the same. See §§ 121.021(60), 121.35(5)(h), and 121.4501(2)(k), Fla. Stat. However, as explained in the Conclusions of Law, all Investment Plan retirees are covered by section 121.4501(2)(k), which defines a "retiree" as "a former member of the investment plan who has terminated employment and taken a distribution of vested employee or employer contributions as provided in s. 121.591."

5. In 2009, the Legislature created section 121.122(2), which provides 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." See Ch. 2009-209, § 12, Laws of Fla. By virtue of this amendment, FRS retirees who did not become reemployed with a covered employer by July 1, 2010, were ineligible for renewed membership in the FRS.

6. The same bill amended section 121.053 by adding a new subsection (3)(a), which provided that on or after July 1, 2010, a "retiree of a state-administered retirement system who is elected or appointed for the first time to an elective office in a regularly established position with a covered employer may not reenroll in the Florida Retirement System." Id. at § 5. This amendment makes clear that the prohibition in section 121.122(2) applies equally to elected officials.

7. In 2012, the Legislature amended section 121.122(2) to provide that "[a] retiree of a state-administered retirement system who is initially reemployed in a regularly established position on or after July 1, 2010, may not be enrolled as a renewed member." See Ch. 2012-222, § 7, Laws of Fla. The sole purpose of the amendment was to "make it clear that a retiree of the investment plan . . . who is reemployed on or after July 1, 2010, is prohibited from being reenrolled as a renewed member of a state-administered retirement system." Fla. Govt. Oper. Comm., CS/HB 7079 (2012) Staff Analysis, p. 5 (final May 11, 2012)(available at http//www.myfloridahouse.gov).[1]

B. Petitioner's Employment History and Retirement Option

8. Petitioner was a member of the FRS while employed as an Assistant State Attorney from January 2, 2001, through September 30, 2003. When first employed, Petitioner was a member of the Pension Plan. Shortly thereafter, the Legislature created the Investment Plan option, and Petitioner was given a deadline of August 31, 2002, to make an election between the two plans. On August 31, 2002, she switched to the Investment Plan.

9. On or about September 30, 2003, Petitioner left the Office of State Attorney for private law practice. In January 2006, she took a complete distribution from her FRS Investment Plan in the amount of $8,154.52. By taking a lump-sum distribution, she became a "retiree." See § 121.4501(2)(k),

Fla. Stat. ("Retiree" means a former member of the investment plan who has terminated employment and taken a distribution of vested employee . . . contributions."). She was not employed in an FRS-eligible position between September 30, 2003, and January 8, 2013.

10. On August 14, 2012, Petitioner was elected to the position of Circuit Judge in the Sixth Judicial Circuit of Florida.

11. On January 8, 2013, Petitioner was commissioned as a Circuit Judge for the Sixth Judicial Circuit of Florida.

C. The Proposed Agency Action

12. In response to her request to enroll in the FRS, by letter dated November 14, 2013, Daniel Beard, who is Director of Policy, Risk Management, and Compliance for the State Board of Administration, advised Petitioner in pertinent part as follows:

> You retired from the FRS on January 23, 2006 when you requested a distribution of your FRS Investment Plan account. Section 121.4501(2)(k), Florida Statutes, defines a "retiree" as a member of the FRS Investment Plan who has terminated employment and has taken a distribution as provided in Section 121.591. There are no statutory provisions that would allow you to cancel or void your retirement, and there are no statutory provisions that would allow you to repay the distribution in order to be "unretired."
>
> Section 121.122, Florida Statutes, states that a retiree of a state-administered retirement system who is initially reemployed in a regularly established

> position on or after July 1, 2010 is not eligible to enroll in renewed membership and receive additional retirement benefits. This change in law pertained to any retiree of a state-administered retirement system who had not returned to FRS employment prior to July 1, 2010. You were hired by the Office of State Courts on January 8, 2013.

13. Petitioner timely challenged the proposed agency action asserting that she is entitled to participate in the FRS as a compulsory member of the EOC pursuant to part I, chapter 121.

CONCLUSIONS OF LAW

14. Petitioner has the burden of proving that she is eligible to participate in the FRS. See, e.g., Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

15. As previously found, the stipulated facts show that Petitioner retired from the FRS Investment Plan in 2006 by withdrawing all funds from her Investment Plan account and that she failed to return to FRS-eligible employment before July 1, 2010. Given this set of facts, her request to reenter the FRS in 2013 should be denied for the following reasons.

16. Pursuant to section 121.122(2), FRS retirees must return to FRS-eligible employment on or before July 1, 2010. See Ch. 2009-209, § 12, Laws of Fla. Retirees returning on or after this date are ineligible to reenroll in the FRS. This

prohibition applies equally to elected officials, including judges, regardless of whether they are a retiree under part I or part II of chapter 121. See § 121.053(3)(a), Fla. Stat. ("A retiree of a state-administered retirement system who is elected or appointed for the first time to an elective office in a regularly established position with a covered employer may not reenroll in the [FRS]."). Given this clear legislative directive, Petitioner is precluded from reenrolling in the FRS. The SBA is obliged to follow these statutory requirements and cannot deviate from them. See, e.g., Balezentis v. Dep't of Mgmt. Servs., Case No. 04-3263, 2005 Fla. Div. Adm. Hear. LEXIS 851 at *8 (Fla. DOAH Feb. 22, 2005), adopted, (Fla. DMS Apr. 4, 2005)("The [SBA] is not authorized to depart from the requirements of its organic statute when it exercises its jurisdiction."); Smith v. Dep't of Mgmt. Servs., Case No. 10-9449, 2011 Fla. Div. Adm. Hear. LEXIS 10 at *7 (Fla. DOAH Feb. 23, 2011), adopted, (Fla. DMS June 14, 2011)(section 121.122(2) "is a legislative limitation giving no discretion to the [SBA]").

17. Petitioner contends, however, that she is a retiree under section 121.021(60), and the prohibition in section 121.053(3)(a) does not apply because she is not currently receiving monthly "benefit payments," as contemplated by the law. Subsection (60) defines a "retiree" as a former member who

"is receiving benefit payments from the system." The case of Blaesser v. State Board of Administration, 134 So. 3d 1013 (Fla. 1st DCA 2012), review denied, 110 So. 3d 440 (Fla. 2013), is instructive on this issue and supports SBA's decision. In that case, the employee was first hired by the Seminole County School Board in September 2005 and enrolled in the Investment Plan. After working for a little more than a year, he terminated employment and in March 2007 took a total distribution of his Investment Plan account. In April 2011, he began work as an attorney with a state agency and was advised by the SBA that he could not participate in the FRS because he was a retiree who came back to FRS-covered employment after July 1, 2010. On appeal, the court affirmed SBA's decision and held that because Blaesser had taken a lump-sum distribution of benefits in 2007, he was ineligible for renewed membership in the FRS by virtue of the prohibition in section 121.122(2). It rejected Blaesser's argument that because he received a prior nonrecurring, lump-sum distribution, he was not a retiree under section 121.021(60) who "is receiving benefit payments." Id. at 1015. The court addressed the argument in the following way:

> [T]he statutory prohibition applies to "[a] retiree of a state-administered retirement system" and that "[s]ystem" is defined by section 121.021(3) as "including . . . the defined benefit retirement program administered under the provisions of part I of this chapter and the defined contribution

> retirement program known as the Public Employees Optional Retirement Program and administered under the provisions of part II of this chapter." Moreover, section 121.4501(2)(k), which falls under part II of Chapter 121, defines "[r]etiree" as "a former participant of the optional retirement program who has terminated employment and has taken a distribution as provided in s. 121.591, except for a mandatory distribution of a de minimis account authorized by the state board." Reading all of these related provisions together, the SBA asserts the prohibition of section 121.122(2) applies to appellant because he retired by taking a total distribution from his Investment Plan account and did not return to FRS-covered employment until after July 1, 2010. This court will defer to an agency's interpretation of a statute that it is charged with administering unless that interpretation is contrary to the plain meaning of the statute or is clearly erroneous. [citation omitted]. We defer to the SBA's interpretation of section 122.122(2), which we conclude is not contrary to the plain meaning of the statute and is not clearly erroneous.

Blaesser at 1015.

18. Even so, Petitioner contends that Blaesser does not apply here because that case involved a regular employee of FRS, and not an elected official. However, this is not a material distinction as the Legislature made it clear that the prohibition on renewed FRS membership applies equally to elected officials. See § 121.053(3)(a), Fla. Stat.

19. Petitioner also contends that she is a retiree under part I of chapter 121; section 121.4501(2)(k) applies only to

retirees under part II; and SBA's reliance on section 121.4501(2)(k) is misplaced. As noted in Blaesser, however, all of these related provisions must be read together and harmonized. When doing so, SBA's application of section 121.4501(2)(k) to an FRS retiree who is elected for the first time to an elective office is not contrary to the plain meaning of the statute or clearly erroneous. Moreover, to construe the statute otherwise would be at odds with the clear language in section 121.053(3)(a).

20. Finally, Petitioner contends that the application of the definition of "retiree" in section 121.4501(2)(k) prevents her from reenrolling in the FRS, and this conflicts with the requirement in section 121.052(3) that "participation in the [EOS] shall be compulsory for elected officers." The undersigned assumes, however, that the Legislature recognized any purported "conflicts" when it enacted the reenrollment prohibition in 2009. Moreover, when reading all of these provisions together, the SBA's interpretation of the statutory framework is not contrary to the plain meaning of the law and is not clearly erroneous. Blaesser at 1015.

21. In summary, as stated in SBA's letter of November 14, 2013, "[a] change in Florida law would be required to grant [Petitioner's] request." While this may be a harsh result,

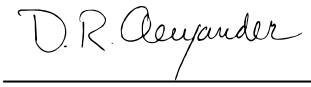
under the existing statutory scheme, Petitioner is ineligible to reenroll in the FRS.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the State Board of Administration enter a final order denying Petitioner's request to reenroll in the FRS.

DONE AND ENTERED this 18th day of September, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 18th day of September, 2014.

ENDNOTE

[1/] The undersigned has taken official recognition of the Legislative staff analysis of chapter 2012-222, § 7, Laws of Florida.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.