

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

STACY MCLEAN,

Petitioner,

vs.

Case No. 16-5327

STATE BOARD OF ADMINISTRATION,

Respondent,

and

ORANGE COUNTY,

Intervenor.

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RECOMMENDED ORDER

D. R. Alexander, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted a hearing in this case in Tallahassee, Florida, on November 14, 2016.

APPEARANCES

For Petitioner: Jerry Girley, Esquire  
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For Respondent: Brian A. Newman, Esquire  
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For Intervenor: Sarah P.L. Reiner, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether Petitioner took an in-service distribution from his Investment Plan retirement account, and if so, must either repay the distribution in full or terminate employment with all FRS-participating employers, including his current employer, Orange County (County), for six calendar months.

PRELIMINARY STATEMENT

On August 1, 2016, the State Board of Administration (SBA) informed Petitioner by letter that a routine audit revealed he had received an "in-service" distribution from his FRS Investment Plan account while still employed by the County. The letter stated that such a distribution is prohibited by section 121.591, Florida Statutes, and Internal Revenue Service regulations, and unless Petitioner or the County repaid \$991,811.60 to Petitioner's Investment Account by September 30, 2016, he must terminate employment with the County for at least six months. Petitioner timely requested a hearing, and the matter was referred by the SBA to DOAH to be set for hearing. The County was later authorized to intervene in this proceeding. By agreement of the parties, this case was heard on a consolidated record with Case No. 16-5326, which involved a similar case with another County employee. However, separate recommended orders are being entered.

At the final hearing, Petitioner testified on his own behalf. The SBA presented the testimony of one witness. The County presented the testimony of one witness. Joint Exhibits 1-10 were accepted in evidence. The undersigned also granted the SBA's request to take official recognition of the case of Colford v. Department of Transportation, Pub. Emp. Rel. Comm., Case No. CS-2011-0278 (Recommended Order April 21, 2011, Final Order May 9, 2011).

A one-volume Transcript of the hearing was prepared. The parties timely filed proposed recommended orders (PROs), which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. The FRS is comprised of the Pension Plan, which is a defined benefit plan, and the Investment Plan, which is a defined contribution plan. The Division of Retirement administers the Pension Plan, while the SBA administers the Investment Plan. Section 121.4501(13) charges the SBA with administering the Investment Plan in compliance with the Internal Revenue Code in order to retain its qualified status.

2. Until March 4, 2014, Petitioner was a member of the FRS Pension Plan by virtue of his employment as a Lieutenant with the Orange County Fire Rescue Department. The County participates in the FRS.

3. Effective March 1, 2014, Petitioner used his one-time Second Election to switch from the FRS Pension Plan to the FRS Investment Plan. He switched plans in order to have ready access to his FRS retirement funds should he be terminated from employment by the County.

4. On March 4, 2014, Petitioner was terminated from his employment for allegedly violating County rules and regulations.

5. On March 10, 2014, Petitioner filed a formal grievance seeking reinstatement and all benefits. The decision to terminate his employment was later upheld.

6. After the grievance was denied, but before he took a distribution, Petitioner obtained legal representation and initiated a lawsuit against the County on the basis that he was terminated because of his race and gender.

7. On June 19 and July 1, 2014, Petitioner withdrew distributions totaling \$991,811.60 from his Investment Plan account.

8. Before taking an Investment Plan distribution, a member is required to answer several questions, either on-line or by telephone, to verify that he is eligible to take a distribution. Petitioner requested his distributions by telephone. One question asks if the member is "pending reemployment," a term that means, among other things, the member is seeking reinstatement through a pending action against his employer at

the time of the distribution. If a member answers yes, he is ineligible to take a distribution. Even though he had a pending discrimination lawsuit against his employer, which could lead to reinstatement if he prevailed, Petitioner answered no. Had he answered the question correctly, Petitioner would not have been allowed to take a distribution.

9. The SBA does not check in real time the veracity of a member's answers to the questions asked during the distribution request process. Petitioner was advised by written information, however, that the SBA might undertake a later review of his distribution and seek repayment if it was determined to be invalid.

10. During the distribution process, if a member has a question regarding the distribution or other financial topics, they are provided access to Ernst & Young planners on the MyFRS Financial Guidance Line. Although offered that educational resource, Petitioner stated he had no questions.

11. On May 24, 2016, Petitioner and his former employer entered into a Settlement Agreement and Mutual General Release (Settlement Agreement) to resolve the discrimination lawsuit. Without admitting liability, the County agreed, among other things, for Petitioner to be reinstated to his former position with all seniority, benefits, and accrued back pay effective June 6, 2016. He also had service credit restored for the

period March 2014 through June 2016. The Settlement Agreement further provided that a letter of reprimand would replace the termination notice. Petitioner was represented by an attorney during the settlement negotiations. The SBA was not a party to the agreement.

12. Following the execution of the Settlement Agreement, but before payment of the settlement funds, the County was advised by the SBA that because Mr. McLean was being reinstated and the termination set aside, an in-service distribution had occurred in September 2015, and Mr. McLean would be required to either pay back the distribution in full or terminate employment with the County for at least six months. The County was also advised that a change to the language in the Settlement Agreement confirming that Mr. McLean had in fact been separated from employment with the County for a period of six months would resolve the in-service distribution issue and make it unnecessary to repay the distribution or be separated from employment with the County. This information was orally conveyed by the County to Petitioner's counsel.

13. Despite this warning, Petitioner declined to modify the Settlement Agreement. The County reconfirmed this information in a letter dated June 14, 2016, to Petitioner's attorney. It read in pertinent part as follows:

[T]his will confirm that you advised you met with Mr. McLean and counseled him on the potential implications of his acceptance of the enclosed payments under the Agreement (a copy of which was previously provided for your records), including the requirement that he repay to the Florida Retirement System (FRS) all sums that he previously received as disbursements from the FRS, and his responsibility for all penalties and tax consequences, if any, related to the Agreement payments and FRS disbursements. This will also confirm that although Orange County offered to enter into an alternate agreement form with Mr. McLean (for the same consideration) that would be acceptable to FRS and not require repayment of FRS disbursements, Mr. McLean elected to remain bound by the terms of the current Agreement and you advised Mr. McLean will make any FRS-related payments necessary.

As we previously discussed, in the event Mr. McLean does not repay sums due and owing the FRS, Orange County will not repay such sums on his behalf. Further, in the event of Mr. McLean's non-repayment of funds to the FRS, we understand from Orange County that it may be compelled by FRS to separate Mr. McLean from his employment pursuant to applicable statutory laws, rules and regulations. In light of the serious consequences to Mr. McLean of non-repayment of the FRS funds, in an abundance of caution, Orange County once again advises that if an alternate form of settlement agreement that does not require repayment to FRS is preferred by Mr. McLean, Orange County stands ready to execute such an agreement in the form previously provided for your consideration.

Jt. Ex. 8, pp. 0001-0002. This was fair warning to Petitioner that there were serious consequences if he chose to ignore the SBA's concerns.

14. On June 15, 2016, Petitioner's counsel replied by letter that the settlement checks which accompanied the County's June 14 letter were cashed, Mr. McLean would not repay funds to the FRS, and Mr. McLean intended to return to work with the County. Id. at pp. 0003-0004. As of the date of the hearing, Petitioner had not repaid the distribution, and pending the outcome of this hearing, he has continued to work as a County employee pursuant to the Settlement Agreement.

15. Based upon an audit by the Division of Retirement after Petitioner was reinstated, which showed that Petitioner had received a distribution, he was currently receiving FRS contributions from his employer, and he had no County termination date, the SBA determined the distribution was invalid.

16. On August 1, 2016, Petitioner was notified by the SBA that his September 2015 distributions were considered "in-service" distributions based on reinstatement to his FRS-covered position and service credit given for the period from March 2014 through June 2016. He was offered the option of returning the distributions to his account by September 30, 2016, or being terminated by his employer, with leave to be reemployed by an FRS-participating employer after six months. A copy of the letter was also sent to the County. Petitioner declined this option and filed an appeal.



CONCLUSIONS OF LAW

17. Petitioner has the burden of proving by a preponderance of the evidence that he is entitled to the relief requested in his Petition. See, e.g., Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

18. The Investment Plan must be administered so as to comply with the Internal Revenue Code. See § 121.4501(13)(a), Fla. Stat. Benefit payments from the FRS that are not valid jeopardize the qualified status of the plan.

19. Section 121.591(1)(a)3. and 4. governs when payments of benefits under the Investment Plan may be made. It reads as follows:

3. The member must be terminated from all employment with all [FRS] employers, as provided in s. 121.021(39).

4. Benefit payments may not be made until the member has been terminated for 3 calendar months.

See also Blaesseer v. State Bd. of Admin., 134 So. 3d 1013, 1014 (Fla. 1st DCA 2012) ("an employee must terminate all FRS-covered employment in order to receive a benefit" under the Investment Plan).

20. If an Investment Plan member takes a distribution in contravention of section 121.591(1)(a)3. and 4., the member has taken an "invalid distribution" and must either return the distribution or terminate employment for at least six months.

Florida Administrative Code Rule 19-11.003(9) implements the statute and requires that the member or former member "repay the entire invalid distribution within 90 days of the member's receipt of a final notification from the SBA, or in lieu of repayment, the member must terminate employment from all participating employers." Otherwise, the qualified status of the Investment Plan would be in jeopardy.

21. In sum, section 121.591(1)(a)5. makes clear that under the facts of this case Petitioner must: (1) repay or terminate employment; and (2) if he fails to repay, he is subject to section 121.122, which prohibits him from further participation in the FRS. In this case, the SBA is doing precisely what the law requires. The County agrees with this analysis.

22. Although Petitioner argues otherwise, the Colford case, officially recognized, is strikingly similar to the circumstances here and supports the position of the SBA. On January 7, 2010, Colford, a DOT employee, was terminated from employment for allegedly violating DOT rules and regulations. Colford elected to grieve her dismissal pursuant to her union contract. While the grievance was pending, due to financial difficulties, Colford elected to withdraw all of her funds from the Investment Plan. Like Mr. McLean, she neglected to advise FRS about the pending grievance. On May 3, 2010, the distribution was taken. A week later, her Step 3 grievance was

sustained, and DOT was ordered to reinstate her with back pay. She was reinstated effective July 6, 2010. After a routine audit, the SBA determined that the distribution was invalid and offered her the option of repaying the distribution and becoming "unretired," or terminating employment with DOT for at least six months. Because she declined to repay the distribution, the SBA (and DOT) concluded termination of her employment was required by chapter 121. This determination was affirmed in both the recommended and final orders. A similar result is required here.

23. The SBA contends that under section 121.091(9)(d)2., if Petitioner fails to repay the distribution and the County does not terminate his employment, the County is jointly and severally liable for repayment of the distribution. That section provides that if an FRS retiree is employed within six calendar months of his termination date, the employee and employer are "jointly and severally liable for reimbursement of any benefits paid to the retirement trust fund from which the benefits were paid." The County asserts the statute does not apply under the circumstances presented here. A resolution of that issue is unnecessary, as the County represents in its PRO that if Petitioner fails to repay the distribution, it will seek to avoid liability by "any lawful means," including terminating Mr. McLean's employment.

24. Finally, in reaching the above conclusions, the undersigned has considered the arguments raised by Petitioner. In the Pre-Hearing Stipulation, he contends the Settlement Agreement is "ambiguous" because it does not explicitly state that he would be treated as never having been terminated. By operation of the terms of the agreement, however, the termination notice was specifically replaced by a letter of reprimand. This meant he no longer had a termination date, and therefore he was not eligible for a distribution. Petitioner also contends he was not an employee when he received the distributions in September 2015. Again, by virtue of the terms of the agreement, he became "unretired" and subject to the Investment Plan distribution rules. In his PRO, Mr. McLean further argues that the Settlement Agreement does not address in detail the ramifications of taking an in-service distribution of his retirement funds. While this may be true, before the settlement checks were cashed, these details were explicitly outlined in the County's letter dated June 14, 2016.

#### 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 dismissing the Petition for Hearing and determining that unless Petitioner repays the distribution to FRS within

30 days from the date of the final order, he must be declared a retiree and ineligible for future participation in the FRS; any retirement contributions received from Petitioner or the County after his first distribution on September 4, 2015, must be returned; service credit awarded for the period from March 2014 through June 2016 must be vacated; and Petitioner must be immediately terminated from employment for at least six calendar months.

DONE AND ENTERED this 21st day of December, 2016, in Tallahassee, Leon County, Florida.

*D. R. Alexander*

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D. R. ALEXANDER  
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Filed with the Clerk of the  
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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.